

**Tomo v Episcopal Health Servs. Inc.**

2009 NY Slip Op 31188(U)

May 18, 2009

Supreme Court, Nassau County

Docket Number: 21477/08

Judge: Roy S. Mahon

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SCAW

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**RONALD TOMO,**

**Plaintiff(s),**

**- against -**

**EPISCOPAL HEALTH SERVICES INC. and  
KURRON SHARES OF AMERICA, INC.,**

**Defendant(s).**

**TRIAL/IAS PART 8**

**INDEX NO. 21477/08**

**MOTION SEQUENCE  
NO. 1**

**MOTION SUBMISSION  
DATE: February 24, 2009**

**The following papers read on this motion:**

**Notice of Motion**

**X**

Upon the foregoing papers, the motion by defendants for an Order pursuant to CPLR 3211(a)(7), dismissing each of the claims for relief in the Complaint, with prejudice; pursuant to CPLR 3211(a)(1), dismissing the claim for relief under NY Lab L. §741 and pursuant to NY Lab L. §740(6), awarding defendants attorney's fees and court costs associated with this action, is determined as hereinafter provided:

The plaintiff brings the instant action pursuant to Labor Law §740 and Labor Law §741. The plaintiff was initially employed by the defendant Episcopal Health Services as a systems coordinator, then promoted to systems coordinator of technology and then to the position of chief information office and chief security officer.

In examining the respective applicabilities of Labor Law §740 and Labor Law §741, the Court in **Reddington v Staten Island University Hospital**, 11 NY3d 80, 862 NYS2d 842, 893 NE2d 120 stated:

"The specialized protection offered by Labor Law §741 extends only to those health care employees who "perform health care services" (*Labor Law §741[1][a]*). Specifically, section 741(2) states:

"Retaliatory action prohibited. Notwithstanding any other provision of law, no employer shall take retaliatory action against any employee because the employee does any of the following:

'(a) 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 that the employee, in good faith, reasonably believes constitutes improper quality of patient care; or

(b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care."

The terms "employee" and "improper quality of patient care" are defined in section 741(1)(a) and (d) respectively. For purposes of section 741, "employee" is defined as "any person who performs health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration" (*Labor Law 741[1][a]* [emphasis added] and "improper quality of patient care" is defined to

'mean, with respect to patient care, any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient' (*Labor Law 741[1][d]* [emphasis added]).

Unlike Labor law §740, which defines "employee" to "mean an individual who performs services for and under the control and direction of an employer for wages or other remuneration" (*Labor Law §740[1][a]*, *Labor Law §741* therefore has an exactingly specific definition of "employee": "any person who performs health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration (*Labor Law §741[1][a]* [emphasis added]). This definition of employee contains two limitations: first, it applies only to those employed by "employer[s] ... provid[ing] health care services," and second, the category of covered workers is further narrowed to those "perform[ing] health care services." It is important that section 741(1)(a) limits both type of employer ("employer which provides health care services"). This puts a clear outer boundary on employees covered by section 741; in order to give effect to both limitations within section 741(1)(a), the universe of covered employees must be smaller than all those employed by a health care provider, who are afforded the more generalized protection of section 740 (*see Labor Law §740[2][1]*; *see also Budget Report on Assembly Bill A9454, at 1, Bill Jacket, L. 2002, ch. 24* ["The instant bill would build upon (section 740's) protections and would specifically address the employment situations of health care workers"]).

Because some limiting principle is mandated by section 741, the question becomes the meaning of the phrase "performs health care services". Webster's Collegiate Dictionary defines "perform" as "carry out; do" or "to do in a formal manner or according to prescribed ritual" (*Merroam-Webster's Collegiate Dictionary 863 [10th ed. 1998]*), while the Oxford English Dictionary defines perform as "to carry through to completion; to complete, finish, perfect (an action process, work, etc.)" (*10 Oxford English Dictionary 543 [2d ed.*

1989)). Similarly, Roget's Thesaurus defines "perform" as "[t]o begin and carry through to completion" and supplies the synonyms "do", "execute" and "prosecute" (*Roget's II, The New Thesaurus* 721 [3d ed. 1995]). Nowhere is the term "perform" defined to mean "coordinate," "communicate," or "develop".

We have observed that "[i]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583, 673 NYS2d 966, 696 NE2d 978 [1998], quoting *Tompkins v Hunter*, 149 NY 117, 122-123, 43 NE 532 [1896] [additional citation omitted]). Here, the "natural signification" of section 741(1)(a) is quite definite: to be subject to the special protections of section 741, an employee of a health care provider must "perform health care services", which means to actually supply health care services, not merely to coordinate with those who do.

A review of the rest of Labor Law §741, as well as the statute's legislative history, further bolsters the plain-text interpretation of section 741(1)(a). The Assembly memorandum in support of Laws of 2002 (ch. 24) which enacted Labor Law §741 as well as Labor Law §740(4)(d) states, under the subtitle "JUSTIFICATION":

"This legislation does not specifically mention adherence to acceptable standards of professional practice or a code of ethics. The bill does allow a professional to go to court to be made whole after retaliatory action when the professional reasonably believes that a state law, rule or regulation has been violated. It is expected that a professional would reasonably believe that a practice identified in their professional standard or ethic as best practice or prohibited practice would be reflected in the determination of the state agencies that regulate professional practice. A professional who knows that a colleague or a facility has been sanctioned or disciplined by the state for improper patient care could reasonably believe that the state's penalties were based upon a violation of state law, rule or regulation. Department of Health regulations (Section 405.5) require facilities to provide nurse staffing 'to ensure, when needed in accordance with generally accepted standards of nursing practice, the immediate availability of a registered professional nurse for bedside care of any patient.' Nurses would reasonably believe when, in their professional judgment, they were not immediately available to meet a patient's needs that there was a violation of state regulations. Therefore, they would be able to have their day in court following retaliation for speaking out about their perception of inadequate staffing levels. (*Assembly Rules Comm. Mem, in Support, at 1, Bill Jacket, L. 2002 ch. 24 [emphasis added]*).

This legislative history indicates that the specialized protections of Labor Law §741 were meant to protect professional judgments regarding the quality of patient care. The example given in the Assembly memorandum the only concrete example provided by the bill's sponsors is illustrative: a nursing regulation requiring "immediate availability" of bedside nursing care is cited.

This is not to say that section 741 only covers employees who possess professional licenses; there may be cases where an employee without a professional license performs health care services in the employment of a health care provider. Nonetheless, section 741, which offers exceptional and specialized whistleblower protection over and above the generalized protection afforded by section 740, is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments."

**Reddington v Staten Island University Hospital, supra at 848-850**

The defendants seek the requested relief pursuant to the provisions of CPLR §3211(a)(1) and (7). In examining an application pursuant to subsection (1) the Court in **Teitler v Max J. Pollack & Sons**, AD2d 302, 733 NYS2d 122 (Second Dept., 2001) set forth:

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see, *Held v Kaufman*, 91 NY2d 425, 430-431, 671 NYS2d 429, 694 NE2d 430; *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511; *Museum Trading Co. v Bantry*, 281 AD2d 524, 721 NYS2d 822, *Jaslow v Pep Boys Manny, Moe & Jack*, 279 AD2d 611, 719 NYS2d 881; *Brunot v Eisenberger & Co.*, 266 AD2d 421, 698 NYS2d 882)."

**Teitler v Max J. Pollack & Sons, supra at 122-123**

As to subsection (7), the Court in **Mastrocola v County of Nassau**, 248 AD2d 684, 671 NYS2d 278 (Second Dept., 1998) stated:

"[T]he sole criterion [when considering a motion to dismiss for failure to state a cause of action] is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzberg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17). The pleadings must be liberally construed, and the facts pleaded are presumed to be true and are accorded every favorable inference (see, *Doria v Masucci*, 230 AD2d 764, 765, 646 NYS2d 363). Under the circumstances of this case, the plaintiff has sufficiently pleaded a cause of action against the Village of Lake Success and the Police Department of the Village of Lake Success (see, *Anderson v Muniz*, 125 AD2d 281, 283, 508 NYS2d 567)."

**Mastrocola v County of Nassau, supra at 279**

As to the defendants' contention that the "documentary evidence" set forth in the language in Labor Law §741(3) supports an application pursuant to CPLR §3211(a)(1), the Court finds such a contention to be inconsistent with the clear language of said subsection. As such, to the extent that the defendants seek an Order pursuant to CPLR 3211(a)(1), dismissing the claim for relief under NY Lab L. §741, said application is **denied**.

The Court does find that a review of the respective submissions establishes that the protections afforded to a party pursuant to Labor Law §741 do not apply to the plaintiff herein as he is not an employee

who performs "health care services" (see, **Reddington v Staten Island University Hospital**, supra). As such, to the extent that the defendants seek relief pursuant to CPLR §3211(a)(7) as to the plaintiff's claim sounding in Labor Law §741, said application is granted. The Court does find that the four corners of the plaintiff's complaint set forth allegations sounding in a cause of action pursuant to Labor Law §740 (see, **Mastrocola v County of Nassau**, supra). Accordingly, to the extent that the defendants seek relief pursuant to subsection (7) of the CPLR §3211, said application is denied.

That branch of the defendants' application which seeks relief pursuant to the provisions of Labor Law §740(6), is denied based upon the foregoing.

SO ORDERED.

DATED: 5/18/2009

*Ray S. Melton*  
.....  
J.S.C.

**ENTERED**  
MAY 20 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE