

Mohyi v Karen G. Brand, P.C.
2017 NY Slip Op 30185(U)
January 27, 2017
Supreme Court, New York County
Docket Number: 157823/15
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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DIANA T. MOHYI,

Plaintiff,

Index No.: 157823/15

-against-

KAREN G. BRAND, P.C. and KAREN G. BRAND,
jointly and severally,

Defendants.

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DEBRA A. JAMES, J.

In this action, defendants Karen G. Brand, P.C. and Karen G. Brand (together, Brand) move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

This action arises out of Brand's alleged employment of plaintiff Diana T. Mohyi (Mohyi) as an attorney, of counsel, to Brand's office in a matrimonial action, during the course of which Mohyi was arrested.

Mohyi claims that, on January 24, 2014, in such matrimonial action, when she appeared before this court (Kaplan, J.), of counsel, to attorneys of record Brand's office, she was arrested for improperly removing documents from the court file. Mohyi asserts that Brand had initially told her that she could remove the documents, but later denied that Mohyi had any connection with Brand's office. As a result, Moyhi was charged with misdemeanor counts by the Manhattan District Attorney's office, although those charges were eventually dismissed.

Mohyi thereafter commenced an action against Brand under New York County Supreme Court Index No. 150671/15 by filing a summons and complaint that set forth 10 causes of action (the first action). On July 27, 2015, this court (Hagler, J.) dismissed the first action at a hearing on Brand's dismissal motion. In particular, Justice Hagler dismissed Mohyi's 10 causes of action as legally insufficient, but noted that Mohyi's pleadings potential claims for malicious prosecution and false arrest.

Mohyi thereafter commenced the instant action on July 29, 2015 by filing a complaint that sets forth causes of action for: 1) malicious prosecution; 2) false imprisonment; and 3) violation of Judiciary Law § 487. Brand now moves pre-joinder of issue to dismiss.

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." See e.g. Arnav

Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. Scott v Bell Atlantic Corp., 282 AD2d 180, 183 (1st Dept 2001), affd as mod Goshen v Mutual Life Insurance Co. of N.Y., 98 NY2d 314 (2002), citing Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 (1st Dept 1994). Mohyi's new complaint asserts causes of action for malicious prosecution, false imprisonment and violation of Judiciary Law § 487, which each must be evaluated under the foregoing standard.

Preliminarily, the court must address Brand's contention that all of Moyhi's current claims are barred by the doctrine of res judicata.

The doctrine of res judicata serves to preclude a party from relitigating issues of fact and law decided in a prior proceeding. Specifically 'as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.'

Gomez v Brill Sec., Inc., 95 AD3d 32, 35 (1st Dept 2012), quoting Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481, 485 (1979).

Here, Brand argues that:

there can be no dispute ... that the [instant] claims arise from the identical factual transactions as those alleged in [the first action, because] . . . [t]hey involve . . . identical conduct occurring at the

identical time . . . involve the identical parties and seek identical relief for the identical injuries . . . [o]nly the names of the claims differ.

Mohyi response is that the claims in this case were neither litigated in the first action, nor identical to the 10 causes of action that Justice Hagler dismissed in that action. This court agrees with Mohyi. Justice Hagler carefully considered that took he believed that based on the complaint in the first action, Mohyi had unpled claims for malicious prosecution and false arrest, but that he would not rule on the viability of those claims because they were not before him. Since the sufficiency of such unpled claims were clearly not determined in the first action, the doctrine of res judicata does not apply to Mohyi's claims in this action.

Mohyi's first cause of action alleges malicious prosecution. The Appellate Division, First Department, notes that:

The tort of malicious prosecution requires proof of each of the following elements: '(1) the commencement or continuation of a . . . criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the . . . proceeding and (4) actual malice.' Additionally, a plaintiff must also allege and prove 'special injury' [internal citations omitted].

Facebook, Inc. v DLA Piper LLP (US), 134 AD3d 610, 613 (1st Dept 2015).

Here, Brand challenges the first two elements. Regarding those elements, Mohyi's complaint specifically states that:

29. As part of the preliminary investigation, [the] Manhattan District Attorney spoke to Defendant Brand. Defendant Brand denied any professional relationship with the Plaintiff, despite evidence to the contrary. In or about March 2014, during preliminary investigation by [the] Manhattan District Attorney, Defendant Brand had the opportunity to offer evidence of Plaintiff's relationship with Defendant Brand, but failed to do so.
30. In or about March 2014, Defendant Brand knew that her statements on the professional relationship with Plaintiff would result in either dismissal of the criminal charges or cause potential indictment of misdemeanor charges. Upon information and belief, in or about March 2014, Defendant Brand intentionally and maliciously falsified her statements knowing they would cause harm to Plaintiff and affect Plaintiff's license to practice law.
31. In or about March 2014, as a direct result of Defendant Brand's false testimony about Plaintiff, [the] Manhattan District Attorney filed two misdemeanor charges against the Plaintiff: 'making a punishable false written statement' (PL 201.45) and 'offering a false instrument for filing in the second degree' (PL 175.30).

40. After submitting the exculpatory evidence that demonstrated [that] Plaintiff was truthful About the professional relationship with Defendant Brand, the Manhattan District Attorney subsequently agreed to drop the charges related to the 'of counsel' affidavit on July 30, 2014."

Brand first argues that "defendants did not initiate the criminal proceeding" because her only role in the Manhattan District Attorney's investigation of Mohyi was to cooperate and furnish requested information. Mohyi replies that her claim is that Brand's furnishing of false information resulted in the

"continuation of a criminal proceeding," which is a permissible basis for a malicious prosecution claim. This court concurs with Mohyi. As the Appellate Division, First Department, observed in Brown v Sears Roebuck & Co. (297 AD2d 205, 210 [1st Dept 2002]), "a defendant may be said to have initiated a criminal proceeding by providing false evidence to the police or withholding evidence that might affect the determination by the police to make an arrest." This type of activity is plainly alleged in Mohyi's complaint. .

Brand next argues that "there was no favorable termination of the criminal action," because the charges against Mohyi "were dismissed on procedural grounds." In response, Mohyi states that she has alleged that the Manhattan District Attorney "formally terminated and abandoned the charges against her on the record." Mohyi then argues that New York law views "abandonment" of charges as a form of "termination" for the purposes of malicious prosecution claims. Mohyi once again correctly states the applicable law. In Smith-Hunter v Harvey (95 NY2d 191 [2000]), the Court of Appeals held that dismissals of charges as a result of settlements, plea bargains or mercy will not be considered favorable terminations that would support malicious prosecution claims, but "formal abandonment of the proceedings" will. Here, Mohyi's complaint alleges that the Manhattan District Attorney's formally dropped the misdemeanor charges that

it had filed against her on the record in open court after reviewing the exculpatory evidence that she provided. This allegation is clearly sufficient to satisfy the "favorable termination" element of Mohyi's malicious prosecution claim, and the court rejects Brand's argument to the contrary.

Mohyi's second cause of action alleges false imprisonment.

The Appellate Division, First Department, notes that:

A plaintiff alleging a claim for false arrest or false imprisonment must show that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged.

Hernandez v City of New York, 100 AD3d 433, 433 (1st Dept 2012).

Brand again raises two arguments against this claim. First, Brand argues that such claim is barred by the one-year statute of limitations that governs false imprisonment claims, because Mohyi was arrested and charged on January 30, 2014, but did not commence this action until July 29, 2015. Mohyi argues that the statute of limitations begins to run on the date of release from confinement, and notes that the Manhattan District Attorney dropped the misdemeanor charges against her on July 30, 2014, and that she commenced this action within a year thereafter, on July 27, 2015. Here Mohyi is not correct on the governing law. Her complaint avers that she was imprisoned for approximately 12 hours on January 30, 2014, that she was released after she was arraigned later that day, and that the charges that had been

filed on that day were resolved in her favor on February 9, 2015. The complaint also avers that a second set of charges was filed against her on March 12, 2014, but does not claim that Mohyi was arrested on those charges, and states that the Manhattan District Attorney formally abandoned them on the record on July 30, 2014 after having conducted a preliminary investigation. New York law plainly holds that the statute of limitations for false imprisonment claims, which is governed by CPLR 215 (3), begins to run upon "release from confinement." See e.g. Charnis v Shohet, 2 AD3d 663, 663 (2d Dept 2003).

Here, Mohyi's complaint states that she was released from confinement on January 30, 2014, so the statute of limitations for her false imprisonment claim would have run, as a matter of law, on January 30, 2015. As Mohyi did not file her instant complaint until July 29, 2015¹, her false imprisonment claim is, indeed, time-barred. As such claim is untimely, the court need not reach it does so, it does not reach Brand's additional dismissal argument.

Mohyi's final cause of action alleges violation of Judiciary Law § 487. That statute provides that:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with

¹As her complaint in the first action was not served until March 3, 2015, had Mohyi pled false arrest in such action, such claim would have been untimely interposed as well.

intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a
view to his own gain; or, wilfully receives
any money or allowance for or on account of
any money which he has not laid out, or
becomes answerable for,

Is guilty of a misdemeanor, and in addition to the
punishment prescribed therefor by the penal law, he
forfeits to the party injured treble damages, to be
recovered in a civil action.

Brand again raises a number of arguments in favor of
dismissal of this statutory claim. First, Brand argues that, "in
order to be actionable, the alleged misconduct must occur in a
court proceeding in which the plaintiff is a party," and Mohyi
was not a party to the matrimonial action, during the course of
which she was arrested. Mohyi responds that this argument is
misplaced, since Brand's alleged misconduct took place during
Mohyi's criminal prosecution, an action to which she most
certainly was a party. Since the complaint plainly alleges as
much, the court agrees, and rejects Brand's first dismissal
argument.

Next, Brand argues that Mohyi's Judiciary Law § 487 cause of
action should be dismissed because it does not allege that she
[Brand] engaged in misconduct during the course of representing a
client in litigation and, in fact, she did not represent Mohyi in
the criminal prosecution. Brand cites the decision of the
Appellate Division, Second Department, in Crown Assoc., Inc. v
Zot, LLC (83 AD3d 765 [2d Dept 2011]), which held that "the
amended complaint failed to allege that [the defendant] was

acting in his capacity as an attorney, and 'the mere fact that a wrongdoer is an attorney is insufficient to impose liability [internal citations omitted].'" Id., at 768. Mohyi counters that "a successful claim for violation of Judiciary Law § 487 does not require that the attorney have represented the party bringing the claim," and asserts that such a claim succeeds where "the attorney's statements rose to the level of advice, as they did here." Mohyi cites the decision of the United States District Court for the Southern District of New York in Amalfitano v Rosenberg (428 F Supp 2d 196 [SD NY 2006]) which found that:

in light of the absence of controlling decisional case law, the penal law origins of § 487, and the language of the statute, we conclude that the New York Court of Appeals would hold that an attempted deceit upon a court is sufficient to trigger liability under § 487.

428 F Supp 2d at 211. However, this holding does not address the fact that Brand was not acting as an attorney in the criminal prosecution against Mohyi, or the fact that Mohyi's complaint does not allege that Brand misled the court, but rather that Brand misled the Manhattan District Attorney, in that prosecution. The allegations of plaintiff's complaint make it clear that Brand was acting merely as a witness, and not in her capacity as an attorney. In light of the fact that Brand was a witness who happened to be an attorney, her purportedly malicious actions were outside the ambit of Judiciary Law § 487. Crown

Assoc., Inc. v Zot, LLC, 83 AD3d at 768. Mohyi's assertion that Brand's purportedly fraudulent statements to the Manhattan District Attorney "rose to the level of advice," in addition to being speculative, cannot overcome the fact of Brand's status as a witness.


Accordingly, for the foregoing reasons, it is hereby ORDERED that the motion, pursuant to CPLR 3211, of defendants Karen G. Brand, P.C. and Karen G. Brand, jointly and severally, is granted solely to the extent that the second and third causes of action of the complaint are dismissed, but is otherwise denied; and it is further

ORDERED that said defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331 , 60 Centre Street, on March 14, 2017, at 9:30 AM.

Dated: January 27, 2017

ENTER:


DEBRA A. JAMES J.S.C.