

Sandhu v Mercy Med. Ctr.

2007 NY Slip Op 32996(U)

September 17, 2007

Supreme Court, Nassau County

Docket Number: 4957-07/

Judge: Daniel Martin

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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

SURINDER SANDHU, M.D.

Plaintiff.

- against -

TRIAL/IAS, PART 31
NASSAU COUNTY

Sequence No.: 001
Index No.: 004957/07

MERCY MEDICAL CENTER and LONG
ISLAND EMERGENCY CARE, P.C.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant Mercy Medical Care's (hereinafter "Mercy") motion for an order dismissing the complaint as asserted against this defendant pursuant to CPLR 3211(a)(1)(4)(5) and/or (7) is hereby granted.

The following facts are undisputed. Defendant Mercy is a licensed not-for-profit acute care hospital with a level II trauma emergency department. Pursuant to contract dated January 1, 2002 defendant Long Island Emergency Care, P.C. (hereinafter "LIEC") was made the exclusive provider of emergency medical services at Mercy. Plaintiff, a physician, was employed by defendant LIEC in Mercy's emergency department pursuant to an employment contract dated June 10, 2002.

On April 6, 2003 plaintiff was involved in an incident in which he allegedly struck a patient while working in the emergency room. By letter dated April 14, 2003 defendant Mercy informed plaintiff that he was suspended as a result of the incident and that plaintiff had the right to a hearing before an ad-hoc committee to review the allegations against plaintiff. By letter dated April 25, 2003 plaintiff's employer, LIEC terminated plaintiff for cause pursuant to its employment agreement with plaintiff, §4.2.2 which provides:

“Except as provided in Section 4.2.1, PC, in its sole discretion, may immediately terminate this Agreement upon written notice to Physician for any of the following reasons:

8. Any material failure of Physician to conduct himself/herself in accordance with or to abide by the bylaws, rules and regulations of the Medical Staff, or of the bylaws or personnel policies of Hospital.
9. A material failure of Physician to competently and efficiently perform Physician’s duties under this Agreement or material breach of any provision of this Agreement.”

Pursuant to the employment agreement §2.9, plaintiff’s staff medical privileges at Mercy were terminated upon his termination as an employee of LIEC.

By letter dated April 28, 2003 plaintiff’s attorney demanded a hearing on plaintiff’s suspension before the ad-hoc committee. Counsel was thereafter advised that said hearing was moot because plaintiff had been terminated and as a result his staff privileges were automatically extinguished. Mercy thereafter reported the termination of plaintiff’s privileges to the New York State Office of Professional Misconduct (hereinafter “OPMC”) by letter dated May 8, 2003 and the National Practitioner Data Bank by letter dated May 15, 2003.

Plaintiff commenced an Article 78 proceeding against defendants herein which sought an order declaring section 2.9 of the employment agreement set forth above null and void and directing Mercy to provide a fair hearing in connection with the loss of plaintiff’s staff medical privileges. By short form order dated December 24, 2003 this court denied Mercy and LIEC’s motions to dismiss the petition on the basis that Sandhu had to present his claim to the Public Health Council prior to the commencement of the special proceeding. The court granted the relief sought in the petition to the extent it directed that Dr. Sandhu be given a hearing.

By short form order dated July 29, 2004 the court granted Mercy and LIEC’s motions for reargument and vacated the December 24, 2003 short form order in its entirety. The court denied all relief sought in said motion but directed Mercy and LIEC to file answers to the petition. On December 5, 2006 the Appellate Division, Second Department reversed the July 29, 2004 order, converted the proceeding into an action for a declaratory judgment and granted the motion to dismiss the newly converted action. In so ruling the Appellate Division held that Dr. Sandhu’s contention that section 2.9 of the employment agreement should be declared null and void was “without merit”. Further, the court held that Dr. Sandhu failed to set forth grounds for which the agreement could be declared void as a contract of adhesion. See, Sandhu v. Mercy Medical Center, 35 A.D.3d 479, 481-182 (2nd Dep’t 2006).

Plaintiff thereafter commenced the instant action, asserting causes of action for 1) breach of contract resulting in a wrongful termination of plaintiff without benefit of a hearing; and 2) defamation for defendants’ alleged report forwarded to the National Medical Data Bank. Defendant Mercy moves to dismiss the instant complaint pursuant to CPLR 3211(a)(1)(4)(5) and/or (7).

Defendant Mercy moves to dismiss the breach of contract cause of action upon the grounds of 1) *res judicata*; and 2) lack of contractual privity between plaintiff and defendant Mercy. Defendant Mercy moves to dismiss the cause of action for defamation because plaintiff fails to properly plead a cause of action for defamation in the complaint, said claim is time barred and Mercy is entitled to certain immunities under federal and state law in reporting the termination of plaintiff's staff privileges.

Of particular interest to the court is that branch of the motion which asserts that plaintiff's breach of contract claim is barred by *res judicata*. In its decision the Appellate Division, Second Department noted that "the gravamen of the dispute actually sounds in contract because even if the petitioner [plaintiff herein] were to prevail at a fair hearing, his medical staff privileges at Mercy could not be restored until either the agreement or section 2.9 thereof is declared void." The court then held that plaintiff's contention that section 2.9 should be declared void was "without merit" and that plaintiff "failed to set forth grounds by which the agreement could be declared void as a contract of adhesion." Plaintiff therein failed to allege that he was unable to read or understand the agreement or that he had no option to seek employment elsewhere. Sandhu, supra, pp. 481-482.

In opposition plaintiff asserts that he is not seeking the same relief in this action as he did in the special proceeding. The Article 78 proceeding sought an order directing a fair hearing while plaintiff alleges herein that Mercy violated its own by-laws and seeks monetary damages.

CPLR 3211(a)(5) authorizes a motion to dismiss a complaint based upon the doctrine of *res judicata*. In order for the doctrine of *res judicata* to apply and prohibit the re-litigation of an issue, the following three part test must be satisfied: 1) a final judgment on the merits; 2) arising out of the same transaction or series of transactions; 3) involving the same parties or privies. See, O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981).

The court, having reviewed both the complaint herein and the prior petition notes that the allegations contained in both are identical except for the fact that plaintiff seeks monetary damages in this action. The Appellate Division has already ruled on this issue and dismissed these claims in the prior proceeding. The mere fact that plaintiff seeks damages instead of a declaratory judgment is unavailing. Further, having reviewed the complaint, nowhere does plaintiff plead a breach of contract on defendant Mercy's part. Such would lead this court to dismiss this claim on the ground that plaintiff failed to set forth a cause of action. CPLR 3211(a)(7). See, e.g., La Duke v. Lyons, 250 A.D.2d 969 (3rd Dep't 1998). Thus, as the doctrine of *res judicata* bars re-litigation of plaintiff's cause of action for breach of contract, the motion is granted to the extent the first cause of action is dismissed.

The court also notes that defendant brings the defamation claim for the first time in this action. As set forth above, the alleged communication upon which plaintiff seeks damages for defamation was made in May, 2003. A cause of action for defamation must be asserted within one year. CPLR 215(3). Said claim accrues on the date the subject statement is originally published. See, Barsim v. Hakett, 184 A.D.2d 908 (3rd Dep't 1992).

In opposition to this branch of the motion, plaintiff asserts, in its entirety:

"43. Moreover, Defendant's allegation with respect to the timeliness of Plaintiff's action for defamation is without merit. In response to Emergency Care and Mercy Medical's total disregard for their own procedure, Dr. Sandhu, by his attorney, timely commenced a proceeding pursuant to Article 78 seeking an order directing Mercy Medical to form an *Ad Hoc* committee and to afford him a fair hearing concerning Dr. Sandhu's alleged and purported conduct, which was incorrectly reported to the National Medical Data Bank.

44. Upon information and belief, Dr. Sandhu was terminated from his employment without a hearing of any kind, yet he followed all protocols for the treatment of violent and emotionally disturbed patients. If given a hearing, Dr. Sandhu would not have been and could not have been terminated, whereas affording Dr. Sandhu a simple due process hearing would have sufficed and resolve the conflict. Dr. Sandhu was more than willing to submit to that process, to give testimony and be cross-examined by his peers or their counsel. Instead, the Defendants forced litigation; they cannot now come forward and imply that Plaintiff is to suffer the repercussions of Defendants' actions and yet not be entitled to a remedy, particularly when the Defendant continues to publish the erroneous findings."

Such does not dispute that publication occurred in excess of three years prior to the commencement of this action, nor does it set forth an exception to the legal standard for commencement of a defamation action.

Based upon the foregoing, it is directed that the complaint as asserted against defendant Mercy is dismissed in its entirety and severed as to defendant LIEC.

The matter is hereby set down for a preliminary conference to be held before the Differentiated Case Management Part on October 23, 2007 at 2:30 p.m.

So Ordered.

Dated: September 17, 2007


A.J.S.C. **ENTERED**

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COUNTY CLERKS OFFICE