Viscomi v Intershoe, Inc.

2002 NY Slip Op 30179(U)

September 17, 2002

Supreme Court, New York County

Docket Number: 103616/02

Judge: Ira Gammerman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

---x

ANNIBALE VISCOMI

Plaintiff,

-against-

Index No. 103616/02
P.C. No. 17799

INTERSHOE, INC., ALBERTO GUARINO,
RICHARD A. MARTIN, and SANTO F. RUSSO

Defendants.

---x

GAMMERMAN, J.:

Defendants Intershoe, Inc., ("Intershoe"), Alberto Guarino, Richard A. Martin and Santo F. Russo move, pursuant to CPLR 3211 (a)(1) and (7), for an order dismissing the action by plaintiff Annibale Viscomi.

FILED
SEP 23 2002
NEW YORK
COUNTY CLERK'S OFFICE

Background

This is an action to recover damages resulting from an alleged malicious prosecution. Visconi is the financial consultant for certain Italian and domestic companies and individuals. Intershoe is a New York company engaged in the business of designing, manufacturing and selling shoes. Guarino is an 85% owner of Intershoe. Viscomi was a long term financial consultant to Guarino and his businesses located in Italy until his resignation in December 1995. Viscomi was the financial counsel to Intershoe from early 1992 until July 1995. Martin and Russo represented Guarino in actions related to the underlying dispute.

Viscomi alleges that in the middle of 1995, he was contacted by an Italian company, Filanto S.p.A. ("Filanto") which was interested in purchasing an interest in Intershoe, Complaint, ¶ 11. Viscomi alleges that he related this offer to Guarino, and that in a meeting with Guarino and another minority shareholder, held in October 1995, he was promised by an individual

named Pucci a commission of $7 million if he would succeed in negotiating a sales price of at least $70 million for all of Intershoe's stock, id. ¶ 12. Viscomi alleges that Guarino subsequently confirmed the promise of commissions. Viscomi states that he ultimately negotiated an $80 million sale price for all of the shares of Intershoe.

In December 1995, Guarino terminated contact with Filanto claiming that Viscomi acted without authorization, and Filanto commenced an action against Guarino to compel him to convey his interest in Intershoe, Filanto S.P.A. v. Guarino, Supreme Court, NY County, Index No. 601546/96 (the "Filanto Action"). In the course of discovery, Viscomi was served with a subpoena duces tecum to appear on January 21, 1997 for deposition and to bring certain documents. Viscomi alleges that, at the time he was served, he had previously scheduled commitments in Italy which he could not postpone, and he requested that his deposition be rescheduled for a date after February 25, 1997, Complaint, ¶¶ 22-23. Viscomi further states that he and Martin exchanged correspondence in which he assured his willingness to appear for a deposition at the later date, id. ¶¶ 24-25. Viscomi alleges that on February 7, 1997, he delivered all documents requested by Martin, and on February 13, 1997, Martin sent a letter to him excusing him from testifying, id. ¶ 26.

On December 24, 1996, Justice Stephen G. Crane denied Filanto's motion for preliminary injunction in the Filanto Action, finding that Filanto failed to establish a likelihood of success on merits because it failed to show that Viscomi had actual or apparent authority to bind Guarino, noting that Filanto, "apparently had a secret arrangement to compensate Viscomi $7 million if the deal were consummated."

[* 3]

On October 7, 1997, Guarino moved for summary judgment in the Filanto Action. Viscomi states that Martin, in an attempt to discredit Viscomi, declared that Viscomi refused to appear for deposition and failed to reveal that Martin previously excused Viscomi from testifying, Complaint, ¶¶ 28-30. Viscomi alleges that both Russo and Martin made submissions to me attaching the decision by Judge Crane. Viscomi alleges that Martin also submitted an affidavit and memorandum of law in which he referred to incorrect information regarding the existence of an agreement between Filanto and Viscomi to pay to Viscomi $7 million in commissions, id. ¶¶ 38-44. On April 3, 1998, I granted summary judgment in favor of Guarino dismissing the Filante Action, finding that Viscomi breached a fiduciary duty owed to Guarino by representing both Guarino and Filanto and noting that,

> [o]f key significance to the transactions is a letter dated December 18, 1995, from Viscomi to Guarino and the two shareholders whose shares Filanto sought to purchase.... In this letter, Viscomi states that he, Viscomi
>
> > 'was hired by a colleague on behalf of one of his client to purchase a minority interest in Intershoe.'

I also noted that the commission was to be paid by the minority shareholders.

