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COURT OF APPEALS

STATE OF NEW YORK

WEBB-WEBER,

Appellant,

-against-

No. 79

COMMUNITY ACTION FOR HUMAN SERVICES,
INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
March 27, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 79, Webb-Weber v. Community Action for
3 Human Services, Inc.

4 Counsel, do you want any rebuttal time?

5 MR. BERGSTEIN: Yes, two minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure.

7 MR. BERGSTEIN: Okay. Good afternoon.
8 Stephen Bergstein for the plaintiff-appellant.

9 The issue on this appeal is whether the
10 First Department properly dismissed the case where
11 the complaint did not cite the rules and regulations
12 - - -

13 CHIEF JUDGE LIPPMAN: It's your position
14 that the statute doesn't require you to plead rules
15 and regulations?

16 MR. BERGSTEIN: Correct. Correct. The - -
17 -

18 CHIEF JUDGE LIPPMAN: What does it require
19 you to do?

20 MR. BERGSTEIN: Well, you have to allege
21 something that would suggest or lead to the
22 reasonable inference that rules and regulations of
23 the State of New York were being violated.

24 JUDGE READ: What were the best allegation
25 - - -

1 JUDGE SMITH: And - - - and - - -

2 JUDGE READ: - - - what were your best
3 allegations, here, to show that?

4 MR. BERGSTEIN: Well, there's five or six
5 categories of - - - of treatment deficiencies that,
6 taken together, would show that this was a very
7 troubled facility.

8 JUDGE SMITH: Where - - - where does it
9 show a substantial - - - a specific and substantial
10 danger to the public health?

11 MR. BERGSTEIN: Well, deficient patient
12 care, paragraph 14, 73, 30. I mean, the complaint is
13 about fifteen page - - -

14 CHIEF JUDGE LIPPMAN: Health fraud - - -

15 JUDGE SMITH: I understand, but I mean, is
16 - - - are you - - - does that do it? You can say I
17 complained of deficient patient care?

18 MR. BERGSTEIN: Well, there's more than
19 that. There - - - there were problems with - - -

20 JUDGE SMITH: What's - - - what's the most
21 specific thing you've got?

22 MR. BERGSTEIN: There was mold, there was
23 dust, sending people to the hospital. There were
24 fire hazards. There were podiatry problems.

25 CHIEF JUDGE LIPPMAN: What about health

1 fraud? That - - - that - - - do you have to allege
2 public harm?

3 MR. BERGSTEIN: Excuse - - -

4 CHIEF JUDGE LIPPMAN: With health fraud, do
5 you have to allege public harm?

6 MR. BERGSTEIN: I don't think you have to
7 allege public harm with health fraud. But there are
8 allegations in the complaint that suggest that the
9 fraud was causing harm to the patients, because it
10 was money that was being diverted from the - - - from
11 the patients. We have a false - - -

12 JUDGE GRAFFEO: And what statutes or regs
13 were violated under that umbrella of public harm?
14 Because you do, at some point, have to cite - - -

15 MR. BERGSTEIN: Correct, and they're in the
16 brief.

17 JUDGE GRAFFEO: - - - some - - - some
18 either statutory or - - -

19 MR. BERGSTEIN: Absolutely.

20 JUDGE GRAFFEO: - - - regulatory basis,
21 correct?

22 MR. BERGSTEIN: Yes. And they're in the
23 brief. We have five or six different provisions of
24 the NYCRR having to do with the dignified treatment
25 of residents, appropriate care. The allegations in

1 the complaint show they were not getting dignified
2 treatment; they were not - - -

3 JUDGE RIVERA: As I recall, the complaint -
4 - -

5 JUDGE GRAFFEO: No, you were giving - - -

6 JUDGE RIVERA: I'm sorry. As I recall, the
7 complaint, correct me if I'm wrong, also says you
8 need to hire some expert or the client needs to hire
9 some expert to figure out really, what all the
10 violations are. So I took the brief to suggest these
11 were only some. Did I misunderstand the brief?

12 MR. BERGSTEIN: Yes, I don't think we - - -
13 we're claiming that we need to hire an expert to
14 prove the scope of the problems at that facility, but
15 - - -

16 JUDGE RIVERA: No, not to prove, to
17 identify.

18 MR. BERGSTEIN: To identify? Well, no. We
19 weren't arguing that.

20 JUDGE RIVERA: All right.

21 MR. BERGSTEIN: But she was the chief
22 operating officer, and she had first-hand knowledge
23 of what was going on there. And we have
24 falsification of medical records.

25 JUDGE ABDUS-SALAAM: Were there any

1 violations issued by OMRDD or the fire department?

2 MR. BERGSTEIN: Yes, and that's - - -

3 JUDGE ABDUS-SALAAM: And did they - - - did
4 those violations indicate what regulations or code
5 provisions were being violated?

6 MR. BERGSTEIN: I don't have the report in
7 the record, so my reasonable presumption is if OMRDD
8 finds treatment deficiencies at the facility, that
9 they're doing so because there are regulatory
10 violations at the facility.

11 JUDGE GRAFFEO: What was the purpose of the
12 court allowing you to amend the complaint, if not to
13 specify your statutory and regulatory citations?

14 MR. BERGSTEIN: The - - - my predecessor
15 counsel did amend the complaint, but for whatever
16 reason, he didn't identify the regulations. But he
17 put them in his brief. And it really leads to the
18 second point of our ar - - -

19 JUDGE GRAFFEO: Is that - - - is there any
20 case law you have to indicate that that's adequate?

21 MR. BERGSTEIN: Nothing that says that
22 putting them in the brief is adequate. But it does
23 implicate 3026 of the CPLR; is there any prejudice to
24 the defendants by not identifying the specific
25 regulations.

1 JUDGE RIVERA: Okay, so - - - so let me go
2 back to my question, because I found it.

3 In the memo of law in opposition to the
4 motion to dismiss, it's page 155 of the - - - of the
5 appendix: "Plaintiff intends to obtain expert
6 assistance in evaluating the defendants' acts and
7 omissions for additional statutory and regulatory
8 violations, however plaintiff submits that the above
9 sampling clearly supports plaintiff's pleaded causes
10 of action."

11 So I take that to mean that your
12 predecessor intended to see what other violations
13 there were, and then subsequently amend the complaint
14 to include those other violations. Am I
15 misunderstanding this memo?

16 MR. BERGSTEIN: No, that's what it says.
17 But that's not - - - I'm not sure that's why it was
18 amended. It was amended because there was a motion
19 to dismiss, and the lawyer wanted to flesh - - -

20 JUDGE SMITH: But can - - - but can you - -
21 - I mean, isn't the gist of your complaint that she
22 was fired for threatening to disclose some
23 violations? It doesn't make sense to say you've got
24 to hire an expert to figure out what the violations
25 were?

1 MR. BERGSTEIN: Correct. In a sense, she
2 is the expert, because she was the chief operating
3 officer.

4 JUDGE SMITH: I mean, I guess what bothers
5 - - - what's bothering me about the complaint is, it
6 doesn't seem to tell a story. I mean, I'm looking
7 for a story that says, look, here - - - here was a
8 violation. I disclosed it to so-and-so, or I
9 threatened to disclose it to so-and-so, or I got
10 fired. Can you make that kind of narrative out of
11 this complaint?

12 MR. BERGSTEIN: I can. The complaint tells
13 us this. The chief operating officer was
14 conscientious and had serious concerns about how the
15 facility was treating its patients, and she
16 identified five or six categories of serious
17 deficiencies, separate and apart from the fraud - - -

18 JUDGE SMITH: Identified most of them
19 pretty vaguely.

20 MR. BERGSTEIN: I don't know if they're
21 vague. I think we know what she's claiming was going
22 on at the facility.

23 JUDGE PIGOTT: Well, I always - - - I
24 looked at this - - - we're a notice-pleading state.
25 The only purpose of a complaint is to put the

1 defendant on notice of what it is. And a bill of
2 particulars, which is used to amplify a pleading, can
3 contain all of what is now being complained about as
4 not being in there.

5 In other words, they can answer, they can
6 deny whatever they want to deny, admit whatever they
7 want to admit, and serve a demand for a bill of
8 particulars, asking you for the specific rules and
9 regulations, laws and ordinances that may have been
10 violated, upon which the complaint is based.

11 MR. BERGSTEIN: That's one of our central
12 arguments. That's the prejudice argument, 3026. If
13 the court thinks that there's something about the
14 complaint that's vague, if the court thinks that you
15 have to identify the regulations in the complaint,
16 the obvious solution is to be found in the CPLR.

17 JUDGE RIVERA: But doesn't the petition
18 itself - - - doesn't the complaint itself - - -
19 excuse me, have to satisfy the CPLR?

20 MR. BERGSTEIN: Yes. And I think it does.
21 It tells us quite a bit about what was going on in
22 the facility. This - - -

23 JUDGE RIVERA: But - - - right. But that's
24 not his point. His point is, but it doesn't satisfy
25 the pleading requirements with respect to the cause

1 of action itself.

2 MR. BERGSTEIN: Well, how does it not? I
3 mean, it tells us what she - - - who she complained
4 to; the basis for her complaints. There's factual
5 detail about the complaints.

6 CHIEF JUDGE LIPPMAN: So - - - so your
7 point is that the statute does not require you to
8 list the specific rules and regulations, and that if
9 there needed more - - - and if they needed more
10 information, they could have gotten it? Is that the
11 gist of - - - of what you're saying?

12 MR. BERGSTEIN: That's the gist of what I'm
13 saying.

14 CHIEF JUDGE LIPPMAN: Through the bill of
15 particulars?

16 MR. BERGSTEIN: That's the gist of what I'm
17 saying. And then - - -

18 JUDGE SMITH: Can you - - - can you focus
19 on one example, what's the clearest, most specific
20 allegation that she got fired for?

21 MR. BERGSTEIN: The podiatry care. There's
22 various allegations - - -

23 JUDGE SMITH: There is - - - there is a
24 specific allegation of a neglect of a patient?

25 MR. BERGSTEIN: More than one patient, four

1 patients. And exposure to loose electrical wires - -
2 - paragraph 34 - - -

3 JUDGE SMITH: Why - - - no, no, no. Before
4 you get to the electrical wires. Four patients;
5 okay. And she disclosed those four patients to whom,
6 or threatened to disclose it?

7 MR. BERGSTEIN: She disclosed them to Bond,
8 the - - -

9 JUDGE SMITH: Well, wait, he's the bad guy,
10 right?

11 MR. BERGSTEIN: Correct.

12 JUDGE SMITH: Is that whistle-blowing?

13 MR. BERGSTEIN: Under the state law, you
14 have to first report it internally, and then if you
15 don't get relief, then you go out - - -

16 JUDGE SMITH: No, no. But don't you - - -
17 I thought the whole idea of whistle-blowing is that
18 you're fired for blowing - - - threatening to blow
19 the whistle. Going to the - - - going to the person
20 who - - - who was the malefactor is not blowing the
21 whistle.

22 MR. BERGSTEIN: I think it is. Because
23 that's - - - but then she went to OMRDD. After - - -

24 JUDGE SMITH: Okay. Where does it say that
25 she went to OMRDD about these four patients?

1 MR. BERGSTEIN: It is in the complaint - -
2 - the complaint is about fifteen pages long. I can
3 find it. But it'll take a while - - -

4 JUDGE SMITH: Okay.

5 MR. BERGSTEIN: - - - because there's so
6 much in here. But the OMR - - -

7 JUDGE SMITH: But I guess, that's - - -
8 that - - - you see my problem? That - - - that's
9 what's bothering me.

10 MR. BERGSTEIN: Well, because - - -

11 JUDGE SMITH: Why - - - why doesn't the
12 complaint have in it very easily that anybody can
13 see, yeah, on such and such a day, I told so-and-so
14 or I threatened to tell so-and-so about this event?

15 MR. BERGSTEIN: Because I didn't write the
16 complaint. But as I wrote the brief - - -

17 CHIEF JUDGE LIPPMAN: Good answer,
18 counselor. Go ahead.

19 MR. BERGSTEIN: - - - as I wrote the brief,
20 I did give a narrative telling us what she said, who
21 she said it to, what happened, what OMRDD did. If
22 there's any need for the specific regs or more
23 details, bill of particulars.

24 We know the bill of particulars amplifies
25 things, it becomes part of the pleadings, and then

1 you can start discovery. They know what we're
2 claiming they did.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 JUDGE ABDUS-SALAAM: Could I just ask one
5 quick - - -

6 CHIEF JUDGE LIPPMAN: Go ahead, Judge
7 Abdus-Salaam.

8 JUDGE ABDUS-SALAAM: In your brief you
9 mentioned that not only does the statute not require
10 the plaintiff to state each rule, law, or regulation
11 that's violated, but the commentary does. Now, the
12 commentary's not a part of this. And I looked in the
13 statute and I don't see any commentary. So where is
14 that commentary?

15 MR. BERGSTEIN: The commentaries are no
16 longer being published.

17 JUDGE ABDUS-SALAAM: Okay.

18 MR. BERGSTEIN: But from '92 and '93, there
19 were extensive commentaries on this law that for some
20 reason McKinney's isn't publishing anymore.

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. BERGSTEIN: Thank you.

23 MR. LALLI: Dennis Lalli, Your Honors, from
24 Bond, Schoeneck & King, for - - -

25 CHIEF JUDGE LIPPMAN: Counselor, why - - -

1 why - - - where does it say that they have to give
2 you the rules and regulations, if they lay out a
3 sufficient basis for you to mount the defense? Does
4 it say anywhere they have to give you the numbers?

