FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CAROLA KIEVE, M.D.,

Plaintiff,

v. **No. D 101-CV-2014-00140**

NEW MEXICO DEPARTMENT OF HEALTH AND THE MEDICAL CANNABIS ADVISORY BOARD,

Defendants.

MOTION TO DISMISS

COME NOW the Defendants, New Mexico Department of Health and the Medical Cannabis Advisory Board, and move to dismiss the above-captioned matter pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for the District Courts, stating as follows:

I. Standard of Review

"A Rule 1–012(B)(6) motion to dismiss tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for the purposes of ruling on the motion, the court must accept as true." *Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 76, *citing Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 650, 905 P.2d 185, 190 (1995). Dismissal under Rule 1–012(B)(6) is appropriate if the non-moving party is "not entitled to recover under any theory of the facts alleged in their complaint." *Madrid v. Vill. of Chama*, 2012-NMCA-071, 283 P.3d 871, *citing Delfino v. Griffo*, 2011–NMSC–015, ¶ 12, 150 N.M. 97, 257 P.3d 917) (internal quotation marks and citation omitted in original).

II. Argument

A. No Standing and No Case or Controversy Regarding Alleged Violation of Compassionate Use Act

In order to maintain an action in District Court, the Plaintiff must establish standing. To establish standing, the Plaintiff must demonstrate the existence of: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *See Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368. "Courts have defined the term 'injury in fact' as 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at ¶ 24 (internal citation omitted). The Complaint in this case fails to satisfy these requirements.

The Complaint does not demonstrate an injury in fact, because it does not demonstrate an invasion of a legally-protected interest that is concrete and particularized and actual or imminent. First, an application to become a qualified patient in the New Mexico Medical Cannabis Program is not submitted on behalf of a certifying practitioner; rather, the "applicant" in this context is the person seeking to become enrolled as a patient. 7.34.3.7(G) NMAC (defining "Applicant"). The Plaintiff is suing not as an applicant to become a qualified patient in the Medical Cannabis Program, but rather, as a medical practitioner who certified an individual's application to become enrolled as a qualified patient in the Program. The Plaintiff alleges, falsely, that the Department denied an application that she certified. Complaint at ¶ 1. The Complaint does not include information sufficient to identify the patient application that the Department is alleged to have denied, and for that reason, the Complaint is not sufficiently specific to satisfy the general rules of pleading. *See* NMRA 1-008. However, in reviewing the patient applications certified by the Plaintiff, the Department has found that none of the patient applications certified by the Plaintiff

have ever been denied. *See* Attachment A (Affidavit of Andrea Sundberg and redacted Business Record identifying statuses of all applications certified by the Plaintiff). Also, even assuming that the Department denied such an application, the Plaintiff could not sue to redress an injury to the legally-protected rights of another person.

The Complaint does not demonstrate a violation of any right held by the Plaintiff. Even assuming that the Plaintiff were to base her claim for declaratory relief on an alleged due process violation related to an alleged protected property interest (an allegation that was not made in the Complaint), the Plaintiff does not hold any such property interest, and even if she did, there is no indication that such an interest was injured. As stated, no patient applications certified by the Plaintiff have ever been denied. Certain patient applications certified by the Plaintiff remain pending; however, the Plaintiff cannot in any event pursue a remedy through the courts without allowing the administrative application process to run its course. *See, e.g., McDowell v. Napolitano*, 119 N.M. 696, 700, 895 P.2d 218, 222 (1995) ("[J]udicial interference is withheld until the administrative process has run its course."); *cf., Western Water, LLC v. Olds*, 184 P.3d 578, 584 (Utah Sup. Ct. 2008) (holding that, in the context of a water rights application, administrative remedies could not be deemed exhausted until the applicant completed the application process). Also, the pendency of an application does not create a vested property interest. *See, e.g., Brazos Land, Inc. v. Board of County Com'rs of Rio Arriba County*, 1993-NMCA-013, 115 N.M. 168, 170 (a plaintiff had no vested right in subdivision plat application); *Moongate Water Co., Inc. v. State*, 1995-NMCA-084, 120 N.M. 399, 405 (a plaintiff did not have a protected property interest in the Environment Department's recommendation of entrants for the EPA water quality award).

The Declaratory Judgment Act limits a district court's jurisdiction in a declaratory action to cases of "actual controversy." NMSA 1978, § 44–6–2; *Moongate Water Company, Inc., v. City of Las Cruces*, 2009-NMCA-117, ¶ 8, 147 N.M. 260, 262-263. "In the absence of any actual case or controversy, it is improper to issue a declaratory judgment." *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 17, 149 N.M. 42, 48, *citing Yount v. Millington,* 117 N.M. 95, 103, 869 P.2d 283, 291 (Ct.App.1993). To demonstrate the existence of an actual controversy in a declaratory judgment action, a plaintiff must demonstrate a controversy involving rights or other legal relations of the parties seeking declaratory relief; a claim of right or other legal interest asserted against one who has an interest in contesting the claim; interests of the parties are real and adverse; and that the issue involved is ripe for judicial determination. *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 16, 124 N.M. 640. "'The mere possibility or even probability that a person may be adversely affected in the future by official acts' fails to satisfy the actual controversy requirement.'" *Yount v. Millington*, 1993-NMCA-143, ¶ 36, 117 N.M. 95, 103, *quoting Dawson v. Department of Transportation*, 480 F.Supp. 351, 352 (W.D.Okla.1979*); cf., Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 1259 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."); *Nova Health Systems v. Gandy*, 388 F.3d 744, 749-750 (10th Cir. 2004) (holding that allegations of possible future injury do not satisfy the requirements of standing, and that a threatened injury must be certainly impending to constitute injury in fact).

The Plaintiff alleges that, with respect to allegations concerning the Compassionate Use Act, there is a controversy ripe for decision by the Court "because the rule at issue has been enforced against Dr. Kieve and her patients and because the Defendants have informed Dr. Kieve

of their intent to continue to impose these requirements on all future applications." Complaint at ¶ 46. For the reasons stated, this allegation and the other allegations of the Complaint are insufficient to demonstrate either standing or the existence of a case or controversy, and the request for declaratory judgment is improper and must be dismissed.

B. No Standing and No Case or Controversy Regarding Alleged Violation of Governmental Conduct Act

The Complaint also contends that there is a controversy ripe for a decision by the Court with respect to the alleged violation by Dr. Rosenberg of the Governmental Conduct Act, "because the hiring decision at issue has affected Dr. Kieve." Complaint at ¶ 55. Contrary to this conclusory assertion, however, the Complaint does not demonstrate an injury in fact with respect to the alleged violation of the Governmental Conduct Act, because it does not demonstrate an invasion of a legally-protected interest that is concrete and particularized and actual or imminent, that occurred as a result of the Department hiring Dr. Rosenberg. Again, none of the patient applications certified by the Plaintiff have ever been denied, and the Complaint does not allege, much less demonstrate, that the Plaintiff holds a legally-protected interest that has been infringed.

Once again, the Declaratory Judgment Act does not enlarge the jurisdiction of the courts over subject matter and parties, but "provides an alternative means of presenting controversies to courts having jurisdiction thereof". *Allstate Ins. Co. v. Firemen's Ins. Co.*, 1966-NMSC-120, 76 N.M. 430, 432 (internal citations omitted). Also, there is no provision within the Governmental Conduct Act that would independently confer standing to the Plaintiff to sue to enforce its terms. The Enforcement provisions of the Governmental Conduct Act, at NMSA 1978, § 10-16-18, provide that if the Secretary of State believes that a person has violated the GCA, the Secretary

of State may refer the matter to the State Attorney General's Office. The Enforcement provisions of the GCA also provide that the Attorney General or a District Attorney may institute a civil action in district court if a violation has occurred, or to prevent a violation of any provision of the Governmental Conduct Act. The Act does not create a private right of action.

C. Failure to State Claim Against Medical Cannabis Advisory Board

The Complaint names the Medical Cannabis Advisory Board as a Defendant, and complains of the actions of Dr. Steven Rosenberg, whom the Complaint incorrectly identifies as the "Executive Director" of the Advisory Board. (Dr. Steven Rosenberg is a part-time employee of the Department who works as a Medical Director for the Department's Medical Cannabis Program, and he is not a member of the Advisory Board, nor does he perform in any capacity with respect to the Advisory Board.)

The Advisory Board was created by the Lynn and Erin Compassionate Use Act, NMSA 26-2B-6, primarily for the purpose of "review[ing] and recommend[ing] to the department for approval additional debilitating medical conditions that would benefit from the medical use of cannabis", and "accept[ing] and review[ing] petitions to add medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis". Even if the Court were to assume the facts alleged in the Complaint to be true, including the allegation that Dr. Rosenberg is the "executive director" of the Advisory Board, the statute establishes that the Advisory Board is purely advisory in nature. Advisory Board members do not dictate the substance of Department policies or Department regulations, and Advisory Board members do not review applications for an individual's certification as a qualified patient in the Medical Cannabis Program. Rather, Advisory Board members review petitions for the Department to add medical conditions to the list of qualifying medical

conditions. *Id.*; *see also* 7.34.2.8(B) NMAC ("Duties and Responsibilities"). Because the Complaint identifies the Medical Cannabis Advisory Board as a Defendant, and because it does so based on a mistaken legal conclusion that Advisory Board members review applications for individuals to become enrolled as qualified patients in the Medical Cannabis Program, all claims against the Medical Cannabis Advisory Board must be dismissed.

D. Failure to State a Claim Regarding the Lynn and Erin Compassionate Use Act

The Plaintiff is identified in the Complaint as a psychiatrist who submitted information to the Department's Medical Cannabis Program "in support of a patient's application for medical cannabis to treat the patient's post-traumatic stress disorder." Complaint at ¶ 7. The Complaint further alleges that the Department requested additional medical documentation attesting that standard treatments had been tried and failed to bring adequate relief. This requirement is identified in Department regulation at 7.34.3.8(B) NMAC. The Complaint alleges that this request for information exceeded the Department's lawful authority under statute, and seeks a declaratory judgment by the Court holding that "the rules and requirements being enforced against [the Plaintiff] and her patients regarding medical records and proof of exhaustion of alternatives to medical cannabis are void and unenforceable"[1], and that "the Defendants may not deny an application for any reason that is not expressly found in the act." Complaint at p. 9.

Pursuant to the Compassionate Use Act at NMSA 1978, § 26-2B-7 at Subsection A, the Department is authorized to promulgate rules to implement the purpose of the Lynn and Erin

[1] The Defendants note that nowhere in Department regulations is it stated that a patient-applicant must submit "proof of exhaustion of alternatives to medical cannabis", and the Complaint does not otherwise allege that this standard was applied by the Department. Rather, the Department has required patient-applicants to submit a statement from a certifying practitioner attesting that standard treatments have failed to bring adequate relief. 7.34.3.8(B) NMAC.

Compassionate Use Act, and those rules shall "govern the manner in which the department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers". Subsection B provides that the Department shall issue registry identification cards to a patient and to the primary caregiver for that patient, if any, who submit a written certification from a medical practitioner and other information, "in accordance with the department's rules". Subsection C also provides that "[t]he department may deny an application only if the applicant did not provide the information required pursuant to Subsection B of this section or if the department determines that the information provided is false." (Emphasis added). Thus, the Department is authorized by statute to identify requirements for the consideration of patient applications, to require the submission of information, and to render a decision as to the truth or falsity of the information submitted, in order to implement the stated purpose of the Lynn and Erin Compassionate Use Act, "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA 1978, § 26-2B-2.

In accordance with the statute, the Department adopted regulations that require that the applicant submit documentation in support of his or her application, including a written certification from the patient's medical practitioner attesting in part that standard treatments have failed to bring adequate relief. The Department has also adopted regulations that authorize a request for additional documentation to verify that an applicant is qualified for enrollment in the program. 7.34.3.10 NMAC.

The Department has additional authority under the Compassionate Use Act to impose requirements for qualifying conditions that are approved by the Department, including the qualifying condition at issue in this case (Post-Traumatic Stress Disorder, or "PTSD"). The

statute expressly authorizes the Department to "set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board". NMSA 1978, § 26-2B-7(B). The statute identifies a total of eight medical conditions that may qualify an applicant for the Medical Cannabis Program, including "any other medical condition, medical treatment or disease as approved by the department". NMSA 1978, § 26-2B-3(B)(8). PTSD is not included in the list of conditions approved by statute, but was instead added by the Department via regulation in December of 2010, when the Medical Cannabis Program regulations were last amended. 7.34.3.8(B) NMAC. When PTSD was added, the regulation also stipulated that "a patient applying on the basis of having any qualifying condition must submit written certification from the patient's practitioner which must attest... that standard treatments have failed to bring adequate relief". 7.34.3.8(B) NMAC. In fact, when then-Department Secretary Alfredo Vigil, M.D. announced his decision to approve PTSD as a qualifying condition, he did so via a Department-issued press release that emphasized this very requirement. Attachment B (Press Release dated 2/16/09). In other words: but-for the requirement that a certifying practitioner attest that standard treatments have failed to bring adequate relief, the Department may not have approved PTSD as a qualifying medical condition in the first instance.

It is established in New Mexico jurisprudence that "[r]ules adopted by an administrative agency will be upheld if they are in harmony with the agency's express statutory authority or spring from those powers or may be fairly implied therefrom." *N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996–NMCA–098, ¶ 15, 122 N.M. 332. "The court will confer a heightened degree of deference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.'" *Rio*

Grande Chapter of Sierra Club v. New Mexico Mining Comm'n, 2003-NMSC-005, ¶ 25, 133 N.M. 97, 106, *quoting Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm.*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 583.

