

Robles v City of New York

2011 NY Slip Op 34168(U)

September 14, 2011

Supreme Court, Kings County

Docket Number: 27364/07

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

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JOSEPH K. ROBLES,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, DET. MICHAEL J.
McCARTHY (Shield No. 06190), ALLSTATE
INSURANCE COMPANY, DAN KELLY and
GLENN VISCONTI,

Defendants.
----- X

DECISION/ORDER

Index No.: 27364/07

HON. SYLVIA G. ASH

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After oral argument and upon the foregoing papers, Defendants Allstate Insurance Company, Dan Kelly ("Kelly") and Glenn Visconti ("Visconti") move for an Order, pursuant to CPLR §3212, granting them summary judgment dismissing Plaintiff's Complaint, which seeks to recover for injuries sustained following an allegedly unlawful arrest and prosecution. For the reasons stated below, Defendants' motion for summary judgment is GRANTED.

Plaintiff's cross-motion to compel the City of New York to produce the Internal Affairs Bureau Report regarding the IAB investigation of Detective Adriane Jones for in-camera review was denied, after oral argument, on procedural grounds.

Factual and Procedural Background

Plaintiff is the owner of an automobile repair shop, Knights Collision & Auto Care ("Knights"). This action stems from repairs done on a 2002 Mercedes Benz vehicle owned by Marcin and Carolina Skoczylas ("Skoczylas") and insured by Allstate. The Mercedes was involved in a collision on May 4, 2006, for which a claim was made to Allstate. In furtherance of the adjustment of the claim for vehicle damages, Defendant Kelly, an Allstate damage evaluator, inspected the Mercedes on May 18, 2006. He prepared a damage report with the cost of repairs totaling \$10,747.66, which Allstate paid out to the Skoczylas. Knights subsequently repaired the vehicle. However, sometime afterwards, Lynn Kramer, an employee within Allstate's Special Investigations Unit, received a complaint from the Skoczylas regarding said repairs. As a result, Ms. Kramer contacted Defendant Visconti, also an Allstate damage evaluator, who re-inspected the vehicle on June 23, 2006, at the Skoczylas's residence. During the re-inspection, Visconti noted that certain items that were supposed to be repaired, based on Kelly's earlier damage report, had not been repaired at all or had not been repaired to the extent noted in the report. The monetary difference between the actual repairs versus the total repairs expected to be completed was \$3,905.89.

On June 30, 2006, on behalf of the Skoczylas, Allstate filed a Complaint Report ("Complaint") with the New York State Department of Motor Vehicles ("DMV") pursuant to Insurance Law §3411[1]. The Complaint alleges that Knights certified, on the Certification of Automobile Repairs, that it had repaired the vehicle according to the attached invoice, which in this case was the Allstate estimate, but that Knights did not, in fact, do so. The Complaint then lists the specific repairs that Knights did not properly complete.

After the filing of the DMV Complaint, both Kelly and Visconti were contacted by Defendant NYPD Detective Michael McCarthy, who questioned them on their respective inspections and damage reports. Subsequently, Kelly and Visconti received subpoenas from the Kings County District Attorney's office to appear before a Grand Jury on August 14, 2006. They were also contacted by telephone. Kelly and Visconti state, in their respective affidavits, that they proffered the same information to the District Attorney's office as that given to the police. Neither Kelly nor Visconti ultimately testified before the Grand Jury. Visconti, however, states in his affidavit that he was asked in October 2006 to review the Knights invoice for the Skoczylas vehicle and to compare it to his observations during his re-inspection of said vehicle. Visconti thus annotated a copy of the Knights invoice indicating items on the invoice that he found were not repaired at the time of his re-inspection. He also made notations regarding certain work or labor that would not have been required for the particular work performed but for which billing was made.

On August 10, 2006, Detective McCarthy arrested Plaintiff. Plaintiff was charged with various crimes including Grand Larceny, Insurance Fraud and Petit Larceny. However, all of the charges against Plaintiff were subsequently dismissed by Hon. William E. Garnett on October 24, 2006.

Plaintiff then commenced this instant action on or about July 25, 2007, setting forth the following: false arrest, malicious prosecution and violations of civil rights under 42 U.S.C. §1983. The Allstate Defendants now move for summary judgment, asserting that Plaintiff has presented no triable issues of material fact.

The Parties' Contentions

The Allstate Defendants argue, in their motion for summary judgment, that they are not liable to Plaintiff for any of the alleged causes of action. It is their position that Kelly and Visconti, when contacted by the police and the District Attorney's office, merely confirmed to them their findings based on their respective inspections of the vehicle and therefore, the decision to arrest and prosecute Plaintiff was solely that of each agency's. They further argue that since both Kelly and Visconti cannot be held liable for false arrest and malicious prosecution in their individual capacity, there can be no collaboration with police that would subject them to liability for violation of Plaintiff's civil rights under §1983. Finally, Defendants also submit that communications made to the police or District Attorney's Office in general and with respect to such communications by insurance company employees are privileged pursuant to New York Insurance Law §406 and thus, such communications cannot form the basis for civil liability.

In response, Plaintiff argues that the Allstate Defendants actively conspired with Detective McCarthy by deliberately misrepresenting facts to effectuate his arrest and prosecution. It is Plaintiff's belief that his arrest was orchestrated by the Allstate Defendants and Detective McCarthy to defeat renewal of Knights' towing contract with NYPD Arterial Highway, a contract that is allegedly worth over one million dollars per year in gross revenue for Knights. Plaintiff alleges that, at the time of his arrest, an Allstate recommended repair facility was a competing applicant for the NYPD Arterial Highway permits.

It is Plaintiff's position that the Allstate Defendants falsified information to instigate his arrest and continued to feed false and misleading information to prosecutors. Specifically, Plaintiff alleges that Kelly falsely informed Detective McCarthy that Paulette Richins, a Knights employee, had certified that the Skoczylas vehicle had been repaired according to the provisions of the estimate. Plaintiff asserts that the Certification of Automobile Repairs shows that Ms. Richins had, in actuality, certified that the vehicle had been repaired "as described on the attached itemized invoice." In addition, Plaintiff argues that Visconti made deliberate misrepresentations when he annotated a copy of the Knights invoice. Plaintiff asserts that Visconti's notations are either completely inaccurate or fail to consider that some of the items of repair had been modified by Mr. Skoczylas and/or were completed after the re-inspection date.

Discussion

Summary Judgment Standard

The moving party on a motion for summary judgment has the burden of demonstrating "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

False Arrest and Malicious Prosecution Causes of Action

To prevail on a cause of action seeking to recover damages for false arrest, a plaintiff must prove that: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was aware of the resulting confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged (*Rivera v County of Nassau*, 83 AD3d 1032, 1033 [2d Dept 2011]). The elements of an action for malicious prosecution are (1) commencement of a criminal proceeding; (2) termination in favor of the accused; (3) absence of probable cause; and (4) actual malice (*Rivera*, 83 AD3d at 1033).

It is well established that "a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 A.D.2d 128, 132 [1st Dept 1999]). Rather, a plaintiff must establish that the defendant civilian "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (*Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003]). "The defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition" (*Mesiti*, 307 AD2d at 340). Merely reporting a crime to the police or participating in the prosecution is insufficient for liability to attach (*see Rivera*, 83 AD3d at 1033).

Here, the Allstate Defendants have demonstrated their prima facie entitlement to summary judgment. The evidence indicates that the Allstate Defendants, based on an initial complaint made by the Skoczylas, filed a DMV Complaint and upon being contacted by Detective McCarthy and the District Attorney's office, provided them with information which they believed to be true and cooperated in their investigation. Plaintiff has failed to provide any evidence of the Allstate Defendants' alleged malice in reporting this incident to the relevant regulatory bodies beyond mere conclusions and unsubstantiated allegations which are insufficient to raise any triable issues of fact. Even assuming that Defendants provided incorrect or incomplete information to law enforcement, a successful false arrest claim requires

allegations that Defendants "affirmatively induced or importuned the officer to arrest" Plaintiff (see *LoFaso v City of New York*, 66 AD3d 425, 426 [1st Dept 2009]). This is not the case here.

The Court also finds that Plaintiff's allegation that the Allstate Defendants deliberately and knowingly misrepresented facts to the authorities and conspired with them to procure Plaintiff's arrest is grossly overstated and unsupported by the facts. The DMV Complaint states that Knights certified that it had repaired the Skoczylas vehicle "according to the attached invoice which in this case was the Allstate estimate." This does not appear to the Court to be a misstatement. The fact that the Complaint fails to go into detail about Mr. Skoczylas's requested deviations from the estimate does not render the Complaint materially misleading. The gravamen of the Complaint is that, notwithstanding the requested deviations, there were items that should have been repaired according to the invoice but that Visconti found had not been completed. While Knights may have made repairs to the vehicle after the Allstate re-inspection due to the Skoczylas's complaints, the Complaint and Visconti's annotations on the Knight invoice were based on findings at the date of re-inspection, and therefore, are not misstatements. Moreover, even if they constituted misstatements, absent proof of fraud or bad faith, the Allstate Defendants would not be subject to civil liability pursuant to New York Insurance Law §406 (see *Zellermaier v Travelers Indem. Co.*, 739 NYS2d 922, 924 [New York Cty 2002]).

Accordingly, Plaintiff has failed to present any credible evidence of bad faith or support for his theory that the Allstate Defendants and Detective McCarthy actively conspired to undermine Plaintiff's business.

42 USC §1983 Cause of Action

Based on the foregoing, Plaintiff's claims under 42 USC §1983 also fail. To state a §1983 cause of action against a private citizen, a plaintiff must show that such citizen engaged in a conspiracy with state officials to deprive plaintiff of federal rights (*Payne v County of Sullivan*, 12 AD3d 807, 809-10 [3d Dept 2004]). Plaintiff has made no showing tending to prove an agreement between the Allstate Defendants and Detective McCarthy and concerted action to arrest Plaintiff.

Plaintiff's remaining contentions are without merit. Accordingly, Defendants' motion for summary judgment is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: September 14, 2011



SYLVIA G. ASH, J.S.C.