Schottenstein v Silverman

2014 NY Slip Op 33612(U)

October 29, 2014

Supreme Court, New York County

Docket Number: 158186/2013

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59

Index Number : 158186/2013
SCHOTTENSTEIN, M.D., DOUGLAS
vs
SILVERMAN, M.D., WARREN
Sequence Number : 001
DISMISS ACTION

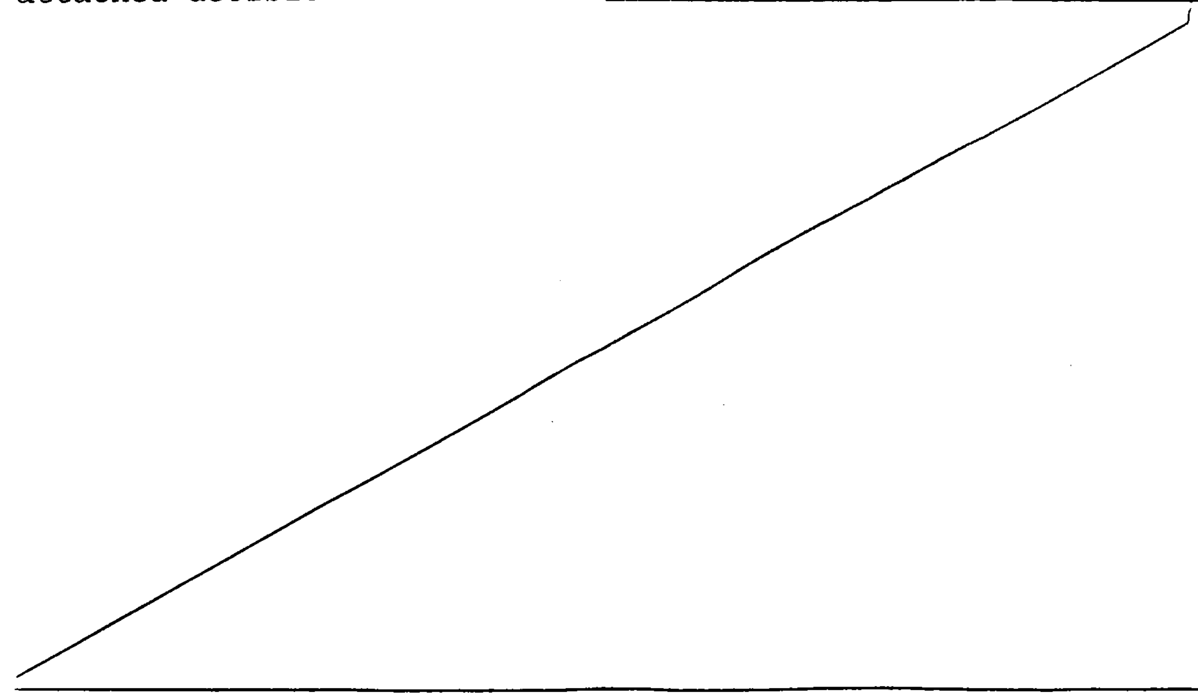
INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

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

Upon the foregoing papers, it is ordered that this motion is granted in accordance with attached decision and order.



Dated: OCT 29 2014 ____, J.S.C.
DEBRA A. JAMES

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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DOUGLAS SCHOTTENSTEIN, M. D.,

Plaintiff,

Index No. 158186/2013

-against-

WARREN SILVERMAN, M.D.,

Defendant.

-------------------------------------x

DEBRA A. JAMES, J.

Plaintiff Schottenstein, M.D. (plaintiff) is a physician licensed to practice medicine in New York state and is board certified in neurology and anesthesiology pain management. Defendant Silverman, M.D. (defendant) is a physician licensed to practice medicine in New York State and is board certified in internal and occupational medicine.

On or about September 19, 2011, plaintiff began treating Eligio Gomez (Gomez) for back pain related to an injury Gomez sustained while at work.

Gomez, a subscriber to insurance Carrier Chubb Indemnity Company (Chubb), filed for benefits to cover the fees for such treatment under the New York Workers' Compensation Law.

Chubb hired defendant as a consulting physician to review Gomez's medical records and to render a peer review report

(Report) assessing whether the medications that plaintiff prescribed for Gomez were "indicated and whether they need to continue to be utilized under the current Workers' Compensation Medical Treatment Guidelines". Defendant issued the Report on May 30, 2013 (Report).

