

Edelman v Greuner
2019 NY Slip Op 31040(U)
April 15, 2019
Supreme Court, New York County
Docket Number: 160854/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

-----X

INDEX NO.

160854/2018

BRET EDELMAN,

MOTION DATE

N/A

Plaintiff,

MOTION SEQ. NO.

001

- v -

DAVID GREUNER, M.D., P.C., GREUNER MEDICAL P.C., DAVID
GREUNER, ADAM TONIS, XYZ COMPANY 1-5, JOHN DOE 1-5

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for

DISMISSAL

The motion by defendants David Greuner, M.D., P.C., Greuner Medical P.C., David Greuner, and Adam Tonis ("Movants") to dismiss paragraph 32 of the complaint, the request for punitive damages, plaintiff's demand for a jury trial and to consolidate this action with another pending matter is granted in part and denied in part.

Background

Plaintiff is a physician who contends that while working for Movants, he witnessed many improper policies and practices. Plaintiff alleges that Movants would offer vouchers on Groupon or LivingSocial for spider vein treatment with the intention of convincing these new patients to undergo additional and medically unnecessary procedures that could be billed to insurance providers. Plaintiff contends that Movants pushed these additional procedures because the traditional treatment for spider veins is considered cosmetic and is not usually covered by insurance. Plaintiff insists that he refused to participate in this scheme and was fired for failing to engage in these allegedly improper practices.

Movants seek to dismiss paragraph 32, plaintiff's request for punitive damages and the jury trial demand. Movants also seek to consolidate this action with another action wherein defendant Greuner Medical P.C. is suing plaintiff (*see* Index No. 655762/2018).

Movants claim that paragraph 32 should be dismissed because plaintiff's lone cause of action (brought under Labor Law § 741) must be based upon retaliatory conduct by an employer concerning an issue that presents a substantial and specific danger to public health or safety.

In opposition, plaintiff argues that Movants seek to dismiss pursuant to CPLR 3211(a)(7) which involves the dismissal of a cause of action rather than a single paragraph. Plaintiff also contends that paragraph 32 supports a larger point about defendant's alleged falsification of records, including false claims that procedures were performed. Plaintiff opposes the branches of the motion to deny the jury trial request and for consolidation on the ground that Movants failed to move on the right ground. Plaintiff does not oppose the branch of Movants' motion to dismiss the punitive damages request.

Paragraph 32

The Court denies the branch of the motion to dismiss paragraph 32. As an initial matter, plaintiff is right in pointing out that making a motion pursuant to CPLR 3211 seeks to dismiss a cause of action. Clearly, Movants do not seek to dismiss a cause of action; instead they seek to strike a single paragraph. And while Movants are correct that Courts have dismissed portions of causes of action (*see e.g., Aronov v Regency Gardens Apartments Corp.*, 34 AD3d 404, 823 NYS2d 542 [2d Dept 2006] [dismissing portions of a wrongful death claim as were time-barred]), plaintiff does not directly seek redress for this paragraph. This allegation provides context about the work environment in which plaintiff worked (it alleges that Movants billed insurance companies for procedures that were never performed).

Not every paragraph in a complaint must allege an element of a cause of action; otherwise complaints would be impossible to decipher. For instance, although plaintiff's assertion that Movants used Groupon or Living Social vouchers to bring in customers is not necessarily essential to proving his retaliation claim, it does provide defendants (and the Court) with helpful context about plaintiff's case. The purpose of a complaint is to explain to defendants why they are being sued—it is plaintiff's version of events. A plaintiff should not be forbidden from including an allegation simply because it may not be material to the case.

And to be clear, Movants do not claim that this allegation should be stricken because it is scandalous or prejudicial (*see* CPLR 3024[b]). Rather, Movants appear to claim that the paragraph should be “dismissed” because it is irrelevant. There is simply no reason to do so. Movants will have the opportunity to admit or deny this allegation in their answer. And plaintiff still must meet his prima facie burden to prove his case. If paragraph 32 is not part of that burden, then it won't be a key part of this case. But that's not a reason to remove a single paragraph from a complaint.

Punitive Damages

Plaintiff did not oppose Movants' insistence that the punitive damages request be dismissed. Therefore, that branch of the motion is granted.

Jury Trial

Plaintiff contends that its request for a jury trial should remain because Movants cite the wrong procedural ground for this relief. Plaintiff observes that “while it may be that a jury trial is not available for a [Labor Law] § 741 claim,” CPLR 3211 is the not the proper way to seek this relief. (NYSCEF Doc. No. 12, ¶ 24). The Court will not exalt form over substance to the degree sought by plaintiff. Clearly, a jury trial is not permissible under plaintiff's lone cause of action

and Movants included a “for such other and further relief” clause in their notice of motion. That permits the Court to grant this branch of motion despite the fact that Movants may not have cited the correct procedural basis.

Joint Trial

“Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion. . . . Although the defendants moved to consolidate the actions, the more appropriate method of achieving that purpose is a joint trial, particularly since the two actions involve different plaintiffs” (*Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540-41, 845 NYS2d 414 [2d Dept 2007] [internal quotations and citations omitted]).

A review of the complaint filed in the other action (Index No. 655762/2018) reveals that it involves common questions of fact. In the other action, Greuner Medical P.C. sues plaintiff based on a non-disparagement clause in an employment contract and claim that plaintiff has falsely claimed that Greuner Medical P.C. engaged in insurance fraud. Because both cases involve plaintiff’s employment and the circumstances related to his termination, a joint trial is appropriate. The fact that Movants sought consolidation, rather than a joint trial, is not a reason to deny the relief.

Accordingly, it is hereby

ORDERED that the motion by David Greuner, M.D., P.C., Greuner Medical P.C., David Greuner, and Adam Tonis is granted only to the extent that plaintiff’s requests for punitive damages and a jury trial are dismissed and there shall be a joint trial with Index No. 655762/2018; and the motion is denied to the extent that it sought dismissal of paragraph 32 of the complaint; and it is further

ORDERED that Movants shall answer pursuant to the CPLR; and it is further

ORDERED the above-captioned action shall be jointly tried with Index No. 655762/2018, pending in this court; and it is further

ORDERED that, within 30 days from entry of this order, counsel for plaintiff in Index No. 655762/2018, shall file with the General Clerk's Office (60 Centre Street, Room 119) a copy of this order with notice of entry, together with a Request for Judicial Intervention and shall pay the fee therefor, and the Clerk of the General Clerk's Office shall assign said action to the undersigned; and it is further

ORDERED that, after discovery is complete, upon payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness with the General Clerk's Office in each of the above actions, the Clerk of the General Clerk's Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED such filing with the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

Preliminary Conference: July 16, 2019 at 2:15 p.m.

4/15/19

~~4/12/2019~~

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE