SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JACQUELINE CAMPBELL,

Index No. 156477/2016

Plaintiff,

-against-

DECISION/ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, KINGS COUNTY HOSPITAL, DR. RAMESH REDDY, in his individual and official capacities, ELVIRA YASOVA, in her individual and official capacities, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 420, JOHN AND JANE DOES 1-10, and XYZ CORP. 1-10,

Motion Seq. 001 and 002

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Jacqueline Campbell ("plaintiff"), brings this action against defendants New York City Health and Hospitals Corporation (the "HHC"), Kings County Hospital (the "Hospital"), and Dr. Ramesh Reddy and Elvira Yasova, in their individual and official capacities, alleging, *inter alia*, unlawful retaliation in violation of New York Whistleblower Act, Labor Law ("NYLL") § 740, *et seq*. (collectively, the "City"). This action is also brought against District Council 37, AFSCME, AFL-CIO and LOCAL 420 (collectively, the "Union") for breach of duty of fair representation.

The Union now moves pursuant to CPLR 3211 (motion sequence 001) and the City moves pursuant to CPLR 3211(a)(5) and (a)(7) (motion sequence 002) to dismiss the complaint against them for failure to state a cause of action and on the ground that the complaint is time-barred.[1] Plaintiff opposes both motions.

[1] Motion sequence 001 and 002 are consolidated for joint disposition herein.

Factual Background

According to the complaint, plaintiff was unlawfully terminated from her position as Operating Room Technician at the Hospital on February 28, 2014.

Plaintiff claims that pursuant to the parties' Collective Bargaining Agreement, plaintiff was required to receive a 90-day end of probation performance evaluation, and a yearly evaluation thereafter. Plaintiff's direct supervisor, the Head Nurse at the Hospital, first issued a "Satisfactory" rating for her performance during her 90-day probationary period beginning on September 9, 2013 and ending on December 18, 2013. Yet, on February 28, 2014, plaintiff was called to a meeting with Hospital personnel, and was advised that she "failed probation" and was terminated as of February 28, 2014. According to plaintiff, a different supervisor (who did not know plaintiff) improperly issued a second, unscheduled performance evaluation rating of "Unsatisfactory" on February 27, 2014, covering a partially overlapping period of September 9, 2013 through February 27, 2014.

Plaintiff then met with her union representative Felicia Creque ("Union Representative") on the same date, after which plaintiff received a Notice and Statement of Charges indicating that plaintiff allegedly failed to give a surgeon a blade during an operation on February 24, 2014.

Upon the Union Representative's request, a Step 1A grievance hearing was scheduled for March 17, 2014. Plaintiff, however, notified the Union Representative of her inability to attend the hearing due to illness. The Union Representative did not attend the hearing or advise the Hospital of plaintiff's illness. After receiving a decision from the Step 1A Hearing, the matter proceeded to a Step 2 Hearing, and then a Step 3 Hearing, both of which were denied. Plaintiff claims that she did not receive notice of either the Step 2 or Step 3 Hearings, and that no one

from the Union prepared plaintiff for these Hearings. Further, the Union failed and refused to comply with plaintiff's numerous requests for documentation concerning her case.

Plaintiff's matter then proceeded to arbitration on March 23, 2015. The arbitrator issued a decision on or about June 10, 2015 upholding the February 28, 2014 termination. Plaintiff learned for the first time during arbitration that it was "Dr. Reddy" who falsely accused plaintiff, in retaliation for her several complaints and for blowing the whistle against Dr. Reddy for improper handling of sterile equipment during surgeries.

In support of dismissal, the Union claims that the Complaint fails to plead that every member of the Union, which is an unincorporated association, is liable for the alleged breach, as required under the "Martin Rule" (*Martin v. Curran* (303 N.Y. 276 [1951]). Further, plaintiff's claim against the Union is time barred under the four-month statute of limitations applicable to claims against a New York public sector union for breach of duty of fair representation. Plaintiff filed the Complaint on or about August 3, 2016, 14 months after the claim accrued.

The City argues that plaintiff's Labor Law § 740 claim is time-barred under the applicable two-year statute of limitations,[2] and, as to any claim for breach of a duty of fair representation, time-barred under the four-month statute of limitations. Further, plaintiff is estopped from bringing the instant action because the arbitrator's June 7, 2015 decision found that the City had just cause to terminate plaintiff based on her poor job performance. And, the complaint fails to state a Labor Law § 740 cause of action as it fails to allege that plaintiff disclosed an actual violation that presents a substantial and specific danger to public health or

[2] Although the City states that the limitations period is "two" years, the caselaw cited indicates that such period is for one year.

safety.

In opposition to the Union's motion, plaintiff argues that this action is timely because the statute of limitations was tolled pending the conclusion of the mandatory grievance procedures. Further, since plaintiff's claim against the Union Defendants does not involve libel, the *Martin* Rule should not apply. In any event, argues plaintiff, the Complaint alleges that "no one from the Union" either appeared at the scheduled grievance hearings or met with plaintiff to prepare for the hearings (see Complaint at ¶¶ 49, 51, 54, 56). Thus, plaintiff sufficiently alleges that other individuals from the Union authorized the acts complained of, such that everyone involved with the Union breached their duty of fair representation of plaintiff. And, the interests of justice support the retroactive application of the statute of limitations, since plaintiff had to complete her grievance and arbitration proceedings with the Union Defendants, file a notice of claim against the City Defendants, and locate an attorney to represent his matter on a contingency basis.

Plaintiff also opposes the City's motion, arguing that collateral estoppel is inapplicable because the Arbitrator did not address the Labor Law § 740 retaliation issue. Further, the Labor Law § 740 claim is timely due to the tolling of the statute of limitations during the grievance proceedings. And, plaintiff sufficiently pled a Labor Law § 740 claim under because the subject of the complaints clearly put patients' health and safety in jeopardy.

In reply, the Union argues that the *Martin* Rule applies, and that the statute of limitations bars plaintiff's claim. Even assuming the statute of limitations was tolled pending the conclusion of the grievance procedures, plaintiff's claims accrued, at the latest, when she received a copy of the adverse award, on June 10, 2015.

The City adds that the tolling caselaw does not apply in that plaintiff fails to allege that the grievance procedure was, in fact, contractually required, or cite to any portion of the collective bargaining agreement to support any claim that she was contractually required to grieve her termination before bringing the instant action. Further, plaintiff fails to address that, in order to plead and maintain a claim pursuant to Labor Law § 740, the alleged retaliatory motive must be the sole, "but for" cause of the adverse employment action complained of. Here, the arbitrator's decision finding just cause for plaintiff's termination eliminates the possibility that the alleged retaliatory motive was the sole, "but for" cause of her termination. Thus, the arbitrator's decision precludes plaintiff's Labor Law § 740 claim. And, plaintiff's vague and conclusory claim that she was discharged "in retaliation . . . for her complaining about the touching and handling of sterile equipment before being used in surgery putting patients' life and health at risk" is insufficient.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court's role is deciding "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 a motion for dismissal will fail" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund*

Strauss, Inc. v. East 149th Realty Corp., 104 A.D.3d 401, *supra; Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v. Hack,* 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *see also Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150, 730 N.Y.S.2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 [1st Dept], *lv denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 [1993] [CPLR § 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 228 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more

causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial, LLC v. Gillett*, supra, citing Art and Fashion Group Corp. v. Cyclops Production, Inc., 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]).

Union's Motion

As to plaintiff's claim against the Union, a four-month period of limitations applies to plaintiff's claim for breach of the duty of fair representation (*Obot v. New York State Dept. of Correctional Services*, 256 A.D.2d 1089, 682 N.Y.S.2d 767 [4th Dept 1998]; *Tantillo v. McDonald*, 223 A.D.2d 168645 N.Y.S.2d 804 [1st Dept 1996]).

At the latest, plaintiff's claim against the Union accrued as of June 10, 2015 when plaintiff received the arbitration decision. As pointed out by the Union, all of the purported failures of the Union occurred prior to issuance of the June 10, 2015 arbitration decision. Thus, the latest date plaintiff's claim could have accrued is on June 10, 2015 (*see LaRue v. N.Y. City Off-Track Betting Corp.*, 2004 U.S. Dist. LEXIS 24433, at *29 ("cause of action based on a duty of fair representation accrues when the union member knows or reasonably should have known that a breach has occurred") *quoting Eatz v. DME Unit of Local Union No. 3 of the IBEW*, 794

F.2d 29, 34 [2d Cir. 1986]; *Obot v. New York State Dept. of Correctional Services*, 256 A.D.2d at 1090] ("Plaintiff's cause of action for breach of the duty of fair representation accrued either on December 13, 1993, the date of the arbitrator's award or, at the latest, January 25, 1994, when the union informed plaintiff that it would not commence a CPLR article 75 proceeding on his behalf to vacate the arbitrator's award (see, CPLR 217[2] [a]). Given that plaintiff commenced this action on August 3, 2016, more than 10 months after the expiration of the limitations period on October 10, 2015, plaintiff's third cause of action is time-barred.

The Court lacks any discretion to extend the statute of limitations, and the case cited by plaintiff, *Bryne v Buffalo Creek R. Co.* (765 F2d 364 [2d Cir. 1985]) is factually distinguishable (noting that "in the interest of justice, courts may exclude certain cases from the retroactive application of a judicial decision" which set forth a six-month statute of limitations to a pending claim)).

Further, contrary to plaintiff's contention, the *Martin* rule "applies to a cause of action by union members for damages resulting from the union's failure to prosecute member grievances . . . which failure constitutes a violation of a union's duty of fair representation with respect to members' rights under the collective bargaining agreement" (*Walsh v. Torres-Lynch*, 266 A.D.2d 817, 697 N.Y.S.2d 434 [4th Dept 1999] ("the Martin rule applies to a cause of action alleging breach of the duty of fair representation")). Here, plaintiff essentially alleges that the Union failed to appear at the Hearings during her grievance. Plaintiff also claims that the Union "refused to introduce key evidence and witnesses to refute the false Charges made against Plaintiff during arbitration." However, plaintiff failed to sufficiently plead "that the individual members of the Union authorized or ratified the complained of conduct" (*id.*, at 818; *see*

Palladino v. CNY Centro, Inc., 101 A.D.3d 1653, 956 N.Y.S.2d 742 [4th Dept 2012] (upholding dismissal of claims against a union which was a voluntary unincorporated association where plaintiff failed to plead that the union's "conduct was authorized or ratified by the entire membership of the association")). Thus, the complaint is fatally defective as against the Union.

As such, dismissal of the third cause of action is warranted.

The City's Motion

Turning to the first and second causes of action against the City, dismissal for failure to state a claim is unwarranted. Plaintiff alleges facts indicating how the "supposedly illegal activities in question . . . imperil the health or safety of the public" (*Connolly v. Harry Macklowe Real Estate Co.*, 161 A.D.2d 520 [lst Dept 1990]). Contrary to the City's contention, plaintiff did not merely allege that she complained of a doctor's "touching and handling of sterile equipment before being used in surgery." As pointed out by plaintiff, she also alleged that the conduct complained of took place "in or about December 2013 and February 2014," and that "[s]ome of the items that were mishandled by Dr. Reddy, included but were not limited to, surgical equipment and tools, labs, sponges and towels" (Complaint ¶¶71-74). According to plaintiff's complaint, "[s]uch inappropriate touching not only puts patients' health and life in jeopardy, but also could cause a miscount of the equipment placed on the field, also known as the back table, before and after the procedure." Thus, it cannot be said that the complaint fails to provide "the employer with notice of the alleged complained-of conduct" (*Webb-'Weber v Community Action for Human Servs.. Inc.*, 23 N.Y.3d 448,452-53 [2014]).

Contrary to the City's contention, the arbitrator's determination that the City had "just

cause" to terminate plaintiff based upon her record of poor work performance does not necessarily preclude her Labor Law § 740 claim (*see e.g., Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP,* 120 A.D.3d 18, 987 N.Y.S.2d 338 [1st Dept 2014] ("Although defendants articulated a nonretaliatory reason for plaintiff's termination, namely a workforce reduction, triable issues of fact exist as to whether that stated reason was a pretext for retaliation, and whether, absent a retaliatory motive, the law firm's decision to terminate her would have occurred"); *Bompane v. Enzolabs, Inc.*, 160 Misc.2d 315, 608 N.Y.S.2d 989 [Sup. Ct., Kings County 1994] (finding that "evidence suggests that plaintiff's attendance record was only a pretext and *not the dominant reason* for her dismissal") (emphasis added); *cf. Knightonv. Municipal Credit Union*, 71 A.D.3d 604, 605 [1st Dept 2010] (holding that the plaintiff's claims of retaliatory termination were properly dismissed because the alleged retaliatory action was predicated on grounds other than the plaintiffs filing a complaint with OSHA); *Rodgers v. Lenox Hill Hosp.*, 251 A.D.2d 244, 246 [1st Dept 1998] (dismissing the complaint on grounds that the defendant established "that it had a valid reason for plaintiff's termination other than plaintiff's exercise of rights protected by Labor Law § 740")). Plaintiff allegedly complained about Dr. Reddy's surgical misconduct in December 2013 and February 2014, and was later terminated for her alleged mishandling of certain instruments during a surgery with Dr. Reddy, which plaintiff denies.

Further, the fact that the arbitrator found just cause for terminating plaintiff based on her job performance during surgeries does not preclude or "estop" her Labor Law § 740 claim herein. *Res judicata* and collateral estoppel are related doctrines that are designed to limit or preclude relitigation of matters that have already been determined (*Fusco v. Kraumlap Realty Corp.*,

1 A.D.3d 189, 767 N.Y.S.2d 84 [1st Dept 2003]). *Res judicata* generally precludes relitigation of claims, while collateral estoppel precludes relitigation of issues (*id.*). The claim and issues addressed during the arbitration are different from the plaintiff's instant retaliatory claims under Labor Law § 740, and it is undisputed that the arbitrator did not address any Labor Law § 740 claims. Therefore, the arbitrator's decision does not preclude plaintiff's claim herein.

However, such claims against the City are untimely.

Labor Law § 740 [4] [a] provides:

> 4. Violation; remedy. (a) An employee who has been the subject of a retaliatory personnel action in violation of this section may institute a civil action . . . within *one year* after the alleged retaliatory personnel action was taken. (Emphasis added).

Thus, as the City's caselaw indicates, a one-year statute of limitations applies to a Labor Law § 740 claim for wrongful discharge (*Russek v. Dag Media. Inc.*, 47 A.D.3d 457, 458 [l st Dept 2008] (*citing* Labor Law § 740 [4] [a], and holding "because this action was commenced more than a year after plaintiff's termination, the complaint was properly dismissed as time-barred"); *Thomas v City of Oneonta*, 90 A.D.3d 1135, 934 N.Y.S.2d 249 [3d Dept 2011] (plaintiff was required to "commence this action "within one year after the alleged retaliatory personnel action[s]" took place); *Brown v Vail-Ballou Press*, 188 A.D.2d 972, 592 N.Y.S.2d 78 [3d Dept 1992] ("Because the one-year Statute of Limitations for the proposed new cause of action [[retaliatory discrimination cause of action (Labor Law § 740 [2] [c])] has expired (see, Labor Law § 740 [4] [a]) and absent the right to relate back to the original complaint (see, CPLR 203 [e]), that cause of action is time barred"); *see also, Moynihan v. New York City Health and Hospitals Corp.*, 120 A.D.3d 1029, 993 N.Y.S.2d 260 [1st Dept 2014] (finding Labor Law § 740

"time-barred under the terms of the statute itself because . . . HHC terminated petitioner's employment on April 6, 2009, and petitioner filed her petition for leave to file a late notice of claim on July 2, 2010, after the expiration of the one-year statute of limitations incorporated into the statute (see Labor Law § 740[4][a]")).

Given that plaintiff was terminated on February 28, 2014, plaintiff had until February 28, 2015 to file her Labor Law § 740 claims against the City. Therefore, plaintiff's action as commenced against the City on August 3, 2016, 888 days after her termination, is time-barred.

As to plaintiff's contention that the grievance proceedings tolled the limitations period, a statute of limitations "will be tolled when the grievance procedure is mandatory [but], it will typically not be tolled where a voluntary grievance procedure is employed (*Matter of Bargstedt v Cornell Univ.*, 304 A.D.2d 1035, 757 N.Y.S.2d 646 [3d Dept 2003] *citing Matter of Queensborough Community Coll. of City Univ. of N.Y. v State Human Rights Appeal Bd.*, 41 NY2d 926, 926 [1977]; *see also Susman v. Commerzbank Capital Markets Corp.*, 95 A.D.3d 589, 945 N.Y.S.2d 5 [1st Dept 2012] (to "toll the statute of limitations, the arbitration must have been 'instituted by the parties in order to resolve the present controversy'")). Even assuming the underlying grievance proceeding was mandatory, and adopting plaintiff's references to the Step 1A Hearing date of March 17, 2014 and date of June 10, 2015, when plaintiff received the arbitrator's decision, such period of 451 days during the grievance procedure, does not save plaintiff's claims against the City.

Having been terminated on February 28, 2014, 18 days elapsed by the time the grievance procedure commenced on March 17, 2014; the grievance procedure concluded, at the latest, on

June 10, 2015, at which time, any such tolling ceased. Inasmuch as plaintiff had a remaining 347 days, or until May 22, 2016, to commence this action against the City, plaintiff's action filed on August 3, 2016, is untimely.

As such, dismissal of the first and second causes of action is warranted

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants District Council 37, AFSCME, AFL-CIO and LOCAL 420 (motion sequence 001) to dismiss the complaint against them pursuant to CPLR 3211 for failure to state a cause of action and on the ground that the complaint is time-barred is granted; and it is further

ORDERED that the motion by defendants (motion sequence 002) to dismiss the complaint against them pursuant to CPLR 3211(a)(5) and (a)(7) for failure to state a cause of action and on the ground that the complaint is time-barred is granted; and it is further

ORDERED that defendants District Council 37, AFSCME, AFL-CIO and LOCAL 420 shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 23, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.