The Report contains various statements that plaintiff alleges are untrue and defamatory. As set forth in the complaint, the statements in the Report include, but are not limited to:

> However, reviewing this medical record it clearly uncovers a variety of disturbing findings....there are hosts of individuals out there seeking to try to take advantage of areas [...sic] that are poorly monitored and poorly managed in order to perpetuate financial interests utilizing unproven methodology and with unsupportable and unexplained costs for whatever reasons.
> ***I don't know who blocked out that one [medical record] in which the fact that there was no muscle relaxant in this gentleman's urine, in spite of the fact that it was a prescribed drug. ***Obviously any attempt to manipulate the medical documentation for whatever purpose would be quite suspect.
>
> ***
>
> There are national laboratories out there that are monitored regularly by the Substance Abuse Management Health Services Administration for the purpose of drug testing for federally mandated programs. These are good, high quality standard laboratories. They are capable of doing the same panel of drugs. They can be bundled and they can be done at an extremely marked down rate. In fact, I would venture to say that the complete panels that are done here by Dr. Schottenstein could be done by one of these laboratories for less

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> than $100. In our office we get panel 10s that include all of the opiates and narcotics and substance abuse drugs for less than $30...
> ...there seems to be ...an embracing of drug testing by pain management doctors for the purpose of generating revenue. Obviously, Dr. Schottenstein is going to charge several hundred dollars to collect and discuss the results of the test, that would be one source of generation of revenue...
>
> This gentleman should have absolutely no more invasive procedures. There is absolutely nothing that the pain management physician has to offer him. There is no need for any more drug testing, because he doesn't need to be on narcotic [sic]. There is no need for any of these topical creams...
>
> I suspect that once these modalities and interventions have been removed, Dr. Schottenstein will not have further interest in this patient
>
> It would be my suggestion that this medical file be bundled up and sent off to both the Office of Professional Misconduct and to the Attorney General's office....to look into some of the practices and discern whether in fact the standards of medicine have been met ethically and within the law, including specifically the manipulation of the medical record.

Defendant moves pursuant to CPLR 3211(a)(7) to dismiss the first cause of action alleging libel, arguing that the statements in the Report are not actionable as they are subject to an absolute privilege. Defendant likewise moves for dismissal of the second cause of action as he contends that its factual allegations fail to state a cognizable claim of intentional infliction of emotional distress.

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> Public policy mandates that certain communications, although defamatory, cannot serve as a basis for the imposition of liability in a defamation action. Communications falling within this category are deemed privileged, either absolutely or qualifiedly.
>
> Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with immunity, rather than a privilege against the imposition of liability in a defamation action. This immunity, which protects communication irrespective of the communicant's motives, has been stringently applied. In general, its protective shield has been granted only to those individuals participating in a public function, such as judicial, legislative, or executive proceedings. The absolute protection afforded such individuals is designed to ensure that their own personal interests--especially fear of a civil action, whether successful or otherwise--do not have an adverse impact upon the discharge of their public function.
>
> In contrast, communications protected by a qualified privilege do not provide the communicant with an immunity against the imposition of liability in a defamation action. A qualified privilege does, however, negate any presumption of implied malice flowing from a defamatory statement, and places the burden of proof on this issue upon the plaintiff. A communication is said to be qualifiedly privileged where it "is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." An absolute privilege against imposition of liability in a defamation action is an immunity which "protects communications irrespective of the communicant's motives." The interest championed by the communicant, viewed as constituting a somewhat lesser degree of importance than those interest vindicated in communications afforded absolute immunity, must be expressed "in a reasonable manner and for a proper purpose."

(Toker v Pollak, 44 NY2d 211, 219 [1978] (Citations omitted.)

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In Toker, the Court of Appeals ruled that the affidavit that defendant Stern provided to the prosecutor in the course of a investigation of whether plaintiff Toker had committed any criminal wrongdoing, was made not in the course of a judicial proceeding, and was subject to a qualified privilege only. The Appeals Court distinguished such facts from cases where the testimony was made in proceedings before a Grand Jury, and observed that Grand Jury communications enjoy an absolute privilege because such statements would be statutorily privileged, and under the law, barred from being disclosed. The Court cited previous decisions approvingly in which an absolute immunity was afforded communications made in the course of proceedings such as the filing of a claim before a Worker's Compensation Board, the filing of a complaint before a grievance committee of a Bar Association and the filing of a complaint before an agency that licences real estate brokers in connection with a license revocation hearing, reasoning that such proceedings were quasi-judicial. (Id. at 222; see also Lipton v Friedman, 2 Misc 2d 165 [Sup Ct NY County 1956]).

