

**Pinckney v Estevez**

2017 NY Slip Op 33469(U)

March 21, 2017

Supreme Court, Westchester County

Docket Number: Index No. 665592/14

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under 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  
-----X

LAVERN TYRONE PINCKNEY,  
  
Plaintiff,

-against-

Index No. 66592/14  
Motion Sequence No. 002  
Decision and Order

JOSE ESTEVEZ and PUTNAM HOSPITAL CENTER,  
  
Defendant.  
-----X

EVERETT, J.

- The following papers were read on the motion:
- Notice of Motion/Affirmation in Supp/Affidavit in Supp/Exhibits A-I/
  - Memorandum of Law
  - Affirmation in Opp/Affidavit in Opp/Exhibits 1-6/Memorandum of Law
  - Reply Memorandum of Law

Defendant Jose Estevez (Estevez) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint. The motion is opposed.

Upon the forgoing papers, the motion is granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff Lavern Tyrone Pinckney (Pinckney) commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on October 3, 2014, to recover damages based on allegations of defamation as against Estevez, and negligent hiring as against defendant Putnam Hospital Center (PHC). Issue was joined by service of Estevez's answer with affirmative defenses on or about November 25, 2014. It appears from the record that PHC was not served with process, that the time to do so has expired, and that no request was

made to extend plaintiff's time to effect service on PHC. The parties conducted discovery pursuant to a preliminary conference order and follow-up compliance conference orders, after which plaintiff filed a note of issue and certificate of readiness on August 25, 2016.

The underlying facts, as relevant to Estevez's motion are that, on the morning of November 24, 2013, Pinckney was working as a mental health worker in the mental health ward at PHC assisting nurses and attending to patients' needs, and that Estevez was employed at PHC as a security guard. According to the complaint, one of the mental health patients (Patient X) became agitated and began to approach a nurse in a menacing manner. When Pinckney stepped between Patient X and the nurse, Patient X punched Pinckney in the face with a closed fist. It is alleged by Pinckney that, after the incident was resolved, Estevez, who was not present during the incident, made a knowingly false report to PHC officials claiming that Pinckney responded to being punched by straddling, strangling and punching Patient X multiple times. The complaint further alleges that, when PHC's physicians found no injuries, marks or bruises on Patient X, which were consistent with Estevez's allegations of abuse, PHC requested that Estevez withdraw his accusations. Estevez allegedly agreed, but then used the abuse "hotline" to anonymously report false claims about the incident to the New York State Justice Center for the Protection of People with Special Needs (Justice Center), which, in turn, triggered a criminal investigation of Pinckney. Pinckney claims that Estevez's false accusations caused him to lose his job at PHC, and subjected him to infamy and ridicule. Finally, it is alleged that Estevez made/published these false claims with malice.

In support of his motion for summary judgment, Estevez submits his sworn affidavit together with copies of the pleadings, discovery materials, and party deposition transcripts. In his

affidavit, Estevez explains that he witnessed a physical altercation between plaintiff and a mentally disabled patient, that he intervened to prevent further abuse of the patient, and that he alerted his superiors, both orally and in a written statement. He states that both statements were made in his role as a mandated reporter, that he made them in good faith and without malice, and that his only intent was to protect a mentally disabled patient (Estevez aff, ¶¶ 2-8).

The written statement provided by Estevez to PHC after the altercation states, in relevant part:

“As I arrived at Reed 4, male tech Tyrone P. was trying to re-direct patient . . . into his room, which then the patient punched the male tech Tyrone P., on the face, which then Tyrone P. strangled, closed-fist punched the patient, and pushed the patient on to [sic] the bed, then fell onto the floor on his back which then nurse tech Tyrone P. straddled on top above the patient and began strangling him, punching him with his right closed fist. I immediately told him to get off the patient and remove yourself from the room. Nurse tech Christine S., was present from the beginning of the incident, as I was on the floor cradling the patient’s head and protecting him from further harm, Tyrone P. came back into the room and again I firmly told Tyrone P. to leave the room again, which then I requested a nursing supervisor and I called code gray over the radio which was at 0640. Shortly thereafter a nursing supervisor arrived and I debriefed what occur [sic]”

(notice of motion, exhibit F).

During his court ordered deposition, Estevez gave a more detailed account of what he observed. Estevez testified that, when he got to the psychiatric ward (referred to alternately as Reade Four or Reed Four), he saw Pinckney using hand signals to try to redirect Patient X into a room, and then saw Patient X punch Pinckney in the face (Estevez tr at 16, 17, 19). Estevez also recalled that a female patient care technician was just outside the patient’s room (*id.* at 18, 19), and when asked what happened next, he stated:

“A. Pinckney then grabbed the patient by the lapel area, pushing like this ([i]ndicating), into the room. The patient went on to [sic] the bed, fell off the bed,

and then he was on his back. The patient then - - Pinckney straddling on top of the patient, grabbing by the area over here ([i]ndicating). From what I saw from the corner, you know, 'don't you ever put your hands on me again.' And I told him to get off the patient. He got off the patient"

(*id.* at 21). When asked where he was during the interaction and what he observed, Estevez explained that he was right behind Pinckney, that he verbally, not physically, tried to intervene, and that, from his angle, he was able to observe Pinckney punch the patient (*id.* at 22, 28, 33). Estevez stated that Pinckney then got off and walked out.

When questioned about his reporting of the incident, Estevez testified that he provided the report because was a mandated reporter at the time of the incident, but that someone at PHC told him not to speak about it to anyone outside of the hospital (*id.* at 37, 40). When questioned about his report to the Justice Center, Estevez explained that he was confused about what to do, because the instruction he was given about not reporting the incident was in conflict with his own understanding of what he was supposed to do as a mandated reporter. He stated that he was concerned that his employment at PHC would be terminated if he reported the incident to the Justice Center. Estevez stated that it was not he, but his girlfriend, Stacey Isaac, who called the Justice Center to report the incident (*id.* at 38, 42, 50, 51), after which he had a face-to-face interview with the Justice Center about the subject incident involving Pinckney and Patient X (*id.* at 49).

Estevez also offers the transcript of Pinckney's deposition testimony in this matter, and the transcript of Pinckney's testimony in a separate action he commenced in the State of New York Court of Claims against the State of New York, New York State Justice Center. According to Pinckney's sworn testimony, Estevez did not use a racial slur to describe him, he could not

explain why he believes Estevez holds racial animus toward him, and that he does not know if Estevez is a racist (notice of motion, exhibit H, Pinckney tr at 210; exhibit I, Pinckney tr at 114, 115). While being deposed, Pinckney conceded that he voluntarily resigned from PHC on March 19, 2014, several months after the subject altercation, when he was being investigated for allegedly conducting improper interactions with a different patient (notice of motion, exhibit H, Pinckney tr at 74, 89-90).

Estevez contends that the evidence supports his motion to dismiss on the grounds of qualified privilege and absolute privilege. This, he explains, is because he is a mandated reporter and his incident report to PHC and his report to the Justice Center are protected against defamation claims by a qualified, or common interest privilege, attendant to these communications.

Under New York law, a qualified privilege is extended to communications:

“made by one person to another upon a subject in which both have an interest. This ‘common interest’ privilege has been applied, for example, to employees of an organization, members of a faculty tenure committee and constituent physicians of a health insurance plan. The rationale for applying the privilege in these circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded”

(*Lieberman v Gelstein*, 80 NY2d 429, 437 [1992][internal citations and quotation marks omitted]).

New York also recognizes that the qualified privilege may be waived when the offending statements are made, or published, with malice, which is defined as spite or ill will. The qualified privilege will also be defeated by statements which are “made with a high degree of awareness of their probable falsity” (*Lieberman v Gelstein*, 80 NY2d at 438, quoting *Garrison v Louisiana*, 379 US 64, 74 [1964]).

Here, Pinckney does not meaningfully dispute that Estevez' communications were made during the course of his employment as a security guard at PHC following his intervention in an altercation between Pinckney and Patient X, or that the communications are protected by the qualified, or common-interest privilege against claims sounding in defamation. Rather, it is Pinckney's contention that the qualified protection shield was waived by Estevez when he made statements which he knew were false, and which he made with malice and in bad faith. To this end, Pinckney asserts that these elements are readily established by the fact that PHC credited his own version of what transpired with Patient X, rather than Estevez' account, which was not supported by the video evidence, a witness or by medical injuries sustained by Patient X, and by the fact that he (Pinckney) was acquitted after trial for the criminal activity asserted in Estevez's report.

For the following reasons, the motion for summary judgment is granted.

As a mandated reporter, Estevez was under a duty to communicate a reportable incident involving a vulnerable person, here, a mentally disabled person, to the Justice Center, and the Justice Center is under a duty to investigate the reported allegations (*see* Social Services Law §§ 491, 492). In fact, under Social Services Law § 491 (3) (b):

“[a] mandated reporter who knowingly and willfully fails to report a case of suspected abuse or neglect to the vulnerable persons' central register may be subject to termination, subject to any applicable collective bargaining agreement. Any person or official required by this article to report a case of suspected abuse or neglect to the vulnerable persons' central register who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure.”

Under Social Services Law § 497:

“[a]ny person participating reasonably and in good faith in making a report . . .

operating the vulnerable persons' central register or disclosing information in compliance with this article shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions. For the purpose of any proceeding, civil or criminal, the good faith of any such person required to perform any of such functions in accordance with this article shall be presumed, provided such person, was acting in discharge of his or her duties and within the scope of his or her employment or responsibilities, and that such liability did not result from the willful misconduct or gross negligence of such person."

Accordingly, not only was Estevez permitted to communicate about the incident to PHC and to the Justice Center, he was required to do so, and his good faith is presumed. Plaintiff counsel's assertion of malice,<sup>1</sup> without supporting evidence, is inadequate to evade the qualified privilege shield.

There is also no merit to Pinckney's argument that his "vindication" in this matter raises questions of fact regarding the falsity of Estevez's reporting requiring a trial on the claim of defamation. The result of Pinckney's logic would be to subject mandated reporters to the possibility of civil liability for defamation based on the eventual outcome of any particular investigation. This, in turn, would have a deterrent, or chilling, effect on a mandated reporter's decision to report alleged abuse or neglect, which is contrary to the Social Services Law's purpose of protecting a vulnerable population, and which is why mandated reporters, such as Estevez, are shielded by the qualified privilege.

Accordingly, it is

ORDERED that defendant Jose Estevez's motion for summary judgment is granted and the complaint is dismissed as against said defendant, and the Clerk is directed to enter judgment in

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<sup>1</sup> Malice is defined as personal spite, ill will, culpable recklessness or negligence (*see Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 259 [1<sup>st</sup> Dept 1995] [internal quotation marks and citations omitted]).

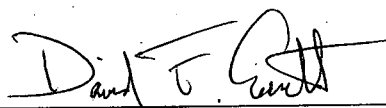
favor of defendant Jose Estevez with costs and disbursements as taxed by the Clerk upon submission of an affirmed bill of costs; and it is further

ORDERED that the complaint is dismissed as against defendant Putnam Hospital Center without prejudice.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 21, 2017

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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