[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X

LOUIS REDA,

Plaintiff,

-against-

ST. JOHNLAND NURSING CENTER,

Defendant.

----------X

INDEX NO.: 5970/2009
CALENDAR NO.: 201102161OT
MOTION DATE: 4/26/2012
MOTION NO.: 003 MD

PLAINTIFF'S ATTORNEY:
SCOTT MICHAEL MISHKIN, P.C.
One Suffolk Square, Suite 240
Islandia, New York 11749

DEFENDANT'S ATTORNEY:
PECKAR & ABRAMSON, P.C.
70 Grand Avenue
River Edge, New Jersey 07661

Upon the following papers numbered 1 to 50 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-22; 50 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 23-46 ; Replying Affidavits and supporting papers 48-49 ; Other 47 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (motion sequence no. 003) of defendant St. Johnland Nursing Center for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint is denied.

This is an action for retaliatory discharge from employment in violation of New York Labor Law §740. The plaintiff alleges that he made complaints to his supervisors regarding violations of state and federal regulations, as well as his employer's written policies, regarding the safe use and storage of oxygen tanks utilized to care for residents at the defendant's skilled nursing facility. It is undisputed that defendant's staff provides care for 250 residents, including persons who suffer from dementia and head trauma, and that some of the residents require oxygen to aid them in breathing.

According to the plaintiff's complaint[1], he began to complain about unsafe practices involving oxygen use and distribution on or about March 6, 2006. Shortly thereafter, he was suspended for one day and required to take an anger management class in retaliation for his actions. Later, his supervisor denied his reasonable request for vacation time that he had earned. After his further complaints were ignored, he wrote a letter outlining his concerns on April 14, 2007. His employer responded with increased oversight of his actions. In July or August 2008, the defendant placed a disciplinary note in plaintiff's personnel file regarding a baseless accusation by the mother of one of the residents at the defendant's facility. The director of safety and security at the facility, John Duffy ("Duffy"), investigated this alleged incident, and knew that the accusation was baseless because a nurse present at the time told Duffy that the incident did not

[1] Some of the allegations in the complaint are not disputed by the defendant, while others are vigorously disputed. The recitation of the allegations is not intended to indicate that the Court considers them to be facts for the purposes of this motion.

happen. In addition, the plaintiff filed a response indicating that the incident never happened. On September 19, 2008, Duffy told the plaintiff that he was being investigated for pushing an oxygen tank a distance of six feet out of an elevator in anger. The plaintiff told Duffy that the incident never happened. On September 24, 2008, an incident occurred when plaintiff asked a nurse, Robin Nicoletto ("Nicoletto"), if she had written on an order sheet in error. Another nurse, Carol Zorn ("Zorn"), butted into the conversation, and the plaintiff told Zorn to mind her own business and he walked away. Instead, Duffy wrote a report that the plaintiff had cursed at Nicoletto, and that the plaintiff had returned the next day to threaten Nicoletto and others if they gave statements about the incident. On or about September 25, 2008, the plaintiff's employment was terminated. The plaintiff then commenced this action against his former employer for unlawful termination pursuant to Labor Law §740, commonly referred to as the "whistleblower statute."

The defendant now moves for summary judgment dismissing the verified complaint in this action on the grounds that the plaintiff cannot prove that he reported one of the alleged violations, that he cannot identify any federal or state law regarding the use and handling of oxygen, that he cannot prove that any of the violations caused actual harm or caused danger to the public health or safety, and that the plaintiff was terminated for a legitimate non-retaliatory reason.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the defendant submits, among other things, multiple excerpts of deposition transcripts[2], a copy of its personnel policy manual, copies of the plaintiff's personnel/disciplinary records and work evaluations, its policies regarding the storage and distribution of oxygen tanks at its facility, and a copy of a letter from plaintiff alleging violations of said policies. The Court notes that all of the excerpts of the deposition transcripts submitted by the defendant are unsigned and uncertified. However, in his opposition the plaintiff submits the same transcripts along with their certification pages. Neither party has submitted proof that the transcripts were forwarded to the respective witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the plaintiff has not raised any challenges to their accuracy (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also Bennet v Berger*, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]). Following the same reasoning, the Court will consider the excerpts submitted by the plaintiff in opposition to the motion.

---

[2] The Court notes that both parties have submitted excerpts of the deposition testimony of the respective deponents that "cherry pick" passages relevant to their arguments.

At his deposition, the plaintiff testified that he was hired by the defendant in 1980, and that he was promoted in 2006 to handle the distribution of oxygen tanks at the defendant's facility. He stated that according to the defendant's policies only one H tank and one E tank[3] were permitted to be stored in the clean utility rooms located in each of the seven or eight units at the facility. He indicated that his understanding about oxygen tank storage and distribution came from the subject policies, and from his supervisor, Lydia DeRosa ("DeRosa"). The plaintiff further testified that he had numerous conversations with DeRosa about his observation of violations of the defendant's policies, including too many oxygen tanks stored in the clean utility rooms, tanks stored in hallways, more than two tanks stored in residents' rooms, tanks running in rooms without anyone being present, and residents "hooked up" to empty tanks. After he wrote a letter regarding his complaints, his superiors started "getting on his case," issuing two instances of written discipline, denying him a requested vacation, and "[coercing me] into going back and forth to sign for ... deliveries." He admitted that signing for deliveries was part of his job responsibilities. However, he stated that the staff assigned to the area near to the place where deliveries were made could have signed for them, and that the real reason was to make his work more difficult. He acknowledged that his request for vacation time was not technically in compliance with the personnel policy manual, and that, eventually, he was given the vacation time that he had requested. The plaintiff testified that he did not object to a work evaluation dated February 11, 2000, in which he was rated "below standard" under the criterion listed as "Ability to work well with residents and staff," and that he does not know why the low mark was given. He stated that he was in agreement with the defendant's zero tolerance policy regarding workplace violence or threats, and agreed that if they occur then one's employment could be terminated immediately. The plaintiff further testified that a co-worker, Robin Nicoletto, made a complaint that he cursed at her in September 2008, that the matter involved a simple dispute, and that he never cursed at her or another co-worker present at that time.

Duffy testified that he was responsible for maintaining the defendant's oxygen storage policies, which follow the National Fire Protection Association 2000 safety code (NFPA 2000), "because that's what the Department of Health follows, the 2000 regulations." He indicated that the policies require no more than one H tank and one E tank in each clean utility room, and that tanks be chained on a dolly or cart. He stated that if a tank is not chained to or on a dolly it could create a dangerous situation if the tank tipped over, that he did not think that additional tanks in a clean utility room posed a danger if chained or on a cart, and that he was not aware of any incidents at the defendant's facility in which an oxygen tank created a dangerous situation or injured someone. Duffy further testified that if an employee has a complaint about compliance issues, the proper procedure is to talk to their immediate supervisor or a number of other administrators. He indicated that Lydia DeRosa was the plaintiff's immediate supervisor. The only complaint made by the plaintiff that he knew about was that the plaintiff was asked by the nursing staff to deliver tanks to the units when unnecessary. He stated that he never saw the letter sent by the plaintiff complaining about violations of the oxygen policies. He further stated that he never saw tanks stored in the hallways of the units, or moved without being chained to a dolly.

At her deposition, Lydia DeRosa ("DeRosa"), testified that she was employed by the defendant as its director of materials management, that she was responsible for the discipline of the employees in her department, and that the plaintiff was the only other person in that

---

[3] The record reveals that H tanks are approximately five feet tall and are relatively heavy, while E tanks are approximately two and one-half foot tall, and are more portable and weigh much less.

department. She stated that she did not remember any resident or employee complaining about the use or handling of oxygen tanks, but that the plaintiff did make verbal complaints to her. The plaintiff told her that nurses were leaving tanks running while not hooked up to a resident, that residents were left hooked up to empty tanks, and he complained that he was making too many deliveries of oxygen. She indicated that she relayed these complaints to the director of engineering, the director of nursing, and the administrator of the facility. In response to plaintiff's complaints, the defendant was able to obtain approval from the fire marshal to install holders for up to one dozen tanks in two of the facility's units that used the most oxygen. She was not aware of what was done regarding the plaintiff's other complaints. She did not recall seeing or receiving the plaintiff's letter dated April 14, 2007, which outlined his complaints, and she does not know if anyone else saw it. DeRosa further testified that the plaintiff's complaints about oxygen use and handling were made before and after the date of his letter. She indicated that she had seen empty oxygen tanks stored in the hallways of the facility and tanks left off dollies, that she did not observe any injuries or harm come from those tanks, and that she was not aware of any citations issued by the Department of Health or the Fire Department. She indicated that she addressed every complaint that the plaintiff made to her, and that the plaintiff was originally denied the vacation that he requested because she had scheduled her vacation for the same time well in advance. She stated that she was involved in the discussion regarding the plaintiff's suspension for threatening a nurse, that she did not investigate that incident, and that she was not involved in the decision to terminate the plaintiff's employment.

Mary Jean Weber ("Weber"), the administrator and chief executive officer of the defendant, testified that the defendant's oxygen policies are in line with the relevant regulations, that they include limits on storage in the clean utility rooms, and that the Department of Health has never cited the defendant for violations regarding oxygen use and handling. She stated that she was not aware of any resident or employee complaints regarding the improper use of oxygen, but that she was aware of the plaintiff's complaints about other issues.

