

<b>McGibbon v Manhattan Facial Plastic Surgery PLLC</b>
2019 NY Slip Op 32869(U)
September 24, 2019
Supreme Court, New York County
Docket Number: 652459/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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MARY MCGIBBON,

Plaintiff,

- v -

MANHATTAN FACIAL PLASTIC SURGERY PLLC,
and SAMIEH RIZK

Defendants.

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INDEX NO. 652459/2017
MOTION DATE 08/22/2018
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54

were read on this motion to/for AMEND CAPTION/PLEADINGS

The plaintiff moves, pursuant to CPLR 3025, to amend the complaint to substitute a whistleblower claim under Labor Law § 741 with a whistleblower claim under Labor Law § 740. Defendants oppose the motion to amend, arguing that the proposed claim is barred by the statute of limitations, devoid of merit, and prejudicial to the defendants. The defendants have also cross-moved pursuant to CPLR 3211 to dismiss the plaintiff's third cause of action for failure to state a cause of action. The motion is granted and the cross-motion is denied.

The plaintiff is a nurse-practitioner who worked in the defendants' medical office. On May 17, 2016 the plaintiff informed defendant Samieh Rizk (Rizk) that she had reported Rizk's practices of allowing staff without DEA licenses to write prescriptions on pre-signed pads and access his Health Commerce Account to electronically order controlled substances without review. The plaintiff was subsequently terminated from her position, and commenced this action alleging claims of hostile work environment based upon gender, termination in violation of whistleblower laws, and tortious interference with her prospective economic relations.

The plaintiff originally brought her whistleblower claim under Labor Law § 741, which was subsequently shown to be improper, as defendants are not 'employers' as defined by statute. She now seeks to amend her complaint to bring her whistleblower claim under Labor

Law § 740. The only difference between the two claims is that under § 741 the plaintiff needs to show retaliation after reporting or threatening to report an employer's activity that they reasonably believed, in good faith, to constitute violation of law or regulation that presents a substantial and specific danger to public health or safety, whereas under § 740 the plaintiff must further show that she knew the employer's activity actually was a violation of law that presented a substantial and specific danger to public health or safety.

The defendants oppose this substitution, claiming that the proposed pleading is legally insufficient. Although leave to amend under CPLR 3025(b) is generally freely granted, leave to amend will be denied under circumstances where a proposed pleading "fails to state a cause of action, or is palpably insufficient as a matter of law." Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 (1<sup>st</sup> Dept. 2001). The defendants argue that the proposed claim is meritless because it is beyond the one-year statute of limitations, as claims under § 740 must be brought within "one year after the alleged retaliatory action was taken..." (NYLL § 740[4][a]), and the relation-back doctrine is improper under the facts of this case.

It is the burden of the plaintiff to establish the applicability of the relation-back doctrine. See Montalvo v. Madjek, 131 AD3d 678, 679 (2<sup>nd</sup> Dept. 2015). In order to amend a pleading to add a time-barred claim, the claim initially asserted must "give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR 203(f). The defendants argue that, as far as notice is concerned, the proposed amendment does not satisfy the relation back doctrine because proper service was not made within the statute of limitations period, as the one year statute of limitations period for the plaintiff's claim under § 740 expired on May 17, 2017, and the initial complaint was not served under May 23, 2017. However, the plaintiff correctly notes that, as explained in Spodek v New York State Commissioner of Taxation & Finance, 85 NY2d 760,763 (1995) service of process on the defendant no longer marks the interposition of a claim for statute of limitations purposes, but rather the date of filing, and the plaintiff's initial complaint was filed on May 5, 2017, satisfying the one-year statute of limitations. See also Demir v Sandoz, Inc., 155 AD3d 464 (1<sup>st</sup> Dept. 2017) (upholding application of relation back doctrine based on date of filing not date of service).

The defendants further argue that they were not given proper notice because the facts and proofs of the amended claim are different than those of the original. Defendants contend

that because an action under § 740 requires actual proof of an underlying violation of law or regulation, as opposed to a mere good faith belief, the relation back doctrine is inapplicable. However, the court finds that the allegations set forth in the original complaint provide adequate notice for the claims asserted in the proposed amended complaint, as the amended claim under § 740 is akin to an additional theory of liability based upon the facts. See Luisi v JWT Groupt, Inc., 128 Misc. 2d 291, 294-95 (Sup. Ct. N.Y. Co. 1985). Therefore, the court finds that the relation-back doctrine is applicable, and that the claim under § 740 is not barred by the statute of limitations.

The defendants further argue that the amended claim should be rejected as it is devoid of merit. Any proposed amended complaint is to be denied if it lacks substantive merit. Altman v New York Bd. Of Trade, Inc., 52 AD3d 396 (1<sup>st</sup> Dept. 2008). The defendants contend that because the plaintiff's complaint was investigated by the New York State Department of Health and the Drug Enforcement Agency and there has been no finding of wrongdoing, the requirement that there actually be a violation of law or regulation under § 740 cannot be met. However, the plaintiff notes that it is possible that the investigation into the defendants is ongoing, and even were it to have been concluded, a lack of a governmental agency's finding of wrongdoing is not dispositive to a claim under § 740. The court agrees with the plaintiff and will not reject the amended claim as meritless.

The defendants also argue that since the plaintiff has delayed seeking this amended complaint, they are prejudiced by the delay because they are now "forced to defend against an entirely new claim with new proofs." The court, when determining whether to grant or deny an amendment, will "consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom..." Brooks v Robinson, 56 AD3d 406, 407 (2<sup>nd</sup> Dept. 2008). In this instance, the defendants argue that the plaintiffs should have been aware that their initial claim under § 741 was deficient, as the defendants were clearly not 'employers' as defined under the statute, and thus should have moved to amend when served with the defendants answer. Although the plaintiff should have known that their claim under § 741 was deficient, it was not until the defendants brought the issue to light that the plaintiff acted. However, upon learning of the issue, the plaintiff proposed an amended complaint to the defendant within hours, asked whether they would submit to the amendment by stipulation, and then, after a week, made their motion to amend.

The only prejudice articulated by the defendants is that the proposed new claim by the plaintiff may require additional discovery and a change in the underlying proofs in the case. Although some additional discovery and changes to underlying strategy are possible, the only significant change to the overall case is that the plaintiff now must prove that a law or regulation was being violated and she knew it, as opposed to her merely having a good faith belief that a law or regulation was being violated. Since the defendants were on notice of the alleged actions upon which the plaintiff based her claim, the proposed amendments do not create substantial prejudice to the defense. Therefore, weighing the plaintiff's lack of excuse for the delay in seeking to amend the complaint against the relative speed with which she moved to amend upon learning of the deficiency and the relatively minimal prejudice to the defendants, the court finds that the timing of the plaintiff's motion to amend does not warrant denial of the motion.

The defendants also move for the dismissal of the plaintiff's third cause of action – tortious interference with prospective economic relations. The plaintiff alleges that Rizk, or his employees, had told several patients, some of whom had previously reached out to the plaintiff for post-operation care, that they could only use nurses selected by Rizk's office, solely to harm the plaintiff. In order to establish a claim for tortious interference with prospective economic relations such that dismissal is not warranted, a party must allege 1) business relations with a third party; 2) the defendant's interference with those business relations, 3) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means, and 4) injury to the business relationship. Advanced Global Technology LLC v Sirius Satellite Radio, Inc., 15 Misc. 3d 776, 779 (Sup Ct, NY County 2007). In alleging tortious interference with prospective economic relations, there must be a showing of 'wrongful' conduct, generally amounting to a crime or independent tort. Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183 (1980). However, malicious conduct by a defendant that is otherwise lawful may still constitute 'wrongful' conduct insofar as a defendant acts for the sole purpose of inflicting intentional harm on a plaintiff. NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 215 AD2d 990, 990-91 (3<sup>rd</sup> Dept. 1995).

In this instance, the court finds that the plaintiff has sufficiently plead a claim for tortious interference with prospective economic relations such that dismissal is not proper at this time. The pleadings allege that 1) there was some degree of a business relation between the plaintiff and those prospective individuals who inquired about using her services for post-operation care, 2) the defendant, or his employees, had told said individuals that they had to use nurses

selected by the office, not the plaintiff, 3) the defendant acted maliciously in that he may have acted solely for the purpose of harming the plaintiff, potentially in retaliation for her report to the DEA, and 4) that the plaintiff had lost whatever possibility she had to provide her services to those who inquired about using her services.

Accordingly, and on the foregoing papers it is,

ORDERED that the plaintiff's motion to amend is granted; and it is further,

ORDERED that the proposed Amended Summons and Complaint is deemed served upon the defendant, and it is further,

ORDERED that the defendant shall serve and file an answer to the Amended Summons and Complaint within 20 days, and it is further,


ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are to mark the court's records to reflect the amendments, and it is further,

ORDERED that any additional discovery arising from the plaintiff's additional claim shall be completed on or before October 30, 2019, the final Note of Issue filing deadline, or it is waived, and it is further,

ORDERED that the defendant's cross-motion to dismiss the third cause of action of the complaint is denied.

This constitutes the Decision and Order by the Court.

9/24/2019  
DATE

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER