11/29/12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-15

----------X

FRANK G. KOEHLER et ano

Plaintiffs,

-against-

SCHERVIER N.C.C. aka/dba SCHERVIER NURSING CARE CENTER, et al

Defendant.

----------X

DECISION/ORDER
Index No. 301951/12

Present:
HON. MARY ANN BRIGANTTI HUGHES
J.S.C.

The following papers numbered 1 to 4 read on this motion to dismiss
No. on the calendar of August 17, 2012

Papers Numbered

Notice of Motion, Affidavits and Exhibits Annexed.....1.....
Answering Affidavits and Exhibits Annexed.....2-3.....
Replying Affidavits and Exhibits Annexed.....4.....

Motion is decided in accordance with the annexed memorandum decision.

Dated: 11/29/12

MARY ANN BRIGANTTI HUGHES, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-15

----------X

FRANK G. KOEHLER et ano

Plaintiffs,

-against-

MEMORANDUM DECISION
Index No. 301951/12

SCHERVIER N.C.C. aka/dba SCHERVIER NURSING CARE CENTER, et al

Defendants.

----------X

HON MARY ANN BRIGANTTI HUGHES:

Defendants move pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action, or alternatively, to strike paragraphs 29 to 81, 87 to 124 and 142 pursuant to CPLR 3014(b).

"On a motion to dismiss, the court is not called upon to determine the truth of the allegations (*see, 19 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Rather, the complaint should be liberally construed in favor of the plaintiff (see, *Foley v. D'Agostino*, 21 A.D.2d 60, 65-66, 248 N.Y.S.2d 121) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17)." *(Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421-422 [1st Dept 2001]).

This action was brought pursuant to the Whistleblower statute, Labor Law §740, against a

Bronx nursing home, Schervier Nursing Care Center. (Schervier). Schervier was the plaintiffs' employer. Defendant, Bon Secours New York Health System, (Bon Secours), purchased Schervier, and it is alleged Bon Secours controlled the health center through a series of shell corporations. Plaintiffs have also alleged Labor Law §740 against two other non-employer defendants, Francis Schervier Housing Development Fund Corporation and Francis Schervier Home and Hospital.

With respect to the three non-employer defendants, pursuant to Labor Law §740(2), an "**employer** shall not take any retaliatory personnel action against an employee." (emphasis added). A whistleblower action cannot be maintained against an entity that is not the plaintiffs' employer. (*see Stephens, M.D., F.A.A.P. v Prudential Ins. Co. of Am.* 278 A.D.2d 16 [1st Dept 2000]). Plaintiffs argue that all the defendant corporations "should be looked upon as a unitary employer for liability." (plaintiffs' memorandum of law p. 38). Plaintiffs maintain that they have a well-plead, piercing the corporate veil theory, that pleads disregard of corporate formalities among the non-employer defendants and Schervier, as well as a financial and operational interrelationship. However these conclusions were never supported by any factual allegations. "[P]laintiff failed to allege any **facts** indicating that [non-employer defendants] engaged in acts amounting to an abuse or perversion of the corporate form." *(East Hampton Union Free School Dist. v. Sandpebble Builders*, 16 N.Y.3d 775, 776 [2011]) (emphasis added). "Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]), nevertheless, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled

to such consideration' " *(WFB Telecom. v NYNEX Corp.*,188 A.D.2d 257, 259 [1st Dept 1992] *quoting Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, *quoting Roberts v Pollack,* 92 AD2d 440, 444). Accordingly, plaintiffs' action against the non-employer defendants must be dismissed.

While defendants argue that plaintiffs failed to allege that they were retaliated against, plaintiffs' clearly allege that they were terminated from their employment at Schervier, (complaint par. 134-135), were denied an opportunity to roll over their retirement accounts, (complaint par.136-137), Koehler was denied the opportunity for COBRA continuation of health insurance, (complaint par. 138) and there are allegations that defendants interfered with Murrell's attempts to find new employment. (complaint par. 139-140). "'Retaliatory personnel action' means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." Labor Law §740(e). Clearly, plaintiffs have alleged retaliatory personnel action as defined by Labor Law §740(e).

In pertinent part, Labor Law §740 provides:

> (2) Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following: (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, or which constitutes health care fraud...or...(c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.
>
> ...
>
> (3) Application. The protection against retaliatory personnel action ...pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has brought the activity, policy or practice in violation of law, rule or regulation to the attention of a supervisor of

> the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice.

Defendants seek to dismiss the claims of plaintiffs under the whistleblower statute as the claims relate to nine separate activities, policies or practices of defendants. Plaintiffs' allegations must conform to the requirements elucidated in Labor Law §740 for each of the nine separate activities, policies or practices of defendants, in order for each of the nine to avoid dismissal.