At her deposition, Elizabeth Arden ("Arden") testified that she is a licensed practical nurse at the defendant's facility, that her job responsibilities include the administration of oxygen to residents, and that she was aware of the defendant's oxygen policies. She indicated that the oxygen policies prohibit more than one H tank and one E tank in the clean utility rooms, and that a sign must be posted on the door of a room where oxygen is being administered. Arden further testified that she never saw a violation of the signage requirement, that she never saw empty tanks sitting in a resident's room, and that she did see empty tanks, not full tanks, temporarily in the facility's hallways. She was not aware of any incidents of harm regarding oxygen tanks, and she did not know of any complaints by residents or employees regarding oxygen. She stated that the defendant held annual in-service training regarding its oxygen policies.

At her deposition, Sylvia Marschhauser ("Marschhauser") testified that she is a licensed practical nurse at the defendant's facility, that her job responsibilities include the administration of oxygen to residents, and that she was aware of the defendant's oxygen policies. She stated that the nursing staff generally knows when an oxygen tank supplying a resident with oxygen will empty, that the staff does not wait until a tank gets completely empty but changes out the tanks when they get low. She indicated that she was not aware of any tanks being left off dollies, and that she did not recall ever seeing a tank without chains. Marschhauser further testified that the oxygen policies prohibit more than one H tank and one E tank in the clean utility rooms, that she did not know of any injuries regarding violations of the oxygen policies, and that she was not

aware of any resident or employee making a complaint about oxygen use or handling. She acknowledged that, if a resident was hooked up to an empty oxygen tank it could be dangerous to the resident, and if a freestanding tank fell over it could explode.

Beth Stewart ("Stewart"), the director of human resources at the defendant's facility, testified that she was not aware of any resident or employee complaints regarding the use and handling of oxygen, and that if an employee made such a complaint she would have Duffy and the director of nursing investigate the matter. She stated that the plaintiff's letter dated April 14, 2007, was in his human resources folder, and that, prior to the letter, the plaintiff had been investigated regarding a disagreement with a co-worker. As a result of that investigation the plaintiff was disciplined, and he was required to undergo counseling for anger management. She and Duffy investigated the incident that led to the plaintiff's termination from employment. Stewart further testified that she thinks that the plaintiff would not have been terminated "if he didn't start back the next day," and that "he would have only been suspended."

Labor Law §740 (2) provides, in pertinent part, that "[a]n employer shall not take any retaliatory personnel action against an employee because such employee...(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety." To establish a cause of action under the whistleblower statute, a plaintiff must plead and prove (1) that his or her employer engaged in an activity, policy, or practice which violated a law, rule, or regulation and (2) that said violation must be actual, not merely possible, and present a substantial and specific danger to the public health or safety (*see Bordell v General Elec. Co.*, 88 NY2d 869, 871, 644 NYS2d 912 [1996]; *Pipia v Nassau County*, 34 AD3d 664, 826 NYS 2d 318; *Connolly v Harry Macklowe Real Estate Co.*, 161 AD2d 520, 555 NYS2d 790 [1990]). In addition, the plaintiff must specify the law, rule or regulation that has actually been violated by the defendant's behavior and describe how the defendant's activity has endangered the health or safety of the public. If the plaintiff fails to satisfy one or both of these prerequisites, the court must dismiss the Labor Law § 740 cause of action (*see Blumenreich v North Shore Health Sys.*, 287 AD2d 529, 731 NYS2d 638 [2001]; *Pail v Precise Imports Corp.*, 256 AD2d 243, 681 NYS2d 498 [1998]; *Connolly v Harry Macklowe Real Estate Co., supra*; *see also Owitz v Beth Israel Med Ctr.*, 1 Misc 3d 912[A], 781 NYS2d 626 [2004]).

Here, the defendant has failed to establish its entitlement to summary judgment. The deposition transcripts submitted in support of the motion reveal that there are multiple questions of fact including, but not limited to, whether the alleged violations of the defendant's written policies, acknowledged to be based on NFPA 2000 because the local Department of Health follows those regulations, presented a specific and substantial danger to the public health and safety, and whether the disciplinary actions taken by the defendant against the plaintiff, including his termination from employment, were legitimate and non-retaliatory. The plaintiff's submission includes contradictory testimony from different witnesses regarding Duffy's investigation of the incident involving the mother of one of the residents, and other witnesses testified regarding the empty tanks being left in the rooms of residents, and too many tanks being stored in the clean utility rooms, and tanks being left freestanding, off of a dolly. Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Elzer v Nassau County*, 111 AD2d 212 [2d Dept 1985]). Indeed, where

there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (*Chilberg v Chilberg*, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *reargd denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; *Barclay v Denckla*, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; *Cohen v Herbal Concepts, Inc.*, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

The excerpts of the deposition transcripts submitted by the plaintiff raise questions of fact requiring a trial in this action.

Accordingly, the defendant's motion for summary judgment is denied.

Dated: September 27, 2012

PAUL J. BAISLEY, JR.
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION