Ryan v New York City Health & Hosps. Corp.
2018 NY Slip Op 31356(U)
June 28, 2018
Supreme Court, New York County
Docket Number: 152457/17
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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RENEE RYAN,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, HARLEM HOSPITAL CENTER OF NEW YORK CITY, DC37 LOCAL UNION 1549, MARTHA A. JONES, in her individual and official capacity, DAVID NADAL, in his individual and official capacity, JOHN AND JANE DOES 1-10, individually and in their official capacities, and XYZ CORP. 1-10,

Defendants.

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Index No. 152457/17
Motion Sequence 003

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Plaintiff Renee Ryan (Plaintiff) moves pursuant to CPLR 2221(d)[1] to partially reargue the court's December 15, 2017 decision and order in this case (Prior Order), which, among other things, dismissed Plaintiff's Labor Law 740 claims. Defendants New York City Health and Hospital Corporation and Martha Jones (collectively, Defendants) oppose and cross-move to reargue that part of the court's Prior Order which denied Defendants' motion to dismiss Plaintiff's retaliation claims brought under the New York State Human Rights Law and the New York City Human Rights Law.[2]

As set forth in more detail in the court's Prior Order, Plaintiff alleges that on July 3, 2014 she was assaulted by defendant Jones while both were working at Harlem Hospital. Plaintiff continued to work after the assault, but allegedly experienced significant pain due to her injuries.

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[1] CPLR 2221(d) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

[2] See Executive Law 296, et seq., NYC Administrative Code 8-107, et seq.

About a year later Plaintiff did stop working after her doctor ordered her not to report to work. During that time period Plaintiff filed written complaints regarding Harlem Hospital's alleged conduct, and in early 2016 commenced a federal lawsuit against Jones and Harlem Hospital, among others. By letter dated December 21, 2016, Harlem Hospital terminated Plaintiff's employment. Thereafter Plaintiff's federal lawsuit was dismissed.

Plaintiff commenced this action on March 15, 2017.[3] Defendants moved to dismiss, and in its Prior Order the court struck the majority of Plaintiff's claims, including her civil assault, civil battery, negligence, negligent supervision, breach of contract, fraud, and whistleblower (Labor Law 740) claims. The court sustained Plaintiff's causes of action under the New York State Human Rights Law and the New York City Human Rights Law.

Plaintiff argues that the court should not have dismissed her whistleblower claims because Plaintiff identified a "substantial and specific danger to the public safety", namely defendant Jones' aggressive and dangerous behavior towards Plaintiff and other hospital employees. The court disagrees. Even if Jones did assault Plaintiff and other hospital employees as alleged, this does not constitute the "danger to the public safety" contemplated by Labor Law 740. For this reason, Plaintiff's motion to reargue must be denied.

Labor Law 740 was designed to prevent health care employers from taking retaliatory action against a health care employee who "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." Labor Law 740(2)(a). To proceed with

[3] By stipulation dated September 20, 2017 Plaintiff discontinued this action as against defendant DC37 Local Union 1549.

a claim under Labor Law 740, a plaintiff must identify the "substantial and specific danger to the public health and safety" that was disclosed or threatened to be disclosed. *Id.*

For example, in *Webb-Weber v Community Action for Human Services, Inc.*, 23 NY3d 448, 452 (2014), the plaintiff registered complaints about a not-for-profit corporation that provided social services to disabled persons which she claimed endangered the welfare and safety of patients. Her allegations included the falsification of patient medication and treatment records, inadequate fire safety, mistreatment of residents, and deficiencies in patient care and in the facility itself. In *Demir v Sandoz Inc.*, 155 AD3d 464, 465 (1st Dept 2017), the plaintiff reported that defendants' procurement of chemicals to manufacture pharmaceuticals violated FDA regulations. And in *Ruiz v Lenox Hill Hospital*, 146 AD3d 605, 605 (1st Dept 2017), the plaintiff alleged that a doctor at Lenox Hill hospital began signing medical procedure reports for procedures which he had neither performed nor witnessed, contrary to the usual practice of having the performing physicians sign those reports. In all of these cases, the plaintiffs were permitted to proceed with their Labor Law 740 whistleblower claims.

Assault cases like this one fall outside of the scope of the statute. *See Diaz v New York State Catholic Health Plan, Inc.*, 133 AD3d 473, 474 (holding that assault and battery by a supervisor is not a practice that creates a specific danger to the public under Labor Law 740); *Barber v. Von Roll U.S.A., Inc.*, 2015 US Dist. LEXIS 112198, *39 (SDNY Aug. 25, 2015) (allegations of "escalating threatening behavior" and the "danger of a mass shooting" based upon an employee's verbal threats and the displaying of ammunition on his desk "simply do not rise to the level of danger to public health and safety required by the statute"). Plaintiff alleges that this case is different because she was not the only assault victim. But as the court stated in its Prior Order, the danger must extend beyond a potential for harm to hospital employees, even several

employees, and into a potential for harm to the public at large. *See Slay v Target Corp.*, 2011 US Dist. LEXIS 82515, *12 (SDNY July 20, 2011). Plaintiff's allegations do not meet this requirement.

With respect to Defendants cross-motion, Plaintiff argues that Defendants' cross-motion is untimely (*see* CPLR 2221(d)(3)). However, since it was Plaintiff who first raised the issue of reargument, it is only fair that the court consider its Prior Order in its entirety. Of course, even where a motion for reargument is technically untimely, a court has discretion to reconsider any of its prior rulings. *See HSBC Bank USA, N.A. v Halls*, 98 AD3d 718, 721 (2d Dept 2012); *Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 165 (1st Dept 2004); CPLR 2004; *see also Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 20 (1986).[4] The court deems it prudent to exercise that discretion here.

Defendants assert that retaliation claims brought under the State and City Human Rights Laws are barred by the election of remedies doctrine when a retaliation claim has been asserted under Labor Law 740. In this regard, Labor Law 740(7) provides that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." The first clause of that same sentence provides that "[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract." *Id.* For some times these seemingly competing clauses led to divergent rulings about the scope of this election of remedies provision. *Reddington v Staten Island University Hospital*, 511 F.3d 126, 134 (2d Cir. 2007).

[4] Plaintiff's only argument with respect to Defendants' cross-motion is that it is untimely.

The Court of Appeals settled the issue in *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 87 (2008), making it clear that "instituting an action [under Labor Law 740] – without anything more – triggers waiver". *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 87 (2008). The waiver cannot be avoided even if a plaintiff were to amend her complaint by withdrawing her Labor Law 740 claim, or as in this case, where the court dismissed such claims by order after motion practice. *See Bones v Prudential Fin., Inc.*, 54 AD3d 589, 589 (1st Dept 2008); *see also Maccagno v Prior*, 78 AD3d 549, 549 (1st Dept 2010). The waiver applies to *retaliation* claims brought under state antidiscrimination laws, but does not apply to *discrimination* claims brought because of a plaintiff's disability. *See Demir v Sandoz Inc.*, 155 AD3d 464, 466 (1st Dept 2017) (Election of remedies does not bar a discrimination claim under State Human Rights Law because "in alleging discrimination on account of plaintiff's [disability], plaintiff does not seek the same rights and remedies as she does in connection with her whistleblowing claim, notwithstanding that both claims allege that she was wrongfully terminated."); *Sciddurlo v Fin. Indus. Reg. Auth.*, 144 AD3d 1126, 1127 (2d Dept 2016) ("waiver provision of Labor Law §740(7) does not bar the plaintiff's age discrimination claims"); *Knighton v Municipal Credit Union*, 71 AD3d 604, 605 (1st Dept 2010) ("In this action for wrongful termination, grounded on charges of disability discrimination and whistleblower retaliation, plaintiff's assertion of a claim for retaliatory termination pursuant to Labor Law §740(7) did not require the dismissal of her causes of action based on disability discrimination."); *see also Collette v St. Luke's Roosevelt Hosp.*, 132 F. Supp. 2d 256, 274 (SDNY Feb. 27, 2001) (waiver applies only to rights and remedies concerning whistleblowing).

In sum, Plaintiff's decision to institute a Labor Law 740 claim requires the dismissal of her retaliation claims. This rule applies even though her Labor Law 740 claim was deemed unactionable.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to reargue is denied, and it is further

ORDERED that Defendants' motion to reargue is granted, and upon reargument, Defendants' motion to dismiss Plaintiff's retaliation claims is granted; and it is further

ORDERED that Plaintiff's second and fourth causes of action contained within the amended complaint (NYSCEF Doc. 39) are hereby severed and dismissed; and it is further

ORDERED that the remaining causes of action shall continue; and it is further

ORDERED that counsel shall appear for a preliminary conference in Part 30 (60 Centre Street, Room 300) on July 23, 2018 at 9:30AM.

The Clerk of the court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 6.28.18

SHERRY KLEIN HEITLER, J.S.C.