

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

The Ohio State Dental Board

Court of Appeals No. H-12-001

Appellee

Trial Court No. CVH 20110953

v.

Jeffery Becker, D.D.S.

DECISION AND JUDGMENT

Appellant

Decided: December 31, 2012

* * * * *

Mike DeWine, Attorney General of Ohio, and Katherine J.
Bockbrader, Assistant Attorney General, for appellee.

Todd W. Newkirk, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Jeffrey Becker, D.D.S., appeals the January 4, 2012 judgment of the Huron County Court of Common Pleas which denied his motion to quash the subpoena of the Ohio State Dental Board. Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} Appellant is a dentist licensed to practice in the state of Ohio. The Ohio State Dental Board (“the Board”) investigates alleged violations of the Dental Practice Act, R.C. Chapter 4715. This action commenced on November 9, 2011, when the Board filed an application to enforce the agency’s subpoena pursuant to R.C. 4715.03(D). The application claimed that on June 17, 2011, the Board issued a confidential investigatory subpoena to appellant requesting the records for nine patients. According to the Board, on September 1, 2011, appellant’s counsel informed the Board that he had received the records from appellant but needed additional time for copying. The documents were never delivered to the Board.

{¶ 3} In response, on November 16, 2011, appellant filed a motion to quash the Board’s subpoena. Appellant argued that the Board’s subpoena was “overly broad” and a “fishing expedition” for any evidence of wrongdoing. Appellant also suggested that the subpoena was issued in retaliation for his support and testimony before the house committee considering proposed amendments to R.C. Chapter 4715. Appellant further argued that he would be unduly burdened by the production of the requested patient records. The Board opposed appellant’s motion to quash.

{¶ 4} On January 4, 2012, the trial court granted the Board’s application to enforce the subpoena and denied appellant’s motion to quash. The court concluded that the records sought were “fairly limited, readily available” and that there was no undue burden in providing the records. A stay was granted and this appeal followed.

{¶ 5} Appellant now raises two assignments of error for review:

I. First Assignment of Error: The lower court erred in denying Appellant's motion to quash agency subpoena, and in holding that the subpoena does not subject Dr. Becker to undue burden.

II. Second Assignment of Error: The lower court erred in granting the Ohio State Dental Board's application to enforce agency subpoena and failed to recognize that the requirements for enforcing an administrative subpoena have not been satisfied.

{¶ 6} The assignments of error are related and they will be jointly addressed. Appellant argues that the trial court abused its discretion when it denied his motion to quash the agency subpoena.

{¶ 7} The Board has the authority to issue subpoenas under R.C. 4715.03(D) which provides, in part, that "[f]or the purpose of any disciplinary proceeding or any investigation conducted under this division, the board may administer oaths, order the taking of depositions, issue subpoenas in accordance with section 4715.033 of the revised code * * *."

{¶ 8} R.C. 4715.033 provides, in part:

(A) All subpoenas the state dental board seeks to issue with respect to an investigation shall, subject to division (B) of this section, be authorized by the supervisory investigative panel.

(B) Before the supervisory investigative panel authorizes the board to issue a subpoena, the panel shall consult with the office of the attorney general and determine whether there is probable cause to believe that the complaint filed alleges a violation of this chapter or any rule adopted under it and that the information sought pursuant to the subpoena is relevant to the alleged violation and material to the investigation.

* * *.

(D) On a person's failure to comply with a subpoena issued by the board and after reasonable notice to that person of the failure, the board may move for an order compelling production of persons or records pursuant to the Ohio Rules of Civil Procedure.

{¶ 9} Appellant argues that the application to enforce was improperly filed because the Board did not move to enforce the subpoena pursuant to the Ohio Rules of Civil Procedure. Appellant further contends that the Board failed to establish the right to judicial enforcement of the subpoena by demonstrating that the subject of the subpoena be permitted by law, be reasonably related to the matter at issue, and that the disclosure of the records not cause unreasonable cost or difficulty. *See State ex rel. Civil Rights Comm. v. Gunn*, 45 Ohio St.2d 262, 267, 344 N.E.2d 327 (1976). Conversely, the Board argues that the subject of the investigation is confidential but that patient records would reasonably lead to the discovery of evidence that appellant violated R.C. Chapter 4715.

Further, appellant had failed to show that production of the documents would be unduly burdensome.

{¶ 10} Reviewing the parties' arguments, we conclude that the trial court did not abuse its discretion when it denied appellant's motion to quash the Board's subpoena. The procedural argument was not raised in the trial court and cannot be raised for the first time on appeal. *See, e.g., B.W. v. D.B.-B.*, 193 Ohio App.3d 637, 2011-Ohio-2813, 953 N.E.2d 369, ¶ 70 (6th Dist.). Even considering the argument, we find that it lacks merit. R.C. 4715.033 was enacted to provide a clear judicial remedy to enforce a subpoena and, conversely, allowed for appellant to file a motion to quash the subpoena. As to the subject of the subpoena, we find that the request was reasonably related to an investigation and was not unduly burdensome. Appellant's first and second assignments of error are not well-taken.

{¶ 11} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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