

**Baturone v Gracie Square Hosp.**

2012 NY Slip Op 33433(U)

September 26, 2012

Sup Ct, New York County

Docket Number: 100091/2012

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: \_\_\_\_\_
Justice

PART 61

Index Number : 100091/2012
BATURONE, JUAN, M.D.
vs.
GRACIE SQUARE HOSPITAL
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. \_\_\_\_\_
MOTION DATE \_\_\_\_\_
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/26/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER ... DO NOT POST ... FIDUCIARY APPOINTMENT ... REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
JUAN BATURONE, M.D.,

Plaintiff,

-against-

GRACIE SQUARE HOSPITAL, COLUMBIA  
PRESBYTERIAN HOSPITAL, and FRANK  
BRUNO, individually and as Chief Executive  
Officer of Gracie Square Hospital,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

Motions bearing sequence numbers 001 and 002 are consolidated for disposition.

Defendant Gracie Square Hospital (“the Hospital”) moves to dismiss the first and second causes of action of plaintiff’s complaint pursuant to CPLR 3211(a)(7), contending that plaintiff’s employment discrimination claims under New York State Executive Law section 296 and New York City Administrative Code section 8-502(a) were irrevocably waived by plaintiff’s institution of a Labor Law section 741 whistleblower claim. In addition, defendant contends that plaintiff’s discrimination claims are substantially time-barred.

In a separate motion, defendant Frank Bruno contends that, should the Court dismiss the first two causes of action – which are the only causes of action asserted

DECISION AND  
ORDER

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against him – the entire complaint should be dismissed, in its entirety, as against him. Plaintiff opposes both motions.

Plaintiff Juan Baturone, M.D. is a former employee of Gracie Square Hospital, which is affiliated with defendant New York Presbyterian Hospital. His employment began in September 1999, and ended in November 2011.

Plaintiff commenced this action by filing a summons and complaint on March 23, 2012. The complaint alleges that, during the course of his employment, Dr. Baturone was discriminated against because of his national origin and disability. According to the complaint, defendant Frank Bruno, the Chief Executive Officer of the Hospital, directed discriminatory remarks towards plaintiff relating to his ethnicity. Plaintiff alleges further that defendants violated New York State law, including Department of Health regulations regarding the maintenance of accurate and complete medical records and the proper functioning of patient safety and quality assurance committees, and fabricated documents, also in violation of state laws and regulations regarding medical records (Complaint, p. 4).

Plaintiff alleges that he was targeted because he noticed – and repeatedly complained of – a systematic trend of the Hospital engaging in unsafe and unlawful medical practices, including discharging patients prior to the time when it was medically appropriate and safe to do so and the deliberate falsification of patient medical records (Complaint, para. 22). The discriminatory remarks by Bruno allegedly

escalated in January 2010, when plaintiff objected to such practices (Complaint, para. 30).

Plaintiff contends that on November 9, 2011, defendants terminated his employment as retaliation; that defendants' actions were done maliciously and/or in reckless disregard of plaintiff's rights; and that defendants knew that their actions violated state and city civil rights laws.

The complaint sets forth three cause of action.

The first cause of action, against all defendants, alleges that defendants discriminated against plaintiff because of his age, national origin, and disability and retaliated against him for objecting to the illegal discrimination, in violation of Executive Law section 296.

The second cause of action, against all defendants, alleges that defendants have violated New York City Administrative Code section 8-502(a).

The third cause of action, which is against the hospitals only and not against Bruno, alleges that plaintiff objected to improper medical practices that violated New York State law and constituted a substantial health risk to patients; accordingly, defendants have violated New York State Labor Law section 741. Plaintiff seeks compensatory damages, punitive damages, and attorneys' fees.

Defendants filed an answer asserting six affirmative defenses.

The first affirmative defense asserts that plaintiff's causes of action under the

New York Executive Law and the New York City Administrative Code have been waived and must be dismissed pursuant to the election of remedies provision set forth in New York Labor Law section 740(7).

The sixth affirmative defense is that plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations.

#### Discussion

Defendants assert that the institution of a claim under Labor Law section 741 operates as an irrevocable waiver of every other statutory or common law claim based upon the same factual circumstances. Defendants point out that a Labor Law section 741 claim is prosecuted under Labor Law section 740. The irrevocable election of remedies is found in Labor Law section 740(7).

“The commencement of a retaliatory discharge action under the health care whistleblower law acts as an election of remedies, waiving other causes of action relating to the discharge, irrespective of the disposition of such claims” (53 N.Y.Jur.2d Employment Relations section 602, citing Pipia v. Nassau County, 34 A.D.3d 664 [2d Dept., 2006]).

Accordingly, it is hereby

ORDERED that defendant Gracie Square Hospital's motion to dismiss is granted, and the first and second causes of action of the complaint are dismissed; and it is further

ORDERED that the motion of defendant Frank Bruno to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety as against Frank Bruno, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further


ORDERED that the caption is amended to reflect the dismissal and that all future papers filed with the court bear the amended caption and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on NOVEMBER 14<sup>TH</sup>, 2012, at 9:30 a.m.

Date: 9/26/12  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE