SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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VIRGINIA MARTINEZ,

Plaintiff,

-against-

JEROME MEDICAL, PLLC, HECTOR FLORIMON, and JASON FAENA,

Defendants.

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TRIAL/IAS PART: 10

NASSAU COUNTY

Index No: 612237-18
Motion Seq. No. 5
Submission Date: 10/7/19

Papers Read on these Motions:
Affirmation in Support with Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition.....x
Reply Memorandum of Law.....x

This matter is before the Court on the motion filed by defendants Jerome Medical, PLLC, Hector Florimon, and Jason Faena (collectively, "Defendants"). For the following reasons, Defendants' motion is denied. The parties are reminded of the appearance scheduled for December 13, 2019 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Defendants seek an Order 1) dismissing this action pursuant to CPLR § 3211(a)(7) and New York Labor Law § 740 for failure to state a cause of action against Defendants, 2) imposing monetary sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1 or alternatively, 3) consolidating plaintiff Virginia Martinez's ("Plaintiff" or "Dr. Martinez") claim in the pending matter of *Martinez v. Jerome Medical, PLLC, et. al.*, Queens County Index No. 712625-19 (the "Queens

Action") with her remaining claim in this action. Dr. Martinez opposes Defendants' motion to dismiss and for sanctions but does not oppose Defendants' motion to consolidate.

B. The Parties' History

The parties' history is set forth in detail in the Court's respective Decisions and Order dated March 11, 2019 ("March Order"), May 22, 2019 ("May Order") and September 24, 2019 ("September Order"), all of which are incorporated by reference as if set forth fully herein. The Amended Verified Complaint alleges as follows:

Dr. Martinez is a duly licensed, board certified physician in New York specializing in family medicine. From July 1, 2010, through September 8, 2018, Dr. Martinez was employed by Jerome Medical, PLLC ("Jerome Medical"), an entity formed and licensed to practice medicine in New York with an office located in the Bronx. Hector Florimon ("Dr. Florimon"), is a duly licensed physician practicing medicine in New York and the sole owner of Jerome Medical. Jason Faena ("Faena") was and is an employee of Jerome Medical.

On or about May 19, 2010, Dr. Martinez began her employment with Jerome Medical pursuant to a written agreement. On September 8, 2018, Dr. Martinez involuntarily terminated her employment due to "impossible working conditions." Based on the illegal and/or unethical conduct that Dr. Florimon created or permitted, Dr. Martinez was compelled to file complaints with the New York Attorney General's Medical Fraud Unit and the Office of Professional Misconduct.

Dr. Florimon encouraged and condoned illegal, unethical, and/or unprofessional acts of Jerome's Medical employees. Faena photocopied and appended Dr. Martinez's signature on Form MIIQs and photocopied her signature on other documents without her knowledge or consent, and ordered unnecessary home care for Jerome Medical's patients. After Dr. Martinez confronted Faena about photocopying her signature, Jerome Medical's staff improperly and secretly erased information from patient charts. Jerome Medical's staff members directed patients to file complaints with insurance providers and government agencies falsely claiming that Dr. Martinez acted improperly as their doctor even though the patients and staff members knew this was untrue. The staff members also hid important patient information from Martinez

to the detriment of patients. A patient asked Dr. Martinez if she was gay, which the patient only could have known if told by one of the staff members.

Additionally, Defendants and staff members 1) falsely told patients that Dr. Martinez did not want to see them, 2) hid information from Dr. Martinez regarding Jerome Medical's business operations so she did not know what was occurring with the medical practice or patients, 3) falsely told patients that Dr. Martinez missed performing tests for patients and/or patient follow-up appointments, 4) called patients and told them to come in early so they would need to wait for their appointments with Dr. Martinez, 5) falsely told patients that Dr. Martinez denied services to them, and 6) provided MIIQ forms to patients and told patients that Dr. Martinez would suggest they use Royal Company for home care, then told patients that they should not accept services from Royal Company and directed them to request specific other companies. Defendants also called a gastroenterologist assistant and advised him or her of operational problems or other clinic issues to coerce the assistant to take their side on disputes. On a daily basis, patients screamed at Dr. Martinez and threatened to sue her for referrals, follow-ups, transportation, home aides, and equipment at the direction of Jerome Medical's staff. A staff member instructed a patient not to complete her laboratory testing, and the patient later went to Jerome Medical for an MIIQ form to obtain home health care.

On September 10, 2018, Dr. Martinez commenced the instant action. On January 7, 2019, Dr. Martinez filed an Amended Complaint asserting the following causes of action: 1) breach of contract against Jerome Medical, 2) tortious interference with contract against Dr. Florimon and Faena, 3) defamation with malice against Defendants, and 4) forgery against Defendants. In the March Order, the Court granted Defendants' motion to dismiss with respect to all claims except the forgery claim and denied Defendants' motion to transfer venue.

Plaintiff subsequently moved to amend the Amended Complaint to assert a claim for breach of fiduciary duty against Dr. Florimon and Defendants cross-moved for an award of sanctions. In its May Order, the Court denied the Motion to Amend, concluding that Plaintiff's proposed claim for breach of fiduciary duty was palpably insufficient, and denied Defendants' cross-motion for sanctions. In its September Order, the Court denied Plaintiff's motion for leave to reargue the May Order.

1. The Queens Action

On or about July 10, 2019, Dr. Martinez commenced the Queens Action against Jerome Medical and Dr. Florimon. *See* Medenica Affm. at Exh. A. The Complaint in the Queens Action alleges as follows:

Dr. Martinez terminated her employment on September 8, 2018 due to the impossible working conditions created by Defendants, which created a substantial and specific danger to public health and safety. Dr. Florimon encouraged and condoned the following acts of employees of Jerome Medical, which left Dr. Martinez with no choice but to terminate her employment: 1) Dr. Martinez's signature was improperly photocopied without her knowledge or consent and appended on multiple occasions on medical request for care forms by Faena, 2) Faena photocopied Dr. Martinez's signature on other documents for Jerome Medical and its patients without her knowledge or consent, 3) Faena ordered unnecessary home care for patients of Jerome Medical by affixing the photocopied signature of Plaintiff to medical care request forms, 4) Jerome Medical staff improperly and secretly erased information from patients' charts, 5) a Jerome Medical staff member began hiding important patient information from Plaintiff, 6) Defendants and staff members falsely told Jerome Medical patients that Dr. Martinez did not want to see them, 7) Defendants and staff members hid information from Plaintiff regarding Jerome Medical's business operation so that Dr. Martinez did not know what was going on with the medical practice or the patients, 8) Defendants and staff members falsely told patients that Plaintiff failed to perform certain testing for patients and/or to schedule follow-up appointments for patients, and 9) on a daily basis, Jerome Medical patients screamed at Dr. Martinez, demanding and threatening to sue her for referrals, follow-up, transportation, home aids, and equipment. All of these events occurred after Dr. Martinez confronted Faena about photocopying her signature without her knowledge or consent and affixing same to medical requests for care.

Dr. Martinez alleges that the photocopying of her signature by Jerome Medical employees and affixing it to requests for medical care without her knowledge, and the making of material and false representations by Jerome Medical employees to Dr. Martinez's patients regarding the

status of the medical care of those patients constitutes a substantial and specific danger to public health and safety. Dr. Martinez asserts one claim for a violation of New York Labor Law 740.

On August 27, 2019, Defendants filed a motion to dismiss or consolidate in the Queens Action. *See* Medenica Affm. at Exh. B. Defendants argue, *inter alia*, that the interests of judicial economy require that the Queens Action be dismissed or stayed in favor of consolidation with the instant action. *Id.* at p. 16. Defendants' motion is presently *sub judice.*

C. The Parties' Positions

Defendants argue that their motion to dismiss should be granted. It is well-settled that the mere institution of a New York Labor Law § 740 ("Section 740") action triggers the waiver provision, and the dismissal of a Section 740 claim does not preclude waiver. By electing to file the Queens Action, Plaintiff waived her forgery claim, as the forgery claim arises out of the exact same facts as Plaintiff's Section 740 claim in the Queens Action. While Plaintiff attempted to distinguish between the contract and tort-based nature of her claims in this action and the statutory nature of her whistleblowing claim, Section 740(7) makes no such distinction between the nature of the claims for waiver purposes. Further, Plaintiff seeks exactly the same type of damages in both actions – namely, lost wages and similar compensatory damages resulting from her alleged wrongful termination. Both actions substantially encompass the same issues and underlying facts, and dismissing the forgery claim would prevent duplicative recovery.

Defendants contend that in the event the Court denies Defendants' motion to dismiss, Plaintiff's Section 740 claim should be consolidated with her remaining claim in this action. Following Plaintiff's commencement of this action in September 2018, the parties have engaged in substantial litigation, including repeated motion practice and discovery, and there are no special circumstances barring this Court from hearing Plaintiff's Section 740 claim. While Section 740(b) requires actions to be brought in the county where the complainant resides, the employer has its principal place of business, or the alleged retaliatory personnel action occurred, Plaintiff cannot show prejudice to a substantial right arising from the consolidation of the Queens Action with this action. Additionally, Defendants are entitled to sanctions, as Plaintiff could have chosen to file this action in Bronx County or Queens County – which would have been proper venues to hear both her initial claims as well as her Section 740 claim – and instead,

Plaintiff brought her initial claims in this Court and her Section 740 claim in Queens County. Plaintiff shamelessly wastes judicial resources in pursuit of duplicative recovery in two distinct legal actions based on the exact same facts.

Plaintiff alleges that the waiver provision of Section 740(7) does not apply to this action because the claim in this matter do not arise out of or relate to the same underlying claim of retaliation. The claim in this matter is predicated on conduct which preceded any retaliatory measures and thus, cannot possibly arise from Plaintiff's claim of wrongful termination. The Queens Action seeks statutory relief which is confined to Defendants' retaliatory actions resulting in Plaintiff's wrongful termination and not redress of the underlying misconduct. Defendants' demand for sanctions is without merit and should be disregarded. Plaintiff, however, has no objection to the consolidation of the Queens Action with the remaining claim in this action.

On reply, Defendants argue that the waiver provision of Section 740 applies to any claim that arises out of or relates to the same acts as those which gave rise to Plaintiff's retaliation claim, and it is not required that such claims arise out of the retaliatory acts. Plaintiff's forgery claim arises out of the exact same acts giving rise to her retaliation claim and patently relates to it. Moreover, a tort claim can be waived pursuant to Section 740.

RULING OF THE COURT

A. Relevant Legal Principles

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." This waiver, however, only applies to claims "arising out of or relating to the same underlying claim of retaliation." *Davis v. Duane Reade, Inc.*, 120 A.D.3d 1386, 1387 (2d Dept. 2014). *See e.g., Sciddurlo v. Financial Industry Regulatory Authority*, 144 A.D.3d 1126, 1127 (2d Dept. 2016) (age discrimination claim was not barred by plaintiff's prior action alleging retaliation in violation of Labor Law § 740 based on his threatened disclosure of his employer's alleged circumvention of SEC regulations). Indeed, "the purpose of the waiver is to prevent duplicative recovery, a policy that is not offended when redress is sought for injury under a claim that is

distinct from a statutory cause of action predicated on wrongful termination." *Seung Won Lee v. Woori Bank*, 131 A.D.3d 273, 277 (1st Dept. 2015) (sexual harassment and negligent training and supervision claims were not waived).

Sanctions may be awarded with respect to frivolous conduct undertaken by a party or attorney. 22 N.Y.C.R.R. § 130-1.1. Conduct is frivolous where it is 1) without legal merit and unsupported by an argument for extension, modification, or reversal of existing law, 2) undertaken for purposes of delay or harassment, or 3) asserts false material factual statements. 22 N.Y.C.R.R. § 130-1.1(c). The determination as to whether sanctions are appropriate is generally within the court's sound discretion. *Perna v. Reality Roofing, Inc.*, 122 A.D.3d 821, 822 (2d Dept. 2014).

B. Application of the Principles to the Instant Action

Defendants' motion is denied. The Court concludes that Plaintiff's forgery claim is separate and independent from her Section 740 claim asserted in the Queens Action. In so deciding, the Court is guided by *Davis v. Duane Reade, Inc.*, 120 A.D.3d 1386 (2d Dept. 2014). In that matter, the plaintiffs alleged that they discovered video recorders placed in the company restrooms to monitor them as they undressed. The *Davis* plaintiffs alleged that they immediately advised the defendants of the surveillance equipment and contacted the police, however, the defendants turned the police away, threatened the plaintiffs with termination if they reported the use of the cameras, and transferred one of the plaintiffs to another facility. The defendants argued, in relevant part, that Section 740(7) barred plaintiffs' claims, including their claim for a violation of a statutory right to privacy under Labor Law 203-c ("Section 203-c"), because the plaintiffs originally pled a Section 740 claim. *Davis v. Duane Reade, Inc.*, No. 445-2011, 2012 WL 12893671, at *2-3 (Sup. Ct. Kings Cty. Aug. 3, 2012). The Second Department held that the Section 203-c claim was not barred by Section 740(7), concluding that the Section 203-c claim "assert[ed] the separate and independent claim of illegal placement of video cameras in employee restrooms." *Davis*, 120 A.D.3d at 1386-87. Thus, while the *Davis* plaintiffs' Section 740 and Section 203-c claims were premised upon the same alleged misconduct – the installation of video recorders in the company restrooms – the statutory claim for illegal placement of video cameras in employee restrooms was independent from the underlying claim of retaliation. The Court

reaches the same result here, where the forgery claim and Section 740 retaliation claim exist independently, notwithstanding the overlapping factual allegations underlying both claims.

Defendants' motion for sanctions is denied. While Plaintiff's apparent delay in asserting her Section 740 claim and filing of that claim in another county certainly does not serve to promote judicial efficiency, it does not rise to the level of sanctionable conduct.

Defendants' motion to consolidate is denied without prejudice and with leave to re-file following a determination of the motion presently pending in the Queens Action. Defendants' motion in the Queens Action was filed prior to the instant motion and includes an identical request to consolidate the Queens Action with this action. Additionally, Defendants' request for consolidation may be rendered academic in the event the Queens Action Court grants their motion to dismiss. Accordingly, the Court will forbear in addressing Defendants' request for consolidation pending a determination by the Queens Action Court.

CONCLUSION

Defendants' motion is denied. The parties are reminded of the appearance scheduled for December 13, 2019 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
December 2, 2019

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.