SHORT FORM ORDER

INDEX No. 04-13392
CAL. No. 07-00334-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-7-07
ADJ. DATE 6-7-07
Mot. Seq. # 002 - MotD

LOUIS LOIODICE,

Plaintiff,

- against -

NEW YORK COLLEGE OF OSTEOPATHIC MEDICINE OF NEW YORK INSTITUTE OF TECHNOLOGY.

Defendant.

PAUL L. DASHEFSKY, ESQ.
Attorney for Plaintiff
317 Middle Country Road
Smithtown, New York 11787

FULBRIGHT & JAWORSKI L.L.P.
Attorneys for Defendant
666 Fifth Avenue
New York, New York 10103

Upon the following papers numbered 1 to 50 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 33 - 43 ; Replying Affidavits and supporting papers 44 - 50 ; Other defendant's and plaintiff's memoranda of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the causes of action enumerated within plaintiff's complaint is determined as follows.

Plaintiff Louis Loiodice ("Loiodice") commenced this action against his former employer New York College of Osteopathic Medicine of New York Institute of Technology ("NYCOM") for unlawful termination pursuant to Labor Law § 740, commonly referred to as the "whistle-blower statute". Plaintiff also seeks unpaid commissions and lost wages based upon NYCOM's alleged breach of his employment contract and fraudulent misrepresentation of reappointment for the period of September 1, 2003 through August 31, 2004. The facts of this case, as gleaned from the respective affidavits submitted by the parties, arise out of NYCOM's termination of plaintiff's teaching contract for practicing medicine outside of NYCOM's network and for doing so without first obtaining malpractice insurance. Prior to his termination plaintiff was also asked to transfer from NYCOM's Central Islip clinic to its Old Westbury clinic due to the negative impact of acrimonious relations between himself and members of staff following NYCOM's finding that plaintiff's accusation that another staff doctor was administering excessive amounts of Dep-Porvera to a patient was without merit.

Defendant now moves for summary judgment dismissing the causes of action enumerated within plaintiff's complaint. Defendant contends that plaintiff's Labor Law § 740 cause of action must be dismissed as a matter of law because plaintiff has failed to demonstrate that defendant violated any law,

rule or regulation, or that it was engaged in conduct that posed a danger to the public at large. Defendant also argues that even if plaintiff's first cause of action were to succeed, his claim for compensatory damages would be precluded by Labor Law § 740 (5) which limits plaintiff to equitable relief in the form of an accounting for back pay and lost benefits. Similarly, defendant asserts that by commencing an action under Labor Law § 740, plaintiff has waived his right to relief under all other causes of action for claims arising from the same events. Furthermore, defendant argues, plaintiff's causes of action for breach of contract and fraudulent misrepresentation are without merit because plaintiff breached the terms of his own employment agreement and NYCOM was well within its rights under the employment agreement to transfer him to its Old Westbury location and terminate his contract. Defendant also asserts that plaintiff has failed to demonstrate that he was underpaid prior to March 2003, or that he was not adequately compensated for any alleged loss in commissions due to his transfer.

In support of its motion NYCOM submits, *inter alia,* copies of the pleadings, various communications between the plaintiff and NYCOM's former Dean, communications between the former Dean and other members of staff, plaintiff's employment agreement and faculty handbook, and excerpts from plaintiff's examination before trial. Defendant also submits an affidavit from the former Dean wherein she explains the series of events leading up the termination of plaintiff's employment with NYCOM.

In opposition plaintiff argues that defendant's motion should be denied because issues of fact exists as to whether defendant's conduct of administering excessive amounts of hormones to a patient violated New York's Public Health Law and posed a danger to the public at large. Plaintiff also contends that the facts giving rise to his breach of contract claims are different from the facts and circumstances underlying his Labor Law § 740 claim. In addition, plaintiff asserts that defendant has not met its burden for summary judgment on the breach of contract claims insofar as it failed to submit proof in admissible form that he impermissibly worked outside of NYCOM's network, or that it was within its rights to terminate his 2003-2004 employment renewal contract.

The proponent of a summary judgment motion must make out a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (***Sheppard-Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (***Alvarez v Prospect Hosp***., *supra*; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To establish a cause of action under Labor Law § 740, commonly referred to as "the whistle-blower statute" (***Lamagna v New York State Assn. for Help of Retarded Children***, 158 AD2d 588, 589, 551 NYS2d 556 [1990]), a plaintiff must plead and prove (1) that his or her employer engaged in an activity, policy, or practice which violated a law, rule, or regulation and (2) that said violation be must be actual, not merely possible, and present a substantial and specific danger to the public health or safety (*see*, ***Bordell v General Elec. Co.***, 88 NY2d 869, 871, 644 NYS2d 912 [1996]; ***Pipia v Nassau County***, 34 AD3d 664, 826 NYS 2d 318; ***Connolly v Harry Macklowe Real Estate Co.***, 161 AD2d 520, 555

NYS2d 790 [1990]). It is essential to the viability of a Labor Law § 740 claim that the plaintiff specify the law, rule or regulation that has actually been violated by the defendant's behavior and that he describe how the defendant's activity has endangered the health or safety of the public. If the plaintiff fails to satisfy one or both of these prerequisites, the court must dismiss the Labor Law § 740 cause of action (*see*, ***Blunenreich v North Shore Health Sys.***, 287 AD2d 529, 731 NYS2d 638 [2001]; ***Pail v Precise Imports Corp.***, 256 AD2d 243, 681 NYS2d 498 [1998]; ***Connolly v Harry Macklowe Real Estate Co.***, *supra*; *see also* ***Owitz v Beth Israel Med Ctr.***, 1 Misc 3d 912[A], 781 NYS2d 626 [2004]).

By failing to specify which law, rule or regulation defendant purportedly violated when it allegedly administered excessive amounts of Dep-Porvera to one of its patients, plaintiff has failed to state a valid cause of action under Labor Law § 740 (*see*, ***Bordell v General Elec. Co.***, *supra*; ***Blunenreich v North Shore Health Sys.***, *supra*; ***Pail v Precise Imports Corp.***, *supra*). Plaintiff also failed to explain how defendant's actions imperiled the health and safety of the public (*see*, ***Connolly v Harry Macklowe Real Estate Co.***, *supra*; *see also* ***Owitz v Beth Israel Med Ctr.***, *supra*). Although plaintiff asserts that defendant violated Public Health Law §§ 230, 2803-e and Education Law § 6509, he has failed to set forth any facts demonstrating that defendant's alleged conduct fell within any of the prohibited activities described in these regulations. Similarly, while plaintiff's complaint sets forth the administering of excessive amounts of Dep-Provera to a patient as the violation upon which his Labor Law § 740 action is based, plaintiff failed to specify any rule, statute or regulation that was breached in defendant's alleged misuse of the hormone. Plaintiff also failed to raise an issue of fact warranting denial of defendant's motion (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v New York***, *supra*). The excerpt from the Physicians Desk Reference submitted by plaintiff in opposition to defendant's motion is inconclusive about the dangers associated with use of the drug for contraception among young women. While the excerpt recommends a dosage of 150 mg of Dep-Provera CI every three months, it does not address possible excessive use of the drug or state any medically recognized limits on dosage. Thus, plaintiff's first cause of action under Labor Law § 740 must be dismissed (***Blunenreich v North Shore Health Sys.***, *supra*; ***Pail v Precise Imports Corp.***, *supra*).

Labor Law § 740 (7) also requires that plaintiff's second, third and fourth causes of action be dismissed since institution of a Labor Law § 740 claim is a waiver of all claims that arise out of the same acts as those that gave rise to the Labor Law § 740 claim and/or that relate to the retaliatory actions on which the action is based (*see*, ***Hayes v Staten Island Univ. Hosp.***, 39 AD3d 593, 834 NYS2d 274 [2007]; ***Bordan v North Shore Univ. Hosp.***, 275 AD2d 335, 712 NYS2d 155 [2000]; ***Owitz v Beth Israel Med Ctr.***, *supra*; *see also*, ***Kraus v Brandsletter***, 185 AD2d 302, 586 NYS2d 289 [1992]). Plaintiff's second cause of action for breach of contract is directly related to defendant's alleged retaliatory conduct and arises from the same facts giving rise to the Labor Law § 740 action since the purported "unilateral transfer" constitutes one of the retaliatory steps taken by defendant following plaintiff's complaint that Dr. Brous wrongfully administered excessive amounts of Dep-Provera to one of her patients. Similarly, plaintiff's third and fourth causes of action alleging breach of his June 15, 2003 reappointment contract and detrimental reliance on such reappointment must be dismissed since these claims arise from the same facts that gave rise to the Labor Law § 740 claim and relate to retaliatory actions undertaken by defendant following plaintiff's efforts to reveal the alleged wrongful conduct (*see*, ***Hayes v Staten Island Univ. Hosp.***, *supra*; ***Bordan v North Shore Univ. Hosp.***, *supra*;

Owitz v Beth Israel Med Ctr., *supra*). Moreover, unlike ***Kraus v Brandsletter***, *supra,* where, in addition to his Labor Law § 740 claim, the plaintiff instituted a separate and independent cause of action for defamation, here, though asserted on a contractual basis, these actions also seek to challenge the propriety of plaintiff's transfer and termination.

Even assuming, arguendo, that plaintiff's claims were separate and independent, plaintiff's assertion that his reappointment contract was prematurely terminated is without merit since in addition to forming "Bay Family Medicine PLLC" in May 2003, plaintiff testified that the family practice started seeing patients as early as July 2003, at least one month before his employment with NYCOM was terminated. Plaintiff also testified that despite Dean Ross-Lee's admonition that he was in violation of his contract and her suggestion that he seek permission to work outside NYCOM's network, he failed to seek permission because he questioned her motives for seeking such a letter. Having breached his employment contract in this manner plaintiff can maintain an action for neither wrongful termination nor detrimental reliance on the June 15, 2003 reappointment contract. Furthermore, in addition to failing to plead his action for fraud with the specificity required by CPLR 3016 (b), plaintiff's cause of action for fraud cannot lie where, as here, the only fraud alleged merely relates to a contracting party's alleged intent to breach a contract obligation (*see*, ***Comtomark, Inc., v Satellite Communications Network***, 116 AD2d 499, 497 NYS2d 371 [1986]; *see also*, ***Baje Realty Corp. v Cutler***, 284 AD2d 282, 728 NYS2d 443 [2001]; ***Caniglia v Chicago Tribune-New York News Syndicate***, 204 AD2d 233, 612 NYS2d 146 [1994]). In opposition plaintiff also fails to raise any issue of fact warranting denial of this portion of defendant's summary judgment motion (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v New York***, *supra*).

Nevertheless, with respect to plaintiff's fifth cause of action for unpaid income and commission alleging that he lost approximately $1000 over two years because he was paid 30% for those patients with capitized insurance plans instead of 35% as provided in his employment contract, issues of fact remain as to whether plaintiff received the appropriate remuneration during the period before and after his transfer. Although defendant submitted excerpts from plaintiff's deposition wherein he testified that he agreed that $70,236.54 represented the loss commission related to his transfer, plaintiff also testified that this figure did not include the additional 5% which he had forgone for approximately two years. Thus, the portion of defendant's motion seeking to dismiss plaintiff's fifth cause of action for unpaid commissions related to patients he treated with capitized insurance plans is denied.

Accordingly, defendant's motion for summary judgment dismissing plaintiff's first, second, third and fourth causes of action is granted. However, the portion of defendant's motion seeking to dismiss plaintiff's fifth cause of action for 5% unpaid commission related to his treatment of patients with capitized insurance plans is denied.

Dated: SEP 25 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION