

**McClure v Engenderhealth Inc.**

2012 NY Slip Op 33424(U)

August 10, 2012

Sup Ct, New York County

Docket Number: 152624/12

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**HON. JUDITH J. GISCHE**  
**J.S.C.**  
Justice

PART 10

Index Number : 152624/2012 E  
MCCLURE, CHARLES  
vs.  
ENGENDERHEALTH INC.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_


Upon the foregoing papers, it is ordered that this motion is

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

*preliminary conf. 10/4/12*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 8/10/12

  
**HON. JUDITH J. GISCHE** J.S.C.  
NON-FINAL DISPOSITION

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

Supreme Court of the State of New York  
County of New York: Part 10

-----x )  
CHARLES MCCLURE,

Plaintiff,

-against-

ENGENDERHEALTH INC.,

Defendants.  
-----x

Decision/Order  
Index #: 152624/12 E  
Seq. No. 001

PRESENT:

Hon. Judith J. Gische,  
J.S.C.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS NUMBERED  
Def's n/m [3211 w/AJT affirm, service affid, exhs 1,2

**Gische, J.:**

*Upon the aforementioned papers the decision and order of the court is as follows:*

Plaintiff brings this action claiming that by terminating his employment, defendant (1) violated a collective bargaining agreement, (2) New York State public policy, (3) New York Labor Law § 740 and (4) New York Labor Law § 190 *et seq.*, all of which plaintiff claims resulted in damages to him. Defendant now moved to dismiss the first, second and third cause of action. Issue has not yet been joined and plaintiff does not oppose the motion.

The complaint alleges that defendant hired plaintiff in January 2009 as a financial specialist and that his duties involved the authentication and reconciliation of reports and accounts, and conversion of financial data. Plaintiff alleges his employment was governed by a Collective Bargaining Agreement ("CBA") that only permitted termination for good cause.

Plaintiff claims that he was promoted to the position of Award Analyst in June 2011.

In his role as Award Analyst, plaintiff reviewed certain files and encountered and unearthed accounting deficiencies and inadequacies in reconciliations concerning government and private fund entrusted to defendant. Plaintiff questioned and remonstrated defendant about these alleged accounting deficiencies and inadequacies, but notwithstanding said remonstrations plaintiff was instead ordered to apply dubious and impressionable methods and directed on a course contrary to established accounting precepts. Defendants terminated plaintiff's employment on January 6, 2012. Based on these factual allegations plaintiff alleges the four causes of action, *supra*.

### **Discussion**

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the challenged pleadings a liberal construction, take the allegations as true, and provide the pleader with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83 [1994]; Morone v. Morone, 50 N.Y.2d 481 [1980]; Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept. 1997]. In deciding Defendant's motion to dismiss, the court must consider whether, accepting all Verdellis' facts, that they support the claims asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561 [2005]).

In deciding whether any claims must be dismissed, the court does not have to consider whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable

at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1st Dept. 1977).

Where a motion to dismiss is premised upon CPLR § 3211(a)(7), the legal sufficiency of the factual allegations are tested. The court, under those circumstances, is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant. Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998); Sanders v. Winship, 57 N.Y.2d 391 (1982). If, from its four corners, factual allegations are discerned, which taken together, manifest any cause of action cognizable at law, the motion for dismissal will fail. The court's inquiry is whether the plaintiff has a cause of action, not whether it has stated one. Guggenheimer v. Ginzberg, *supra*, 43 N.Y.2d 268 (1st Dept. 1977).

Applying these legal principals to the facts of this case, the court's decision is as follows:

*Violations of New York State Public Policy and The Collective Bargaining Agreement*

Here, plaintiff claims the he was terminated in violation of New York State public policy and a collective bargaining agreement. In New York, the courts have held that

[w]here the term of employment is for an indefinite period of time, it is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason. Martin v New York Life Ins. Co., 148 N.Y.117, 121 (1895). New York does not recognize the tort of wrongful discharge. Murphy v American Home Prods. Corp., 58 NY2d 293, 297 (1983). Furthermore, there is no exception for firings that violate public policy such as, for example, discharge for exposing an employer's illegal activities. (*id.* at 301).

Lobosco v. New York Tel. Co./NYNEX, 96 NY2d 312, 316 (2001). Furthermore, firing that allegedly violate pubic policy, such as disclosing illegal activities by an employer, are not excepted from this doctrine. Lobosco v. New York Tel. Co./NYNEX, 96 NY2d 312, 316

(2001). Recently, in Sullivan v. Harnisch (19 N.Y.3d 259, 262-63 [2012]) the Court of Appeals restated well established law that absent a violation of constitutional requirement, statute or contract, an employer's right at any time to terminate an employment at will remains unimpaired. Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 305. In Murphy the Court of Appeals applied that rule to dismiss the claim of a plaintiff who said he was fired "because of his disclosure to top management of alleged accounting improprieties on the part of corporate personnel" (id. at 297-298; Sullivan v Harnisch, 19 N.Y.3d 259, 262-63 [2012]). The Court of Appeals reached a similar result in Sabetay v. Sterling Drug (69 N.Y.2d 329, 332 [1987]), where the plaintiff claimed "that he was discharged because he refused to participate" in illegal conduct including "tax avoidance schemes and maintenance of slush funds." Sullivan v Harnisch, 19 N.Y.3d 259, 262-63 (2012).

Although New York has long recognized that there is no freestanding public policy exception to the employment at will doctrine, it is not clear whether plaintiff's employment was governed by a collective bargaining agreement and what the terms of that contract were. Weiner v McGraw-Hill, Inc., 57 N.Y.2d 458 (1982); Murphy v Am. Home Products Corp., 58 N.Y.2d 293, 305 (1983). Therefore, that portion of the motion to dismiss the first and second causes of action pursuant to 3211(a)(7) is denied.

*New York Labor Law § 740*

The court takes notice that plaintiff amended his complaint on July 30, 2012. CPLR 3025. The amendment deleted plaintiff's third cause of action, pursuant to New York Labor Law § 740. Thus this portion of defendant's motion is granted as academic.

**Conclusion**

In accordance with the foregoing, it is hereby:

**Ordered** that defendant's motion to dismiss plaintiff's third cause of action pursuant to CPLR 3211(a)(7) is granted as academic; and it is further

**Ordered** that defendant's motion to dismiss plaintiff's first and second causes of action pursuant to CPLR 3211(a)(7) is denied; and it is further

**Ordered** that defendant is to serve an **answer** within 30 days of the date of this decision and order; and it is further

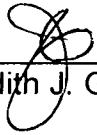
**Ordered** that a **preliminary conference** is scheduled for October 4, 2012 at 9:30 am, in 60 Center Street, room 232; and it is further

**Ordered** that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

**Ordered** that this constitutes the decision and order of the court.

Dated: New York, NY  
August 10, 2012

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.