

Jaeger-Ramberg v New York City Health & Hosps. Corp.
2007 NY Slip Op 31545(U)
June 5, 2007
Supreme Court, New York County
Docket Number: 0104332/2006
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH
Justice

PART 62

VIVIAN JAEGER-RAMBERG

INDEX NO. 104332/2006

MOTION DATE 03/08/2007

- v -

MOTION SEQ. NO. 001

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION/
BELLEVUE HOSPITAL CENTER

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to dismiss specified claims and causes of action

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...Memorandum

1-2

Answering Affidavits — Exhibits __ Memorandum _____

3

Replying Affidavits __ Memorandum _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion is denied as set forth in the attached memorandum decision and order.

This matter is scheduled for a compliance conference on July 5, 2007 at 2:00 PM in Room 103 at 80 Centre Street, New York, New York.

FILED
JUN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/5/07

KSS
Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
VIVIAN JAEGER-RAMBERG,

Plaintiff,
-against-

Index no.: 104332/2006
Motion seq.: 001
Motion date: 03/08/2007

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION /BELLEVUE HOSPITAL CENTER,
Defendants.

DECISION AND ORDER

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

FILED
JUN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendant's motion to dismiss certain of the plaintiff's claims and causes of action herein is denied.

Plaintiff (hereafter referred to as "Jaeger-Ramberg") brought this action for employment discrimination alleging that she had been forced to resign from her employment in violation of both Civil Service Law §75-b and Labor Law Sections 740 and 741. Jaeger-Ramberg alleges that the termination of her employment was in retaliation for her "whistle-blower" activities which consisted of reporting conditions constituting violations of law or presenting a specific danger to the public health and safety. In addition, Jaeger-Ramberg asserts causes of action for wrongful discharge and fraudulent misrepresentation. Jaeger-Ramberg premises her wrongful discharge claim upon allegations that, in addition to the provisions of the Civil Service Law, defendant (hereafter referred to as "HHC") had a rule book which provided procedures for employee termination and that Jaeger-Ramberg was terminated without compliance with either the Civil Service Law or the HHC rule book.

With respect to her fraudulent misrepresentation claim, Jaeger-Ramberg alleges that; 1) in

hiring her, HHC implicitly represented that it wanted her to fulfill the duties of her position which required her to ensure that Bellevue Hospital Center complied with applicable statutes and regulations, 2) she relied upon that implicit representation in accepting and continuing her employment with HHC and 3) HHC's firing of Jaeger-Ramberg for performing the duties of her position constituted fraud and misrepresentation.

At the same time HHC answered Jaeger-Ramberg's complaint, HHC served a motion to dismiss Jaeger-Ramberg's Civil Service Law §75-b claims as well as her causes of action for wrongful discharge and fraudulent misrepresentation. In its Notice of Motion, HHC states that the motion is premised upon; "...the grounds that plaintiff's claims fail to state a cause of action and are time-barred by the applicable statutes of limitations". However, in its Memorandum of Law on the motion, HHC specifies that it is seeking to dismiss; 1) the Civil Service §75-b claims pursuant to CPLR §3211(a)(7) (failure to state a cause of action), 2) the causes of action for wrongful discharge and fraudulent misrepresentation pursuant to CPLR §3211(a)(5) (Statute of Limitations) and 3) the fraudulent misrepresentation claim because the service and filing of a Notice of Claim is a mandatory condition precedent to commencing an action for this claim and Jaeger-Ramberg failed to do so (see HHC's Memorandum of Law, Pages 1-2).

The branch of HHC's motion seeking to dismiss Jaeger-Ramberg's Civil Service Law §75-b claims argues that Jaeger-Ramberg failed to state a cause of action because she did not report the statutory violations or deficient conditions she alleges in her complaint to the "appointing authority" of the HHC. HHC contends that its "appointing authority" is its Board of Directors, its President and the designees thereof. HHC claims Jaeger-Ramberg did not make any reports to any individual within HHC who was at the level of the Board of Directors or to

HHC's President (HHC does not mention whether or not the Board of Directors or President of HHC had any "designees" or whether Jaeger-Ramberg made any reports to them). Further, HHC argues that Jaeger-Ramberg did not report the conditions to a "governmental body". Therefore, HHC contends that, since Jaeger-Ramberg's conduct has not met these two essential elements of "whistle blower" activities, she has not alleged (and is unable to allege) a cause of action for retaliatory termination based upon "whistle blower" activities.

