



STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-10-376
NM-CUM-7/27/2011

JOSEPH GELBAND,

Plaintiff

v.

ORDER ON DEFENDANTS'
MOTION TO DISMISS

MEGAN BATES and
JILLIAN HILTON,

Defendants

Before the court is defendants Megan Bates and Jillian Hilton's joint motion to dismiss plaintiff Joseph Gelband's complaint against them pursuant to Maine's Anti-SLAPP Statute, 14 M.R.S.A. § 556. For the following reasons, the motion is denied.

BACKGROUND

The plaintiff alleges that the defendants assaulted him in his residence, and then called the Portland Police to report that the plaintiff assaulted them. (Compl. ¶¶ 4-5.) The plaintiff was charged with two counts of aggravated assault. (Compl. ¶ 6.) He was later indicted on these charges based on the defendants' grand jury testimony. (Compl. ¶¶ 10-11.) The criminal case was eventually dismissed. (Compl. ¶ 12.) The plaintiff also alleges that the defendants repeated their allegations to friends and others, and gave out the plaintiff's phone number and e-mail address to friends and others to enable those persons to harass, intimidate, menace, and threaten the plaintiff. (Compl. ¶¶ 14-16.)

The plaintiff filed a complaint with the court and alleges malicious prosecution¹ and intentional infliction of emotional distress.² The defendants now move to dismiss the plaintiff's complaint and argue that the allegations relate to the defendants protected right to report the plaintiff to the police.

DISCUSSION

1. SLAPP Lawsuit

A Strategic Lawsuit Against Public Participation, or SLAPP lawsuit, "is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants." Morse Bros., Inc. v. Webster, 2001 ME 70, ¶ 10, 772 A.2d 842, 846 (internal citation omitted). The statute defines the protected "right to petition" to include:

[A]ny written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body . . . ; or any other statement falling within constitutional protection of the right to petition government.

14 M.R.S.A. § 556; see also Schelling v. Lindell, 2008 ME 59, ¶ 11, 942 A.2d 1226, 1230.

¹ To prevail in a malicious prosecution action, a plaintiff must prove, by a preponderance of the evidence, that:

- (1) The defendant initiated, procured or continued a criminal action without probable cause; (2) The defendant acted with malice; and (3) The plaintiff received a favorable termination of the proceedings.

Trask v. Devlin, 2002 ME 10, ¶ 11, 788 A.2d 179, 182 (quoting Davis v. Currier, 1997 ME 199, ¶ 4, 704 A.2d 1207, 1208-09).

² A plaintiff must satisfy four elements to recover on a claim of intentional infliction of emotional distress:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [the defendant's] conduct;
- (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;
- (3) the actions of the defendant caused the plaintiff's emotional distress; and
- (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Lyman v. Huber, 2010 ME 139, ¶ 16, 10 A.3d 707, 711 (quoting Curtis v. Porter, 2001 ME 158, ¶ 10, 784 A.2d 18, 22-23 (alteration omitted) (quotations omitted)).

The statute allows a defendant to file a "special motion to dismiss" that the court will hear "with as little delay as possible." 14 M.R.S.A. § 556; Schelling, 2008 ME 59, ¶ 6, 942 A.2d at 1229. The defendant bears the initial burden of "showing through the pleadings and affidavits that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 167-68, 691 N.E.2d 935, 943 (Mass. 1998).³ "Once the defendant demonstrates . . . that the statute applies, the burden falls on the plaintiff to demonstrate that the defendant's activity (1) was without 'reasonable factual support,' (2) was without an 'arguable basis in law,' and (3) resulted in 'actual injury' to the plaintiff." Schelling, 2008 ME 59, ¶ 7, 942 A.2d at 1229 (citing 14 M.R.S.A. § 556). "Actual injury" is defined as requiring "evidence from which damage in a definite amount may be determined with reasonable certainty." Id. 2008 ME 59, ¶ 17, 942 A.2d at 1231 (quoting Maietta Constr., Inc. v. Wainwright, 2004 ME 53, ¶¶ 9-10, 847 A.2d 1169, 1173-74). The court views the evidence in the light most favorable to the moving defendant because the non-moving plaintiff bears the burden of proof. Morse Bros., Inc., 2001 ME 70, ¶ 18, 772 A.2d at 849.

The defendants argue that their report to the Portland Police Department, which resulted in the plaintiff's arrest and which forms the basis of this lawsuit, is a protected "written or oral statement . . . submitted to a[n] . . . executive body" within the meaning of the anti-SLAPP statute. 14 M.R.S.A. § 556; (Compl. ¶¶ 5, 6.). Courts have found that reporting incidents of crime or abuse to the police constitutes a protected exercise of the reporter's right to petition. See Benoit v. Frederickson, 454 Mass. 148, 153, 908 N.E.2d

³ Though the plaintiff faults the defendants' citation to Massachusetts law, the Massachusetts anti-SLAPP legislation is "nearly identical to 14 M.R.S. § 556." See Morse Bros., Inc., 2001 ME 70, ¶ 15, 772 A.2d at 848 (citing and explaining Donovan v. Gardner, 50 Mass. App. Ct. 595, 740 N.E.2d 639, 642 (Mass. App. Ct. 2000)).

714, 718 (Mass. 2009) (reporting rape to police is protected petitioning activity); McLarnon v. Jokisch, 431 Mass. 343, 344-45, 349, 727 N.E.2d 813, 815, 818 (Mass. 2000) (mother's call to police to report perceived violation of a restraining order and subsequent efforts to extend order were petitioning activities protected by anti-SLAPP legislation).

The defendants' conduct goes beyond reporting to the Portland Police. The plaintiff alleges that the defendants also falsely testified in front of the grand jury, leading to the plaintiff's indictment. (Compl. ¶¶ 9-11.) In Pylypenko v. Bennett, the Superior Court, facing similar facts, found that reports to the police were protected activities, even when the reports lead to charges for reckless conduct, a court summons, and arrest for failure to appear. 2011 Me. Super. LEXIS 13, *3-4, 26-27 (Feb. 23, 2011). Further, testimony in a criminal proceeding is an "oral statement made before or submitted to a . . . judicial body, [or an] oral statement made in connection with an issue under consideration or review by a . . . judicial body" 14 M.R.S.A. § 556.

2. Standard of Review

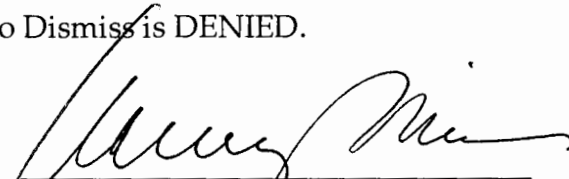
The standard of review of an Anti-SLAPP motion to dismiss "should resemble the standard for reviewing a motion for summary judgment." Morse Bros., Inc., 2001 ME 70, ¶ 17, 772 A.2d at 848. In Liberty v. Bennett, the Law Court affirmed the Superior Court's denial of an Anti-SLAPP motion to dismiss in an unpublished decision. 2009 Me. Unpub. LEXIS 24, *2-3 (Feb. 3, 2009). The Court stated: "By filing a motion without an affidavit, attached copies of or any other factual assertions about his so-called petitions, Liberty failed to meet his initial burden of proving that the anti-SLAPP statute applies." Id. at *2.

In this case, neither party submitted affidavits in support of their arguments. The defendants rely on photographs, for which no foundation is established, their motion, and the parties' pleadings. This record is not sufficient to meet their burden.

The entry is

The Defendants' Motion to Dismiss is DENIED.

Date: July 27, 2011



Nancy Mills
Justice, Superior Court

CUM-CV-10-376

Date Filed 07-29-10		Action OTHER CIVIL		Answer Due Date:		Docket No. CV-10-376	
Scheduling Order Issued: 9-27-10		Discovery Deadline: 5-22-10	Jury <input type="checkbox"/> Fee Pd. <input type="checkbox"/> Non-Jury <input type="checkbox"/>	Statement Filed: Order to File Statement:	Length of Trial:	Rule 16(b) <input type="checkbox"/> Rule 16(c) <input type="checkbox"/>	Pre Trial Issued: 5-6-11
Plaintiff(s) JOSEPH GELBAND JR 540 CONGRESS ST PORTLAND, ME 04101				Defendant(s) JULLIAN HILTON - served 7/26/10 MEGAN BATES - served 7/27/10			
Plaintiff's Attorney(s) pro se				Defendant's Attorney(s) Bruce M Merrill, Esq - Jullian Hilton Peter Rodway, Esq - Megan Bates			
Date	Justice	Action and Comments			Est Time	Not Reached	Cont
6-7-11		motion for date certain					
6/13/11	denied	Joint Motion to Dismiss					