Emery v Parker
2012 NY Slip Op 30716(U)
March 20, 2012
Supreme Court, New York County
Docket Number: 116082/2010
Judge: Paul Wooten
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SCANNED ON 3/23/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JEAN EMERY,

Plaintiff,

-against-

ROGER N. PARKER, ESQ., LAUREN M. LEVINE, ESQ., MARIANNE MONROY, ESQ., MELISSA KUBIT ANGELIDES, ESQ. a/k/a MELISSA S. KUBIT, ESQ., LEONARD M. ROSENBERG, ESQ., GARFUNKEL WILD, P.C. f/k/a GARFUNKEL, WILD AND TRAVIS, P.C. and JOHN/JANE DOES 1-5,

Defendants.

INDEX NO. 116082/2010

MOTION SEQ. NO. 001

FILED
MAR 23 2012
COUNTY CLERK'S OFFICE
NEW YORK

The following papers numbered 1 to 8 were read on this motion by the defendants for summary judgment dismissing the complaint and for sanctions against the plaintiff and her counsel.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4, 5, 6
Reply Affidavits — Exhibits (Memo)	7, 8

Cross-Motion: ☐ Yes ■ No

Plaintiff commenced this action on December 13, 2010, requesting treble damages, alleging that the defendant attorneys and law firms violated Judiciary Law § 487(1) in administrative proceedings before the New York State Department of Labor. Defendants move for summary judgment dismissing the complaint, pursuant to CPLR 3212, and for sanctions against plaintiff Jean Emery (plaintiff) and her counsel, pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts.[1]

BACKGROUND

Plaintiff worked for Memorial Sloan-Kettering Cancer Center (MSKCC) as a registered

[1] The Court notes that the sur-reply affirmation of plaintiff's counsel, Victor M. Serby, dated October 12, 2011 and received by the Court on the same date, was not considered by this Court in determination of this motion.

nurse from July 2003 to June 2007, on a per diem basis. She is also a licensed attorney. Among her duties was witnessing and verifying patients' signatures on surgical consent forms. Patients were asked to sign a consent form at the end of a discussion with their physicians about the risks of prospective surgical procedures. An observer, such as plaintiff, was expected to be present to witness the signature and sign the form as well. Later, at the pre-surgery unit, plaintiff and others would verify the patient information on the consent forms with the patient, and themselves sign an electronic verification consent form.

When MSKCC allegedly changed its procedure regarding the witnessing of patient signatures on surgical consent forms, in June 2007, plaintiff objected because she claimed that she was expected to sign surgical consent forms as a witness when she had only participated in the verification process. On June 11, 12 and 13, 2007, she crossed out "witness" on surgical consent forms she was to sign under these circumstances and wrote in "verification" above her signature. When her supervisor instructed the staff to cease changing the witness line of the surgical consent form, plaintiff stated that she could not sign as a witness to a signature that she had not, in fact, witnessed. She offered to work in another unit, but, when this was refused, she did not return to work after June 13, 2007.

After plaintiff's application for unemployment insurance benefits was rejected, she was given a hearing on December 21, 2007 before the Department of Labor's Administrative Law Judge Section (Motion, exhibit 20). On December 24, 2007, Beverly Diego, an administrative law judge (ALJ), upheld the initial determination that plaintiff voluntarily separated from her employment without good cause, making her ineligible to receive benefits (Motion, exhibit 21). The matter remained open, however, and ALJ Diego continued hearings on January 31, 2008 (Motion, exhibit 25), February 27, 2008 (Motion, exhibit 26) and April 9, 2008 (Motion, exhibit 27). On June 10, 2008, ALJ Diego overruled her initial determination and found that plaintiff was allowed benefits as of June 14, 2007 (Motion, exhibit 28).

Defendants, who are MSKCC's inside and outside counsel, took an appeal of ALJ Diego's June 10, 2008 determination to the Unemployment Insurance Appeal Board (Appeal Board) on June 25, 2008 (Motion, exhibit 29). When the Appeal Board affirmed ALJ Diego's determination, defendants served a notice of appeal to the Appellate Division, Third Department on March 27, 2009 (Motion, exhibits 30-31). The Appellate Division, in turn, affirmed the Appeal Board's determination on August 5, 2010 (*see Matter of Emery v Memorial Sloan Kettering Cancer Ctr.*, 76 AD3d 731 [3d Dept 2010]).

Plaintiff commenced the instant action on December 13, 2010, asserting misconduct in violation of Judiciary Law § 487(1):

> "An attorney or counselor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party: . . . Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*,

100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Six copies of surgical consent forms (Original Form), indisputably signed by plaintiff on June 11 or 12, 2007, are attached to the motion (exhibit 6). On five of the six Original Forms, she has crossed out the pre-printed line "Witness Signature" and instead written "Verification of signature" (once), "Verified signature" (once), "Verification signature" (twice) and "Verification of [illegible]" (once). Attached to the complaint is a copy of a blank surgical consent form, with a revision date of "6/6/07" (Revised Form), which replaced the pre-printed words "Witness Signature" on the Original Form with the words "Signature Verification Witness (Required)"[2] (Motion, exhibit 1).

The key allegation of the instant complaint is that defendant Roger N. Parker, Esq. (Parker), MSKCC senior vice president and general counsel, submitted the Revised Form to the

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[2] The complaint, at ¶ 33, incorrectly states that the Revised Form "had two signature lines, one for the signature of a witness and the other for a signature verification witness." The Revised Form has provision for the following: "Signature of Patient," "[Signature of] Patient's agent, relative, or guardian," "Signature Verification Witness (Required)," "Signature of Interpreter if interpretation required," and "Physician signature." To the right of each signature line, except the patient's, a line is provided to print the name of the signatory. No provision is made on the Revised Form for the signature of a witness as apart from the verification witness.

Appeal Board as evidence for the December 21, 2007 hearing, and, subsequently, the other defendants engaged by him submitted it for the January 31, 2008 re-hearing, the Appeal Board proceeding and the Appellate Division proceeding. Plaintiff charges that defendants claimed that the Revised Form "was in effect on the plaintiff's last day of work . . . with knowledge that said revised consent form dated June 6, 2007 was not in use on June 11, 12 and 13, 2007" (Complaint ¶¶ 36, 39). Further, they allegedly continued to use this "false evidence" in their appeals to the Appeal Board and the Appellate Division, even after acknowledging its inapplicability.

At the January 31, 2008 hearing, Parker testified that MSKCC, at the request of the Appeal Board hearing officer, provided a copy of the surgical consent form "in use at the time of the request," that is, the Revised Form (Motion, exhibit 25 at 58). He testified that the Revised Form bears a revision date of June 6, 2007, because MSKCC changed its policy on witnessing the surgical consent form on that date (*id.* at 62). Further, he stated that the word verification "was added due to" plaintiff's concern (*id.* at 62). Finally, he acknowledged that the Revised Form was not actually in use on June 11 and 12, when plaintiff made her hand-written changes to the Original Form (*id.* at 68).

Kevin Browne (Browne), plaintiff's supervisor, testified when the hearing resumed on February 27, 2008 (Motion, exhibit 26). He stated that the Revised Form was introduced in August 2007, but bore the June 6, 2007 revision date because the revision process reached back to June 6, 2007 (*id.* at 7-8). Browne sent an e-mail message, dated June 6, 2007, to a long list of administrative and nursing personnel, including plaintiff, that announced a change to witnessing patient consents (Motion, exhibit 4). Browne's e-mail included a notice by MSKCC's regulatory affairs office that, "**effective Monday, June 11, 2007**, ALL **consent forms** for operative and other invasive procedures must contain a **witness signature** and **date**"

(emphasis in original). Browne's message explained to the staff that "[y]ou are only confirming patient signature not attesting to the content of the informed consent discussion."

Plaintiff responded to Browne's e-mail on June 10, 2007, by distinguishing between a "witness involv[ing] direct contemporaneous visualization participation, and verification [a]s after-the-fact confirmation" (Motion, exhibit 6). She wrote that a witness not present at the time of consent might be subject to disciplinary action by lending credence to "misleading statements/misrepresentations, even falsification of a business record." She concluded that if a pre-surgical observer "is doing verification, the consent should say verification, and only the witness sign on that witness line." Browne's e-mail, including the notice from the regulatory affairs office, does not include the words verify or verification. As Parker testified, the replacement of Witness Signature on the Original Form, still in use in June 2007, with Signature Verification Witness (Required) on the Revised Form, introduced in August 2007, reflected plaintiff's concern, expressed first on June 10, 2007.

ALJ Diego's December 24, 2007 decision does not contain any mention of an alternate consent form or a revised consent form. Its description of events comports with the physical evidence of the six forms signed by plaintiff on June 11 and 12, 2007. The relevant portion reads:

> "On or about June 6, 2007 the employer told the claimant that when she conducted her verification interview with the patient she was no longer to sign in the verification section of the consent form, instead she was to sign in the section reserved for a witness. The claimant in an e-mail stated her ethical and legal objections to this new procedure. On June 11th and 12th, the claimant crossed out witness and entered verification above her signature. She did so because she did not witness the patient when she [the patient] gave her consent during her discussion with the doctor."

Defendants concededly submitted the Revised Form before the December 21, 2007 hearing. The fact that a copy of a blank Revised Form seemed to play no role in the initial

determination by ALJ Diego, especially when six filled-out copies of the Original Form were produced, does not necessarily excuse defendants of misconduct.

The June 10, 2008 determination, reversing the previous denial of unemployment benefits to plaintiff, took significant note of the Revised Form.

> "The claimant applied for unemployment insurance benefits effective July 9, 2007. A representative of the Department of Labor contacted the employer and it submitted copies of the revised consent form which had a revision date of June 6, 2007. This document had two signature lines, one for the signature of a witness and the other for a signature verification witness. This consent form was not in use on June 11th, 12th and 13, 2007. The employer did not begin using this new form until August 2007. . . . [The employer] submitted to the Department of Labor a copy of the revised consent form dated June 7, 2007[3], alleging that it was in effect on the claimant's last day of work, and which included separate lines for a verification signature and a witness signature.[4] However, at the unemployment insurance hearing held herein it conceded that this document was not in effect on June 7, 2007 and in fact was not implemented until August 2007. I conclude that under these circumstances, that the failure of the employer to address the claimant's valid concerns as stated herein gave her good cause to quit her job. Accordingly, I find that her employment ended under non-disqualifying conditions."

However, plaintiff's claim that "defendants submitted this falsified document [to the hearing panels and the appellate court] in a clear attempt to use this false evidence to cheat Ms. Emery out of her unemployment insurance benefits to which she was otherwise legally entitled" (Memorandum of Law in Opposition at 1-2), is not only conclusory, it misrepresents the document's evidentiary significance. While its June 6, 2007 revision date is of dubious accuracy, the respective notices of appeal to the Appeal Board and the Appellate Division do not suggest that the Revised Form was available to plaintiff at any time before she stopped reporting for work. The June 25, 2008 notice of appeal to the Appeal Board presented a clear

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[3] There is no copy of a surgical consent form, original or revised, produced by any party bearing the date June 7, 2007. The reference is understood to be June 6, 2007.

[4] This repeats the mistaken description of the form contained in the complaint (*see* n 1, *supra*).

statement of the dispute and the status of the forms at issue:

> "As reflected in the record, the Claimant objected to signing the consent forms because she disagreed with the wording of the form. . . . [T]he Claimant [did] not give the Hospital any reasonable opportunity to address her concern by abandoning her job just a week after she gave the Hospital an ultimatum to revise the form . . . Indeed, the Hospital was working on revising the form as of June 7, 2007 and implemented a new form later that summer" (Motion, exhibit 29).

The March 27, 2009 notice of appeal to the Appellate Division makes similar representations:

> "As reflected in the record, Claimant objected to signing the consent forms because she disagreed with the wording of the form. [She] demanded that the Hospital change the form to her satisfaction. Instead of affording the Hospital any reasonable opportunity to address her concern, Claimant abandoned her job only one week after she gave the Hospital an ultimatum to revise the form" (Motion, exhibit 30).

Parker acknowledged the inapplicability of the Revised Form to plaintiff's conduct in June 2007 at the January 31, 2008 hearing. While the Revised Form apparently was in the evidence bundle in subsequent proceedings, nowhere was it argued that plaintiff reverted to the Original Form when the Revised Form was available for use. Defendants' notices of appeal refered to a surgical consent form that plaintiff refused to use. Had the Revised Form been available as soon as June 11, 2007, she would have had no cause to dispute hospital policy thereafter. Plaintiff's allegations that defendants' production of the Revised Form on appeal is "a clear attempt to use this false evidence to cheat Ms. Emery out of her unemployment insurance benefits" simply does not comport with any language or conduct by defendants.

"[I]t is recognized that public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients" (*Art Capital Group, LLC v. Neuhaus*, 70 AD3d 605, 606 [1st Dept 2010]). Plaintiff offers no evidence that defendants

lacked good faith when submitting the Revised Form to the various tribunals.

Moreover, the Court finds that nothing in plaintiff's conduct or that of her counsel warrant sanctions pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint against them is dismissed, with costs and disbursements to them as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that defendants' motion for sanctions against plaintiff and her counsel, pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, is denied; and it is further

ORDERED that defendant Roger N. Parker, Esq. shall serve a copy of this order with notice of entry upon the plaintiff and upon the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
MAR 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3-20-12

PAUL WOOTEN J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE