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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARIA LEON et al.,

Plaintiffs and Appellants,

v.

MEDICAL BOARD OF CALIFORNIA,

Defendant and Respondent.

A140455

(City & County of San Francisco
Super. Ct. No. CPF 13-513013)

Plaintiffs Maria Leon and Rafael Leon complained to defendant Medical Board of California (the Board) about alleged improper billing by emergency room physicians. When the Board declined to take action, the Leons filed in the trial court a petition for a writ of mandate (Code Civ. Proc., § 1085). The Board filed a demurrer, which the court sustained without leave to amend. The Leons appeal, arguing the court should have compelled the Board to take jurisdiction of their complaint. We affirm.

I. BACKGROUND

On August 1, 2012, the Leons sent a letter to the Board stating that, several years earlier (in 2006 and 2007), they visited the emergency room at Watsonville Community Hospital (the hospital) in Watsonville. The Leons had Blue Cross Blue Shield (BCBS) medical insurance, and the hospital accepts payments from BCBS as payment in full. The emergency room physicians, however, were not employed by the hospital and were not members of the BCBS network of providers. The physicians were members of

Watsonville Emergency Medical Group, Inc. (the medical group), which billed the Leons separately, and the Leons paid the difference between the amount allowed by BCBS and the billed amount; that difference totaled about \$532.

In their letter to the Board, the Leons stated that, after paying the bills, they learned the medical group's contract with the hospital required that the medical group accept the amount paid by BCBS as payment in full. The Leons also stated the physicians' "balance billing" (i.e., billing the Leons for the amount not covered by BCBS) "is prohibited in this state under the authority of" the Supreme Court's 2009 decision in *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497 (*Prospect*). The Leons stated that it appeared the medical group had engaged in unprofessional conduct meriting action by the Board. Finally, the Leons stated their efforts to resolve their complaint through the courts had been unsuccessful and asked for the Board's "intervention" to resolve the matter.

On August 7, 2012, the Board responded with a letter stating it had "completed its review" of the Leons' complaint but was "only authorized to take action against those individuals it finds in violation of the Medical Practice[] Act [(Bus. & Prof. Code, § 2000 et seq.)]."¹ The Board stated it would forward the Leons' complaint information to the Department of Public Health.

The Leons sent a second letter to the Board on August 13, 2012. The Leons repeated the text of their first letter asking for the Board's "intervention," and asserted the physicians' conduct did "come under" the Medical Practice Act.

The Board responded on November 27, 2012, again stating it was "only authorized to take action against any individual it finds in violation of the Medical Practice Act." The Board stated: "Your complaint does not fall within our jurisdiction because your complaint is not about medical care and treatment." The Board stated that the Leons' complaint "concerns a matter which would fall within the jurisdiction of Department of

¹ All undesignated statutory references are to the Business and Professions Code.

Managed Health Care [(DMHC)],” and that the Board would forward the complaint information to the DMHC. The letter attached a press release from the DMHC about its efforts to protect patients from “balance billing.”

On December 14, 2012, the Leons’ attorney sent a letter to the Board, repeating the allegations in the Leons’ prior letters. Counsel stated the Leons wanted to give the Board “an opportunity to respond to and investigate the Leons’ complaint.” Counsel stated that, if the Board did not respond, he would “attempt to have a court determine whether the Board has jurisdiction over such matters.”

The Board responded with a letter to the Leons’ attorney on January 15, 2013. The Board again attached the DMHC press release and stated that, in 2008, the DMHC promulgated regulations addressing balance billing. The Board stated it had “no authority to assist the public in mediating complaints over the fees charged by physicians” and could not “enforce the provisions of a contract between [the hospital] and [the medical group].” The Board also stated it “would not be able to charge the individual physicians with dishonesty for not complying with the terms of a privately executed contract.” The Board noted the DMHC “has regulatory authority over complaints regarding balance billing and that information was provided to your clients.”

The Leons filed a petition for a writ of mandate pursuant to Code of Civil Procedure section 1085. The petition alleged the Leons had a “beneficial right to seek out and obtain [the Board’s] investigation of complaints,” and asked the court to compel the Board to accept jurisdiction of the Leons’ complaint.

The Board filed a demurrer, arguing in part that the Leons could not use a traditional mandamus writ to control the Board’s discretion as to whether to initiate investigations. The court sustained the demurrer without leave to amend, concluding the Leons had failed to state a claim for writ relief. The court stated the petition and its attachments (the parties’ correspondence outlined above) “show that [the Board]

exercised its discretion in refusing to investigate [the Leons'] complaints and referring the matter to [DMHC].”²

II. DISCUSSION

“On appeal after the sustaining of a demurrer, we review the petition de novo for facts sufficient to state a cause of action under any legal theory.” (*International Brotherhood of Electrical Workers, Local 1245 v. City of Redding* (2012) 210 Cal.App.4th 1114, 1118.) The prerequisites for issuance of a traditional writ of mandate under Code of Civil Procedure section 1085 are “(1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty.” (*California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 704.) Because the Leons’ petition did not allege facts showing the Board had a duty to respond to the Leons’ complaint in a particular manner, the court correctly sustained the Board’s demurrer without leave to amend.

The Board is an administrative agency within the Department of Consumer Affairs. (§§ 101, subd. (b), 2001, subd. (a).) It is authorized to license and discipline medical practitioners. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 7.) The Board is “charged with the duty to protect the public against incompetent, impaired, or negligent physicians, and, to that end, has been vested with the power to revoke medical licenses on grounds of unprofessional conduct [citation].” (*Ibid.*) The Board’s statutory responsibilities include “enforcement of the disciplinary and criminal provisions of the Medical Practice Act [(§ 2000 et seq.).]” (§ 2004, subd. (a); accord, *Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 651.) “To enable the Board to carry out its enforcement responsibilities, the Medical Practice Act ‘broadly vests’ the Board with investigative powers.” (*Id.* at p. 652.) These include the power to investigate complaints from the

² The court entered an order sustaining the demurrer without leave to amend; the record does not reflect that the court entered a separate judgment or order of dismissal. We deem the court’s order to incorporate a judgment of dismissal, and we will review it. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527, fn. 1.)

public that a physician may be guilty of “unprofessional conduct” (§ 2220, subd. (a)), a category that includes a variety of types of conduct, including violating the Medical Practice Act, gross negligence, and incompetence (§ 2234).

In their letters to the Board, the Leons argued the medical group’s practice of “balance billing” was a breach of its contract with the hospital and was illegal under *Prospect*. The Leons noted they had attempted unsuccessfully to obtain redress from the physicians and were involved in litigation against them. The Leons then stated that it “also appears” the medical group “engaged in unprofessional conduct meriting action by [the Board]” because it “violated requirements for doctors” under sections 2234, subdivision (e) and 2261. Those statutes provide that unprofessional conduct includes “[t]he commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon” (§ 2234, subd. (e)) and “[k]nowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine . . . which falsely represents the existence or nonexistence of a state of facts” (§ 2261). In their writ petition, the Leons argued that these allegations of statutory violations gave the Board jurisdiction over their complaint.

The Leons’ allegation that the medical group’s balance billing violated the above statutory provisions did not trigger a duty on the part of the Board to respond in a particular manner. As noted, the Board has statutory authority to investigate complaints from the public about alleged unprofessional conduct by physicians. (§ 2220, subd. (a).) But that does not mean the Board is required to conclude that the allegations in any given complaint establish unprofessional conduct warranting further action. In the instant case, we note the Leons’ letters alleged the medical group engaged in balance billing for services provided in 2006 and 2007, prior to (1) the Supreme Court’s determination in *Prospect* in 2009 that balance billing is barred by applicable statutes (principally the Knox-Keene Health Care Service Plan Act of 1975, Health & Saf. Code, § 1340 et seq.) (*Prospect, supra*, 45 Cal.4th at pp. 502, 507), and (2) the DMHC’s adoption in 2008 of a regulation defining balance billing as an unfair billing pattern (Cal. Code Regs., tit. 28, § 1300.71.39; see *Prospect, supra*, 45 Cal.4th at p. 510). The Board was not

obligated to agree with the Leons' suggestion in their letters that this billing involved dishonesty or false representations by the emergency room physicians within the meaning of sections 2234, subdivision (e) and 2261 and therefore constituted "unprofessional conduct meriting action by [the Board]."

The Leons appear to agree the Board is not obligated to take a particular action in response to a complaint alleging unprofessional conduct; they state the Board "may" not be required to investigate every complaint it receives. The Leons, however, relying on the letters the Board sent in response to their complaint, contend the Board's decision not to take action was not an exercise of investigatory discretion, but was instead based on the Board's erroneous conclusion that it lacked jurisdiction to pursue the matter. The Leons argue they are properly seeking writ relief to compel the Board to accept jurisdiction of their complaint and then exercise discretion as to how to proceed.

We reject this argument. The Board's letters (which reveal an evolving response to the Leons' letters) do not show the Board ultimately concluded it could never investigate whether a physician's billing practice constituted unprofessional conduct warranting discipline, nor do the letters show the Board simply ignored the allegations in the Leons' complaint. In its first letter (dated August 7, 2012), the Board stated it had "completed its review" of the Leons' complaint, and explained it was "only authorized to take action against those individuals it finds in violation of the Medical Practice[] Act." The Board repeated the latter statement in its second letter (dated November 27, 2012). These statements reflect a conclusion by the Board that the medical group's balance billing, as alleged in the Leons' letters, did not establish that the individual emergency room physicians had violated the Medical Practice Act and were subject to discipline by the Board.

In its second letter, the Board did state the Leons' complaint did not fall within the Board's jurisdiction because the complaint was "not about medical care and treatment." But in its third letter (dated January 15, 2013), the Board provided a more nuanced explanation of its decision not to take action on the Leons' complaint. In that letter, the Board noted that the Leons had emphasized the medical group's balance billing

conflicted with the contract between the hospital and the medical group. The Board responded to that allegation by stating (1) it could not enforce the provisions of the contract between the hospital and the medical group, and (2) it could not charge the individual physicians with dishonesty based on the alleged breach of contract. As noted above, the Leons' letters also had requested the Board's "intervention" in their dispute with the physicians, since the Leons had been "stymied" in their efforts to resolve that dispute through the courts. In an apparent response to that request, the Board explained in its third letter that it had "no authority to assist the public in mediating complaints over the fees charged by physicians[.]"

The Board's letters, taken together, show the Board reviewed the Leons' complaint, attempted to respond to concerns and requests presented by the Leons, and explained the Board's judgment that the conduct alleged by the Leons (i.e., a medical group's balance billing for services rendered prior to *Prospect*) did not constitute dishonesty warranting disciplinary proceedings against the individual physicians involved. The Board also referred the Leons to the Department of Managed Health Care, an agency that the Board believed might be able to address the billing issues raised by the Leons. The Leons' petition did not allege facts showing that this response by the Board to the Leons' complaint was improper or an abuse of discretion (see *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 261), or that the Board had a clear duty to respond to the complaint in a different manner (see *California Assn. for Health Services at Home v. State Dept. of Health Services, supra*, 148 Cal.App.4th at pp. 707–708). And contrary to the Leons' suggestion, the Board's modification and clarification of its position over the course of the parties' correspondence did not provide a basis for concluding the Board acted improperly or had a duty to respond differently.

Finally, in their reply brief, the Leons cite section 2234, which states, "The [Board] shall take action against any licensee who is charged with unprofessional conduct," and then provides a nonexclusive list of types of behavior that constitute unprofessional conduct. We are not persuaded (and the Leons have cited no authority

suggesting) that the above sentence in section 2234 requires the Board to agree that every allegedly improper act identified in a complaint is unprofessional conduct warranting discipline. The trial court correctly sustained the Board's demurrer.³

III. DISPOSITION

Treating the order sustaining the demurrer as a judgment of dismissal, we affirm. The Board shall recover its costs on appeal.

Streeter, J.

We concur:

Reardon, Acting P.J.

Rivera, J.

³ The Leons have asked this court to take judicial notice of (1) briefs and declarations filed by the medical group and another party in related litigation brought by the Leons, and (2) a 2013 decision issued by the Board in a disciplinary proceeding involving a physician who is not a member of the medical group. We deny both requests for judicial notice, because the materials at issue are not relevant to the question whether the Board had a duty to respond to the Leons' complaint in a particular manner.