Bontempo v North Shore LIJ - Huntington Hosp.
2019 NY Slip Op 32861(U)
September 27, 2019
Supreme Court, Suffolk County
Docket Number: 1584/2017
Judge: Joseph Farneti

ORIGINAL

SHORT FORM ORDER

INDEX NO. 1584/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ANN MARIE BONTEMPO,

Petitioner,

-against-

NORTH SHORE LIJ – HUNTINGTON HOSPITAL,

Respondent.

ORIG. RETURN DATE: APRIL 18, 2017
FINAL SUBMISSION DATE: NOVEMBER 16, 2017
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: SEPTEMBER 7, 2017
FINAL SUBMISSION DATE: NOVEMBER 16, 2017
MTN. SEQ. #: 002
MOTION: MG

PLTF'S/PET'S ATTORNEY:
JOHN J. NAPOLITANO, ESQ.
55 WOODLAND DRIVE
OYSTER BAY, NEW YORK 11771
917-952-7106

DEFT'S/RESP ATTORNEY:
GARFUNKEL WILD, P.C.
111 GREAT NECK ROAD
GREAT NECK, NEW YORK 11021
516-393-2200

Upon the following papers numbered 1 to 11 read on these motions TO REINSTATE PETITIONER AND TO DISMISS.
Order to Show Cause and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Memorandum of Law in Opposition and in Support 7; Reply Affidavit and supporting papers 8, 9; Memorandum of Law in Support and in Opposition 10; Reply Memorandum of Law in Opposition and in Support 11; it is,

ORDERED that this motion by petitioner ANN MARIE BONTEMPO for an Order permitting petitioner to be reinstated as a Registered Nurse at NORTH SHORE LIJ – HUNTINGTON HOSPITAL located at 270 Park Avenue, Huntington, New York, and be compensated for back pay as well as vacation, pension, medical coverage and attorney's fees and court costs, is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

ORDERED that this motion by respondent NORTH SHORE LIJ – HUNTINGTON HOSPITAL ("respondent" or "Hospital") for an Order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing petitioner's Order to Show Cause and Petition in its entirety, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received opposition to this motion from petitioner.

Petitioner commenced this special proceeding by Order to Show Cause and petition on March 27, 2017, pursuant to New York's "Whistleblower Law," seeking the following relief: (1) that she be reinstated as a Registered Nurse at the Hospital; (2) that she be compensated for back pay of approximately $130,000, as well as for lost vacation, pension, and medical coverage; (3) that she be compensated for damage to her reputation; and (4) that she be reimbursed for attorney's fees and court costs.

Petitioner informs the Court that she had been a Registered Nurse for twenty-five (25) years, and employed at the Hospital from 1998 to 2015, at which time she was discharged on May 19, 2015.

Petitioner alleges that on April 23, 2015, a fellow nurse "made a horrible mistake" that could have resulted in brain damage to a new born baby. Petitioner allegedly reported this incident to her supervisor and an incident report was made. After that time and until her discharge, petitioner claims that the fellow nurse threatened petitioner, slammed items on the desk and/or table, and refused to take reports from petitioner. Petitioner characterized this as a "patient safety issue," which she allegedly reported to her supervisor and corporate compliance. However, petitioner claims that the fellow nurse's behavior was never addressed. Instead of reciting all of her allegations in the petition itself, petitioner has submitted a copy of a letter dated January 18, 2017, drafted by petitioner, which supposedly provides a summary of the factual allegations underlying her whistleblower claim. Petitioner has also submitted a printout from "Zuckerman Law," which apparently is a law firm that represents whistleblowers, in order to outline the applicable law for the Court.

After being discharged, petitioner sought a review of her discharge in binding arbitration pursuant to a Collective Bargaining Agreement. The arbitration hearing was held over the course of four days, before a mutually agreed-upon arbitrator. By Arbitration Award dated May 29, 2016, the arbitrator found that the hospital had "established just cause for [petitioner's] termination." Thereafter, on or about October 20, 2016, petitioner filed a charge with the

National Labor Relations Board ("NLRB"), and on December 29, 2016, the NLRB dismissed the charge, finding that there was insufficient evidence to establish a violation of the National Labor Relations Act. Petitioner then appealed that decision, which was denied by the NLRB on January 31, 2017.

Petitioner filed the instant petition two months later, seeking the relief described above. In response, the Hospital has filed a motion to dismiss, pursuant to CPLR 3211 (a) (1), (5) and (7), arguing that: (1) petitioner's claims are barred by the doctrine of collateral estoppel as they were fully adjudicated in the arbitration; (2) petitioner's Labor Law §§ 740 and 741 claims must be dismissed as she does not satisfy the statutory requirements and the claims were not brought within the applicable statute of limitations; (3) by seeking relief under Labor Law § 740, she waived all other claims against the Hospital; (4) petitioner failed to state a cause of action under Labor Law § 215; and (5) petitioner's request for attorney's fees and costs cannot be maintained as a separate cause of action.

Where a defendant moves to dismiss an action pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works*, Inc., 20 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 Ad3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 300 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

In order to invoke the doctrine of collateral estoppel, two well-settled requirements must be satisfied: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]). The policies underlying its application are avoiding

relitigation of a decided issue and the possibility of an inconsistent result (*see Buechel v Bain*, 97 NY2d 295 [2001]; *Altegra Credit Co. v. Tin Chu*, 29 AD3d 718 [2006]).

In the instant matter, the Court finds that the doctrine of collateral estoppel does not act as a bar to the instant matter. As stated by the Second Department in *Von Maack v Wyckoff Hgts. Med. Ctr.*, 140 AD3d 1055 (2016):

> Collateral estoppel effect will only be given to matters "actually litigated and determined" in a prior proceeding. Because the issue of retaliation raised by the plaintiff in this action was not actually litigated in the arbitration proceeding, the plaintiff cannot be collaterally estopped from litigating that issue in this action

(*Von Maack*, 140 AD3d at 1056 [citations omitted]).

Here, as discussed, petitioner's union challenged the termination, and the matter was heard in an arbitration proceeding. The arbitrator determined that the termination was for just cause based upon numerous grounds, including petitioner's failure to take the vital signs of an infant; petitioner providing false information to another nurse concerning an infant's vital signs readings; petitioner disrupting the unit with unprofessional and over-dramatized behavior; and petitioner violating the Hospital's infection control practices by eating and drinking at the nursing station while infants were nearby. However, the arbitrator did not determine the issue of retaliation. As such, collateral estoppel cannot act as a bar to the instant proceeding (*see id.*; *Caban v New York Methodist Hosp.*, 119 AD3d 717 [2014]; *Chiara v Town of New Castle*, 61 AD3d 915 [2009]).

Notwithstanding the foregoing, the Court finds that the petition must be dismissed on other grounds. Initially, this matter was commenced as a special proceeding, and not a civil action (*see* Labor Law § 740 [4] [a]). Further, the petition lacks statements sufficiently particular to give the court and the respondent notice of the series of transactions or occurrences intended to be proved and the material elements of each cause of action (*see* CPLR 3013), and lacks separately stated causes of action (*see* CPLR 3014). Indeed, the Hospital, and the Court, must divine the actual statutes that petitioner claims the Hospital violated and the causes of action asserted against it.

Assuming, *arguendo*, that petitioner asserts a claim under Labor Law § 740, it is barred by the one-year statute of limitations, which begins to run after an allegedly retaliatory personnel action was taken (*see* Labor Law § 740 [4] [a]; *Matter of Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029 [2014]). Here, petitioner was terminated on May 19, 2015, and this proceeding was commenced on March 27, 2017, over one year later.

Next, if petitioner seeks relief under Labor Law § 741, she has failed to allege that she had disclosed or threatened to disclose to a supervisor, or to a public body an activity, policy or practice of the Hospital or its agent that petitioner, in good faith, reasonably believed constituted improper quality of patient care (*see* Labor Law § 741 [2]; *Pipia v Nassau County*, 34 AD3d 664 [2006]). In contrast, petitioner's complaints regarding a fellow nurse concern two isolated incidents, both of which fail to meet the statutory threshold. Moreover, petitioner's attempted assertion of claims under Labor Law §§ 740 and 741 was an election of remedies and waives her right to assert whistleblower claims under other provisions of law, i.e., Labor Law § 215 (*see* Labor Law § 740 [7]; *Freese v Willa*, 89 AD3d 795 [2011]; *Deshpande v TJH Med. Servs., P.C.*, 52 AD3d 648 [2008]).

Therefore, upon favorably viewing the facts alleged as amplified and supplemented by petitioner's opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording petitioner "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that petitioner has failed to state a cause of action for retaliation against the Hospital.

In view of the foregoing, this motion by respondent to dismiss the petition is **GRANTED**, and this special proceeding is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: September 27, 2019

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION