

Sapienza v Notaro

2021 NY Slip Op 33075(U)

December 13, 2021

Supreme Court, Queens County

Docket Number: Index No. 700060/2016

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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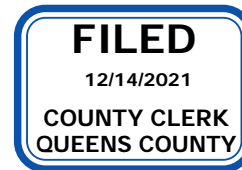
RICHARD SAPIENZA, JR., Index No.: 700060/2016

Plaintiff, Motion Date: 12/9/21

- against - Motion No.:25

PHILIP NOTARO, JR.; THE LAW OFFICE OF Motion Seq.: 10
MICHAEL A. KOFSKY, PLLC, a New York
professional service limited liability
company; and MICHAEL A. KOFSKY,

Defendants.



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The following electronically filed documents read on this motion by THE LAW OFFICE OF MICHAEL A. KOFSKY, PLLC, a New York professional service limited liability company and MICHAEL A. KOFSKY (collectively hereinafter the Kofsky defendants) for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the Second Amended Complaint in its entirety and with prejudice as against the Kofsky defendants; and on this cross-motion by plaintiff RICHARD SAPIENZA, JR. for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff and against the Kofsky defendants on plaintiff's first cause of action for malicious prosecution of the Queens County Action, and if necessary, setting this matter down for a hearing or inquest to determine the appropriate amount of damages to award plaintiff:

	<u>Papers</u> <u>Numbered:</u>
Notice of Motion-Affirmation-Exhibits-Memo. of Law..EF	246 - 289
Notice of Cross-Motion-Affirmation-Exhibits-Memo. of Law.....EF	291 - 324
Affirmation in Opposition to Cross-Motion & in Further Support-Memo. of Law.....EF	326 - 328
Memo. of Law in Reply.....EF	329

Plaintiff alleges that this action arises out of a campaign by defendant Philip Notaro, Jr. and his attorneys, the Kofsky defendants, to pursue meritless claims against plaintiff in at

least three different forums for the purpose of extorting a settlement from plaintiff. In December 2007, Notaro commenced an action against plaintiff in New Jersey (hereinafter the New Jersey Action). Plaintiff ultimately succeeded on a summary judgment motion dismissing the complaint. In April 2010, Notaro, represented by the Kofsky defendants, commenced an action in the Queens County Supreme Court (hereinafter the Queens County Action) alleging claims based on the same facts that had been alleged in the New Jersey action. Plaintiff was granted summary judgment on the ground of res judicata. Additionally, the Court, in an Order dated October 14, 2015 (Kitzes, J.), which dismissed the action, found that Notaro's conduct was frivolous in continuing to pursue the Queens County Action well after it was apparent, or should have been apparent, that Notaro's alleged claims were frivolous.

Thereafter, plaintiff commenced this action on January 5, 2016. The remaining causes of action seek to recover damages for malicious prosecution and tortious interference with advantageous business relationship. The Kofsky defendants and plaintiff now move for summary judgment.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Malicious Prosecution:

The elements necessary for malicious prosecution are: (1) the initiation of a proceeding by the defendant; (2) its termination in favor of plaintiff; (3) a lack of probable cause; and (4) malice (see Hornstein v Wolf, 109 AD2d 129 [2d Dept. 1985]; Colon v City of New York, 60 NY2d 78 [1983]). Where the malicious prosecution claim is premised on a prior civil lawsuit, the plaintiff must also show a special injury (see Engel v CBS, Inc., 93 NY2d 195 [1999]). To demonstrate a special injury for civil malicious prosecution claims, a plaintiff must show "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (Engel, 93 NY2d at 196]).

Here, it is undisputed that plaintiff has established the first two elements of a malicious prosecution cause of action. The Kofsky defendants contend that plaintiff's failure to move to

dismiss the Queens County Action on the grounds of res judicata for five years undermines malice, bad faith, and a lack of probable cause on the part of the Kofsky defendants.

Regardless of whether the Kofsky defendants acted with malice or a lack of probable cause, issues of fact remain as to whether plaintiff sustained a special injury. The Kofsky defendants contend that because plaintiff testified at his July 18, 2014 deposition that he decided that he did not want to be employed by Performance Team, plaintiff failed to establish a special injury. However, Craig Kaplan, Performance Team's CEO, testified that plaintiff's employment came to an end on December 31, 2013 partially because of, inter alia, deposition threats. Based on such conflicting deposition testimony, issues of fact preclude summary judgment in favor of either party (see DeSario v SL Green Management LLC, 963 NYS2d 24 [1st Dept. 2013]).

Tortious Interference:

A tortious interference claim has a three year statute of limitations (see CPLR 214[4]; Pursnani v Stylish Move Sportswear, Inc., 92 AD3d 663 [2d Dept. 2012]). The statute of limitations begins to run on the date of injury or when all of the elements of the tort could be truthfully alleged (see Snyder v Town Insulation, 81 NY2d 429 [1993]). The cause of action for tortious interference is not enforceable until damages are sustained and that point, rather than the wrongful act of the defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual (see Kronos, Inc. v AVX Corp., 81 NY2d 90 [1993]).

After discovery has proceeded in this matter, it has become apparent that plaintiff first suffered damages, including a great loss of income, as soon as the Queens County Action was commenced in 2010. Plaintiff testified that as soon as the litigation was filed in 2010, he was precluded from selling and from soliciting accounts. Therefore, this claim is untimely as plaintiff sustained an injury in 2010, and thus, this claim accrued in 2010.

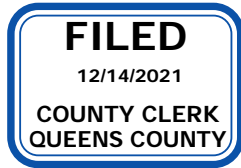
Accordingly, and for the reasons stated above, it is hereby

ORDERED, that the motion by THE LAW OFFICE OF MICHAEL A. KOFISKY, PLLC, a New York professional service limited liability company and MICHAEL A. KOFISKY is granted only to the extent that the cause of action for tortious interference is dismissed as against THE LAW OFFICE OF MICHAEL A. KOFISKY, PLLC, a New York professional service limited liability company and MICHAEL A.

KOFSKY. The cause of action for malicious prosecution remains;
and it is further

ORDERED, that the cross-motion by plaintiff RICHARD
SAPIENZA, JR. is denied.

Dated: December 13, 2021
Long Island City, N.Y.



Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.