[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO S. HAGLER, J.S.C. PART 17

Justice

Index Number : 115341/2010
MOKRUE, M.D., CHONLADA
vs
COMPREHENSIVE CARE
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision/Order.

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

Dated: 5/9/13

SHLOMO S. HAGLER, J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [X] 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 17

----------X

CHONLADA MOKRUE, M.D.,

Plaintiff,

Index No. 115341/10

-against-

COMPREHENSIVE CARE MANAGEMENT CORP., a/k/a CCM, BETH ABRAHAM HEALTH SERVICES, a/k/a THE BETH ABRAHAM FAMILY OF HEALTH SERVICES, ABC CORP., and XYZ LLC.,

DECISION/ORDER

Defendants.

Hon. Shlomo Hagler, J.S.C.:

In this action brought under New York's "whistleblower" statutes, Labor Law §§ 740 and [illegible] Beth Abraham Health Services, a/k/a the Beth Abraham Family of Health Services ("Beth Abraham") and Comprehensive Management Corporation a/k/a CCM ("CCM") move for an order pursuant to CPLR § 3212 seeking summary judgment dismissing the complaint. Plaintiff Chonlada Mokrue, M.D. ("plaintiff" or "Dr. Mokrue") opposes the motion.

I. Background

Beth Abraham is a not-for-profit entity providing rehabilitation, home care and nursing home services for geriatric patients. CCM manages Beth Abraham's healthcare services, including a program called the Program for All Inclusive Care for

the Elderly ("PACE"), which allows patients to receive comprehensive healthcare in their homes.

Plaintiff was employed by CCM from February 2009 to July 2010, as a geriatric physician in the PACE program, at a CCM site located at 375 Grand Street in Manhattan. Plaintiff was supervised until early 2010 by CCM Medical Director D. Jonathan Gold ("Dr. Gold"), and then by Dr. Wayne Lee ("Dr. Lee"), when Dr. Gold retired.

This action arises from two occasions where plaintiff reported to her supervisors what she believed were instances of diversion of medications by William Rosa ("Rosa"), a Community Health Nurse who worked on plaintiff's PACE team. One instance involved the drug Cymbalta, which had been prescribed to one of plaintiff's patients, but which prescription plaintiff had discontinued for that patient in December 2009. Plaintiff claims that the prescription was reordered by another physician on Rosa's request in January 2010.

The second incident occurred in March 2010 when plaintiff discovered that a patient's Neurontin was missing. Plaintiff asked Rosa about her suspicions and was told that the order was never received.

Plaintiff reported these incidents to her supervisors, Sands, Dr. Yo and Dr. Gold because she was concerned that Rosa

was misappropriating prescription medications. Plaintiff believed her concerns were dismissed without defendants CCM and Beth Abraham conducting a meaningful investigation. Plaintiff then notified Dr. Lee, who was preparing to take over for Dr. Gold, who also was not concerned.

In March, 2010, CCM's Chief Corporate Compliance Officer Joan Hogarth ("Hogarth") received an anonymous letter alleging that Rosa had misappropriated medications. Hogarth undertook an investigation, involving interviews with 10 CCM employees, including plaintiff and Rosa, and a review of pharmacy procedures. Hogarth apparently encouraged Dr. Mokrue to uncover any facts which might help the investigation.

On May 4, 2010, Hogarth drafted a compliance report which described her investigation, concluding that she was unable to substantiate the allegations against Rosa. Hogarth made recommendations in the report aimed at improving the tracking of medications. She also recommended that Rosa be put on a Performance Improvement Plan for six months to monitor his understanding and compliance with medical disposal policy.

Hogarth informed plaintiff that she had been unable to substantiate plaintiff's suspicions concerning Rosa. On June 4, 2010, at plaintiff's request, all patients which plaintiff and Rosa shared were reassigned to other physicians, so that plaintiff would no longer have to work with Rosa.

In her complaint, plaintiff claims that she was subject to retaliation for her complaints to management from co-workers, particularly Rosa and Rosa's supervisor, Veronica Mahoney ("Mahoney"). Plaintiff claims that she heard, through a third party, that Rosa and Mahoney were insulting her. Mahoney allegedly told "people" at the facility that plaintiff was too young to make medical decisions. Plaintiff claims that her complaints about these statements were ignored by management.

Plaintiff sets forth a litany of incidents which she claims shows the hostility under which she was forced to work after the failed investigation. Mahoney allegedly ordered a urinalysis of a patient without plaintiff's approval. Rosa put plaintiff on speaker phone in front of patients. On one occasion, Rosa allegedly went over plaintiff's head for routine directions concerning the care of one of plaintiff's patients.

Plaintiff also learned through the third party that Sands, Mahoney and Rosa were allegedly mocking her, by calling her a munchkin. Plaintiff complained on several occasions to management about these alleged indignities, but received no satisfactory response. Plaintiff further claims that, at that time, "staff was not responding to me" and that she was being "avoided by team members who I relied upon to support me in providing patient care." (See Affidavit of Dr. Mokrue, sworn to on September 14, 2012 at ¶ 23).

Based on the "hostile and callous way" plaintiff was allegedly being treated by the staff after the investigation (*id.* at 6), and despite the reassignment of patients, plaintiff submitted her resignation on June 23, 2010. Plaintiff apparently had lined up a new job at this point. Dr. Lee offered to transfer plaintiff to another CCM site in order to retain her, and then offered to compete with the salary plaintiff would be receiving at her new job. While plaintiff held off her resignation for several weeks at CCM's request, she eventually found both options offered to her unacceptable, and resigned on July 30, 2010.

II. Discussion

A. Summary Judgment

Plaintiff commenced this action under Labor Law §§ 740 and 741, claiming that she had been treated in a hostile manner, and constructively terminated from her position with CCM, in retaliation for her attempts to get CCM's management to recognize Rosa's alleged misappropriation of medications. Defendants now move for summary judgment dismissing the complaint, on the ground that plaintiff cannot meet the standards set forth in Labor Law §§ 740 and 741.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-*

Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

B. Claim Under Labor Law § 740

Labor Law § 740, which deals with retaliatory personnel actions by employers, states, in pertinent part as follows:

> 2. 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 ... .

A "retaliatory personnel action" is defined as "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(1)(e). In order to make a claim under Labor Law § 740, a plaintiff must

allege "with the requisite particularity and specificity" that there was an actual violation of a law, rule or regulation. *Freese v Willa*, 89 AD3d 795, 796 (2d Dept 2011). A reasonable belief in a violation of law does not suffice; the violation must be actual. *Bordell v General Electric Co.*, 88 NY2d 869 (1996); *Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 288 AD2d 350 (2d Dept 2001). Further, "even assuming that the alleged conduct constituted a violation of law, rule or regulation," the proof must show a "'*substantial* and specific danger to the public health.'" *Peace v KRNH, Inc.*, 12 AD3d 914, 915 (3d Dept 2004), quoting Labor Law § 740(2)(a). As the Court stated in *Peace*, "[t]he statute at issue clearly envisions a certain quantum of dangerous activity before its remedies are implicated." *Id.*

In the present matter, plaintiff has alleged a speculative compilation of laws she claims defendants might have violated, such as sections of the New York Penal Law concerning various degrees of larceny; Article 260 of the New York Penal Law, which is entitled "Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons " (Plaintiff's Memo. of Law at 27); New York Penal Law § 178.20, which is concerned with the criminal diversion of prescription medication, where the value exchanged is in excess of $3,000; 8 NYCRR 29.2(a)(3), relating to record keeping for patients which "reflects the evaluation and treatment

of the patient," and section 29.14, which deals with nursing misconduct with regard to, inter alia, 8 NYCRR 29.2; and Education Law §§ 2509(9) and 6511, concerned with professional misconduct of licensed individuals in general. Plaintiff also makes broad allegations of health care fraud.

Plaintiff has failed to make out a case under Labor Law § 740. First, she has put forth no *actual* violation of any law, rule or regulation which occurred as a result of Rosa's alleged misdirection of medications to himself. It is noteworthy that Dr. Mokrue neither alleges nor presents proof that any patient did not receive his or her medications as a result of Rosa's alleged misconduct. Second, even if there was proof that Rosa misdirected medication to himself on two occasions (which was never determined), this does not amount to a "substantial and specific danger to the public health or safety." *See Easterson v Long Island Jewish Medical Center*, 156 AD2d 636, 637 (2d Dept 1989)(violation under Labor Law § 740 must affect the "public-at-large"). Rosa's actions do not appear to have harmed anyone for purposes of the statute. In fact, any misinformation which may make its way into a patient's file is not actionable as a substantial danger to the public health and safety.

Clearly, the indignities allegedly aimed at plaintiff by her co-workers were not "retaliatory personnel actions" on the part of defendants, as that term is defined by statute. Nor has

plaintiff alleged "retaliatory personnel action" on the part of defendants as a result of their alleged failure to stop CCM personnel from mocking plaintiff behind her back,[1] putting her on speaker phone or going over her head.

Moreover, plaintiff has not shown a retaliatory constructive discharge because plaintiff has failed to allege facts to support an inference that "defendants deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *See Mascola v City University of New York*, 14 AD3d 409, 410 (1st Dept 2005)(in context of discrimination action); *see also Lumpkin v H.E.L.P. USA*, 2005 WL 839669, *4, 2005 US Dist LEXIS 6227, *12 (ED NY 2005), *affd* 176 Fed Appx 201 (2d Cir 2006)(constructive discharge in discrimination context shown when employer "rather than discharging [an employee] directly, intentionally creates a work atmosphere so intolerable that he [or she] is forced to quit involuntarily"). In reality, plaintiff chose not to accept alternative arrangements provided by CCM which would potentially

---

[1]Plaintiff's unsupported claim that another person told her what other persons were saying about plaintiff is double hearsay, and is insufficient on its own to oppose a summary judgment motion. *See Sullivan v Harnisch*, 100 AD3d 513 (1st Dept 2012)(hearsay evidence may be considered on a summary judgment motion only if there is other viable evidence available to create a question of fact). Plaintiff has no viable evidence as to the charges that her co-workers were mocking her.

have solved her problems with staff at that location. *See Polidori v Societe Generale Groupe*, 39 AD3d 404 (1st Dept 2007).

C. Claim Under Labor Law § 741

Plaintiff also may not recover under Labor Law § 741. Labor Law § 741, in pertinent part, states that:

> 2. Notwithstanding any other provision of law, no employer shall take retaliatory action against any employee because the 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 or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care ... .

"Retaliatory action" is defined as "the discharge, suspension, demotion, penalization or discrimination against an employee ... in the terms and conditions of employment." Labor Law § 741(1)(f). "Improper quality of patient care" is:

> any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or safety or a significant threat to the health of a specific patient.

Labor Law § 741(1)(d).

A claim under Labor Law § 741(2) "'differs from a cause of action alleging a violation of Labor Law § 740(2) in that such a complaint is required to allege only a good faith, reasonable belief that there has been a violation of the applicable standards, rather than an actual violation.'" *Minogue v Good*

Samaritan Hospital, 100 AD3d 64, 70 (2d Dept 2012), quoting *Pipia v Nassau County*, 34 AD3d 664, 666 (2d Dept 2006). However, a complaint asserting a violation of Labor Law § 741(2)(a) must still allege conduct that constitutes improper quality of patient care as defined in Labor Law § 741(1)(d). *Id.*

Here, nothing Rosa is alleged to have done rises to the level of "improper quality of patient care" as defined in Labor Law § 741(1)(d), which requires the alleged violation to be related to matters which may "present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient." As set forth above, the alleged misdirection of two prescriptions cannot cause a "substantial" danger to the *public* health or safety. It is also uncontroverted that no specific patient lacked for medicine due to Rosa's alleged wrongdoing.

Plaintiff has also failed, as set forth above, to show sufficient "retaliatory action" on defendants' part. Failing to stop plaintiff from being mocked, or even marginalized, if that is how she felt, is not retaliatory conduct as set forth above in the statute. As stated above, plaintiff has also failed to show that she was constructively discharged. Dr. Mokrue's Labor Law § 741 claim is dismissible on this ground alone.

In addition, plaintiff has not shown that defendants failed to act in response to her complaints concerning Rosa's behavior;

rather, an investigation was conducted, and certain remedial actions were taken. Plaintiff unhappiness with those results does not show that there was a failure to act.[2]

III. Conclusion

Accordingly, it is

ORDERED, that the motion for summary judgment dismissing the complaint brought by defendants Beth Abraham Health Services, a/k/a the Beth Abraham Family of Health Services and Comprehensive Management Corporation a/k/a CCM, is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment dismissing this action accordingly.

The forgoing constitutes te decision and order of this Court.

Dated: May 9, 2013

FILED
ENTER:
MAY 20 2013
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
SHLOMO HAGLER
J.S.C.

[2]This is certainly not to say that Rosa's alleged misconduct, if proven, would be anything but despicable, and possibly criminal behavior. However, Labor Law §§ 740 and 741 are not intended as a means of prosecuting any party for his or her misdeeds, if they do not implicate the specifics of the statutes.