Because the Compassionate Use Act authorizes the Department of Health to create rules that identify requirements for the consideration of patient applications and that require the submission of information in accordance with the Department's rules, the Department was within its lawful authority to enact and enforce the regulatory requirements that a certifying practitioner must attest that standard treatments have failed to bring adequate relief and that the Department may request documentation to verify that the applicant qualifies for enrollment. Furthermore, because the Department had the authority to add PTSD as a qualifying condition, it likewise had the authority to identify application requirements that needed to be met in order for an application under PTSD to be approved, including not only the requirement that a certifying practitioner attest that standard treatments have failed to bring adequate relief, but also the requirements (unique to PTSD) that "each individual applying to the program for enrollment [under PTSD] shall submit medical records that confirm the diagnosis of PTSD based upon the evaluation of a psychiatrist or psychiatric nurse practitioner and meeting the diagnostic criteria of the current diagnostic and statistical manual of mental disorders". 7.34.3.8(B)(7) NMAC.

E. <u>Failure to State a Claim Regarding the Governmental Conduct Act</u>

The Complaint seeks a declaratory judgment by the Court announcing that the Department's employment of Dr. Steven Rosenberg violates the Governmental Conduct Act ("GCA"), specifically those portions of the GCA that state:

> B. A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest....

> C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.

NMSA 1978, § 10-16-4; Complaint at ¶¶ 37, 39. The Complaint highlights the fact that Dr. Rosenberg is the owner of a clinic that is dedicated to certifying patients to the Medical Cannabis Program, and that he also evaluates patient applications to the Medical Cannabis Program. Complaint at ¶¶ 32-34. The Complaint alleges that Dr. Rosenberg "is routinely placed in the position of approving or denying applications submitted by his economic competitors", and concludes on the basis of these factual allegations that he "possesses a financial interest that is directly affected by his official actions and decisions." Complaint at ¶¶ 36, 44.

Even accepting all of the factual allegations of the Complaint as true, the allegations are insufficient to demonstrate the existence of a prohibited financial interest under the GCA. Significantly, the Complaint does not allege that Dr. Rosenberg reviews his own private certifications in his role with the Department (he does not), or that Dr. Rosenberg has denied an application in his capacity as Medical Director of the Medical Cannabis Program in order to subsequently acquire that patient's business via his private practice. Instead, the Complaint alleges broadly that Dr. Rosenberg is "routinely placed in the position of approving or denying applications submitted by his economic competitors, namely other physicians whose patients did not choose Dr. Rosenberg for certification." Complaint at ¶ 36. Thus, with respect to Sections 10-16-4(B) and (C), the Complaint attempts to insinuate the existence of a conflict of interest, but fails to identify any "official act directly affecting the public officer's or employee's financial interest". The mere *potential* for a public employee to act in a manner that impacts his or her financial interest is not sufficient to establish a violation of the GCA - and indeed, if it were, then

all public officers and employees would be in violation of the Act. The mere speculative potential for the denial of a patient application to somehow result in financial benefit to Dr. Rosenberg is not sufficient to demonstrate a violation of the GCA. If it was, then by this reasoning, any public officer or employee who sat on a licensing board who rendered an administrative adjudicatory decision concerning another licensee within their profession (a doctor on the Medical Board ruling on other doctors, a nurse on the Nursing Board ruling on nurses, etc.) would be in violation of the GCA, simply because a decision against a fellow license could conceivably result in a financial benefit in the form of more work for that public officer or employee's private practice (as a result of decreased competition). Clearly, this is not what was targeted by the expression "official act directly affecting the public officer's or employee's financial interest".

F. Attorney Fees and Costs Are Not Recoverable

Ordinarily, "each party to an action is required to bear its own attorney's fees unless by statute, contractual agreement, or court rule an award of attorney's fees is authorized." *G.E.W. Mech. Contractors, Inc. v. Johnston Co.,* 1993-NMCA-081, 115 N.M. 727, 732, *citing* Reed *v. Aaacon Auto Transport, Inc.*, 637 F.2d 1302, 1308–09 (10th Cir.1981), *Hickey v. Griggs*, 106 N.M. 27, 30, 738 P.2d 899, 902 (1987).

The Complaint cites Section 44-6-9 of the Declaratory Judgment Act as a basis for a request for attorney's fees and costs. However, that section of the statute does not authorize recovery of attorney's fees or costs, and it is well established that such costs are generally not recoverable in declaratory judgment actions. *Sec. Pac. Fin. Servs., a Div. of Bank of Am., FSB v. Signfilled Corp.*, 1998-NMCA-046, ¶ 21, 125 N.M. 38, 45 (holding in part that "attorney fees are not recoverable by rule of law or by statute" in declaratory judgment actions). Although courts

have recognized exceptions to the general rule (for fraud, bad faith, etc.), none of the facts alleged in the Complaint could support the application of such an exception in this case. For these reasons, the Plaintiff's request for attorney's fees and costs must be denied.

WHEREFORE, for each of the reasons stated, the Defendants request that the Motion to Dismiss be granted, that the Court dismiss all claims against each of them with prejudice, and that the Court render such other relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certified that on February 24, 2014, I caused the foregoing document to be filed via the Court's electronic filing system, which caused the following persons to be served, as more fully stated in the notice of electronic filing:

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