Salimi v New York Methodist Hospital
2006 NY Slip Op 30496(U)
May 26, 2006
Supreme Court, Kings County
Docket Number: 39054/04
Judge: David Schmidt
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At an IAS Term, Part XCOMM of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of May, 2006

PRESENT:

HON. DAVID I. SCHMIDT,
Justice.

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BEHZAD SALIMI,

Plaintiff,

- against -

NEW YORK METHODIST HOSPITAL., et al.

Defendants.

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Index No. 39054/04

The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2 3, 4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6 7
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the motion by defendants New York Methodist Hospital, Dean Martin, M.D., Robert Rainer, M.D., Jason Halper, M.D., Solomon Osei, M.D., Gillian S. Hans, CNM and Mark Mundy (collectively, "the Hospital Defendants") for an order, pursuant to CPLR 3211, dismissing the amended complaint insofar as asserted against them and the motion by defendants Park Slope Anesthesia Associates, P.C., Joseph Schianodicola, M.D., Victoria Gerstheyn, M.D. and Devasena Manchikalapati, (collectively, the Park Slope

Defendants) for, among other things, an order dismissing the first, third and fifth causes of action against them are consolidated for disposition herein and, upon consolidation:

1. the motion by the Hospital Defendants is granted only to the extent of dismissing the first, second, third and sixth causes of action against them and

2. the motion by the Park Slope Defendants is granted only to the extent of dismissing the fifth cause of action in its entirety, the first cause of action insofar as asserted against Victorya Gerstheyn, M.D. and Devasena Manchikalapati, M.D. and the third cause of action insofar as asserted against Joseph Schianodicola, M.D.

In his complaint, plaintiff, a board certified anesthesiologist, alleges that he was wrongfully terminated by his employer, Park Slope Anesthesia Associates, P.C. (Park Slope). Park Slope is the outsourced anesthesia department of New York Methodist Hospital (Methodist). Plaintiff further alleges that several of the co-defendants exerted pressure on Park Slope to terminate his employment after he objected to the quality of patient care performed by them.

Plaintiff asserts claims of tortious interference with contract against all of the defendants except Park Slope and Joseph Schiandodicola, M.D. (the first cause of action), wrongful termination in violation of Labor Law §§ 740 and 741, known as the "Whistle blower Law,"[1] against all defendants (the third cause of action) and breach of contract against

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[1] Labor Law § 740 provides, in part, that an employer shall not take any retaliatory personnel action against an employee who discloses or threatens to disclose to a supervisor or to a public body an activity or practice of the employer that is in violation of law or regulation, which violation presents a substantial and specific danger to the public health or safety. Labor Law § 741 more specifically applies to health care employers and employees.

Park Slope (the fifth cause of action). Plaintiff further asserts claims for defamation against Methodist and Mark Mundy (the second cause of action), assault against Robert Rainer, M.D. (the fourth cause of action) and negligent supervision against Methodist (the sixth cause of action).

In their motion, the Hospital Defendants argue that plaintiff's tortious interference claim must fail because plaintiff has not pled the existence of anything but an at-will employment relationship with Park Slope, nor has he alleged the requisite improper means and disinterested malevolence on the part of defendants (*see e.g., Simaee v Levi*, 22 AD3d 559 [2005]). The Hospital Defendants further argue that plaintiff has waived his tort causes of action as a matter of law by alleging a "whistleblower claim". In their motion, the Park Slope Defendants note that the first cause of action does not contain any allegations directed against Victorya Gerstheyn, M.D. and Devasena Manchikalapati, M.D. and that it should, therefore, be dismissed against them.

With respect to the defamation claim against Methodist and Mark Mundy (the third cause of action), the Hospital Defendants once against assert that such cause of action has been waived by interposition of a "whistleblower claim". Additionally, they contend that the defamation claim should be dismissed because the two form letters which plaintiff characterizes as defamatory contain no false information and were sent to parties who shared a "common interest" with Methodist. The Hospital Defendants also rely upon a purported Release and Immunity Agreement signed by plaintiff when he applied for reappointment at Methodist.

Insofar as plaintiff alleges a claim pursuant to the "Whistleblower Law", both the Hospital Defendants and the Park Slope Defendants maintain that plaintiff was required to, but did not specifically plead an actual violation of law by defendants, which violation created an immediate and substantial specific threat to public safety. They further argue that plaintiff has no standing to sue any of the defendants under the "Whistleblower Law" except Park Slope since only Park Slope was plaintiff's employer. Defendants additionally assert that the "whistleblower claim" is time-barred (at least with respect to the Park Slope's failure to make plaintiff a partner) and that plaintiff cannot establish a causal connection between the four incidents of alleged malpractice which plaintiff brought to the attention of Methodist and the termination of his employment by Park Slope several years later.

In arguing that plaintiff's assault claim should be dismissed, the Hospital Defendants characterize plaintiff's confrontation with Dr. Robert Rainer as "merely a verbal dispute between two doctors on duty in the process of rendering services to a patient" and not sufficient to "support a claim that plaintiff reasonably believed he would be physically harmed."

The Park Slope Defendants assert that the breach of contract claim (the fifth cause of action) is untimely because Park Slope allegedly promised in 1994 to make plaintiff a partner by 1997, more than six years prior to commencement of this action. Said defendants further note that plaintiff testified in an unrelated action in 1999 that he was an at-will employee and, therefore, he "had no enforceable vested rights under his oral employment agreement."

Because plaintiff was not subjected to any physical violence, the Hospital Defendants contend that the claim against Methodist for negligent supervision must likewise be dismissed.

In opposition to the motions, plaintiff points out that he has alleged actual violations by defendants which posed a significant threat to specific patients and that he was retaliated against for disclosing such violations to his supervisor. According to plaintiff, such retaliation took the form of his failure to be made a partner at Park Slope and, ultimately, his firing. Plaintiff argues that all defendants are liable under the Labor Law because they all qualify as "employers" under Labor Law § 740 - - - Dr. Schianodicola (as an officer of Park Slope), Mark Mundy (as president of Methodist) and the remaining defendants because they "personally benefitted from Park Slope and [Methodist's] violation of Section 740 and 741." Since plaintiff's other claims are "separate and independent" from his "whistleblower claim," plaintiff contends that the other claims have not been waived. Plaintiff further asserts that he has properly pleaded a breach of contract. Plaintiff scoffs at defendants' suggestion that his deposition testimony in another action is decisive on the issue of whether he was an at-will employee. Plaintiff also notes that repeated promises were made to him over a period of several years regarding his possible partnership and, therefore, the applicable Statute of Limitations has not expired. With respect to his claim of tortious interference, plaintiff argues that the Hospital Defendants knowingly made false statements about him in a letter dated April 20, 2004 which led to the termination of his ongoing business relationship with

Park Slope. [2] Plaintiff adds that such a claim is viable even if he were an at-will employee. Insofar as his defamation claim is concerned, plaintiff refers to a letter dated June 8, 2004 which was sent by Mark Mundy to advise six departments of Methodist that plaintiff's liability insurance had been terminated and, therefore, he no longer held privileges at the hospital. Plaintiff cites a letter of apology issued by Methodist three days later to support his contention that the prior letter was false and defamatory per se since it tended "to injure [the plaintiff] in his or her trade, business or profession." Because the defamatory statements were allegedly motivated by malice, plaintiff asserts that any "qualified privilege" has been overcome. With respect to the release signed by plaintiff on June 26, 2003, plaintiff points out that the release pre-dated the defamatory statements by almost a year. Lastly, plaintiff states that his claims for assault and negligent supervision were properly pleaded because "[p]hysical injury need not be present for an assault" and because the complaint alleged that Methodist "knew or should have known of [Dr. Rainer's] propensity for the conduct which caused the injury."

In reply, the Hospital Defendants argue that the complaint alleges "nothing more than an at-will employment relationship with Park Slope" and, therefore, a claim for tortious interference "must fail as a result." The Hospital Defendants reiterate their position that

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[2] In the letter, which was prepared on Methodist stationery, Dr. Rainer, Dr. Martin, Dr. Halper and "Dr. Soloman" demanded that plaintiff be removed as Director of Obstetric Anesthesiology because plaintiff has created "disharmony" and "compromised the quality of care provided to patients." The letter was circulated to medical staff at Methodist. Thereafter, Dr. Schianodicola allegedly showed the letter to plaintiff and said he [Dr. Schianodicola] "was instructed by Dr. Mundy to terminate [plaintiff's] employment."

plaintiff was never their employee and, therefore, his "whistleblower claim" against them must be dismissed.

In their reply papers, the Park Slope Defendants counter that plaintiff's only employer was Park Slope; thus, the "whistleblower claim" against all other defendants must be dismissed. Moreover, by asserting such claims, plaintiff allegedly waived a claim for breach of contract since the facts underlying both claims are identical.

Plaintiff's second cause of action for defamation is only asserted against Methodist and Mark Mundy and clearly refers to the latter's letter of June 8, 2004 which advises plaintiff and others that plaintiff's professional liability insurance had been terminated.[3] The letter cites a prior letter from "Marsh USA, Inc." to that effect. Three days later, in a letter sent to plaintiff, six hospital departments and Dr. Schianodicola, Mark Mundy conceded that his letter of June 8, 2004 had been sent in error. It is clear that, on or about May 21, 2004, Methodist received a "notice of cancellation or nonrenewal" from National Union Fire Insurance Co. which stated that plaintiff's policy had been cancelled on May 4, 2004. Since Mark Mundy's statement that Methodist had received notification of cancellation of insurance was accurate, a defamation claim will not lie based upon the letter of June 8, 2004 (*see Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435 [2002]). Moreover, because Mark Mundy's letter was made by a person with an interest in the subject matter and was addressed to other persons with a corresponding interest, it was covered by

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[3] Plaintiff had been terminated by Park Slope about a month earlier.

a qualified privilege (*see Foster v Churchill*, 87 NY2d 744 [1996]). Although the defense of qualified privilege will be defeated by demonstrating that a defendant spoke with malice (*see, e.g., Liberman v Gelstein*, 80 NY2d 429, 437 [1992]), given Mark Mundy's receipt of the notice of cancellation, plaintiff's allegation of malice is not sufficient to permit an inference that Mark Mundy acted out of spite or ill will and with reckless disregard for the statement's truth or falsity (*see Sborgi v Green*, 281 AD2d 230 [2001]). Accordingly, the second cause of action is dismissed.

An assault is the intentional placing of another person in apprehension of imminent harmful or offensive contact (*see Bastein v Sotto*, 299 AD2d 432 [2002]; *Bunker v Testa*, 234 AD2d 1004 [1996]). While no actual bodily contact is required in order to make out a claim for assault (*see Hassan v Marriott Corporation*, 243 AD2d 406 [1997]), a defendant must have the real or apparent ability to bring about the harmful or offensive contract *(see DiGilio v William J. Burns International Detective Agency, Inc.*, 46 AD2d 650 [1974]). Threatening words without some menacing act or gesture are insufficient to support a claim of assault (*see Carroll v New York Property Ins. Underwriting Assoc.*, 88 AD2d 527 [1982]). Here, plaintiff's allegation in his fourth cause of action that Dr. Rainer lunged at him and told plaintiff that he would strike him support the claim of assault since plaintiff was allegedly in apprehension of imminent harmful contact. Therefore, that branch of the motion by the Hospital Defendants which seeks dismissal of the fourth cause of action is denied.

To the extent that plaintiff claims that Methodist is liable based on a theory of negligent supervision, a necessary element of such a cause of action is that "the employer

knew or should have known of the employee's propensity for the conduct which caused the injury" *(Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [1997], cert. denied 522 U.S. 967 [1997]). A review of the complaint reveals that plaintiff's sixth cause of action merely alleges that Methodist was "aware of Dr. Rainer's animosity toward" plaintiff and that Dr. Rainer was "capable of causing [plaintiff] injury." There are no allegations, for example, that Dr. Rainer had a propensity for violence and that Methodist was aware of it (*see Yeboah v Snapple, Inc.*, 286 AD2d 204 [2001]). Accordingly, the sixth cause of action is dismissed.

It is essential to the viability of Labor Law §§ 740 and 741 claims that the plaintiff specify the law, rule or regulation that has actually been violated by defendants' behavior and that he or she describe how defendants' activities have endangered the health or safety of the public *(see e.g., Bordell v General Electric Co.*, 88 NY2d 869, 871 [1996]). Giving him "the benefit of every possible favorable inference" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]), it appears that Dr. Salimi has adequately pleaded actual violations of the Education Law and the Public Health Law and that such violations, if true, imperiled public safety.

Plaintiff concedes that the existence of an employer-employee relationship is central to a whistleblower claim (*see e.g., Rotwein v Sunharbor Manor Residential Health Care Facility*, 181 Misc 2d 847 [1999]). Section 740 (1) (b) defines an employer as "any person, firm, partnership, institution, corporation, or association that employs one or more employees." Although, for example, an individual who is chairman of the board of a

corporate employer and its sole shareholder may be an "employer" within the meaning of Labor Law § 740 (*see Noble v 93 University Place Corp.*, 303 F. Supp. 2d 365 [2003]), neither Methodist nor any of the individual defendants had a relationship of a similar nature with plaintiff. Therefore, with the exception of Park Slope, plaintiff's third cause of action is dismissed.

Plaintiff's complaint alleges, among other things, that "repeated promises were made" by Park Slope regarding a partnership and that, because of his complaints regarding defendants' medical lapses, the partnership never materialized and he was terminated by Park Slope. While plaintiff's "whistleblower claims" against Park Slope based upon promises made in 1994 when he was hired are untimely, the third cause of action is not necessarily time-barred.

The wording of Labor Law § 740 suggests that, if a plaintiff brings an action under that statute, he or she is deemed to have waived other remedies. Courts have limited this waiver to all claims that "arise out of the same acts" as those that gave rise to the Labor Law claim and/or that "relate to" the retaliatory actions on which the Labor Law claim is based *(see Bordan v North Shore University Hospital*, 275 AD2d 335, 336 [2000]). Under the circumstances, plaintiff's breach of contract claim - - - his fifth cause of action - - - is dismissed since it arises from the same facts upon which his Labor Law claim is based.

According to the complaint, the Hospital Defendants "made materially false statements about Dr. Salimi and his ability and reputation in the conduct of his business." Additionally, they did so "for improper reasons separate and apart from any spite or anger

at Dr. Salimi's whistleblowing" so as to interfere with his business relationship with Park Slope (i.e., to have his employment terminated). Said defendants' alleged untruths consisted of a petition circulated at Methodist which criticized his "character indifference, apathy, inappropriateness and . . . disharmony" and called for his replacement as Director of Obstetric Anesthesiology. Plaintiff has, however, failed to specifically plead how the Hospital Defendants' acts were illegal or motivated solely by disinterested malevolence *(see WFB Telecommunications v NYNEX Corp.*, 188 AD2d 257 [1992]); rather, the individuals who circulated the petition indicated that plaintiff's actions were creating a disharmonious working atmosphere. The petition did not call for plaintiff's termination from Park Slope (which occurred three days later) and plaintiff, in fact, alleges in his complaint (at paragraph "91") that for Dr. Schiandicola the letter was "merely a pretext" to rid Park Slope of an unwanted whistleblower, rather than its cause. Therefore, the first cause of action is likewise dismissed.

Since neither plaintiff's complaint, in general, nor his first cause of action, in particular, allege any actions by Dr. Manchikalapati or Dr. Gerstheyn which interfered with his employment by Park, the first cause of action is dismissed against said defendants as well.

In summary, what remains of plaintiff's complaint is his "whistleblower claim" against Park Slope, his employer, and an assault claim against Dr. Robert Rainer.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. DAVID L. SCHMIDT

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