5 MR. LALLI: It has been the rule in the
6 Appellate Division since 1990 - - -

7 CHIEF JUDGE LIPPMAN: No, no, I didn't ask
8 you - - - I asked you - - -

9 MR. LALLI: Okay. Well, I - - -

10 CHIEF JUDGE LIPPMAN: - - - where - - -
11 where does it say it, particularly when you have some
12 of these charges, there have been sanctions, and it
13 would be crystal clear what was violated, some of it
14 is health fraud, which is a different category, and,
15 you know, the legislature has made it a different
16 category. And you have generally liberal pleading
17 requirements. Why can't you get a pretty good story
18 as to what's going on here, and then if you need
19 more, go to the bill of particulars?

20 MR. LALLI: Let me answer it this way.

21 CHIEF JUDGE LIPPMAN: Yes.

22 MR. LALLI: He didn't write the complaint;
23 I had to answer it. And when I get the complaint, I
24 look to see whether it comply - - - comports with
25 3013, which says that the complaint has to put me on

1 notice of the transactions or occurrences at issue,
2 and the essential elements - - -

3 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
4 that's not the first question I asked. Where does it
5 say they have to put the sections in?

6 MR. LALLI: The essential elements include

7 - - -

8 CHIEF JUDGE LIPPMAN: No, no. But - - -

9 MR. LALLI: - - - a violation - - -

10 CHIEF JUDGE LIPPMAN: - - - do you have to
11 put the sections in the - - - in the complaint? The
12 numbers that's been violated?

13 MR. LALLI: I have - - - I have to be on
14 notice that there's a violation of a law, rule or
15 regulation - - -

16 JUDGE SMITH: Are you - - - is that a yes -

17 - -

18 MR. LALLI: - - - and without that I can't

19 - - -

20 JUDGE SMITH: - - - or a no to the Chief's
21 question?

22 MR. LALLI: - - - know it. And I can't
23 know which law, rule or regulation - - -

24 JUDGE GRAFFEO: Is this under Section
25 (2)(a)? Are you talking about Section (2)(a) of

1 Section 740?

2 MR. LALLI: Yes.

3 CHIEF JUDGE LIPPMAN: Counselor, but is - -

4 -

5 MR. LALLI: Section 740 requires - - -

6 CHIEF JUDGE LIPPMAN: - - - is the answer

7 yes or no - - -

8 MR. LALLI: The answer is yes, I need to -

9 - -

10 CHIEF JUDGE LIPPMAN: Yes, you - - -

11 MR. LALLI: - - - know.

12 CHIEF JUDGE LIPPMAN: - - - have to put the

13 numbers of the regulations and the rules that are

14 being violated?

15 MR. LALLI: Yes. In a case where, in order

16 to plead - - -

17 CHIEF JUDGE LIPPMAN: What statute - - -

18 what statute says that, in relation to pleadings?

19 MR. LALLI: Section 3013 says that the

20 essential elements of the cause of action - - -

21 CHIEF JUDGE LIPPMAN: But that's not the

22 question - - -

23 MR. LALLI: - - - have to be pleaded.

24 CHIEF JUDGE LIPPMAN: - - - I'm asking you.

25 I'm asking you, do you have to put the numbers of the

1 sections of the rules or regulations that are
2 violated. I think it's a key distinction here, and
3 that's why I'm being persistent with trying to - - -
4 to get an answer.

5 I understand what you're answering in
6 relation to what he needs to show, but I don't think
7 you're saying he needs to give you the particular
8 rules and regulations, or are you?

9 MR. LALLI: I'm saying he does. And the
10 reason he does is that one of the elements of the
11 cause of action is a violation of a law, rule, or
12 regulation. This is not - - -

13 JUDGE PIGOTT: Right. But let me - - - let
14 me give you another hypothetical. In labor law
15 cases, where some - - - where a worker's injured, and
16 he says, you know, the violation - - - you know, I
17 was injured because of a defective tool. And they
18 say what - - - what section of the New York Code of
19 Rules and Regulations under the Labor Law was
20 violated? And you tell him in your bill of
21 particulars, 241-6-sub-whatever. And then - - - and
22 then you have the entire thing.

23 Here, it seems to me that notice is I tried
24 to blow the whistle. I told them of a - - - of
25 problem, and I got fired. And a janitor can allege

1 that. It - - - you know, you don't have to be a
2 college graduate to say, you know, I got fired
3 because I brought to their attention something bad.

4 And then, when the complaint comes out and
5 then you now know this man is claiming that he was
6 fired because of what he saw in his duties as a
7 janitor and it's alleged that we fired him because he
8 was blowing the whistle on that, then you can say
9 what - - - what specifically is it. Because as Judge
10 Smith implies, it's not just anything. It has to be
11 something that's a danger to the - - - you know, to
12 the patients and the public, et cetera, and then you
13 can go.

14 MR. LALLI: But I don't - - - I don't serve
15 a bill of particulars until I've joined issue.

16 JUDGE PIGOTT: Right.

17 MR. LALLI: And I don't have to join issue
18 if the complaint fails to allege the essential
19 elements of the - - -

20 JUDGE PIGOTT: No, but the only places, it
21 seems to me, where we say something more is in
22 medical malpractice where we say you can't just
23 allege medical malpractice, you have to have a
24 certificate of - - - what's the word I'm looking for
25 - - - of merit.

1 MR. LALLI: Yeah.

2 JUDGE PIGOTT: Certificate of merit. And
3 in liable and slander, where you got to say the
4 specific words.

5 MR. LALLI: And fraud.

6 JUDGE PIGOTT: And fraud, right. But
7 generally, speaking, we - - - we simply say, you
8 know, notice and in the pleadings, and in you go.

9 MR. LALLI: But the rule says that there mu
10 - - - the plaintiff has to allege the essential
11 elements.

12 JUDGE ABDUS-SALAAM: Well, if - - -
13 counsel, I asked your adversary this, I'll ask you
14 this. These reports allegedly were made to OMRDD,
15 regulates your industry, correct? And did OMRDD
16 issue any violations to this agency?

17 MR. LALLI: Well, my answer is similar to
18 that of Mr. Bergstein, in that the OMRDD report and
19 the fire department report are not part of the
20 record. But in order to determine whether we have a
21 cause of action here, the violation must be one which
22 creates or presents a substantial and specific - - -

23 JUDGE SMITH: Suppose - - -

24 MR. LALLI: - - - injury to the public
25 health or safety. And unless - - -

1 JUDGE SMITH: Suppose - - -

2 MR. LALLI: - - - I know what statute - - -

3 JUDGE SMITH: - - - suppose the complaint
4 says - - - sorry, maybe you didn't finish your
5 answer.

6 MR. LALLI: Unless I know what specific
7 statute or law or regulation I'm alleged to have
8 violated - - -

9 JUDGE SMITH: Okay.

10 MR. LALLI: - - - I can't know - - -

11 JUDGE ABDUS-SALAAM: But could I just
12 follow - - - if the complaint says I made allegations
13 to OMRDD about X, Y, and Z, and OMRDD then issued
14 violations based on these allegations, then isn't
15 that some kind of notice of what the particular
16 regulations or rules or - - - regulations or rules
17 that were violated?

18 MR. LALLI: Not necessarily. And certainly
19 not in this case. For example, with the fire
20 department, she alleges they - - - they took away her
21 key to an office on the third floor. There's nothing
22 about that which constitutes a violation of a fire
23 code.

24 I don't know what violations the fire
25 department found - - -

1 JUDGE ABDUS-SALAAM: I thought that was
2 related to a door - - - another exit door, or
3 something, in case of emergency.

4 MR. LALLI: But if I don't know what the
5 violation is, I can't tell whether it creates a - - -

6 JUDGE PIGOTT: You need a - - -

7 JUDGE SMITH: But that's a different point
8 you're making, isn't it?

9 MR. LALLI: - - - substantial and specific
10 - - -

11 JUDGE SMITH: I mean, suppose - - - suppose
12 we have a complaint that says I noticed some bubonic
13 plague virus about to spread and I call - - - and I
14 threatened to call the police, and I was fired.
15 You're saying that that's not a specific complaint,
16 because it doesn't tell you what section number the
17 bubonic plague violates?

18 MR. LALLI: I'm saying that I don't know
19 what violation of law, rule, or regulation - - -

20 JUDGE SMITH: You're saying that's an
21 insufficient - - -

22 MR. LALLI: - - - I - - -

23 JUDGE SMITH: - - - whistle-blower
24 complaint?

25 MR. LALLI: What I'm saying is that I don't

1 need to use the discovery devices to find out the
2 elements that have to be pleaded in the first
3 instance.

4 JUDGE SMITH: Well, can you try - - - try
5 yes and no to the question? I mean, you're saying
6 that the complaint I described is insufficient as a
7 whistle-blower complaint - - -

8 MR. LALLI: Yes, I'm saying that.

9 JUDGE SMITH: - - - because it doesn't have
10 the section number?

11 MR. LALLI: Yes, Your Honor.

12 JUDGE RIVERA: So - - -

13 JUDGE SMITH: Do you have - - - do you make
14 the alternative argument that even if you don't have
15 to put the section numbers in, this complaint just
16 doesn't - - - does not make reasonably clear what
17 she's complaining about?

18 MR. LALLI: I do make that argument, Your
19 Honor, because there are so many - - - there are nine
20 separate bundles of facts, which appear to have been
21 shuffled before they were articulated in the
22 complaint.

23 And I can't tell what particular bundle of
24 facts leads to which particular violation. And
25 critically, I can't see anything in this complaint

1 which alleges any violation or any facts which might
2 constitute a violation, that creates and presents a
3 substantial and specific danger to the public health
4 or safety.

5 This is a private residential facility.

6 JUDGE PIGOTT: That makes some sense. I
7 mean, you're right. I mean, had you moved - - - and
8 I assume you did - - - about unpaid federal and state
9 taxes, I don't know that that - - - you know, that's
10 a cause of action, or bouncing payroll checks or
11 unpaid vendor bills.

12 But when you get into falsifying medical
13 records, or lack of proper maintenance of the
14 facilities, wouldn't - - - wouldn't that give you
15 enough to say what are you talking about, you know,
16 in a bill of particulars?

17 Because if you - - - if you did falsify
18 medical records, and if that, you know, is a danger
19 to the public and to the patients, there's a cause of
20 action there, right?

21 MR. LALLI: It doesn't create a substantial
22 - - - I don't see how those allegations pre-create a
23 sufficiently substantial and specific danger to the
24 public health and safety - - -

25 JUDGE PIGOTT: Well, if you're saying - - -

1 MR. LALLI: - - - when they're referring to
2 a private residential facility.

3 JUDGE PIGOTT: - - - the pa - - - if you're
4 saying the patient's fine, and under Judge Smith's
5 suggestion, the patient actually had bubonic plague,
6 but you didn't anybody to know that, so you falsified
7 a medical record, that would be a problem.

8 MR. LALLI: Well, there's no bubonic plague
9 here. There's long toenails.

10 JUDGE PIGOTT: That's - - - that's - - -
11 well, that's what a bill of particulars will tell
12 you, it seems to me.

13 JUDGE RIVERA: No, but she also claims
14 there's mold.

15 MR. LALLI: How does that affect the public
16 in a private residential facility?

17 JUDGE RIVERA: How does that affect - - -

18 MR. LALLI: I moved - - - I moved to
19 dismiss on several grounds.

20 JUDGE GRAFFEO: What are - - -

21 JUDGE RIVERA: Well how are you defining
22 "the public"?

23 MR. LALLI: The public is - - -

24 JUDGE RIVERA: Yeah?

25 MR. LALLI: - - - the public. In the

1 Rogers case, for example - - -

2 JUDGE ABDUS-SALAAM: But nobody comes there
3 to visit these people. It's just - - -

4 MR. LALLI: At invitation. There's no
5 allegation - - -

6 JUDGE RIVERA: So you mean contractors who
7 come to do repair work, all the employees, none of
8 these people are the public?

9 MR. LALLI: They're invited. They're
10 invitees. They're not the public. The public can't
11 - - - can't just walk in.

12 JUDGE RIVERA: If there's a fire hazard and
13 they come in to take care of a fire? Yeah.

14 JUDGE GRAFFEO: The fire code violations
15 would affect any visitors to the residents of the
16 facility.

17 MR. LALLI: But they're not members of the
18 public. They're - - - they're invitees.

19 JUDGE RIVERA: If you're - - - if you have
20 a fire hazard that causes a fire and affects
21 surrounding areas, we haven't affected the public?

22 MR. LALLI: There's no allegation in this
23 complaint that there could be that kind of a fire.
24 What's causing the allegation - - -

25 JUDGE PIGOTT: Is it - - -

1 MR. LALLI: - - - has to do with - - -

2 JUDGE GRAFFEO: That would mean - - -

3 MR. LALLI: - - - means of ingress and
4 egress.

5 JUDGE GRAFFEO: - - - that would mean all
6 nursing - - - that would mean all nursing homes are
7 out from under coverage of the statute - - -

8 MR. LALLI: It might well mean that.

9 JUDGE GRAFFEO: - - - dealing with whistle-
10 blowers.

11 MR. LALLI: The statute is not a broad
12 remedial statute to be construed broadly - - -

13 CHIEF JUDGE LIPPMAN: Counsel, but doesn't
14 it just defy credulity to say that you have a fire
15 violation, you're sanctioned for it, and yet you have
16 no idea what the complaint is talking about?

17 MR. LALLI: Not at all, Your Honor. This
18 is a - - - I don't know how broad the violation is -
19 - -

20 CHIEF JUDGE LIPPMAN: It doesn't defy any
21 kind of - - -

22 MR. LALLI: - - - I don't know - - -

23 CHIEF JUDGE LIPPMAN: - - - credibility
24 that you would say you don't know anything about - -
25 -

1 MR. LALLI: I don't think so, Your Honor.

2 CHIEF JUDGE LIPPMAN: - - - it?

3 MR. LALLI: How can I be - - -

4 JUDGE RIVERA: Your client received the
5 violations. They were actually issued.

6 MR. LALLI: Yes.

7 JUDGE RIVERA: Your client knows what these
8 violations are.

9 MR. LALLI: Yes.

10 JUDGE RIVERA: So you know what these
11 violations are.

12 MR. LALLI: But I'm - - -

13 JUDGE RIVERA: How are you in - - - how are
14 you in the dark? How are you uninformed?

15 MR. LALLI: How do I - - - how do I decide
16 what affirmative defenses? Some of those violations
17 might have been something that affects the public
18 safety; some of them may not.

19 CHIEF JUDGE LIPPMAN: But - - - but what
20 about Judge Pigott's suggestion. What about a bill
21 of particulars? So you know at least what to ask,
22 no?

23 MR. LALLI: I don't have to file a bill of
24 particulars if the complaint doesn't allege the
25 essential elements of - - -

1 JUDGE RIVERA: Well - - -

2 MR. LALLI: - - - the cause of action - - -

3 JUDGE RIVERA: - - - well, of course you're

4 - - -

5 MR. LALLI: - - - and I move to dismiss it.

6 The plaintiff can always amend. This plaintiff had

7 the opportunity to amend - - -

8 JUDGE RIVERA: Counsel - - -

9 MR. LALLI: - - - and she didn't take it.

10 CHIEF JUDGE LIPPMAN: But you haven't been

11 able to answer the question. You keep saying the

12 essential elements, and now we're asking you about

13 something like a fire violation. That would seem, to

14 the average person, particularly a person running

15 this outfit, that you would know what he's talking

16 about or what she's talking about, and - - - and I -

17 - - you know, I can't understand it; if you don't

18 have to plead the sections, and they give you

19 something as specific as a fire violation, how can

20 you say they're not giving you the essential

21 elements?

22 MR. LALLI: They didn't give me a violation

23 that creates a substantial and specific danger to the

24 public health or safety.

25 JUDGE SMITH: Are there - - - are there

1 violations - - -

2 MR. LALLI: It had to do with - - -

3 JUDGE SMITH: - - - are there violations to
4 the fire code that are not particularly dangerous?
5 Is it possible - - -

6 MR. LALLI: In this particular instance - -
7 -

8 JUDGE SMITH: - - - is it possible to have
9 a fire code violation without creating a substantial
10 and specific danger?

11 MR. LALLI: Sure. The absence of a smoke
12 detector that - - -

13 CHIEF JUDGE LIPPMAN: That's not - - -
14 that's not a threat to the public?

15 JUDGE RIVERA: How could that be? There
16 might be a fire?

17 MR. LALLI: There might be a fire. But the
18 - - -

19 JUDGE RIVERA: And it'll spread outside of
20 the premises, if you want - - - if you want to go
21 beyond just the limited number of people in the
22 building.

23 MR. LALLI: In this particular - - - in
24 this case, the allegation is that we took away her
25 key to an office that had the only means of egress

1 from the third floor, the top floor, of a residential
2 building - - -

3 JUDGE RIVERA: So people couldn't escape?

4 MR. LALLI: They - - - she didn't say that
5 the - - - the means of egress wasn't there. It's
6 just they took away her key.

7 JUDGE SMITH: Your point is taking away her
8 key doesn't - - - doesn't endanger anyone but her?

9 MR. LALLI: Not if she's not - - - not if
10 she doesn't go to the third floor. She doesn't have
11 to go to the third floor. She wanted an office up
12 there. They took it away from her.

13 JUDGE PIGOTT: Does this really come down
14 to - - - I - - - I noted that 740 has three elements,
15 that the employee must either disclose or threaten to
16 disclose an employer activity or practice - - -

17 MR. LALLI: Or policy.

18 JUDGE PIGOTT: - - - or policy, right, that
19 is in violation of a law, rule, or regulation, that
20 creates a substantial and specific danger to the
21 public health and safety. If - - - if a plaintiff
22 asserted those three things, just like that, would
23 that be a sufficient complaint in your view?