While it was plead that Koehler reported the alleged false medical billing and false home care billing to management, (complaint par. 88, 94), in compliance with the prior notification provision of Labor Law §740(3), there is admittedly no allegations that Murrell has complied with the prior notification provision. Plaintiffs' argument that reporting the violations would have been futile and therefore should be excused, have no basis in case law or statute. "Labor Law § 740 represents a narrow exception to the general rule of employment at will; without authorization from the Legislature, its scope cannot be expanded." (*Roach v Computer Assoc. Intl.*, 224 A.D.2d 676, 677 [2nd Dept 1996]). Accordingly, Murrell's claim to whistleblower protection as it relates to the alleged false medical billing and false home care billing must be dismissed.

With respect to the alleged HUD building embezzlement there is an absence of alleged "substantial and specific danger to the public health or safety." Labor Law §740(2)(a). The alleged HUD building embezzlement claim is essentially a non-health care financial fraud which is not covered afforded coverage of the whistleblower statute. "Fraudulent billing is not the type of violation which creates a "substantial and specific danger to the public health or safety (see, *Leibowitz v Bank Leumi Trust Co.*,[152 A.D.2d 169] [fraudulent banking activities]; *Vella v*

United Cerebral Palsy, 141 Misc 2d 976 [improper purchasing practice]" *(Remba v Federation Empl. & Guidance Serv.*, 76 N.Y.2d 801, 802 [1990]).

Plaintiffs unpersuasively argue that because money was embezzled, there was a shortage of funds to provide for fire and building security. The statute requires the activity itself be"a substantial and **specific** danger to the public health or safety," Labor Law §740(2)(a) (emphasis added), not an attenuated threat. "Further, the statute 'envisions a certain quantum of dangerous activity before its remedies are implicated' That is, any claim that an alleged wrongdoing would create a substantial and specific danger to the public health or safety must be based on more than "mere speculation" *(Villarin v Rabbi Haskel Lookstein School*, 96 A.D.3d 1, 7 [1st Dept 2012] quoting *Cotrone v Consolidated Edison Co. of N.Y., Inc.*, 50 AD3d 354-355 [1st Dept 2008]). Therefore, plaintiffs' claims to whistleblower protection as the claims relate to an alleged HUD building embezzlement must be dismissed.

Plaintiffs characterize the threatened excavation disaster as a policy or practice while the threatened excavation disaster was neither. It was not alleged that the employee parking lot was ever built. Plaintiffs' attorney argues in plaintiffs' memorandum of law that Murrell should have the protection of the whistleblower statute because Murrell had refused to proceed with building the parking lot, and that is why it was never built. Under Labor Law §740 (2)(c), a refusal "to participate in any activity, policy or practice in violation of a law, rule or regulation" undoubtedly brings the employee under the protection of the whistleblower statute. However, Murrell's refusal was not plead. Therefore, plaintiffs' claims to whistleblower protection as the claims relate to a threatened excavation disaster must be dismissed.

Plaintiffs alleged numerous safety violations as a result of the medical gas danger,

(complaint, par. 62), and violation of specified ordinances. (complaint par. 65). Under the allegations of the complaint both plaintiffs gave the required notice of the medical gas danger to Schervier. (complaint, par. 108, 109). It was alleged that Murrell reported the medical gas danger to the New York City Fire Department. (complaint par. 111). Specific violations threatening public safety were alleged as follows: ""it was not inspected, commenced operation with potential safety violations, including inadequate ventilation, no mounted fire extinguisher, a door without an automatic closure, and a fixture which was not explosion proof." (complaint par. 61).

While defendants argue that the medical gas danger was only a danger to certain residents of Schervier and not the public, the complaint alleges that the medical gas danger threatened not only the residents who required oxygen but "their visitors and staff were placed in jeopardy." (complaint par. 63). "There is no requirement that there be a . . . large-scale threat, or multiple potential [or actual victims;] . . . [rather] a threat to any member of the public might well be deemed sufficient" (*Bompane v Enzolabs, Inc.*, 160 Misc 2d 315, 318-319 [1994], quoting Givens, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 30, Labor Law § 740, 1993 Pocket Part, at 67). *(Villarin v Rabbi Haskel Lookstein School*, 96 A.D.3d 1, 7 [1st Dept 2012]). In *Villarin* the action taken by the employee was to report a single instance of child abuse to the appropriate authorities, against the wishes of her supervisor. Said action was held to be taken under the protection of the whistleblower statute. Therefore, plaintiffs' claims to whistleblower protection as the claims relate to medical gas danger survive this motion to dismiss in its entirety.

With respect to the claim of alleged elopement danger and elopement coverup, it is

alleged that Murrell reported the elopement danger and elopement coverup to "department heads and vice presidents and other senior management." (complaint par. 115, 118). Under *Villarin*, it is clear that the allegations that Schervier permitted obtunded patients to leave Schervier, unattended, is a danger to the public. Accordingly, Murrell's claim to whistleblower protection as it relates to the alleged elopement danger and elopement coverup is not dismissed.

