

2013 IL App (2d) 121201-U
No. 2-12-1201
Order filed July 8, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DARON SEYMOUR-REED,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-SR-1425
)	
ALLIED BARTON SECURITY)	
SERVICES, LLC,)	Honorable
)	Michael A. Wolfe,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly granted judgment for defendant on plaintiff's defamation claim, ruling that plaintiff did not establish actual malice to overcome the qualified privilege applicable to corporate investigations into employee misconduct: plaintiff did not show that defendant concocted the incidents at issue, and defendant's reported suspicions of plaintiff were reasonable given that plaintiff was the supervisor on duty when the incidents occurred.
- ¶ 2 Plaintiff, Daron Seymour-Reed, filed a *pro se* small claims complaint in the circuit court of Du Page County against defendant, Allied Barton Security Services, LLC, his former employer. He alleged that he was defamed *per se* when one of defendant's employees made false allegations about

his work performance and thereby damaged his personal and professional reputation. Following completion of plaintiff's case-in-chief during a bench trial, the trial court granted defendant's motion for a directed finding,¹ ruling that the alleged statements were qualifiedly privileged because they were made as part of a corporate investigation into plaintiff's employment-related conduct. Plaintiff filed a motion for reconsideration that was denied, and, in turn, he filed a timely notice of appeal. Because plaintiff failed to submit evidence of actual malice sufficient to defeat the qualified privilege, we affirm the entry of judgment in favor of defendant.

¶ 3

I. BACKGROUND

¶ 4 Defendant employed plaintiff as a part-time security supervisor and assigned him to one of its clients, the Naperville BP facility (facility). On December 11, 2011, plaintiff attended a meeting at the facility with Gregory Little, defendant's account manager for the facility, Marvin McClain, plaintiff's immediate supervisor, and David Hoffman, defendant's technology manager. Hoffman attended the meeting at plaintiff's request.

¶ 5 The purpose of the meeting was to investigate two incidents that occurred on December 4, 2011, while plaintiff was supervising the overnight shift at the facility. Based on his prior investigation, Little suspected that plaintiff had left a cup of urine at a particular security post and also had not been present at that post as required. During the meeting, Little made the alleged defamatory statements regarding plaintiff's suspected involvement in the two incidents.

¹Although defendant moved for a directed verdict, the trial court properly considered and ruled on it as a motion for a directed finding. See 735 ILCS 5/2-1110 (West 2010). We will refer to the motion as one for a directed finding.

¶ 6 Plaintiff was subsequently removed from his assignment at the facility, based on the investigation. Instead of accepting reassignment to another location, plaintiff opted to resign. He subsequently filed this suit, seeking damages for defamation *per se* based on Little's accusations during the December 11 meeting.

¶ 7 At the bench trial, plaintiff called two witnesses in his case-in-chief, Little and Hoffman. According to Hoffman, the December 11 meeting was related to an investigation about complaints involving the security staff at the facility.

¶ 8 Little testified that he was informed that there had been a cup of urine left at a security post during the December 4 shift over which plaintiff was the supervisor. As Little investigated that incident, he discovered that the same security post had been left unmanned during the same shift. After examining the available information, and talking with the other two security officers working that evening, Little decided to speak with plaintiff about the incident. Little further explained that, although he did not remove the two officers from the schedule prior to completing his investigation, he did so as to plaintiff because plaintiff was the shift supervisor.

¶ 9 Plaintiff testified that he was advised by McClain that he was being removed from the schedule and was to attend the December 11 meeting with Little. During the meeting, Little, in the presence of McClain and Hoffman, informed plaintiff of the allegations regarding the cup of urine and the unmanned security post. According to plaintiff, he was not informed of the allegations prior to the meeting and was never given an opportunity to submit a written report as to the incidents. When plaintiff asked Little at a subsequent meeting what happened to the cup of urine, Little responded that that issue was irrelevant.

¶ 10 Near the end of plaintiff’s testimony, he stated that “the defense attorney, he would like to introduce a qualified privilege defense. That will work in a case where reckless disregard was not evident. In this case Mr. Little—.” At that point, the trial court cut plaintiff off, stating, “Hold on. You get to make a closing argument in a little bit, but right now this is just testimony.” The trial court then asked if plaintiff had “[a]nything else in terms of testimony about the facts?” To this, plaintiff responded, “No, your honor.” Plaintiff was in turn cross-examined, but he offered no further testimony relevant to the issues of qualified privilege or actual malice.

¶ 11 After the close of plaintiff’s case, defendant moved for a directed finding. In doing so, defendant contended that the alleged defamatory statements were qualifiedly privileged. Defendant further asserted that plaintiff needed to “come forward with actual evidence creating an issue of fact as to whether the defendant has abused the privilege” and that there was “no such evidence” presented to the court.

¶ 12 In responding to defendant’s argument, plaintiff recognized that actual malice was necessary to overcome the qualified privilege. In that regard, he stated that Little’s “reckless disregard during his investigation destroy[ed] any qualified privilege defense.” He also contended that Little “knew [the] allegations were false and even misrepresented the facts to cover up the truth.”

¶ 13 The trial court granted defendant’s motion for a directed finding. In doing so, it found that the alleged defamatory statements were made as part of a corporate investigation and were thus qualifiedly privileged. The trial court did not expressly mention the issue of actual malice.

¶ 14

II. ANALYSIS

¶ 15 In a bench trial, section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2010)) allows the defendant, at the close of the plaintiff’s case-in-chief, to move for a directed

finding. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 52 (2010). In ruling on such a motion, the trial court must apply a two-step analysis. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 52. First, the trial court determines as a matter of law whether the plaintiff has presented a *prima facie* case. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 52. In other words, the trial court must assess whether the plaintiff presented some evidence on each element of his cause of action. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 52. Second, if the plaintiff presents some evidence on each element, the court must consider and weigh the totality of the evidence presented, including evidence that is favorable to the defendant. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 52. After weighing all the evidence, the court determines, applying the applicable standard of proof, whether sufficient evidence remains to establish the plaintiff's *prima facie* case. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 52.

¶ 16 If the trial court finds that the plaintiff failed to present a *prima facie* case as a matter of law (step one), the standard of review is *de novo*. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 52-53. If, however, the trial court considers the weight and quality of the evidence and finds that no *prima facie* case remains (step two), that decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *527 S. Clinton, LLC*, 403 Ill. App. 3d at 53.

¶ 17 We may affirm on any basis supported by the record, whether or not the trial court relied on that basis, and even if the trial court erred in its reasoning. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 62.

¶ 18 To state a defamation claim, a plaintiff must present facts showing that the defendant made an unprivileged publication of the statement to a third party, and that the publicized statement damaged the plaintiff. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). A defamatory statement is one

that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with him. *Green*, 234 Ill. 2d at 491.

¶ 19 A statement is defamatory *per se* if its harm is facially obvious and apparent. *Green*, 234 Ill. 2d at 491. Two categories of such statements relevant to this case are: (1) words that impute that a person is unable to perform, or lacks integrity in performing, his employment duties; and (2) words that impute a person's lack of ability, or otherwise prejudices him, in his profession. *Green*, 234 Ill. 2d at 491-92.

¶ 20 An otherwise defamatory statement is not actionable where it is subject to a qualified privilege. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 43. To determine whether a qualified privilege exists, a court decides as a matter of law and policy whether the occasion for the communication created some recognized duty or interest sufficient to justify making it privileged. *Coghlan*, 2013 IL App (1st) 120891, ¶ 43. One such occasion involves statements made as part of a corporate investigation into employee misconduct. *Coghlan*, 2013 IL App (1st) 120891, ¶ 43. Thus, a qualified privilege exists for communications made during such an investigation. *Coghlan*, 2013 IL App (1st) 120891, ¶ 43.

¶ 21 A defendant bears the burden of proving that a qualified privilege exists. *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 265 (2005). Once a defendant establishes a qualified privilege, the plaintiff must prove that the defendant abused the privilege by either having intentionally published the false statement intending to injure the plaintiff, or having done so with reckless disregard for the truth or falsity of the statement. *Naleway v. Agnich*, 386 Ill. App. 3d 635, 639 (2008). Establishing such "actual malice" will overcome a qualified privilege. *Naleway*, 386 Ill. App. 3d at 645. The issue of whether a qualified privilege exists is one of law, but whether the

defendant abused the privilege in making the defamatory statement is a question of fact. *Naleway*, 386 Ill. App. 3d at 640.

¶ 22 In our case, plaintiff does not dispute that the alleged statements were made as part of a corporate investigation into his suspected wrongdoing and were thus qualifiedly privileged. Instead, he contends that he submitted sufficient evidence of actual malice on the part of Little to overcome the privilege.

¶ 23 Although the question of whether plaintiff submitted enough evidence to overcome the privilege is ultimately dispositive, we initially address some preliminary matters. We first note that the trial court granted the motion for a directed finding on the basis that the statements were qualifiedly privileged. This is problematic because the issue of whether defendant's statements were qualifiedly privileged was not necessary to plaintiff's *prima facie* case. Nonetheless, as noted above, we may affirm on any basis in the record. Undoubtedly, the existence of a qualified privilege had been well established at the close of plaintiff's case. The burden had effectively shifted at that point, and defendant had met its burden based on plaintiff's evidence. Moreover, plaintiff does not object to that procedure on appeal, forfeiting any objection. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). We add that the rules of procedure may be relaxed in an informal small claims hearing. See Ill. S. Ct. R. 286(b) (eff. Aug. 1, 1992). Thus, the error in deciding the qualified-privilege issue as part of the motion for a directed finding is not reversible in this context.

¶ 24 Additionally, once defendant met its burden on the qualified-privilege issue, the burden of proof shifted back to plaintiff to show actual malice. This was not an issue properly resolved via a directed finding as it also was not part of plaintiff's *prima facie* case. But just as the error was not prejudicial as to the qualified-privilege issue, this latter error was also of no consequence to plaintiff.

This is so because the record shows that plaintiff was fully aware of the need to overcome the privilege by proving actual malice. This understanding is reflected by his touching on the issue via the testimony of Little and Hoffman. Further, he argued the existence of actual malice when responding to defendant's motion for a directed finding. Also, when asked by the trial court if he had any additional "facts" related to the actual-malice issue, he said no. Not only was plaintiff aware of the need to prove actual malice, but had defendant waited until the close of all evidence and asked for a finding in its favor based on the evidence as developed, the trial court would certainly have made the same ruling. For these reasons, plaintiff was not prejudiced by the trial court's apparent error, which plaintiff has forfeited in any event.

¶ 25 That brings us to one last glitch in the trial court's ruling. The trial court never expressly ruled on the issue of whether Little acted with actual malice in making the alleged statements. Nonetheless, such a ruling was implicit in the trial court's judgment. The trial court is presumed to know the law and apply it correctly, absent an affirmative showing to the contrary in the record. *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 30. There is nothing in the record here to show that the trial court did not understand that plaintiff could overcome the privilege with evidence of actual malice. Rather, the record reflects that the trial court recognized that aspect of plaintiff's case and gave him the opportunity to meet his burden on that issue. Finally, again, plaintiff asserts that the trial court failed to rule on the issue.

¶ 27 That leaves the issue of whether plaintiff in fact proved actual malice in this case. He did not. Although plaintiff argues strenuously that Little was out to get him, the evidence simply does not bear that out. Plaintiff did not show that either the incident involving the cup of urine or the one of failing to man the security post was concocted by Little. Nor did he demonstrate that Little

unfairly focused on him. The mere fact that Little spoke to plaintiff seems entirely reasonable in light of plaintiff's position as supervisor of the shift on which the incidents occurred and plaintiff's having been assigned to the security post during the shift. The fact that Little removed plaintiff from his next shift prior to completing the investigation strikes us as eminently proper, as opposed to reflecting some sort of vendetta by Little. If the weak evidence offered by plaintiff were allowed to overcome the privilege in this case, the privilege would never be effective in any case. Thus, we agree with the trial court's implied finding that plaintiff did not sufficiently establish actual malice to overcome the privilege.²

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 30 Affirmed.

²We also note that the trial court stated that it was granting the motion for a directed finding based on the alternative reason that there had been "no proof presented to the court in the plaintiff's case about damages, and how his reputation has been damaged." This issue, not raised by the parties, does not provide an alternative basis to affirm the trial court, as plaintiff was not required to prove damages on his claim of defamation *per se*. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996).