

Pickney v Estevez

2016 NY Slip Op 33173(U)

March 30, 2016

Supreme Court, Westchester County

Docket Number: Index No. 66592/2014

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
LAVERN TYRONE PICKNEY,

Plaintiff,

-against-

JOSE ESTEVEZ and
PUTNAM HOSPITAL CENTER,

Defendant

-----X
LEFKOWITZ, J.

DECISION and ORDER
Index No. 66592/2014
Return Date: Mar. 28, 2016
Seq. No. 1

The following papers were read on the motion of defendant Jose Estevez (hereinafter "Estevez") for an order: (1) dismissing plaintiff's complaint; or (2) compelling discovery or precluding for failure to provide complete discovery responses; (3) costs; and (4) such other and further relief as this court deems just and proper.

Order to Show Cause dated February 16, 2016; Affirmation in Support; Exhibits A-S
Affirmation in Opposition; Exhibits 1-4

Upon the foregoing papers and proceedings held on March 28, 2016 this motion is determined as follows:

This defamation action was commenced on or about October 3, 2014. According to plaintiff, Estevez falsely accused him (a hospital aide) of physically attacking a dementia patient who had been in his care. In paragraph 18 of his complaint plaintiff alleged that Estevez' false claims subjected him to infamy and ridicule. In paragraph 23 of his complaint plaintiff alleged that he "suffered financial loss due to the false and wrongful claims made by Estevez." Estevez joined issue on or about November 25, 2014.

On or about February 13, 2015 Estevez served his combined discovery demands and a notice to admit. Estevez followed up with a letter to plaintiff, dated March 20, 2015 requesting a response to his discovery requests. Plaintiff responded on or about April 26, 2015 but Estevez found the responses "grossly insufficient" and so stated in a letter dated May 28, 2015 in which he outlined what he believed were the deficiencies.

The parties executed a preliminary conference stipulation on June 17, 2015 which was so-

ordered by this court (Lefkowitz, J.).

By letter dated July 15, 2015 Estevez again requested plaintiff to provide appropriate discovery responses. He also served plaintiff with a demand for a bill of particulars. Paragraph 12 thereof sought “a statement identifying who subjected the plaintiff to infamy and ridicule as alleged in paragraph 18 of plaintiff’s complaint.” By letter dated September 1, 2015 Estevez noted that plaintiff had not served a bill of particulars. Plaintiff responded by letter dated September 4, 2015 that he was not in possession of a demand for a bill of particulars and asked that it be faxed or emailed to him. On or about September 8, 2015 Estevez mailed a courtesy copy of his demand for a bill of particulars.

Plaintiff served Estevez with a bill of particulars dated September 8, 2015. As to his response to paragraph 12 of the demand for a bill of particulars, plaintiff stated, “fellow hospital employees and hospital administration personnel subjected plaintiff to such infamy and ridicule.” In paragraph 17 thereof plaintiff stated that his reputation and ability to work in the hospital community was permanently damaged and he was unable to obtain employment. He further claimed that he had lost about \$3500.00 in legal fees needed to defend himself against the malicious allegations made by Estevez.

By letter dated September 24, 2015 in response to plaintiff’s request, Estevez mailed a courtesy copy of his earlier letter dated May 28, 2015 (in which he had outlined what he believed were the deficiencies in plaintiff’s discovery responses).

By letter dated October 21, 2015 Estevez outlined what he believed were the deficiencies in plaintiff’s bill of particulars and by that letter he also made a demand for authorizations. Estevez’ notice to produce, dated October 23, 2015 sought, among other items, a copy of all legal bills supporting the claim of \$3,500.00 in legal fees set forth in paragraph 17 of the bill of particulars.

A compliance conference was held on November 12, 2015. Estevez states that plaintiff’s counsel appeared one hour late. The Compliance Conference Referee Report & Order, so-ordered by the court (Lefkowitz, J.), directed Estevez to email to plaintiff a courtesy copy of his previously served discovery demands and directed that on or before November 24, 2015, plaintiff serve a supplemental bill of particulars; responses to Estevez’ demands for discovery including copies of the non-privileged portion of his legal bills relevant to this action; and duly executed authorizations for his employment records, medical records, and income tax returns from 2011 to the present.

By letter dated December 7, 2015 Estevez acknowledged receipt from plaintiff of authorizations for his employment, health and tax return records. Estevez stated that, however, plaintiff had not served a supplemental bill of particulars and responses to Estevez’ discovery demands (notice to produce dated October 23, 2015) which was to include copies of the non-privileged portion of legal bills relevant to this action.

A compliance conference was held on January 7, 2016. The Compliance Conference Referee Report & Order, so-ordered by the court (Lefkowitz, J.), directed plaintiff to serve a supplemental bill of particulars and responses to Estevez' demands for discovery (notice to produce dated October 23, 2015) which was to include copies of the non-privileged portion of legal bills relevant to this action.

By letter dated January 7, 2016 Estevez made a demand for supplemental authorizations (for employment records from Bedford Acura and Phelps Memorial Hospital).

Although Estevez now states that he appeared for a compliance conference on January 8, 2016 and that plaintiff did not appear, this court's records indicate that a compliance conference was held on January 7, 2016.

On this motion Estevez sought an order, among other things, dismissing plaintiff's complaint. He asserted that plaintiff has failed to respond to: (1) paragraph 12 of the demand for a bill of particulars; (2) the demand for a receipt for plaintiff's legal bills as alleged in paragraph 23 of the complaint and paragraph 17 of the bill of particulars; and (3) the demand for supplemental authorizations dated January 7, 2016. Estevez further asserted that costs are proper in this matter due to plaintiff's frivolous actions and general course of conduct in this matter.

Plaintiff opposed this motion. He asserted that the disclosure sought by Estevez had been provided and was provided fairly quickly after it was requested.

At the proceedings held in this matter Estevez stated that all outstanding discovery was provided.

CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]).

The Rules of the Chief Administrator (22 NYCRR) §130-1.1 provide that the court, in its discretion, may award to any party or attorney costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Conduct is defined in Part 130 of the Rules of the Chief Administrator as, inter alia, "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (Rules of the Chief Administrator [22 NYCRR] § 130-1.1[c]).

On this record it is clear that throughout these proceedings plaintiff failed to promptly

respond to discovery demands and often times responded only after Estevez had repeatedly requested the discovery and/or after a compliance conference order was issued directing plaintiff's compliance with Estevez' discovery requests. Notwithstanding the delays, it cannot be said that plaintiff's actions in this matter were willful and contumacious such that it would be proper to strike his complaint. However, plaintiff's actions in delaying discovery were frivolous within the meaning of the Rules of the Chief Administrator. Therefore, it is proper for the court to impose costs against plaintiff in the sum of \$250.

In light of the foregoing, it is:

ORDERED that the branch of the motion of defendant Jose Estevez seeking costs is granted and on or before April 7, 2016 counsel for plaintiff shall pay to defendant Jose Estevez costs in the sum of \$250 and file proof of payment of this amount on the court's NYSCEF system on or before April 7, 2016; and it is further,

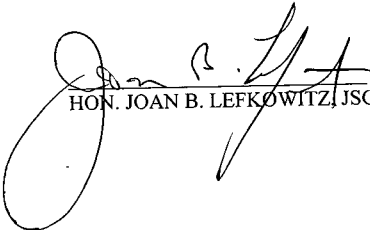
ORDERED that all other branches of the motion of defendant Jose Estevez are denied; and it is further,

ORDERED that defendant Jose Estevez serve a copy of this decision and order with notice of entry on all parties within five days of entry; and it is further,

ORDERED that all parties shall appear in the Compliance Part, Room 800 on April 14, 2016 at 9:30 A.M..

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
March 30, 2016


HON. JOAN B. LEFKOWITZ, JSC

To:

Anthony M. Giordano, Esq.
Attorney for Plaintiff
23 Spring Street, Suite 204A
Ossining, New York 10562
By NYSCEF

Ryan Thomas Donovan, Esq.
Harris, Conway & Donovan
Attorneys for Defendant Estevez
5 Clinton Square
Albany, New York 12207
By NYSCEF

Putnam Hospital Center
Defendant
670 Stoneleigh Avenue
Carmel, New York
By U.S. Mail

cc: Compliance Part Clerk