Frey v Health Mgt. Sys., Inc.
2020 NY Slip Op 32503(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 158415/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM

Justice

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CHRISTOPHER FREY,

Plaintiff,

- v -

HEALTH MANAGEMENT SYSTEMS, INC.,

Defendant.

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INDEX NO. 158415/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 49, 50

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant's motion to dismiss the complaint in this action is granted for the reasons set forth hereinbelow.

BACKGROUND

Defendant Health Management Systems, Inc. ("HMS"), is a New York corporation with operations throughout the United States and maintaining a principal place of business in the State of Texas (Complaint ¶¶ 1, 12; Doc. No. 9 at 3).[1] Its business lies in assisting states to recover Third-Party Liability Claims paid through state Medicaid funds in the first instance, but for which other, private, insurers are actually responsible (Complaint ¶ 1; Doc. No. 9 at 3). HMS identifies responsible third-parties and pursues recovery of amounts previously paid by the states' Medicaid Plans for recoupment by such states (Complaint ¶ 1; Doc. No. 9 at 3).

[1] References to "Doc. No." are to e-filed documents found in the NYSCEF electronic docketing system related to this motion.

Plaintiff Christopher Frey, a Texas resident, began working as a regional vice president at HMS in September 2006 at the time HMS acquired the company for which Mr. Frey worked (Complaint ¶ 3). On August 31, 2006, Mr. Frey entered into an Employment Agreement with HMS (Doc. No. 10) and worked for HMS as a territorial sales and client manager (Complaint ¶ 4; Doc. No. 9 at 3). His territory included Texas and other states; but not New York (Complaint ¶¶ 4, 59).

Several performance appraisals prepared by Mr. Frey's HMS supervisors indicated difficulties related to his performance (*see*, Doc. No. 9 at 19, 20). Ultimately, on May 14, 2013, Mr. Frey's employment was terminated as part of a general Reduction in Force ("RIF") (Complaint ¶3; Doc. No. 9 at 5).

In November 2013, Mr. Frey filed a "Whistleblower Retaliation Claim" against HMS with the United States Department of Health and Human Services (HHS) (Doc. No. 11). His claim alleged that his termination was motivated by HMS' desire to retaliate against him for raising concerns with HMS management about certain of HMS' business practices (*see*, Doc. No. 11 at 1). In both that claim and this lawsuit, Mr. Frey claims the following:

- Failure to bill claims timely or at all (*compare* Complaint ¶¶ 20-29 *with* Doc. No. 11 at 3, 10-19);
- Failure to upload insurance coverage information to the Medicaid Management Information System (*compare* Complaint ¶¶ 30-35 *with* Doc. No. 11 at 3, 19-21);
- Failure to refund policy "add fees" under contract with New York (*compare* Complaint ¶¶ 36-39 *with* Doc. No. 11 at 4, 22-23);
- Inappropriate client inducement practices and conflicts of interest (*compare* Complaint ¶¶ 40-46 *with* Doc. No. 11 at 4, 25-28).

In both that claim and this lawsuit, Mr. Frey alleges the same retaliatory conduct, as follows:

- HMS management "began gradually whittling away at his territory" (*compare* Complaint ¶ 59 *with* Doc. No. 11 at 5);
- HMS management limited his "participation in corporate and industry events" (*compare* Complaint ¶ 60 *with* Doc. No. 11 at 5);

- HMS management excluded him "from important business strategy meetings" (*compare* Complaint ¶ 60 *with* Doc. No. 11 at 5-6);
- HMS did not pay him his "target bonus" (*compare* Complaint ¶ 60 *with* Doc. No. 11 at 6);
- HMS terminated his employment (*compare* Complaint ¶ 4 *with* Doc. No. 11 at 6).

In 2014, the HHS Office of Inspector General (OIG) investigated Mr. Frey's claim. The investigation included interviews of Mr. Frey, his counsel, his former supervisors, various HMS managers and employees, and HMS clients (*see*, Doc. No. 9 at 11-21). The investigation also included a study of relevant documents (*see*, Doc. No. 9; Doc. No. 21 at 7-8). Mr. Frey was represented by counsel in the course of his HHS claim, who submitted evidentiary materials as well as advocacy (*see*, Doc. Nos. 12, 16, 17). OIG's investigation concluded with a finding that Mr. Frey's claim of whistleblower retaliation was "unsupported" (Doc. Nos. 9 at 5, 18 at 3). OIG found that Mr. Frey failed to prove that his disclosure of what he perceived as concerns with HMS management was a "contributing factor" in his termination (Doc. No. 9 at 8). OIG reasoned that four years had passed since Mr. Frey's disclosures, before he was terminated, leading to the reasonable conclusion that those four-year-old disclosures were a contributing factor in his termination (Doc. No. 9 at 8). That delay, plus "the lack of other evidence to support a finding of retaliation," militated in favor of a finding that Mr. Frey's disclosures were not a contributing factor in his termination (*id.*). OIG further concluded that "[a]lthough Frey alleges that there were multiple instances of retaliation between his 2009 disclosure and his termination in 2013," "investigators could not substantiate these allegations based on evidence from interviews and documentation provided by Frey and HMS" (Doc. No. 9 at 8 n. 1).

In addition to the foregoing, OIG found "clear and convincing evidence" that "HMS would have terminated Frey" as part of a company-wide RIF "due to his poor performance" "in the absence of his disclosures" (Doc. No. 9 at 9). OIG's findings were adopted in HHS' final

decision denying Mr. Frey's HHS claim against HMS (Doc. No. 19). The United States Court of Appeals for the Fifth Circuit affirmed HHS' decision (Doc. Nos. 20, 41, 49, 50).

DISCUSSION

Plaintiff is Collaterally Estopped:

Where an administrative agency has "adjudicatory authority" over a matter and "employ[s] procedures substantially similar to those used in a court of law," collateral estoppel will obtain (*Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]; *see also, Constantine v Teachers' College*, 93 AD3d 493 [1st Dept 2012]; *Metro-North Commuter R.R. Co. v New York State Executive Dept. Div. of Human Rights*, 271 AD2d 256 [1st Dept 2000]).

A comparison between the allegations in this action and the final findings by HHS in the prior administrative proceeding shows that both involve identical issues. This action alleges that plaintiff was fired "because he was a whistleblower" (Complaint ¶¶ 73, 78); HHS found that plaintiff's "protected disclosure" was "not a contributing factor in the personnel action at issue" Doc. No. 9 at 8). This action alleges that HMS' restructuring was a "pretext," and "refuted by the fact that the company continued to hire, re-hire, and promote other individuals to RVP [Regional Vice President] positions around the time of Mr. Frey's firing," and that "[o]ther facts also were inconsistent with Mr. Frey's termination being part of an RIF" (Complaint ¶¶ 69-70); HHS found that "HMS has established by clear and convincing evidence that Frey would have been terminated as part of the RIF in the absence of the disclosures" (Doc. No. 9 at 5). This action alleges that plaintiff "made important contributions to [HMS'] growth, success and revenues" and that he was "an excellent trustworthy executive " (Complaint ¶¶ 5, 72); HHS found that HMS presented "clear and convincing evidence that HMS would have terminated Frey in the absence of his disclosures due to his poor performance" and that "Frey was the

logical choice for" RIF termination "since he was the lowest performing" Regional Vice President (Doc. No. 9 at 9). And, this action alleges that HMS engaged in a "cascade of retaliatory action over time" and tried to "ostracize and demote" plaintiff due to his disclosures (Complaint ¶¶ 8, 59); HHS found that there was no evidence of "multiple instances of retaliation between his 2009 disclosure and his termination in 2013" (Doc. No. 9 at 8 n. 1).

It is of no moment that the HHS proceeding was in conjunction with federal law, in contrast to this action which was brought under state law, because collateral estoppel will obtain so long as "strictly factual" determinations resolved in the administrative proceeding affect the outcome of a subsequent proceeding (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1st Dept], *lv denied* 28 NY3d 902 [2016]).

It cannot be credibly asserted that the HHS proceeding did not: (i) possess adjudicative authority; or (ii) employ procedures substantially similar from plenary litigation in this forum. The HHS proceeding was brought under the American Recovery & Reinvestment Act of 2009 ("ARRA") (Pub. L. 111-5, 123 Stat. 115) (Doc. No. 11). That statute enables an employee to submit a complaint regarding retaliation to the appropriate inspector general (ARRA § 1553 [b] [1]). The complainant bears a burden of proof, subject to his right to an opportunity for rebuttal (ARRA § 1553 [c] [1] [A], [B]). Significantly, while this court would have applied the higher causation standard of but-for causation generally applicable, Mr. Frey only needed to show in the HSS proceeding that his disclosures were a contributing factor in his dismissal. Concomitantly, while this court would have held HMS to the lower burden-of-proof standard of preponderance of the evidence vis-a-vis its defenses generally applicable, HMS needed to support its defenses in the HSS proceeding by clear and convincing evidence (ARRA § 1553 [c] [1] [B]; *see, Cohen v Akabas & Cohen*, 79 AD3d 460 [1st Dept 2010]).

Furthermore, ARRA affords the remedies of reinstatement, back-pay, employee benefits, and other terms of employment, plus appellate rights[2] (ARRA § 1553 [c] [2] [a] [B]; *id.*, § 1553 [c] [5]).

Plaintiff acknowledges that he presented evidence and argument through numerous submissions over the course of four years (Doc. No. 21 at 7, 8). Moreover, HHS took testimony from at least 15 witnesses and reviewed extensive documentary evidence (Doc. No. 9 at 9-10). Plaintiff further acknowledges that "HHS shared the first (2015) and second (2016) versions of its investigative reports with my attorney and me in order to enable us to respond to the statements and supposed findings in the report before a final decision would be made on my claim by HHS" (Doc. No. 27 ¶ 27). In short, the HHS proceedings fully "permit confidence that the facts were adequately tested, and the issue fully aired" (*Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271, 277 [1988], *cert denied* 488 US 1005, 109 S Ct 785 [1989]).

Insofar as the HHS proceeding did not entail a formal adversarial hearing with cross-examination, such an element is unnecessary for application of collateral estoppel (*Reubens v New York City Dept. of Juvenile Justice*, 930 F Supp 887 [SDNY 1996]). In this regard, plaintiff's citation to *Yates v Philip Morris, Inc.* (690 F Supp 180 [SDNY 1988]) is distinguishable, as the prior proceeding involved in that case based its finding on a mere "cursory" review without any witness interviews at all (*id.*, at 183). In stark contrast, the HHS proceeding preceding this action involved extensive documentary review, interviews of 15 witnesses, and approximately sixty submissions by the plaintiff. And, as is worth noting again, the Fifth Circuit affirmed the HHS denial of plaintiff's claims.

[2] As noted earlier, the HHS determination was affirmed by the Fifth Circuit.

Consequently, this court finds that the comprehensive administrative proceedings, leading to HHS' denial of the very claims asserted in this action, which denial was affirmed by the United States Court of Appeals for the Fifth Circuit, amply give rise to the proper assertion of collateral estoppel in this action, warranting dismissal of this action.

This Action is Untimely:

HMS terminated Mr. Frey's employment in Texas, in May 2013. This action was commenced in New York more than five years later, in September 2018. The complaint in this action asserts a cause of action under the anti-retaliation provision of section 191 of the New York State Finance Law (*see*, NYSCEF Doc. No. 1 ¶¶ 76-80). A cause of action under that section would be subject to a three-year limitations period prescribed for an "action to recover upon a liability . . . created or imposed by statute" (CPLR 214 [2]). It would not be subject to the longer, ten-year, limitations period for whistleblower *qui tam* actions authorized under section 192 (1) of the New York State Finance Law[3] because this action is decidedly *not* a whistleblower *qui tam* action. However, even if it were, this action is still untimely for the following reason.

The circumstances of this case bring New York's "borrowing statute" (*Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665, 668 [2014]) – CPLR 202 – into direct application. As described by the Court of Appeals: "When a cause of action accrues outside New York and the plaintiff is a nonresident, section 202 'borrows' the statute of limitations of the jurisdiction where the claim arose, if shorter than New York's, to measure the lawsuit's timeliness" (*id.*).

There is absolutely no dispute that Mr. Frey is a Texas resident, and not a New York resident, as acknowledged in the complaint in this action (NYSCEF Doc. No. 1 ¶ 11). Moreover, it cannot be reasonably gainsaid that Mr. Frey's claims in this action accrued in Texas, where his

[3] *See,* New York State Finance Law § 192 (2) (making express, limited, reference to "*qui tam*").

termination from HMS occurred (*see, Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 [1999]; *Proforma Partners, L.P. v Skadden Arps Slate Meagher & Flom, LLP*, 280 AD2d 303 [1st Dept], *lv denied* 96 NY2d 722 [2001]). Indeed, the United States Court of Appeals for the Fifth Circuit has already determined that its own subject matter jurisdiction over Mr. Frey's (unsuccessful) appeal of the HHS determination was predicated on the undeniable fact that it was the "circuit in which the alleged reprisal occurred" (NYSCEF Doc. No. 41 at 5). Based on that fact, CPLR 202 requires this court to apply Texas' three-year statute of limitations under Texas Human Resources Code § 36.115 (c) which limits a cause action for retaliatory employment discharge to "the third anniversary date on which the cause of action accrues" defined in that section as "the date the retaliation occurs."

Because this action was commenced after three years from the May 2013 termination date of Mr. Frey's employment with HMS, it is untimely, and subject to dismissal on this independent ground.[4]

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint in this action is granted in its entirety; and, accordingly, it is

ORDERED that the complaint in this action is dismissed.

[4] Because this action is subject to dismissal on the unequivocally dispositive procedural grounds stated herein (collateral estoppel and statute of limitations), the court finds it unnecessary to treat remaining arguments – in several respects, grounded in factual assertions – that have been submitted by defendant in support of its instant motion to dismiss.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 20, 2020

ENTER:

Louis L Nock

Hon. Louis L. Nock, J.S.C.

HON. LOUIS L. NOCK
J.S.C.