It is alleged that Koehler contacted the NYS Attorney General regarding the elopement danger and elopement coverup. However, there is no allegation that he contacted "a supervisor of the employer" prior to contacting the Attorney General's office as required by Labor Law §740(2)(3) and therefore Koehler's claims to whistleblower protection as the claims relate to the alleged elopement danger and elopement coverup must be dismissed.

With respect to the alleged patient abuse cover-up, defendants argue that the Fourth Department cases, *Kern v Depaul Mental Health Services, Inc.*, 152 AD2d 957 [4th Dept 1989] and *Gardner v Continuing Development Services, Inc.*, 292 AD2d 838 [4th Dept] 2002], hold that the whistleblower statute will not protect employees in care facilities for reporting patient abuse. However, the First Department case of *Villarin v Rabbi Haskel Lookstein School*, (96 A.D.3d 1, 7 [1st Dept 2012]), held in favor of whistleblower statute protection for an employee who reported a single instance of child abuse. Similar to the mandatory reporting statute for child abuse that governed the behavior of the employee/reporter in *Villarin*, Public Health Law § 2803-d requires employees of a residential health care facility, such as Schervier, to report patient abuse. Given an apparent conflict between earlier Fourth Department cases and a current First Department case, this Court must follow the First Department. "The Appellate Division is a

single State-wide court divided into departments for administrative convenience ... and, therefore, the doctrine of *stare decisis* requires trial courts [and the Appellate Term] in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or [the Appellate Division of this department] pronounces a contrary rule" (*Mountain View Coach Lines v Storms*, 102 AD2d 663,664 [Titone, J.]). (*People v Brisotti*, 169 Misc 2d 672 [App. Term. 1st Dept 1996]).

It was alleged that Murrell reported an incident of patient abuse to the Vice President of compliance for Schervier. (complaint par. 122). Therefore, Murrell's claims to whistleblower protection as the claims relate allegations of patient abuse cover-up by Murrell are sufficiently well plead to withstand this motion to dismiss.

It is alleged that Koehler reported the alleged patient abuse cover-up to supervisors through an intermediary. There is no provision in statute or case law permitting reporting through intermediaries. "[A]lthough the present "Whistleblower" statute has been criticized by commentators for not affording sufficient safeguards against retaliatory discharge (see, Minda and Raab, Time for an Unjust Dismissal Statute in New York, 54 Brooklyn L Rev 1137, 1138, 1182-1187 [1989]; Dworkin and Near, Whistleblowing Statutes: Are They Working?, 25 Amer Bus LJ 241, 253 [1987]), any additional protection must come from the Legislature (see, *Sabetay v Sterling Drug*, 69 NY2d 329, 336)." *Remba v Federation Empl. & Guidance Serv.*, 76 N.Y.2d 801, 803 [1990]). Accordingly, Koehler's claims to whistleblower protection as the claims relate to the alleged patient abuse cover-up is dismissed.

With respect to plaintiffs' claims relating to condoning workplace violence, neither

Murrell nor Koehler directly reported the claim to a supervisor. Therefore, Labor Law §740 does not provide protection for reporting the condoning of workplace violence since plaintiffs never made a report. Plaintiffs' claims of whistleblower protection as it relates to condoning of workplace violence is dismissed.

CONCLUSION

Defendants' motion pursuant to CPLR 3211(a)(7) is granted to the extent that the complaint is dismissed as against defendants, Frances Schervier Home and Hospital, Bon Secours New York Health System, Inc. and Schervier Housing Development Fund Corporation.

Defendants' motion is granted to the extent that plaintiffs' claims to whistleblower protection are dismissed in their entirety as the claims relate to the alleged HUD building embezzlement, the threatened excavation disaster and the condoning of workplace violence. Defendants' motion is granted to the extent that the claims to whistleblower protection of plaintiff, Stephen Murrell, as the claims relate to an alleged false medical billing scheme and a false home care billing scheme, are dismissed. Defendants' motion is granted to the extent that the claims to whistleblower protection of plaintiff, Frank G. Koehler, as the claims relate to an alleged elopement danger, elopement cover-up and a patient abuse cover-up are dismissed. That branch of defendants' motion that seeks to strike allegations from the complaint is granted to the extent that plaintiffs are directed to serve an amended complaint that reflects the dismissal of the complaint against Frances Schervier Home and Hospital, Bon Secours New York Health System, Inc. and Schervier Housing Development Fund Corporation and dismissal of the individual claims of whistleblower protection dismissed hereinabove against the remaining defendant,

Schervier Nursing Care Center. within 30 days of service of this decision and order with notice of entry.

This is the decision and order of the Court.

Dated: 11/20/12

MARY ANN BRIGANTTI HUGHES, J.S.C.