

Blashka v New York Hotel Trades Council

2013 NY Slip Op 32679(U)

October 9, 2013

Sup Ct, New York County

Docket Number: 113112/10

Judge: Nancy M. Bannon

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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. NANCY M. BANNON

PRESENT: _____
Justice

PART 42

Robert Blaskka DDS

INDEX NO. 113112/10

-v-

MOTION DATE _____

The New York Hotel Trades Council et al.

MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, 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). _____

Upon the foregoing papers, it is ordered that this motion is for summary judgment dismissing the complaint, is granted, and the complaint is dismissed as against defendant The New York Hotel Trades Council and Hotel Association of New York City Health Center Inc., pursuant to the Decision and Order dated October 9, 2013, attached.

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

FILED

OCT 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/9/13

NMB, J.S.C.
HON. NANCY M. BANNON

- 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
NEW YORK COUNTY - PART 42

-----X
ROBERT BLASHKA, D.D.S.,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 113112/10

THE NEW YORK HOTEL TRADES COUNCIL AND
HOTEL ASSOCIATION OF NEW YORK CITY HEALTH
CENTER, INC., HOTEL ASSOCIATION OF NEW YORK
CITY, INC., individually and jointly as Administrators and
Trustees of the EMPLOYEE BENEFITS FUNDS,

Defendants.

FILED

-----X
NANCY M. BANNON, J.

OCT 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

Introduction

In this action to recover damages for an alleged violation of Labor Law § 741, the “Health Care Employee Whistleblower Act”, defendant The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. (“The Health Center”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Counsel for The Health Center answered for the co-defendant Hotel Association of New York City, Inc., which denied service of the summons and complaint. Since counsel for The Health Center did not move to dismiss based on lack of personal jurisdiction or assert this affirmative defense in the answer, it waived this defense. See CPLR 3211(e).

After oral argument, a review of the papers submitted by the parties, and consideration of the applicable law and facts, The Health Center's motion is granted and the complaint is dismissed as against it.

Background

The plaintiff was hired by The Health Center in April of 2005 as a quality assurance dentist assigned to The Health Center's facility in Queens, New York, which treated hotel workers and their families. In November of 2005, the plaintiff was promoted to the position of Dental Director at The Health Center's Brooklyn facility. In 2007, the plaintiff was given a written reprimand for using racist language and was warned that he would be terminated if he used such language again. In February of 2009, the plaintiff received a written warning from the Health Center after he aggravated, instead of defused, a dispute between two staff members. On February 25, 2009, the plaintiff signed a memorandum acknowledging that "[i]f [his] unsatisfactory performance continues, further corrective action will occur, up to and including termination of employment." In July of 2009, the plaintiff was terminated after he allowed a dentist at The Health Center to treat a patient after he saw that dentist drinking alcohol on his lunch hour.

In October of 2010, the plaintiff commenced this action under the health care employees' "whistleblower" statute, Labor Law § 741, alleging that he was removed from his position for having complained about practices of The Health Center relating to the quality of patient care, including its failure to terminate the dentist who had a drinking problem. In his complaint, the plaintiff did not cite any law, rule, regulation or declaratory ruling adopted pursuant to law that

he in good faith believed had been violated by The Health Center. The Health Center now moves for summary judgment on that ground and further asserts that the plaintiff's termination was attributable to his overall management ability and not just to the incident involving the dentist who drank alcohol during his lunch hour.

In support of its motion, The Health Center submits the affidavit of its Director of Human Resources, William Torres, the pleadings, a memorandum of law, and several memoranda written by The Health Center documenting and criticizing the plaintiff's management skills in connection with incidents in 2007 and 2009.

In his affidavit, Mr. Torres states that the plaintiff: 1) had recommended the termination of two dentists in 2007 or 2008 without any retaliation against him; 2) made inappropriate comments to employees of The Health Center in 2007, for which he received a warning; 3) aggravated a conflict between employees of The Health Center in 2009 when he could have defused the situation, for which he received another warning; and 4) admitted that he allowed the dentist with the drinking problem to return to work after he saw the latter drinking on his lunch hour.

The plaintiff opposes the motion, asserting that he was fired for disclosing an illegal activity permitted by The Health Center. He further asserts that The Health Center's contention that he was fired due to his overall management skills is without merit and that the prior warnings he received were a "mere pretext" for his firing. The plaintiff further asserts that Dr. Robert Greenspan, the Health Center's Chief Medical Officer during the time of his employment, and Mr. Torres allowed the dentist with the drinking problem to return to work after alcohol rehabilitation without first confirming that he was fit to resume his employment.

In opposing the motion, the plaintiff submits an attorney affirmation, the deposition transcript of Dr. Greenspan and the exhibits thereto, the deposition transcripts of Mr. Torres and the plaintiff, and a memorandum of law.

At his deposition, the plaintiff stated that he “thought” he was fired a result of Dr. Greenspan retaliating against him, but that he “can’t prove it.” He also admitted that he did not know whether Dr. Greenspan was involved in the decision to terminate him. Nor could he state a precise reason why he was fired. Dr. Greenspan testified that the plaintiff was terminated because he had a “checkered past” as a result of prior incidents involving his management skills and that he was “ultimately terminated” because he allowed a dentist with an alcohol problem to return to work after he observed that dentist drinking on his lunch hour. Mr. Torres testified that the plaintiff told him that a dentist at The Health Center had a drinking problem, that the dentist had consumed alcohol on his lunch break, and that the plaintiff did not prevent the dentist from returning to work after his lunch hour.

Discussion

Labor Law § 741(2)(a) prohibits retaliation against an employee who “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.” Reddington v Staten Is. Univ. Hosp., 11 NY3d 80, 92 (2008); see Webb-Weber v Community Action for Human Services, Inc., 98 AD3d 923 (1st Dept 2012); Depshpande v Medisys Health Network, Inc., 70 AD3d 760 (2nd Dept. 2010). “‘Improper quality of patient care’ means, with respect to patient care, 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 and safety or a significant threat to the health of a specific patient.” Labor Law § 741(1)(d). In order to establish a cause of action pursuant to Labor Law § 741, the plaintiff must cite a “law, rule, regulation or declaratory ruling adopted pursuant to law” that defendants violated. Labor Law § 741 (1)(d); Webb-Weber v Community Action for Human Services, Inc., 98 AD3d 923 (1st Dept 2012). Assuming that this pleading requirement is met, the plaintiff must also establish that his termination was based on retaliation for disclosures he made about safety issues at The Health Center. See Minogue v Good Samaritan Hosp., 100 AD3d 64 (2nd Dept 2012).

It is well settled that the proponent of a summary judgment motion is entitled to that relief upon a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof in admissible form to eliminate any material issues of fact. Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Here, the defendant established its *prima facie* entitlement to summary judgment and the plaintiff has failed to raise any triable issue of fact in opposition.

The Health Center has established its *prima facie* entitlement to judgment as a matter of law by submitting, *inter alia*, the plaintiff’s complaint, which fails to cite any “law, rule, regulation or declaratory ruling adopted pursuant to law” (Labor Law § 741[1][d]) that he “in good faith, reasonably believe[d]” to have been violated by The Health Center. Labor Law § 741(2)(a); see King v New York City Health and Hosps. Corp., 85 AD3d 631 (1st Dept 2011); Luiso v Northern

Westchester Hosp. Ctr., 65 AD3d 1296 (2d Dept 2009). Further, since The Health Center demonstrated that the plaintiff had been warned on two previous occasions that his management skills were wanting and that he could be terminated if they did not improve, and the plaintiff subsequently allowed a dentist to return to work after consuming alcohol on his lunch hour, it established “a defense that the [plaintiff’s firing] was predicated upon grounds other than the [plaintiff’s] exercise of any rights protected by [section 741].” Labor Law § 741(5); see Luiso v Northern Westchester Hosp. Ctr., *supra*.

In response, the plaintiff failed to raise a triable issue of fact regarding whether his complaint alleged any “law, rule, regulation or declaratory ruling adopted pursuant to law” (Labor Law § 741[1][d]) that he “in good faith, reasonably believe[d]” to have been violated by The Health Center. Labor Law § 741(2)(a). Despite the plaintiff’s contention that he was “informed” that The Health Center may have violated the Education Law or the Rules of the Board of Regents, he fails to state that this was his own reasonable belief, as required by Labor Law § 741(2)(a). Nor does he state who informed him of this fact or when. Therefore, he has failed to raise a material issue of fact in that regard and otherwise fails to raise any factual issue warranting a trial. See Luiso v Northern Westchester Hosp. Ctr., *supra*. Although plaintiff maintains that he was terminated for complaining about The Health Center’s practices relating to the quality of patient care, including its failure to terminate the dentist who had a drinking problem, he admitted at his deposition that he “thought” he was fired a result of Dr. Greenspan retaliating against him, but that he “can’t prove it.” Nor could he state a precise reason for his termination. It is well settled that such speculation is insufficient to defeat a motion for summary judgment. See The Humane League of Philadelphia, Inc. v Berman

and Co., 108 AD3d 417 (1st Dept 2013). Indeed, the credible evidence submitted on the motion indicates that the plaintiff's own conduct posed a threat to The Health Center's patients.

Accordingly, it is:

ORDERED that the motion by defendant The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. is granted and the complaint is dismissed as against it with costs and disbursements to that defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that counsel for the plaintiff and the Hotel Association of New York City, Inc. shall appear for a pretrial conference on November 6, 2013, at 2:30 p.m.

Dated: October 9, 2013

FILED
OCT 28 2013
NEW YORK
COUNTY CLERK'S OFFICE



NANCY M. BANNON, A.J.S.C.