24 MR. LALLI: They couldn't do it in a
25 conclusory fashion. They'd have to allege facts that

1 support each of those three things.

2 JUDGE PIGOTT: You think - - - you think
3 that simple notice is not enough?

4 MR. LALLI: That's correct, Your Honor.
5 There - - - it's well established that conclusory
6 allegations are not sufficient to sustain a motion -
7 - - to withstand a motion to dismiss.

8 JUDGE PIGOTT: But you're not going so far
9 as to say that in order to sustain a claim under 740
10 that you have to cite the specific rule or regulation
11 violated?

12 MR. LALLI: I think you have to, because of
13 the - - - the legislative history of this statute is
14 that, you know, everybody held their nose when they
15 signed this the - - - the bill into law, saying that
16 it's just a start. This court has acknowledged that
17 there have been a lot - - -

18 JUDGE PIGOTT: But what do you do with my
19 janitor, you know, who says, you know, I saw this
20 stuff, I brought it to their attention and they
21 didn't do anything about it, and he doesn't know
22 anything about rules, regulations, or anything else?

23 MR. LALLI: Well, you - - - the - - - Mr.
24 Bergstein's citation to the commentaries is accurate
25 in that there's nothing in the law which requires the

1 employee to cite the specific statute, rule, or
2 regulation when he complains to his boss. But when
3 you're filing a complaint in court under Section 740,
4 you've got to allege a violation of a law, rule, or
5 regulation - - -

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MR. LALLI: - - - and this complaint
8 doesn't do that.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.
10 Thanks.

11 MR. LALLI: Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you.

13 Rebuttal?

14 MR. BERGSTEIN: Yes. A couple of points.

15 What the First Department is really doing
16 is imposing this bright-line rule that no matter what
17 we say in the complaint, no matter how the
18 allegations tell us what's really going on in the
19 facility, if you don't cite the rules and
20 regulations, the case is dismissed. Even though, in
21 the early 60s when the CPLR was enacted and we had
22 this notice pleading policy, *Foley v. D'Agostino*, I
23 think, we all know the case, and it has language
24 telling us how to interpret the pleading
25 requirements, which is that every pleading question

1 must be approached in light of the rule that
2 pleadings shall be liberally construed and that the
3 test of prejudice is one of primary importance.

4 JUDGE READ: Well, I take it, your - - -
5 your opponent, though, is saying something a little
6 bit different. He's saying that - - - that the
7 legislative history of this specific provision, this
8 whistle-blower statute over - - - kind of - - - not
9 amended that, but - - - but says, at least for this
10 kind of a cause of action, you do have to be a little
11 bit more specific than what we would typically think
12 of as notice pleading.

13 MR. BERGSTEIN: Not that - - - not any
14 provision of the CPLR that I know of. Under 3015 and
15 30 - - -

16 JUDGE READ: What about - - - what about
17 the legislative history for, was it, 740?

18 MR. BERGSTEIN: Well, it tells us the
19 statute is narrowly construed. It only concerns
20 public health and safety. It doesn't concern
21 financial fraud. But in term of pleading, there was
22 no effort to strictly require you to plead in a
23 certain way, not like we have in 3015, 3016, where
24 there is particularity requirements of - - -

25 JUDGE PIGOTT: Well, if you had just pled

1 one or two of these, you know, for example, if you'd
2 simply said, you know, I got fired because I brought
3 to their attention that the payroll checks were
4 bouncing, then that would be subject to a motion to
5 dismiss, because there's no way you can amplify that
6 - - -

7 MR. BERGSTEIN: Correct. Payroll problems
8 are not a violation of 740 - - -

9 JUDGE PIGOTT: Right, but there are, among
10 these - - - I think your opponent says nine, I
11 counted eight - - - but allegations, your claim is
12 that there are some of them that are, in fact, a
13 danger to - - -

14 MR. BERGSTEIN: Yes. And in the aggregate
15 as well.

16 And the only other point I want to make is
17 that the Second Department had a case called Rogers
18 v. Lennox Hill, and it talks about systemic problems
19 in a hospital where you had one incident that
20 highlighted, you know, structural problems in the way
21 the hospital was functioning, that could cause
22 problems down the road. And there was no suggestion
23 those problems were being remedied.

24 And that made out a 740 claim. You know,
25 that's what we have here. This looks to me like a

1 facility that had a lot of problems, and she was
2 screaming it out daily to management about what was
3 going on, and she was fired for it.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. BERGSTEIN: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you both.

7 Appreciate it.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Webb-Weber v. Community Action for Human Services, Inc., No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: April 4, 2014