

**Scuderi v Family Residences & Essential Enters.,
Inc.**

2014 NY Slip Op 32832(U)

August 29, 2014

Supreme Court, Nassau County

Docket Number: 9480/13

Judge: F. Dana Winslow

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

S

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. F. DANA WINSLOW,

Justice
TRIAL/JAS, PART 3
NASSAU COUNTY

GINA SCUDERI,

Plaintiff,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 3/25/14

FAMILY RESIDENCES AND ESSENTIAL
ENTERPRISES, INC.,

Defendant.

INDEX NO.: 9480/13

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
 Notice of Cross Motion.....2
 Affirmation in Opposition.....3

Memorandum of Law.....A
 Memorandum of Law in Opposition.....B
 Reply Memorandum of Law.....C

In this retaliatory termination action, defendant FAMILY RESIDENCES AND ESSENTIAL ENTERPRISES, INC. (“defendant” or “FREE”) moves for an Order: (i) dismissing the Amended Complaint in its entirety pursuant to CPLR §§ 3211(a)(3) and 3211(a)(7); and (ii) awarding attorneys’ fees, costs and disbursements pursuant to Labor Law § 740(6). Plaintiff GINA SCUDERI (“plaintiff”) cross-moves for an Order pursuant to CPLR §3025 granting leave to amend the first Amended Complaint as set forth in the proposed Second Amended Complaint [Aff. In Opp., Exh. 1].

BACKGROUND

The undisputed facts are as follows. From March 13, 2009 through approximately February 28, 2013, plaintiff was employed by FREE, a not-for-profit healthcare corporation which operates residential programs and provides therapeutic and other services for developmentally disabled and mentally ill children and adults. At all relevant times, plaintiff was employed as a Direct Support Professional (“DSP”), whose overall responsibilities concerned the “supervision and care of all individuals residing within a

program.” Direct Support Professional Job Description (“Job Description”) [Def. Mot., Exh. B]. According to plaintiff, this included, among other things, assisting the patients with everyday personal tasks and personal hygiene, administration of medications, and monitoring of the patients’ behavior. Plaintiff is a High School graduate, certified in Approved Medication Administration Personnel (“AMAP”), Cardio Pulmonary Resuscitation (“CPR”) and Strategies for Crisis Intervention & Prevention (“SCIP”).

Plaintiff alleges that on February 20, 2013, she was working with a developmentally and/or mentally disabled resident/client (the “Resident”) at FREE’s Bethpage facility. According to plaintiff, the Resident reported to plaintiff that an overnight staff employee was verbally abusive and threatening to her, causing the Resident significant distress and fear for her safety. Plaintiff claims that the Resident had reported this type of abuse to plaintiff on prior occasions, and that on each occasion, plaintiff reported or attempted to report the abuse to her direct supervisor, the assistant supervisor, the rehabilitation coordinator and/or the program coordinator, “working her way up the chain of command as appropriate and necessary.” [Amended Complaint, ¶26] Plaintiff alleges that, upon reporting the latest incident, she was suspended. On or about February 27, 2013, plaintiff states, she was terminated from her position for allegedly failing to follow the chain of command in reporting abuse. [Amended Complaint, ¶28] Plaintiff also complains that, after termination, FREE made false statements to the Labor Department in connection with plaintiff’s claim for unemployment benefits.

The instant action is predicated on the alleged violation of **New York Labor Law §741**; that is, plaintiff claims that she was terminated in retaliation for reporting the “improper quality of patient care.” *See Labor Law §§ 741(1)(d); 741(2)(a)*. Plaintiff seeks reinstatement to her former position, compensatory and consequential damages, reasonable costs and attorneys fees, as well as the imposition of a civil penalty upon defendant. *See Labor Law §§ 740(4)(d); 740(5)*.

Defendant moves to dismiss the action on the grounds that: (1) plaintiff has no standing to bring this action because she is not an “employee” as defined in **Labor Law §741**; and (2) plaintiff fails to properly allege a *prima facie* violation of **Labor Law §741**, because she does not allege a reasonable belief that defendant’s conduct constituted improper patient care which violates a law, rule or regulation, as required by **Labor Law §§ 741(1)(d)**. Defendant also seeks to dismiss the allegations of retaliation which were based upon FREE’s statements to the Labor Department, because, among other things, such statements are privileged and do not qualify as retaliatory action for purposes of **Section 741**. Plaintiff does not address this argument in her opposition papers and thus apparently concedes it.

Plaintiff cross-moves to amend the first Amended Complaint. The proposed Second Amended Complaint adds allegations citing the specific laws or rules which plaintiff believed were violated by defendant or its agents.

DISCUSSION

Legal Standard and Plaintiff's Cross-Motion to Amend

On a motion to dismiss pursuant to **CPLR §3211(a)(7)**, the court must liberally construe the complaint, accept all facts as alleged in the complaint to be true, accord plaintiff the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. **Gershner v Eljamal**, 111 AD3d 664, 665. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” **Sokol v. Leader**, 74 A.D.3d 1180, 1181 (internal quotations omitted).

The opposing party may bring a cross-motion for leave to amend the pleading, in order to cure the deficiencies underlying the motion to dismiss. The standard to be applied in this context is consistent with the standard generally applicable pursuant to **CPLR §3025**. See **Janssen v. Incorp. Village of Rockville Centre**, 51 AD3d 15. Leave to amend pleadings should be freely granted absent prejudice or surprise to the opposing party. **Gomez v State of New York**, 106 AD3d 870, 871; **Janssen**, 51 AD3d at 27. The party seeking to amend the pleading is not required to establish the merit of the proposed amendment in the first instance. The legal sufficiency or merits of the proposed amendment will not be examined unless the amendment is “palpably insufficient or patently devoid of merit.” **Lucido v. Mancuso**, 49 AD3d 220; 222, 227. See also **Carroll v Motola**, 109 AD3d 629, 630.

When a motion to amend is filed after a motion to dismiss addressed to the original pleading, the movant on the motion to dismiss has the option to decide whether its motion should be applied to the new proposed pleading. **Sage Realty Corp. v Proskauer Rose**, 251 AD2d 35, 38.

In the case at bar, defendant does not allege prejudice or surprise with respect to the proposed amended pleading. Rather, defendant argues that the amendment is futile. Defendant addresses the merits of the Proposed Second Amended Complaint, arguing that it too must be dismissed based upon the grounds of lack of standing and legal insufficiency. Accordingly, the Court considers defendant's motion as directed to the proposed Second Amended Complaint.

Is Plaintiff an "Employee" for Purposes of Labor Law §741?

Unlike the "whistle-blower" protection set forth in **Labor Law §740**, which applies to employees generally regardless of the nature of the services provided, the protection set forth in **Labor Law §741** applies more narrowly to a specific category of employee – that is, one 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)**. The definition of "employee" in **Labor Law §741(1)(a)** thus limits both the type of employer (one which provides health care services) and the type of employee (one who performs health care services).

In the case at bar, it is undisputed that FREE provided health care services, and that plaintiff was a wage-earning employee under the control and direction of FREE and its agents. At issue is whether or not the duties performed by plaintiff in the course of her employment as a DSP (Direct Support Professional), constituted the performance of health care services for purposes of **Labor Law §741(1)(a)**.

The Court could find no statutory definition of "performs health care services" that is applicable to **Section 741**. The definition is shaped by a small group of cases, none of which is directly on point. The leading decision by the Court of Appeals in **Reddington v. Staten Is. Univ. Hosp.** [11 NY3d 90] seems to offer two criteria. First, the employee is required "to actually supply health care services, not merely to coordinate with those who do." **Reddington**, 11 NY3d at 91. Second, the employee must, in providing such services, exercise some degree of knowledgeable judgment. "[S]ection 741, ... 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." **Id.**, at 93.

In **Reddington**, the general question presented, which the Court of Appeals answered in the negative, was "does the definition of employee in New York Labor Law §741 encompass an individual who does not render medical treatment, and under what circumstances?" The Court's analysis and specific holding, however, did not center on distinction between medical and non-medical treatment, but rather, on the distinction between actually providing health care services and merely coordinating the services provided by others. The plaintiff in **Reddington** held the positions of Coordinator and Manager of Volunteer Services, and later, the Director of the International Patient Program. Her duties included serving as a translator, and later, coordinating services offered to international patients, such as arrival, transportation and lodging assistance, translation services and the development of a calendar of activities. The Court of Appeals

held that plaintiff, who merely coordinated the services of others, was not an employee for purposes of **Section 741**.

Similarly, in **Webb-Weber v. Community Action for Human Services, Inc.**, [98 AD3d 923, *rev'd on other grounds*, ___ NY3d ___, 2013 NY Slip Op. 03428] the First Department held that a licensed clinical social worker, who held the position of chief operating officer, was not an employee for purposes of **Section 741**. The social worker, whose duties included securing prescribed medications, evaluating the need for and arranging for individual patients' staffing and treatment, and ensuring that the patients received "protective and healthful grooming and other health-related treatment," was not entitled to **Section 741** protection because she merely coordinated with those who performed health care services and did not perform the services herself. **Webb-Weber**, 98 AD3d at 924.

