

Kennedy v. Superior Court for City and County of San Francisco, --- Cal.Rptr.3d ---- (2019)

2019 WL 2484008

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Court of Appeal, First District, Division 4, California.

Ron KENNEDY, M.D., Petitioner,

v.

SUPERIOR COURT FOR the **CITY** AND
COUNTY OF SAN FRANCISCO, Respondent;
Dean **Grafilo**, et al., Real Parties in Interest.

A157089

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Filed 6/14/2019

City and **County** of **San Francisco Superior Court**, Hon.
Ethan P. Schulman, Judge, **City & County** of **San
Francisco** Super. Ct. No. CPF19516531

Attorneys and Law Firms

Machat & Associates, **Michael Machat**, Beverly Hills; and
Jacques G. Simon, for **Petitioner**.

Xavier Becerra, Attorney General, **Jane Zack Simon** and
Lawrence Mercer, Deputy Attorneys General, for Real
Parties in Interest.

ORDER DENYING PETITION FOR WRIT OF SUPERSEDEAS

THE COURT^{*}:

*1 **Ron Kennedy, M.D.**, petitions for a writ of
supersedeas to stay the **superior court's** order compelling
him to produce patient records to the Medical Board of
California (the Board), pending his appeal of the same
order. We will deny his petition.

This matter stems from a series of investigative subpoenas
served by the Board on Dr. **Kennedy** pursuant to
Government Code section 11181. The Board sought
the medical records of three minors for whom Dr.
Kennedy provided **vaccination** exemptions. After Dr.
Kennedy refused to produce the records, the Director
of the Department of Consumer Affairs filed a petition
in the **superior court** pursuant to **Government Code**

section 11187 to compel Dr. **Kennedy** to comply with
the subpoenas. The **superior court** granted the petition
and ordered Dr. **Kennedy** to produce records shortly
thereafter.

The **superior court** denied Dr. **Kennedy's** request to stay
the order while he pursued appellate review. Dr. **Kennedy**
then filed the instant petition for a writ of supersedeas to
stay the order pending appeal. We granted a temporary
stay and requested further briefing from the parties.

Our Supreme Court has held that an order compelling
production of records in response to a subpoena is
appealable as a final judgment, but the Supreme Court
left undecided “whether an appealing party is entitled
to a stay of enforcement of the subpoena pending
appeal.” (**Dana Point Safe Harbor Collective v. Superior
Court** (2010) 51 Cal.4th 1, 11, 13, fn. 9, 118 Cal.Rptr.3d
571, 243 P.3d 575 (**Dana Point**)). As we explain, we
conclude Dr. **Kennedy** is not entitled to an automatic stay
of the **superior court's** order. We will also decline to grant
a discretionary stay of the order.

Dr. **Kennedy** argues the **superior court's** order is stayed
under **Code of Civil Procedure section 917.2**, which
operates automatically to stay an order directing “the
assignment or delivery of personal property, including
documents,” if the appellant posts an undertaking “in a
sum and upon conditions fixed by the trial court.” (**Code
Civ. Proc.**, § 917.2.) Neither **section 917.2**, nor any of
the other automatic stay provisions contained in the
same chapter of the Code of Civil Procedure (see **Code
Civ. Proc.**, §§ 916–917.9), is applicable in this matter.
The automatic stay provisions of **sections 916 et seq.**
apply to “civil ‘actions,’ ” but do not apply to a “
‘special proceeding’ ” unless “ ‘the statutes establishing a
“special proceeding” expressly incorporate the appellate-
stay provisions.’ ” (**Veyna v. Orange County Nursery,
Inc.** (2009) 170 Cal.App.4th 146, 154–155, 87 Cal.Rptr.3d
658.) The underlying **superior court** action in this matter
—a petition under **Government Code section 11187**
to enforce an administrative subpoena—is a special
proceeding because it is “established by statute” and
“ ‘commenced independently of a pending action by
petition.’ ” (**People v. Superior Court (Laff)** (2001)

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25 Cal.4th 703, 725, 107 Cal.Rptr.2d 323, 23 P.3d 563; see also [Millan v. Restaurant Enterprises Group, Inc.](#) (1993) 14 Cal.App.4th 477, 485, 18 Cal.Rptr.2d 198 [order requiring compliance with investigative subpoena is a final judgment in special proceeding]; [City of Los Angeles v. Superior Court](#) (2017) 9 Cal.App.5th 272, 285, 214 Cal.Rptr.3d 858 [statutory action to compel production of records in response to public records act request is a special proceeding.] The automatic stay provisions of [Code of Civil Procedure section 916 et seq.](#) are not incorporated in the Government Code statutes that created the special proceeding used in this case. (See [Gov. Code, § 11187–11188.](#)) Accordingly, the automatic stay provisions do not apply.

*2 Our conclusion is consistent with the practice of federal courts, where appellants are not entitled to an automatic stay pending appeal of a subpoena compliance order. (See [NLRB v. Westphal](#) (9th Cir. 1988) 859 F.2d 818, 819 [rejecting argument that federal rules of civil procedure permit a stay of subpoena compliance orders “as a matter of right” by posting a bond].) Instead, federal litigants must seek a discretionary stay of the order. (E.g. [EEOC v. Quad/Graphics, Inc.](#) (E.D. Wis. 1995) 875 F.Supp. 558, 559–560 [declining automatic stay of subpoena compliance order based on [Westphal](#), but granting discretionary stay upon appellant's showing of irreparable harm]; accord 11 Wright et al., *Federal Practice and Procedure* (2019 supp.) § 2905, pp. 72–74, fns. 5–6 [appellants in injunction cases, including cases ordering compliance with a subpoena, must seek discretionary stay pending appeal].)¹ We find the federal court rules in this area instructive, as our Supreme Court in [Dana Point](#) cited with approval to the federal court rule that subpoena compliance orders are appealable. ([Dana Point, supra](#), 51 Cal.4th at pp. 11–12, 118 Cal.Rptr.3d 571, 243 P.3d 575 [noting “the rule we adopt here is the same rule that applies in federal court”].)

Footnotes

* Tucher, Acting P.J., Streeter, J., and Brown, J.

¹ Although the federal rules of civil procedure have been amended as recently as 2018, the amendments have not changed the substance of the provisions applied by federal courts that have denied an automatic stay. (See [Fed. Rules Civ. Proc., rule 62](#), *Advisory Com. Notes*, 2007 and 2018 amendments.)

Furthermore, an automatic stay would impede the Board's discharge of its duty to “protect the public against incompetent, impaired, or negligent physicians.” ([Arnett v. Dal Cielo](#) (1996) 14 Cal.4th 4, 7, 56 Cal.Rptr.2d 706, 923 P.2d 1.) The Legislature has “broadly” vested the Board with authority to investigate complaints against physicians. ([Id.](#) at pp. 7–8, 56 Cal.Rptr.2d 706, 923 P.2d 1.) The power to investigate would be hamstrung if a physician could force the Board to bring a court action to enforce a subpoena, then obtain an automatic stay of an adverse order pending a subsequent appeal.

The absence of an automatic stay does not impose the same degree of harm on Dr. [Kennedy](#) since he, like a federal court appellant, may seek a discretionary stay pending appeal by showing that his appeal raises substantial questions, and that disclosure of the records will cause irreparable harm. ([Code Civ. Proc., § 923](#); [Smith v. Selma Community Hospital](#) (2010) 188 Cal.App.4th 1, 18, 115 Cal.Rptr.3d 416.) Dr. [Kennedy](#) has not shown a discretionary stay is warranted here. We would likely conclude that the [superior court](#) acted within its discretion in finding the Board's interest in obtaining records of [vaccination](#) exemptions outweighed the patients' privacy rights, given that the Board must keep the records confidential during its investigation. (See [Gov. Code, § 11183](#); [Bus. & Prof. Code, § 2225, subd. \(a\).](#))

The petition for writ of supersedeas is denied. The temporary stay issued by this court on May 3, 2019, will expire at 5:00 p.m. on June 21, 2019.

All Citations

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