In opposition to this branch of HHC's motion, Jaeger-Ramberg argues the statute provides that an employee must make a good faith effort to report the statutory violations or deficient conditions to his or her superiors and allow them a reasonable time to correct or respond to the circumstances before making a report to a "governmental body". Jaeger-Ramberg further argues that Civil Service Law §75- b(2)(b) specifically provides that an employee who has reported such violations or conditions to his or her superiors shall be deemed to have reported them to a "governmental body" for the purposes of the statute.

Civil Service Law § 75-b(1)(a) defines the term "public employer" to include public benefit corporations, such as HHC. Civil Service Law § 75-b(1)(c) defines "governmental body" to include; "...an officer, employee ... authority or other body of a public employer ...". Civil Service Law § 2(9) states: "[t]he term 'appointing authority' ... means the officer, commission or body having the power of appointment to subordinate positions". In addition, § 7385(11) of McKinney's Unconsolidated Laws includes, among the general powers of HHC, the power; "[t]o employ ... management personnel, and such other employees who ... determine the number of, and appointment and removal of, employees of the corporation, fix their qualifications and prescribe their duties and other terms of employment".

Based upon the applicable definitions contained within the relevant statutory provisions, HHC's interpretation of the law attempts to overly restrict the individuals to whom a "whistle blower" may report statutory violations or conditions which jeopardize the health or safety of HHC's patients and the general public. Within HHC, an "appointing authority" can include anyone who qualifies as "management personnel" or "such other employees" who determine the number, appointment and removal of employees. Thus, it is not necessary for an employee to locate and report to a member of the Board of Directors or the President of HHC in order to be reporting to an "appointing authority" of HHC. Moreover, as stated above, the term "governmental body" includes an employee of a "public employer". Therefore, based upon the statutory definition, it appears that the "governmental body" to which a public employee may report a statutory violation or deficient condition could be a "governmental body" within the employee's own employer. In at least one case, the courts have so held (see *Rameau v Cannon*, 141 AD 2d 454 [1st Dept, 1988]). On the other hand, the courts have also held that the "governmental body" cannot be the individual employee who is alleged to be committing the improprieties (*Bal v City of New York et al*, 266 AD2d 79 [1st Dept, 1999]).

If this court were to accept the HHC's interpretation of the statute, a "whistle blowing" employee of HHC would not be eligible for "whistle blower" protection until he or she had located a member of the Board of Directors or the President of HHC, reported a statutory violation or dangerous condition, waited for a reasonable time to allow the Directors or President to address the issue, then, only after allowing a reasonable time, reported the matter to his or her supervisor (presuming that the supervisor was not the individual allegedly committing the impropriety) or some other committee, entity or outside agency which qualifies as a

“governmental body”. Clearly this was not the intent of the statute and the courts have not construed it in accordance with the interpretation urged by HHC. Instead, it has been held that the first step in the process is for an employee to report the violations or dangerous conditions to the employee’s superiors and cannot receive whistle blower protection if he or she reports the matter to an outside agency without first reporting to superiors and allowing those superiors a reasonable time to resolve the issues (see eg *Garrity v University of Albany et al*, 301 AD2d 1015 [3rd Dept, 2003]).

In the instant matter, Jaeger-Ramberg’s complaint alleges that she made her reports to numerous individuals and committees at the level of management personnel. At least some of these individuals and committees were not the particular individuals alleged to actually be undertaking the conduct which constituted the improprieties. Based upon the statutory definitions, accepting the factual allegations of Jaeger-Ramberg’s complaint as true and granting them every favorable inference which can be drawn from them, the allegations of the complaint sufficiently set forth a claim of the violation of Civil Service Law § 75-b by HHC. Thus, a cause of action for such a violation is stated in the complaint. Accordingly, this branch of HHC’s motion is denied.

In the branch of HHC’s motion seeking dismissal of Jaeger-Ramberg’s causes of action for wrongful discharge and fraudulent misrepresentation pursuant to CPLR §3211(a)(5), HHC argues that these claims should have been asserted in a CPLR Article 78 proceeding. HHC asserts that the statute of limitations for commencing such a proceeding expired four months after the date Jaeger-Ramberg was terminated from her position with HHC. Since Jaeger-Ramberg commenced the instant proceeding almost two years after she was terminated, HHC

contends that these causes of action are time barred.

In opposition to this branch of HHC's motion to dismiss, Jaeger-Ramberg asserts that, because, she was not a civil service employee, the provisions of CPLR Article 78 did not apply to her and she was not obligated to commence the instant proceeding within four months of her discontinuance of employment with HHC. Furthermore, Jaeger-Ramberg contends that an Article 78 proceeding is intended to involve administrative determinations and consider only the specific questions set forth in CPLR § 7803. Since Jaeger-Ramberg was forced to resign, no administrative determination was made. Therefore, Jaeger-Ramberg contends that her claims are not subject to review pursuant to CPLR Article 78 and the four month statute of limitations does not apply.

In reply, HHC cites McKinney's Unconsolidated Laws §7390(6)¹ which states: "[a]ny employee of the corporation shall be authorized to institute a proceeding against the corporation in accordance with the provisions of article seventy-eight of the civil practice law and rules and for purposes hereof the corporation shall be deemed an administrative body or agency within the meaning of the said article seventy-eight". Based upon this language, HHC argues that Jaeger-Ramberg must raise her current claims in the context of a timely CPLR Article 78 Proceeding. As a fall-back position, HHC argues that these two causes of action assert tort claims and, even if the four month statute of limitations for commencing a CPLR Article 78 proceedings does not apply, the statute of limitations for tort claims against HHC is one year and ninety days (which

¹ The court notes that the Unconsolidated Laws are cited differently by McKinney's and Lexis. In addition, at this point in its argument, HHC cites directly to the Laws of 1969. This results in a third variant in citation format referring to the same statutory language. For purposes of clarity in this decision, the Court refers only to the McKinney's citations.

expired before the instant litigation was commenced).

Initially, the court notes that the branch of HHC's motion seeking dismissal pursuant to CPLR §3211(a)(5) is not timely. CPLR §3211(e) requires that any objection pursuant to CPLR §3211(a)(5) be asserted in the party's answer or be raised in a motion to dismiss *prior to* the submission of the party's answer. Here, HHC served the instant motion with its answer but did not assert that the action was barred by the statute of limitations in the answer. Therefore, HHC has failed to either make its motion to dismiss prior to answering or to assert the statute of limitations defense in its answer. Accordingly, CPLR §3211(e) provides that the objection is waived.

Moreover, even if the court were to consider the objection, HHC has not met its burden to prevail on the instant motion. Subsection (6) of McKinney's Unconsolidated Laws §7390 must be read in conjunction with §7390 in its entirety. The section discusses personnel management within HHC. As a public benefit corporation specifically established pursuant to the provisions of the Unconsolidated Laws relating to public health, HHC is a completely separate entity from any other commercial or government entity. Therefore, it is "quasi-governmental" entity only to the extent so provided by law. McKinney's Unconsolidated Laws §7384(1) provides, in pertinent part; "[s]uch corporation shall be a body corporate and politic constituting a public benefit corporation". McKinney's Unconsolidated Laws §7390(5) provides that the HHC is subject to; "...article fourteen of the civil service law ..." and that the employees of the corporation shall be deemed "public employees" for such purposes. Article XIV of the Civil Service Law is entitled "PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT". Civil Service Law §200 is the policy statement section for Article 14. It indicates that the legislature has determined that the public

policy of the state is best effectuated by harmonious relations between the government and its employees. Additionally, the section provides guidelines to effectuate the policy including; 1) allowing public employees the right to union representation and collective bargaining, 2) establishing an employment relations board to assist in resolving employer-employee disputes and 3) continuing to prohibit strikes by public employees. Finally, CPLR §217(2)(b) provides a four month statute of limitations for an employee or former employee to bring an action for violation of; "...article fourteen of the civil service law...". With that backdrop, it becomes apparent that McKinney's Unconsolidated Laws §7390(6) is a specific statutory provision conferring standing upon any HHC employee to bring a CPLR Article 78 proceeding when the employee has been aggrieved by an action of HHC falling within the ambit of the relevant statute.

There are other provisions of law providing similar constraints. For example, if Jaeger-Ramberg was an individual who fit within any of the descriptions set forth in subparagraphs (a) through (e) of Civil Service Law § 75 , Civil Service Law §76 provides that she would be obligated to bring a proceeding pursuant to CPLR Article 78. However, the statutory provisions specifically make the obligation to pursue Article 78 proceedings conditioned upon the plaintiff being an individual who fits within one of the statutory descriptions. It is not a blanket mandate that all actions instituted by HHC employees against HHC be commenced as CPLR Article 78 proceedings within the four month statute of limitations. The court cannot simply assume that, because a particular plaintiff is or was a public employee, the plaintiff is obligated to pursue CPLR Article 78 proceedings.

In the context of the instant motion, it is HHC's burden to show that Jaeger-Ramberg's

status and/or the facts underlying the causes of action alleged in her complaint are governed by a relevant statute obligating her to commence a CPLR Article 78 proceeding. At the current juncture, the only information we have about Jaeger-Ramberg comes from the allegations of her complaint and the arguments of her counsel. From that information, it appears Jaeger-Ramberg was an appointed Director of Nursing and a non-competitive, confidential policy influencing employee. Furthermore, she alleges (and HHC has not challenged) that there was no formal or final administrative determination terminating Jaeger-Ramberg's services. Instead, she alleges her superiors prospectively advised her that her services were no longer needed then convinced her it would be in her best interests to resign rather than be terminated. Without speculating, the court is not in a position to determine whether any statute requiring Jaeger-Ramberg to commence a CPLR Article 78 proceeding applies to the facts of the instant matter as HHC has failed to cite to any provision of law which relates to those facts. Therefore, even if the instant motion had been submitted on a timely basis, HHC has not met its burden and the motion would still have to be denied. Finally, HHC has not argued (and cannot now be heard to complain) that it does not have sufficient information to make an appropriate motion. HHC charted its course in the instant litigation. It chose to make the instant motion rather than asserting an appropriate affirmative defense in its answer and filing its motion after the completion of discovery.

A similar fate befalls HHC's contention that the instant action must have been commenced within one year and ninety days of Jaeger-Ramberg's discontinuance of her employment. This defense was first asserted by HHC in its reply on the instant motion. Therefore, the defense was neither asserted in a pre-answer motion or in HHC's answer itself and is untimely. Additionally, both Jaeger-Ramberg's cause of action for wrongful discharge, which

sounds in contract (see eg; *Weiner v McGraw-Hill, Inc.* 57 NY2d 458 [1982]), and her cause of action for fraudulent misrepresentation carry a six year statute of limitations (see CPLR §213).

Finally, the branch of HHC's motion seeking dismissal of Jaeger-Ramberg's cause of action for fraudulent misrepresentation is also without merit. "Discrimination claimants, such as plaintiff, are not required to file notices of claim pursuant to the General Municipal Law. Both General Municipal Law §50-i and McKinney's Unconsolidated Laws of NY §7401(2) ... define the torts for which a notice of claim is required only as personal injury, wrongful death, or damage to property and not torts generally" (*Sebastian v New York City Health and Hospitals Corporation et al*, 221 AD2d 294 [1st Dept 1995]). It is the theory of the claim rather than the nature of the resulting damages which determines whether a notice of claim is necessary. Jaeger-Ramberg's claims do not fall into any of the categories requiring a notice of claim. Accordingly, it is;

ORDERED that HHC's instant motion to dismiss Jaeger-Ramberg's claims pursuant to Civil Service Law §75-b and her causes of action for wrongful discharge and fraudulent misrepresentation is denied.

The foregoing constitutes the decision and order of the court.

Dated: June 5, 2007

ENTER:



 Hon. Karen S. Smith, J.S.C.

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