Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Paul N. Gunderson,

Plaintiff,

-against-

Trinity Homecare, LLC a/k/a Trinity Homecare, A Walgreens Company, Option Care, Inc., Option Care of New York, Inc. and Walgreen Company,

Defendants.

Clerk of the Court

Index No.: 05912/2009

Motion Sequence No.: 002; MD
Motion Date: 4/22/10
Submitted: 12/8/10

Motion Sequence No.: 003; XMD
Motion Date: 5/12/10
Submitted: 12/8/10

Motion Sequence No.: 004; MD
Motion Date: 10/26/10
Submitted: 12/8/10

Motion Sequence No.: 005; XMD
Motion Date: 11/9/10
Submitted: 12/8/10

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Upon the following papers numbered 1 to 39 read upon this motion for protective order; cross motion to compel disclosure; motion to compel disclosure; cross motion for sanctions: Notice of Motion and supporting papers, 1 - 11; 23 - 30; Notice of Cross Motion and supporting papers, 12 -

21; 31 - 34; Answering Affidavits and supporting papers, 22; 35 - 36; Replying Affidavits and supporting papers, 37; 38; 39; Other, defendants' memorandum of law (#002); plaintiff's memorandum of law (#002 & #003); defendants' reply memorandum of law (#002 & #003).

This is an action for injunctive relief and to recover damages under Labor Law §740, as well as for breach of contract, based on the claim that the defendants, who are providers of home health care services, unlawfully terminated the plaintiff from his employment in retaliation for reporting suspected fraudulent billing activity.

According to the plaintiff, he was employed by one or more of the defendants for 10 years prior to his termination on December 9, 2008. In September 2008, he received a letter from one of his coworkers, Dawn Remiszewski, advising him about the defendants' ongoing fraudulent billing activities. In the letter and, in subsequent discussions, Remiszewski stated that she had been instructed by her supervisors, including Monica Persaud, to "fix" Medicare explanation of benefit forms by changing the denial codes to ensure that the defendants would receive payment when the altered forms were subsequently submitted to secondary insurance carriers. On October 24, after investigating and confirming the truth of these allegations, the plaintiff reported the suspected fraud to Heather Olsen, a vice president in the billing department. The plaintiff specifically implicated Persaud, who was also his immediate supervisor and the general manager of the facility, in his report. An internal investigation followed. Despite assurances from Olsen that there would be no reprisals against anyone regarding this matter, the plaintiff was advised on December 9 by his supervisors, including Persaud, that he was being terminated effective immediately. He later learned from John Mullen, a former owner, that Mullen had received a text message from his partner stating that the plaintiff was "a nice guy" but "he turned Monica in for fraud, and he got what he deserved."

The defendants, for their part, deny that the plaintiff's whistleblowing activity played any role in his termination.

The defendants now move for a protective order. Having conceded, for purposes of this action, that the plaintiff engaged in protected activity under Labor Law §740, they contend that the nature and circumstances of the alleged fraud, and the validity of the plaintiff's reports, are not material to the plaintiff's claim.

CPLR §3101 (a) provides that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."

> The words, "material and necessary," are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. * * * In this connection, we note, the word "necessary," even under former section 288 of the Civil Practice Act, was held to mean "needful" and not indispensable.

(Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 [1968]). Thus, "[a]ny matter which may lead to the discovery of admissible proof is discoverable" (Bigman v. Dime Sav. Bank of N.Y., FSB, 153 AD2d 912, 914 [2nd Dept., 1989]).

Based on the evidence that the plaintiff's report directly implicated his immediate supervisor, as well as the temporal proximity of his whistleblowing activity and his termination, the Court finds that the nature and circumstances of the alleged fraud are germane to whether the defendants had a retaliatory motive in terminating the plaintiff's employment and, hence, are material to the plaintiff's claim. Accordingly, the defendants' motion is denied.

The plaintiff cross-moves, *inter alia*, for an order compelling that the defendants produce documents previously withheld in response to the plaintiff's first notice of discovery and inspection.

Pursuant to Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a), a party seeking to compel disclosure is required to serve and file an affirmation of a good faith effort to resolve the underlying discovery dispute. Such an affirmation must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with opposing counsel was held (Uniform Rules for Trial Cts. [22 NYCRR] §202.7 [c]; Natoli v. Milazzo, 65 AD3d 1309 [2nd Dept., 2009]; 148 Magnolia v. Merrimack Mut. Fire Ins. Co., 62 AD3d 486 [1st Dept., 2009]).

> The "good faith" requirement is intended to remove from the court's work load all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues. Most seasoned litigators know that, with a modicum of good sense, discovery disputes can and should be resolved by the attorneys without the necessity of judicial intervention.

(Eaton v. Chahal, 146 Misc 2d 977, 982 [Sup Ct., Rensselaer County, 1990]).

Here, it appears from the affirmation submitted by the plaintiff's attorney that the only issue discussed by the parties in attempting to resolve their discovery dispute was the materiality of evidence concerning the nature and circumstances of the alleged fraud. The Court has now resolved that issue in the plaintiff's favor. Nevertheless, there remain numerous unresolved (and potentially meritorious) objections to the outstanding document requests, *e.g.*, that they seek privileged information, that they are overly broad, and that they are not reasonably calculated to lead to the discovery of admissible evidence. Thus, to the extent the plaintiff seeks to compel the defendants to produce the documents previously withheld, the cross motion is denied, without prejudice to renewal upon the submission of a new affirmation evincing a diligent effort by the plaintiff to resolve the ongoing dispute, as by offering to narrow or otherwise modify the outstanding requests to accommodate any valid objection. Insofar as the plaintiff seeks to compel Dawn Remiszewski and Heather Olsen to testify at their depositions concerning the details of the alleged fraud, the cross motion is denied as premature, as it does not appear that the depositions have yet taken place (see, CPLR §3124).

The defendants separately move for an order compelling further responses to certain interrogatories and document requests. The Court finds the supporting affirmation of good faith deficient. Based on the affirmation provided, it appears that after the plaintiff served his response to the defendants' second request for production of documents, the defendants' attorney sent a letter dated August 6, 2010 to the plaintiff's attorney outlining the perceived deficiencies in the response, to which no written reply was received. The defendants' attorney then contacted the plaintiff's attorney by telephone inquiring whether he intended to respond to the August 6 letter, to which the plaintiff's attorney replied that he did not intend to revise his response. Such an exchange, absent any apparent effort to modify or simplify the subject requests, is insufficient to comply with the rule (see, Amherst Synagogue v. Schuele Paint Co., 30 AD3d 1055 [4th Dept., 2006]), as is the vague reference in the affirmation to "discussions in an attempt to settle th[e] issue" (see, Uniform Rules for Trial Cts [22 NYCRR] §202.7 [c]; 148 Magnolia v. Merrimack Mut. Fire Ins. Co., 62 AD3d 486 [1st Dept., 2009]). Nor does the affirmation reflect any efforts to resolve the dispute regarding the plaintiff's response to the defendants' first set of interrogatories and request for production of documents. Accordingly, the defendants' motion is denied, without prejudice to renewal upon the submission of a new affirmation evincing a diligent effort by the defendants to resolve the ongoing dispute.

Irrespective of the foregoing, the Court is constrained to question the relevance and scope of the defendants' requests for resumes and authorizations for the release of employment records from the plaintiff's former, current, and potential employers, as well as to note the defendants' acknowledgment that the plaintiff is not seeking damages for emotional distress.

The plaintiff separately cross-moves for an order awarding sanctions against the defendants and their attorney on account of their alleged abuse of the discovery process and their threats to seek sanctions against the plaintiff for continuing to prosecute the action.

This cross motion is denied as well. To the extent that the plaintiff seeks relief under CPLR §3126, the Court observes that the plaintiff's attorney failed to provide any affirmation of a good faith effort to resolve the underlying discovery dispute (see, Uniform Rules for Trial Cts [22 NYCRR] §202.7 [a]); in any event, since CPLR §3126 applies only to parties who refuse to obey an order for disclosure or wilfully fail to disclose information which a court finds ought to have been disclosed (see, Piazza v. Great Atl. & Pac. Tea Co., 300 AD2d 381 [2nd Dept., 2002]), the plaintiff's request for such relief is premature. Finally, since the Court cannot determine at this juncture whether the defendants have engaged in "frivolous conduct" within the meaning of 22 NYCRR §130-1.1 (c), the plaintiff's further request for an award of sanctions pursuant to 22 NYCRR part 130 is denied without prejudice to renewal upon the conclusion of the action.

The parties are advised to make a determined effort to resolve continuing and future discovery disputes expeditiously and without additional motion practice.

Based on the foregoing, it is

ORDERED that these motions and cross motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants for an order pursuant to CPLR §3103 (a) precluding the plaintiff from seeking to obtain disclosure, including documents and deposition testimony, concerning the nature, circumstances or validity of any alleged fraudulent activity engaged in by the defendants, is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR §3124 compelling the defendants to respond to the plaintiff's first notice of discovery and inspection dated August 6, 2009, and to testify concerning the details of the alleged fraudulent billing activity, is denied; and it is further

ORDERED that the motion by the defendants for an order (i) pursuant to CPLR §3124 compelling the plaintiff to disclose each and every document and thing responsive to document request numbers 19 and 20 of the defendants' first set of interrogatories and request for production of documents, and document request numbers 3, 5, 7, 8, and 9 of the defendant's second request for production of documents, (ii) pursuant to CPLR §3101 (h) compelling the plaintiff to amend, supplement or update his answers to interrogatory number 8 of the defendants' first set of interrogatories, and (iii) awarding the defendants their reasonable expenses, including attorneys' fees and costs, is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR §3126 and 22 NYCRR §130-1.1 awarding sanctions against the defendants and their attorney is denied.

Dated: April 6, 2011

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION