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Litigation privilege can't be used to bar defamation lawsuit

By Eric T. Berkman
Lawyers Weekly Correspondent

The Patriot Group, LLC. v. Edmands, et al.

THE ISSUE Did the litigation privilege shield an attorney from a defamation suit stemming from a letter he sent an adverse party on his client's behalf?

DECISION No (Appeals Court)

LAWYERS Jack I. Siegal of Gordon, Rees, Scully, Mansukhani, Boston (plaintiff) Michael J. Stone and Steven DiCairano, of Peabody & Arnold, Boston (defense)

The litigation privilege did not shield an attorney from a defamation suit stemming from a letter he sent an adverse party on his client's behalf, the Appeals Court has ruled.

Plaintiff Patriot Group LLC, an investment company in the real estate sector that was seeking to collect on a $20 million judgment against businessman Steven C. Fustolo from a dispute over a development project, initiated involuntary bankruptcy proceedings against Fustolo.

Defendant Bruce W. Edmands, who did not represent Fustolo in the bankruptcy case but apparently served as his longtime attorney in other matters, sent a letter to the plaintiff on Fustolo's behalf making allegedly false accusations of tax fraud and stating that Fustolo had filed whistleblower claims with the Internal Revenue Service and Securities and Exchange Commission.

A Superior Court judge dismissed the plaintiff's subsequent defamation claim, ruling that it was barred by the absolute litigation privilege, a complete defense to lawsuits for statements made in the context of a judicial or quasi-judicial proceeding.

But the Appeals Court reversed, finding that the defendant's statements were not made in such a context.

"Even assuming arguendo that Fustolo did submit whistleblower claims to these agencies, [the defendant has not] called to our attention any authority — statutory, regulatory, case law, or otherwise — even suggesting that the proceedings for either the IRS or the SEC whistleblower claims provide for the presentation of evidence, cross-examination of witnesses, a decision by an impartial decision maker, or review of that decision," Judge Edward J. McDonough Jr. wrote for the panel, distinguishing the case from *Fisher v. Lint*, a 2007 case in which the Appeals Court applied the privilege to statements made in the context of a proceeding before the State Police trial board. "Rather … claims to the IRS and the SEC for whistleblower awards appear to be resolved as part of each agency's administrative, as opposed to adjudicative, functions."

The court also found that Fustolo's bankruptcy case, a judicial proceeding, could not serve as a basis for the litigation privilege because the defendant, when sending the letter, was not Fustolo's bankruptcy counsel.

The 20-page decision is *The Patriot Group, LLC. v. Edmands, et al.*, Lawyers Weekly No. 11-154-19. The full text of the ruling can be found at masslawyersweekly.com.

Undermining protection?

Defense counsel Michael J. Stone of Boston said he was confident his client would prevail once the more demanding summary judgment standard is applied to the plaintiff's claim.

Still, he said, the Appeals Court's decision will expose attorneys who are zealously representing their clients to the expense and burdens of litigation before obtaining the benefits of the privilege.

"In order to protect the integrity of the legal system, it has long been recognized that judges, witnesses and lawyers all need to be immune not just from liability but from the burdens and costs of litigation itself," Stone said. "This opinion undermines that protection."

Jack I. Siegal of Boston, who represented the plaintiff, could not be reached for comment before deadline. But Vincent J. Pisegna, a Boston civil litigator, said the ruling shows the courts taking seriously their obligation to manage the bar and, in conjunction with that obligation, a trend toward limiting attorney-related privileges.

Boston attorney Jonathan D. Plaut, who handles attorney malpractice claims, said the ruling reminds attorneys that zealous client advocacy is no substitute for due diligence.

Plaut pointed out that the defendant attorney wrote an allegedly defamatory letter based on information provided by his client and apparently failed to press his client beforehand for proof or otherwise ensure that the allegations were true. The client then used the imprimatur of the lawyer's letter to further defame the plaintiff on the internet, Plaut continued.

"The tip for the practitioner is simple: Do not be a stooge for your client," Plaut said. "If a lawyer puts her good name behind a client's assertion, and with a modicum of effort that assertion could have been disproved, blame properly lies at the lawyer's feet."

Joseph G. Blute, a lawyer in Boston who has handled disputes over the litigation privilege, said he agreed with the decision.

Vincent Pisegna

"The facts [in this case] are bad," Pisegna said. "This lawyer apparently did some fairly nasty things on behalf of a client who was found to engage in a whole range of illegal activities. So the court seemed disinclined to agree with the arguments put forth by the defendant lawyer to excuse or minimize his conduct."

"There's no evidence in the record that there was ever a whistleblower claim even filed, or if one was filed, that could be considered a judicial or quasi-judicial proceeding," Blute said. "Therefore, it wasn't part of litigation for purposes of the litigation privilege, so it was correct on the merits."

Blute said he, too, saw the decision as expressing disapproval over the defendant's actions.

"When you read the music of the decision and not just its lyrics, I think the court is trying to say, 'Look, you're a lawyer. Your job is to litigate a dispute within the rules and not assume the client's role and not assume the client's battles on an emotional level,'" he said. "One of the jobs of a litigator is sometimes to tone down the dispute so it can be resolved."

Thomas P. Campbell III, who successfully asserted the litigation privilege on behalf of the defendant in *Fisher*, said it was difficult to draw major new conclusions from the decision given that the case involved no litigation or judicial proceeding contemplated in good faith.

"But it's interesting that the court has determined that whistleblower complaints of the kind at issue here to the IRS and SEC are considered solely administrative," the Boston lawyer said. "In the past, the decisions have often commented on testimony under oath as being one of the major factors considered in determining whether a proceeding was judicial or quasi-judicial. While these whistleblower claims do require signatures under pain of perjury, the Appeals Court found this wasn't enough."

Alleged defamation

In 2011, the plaintiff obtained a judgment in excess of $20 million against Fustolo following litigation arising from a development project dispute.

Unsuccessful in collecting, the plaintiff and two other creditors initiated involuntary bankruptcy proceedings against Fustolo, who was represented by attorney David M. Nickless in that case.

But on May 9, 2014, purportedly acting as Fustolo's attorney, the defendant, Edmands, sent a letter to the plaintiff's attorney and three other people that allegedly included false statements of fact, including statements that the plaintiff had committed tax fraud, that Fustolo had filed whistleblower claims for award with the IRS and SEC based on such fraud, and that the plaintiff had filed the involuntary bankruptcy petition to harass and intimidate Fustolo and destroy his reputation.

When Fustolo and the defendant were deposed during the bankruptcy proceeding, Fustolo apparently could not remember a single detail supporting the letter. Meanwhile the defendant testified that he sent the letter, drafted by Fustolo, to intimidate the plaintiff and that he did so without verifying any factual basis behind its allegations.

Fustolo subsequently republished the false statements over the internet, hiring someone to post them on a blog created for that purpose.

On April 10, 2017, the plaintiff brought a defamation claim against the defendant in Superior Court. Applying the litigation privilege, Judge C. William Barrett granted the defendant's motion to dismiss.

The plaintiff appealed.

Non-judicial proceeding

The Appeals Court found the litigation privilege inapplicable because even if Fustolo actually did submit whistleblower claims to the IRS and SEC, such proceedings would not be judicial or quasi-judicial in nature.

Specifically, the court said that while such claims are filed under penalty of perjury and the claimant can be represented by counsel, they do not exhibit other characteristics — such as presentation of evidence, cross-examination of witnesses, and a decision by an impartial decision-maker — associated with a judicial proceeding.

The court also found the litigation privilege inapplicable to Fustolo's bankruptcy proceeding.

"As we noted at the outset, Nickless, not [the defendant] represented Fustolo in his bankruptcy proceeding," McDonough wrote. "Indeed, [the defendant] submitted an affidavit, prior to the hearing on his motions to dismiss, denying that he was in any way involved with Fustolo's bankruptcy proceeding."

Accordingly, the Appeals Court reversed the Superior Court's dismissal judgment.