

Deshpande v TJH Med. Servs., P.C.

2007 NY Slip Op 34441(U)

January 12, 2007

Supreme Court, Queens County

Docket Number: 27808/05

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

SATISH DESHPANDE x Index
2005 Number 27808

- against - Motion
2006 Date November 8,

TJH MEDICAL SERVICES, P.C., et al. Motion
_____ x Cal. Number 20

The following papers numbered 1 to 3 read on this motion by the defendants for an order pursuant to CPLR 3211(a)(1), (4), and (7) dismissing the complaint against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3

Upon the foregoing papers it is ordered that:

Those branches of the defendants' motion which are for an order dismissing the complaint against them pursuant to CPLR 3211(a)(7) are granted to the extent that the fourth, fifth, and sixth causes of action are dismissed.

The defendants' motion is otherwise denied.

(See the accompanying memorandum.)

Dated: January 12, 2007

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

	X	INDEX NO. 27808/05
SATISH DESHPANDE		BY: KITZES, J.
- against -		DATED: January 12, 2007
TJH MEDICAL SERVICES, P.C., et al.		
	X	

The defendants have moved for an order pursuant to CPLR 3211(a)(1), (4), and (7) dismissing the complaint against them.

Defendant Jamaica Hospital Medical Center, defendant TJH Medical Services, P.C., defendant Medisys Management, LLC, and defendant Medisys Health Network, Inc. allegedly employed plaintiff Satish Deshpande, a medical doctor. Plaintiff Deshpande alleges, inter alia, that the defendants subjected him to discriminatory treatment because he is not a Gujarati Indian and to retaliatory treatment because he is a "whistle blower."

That branch of the defendants' motion which is for an order dismissing the complaint pursuant to CPLR 3211(a)(1) is denied. The defendants did not show that documentary evidence in this case is dispositive of any of the plaintiff's claims. (See, Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

That branch of the defendants' motion which is for an order dismissing the complaint pursuant to CPLR 3211(a)(4) is

denied. The defendants did not show that there is presently another action pending involving the same claims. (See, Diaz v Philip Morris Companies, Inc., 28 AD3d 703.)

That branch of the defendants' motion which is for an order dismissing the first cause of action asserted against them pursuant to CPLR 3211(a)(7) is denied. The first cause of action alleges, inter alia, that the defendants violated Labor Law §§ 190 et seq. by not offering the plaintiff an overtime differential in pay. The plaintiff alleges that the defendants frequently required him to work more than forty hours a week to assist third year residents. Contrary to the argument made by the defendants, the plaintiff, even though a professional, is protected by Labor Law §§ 190 et seq. (See, Klepner v Codata Co., 139 Misc 2d 382 aff'd 150 AD2d 994; Jordan v Schreiber, Simmons, Macknight & Tweedy, 1994 WL 108011 [n.o.r.]; Miteva v Third Point Management Co., L.L.C., 323 F Supp 2d 573.)

That branch of the defendants' motion which is for an order dismissing the second cause of action asserted against them pursuant to CPLR 3211(a)(7) is denied. The plaintiff alleges that the defendants discriminated against him on an ethnic basis because he was not a Gujarati Indian. The plaintiff alleges, inter alia, that the defendants denied him promotional opportunities and lucrative job assignments because of ethnic considerations favoring Gujarati Indians. The plaintiff asserts that the defendants violated the New York State Human Rights Law

(Executive Law §§ 290 et seq.) and the New York City Human Rights Law (New York City Admin. Code §§ 8-101 et seq.) by discriminating against him on the basis of national origin. The criteria for establishing unlawful discrimination under section 296 of the New York State Human Rights Law are the same as those controlling Title VII cases under the Federal Civil Rights Act of 1964. (See, Mittl v New York State Div. of Human Rights, 100 NY2d 326; Ferrante v American Lung Assn., 90 NY2d 623.) Claims arising under the New York City Human Rights Law are also generally controlled by the same federal standards. (See, Landwehr v Grey Advertising Inc., 211 AD2d 583; Cruz v Coach Stores, Inc., 202 F3d 560.) In order to adequately state a cause of action for discrimination under the Human Rights Law, a plaintiff must allege (1) that he belongs to a class protected by the statute; (2) that his employer actively or constructively discharged him or took other adverse action against him; (3) that he had the qualifications to hold the position from which he was terminated or from which he experienced adverse action; and (4) that his employer discharged him or took adverse action against him under circumstances giving rise to an inference of discrimination. (See, McDonnell Douglas Corp. v Green, 411 US 792; Mittl v New York State Div. of Human Rights, supra; Ferrante v American Lung Ass'n, supra; Kent v Papert Companies, Inc., 309 AD2d 234; Pramdip v Building Service 32B-J Health Fund, 308 AD2d 523.) In the case at bar, the plaintiff has adequately stated a

cause of action arising under the city and state Human Rights Laws. Moreover, although the plaintiff has pleaded causes of action based on Labor Law §§ 740 and 741 (the “whistle blowing” statutes), Labor Law § 740(7) does not bar the assertion of the cause of action for discrimination. Labor Law § 740(7) provides in relevant part: “the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.” (See, Kraus v Brandstetter, 185 AD2d 302.) It is true that “[t]he mere commencement of an action under Labor Law § 740(4) *** acts as an election of remedies, waiving other causes of action relating to the alleged retaliatory discharge,” or other retaliatory behavior, “irrespective of the disposition of such claims.” (Pipia v Nassau County, 34 AD3d 664.) “Because a claim alleging a violation of Labor Law § 741(2) is enforced pursuant to Labor Law § 740(4)(d) (see Labor Law § 741[4]), the same waiver is effected by the institution of a cause of action alleging a violation of Labor Law § 741(2) (see Labor Law § 740[7]).” (Pipia v Nassau County, supra.) However, where a cause of action is “separate and independent” from a cause of action based on Labor Law § 740 or § 741, the bar of Labor Law 740(7) does not operate. (See, Bordan v North Shore University Hosp., 275 AD2d 335; Kraus v Brandstetter, supra.) Distinct claims, based on different facts, which seek to protect a

different legal interest than the protection of whistle blowing activity are not barred by the operation of Labor Law § 740(7).

(See, Collette v St. Luke's Roosevelt Hosp., 132 F Supp 2d 256.)

In the case at bar, the plaintiff's cause of action for discrimination is separate and independent from his cause of action based on whistle blowing activity, and the protection of different legal interests are involved. (See, Collette v St. Luke's Roosevelt Hosp., supra.)

That branch of the defendants' motion which is for an order dismissing the third cause of action asserted against them pursuant to CPLR 3211(a)(7) is denied. The third cause of action is based on Labor Law §§ 740 and 741. An employer is prohibited by Labor Law § 740 from taking retaliatory action against an employee who discloses or threatens to disclose an employer activity or practice which (1) is in violation of a law, rule or regulation, and (2) creates a substantial and specific danger to the public health. (See, Bordell v General Elec. Co., 88 NY2d 869; Pipia v Nassau County, 34 AD3d 664; Bordan v North Shore University Hosp., 275 AD2d 335.) A health care employer is prohibited by Labor Law § 741 from taking retaliatory action against an employee who, inter alia, "discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care ***." (See, Pipia v Nassau County, supra.) In the

case at bar, the plaintiff adequately alleges that his employers subjected him to retaliatory action because he complained of improper emergency room practices, among other things.

That branch of the defendants' motion which is for an order dismissing the fourth cause of action pursuant to CPLR 3211(a)(7) is granted. General Business Law § 340, the antitrust statute, does not apply to the medical profession. (See, People v Roth, 52 NY2d 440; Glen Cove Associates, L.P. v North Shore University Hosp., 240 AD2d 701; Rockland Physician Associates, P.C. v Grodin, 1986 WL 954 [S.D.N.Y.], [n.o.r.])

That branch of the defendants' motion which is for an order dismissing the fifth cause of action pursuant to CPLR 3211(a)(7) is granted. In order to state a cause of action for tortious interference with business relationships, a plaintiff must allege that a defendant interfered with his business relationships either with the sole purpose of harming him or by means that were unlawful or improper. (See, Henek v Bechor, 289 AD2d 294; McQuillan v Kenyon & Kenyon, 271 AD2d 511; 71 Pierrepont Associates v 71 Pierrepont Corp., 243 AD2d 625.) The complaint, read in its entirety, alleges that because of his whistle blowing activity, the defendants sought to impose on the plaintiff new and retaliatory restrictions on his "moonlighting" activity in violation of Labor Law § 740, prohibiting, inter alia , "other adverse employment action taken against an employee in the terms and conditions of employment." Since the plaintiff's

cause of action for tortious interference with business relationships is intertwined with his cause of action based on whistle blowing activity, the fifth cause of action is barred by operation of Labor Law § 740(7).

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action is granted. The plaintiff did not adequately state a cause of action for illegal fee-splitting. (See, Albany Medical College v McShane, 66 NY2d 982; Rabin v Hirshfield, 223 AD2d 535.)

Short form order signed herewith.

J.S.C.