In **Phillips v. Ralph Lauren Ctr. for Cancer Care and Prevention**, 22 Misc.3d 1128(A) (decided by a court of corresponding jurisdiction and thus not controlling here), the issue was not whether the plaintiff supplied or coordinated health care services, but rather, whether the plaintiff possessed the professional status and exercised the professional judgment necessary to qualify for **Section 741** protection. There, the Supreme Court, New York County held that an endoscopy technician, whose primary duties were to maintain the endoscopy equipment, inventory supplies, and assist the licenced practical nurse in the admitting, recovery and discharge process, was not an employee for **Section 741** purposes. Although the endoscopy technician's duties included monitoring the patient's vital signs, and (at the direction of the physician) using a snare to remove polyps, the Court considered the plaintiff's work to be non-discretionary and therefore, not medical.

The case at bar presents a factual scenario not previously considered by any Court to this Court's knowledge. That is, the work performed by plaintiff herein does not fall squarely within the parameters set forth in any of the cases cited by the parties or found by the court.

Based upon the Job Description provided by defendant, plaintiff's duties included, in relevant part:

- "I. Provide For The Health And Safety of the Consumers. [patients]
- A.) Mediate emergency situations pertaining to the program...
- B.) Provide coverage until relieved in emergency situations.
- ...
- D.) Provide adequate supervision of individuals...

- ...
- F.) Provide instruction and training in cleanliness, hygiene and group living...
 - G.) Notify a physician or other treatment personnel when necessary...

II. Advocate For the Consumers.

- A.) Treat each individual with dignity and respect in accordance with New York State regulations and Agency policy.
- B.) Report possible violations of individual's rights promptly...

...

- D.) Ensure that the consumer's needs are met and intercede on their behalf as necessary.

IV. Documentation

- ...
- B.) Assist with regular, on-going assessment of consumer progress.

V. Team Participation

- ...
- F.) Provide accurate, concise information regarding consumer functioning and/or difficulties...

VI. Additional Responsibilities:

- ...
- B.) Obtain/maintain certification in First Aid, CPR, SCIP – Level II, AMAP, etc.
 - F.) Administer/supervise the administration of medication.
 - G.) Capable of providing assistance with individuals' personal care needs, including toileting, if necessary.
 - H.) Ability to transfer persons, weighing as much as 250 pounds in and out of bed to a wheelchair, from a wheelchair to a toilet or mat, or from a mat to a wheelchair
 - I.) Ability to assist in 2-person lift of consumer.

In addition, plaintiff alleges that she assisted the residents with everyday personal tasks, such as bathing, brushing their teeth, shaving their legs, etc. She monitored the patients to ensure that the tasks were completed. For some patients, plaintiff would pour out mouthwash, put toothpaste on toothbrushes and apply body powders and creams. Plaintiff states that she administered medications three times daily. She made sure that the patients swallowed the pills. First Amended Complaint, ¶¶ 14-15; Proposed Second Amended Complaint, ¶¶ 15-16.

Plaintiff alleges that she was also required to monitor the patients' behavior. "If a patient hit herself, banged her head against the wall or engaged in other forms of harmful behavior, plaintiff would have to stop the patient and call the nurse. Plaintiff, in accordance with her SCIP training, would taking [sic] certain steps, beginning with verbal, and then physical restraints, and two-person take-downs, if necessary, in these situations." First Amended Complaint, ¶19; Proposed Second Amended Complaint, ¶20.

Defendant argues that, based upon the foregoing, plaintiff was not an "employee" for purposes of **Section 741**. Citing **Reddington, Webb-Weber and Phillips**, defendant argues that plaintiff merely coordinated health care services, but did not provide them. Further, the duties performed by plaintiff, in defendant's view, did not satisfy the exacting standards outlined in **Reddington, Webb-Weber and Phillips** and, in fact, fell short of the duties performed by the plaintiffs in those cases, who were denied coverage under **Section 741**.

Defendant relies heavily on the fact that plaintiff was not herself a medical professional. She did not provide medical treatment (such as prescribing medication or drawing blood), she had no authority to make medical decisions, and she did not have the kind of education or medical training that would qualify her to make professional judgments concerning patient care.

This court believes that the bright-line – medical versus non-medical – rule seemingly advocated by defendant is neither mandated by controlling precedent nor appropriate under the circumstances at bar. The paradigm **Section 741** employee mentioned in the legislative history and cited by **Reddington** is the registered nurse, providing bedside care to the patient. Nonetheless, even the Court in **Reddington** acknowledged that **Section 741** protection is not limited to employees who possess professional licenses. "[T]here may be cases where an employee without a professional license performs health care services in the employment of a health care provider." **Reddington**, 11 NY3d at 92.

In this Court's view, **Reddington** leaves open the possibility that there are certain employees, to some extent less qualified (or not qualified) to provide medical care or make treatment decisions regarding a patient, but who perform tasks beyond those of mere administrators or coordinators, janitors or cafeteria workers; that is, employees who provide hands-on services directly to the patient, which are in the nature of healthcare services. The key to **Section 741** protection under **Reddington** is that the employee possess the kind of training and/or experience that would qualify him or her to make a judgment as to the quality of the healthcare services being provided by his or her employer, and that the employee's job requires him or her to make such judgments. Such

status constitutes the justification for insulating those employees from the repercussions of reporting employer violations. It reflects a policy to encourage the reporting of improper patient care by those in a position to do so.

The Court finds that the tasks performed by plaintiff were neither purely administrative nor merely coordinative of the services of others. Rather, plaintiff's duties involved the provision of direct, hands-on assistance to and supervision of individual patients in the context of their personal care. The Court notes that "healthcare" is defined as "the field concerned with the maintenance or restoration of the health of the body or mind." Websters New Universal Unabridged Dictionary, Random House Value Publishing, 1996. Assisting the patient with hygiene, toileting, and taking medication, and monitoring their behavior and progress, are functions in the nature of healthcare, as that term is plainly and ordinarily understood.

Moreover, plaintiff was qualified to, and her job required her to, make judgments about the quality of the healthcare services, at least within the sphere of her own knowledge and experience. According to the Job Description, plaintiff was required to "mediate emergency situations," and thus is presumed to have the knowledge and experience to make a judgment about what constitutes an emergency, and the discretion to choose a course of action. Plaintiff was required to "[a]ssist with regular, on-going assessment of consumer progress" and to "[p]rovide accurate, concise information regarding consumer functioning and/or difficulties," which again, presumes that she was qualified to make knowledgeable judgments about such matters. The Court notes that this distinguishes the instant case from **Phillips**, wherein the technician's job involved direct, hands-on service to the patient, but required no exercise of discretion.

More significantly, plaintiff was required to serve as an "[a]dvocate for the consumer" – to ensure that the patient was treated with dignity and respect, to report violations of a patient's rights, and to "[c]nsure that the consumer's needs are met and intercede on their behalf as necessary." Not only does this presume that plaintiff was qualified to make knowledgeable judgments concerning the quality of patient care (at least to the extent of determining whether or not the patient's physical and/or emotional needs were being met), but also, it required her to do so. This alone suggests that plaintiff was exactly the kind of employee for whom **Section 741** was designed to protect. The Court does not suggest that **Section 741** would protect plaintiff from retaliation if she reported a violation outside her field of knowledge (such as a breach of medical treatment protocols), but that is not what is alleged here. Plaintiff allegedly reported a possible violation of a resident's right to be treated with dignity and respect, as she was apparently qualified and required to do.

The Court finds that plaintiff qualifies as an “employee” for purposes of **Section 741** “whistle-blower” protection, and thus has standing to bring this action.

Has Plaintiff Alleged a Prima Facie Violation of Labor Law §741?

Labor Law § 741(2) prohibits an employer 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;”

Conduct that constitutes improper quality of patient care is defined as:

“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)**.

In determining whether plaintiff has alleged a *prima facie* case, the Court looks to the proposed Second Amended Complaint which, as discussed above, was addressed by both parties in their respective submissions, and which elaborates upon the allegations of improper patient care on the part of FREE and its agents. As discussed above, plaintiff alleges that on February 20, 2013, she was working with a developmentally and/or mentally disabled resident/patient (the “Resident”) at FREE’s Bethpage facility. The Resident reported to plaintiff that an overnight staff employee was “verbally abusive and threatening,” resulting in the Resident’s “significant distress and fear for her safety.” [Proposed Second Amended Complaint, ¶26] “The Resident stated she was afraid of going home and was afraid for her life because fo [sic] the yelling, screaming, cursing, and abuse.” [Proposed Second Amended Complaint, ¶27] Plaintiff alleges that “[t]he Resident had reported this type of abuse to Scuderi on prior occasions.” [Proposed Second Amended Complaint, ¶32]

Plaintiff alleges that the reported conduct of the overnight employee violated three sections of the Mental Hygiene Law; namely Section 16.19 which requires a patient with a developmental disability to be treated safely and without cruelty; Section 31.19 which

requires a patient with a mental disability to be treated safely and without cruelty; and Section 33.03, which requires that each patient in a mental health facility receive care and treatment that is “skillfully, safely and humanely administered with full respect for his dignity and personal integrity” [Mental Hygiene Law §§16.19; 31.19; 33.03]. Further, plaintiff alleges that FREE violated Section 415.4 of the Department of Health regulations, which prohibits a facility from using or permitting the use of verbal, mental, sexual or physical abuse upon a patient [10 NYCRR 415.4(b)(1)].

In addition, plaintiff alleges, upon information and belief, that FREE never reported the abuse to the Department of Health, as required by **Public Health Law §2803-d**. The Court notes that **Public Health Law §2803-d** requires a facility to report instances of physical abuse, mistreatment or neglect to the Department of Health within 24 hours, but does not explicitly include verbal abuse.

Defendant argues that, even with the proposed amendments, the complaint fails to allege a *good faith reasonable belief* that defendant’s conduct constituted improper quality patient care. Plaintiff never witnessed the alleged abuse, nor stated any reason to believe the Resident’s report. Further, defendant argues, the complaint fails to allege conduct that represented a *significant threat* to the health of the Resident. The vague and general allegations of verbal abuse and resulting emotional distress are, in defendant’s view, “garden variety” complaints that do not rise to the level of a significant threat.

For purposes of this motion to dismiss, the Court accepts as true plaintiff’s allegations regarding (i) the Resident’s report of verbal abuse and its affect on the Resident’s mental status, (ii) the repeated nature of such reports; and (iii) plaintiff’s response; namely, that she reported the alleged abuse to her immediate supervisor and up the chain of command. The Court notes that none of plaintiff’s allegations are flatly contradicted by the record.

Although plaintiff’s allegations are somewhat vague and general with respect to the verbal abuse reported by the Resident, that doesn’t negate plaintiff’s good faith belief that such abusive conduct occurred and warranted disclosure to a supervisor. On a motion to dismiss, the Court is required to give the plaintiff the benefit of every possible favorable inference. From the facts alleged, one can infer that the Resident, who was developmentally or mentally disabled, may not have been able to remember or recount the specific language used or the specific circumstances under which the abuse took place. Plaintiff, however, alleges that she heard the Resident’s complaints directly and in person. This suggests that plaintiff was in a position to witness the Resident’s demeanor and emotional state at the time the Resident reported the alleged abuse, and to assess the Resident’s credibility. The repeated nature of the complaints supports the inference that

plaintiff reasonably and in good faith believed that the Resident's care was being compromised.

As to the significance of the threat to the Resident's health, the Court notes that State law, unlike defense counsel, does not underestimate the impact of "garden variety" verbal abuse. The Mental Hygiene Law and Department of Health Regulations cited above are premised upon the recognition that mentally or developmentally disabled individuals receiving care in a residential facility constitute a particularly vulnerable population in need of protection. Among the threats or abuses deemed worthy of prohibition are verbal abuse and other affronts to a patient's dignity or personal integrity. Furthermore, plaintiff alleges that the Resident reported yelling, screaming, cursing and verbal threats which made the Resident fear for her life. This is more than a mere "verbal dispute with a patient," as depicted by defense counsel [Memorandum of Law in Support, p. 19].

The Court finds that plaintiff has satisfied the liberal pleading requirements of New York law. Plaintiff's allegations, if taken as true and given the benefit of every possible inference to be drawn therefrom, are sufficient to manifest a cognizable cause of action pursuant to **Labor Law §741**. Whether or not a plaintiff can ultimately establish her allegations is beyond the scope of this determination.

CONCLUSION

The Court has considered the remaining contentions of the parties and finds them to be without merit or rendered academic by the determinations herein. Based upon the foregoing, it is

ORDERED, that defendant's motion to dismiss the action pursuant to **CPLR §3211** is **denied** in its entirety; and it is further

ORDERED, that plaintiff's cross-motion for leave to amend the first Amended Complaint in the form annexed to the motion papers is **granted**; the proposed Second Amended Complaint is deemed served upon defendant, and defendant's time to file and serve an Answer thereto is extended for ten (10) days after service of Notice of Entry of this Order. **CPLR §3211(f)**.

Dated: August 29, 2014

Dana N. [Signature]
ENTERED

SEP 19 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE