State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 31, 2020 529824

DANIEL BRADEN SR. et al.,
Appellants,
v

CHARLES E. STURGES et al.,
Defendants, MEMORANDUM AND ORDER
and

JOSEPH STANZIONE, as Greene
County District Attorney,
et al.,
Respondents.

Calendar Date: November 17, 2020

Before: Aarons, J.P., Pritzker, Reynolds Fitzgerald and
Colangelo, JJ.

Law Office of Ralph C. Lewis Jr., Catskill (Daniel A. Benoit of counsel), for appellants.

Murphy Burns LLP, Loudonville (Stephen M. Groudine of counsel), for respondents.

Pritzker, J.

Appeal from an order of the Supreme Court (Elliot III, J.), entered June 25, 2019 in Greene County, which granted a motion by defendants Joseph Stanzione and County of Greene to dismiss the amended complaint against them.

Plaintiffs commenced this action contending, as is relevant here, that they were entitled to damages pursuant to 42 USC § 1983 as a result of federal constitutional rights violations by defendant County of Greene and its District Attorney, defendant Joseph Stanzione (hereinafter collectively referred to as defendants). In particular, it was alleged that defendants had infringed upon plaintiffs' rights by serving grand jury subpoenas for their prescription and medical records in the course of an investigation into whether plaintiff Daniel Braden Jr. had misused opioids prescribed to him and other plaintiffs. In lieu of serving an answer, defendants moved to dismiss the complaint against them. Plaintiffs opposed the motion and served an amended complaint that reduced the number of their claims against defendants and clarified that a violation of their right to privacy in their medical records was at issue. Defendants replied and argued that the amended complaint also failed to state a cause of action. Supreme Court agreed and granted the motion, prompting this appeal by plaintiffs.

We affirm. "To maintain a [42 USC] § 1983 action, a plaintiff must establish two elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct complained of deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States" (Sinacore v Dept. of Correctional Servs., 104 F3d 354, 1996 WL 671144, *1, 1996 US App LEXIS 30029, *4-5 [2d Cir 1996] [citation omitted]; see 42 USC § 1983; Town of Tupper Lake v Sootbusters, LLC, 147 AD3d 1268, 1270 [2017]). "The Fourteenth Amendment's due process clause . . . protects individuals . . . from arbitrary intrusions into their medical records" (Hancock v County of Rensselaer, 882 F3d 58, 65 [2d Cir 2018]; see Whalen v Roe, 429 US 589, 599-600 [1977]; Doe v City of New York, 15 F3d 264, 266-267 [2d Cir 1994]). The right to privacy in one's medical records "is not absolute," and "[a] constitutional violation only occurs when the individual's interest in privacy outweighs the government's interest in breaching it" (Hancock v County of Rensselaer, 882 F3d at 65). As relevant here, to establish a substantive due process violation, the governmental action

alleged must be "so arbitrary as to shock the conscience" (id. at 66 [internal quotation marks and citation omitted]; see County of Sacramento v Lewis, 523 US 833, 846-847 [1998]). "Whether executive action shocks the conscience depends on the state of mind of the government actor and the context in which the action was taken" (Hancock v County of Rensselaer, 882 F3d at 66 [internal quotation marks, brackets and citation omitted]). "Mere irrationality is not enough: only the most egregious official conduct, conduct that shocks the conscience, will subject the government to liability for a substantive due process violation based on executive action" (O'Connor v Pierson, 426 F3d 187, 203 [2d Cir 2005] [internal quotation marks and citation omitted]; see Hancock v County of Rensselaer, 882 F3d at 66).

Here, plaintiffs allege that Stanzione, pursuant to his office policy, issued grand jury subpoenas for plaintiffs' medical records during a criminal investigation but outside the auspices of a pending judicial proceeding and that these subpoenas did not comply with CPLR 3122. Even accepting these allegations as true and conferring on plaintiffs the benefit of every possible inference, as we must in a motion to dismiss (see CPLR 3211 [a] [7]; McFadden v Amodio, 149 AD3d 1282, 1283 [2017]), plaintiffs have failed to state a cause of action. Liberally construed, Stanzione acted carelessly and negligently in the issuance of the subpoenas but, as currently alleged, his conduct does not "shock the conscience" (Edwards v Orange County, 2020 WL 635528, *3, 2020 US Dist LEXIS 23480, *9 [SD NY, Feb. 10, 2020, No. 17-CV-10116 (NSR)] [internal quotation marks and citation omitted]), especially given "the overriding public interest in having the [g]rand [j]ury investigate all avenues which might help detect criminal conduct, and the built-in security provisions in the [g]rand [j]ury system which militate against subsequent unauthorized disclosure" (Matter of Grand Jury Proceedings [Doe], 56 NY2d 348, 353-354 [1982] [internal quotation marks and citation omitted]). Thus, inasmuch as plaintiffs have failed to plead the requisite mental state required to establish a constitutional infringement (see CPLR 3013; Peri v State of New York, 66 AD2d 949, 949 [1978], affd 48

NY2d 734 [1979]), Supreme Court properly granted defendants' motion to dismiss the amended complaint against them.

Plaintiffs' remaining contentions, to the extent that they are properly before us, have been considered and rejected.[1]

Aarons, J.P., Reynolds Fitzgerald and Colangelo, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

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[1] Plaintiffs allege, for the first time on appeal, facts and derivative arguments that were not asserted in their amended complaint and are dehors the record. These arguments are thus unpreserved and will not be considered (see Reed v New York State Elec. & Gas Corp., 183 AD3d 1207, 1208-1209 [2020]; Matter of Cadlerock Joint Venture, L.P. v John H. Fisher, P.C., 178 AD3d 1160, 1162 [2019]).