Avellini v Beloten
2013 NY Slip Op 31789(U)
August 1, 2013
Sup Ct, New York County
Docket Number: 100561/13
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice

PART 6

JAMES AVELLINI, M.D.

- v -

ROBERT A BELTON

INDEX NO. 160561/13

MOTION DATE 5-7-13

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 19 were read on this motion to/for Art. 78 Petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-11
Answering Affidavits — Exhibits	x-mot: 12-14
Replying Affidavits	15-18; 19

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 06 2013

COUNTY CLERK'S OFFICE
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & Order

Dated: 8/1/13

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

JAMES R. AVELLINI, M.D.,

Petitioner,

-against-

ROBERT E. BELOTEN, as Chair of the New York State Workers' Compensation Board,

Respondent.

----------X

Index No. 100561/13

Interim Decision and Order

JOAN B. LOBIS, J.S.C.:

By this Article 78 proceeding, petitioner James R. Avellini, M.D., seeks to lift a temporary suspension order (Order) issued on October 19, 2012, by the New York State Workers' Compensation Board (Board). The Order suspends petitioner's participation in the Workers' Compensation Program and prevents him from treating workers for their work-related injuries or illnesses. The basis for the action is a finding by the Office of Professional Medical Conduct (OPMC) of the New York State Department of Health (DOH) that petitioner had committed professional misconduct. In lieu of answering the petition, respondent cross-moves to dismiss the action or in the alternative to change the venue to Schenectady County.

Briefly stated, the underlying facts are as follows. On a website maintained by Rejuvenation Medispa (Rejuvenation), the petitioner was incorrectly identified as being specialty board certified. Rejuvenation is a facility that markets cosmetic services to the general public. Dr. Avellini had a contractual relationship with Rejuvenation commencing in 2007. He asserts that he first learned of the incorrect listing in 2009 and took immediate steps to correct the advertisement

and amend his internet profile.

He alleges that the task of correcting the profile was complicated because websites other than Rejuvenation had picked up his name and the misstatement of his credentials. He became the subject of an OPMC investigation as a result of a complaint filed by a former patient on whom he had performed cosmetic services. The investigation by OPMC did not find that he had departed from good and accepted practices in the care of the complainant. OPMC did, however, conclude that petitioner had violated Section 6530(2) of the New York Education Law, which defines professional misconduct as "practicing the profession fraudulently or beyond its authorized scope." Petitioner entered into a consent order admitting to a single violation of Section 6530(2). He received a censure, a reprimand, and a $10,000.00 fine, and was required to attend a course in medical ethics. He has satisfied all of the requirements placed upon him by OPMC. At no time was his license to practice medicine revoked, suspended or restricted. The action by the respondent Board suspending petitioner's participation in the Worker's Compensation program has affected his medical practice since a significant portion of the practice is devoted to providing objective diagnostic treatment and evaluations of work-related injuries.

The first branch of respondent's motion asserts that this petition is untimely. Respondent argues that the last date that petitioner could have commenced this Article 78 proceeding was February 22, 2013, four months after the Board delivered the notification of the temporary suspension to petitioner on October 22, 2012. This petition was commenced on April 9, 2013. In opposition to the cross-motion, petitioner argues that respondent's October 19, 2012 Notice of

Temporary Suspension (Notice) from the Workers' Compensation Program was not a formal and final decision within the meaning of Section 217 of the Civil Practice Law and Rules, the statute that establishes a four month statute of limitations for cases of this nature. He argues statements in the Notice are vague and ambiguous and not a clear statement of a final termination. He cites examples from the Notice, the statement "the Chairman believes that you may be guilty of instances of misconduct," that the suspension is temporary while an investigation is undertaken, and that the suspension is subject to future action by the Board, which could include a lifting of the suspension or further investigation, interrogation or permanent revocation. Petitioner argues that a letter of December 6, 2012, from the Board in response to a submission from petitioner's attorney that the Board "will be in contact soon regarding further investigation into Dr. Avellini's treatment of worker's compensation claims" further supports his characterization of the non-final nature of the Notice. Only with the passage of time did petitioner realize that the temporary suspension was a de facto final termination.

The respondent's argument that the petition is untimely is not persuasive. Although the cases cited support the legal proposition that finality can attach to something that is identified as temporary, Weiner v. State of New York, 27 Misc.3d 1203 (A)(Sup. Ct. Suffolk Co. 2010); that a determination is considered final when the petitioner knows the petitioner is aggrieved, James v. Wing, 281 A.D.2d 627 (2d Dep't 2001); and that a request for a reconsideration does not extend the time for the calculation of the four months, De Milio v. Borghard, 55 N.Y.2d 216 (1982); respondent has not overcome another line of cases submitted by petitioner that any vagueness or unreliability must be resolved against the agency. Mandy v. Nassau County Civ. Serv. Comm., 44 N.Y.2d 352

(1978); Castaways Motel v. Schuyler, 24 N.Y.2d 120 (1969). The petitioner has demonstrated the existence of significant ambiguities in the Notice. The letter of October 19, 2012, was more consistent with a notification of the commencement of an investigation by the Board with an interim sanction than with a final and binding determination barring petitioner from treating workers. While the petitioner was aggrieved by the Notice he had no way of knowing the duration of his suspension, to make an informed decision whether recourse to a court proceeding was necessary to regain his status with the Workers' Compensation Board. The line of cases cited by petitioner that require that any ambiguity or vagueness in the finality and binding nature to be resolved against the agency compels a determination that the proceeding was timely commenced.

The second branch of respondent's motion is equally unavailing. Venue is proper in New York County as it is the location of petitioner's office during the time of the material events underlying the action. C.P.L.R. § 506(b). While respondent claims that petitioner has not established that any material events have taken place in New York County, petitioner argues that all the relevant events occurred in this county, since his practice of medicine is based at his office, 770 Broadway, New York, New York. Indeed, the notice of temporary suspension was sent to Dr. Avellini at this address in New York County. That branch of respondent's motion seeking to change venue is denied. Accordingly, it is

ORDERED that the cross-motion is denied in its entirety, and the respondent shall have 20 days from service of a copy of this decision and order with notice of entry to file its answer, and petitioner shall serve any reply five days thereafter. No further appearance is required unless

notified by the Court.

This constitutes the decision and order of the Court.

Dated: Aug. 1, 2013

ENTER:

JOAN B. LOBIS, J.S.C.