Plaintiff argues, in part, that defendant may not be afforded the claimed privilege by reason of his having unreasonably departed from the scope of the issues for which his

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expertise was retained. However,

> [t]he subject of inquiry was the claimant's condition and whether it had necessitated the [procedure] that was performed. Remarks on that subject were pertinent to the issue, as were questions of the value of the doctor's services [ ]. In determining whether remarks are pertinent or gratuitous an absolute criterion is not feasible. The mere fact that every word uttered might not immediately bear upon the issues would not put it outside the protection of the privilege.

(Lipton, 2 Misc.2d at 166).

Plaintiff argues that though an absolute privilege may apply to a preliminary or investigatory segment of a quasi-judicial proceeding, an absolute privilege is not afforded remarks made prior to the commencement of the proceedings. However, Workers Compensation Law § 20(1) provides that a Worker's Compensation claim may be made to the employer, or the chair of the Worker's Compensation board, at any time after the expiration of the first seven days of claimant's disability. Upon such presentation

> the board shall have full power and authority to determine all questions in relation to the payment of the claims presented to it for compensation under the provisions of this chapter. The chair or board shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing...Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. (*Id.*)

Therefore, as the filing of a Workers' Compensation has been held to be a quasi-judicial proceeding, the statements of defendant made during the course of such proceeding are subject

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to an absolute privilege. Such statements are distinguishable on their facts from the statements that defendant Stern made to the District Attorney in Toker. Unlike in Toker, where the District Attorney was not required to and took no further action with respect to Stern's hearsay accusations, the Workers Compensation Board was required to conduct an investigation, which in this instance included defendant's Report, provide a hearing if requested by either Gomez, Gomez's medical provider (see Matter of Kigin v State of NY Workers' Compensation Bd., 109 AD3d 299 [3d Dept 2013]) or Chubb, and render a decision either approving or denying the claim that Gomez and/or Dr. Schottenstein made.

Park Knoll Associates v Schmidt (59 NY2d 205 [1983]), relied on by plaintiff is distinguishable on its facts, since it held that the defendant tenants' association president did not acquire immunity for defamation by virtue of his being an advisor or scrivener to the tenant-parties in the quasi judicial proceeding, since he was neither an attorney, party or witness in that proceeding. Here, defendant was certainly a witness with respect to the Workers' Compensation Board proceeding.

Hollander v Long Island Plastic Surgical Group (104 AD2d 357 [2nd Dept 1984]), also cited by plaintiff, is similarly distinguishable on its facts as it concerned statements made in a

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medical report prepared at the request of an insurance company, which request was not in the context of any judicial or quasi-judicial proceeding.

Assuming all of the allegations of the complaint to be true, the court holds that the statements in the Report made by defendant are entitled to absolute privilege and thus, plaintiff's cause of action fails to state a cause of action for libel under CPLR 3211 (a) (7). (See also Goldwater v Merchants Importing, 6 AD2d 777 [1958]).

To sustain a cause of action for intentional infliction of emotional distress, plaintiff must allege behavior "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community'" (citation omitted)'(164 Mulberry Street Corporation v Columbia University, 4 AD3d 49, 56 [1st Dept 2004]). "Claims typically fail because the challenged conduct is not sufficiently outrageous or because a statement is privileged [citation omitted]" (*Id.*)

Here, as the statements in question are protected by an absolute privilege, as a matter of law, they do not constitute outrageous, atrocious and utterly intolerable behavior. (See also

Howell v New York Post Co., 81 NY2d 115 [1993].)

Accordingly, it is hereby

ORDERED that the first branch of the motion of defendant for dismissal of the first cause of action for libel per se, for failure to state a cause of action, pursuant to CPLR 3211 (a) (7) is granted; and it is further

ORDERED that the second branch of the motion of defendant for dismissal of the second cause of action for intentional infliction of emotional distress, for failure to state a cause of action, pursuant to CPLR 3211 (a) (7) is granted; and it is further

ORDERED that the complaint herein is dismissed in its entirety.

This constitutes the decision and order of the court.

DATED: October 29, 2014

ENTER:

J.S.C.