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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
DOCKET NO. 2284CV02805G

_____)
JOHN DOE,)
)
Plaintiff,)
)
v.)
)
BOSTON MEDICAL CENTER)
CORPORATION, INC., ARCHANA)
ASUNDI, JAI MARATHE, and MARGRET)
COOKE, in her official and individual)
capacities,)
)
Defendants.)
_____)

SUFFOLK SUPERIOR COURT
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 MICHAEL JOSEPH D
 CLERK / MAGIST

DEFENDANTS' BOSTON MEDICAL CENTER CORPORATION, ARCHANA ASUNDI, M.D., AND JAI MARATHE, M.D., MEMORANDUM OF LAW IN SUPPORT OF THEIR OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY RELIEF

Now come the defendants, Archana Asundi, M.D. ("Dr. Asundi"), Jai Marathe, M.D. ("Dr. Marathe"), and Boston Medical Center Corporation ("BMC") (collectively referred to as, "Defendants"), and respectfully move that this Court deny Plaintiff's ("Mr. Doe") motion for preliminary relief as pleaded against them pursuant to Mass. R. Civ. P. 65. As grounds for this opposition, Plaintiff fails to demonstrate (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction. *Boston Police Patrolmen's Ass'n, Inc v. Police Dept. of Boston*, 446 Mass. 46 (2006) (internal citations and punctuation omitted).

Plaintiff has manufactured a crisis by refusing to either comply with the Defendants' reasonable and lawful policies or seek care elsewhere. Plaintiff has been repeatedly told, since

February 2022, that he would need to wear a mask or provide a medical basis for an accommodation/exemption to the mask policy. He was provided seven (7) months of bridging prescriptions to establish care with another provider. He refused. Despite being aware of the inevitability of his present circumstances for over ten (10) months, he has waited until the very last minute to bring this issue to the Court.

Plaintiff now seeks to force Defendants to care for him against their medical judgment and suspend their own policies, based on Plaintiff's own personal preferences. If Plaintiff's demands were accepted by the court, any patient could force medical providers to provide care, against that provider's medical judgment and against their will, based on their own personal views and preferences. Such a result would be unprecedented and cannot stand. Plaintiff's motion for a preliminary injunction should be denied.

FACTUAL BACKGROUND

Plaintiff sought treatment at BMC's Infection Disease Clinic ("Clinic") beginning in 2006 related to a recent diagnosis of Human Immunodeficiency Virus (HIV). Exhibit A, Plaintiff's Complaint, at ¶¶ 3, 11. Dr. Asundi had been following Mr. Doe in the Clinic and providing care and treatment related to his HIV diagnosis since September 23, 2020. Exhibit B, Affidavit of Archana Asundi, M.D.

BMC's Infectious Disease clinic operates consistent with all BMC policies and all federal and state rules, regulations, and guidelines. Exhibit B. Pursuant to the guidance issued by the Massachusetts Department of Public Health ("DPH") via emergency order which has been periodically updated, BMC requires all persons to wear a mask in their facilities unless they meet one of the specified exemptions. *See, e.g.*, Exhibit C, Emergency Order 2022-19, issued October

13, 2022; *See also, Desrosiers v. Governor*, 486 Mass. 369 (2020), *cert. denied sub nom. Desrosiers v. Baker*, 142 S. Ct. 83 (2021) (upholding COVID-19 Emergency Orders).

Mr. Doe has been prescribed Odefsey since March 16, 2017. Exhibit B. Odefsey is the brand name for a prescription pill consisting of three anti-retroviral medicines (ART) used to treat HIV. *Id.* Odefsey can be hepatotoxic and nephrotoxic. *Id.* For patients with HIV who are prescribed Odefsey, monitoring labs are recommended every six months. *Id.* The labs include HIV viral load, renal and liver function tests, and lipid panels. *Id.* The purpose of these labs is to evaluate the anti-retroviral medication's efficacy as well as for monitoring potential toxicities to other organ systems resulting from the medication itself. *Id.* A physical exam is also necessary to assess for any clinical changes or signs of organ damage that may be undetectable via labs or in a telehealth visit. *Id.*

Mr. Doe's labs were last drawn in September 2021. *Id.* There were borderline high lab results related to kidney and liver function at that time. *Id.* Mr. Doe presented for a follow-up visit at the Clinic in February of 2022. *Id.* At that time, he refused to wear a mask. *Id.* He was informed that he needed to wear a mask in order to obtain treatment at BMC in accordance with hospital policies. *Id.* Because he refused, he was not seen but he was provided with a two-month renewal of his Odefsey prescription pending a rescheduled appointment. *Id.*

Following the February 2022 incident, as documented in the patient's chart, the clinical operations manager left a voice message for Mr. Doe on April 26, 2022, and spoke with him on the phone on April 27, 2022. *Id.* Consistent with the Infectious Disease department's policy of keeping patients engaged in their care, he was provided with a prescription through August of 2022. *Id.* He was advised that during that time he could transfer his care to a different provider who may not require masks. *Id.* He was advised that if he did not transfer his care, he would

need to be seen in person in August for his prescription to be renewed, subject to BMC's mask policy. *Id.* At that time, he expressed that he would not transfer his care and would not wear a mask. *Id.*

Plaintiff asserts that wearing a mask has resulted in "negative medical symptoms" including feeling anxious, eye itching, a burning sensation, and a rash. Exhibit A at ¶¶ 22-25. There is no medical documentation of supporting Plaintiff's assertion that he has a medical condition or impairment related to mask wearing. *Id.* at ¶ 41; Exhibit B.

Mr. Doe presented to the Clinic on September 7, 2022 for an in-person follow-up appointment. This event was recorded and narrated by Mr. Doe and broadcast via "Facebook Live." During Mr. Doe's narration preceding his arrival at BMC, he states that he had already been told he would not be seen if he did not wear a mask. Exhibit D, Transcript of Facebook Live Video from September 7, 2022. Nonetheless, he went to the appointment and continued to refuse to wear a mask. He attempted to argue with staff, but ultimately left and indicated he would go through his lawyer. *Id.*; Exhibit A at ¶ 38.

Following the September incident, Plaintiff was again provided a 30-day prescription, despite not being seen, for him to obtain care elsewhere as an accommodation. *Id.* at ¶¶ 43, 46. Alternatively, since there was no medical documentation supporting Plaintiff's assertion that he has a medical condition or impairment related to mask wearing, Defendants offered Plaintiff a telehealth appointment for the purpose of determining whether he qualified for an exemption to BMC's mask policy. *Id.* at ¶¶ 48, 51. Plaintiff refused to attend the telehealth appointment unless his counsel could also be present. *Id.* at ¶¶ 49, 52. BMC declined Plaintiff's request to allow his counsel to be present. *Id.* at ¶ 51.

Mr. Doe has been provided 7 months of bridging prescriptions. Exhibit B. Providing Mr. Doe with any further Odefsey prescription without an appropriate assessment would be inconsistent with the standard of care and violative of the ethical, regulatory, and statutory obligations applicable to the Defendants. *Id.*

Even though he was aware, as early as September 7, 2022, that he would not be receiving care by the Defendants if he did not comply with their policies, Plaintiff waited to file a complaint in superior court on October 14, 2022, when his Odefsey prescription ran out in the hopes of forcing the court to confront a “trolley problem” of his own design. That complaint asserted identical claims to those presently at bar, except without the inclusion of the Department of Public Health. Exhibit E, Verified Complaint filed 10/13/22.

Defendants promptly served Plaintiff’s counsel with a motion to dismiss. Rather than respond to the motion to dismiss, Plaintiff voluntarily dismissed the case only to refile the present one without prior notice in a bald attempt to prevent the court from hearing the motion to dismiss. Exhibit F, Docket for 2284-cv-02343. In Plaintiff’s new complaint, he adds a new allegation, that Plaintiff was able to “locate” enough ART medicine to last until December 15, 2022. Exhibit A, ¶ 54. Plaintiff provides no explanation of who provided the medicine or how it was obtained, and it is unclear whether he established care with a new provider who wrote him a prescription (a critical omission to any rationale analysis of the issue of harm).

Plaintiff has now refiled the suit, seeking preliminary relief. The motion should be denied for the reasons set forth below.

LEGAL ARGUMENT

I. Motion for Preliminary Relief Standard

In order for a motion for preliminary relief to be issued, the moving party must show “(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff’s likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.” *Boston Police Patrolmen’s Ass’n*, 446 Mass. at 49.

In the instant case, Plaintiff fails to establish a likelihood of success on the merits and fails to demonstrate that irreparable harm to Plaintiff greater than to the Defendants will result from the denial of the injunction. Therefore, Plaintiff’s motion for preliminary relief must be denied.

II. Plaintiff’s Motion Must Be Denied Pursuant to Mass. R. Civ. P. 65.

1. Plaintiff Cannot Show a Likelihood of Success on the Merits

Plaintiff cannot make the requisite showing that he will be successful on any claim that he has wrongly been denied care, and as such, he is unlikely to be successful on the merits in this action. As is frankly admitted in Plaintiff’s own motion, his arguments have been repeatedly rejected by courts throughout the country, including this court.

Plaintiff’s medical privacy rights are not being infringed by the Defendants’ enforcement of their mask policy. First, to the extent Plaintiff is attempting to argue that masks are considered “medical treatment”, courts have consistently rejected such arguments. *See e.g., Fam. Freedom Endeavor, Inc. v. Riley*, No. 2179CV00494, 2021 WL 6298346 (Mass. Super. Nov. 16, 2021)(affirmed by Exhibit G, *The Family Freedom Endeavor, Inc. v. Riley*, Appeals Docket. No. 21-J-599, at 2-4 (App. Ct. Jan. 25, 2022) (Ditkoff, J., single justice)(“[t]he plaintiffs’ calling

mask wearing a ‘healthcare decision’ does not make it so.”)); *See also Frigon, et. al. v. Riley*, No. 2284CV0344, 2022 WL 522225 (Mass. Super. Aug. 3, 2022)(and cases cited¹).

While the bulk of Plaintiff’s motion for Preliminary Injunction deals with “masking as medical treatment,” the issue is not controlling. Even if, *arguendo*, mask wearing alone was considered medical treatment, “[t]he right to refuse medical treatment, although strongly rooted in our constitutional and common law, is not absolute.” *Commonwealth v. Pugh*, 462 Mass. 482, 504 (2012).

Plaintiff’s refusal to wear a mask (whether based on constitutional principles or not) is not a protected right in the sense that Plaintiff can be free from the consequences of doing so. An individual’s right to bodily autonomy prevents them from undergoing forced treatment—*See Shine v. Vega*, 429 Mass. 456 (1999)—it does not guarantee them treatment anywhere nor does it grant them authority to usurp healthcare providers’ general policies as a condition for treatment. Simply put, while Plaintiff has the right to refuse to wear a mask, BMC also has the right to enforce its policies for the safety of all patients and staff. Per DPH orders, BMC requires all

¹ *Zinman v. Nova Southeastern Univ., Inc.*, 2021 WL 4025722, *17 (S.D. Fla. August 30, 2021) (“Nor can one plausibly allege that the government is requiring medical treatment by requiring individuals to wear a face mask.”), report and recommendation adopted, 2021 WL 4226028 (S.D. Fla. Sept. 15, 2021), appeal pending (11th Cir. No. 21-13476); *Gunter v. North Wasco County Sch. District Bd. of Educ.*, 2021 WL 6063672, *9 (D. Oregon Dec. 22, 2021) (“[T]he mask mandate ‘no more requires a “medical treatment” than laws requiring shoes in public places . . . or helmets while riding a motorcycle’” (internal citations omitted), citing *Lloyd v. Sch. Bd. of Palm Beach Cnty.*, 2021 WL 535879, at *10 (S.D. Fla. Oct. 29, 2021) (“The Court agrees that the circumstance of being required to wear a mask is distinguishable from compulsory medical treatment[,] and the School Board’s Mask Mandate, therefore, does not implicate Plaintiffs’ right to bodily autonomy.”); *Celauro v. Whole Foods Market*, 2021 WL 4844538, *4 (D. Colorado Oct. 18, 2021) (“While the Supreme Court [of the United States] has been silent on whether mask mandates are in fact medical treatment, other courts have held that a requirement that a customer wear a face mask while grocery shopping ‘is a far cry from compulsory vaccination, mandatory behavior modification treatment in a mental hospital, and other comparable intrusions into personal autonomy’ and fails to constitute unwanted medical treatment protected by the Constitution.”) (emphasis in original), quoting *Forbes v. County of San Diego*, 2021 WL 843175, at *7 (S.D. Cal. Mar.4, 2021); *Cangelosi v. Sizzling Caesars LLC*, 2021 WL 291263, at 2 (E.D. Louisiana January 28, 2021) (“Plaintiff does not show how the mask requirement ‘forces unwanted medical treatment upon him.’”), quoting *Cangelosi v. Sheng*, 2020 WL 5960682, at *2 (E.D. La Oct. 8, 2020); see also *Manning v. Whole Foods Market Group, Inc.*, 2022 WL 194999, *7 (D. Mass. Jan. 21, 2022) (rejecting claim that, by enforcing mask mandate, defendant was “practice[ing] or attempt[ing] to practice medicine”) (parentheses in original), quoting *Machovec v. Palm Beach County*, 310 So. 3d 941, 946 (Fla. Dist. Ct. App. 2021)).

persons to wear a mask in their facilities unless they meet one of the specified exemptions or can otherwise be accommodated.

No one has forced Plaintiff to wear a mask. Rather, Plaintiff's decision to not wear a mask has been and can properly be considered as a condition for receiving treatment by Defendants pursuant to its mask policy.

i) *Plaintiff does not have an absolute right to continued treatment with Defendants.*

Underlying Plaintiff's complaint and motion for preliminary injunction is the false and unsupported assumption that, if he can show he cannot be compelled to wear a mask, he therefore has a right to continued care by Defendants. This is false as a matter of law. Plaintiff can cite to no authority that gives him the absolute right to seek care where he pleases on his own terms.

It is well recognized that a physician may unilaterally terminate a treatment relationship with a patient when it becomes untenable to maintain the relationship. *See 57 A.L.R.2d 432, § 3* (right of physician to withdraw from case). In fact, it is principle of medical ethics that a physician "shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care." American Medical Association, Principles of Medical Ethics, Principle VI.

To the extent Plaintiff is relying on the Massachusetts Patient Bill of Rights, that statute does not guarantee him the right to care where he pleases on his own terms. That statute provides that:

Every such patient or resident of said facility shall have, in addition to any other rights provided by law, the right to freedom of choice in his selection of a facility, or a physician or health service mode, except in the case of emergency medical treatment or as otherwise provided for by contract, or except in the case of a patient or resident of a facility named in section fourteen A of chapter nineteen; *provided, however, that the physician, facility, or health service*

mode is able to accommodate the patient exercising such right of choice. See G.L. c. 111, § 70E. (emphasis added).

A patient's right to choose a physician or facility is not absolute and, by its own terms, the statute limits the right to the providers' ability to accommodate the patient. *See id.*; *See also Bello v. S. Shore Hosp.*, 384 Mass. 770 (1981).

Defendants have established reasonable and lawful policies, including the masking policy, with which all patients must comply to receive care. Defendants are free to determine to whom they provide medical care, provided that the refusal is not based on prohibited criteria. *See e.g.*, 243 CMR 2.07 (9)(prohibiting refusal to treat recipients of public assistance). Plaintiff was on notice of these policies, which were repeatedly explained to him since February of 2022. The Defendants provided him with sufficient bridge care so that he could find alternative treatment providers if he chose not to comply with Defendant's policies. He chose not to do so.

Moreover, BMC made reasonable efforts to assess the propriety of modifying its policies for the Plaintiff. Plaintiff refused Defendants' efforts. More specifically, as set forth in the complaint, Defendants offered Plaintiff a telehealth appointment for the purpose of evaluating him for his asserted reaction to masking and exemption or accommodation under the policy. Plaintiff refused unless his counsel was allowed to join him at the appointment, to which BMC would not agree. Exhibit A, at ¶¶ 43-45.²

² To the extent that plaintiff argues the refusal to allow his counsel to attend a medical appointment is unreasonable or against BMC's own policy, such arguments fail. Although BMC's patient bill of rights states that an individual has the right to "[t]he presence of your chosen support person" that policy qualifies such right: "unless it infringes on the rights of others or poses a safety or health risk to you, other patients, or staff." Exhibit A, at ¶ 46. BMC's providers have the right to be free of intimidation during medical appointments, and the presence of a patient's lawyer w threatening litigation infringes on that right. Moreover, where plaintiff's counsel had already threatened the defendants with litigation, there can be no proper purpose for his presence at a medical appointment. To the extent plaintiff's counsel would be attending as a witness, it would be improper under the Massachusetts Rules of Professional Conduct Rule 3.7 (prohibiting lawyer from serving as a witness in the same proceeding). To the extent he would be attending as an advocate, it would violate Massachusetts Rules of Professional Conduct Rule 4.2 to communicate with the defendants (prohibiting communication with person represented by counsel).

Defendants conditioning Plaintiff's care and treatment on his compliance with their policies is fully appropriate, and Plaintiff cannot succeed on the merits to show otherwise.

2. No Irreparable Harm Will Result from Denial of Preliminary Relief.

Plaintiff will not suffer irreparable harm if he is denied preliminary relief. Plaintiff's motion sets this issue up as a binary choice; Plaintiff gets care from Defendants or no care at all. This is patently false. Plaintiff can seek care wherever he pleases. There is no evidence or even a suggestion that Defendants are somehow the sole providers offering this type of care (they are not), or that he cannot obtain care by simply wearing a mask or properly substantiating his medical need to be exempt or accommodated.

In fact, Plaintiff has been able to continue to receive ART medicine since the expiration of his BMC issued prescription over two months ago. While Plaintiff does not disclose in his complaint where that medicine is coming from, he has apparently obtained the care he seeks elsewhere and there is no reason to believe he cannot continue to do so.

The fact that this motion comes on the eve of the expiration of Plaintiff's renewed supply of ART medicine is no coincidence. Plaintiff has known for ten (10) months that the Defendants would require him to comply with their policies to receive care. He refused to seek care elsewhere instead choosing to litigate the matter. Plaintiff has been directly threatening litigation for three months, and previously filed and aborted this lawsuit once already. The timing of this suit is by cynical design, seeking to increase the perceived harm of denying the motion. Where Plaintiff has other options if the motion is denied, no irreparable harm can be shown. The motion should be denied.

3. The Risk of Irreparable Harm to Plaintiff Does Not Outweigh the Potential Harm to Defendant in Granting Preliminary Relief

Should the motion for preliminary relief be granted, Defendants would be forced to abandon its own infection control policies and violate the directives of the Department of Public Health. This would place BMC's providers and patients at increased risk³. The Defendants would further be required to provide care inconsistent with the standard of care and violative of the ethical, regulatory, and statutory obligations applicable to them. Exhibit B. It is not for Plaintiff or the court to determine that these concerns, based upon their own medical judgment, are overblown or unjustified.

In contrast, denial of the motion would force Plaintiff to seek care elsewhere, wear a mask to a medical appointment, or provide appropriate support for his medical condition if he wishes to continue to receive care. These are not serious harms. The lack of irreparable harm presented to Plaintiff as explained *supra* is vastly outweighed by the myriad potential harms to Defendants if preliminary relief is granted. The motion should be denied.

CONCLUSION

Defendants have established and enforced a mask policy consistent with the valid directives of the Department of Public Health, which regulates Defendants. *See Desrosiers, supra*.

Nonetheless, Plaintiff has refused to wear a mask and refused an opportunity for an evaluation of his asserted inability to wear a mask to assess for an appropriate

³ Notably, Plaintiff's memorandum includes what purports to be a mathematical assessment of the relative risks associated with either outcome. This analysis is wholly unsupported by any expert testimony and appears to be a back-of-the-envelope risk assessment that should be disregarded by the court. Most striking is the fact that it completely ignores that fact that BMC's patients and the Clinic's patients in particular have different health conditions and co-morbidities than the general population, including health conditions which make them immunocompromised.

accommodation/exemption from the mask policy. Despite these expectations being clearly communicated to him, and despite being provided with a final prescription to bridge his care to another provider, he has refused to seek care elsewhere, insisting that Defendants care for him against their will and their medical judgment.

Plaintiff is unlikely to succeed on the merits, will not suffer irreparable harm, and the potential harm to Defendants should preliminary relief be granted outweighs the paucity of Plaintiff's irreparable harm. Thus, for the reasons set forth above, Plaintiff's motion for preliminary relief should be denied.

The Defendants,
**BOSTON MEDICAL CENTER
CORPORATION, INC., ARCHANA
ASUNDI, M.D., and JAI MARATHE,
M.D.,**
By their attorneys,

/s/ Thomas (Toby) Bright

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Dated: December 14, 2022

CERTIFICATE OF SERVICE

I, Thomas (Toby) Bright, attorney of record for the Defendants, Boston Medical Center Corporation, Inc., Archana Asundi, M.D., and Jai Marathe, M.D., do hereby certify that the foregoing *Defendants' Boston Medical Center Corporation, Archana Asundi, M.D., and Jai Marathe, M.D., Memorandum of Law in Support of Their Opposition to Plaintiff's Motion for Preliminary Relief* was this day forwarded by electronic & USPS mail to the following:

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Dated: December 14, 2022