

**Novak v St. Lukes-Roosevelt Hosp. Ctr., Inc.**

2012 NY Slip Op 30083(U)

January 11, 2012

Supreme Court, New York County

Docket Number: 100979/11

Judge: Louis B. York

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

PRESENT: Hon. L. York  
Justice

PART 2

Novak,

INDEX NO. 700979/11

MOTION DATE \_\_\_\_\_

- v -

St. Lukes-Roosevelt Hospital  
Center, et al.

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

Cross-Motion:  Yes  No

JAN 17 2012

Upon the foregoing papers, it is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ADVANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 1/17/12

Levy

**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X  
DANNA NOVAK,

Plaintiff,

Index No. 100979/11

-against-

**FILED**

ST. LUKES-ROOSEVELT HOSPITAL CENTER, INC.,  
PATRICIA CAREY, M.D., and EILEEN YOST, R.N.,  
Defendants.

JAN 17 2012

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
LOUIS B. YORK, J.:

Defendant moves to dismiss pursuant to CPLR 3211(a)(1). This is an action seeking reinstatement and damages for violation of New York Labor §741 (the Whistleblower Statue) and also invoking causes of action for *prima facie* tort and intentional infliction of emotional distress. For the reasons set forth *infra*, the Court denies dismissal of the portion of the motion pertaining to L.L. §741 and grants it as to *prima facie* tort and intentional infliction of emotion al distress..

**Factual Allegations**

Plaintiff, a registered nurse, was employed at St. Luke's-Roosevelt Hospital ("St. Luke's") in the emergency room (the "E.R."). Defendant Patricia Carey, M.D. was the medical director of the E.R. Defendant Eileen Yost, R.N. was a nursing manager of the E.R. and plaintiff's supervisor.

In August of 2009, a patient appeared in the E.R. and told plaintiff that he wanted to die and that he had very recently taken an overdose of morphine. He also stated that "my time has come." His vital signs were abnormal and his oxygen levels were extremely low.

Plaintiff recorded the patient's statements and determined that he was a potential suicide.

Nevertheless, the charge nurse ordered the patient out of the E.R.. Then the hospital staff refused treat the patient. The senior nurse on staff insisted that the patient was a homeless, manipulative drunk and a liar. No one examined him and when the patient started to leave, the senior nurse opened the door for him and invited him to leave. Later on, the patient was found motionless and rushed back to the E.R. where he was pronounced dead. An autopsy revealed that he died of massive amounts of morphine and other drugs. Although the Medical Examiner's Office sent word that it wished to speak to plaintiff, defendant Carey refused to give defendant the proper contact information, and spoke to him herself.

Because the plaintiff had complained orally and by e-mail, plaintiff was subjected to a continuing pattern of harassment by hospital staff. Plaintiff reported to defendants Yost and Carey about the harassment, to no avail. Plaintiff was told that Yost was overheard stating that she was attempting to "push out" plaintiff.

Plaintiff's dinner break was between 6 and 7 p.m. Shortly before her one-hour break, at 5:38 p.m., plaintiff conferred with one of the directors. To get to the meeting, they passed the charge nurse who saw them go into the corridor connected to the garage several yards past the E.R. room. Moreover, they were in plain sight of the security cameras, and security personnel saw her in conference with the doctor. Yet, no one attempted to call her back.

Plaintiff returned to her post a few minutes past 7:00 p.m. Subtracting her one hour dinner break, plaintiff had been gone from her assignment about ½ hour, not the two hours

she was accused of.

Plaintiff contends that defendants used this incident as a pretext for terminating her, even though plaintiff heretofore had an unblemished record over the twelve years she had worked as an E.R. nurse.

At the time of plaintiff's alleged abandonment of her patients, none of the patients were in medical danger and none was harmed by her brief absence.

Plaintiff's termination was upheld at the conclusion of both the Termination Hearing and the Grievance Hearing that followed it.

### **Defendants' Contentions**

Defendants have supported their motion to dismiss by asserting several contentions. Defendants contend that the complaint is bereft of the violation of any specific law, rule or regulation which is fatal to a cause of action based on Labor Law §741, the Whistleblower Statute. Also, under LL§741, claims against individual defendants must be dismissed because the statute is directed against employers only, and these individuals are employees. In addition, plaintiff's misconduct, alleges defendants, bars her from utilizing the Whistleblower Statute. Defendants also contend that LL§740(7) *inter alia* precludes the bringing the two tort claims she has asserted.

### **Decision and Opinion**

On a motion to dismiss, the Court's task is to decide whether based on the factual allegations taken together, the plaintiff has a cause of action, not whether he or she has

correctly pleaded one. Moreover, the allegations in the complaint are to be liberally construed (*511 W. 232 Owners' Corp. v Jennifer Realty*, 98 NY2d 144, 746 NYS2d 131 [2002]). All allegations of the complaint on such a motion must be taken as true and the plaintiff must be given the benefit of every possible inference, *id.*

Affidavits by the plaintiff supporting causes of action in the complaint may be considered, but defendants' affidavits may not. They are not considered documentary evidence for CPLR 321(a)(1) purposes (*Erepin v Fogarty*, 59 AD3d 837, 874 NYS2d 278 [3d Dept 2009]). Defendants' documents may be considered only if they conclusively refute the allegations in the complaint and unequivocally establish a defense as a matter of law (*Granada Condominium v Palomino*, 78 AD3d, 966, 315 NYS2d 688 [2d Dept 2010]).

Documents may be considered only if they conclusively refute the complaint's allegations and unequivocally establish a defense as a matter of law (*Granada Condominium v Palomino*, 78 AD3d 996, 913 NYS2d 688 [2d Dept 1010]). Affidavits, depositions testimony and letters are not considered documentary evidence, *id.* A good example of the kind of document acceptable in a pre-answer motion to dismiss is a deed, the contents of which can decide whether a particular property has an easement, *see, Crespin v Fogarty, supra.*

The defendants' affidavits and exhibits which consist of memos, the pleadings, the statement of Dana Novak, regarding December 29, 2010, letters, etc., do not satisfy the standards for the consideration of documentary evidence in this type of motion. They are not

[\* 6]

the kinds of documents that convey unequivocal information and none of them can be construed as conclusively proving the invalidity of plaintiff's claims. They are the types of documents that are more appropriate for a motion for summary judgment. Nevertheless, defendants' legal arguments will be considered to the extent they are not based on factual assertions.

Defendants claim that plaintiff's failure to allege a violation of any rule, regulation, law or declaratory ruling is fatal to her retaliation claim is not true. In her affidavit in opposition, plaintiff has successfully furnished any missing assertions. She asserts (1) the Board of Regents Rules §29(a) concerning the neglect and abandonment of the now deceased patient; (2) Board of Regents Rules §29(1)(2)(a) making a false report about a patient's status; (3) Penal Law §§120.20 and 120.25-conduct which created a substantial risk of death and/or serious physical injury; (4) Penal Law §125.10, engagement of hospital in criminal negligence causing the patient's death. Thus, whatever gap may have existed in plaintiff's prima facie case because of the absence of any allegation concerning the violation of a statute, regulation, rule or declaratory decision has been filled.

The New York courts have not ruled on whether L.L. 741 applies to individuals as well as companies. The Federal District courts have gone both ways (*Compare Geldzler v New York Med. College*, 746 F. Supp 618 [SDNY 2010] with *Suliman v Roswell Park Carver Institute*, 2008 WL 2690278 [WDNY 2008]). While New York cases have not yet dealt with this issue with respect to L.L. §741, the Court of Appeals has within the context

of Executive Law §296 which bars unlawful discrimination by an employer. In *Patrowich v Chemical Bank*, 63 NY2d 541 [1984], the Court held that the statute was applicable to individuals who possessed an ownership interest or have the authority to do more than carry out decisions of others. This Court can see no reason why similar reasoning may not be applied in a L.L. 741 case.

Interpreting the complaint in its most favorable light, a reasonable inference is that these individuals had more authority than just carrying out the decisions of others. It will remain for the fact-finder to determine the extent of the authority of Carey and Yost.

The defendants have seized upon the sixteen months between the beginning of the harassment of plaintiff and her filing of her grievance as waiving her Whistleblower claim. However, the plaintiff has alleged that she was complaining all along. Moreover, there was not a basis to file the L.L. 741 claim until she was actually terminated which occurred approximately 15 months after the harassment began.

Finally, L.L. §740(7) is pretty explicit that the filing of a L.L. §741 action under the statute waives any other claims that plaintiff might possess. This applies to the two tort claim causes of action in the complaint (*Pipas v Syracuse Home Assn.*, 226 AD2d 1097, 641 NYS2d 768 [4<sup>th</sup> Dept 1996]). As a result of this dismissal on the basis of waiver, the Court need not disclose the other grounds for dismissal of these tort actions, and it is

**ORDERED** that the causes of action for *prima facie* tort and for intentional infliction of emotional distress are dismissed; and it is further

**ORDERED** that the motion to dismiss the cause of action for L.L. §741 is denied.

I have considered defendants' remaining arguments and find them to have no merit.

Enter:

**FILED**

Dated: 1/11/12

JAN 17 2012

*Ley*  
\_\_\_\_\_  
Louis B. York, J.S.C. NEW YORK COUNTY CLERK'S OFFICE

**LOUIS B. YORK**  
J.S.C.