Viscomi alleges that this finding was based on an incorrect translation of a letter dated December 18, 1995, which, properly translated from the Italian original, states that Viscomi was "contacted by a colleague", and not "hired by a colleague," id. ¶¶ 31-32.

Viscomi alleges that subsequent to the April 1998 decision, Filanto moved to reargue based on the mistranslation but that the parties settled the action, id. ¶ 47. According to the settlement agreement, Guarino agreed not to rely on the April 1998 decision to establish that Viscomi acted as Filanto's agent, id.

[* 4]

Nevertheless, on January 25, 2000, Guarino commenced an action against Viscomi, Filanto and others, Intershoe, Inc. v. Filanto, Index No. 00 Civ. 1168 (the "Guariano Action"), seeking damages in excess of $50 million against Viscomi and alleging that Viscomi had a secret arrangement with Filanto for a $7 million commission and quoting the opinion by Justice Crane stating that Viscomi's commissions were due from Filanto. Viscomi also alleges that Guarino attached the April 1998 decision and intentionally omitted to state that the letter, which was found to be of most importance, was incorrectly translated, id. ¶ 49. The complaint alleged that Viscomi improperly obtained and disclosed confidential information, falsely represented himself to have authority to sell shares and threatened to file a frivolous a bankruptcy filing and to use other means to harm Intershoe, in order to obtain a secretly agreed to $7 million commission. In July 2000, Guarino settled the action with Filanto and its principals. Then, Guarino moved to amend the complaint to state a single cause of action for fraud against Viscomi, and Viscomi cross-moved to dismiss the action. On April 10, 2001, I denied Guarino's motion to amend, finding that the proposed claim for fraud failed to state a valid claim, and granted Viscomi's motion to dismiss the action, dismissing the third thorough ninth causes of action as barred by the applicable statute of limitations, and claims for conspiracy to commit fraud and conspiracy to commit intentional torts as not recognized as independent causes of action in New York.

Subsequently, Viscomi commenced this action alleging that he suffered damages to his professional reputation and loss of business as a result of defendants' initiation and prosecution of meritless claims against him in the Guariano Action and the foreseeable reporting of that suit and representations contained therein. Viscomi alleges that the news of that lawsuit appeared in certain first page headlines, together with his photograph, on the first page of multiple

publications in Italy. He also alleges that it is common in Italy to display poster-size first pages featuring the headlines of publications sold. Viscomi further states that the articles referred to the Guariano litigation and mentioned Justice Crane's finding of a secret agreement between Viscomi and Filanto. Viscomi alleges that, after the lawsuit was published, he lost five separate retainer agreements and numerous Italian companies terminated him as a financial advisor.

Analysis

Defendants move to dismiss the action, arguing that Viscomi failed to state his claim. In order to state a cause of action for malicious prosecution, plaintiff must show that defendant instituted an action with actual malice, that defendant lacked probable cause for such action, that the action was terminated in plaintiff's favor, and that plaintiff suffered special damages as a result of such malicious prosecution, Engel v. CBS, Inc., 93 NY2d 195 (1999), Dudick v. Gulyas, 277 AD2d 686, 687 (3d Dept 2000), LaMarche v. Power Test Petroleum Distributors, Inc., 118 AD2d 521, 523 (1st Dept 1986).

Defendants argue that Viscomi failed to state that the underlying proceeding was terminated in his favor because dismissal on statute of limitations grounds is not sufficient to support a malicious prosecution claim. Termination in favor of plaintiff in the underlying proceeding is a condition precedent to a claim of malicious prosecution. Generally, favorable termination is a final disposition of the action in favor of the plaintiff and against defendant-claimant. The purpose of this element in criminal cases is to indicate innocence, and in civil cases, to indicate the absence of liability. Certain courts, including New York courts, have held that, in general, termination chargeable to complainant, such as discontinuance or dismissal of the underlying action, is sufficient to support a claim for malicious prosecution absent evidence

of fraud or compromise, Levy's Store, Inc. v. Endicott Johnson Corp., 272 NY 155, 162 (1936), Freedman v. Freedman, 82 NYS2d 415, 417 (Sup Ct, Bronx County 1948). The issue is whether dismissal based on statute of limitations grounds is sufficient and New York courts have not decided issue and other jurisdictions are split.

The leading case, followed be a majority of jurisdictions, holds that dismissal on statute of limitations grounds is not sufficient to support a claim of malicious prosecution, Lackner v. Lacroix, 25 Cal3d 747, 602 P2d 393 (1979). The Supreme Court of California in Lackner applied the analysis formulated in Minasin v. Sapse, 80 Cal App3d 823 (2d Dist 1978), in which the court identified three categories of the manner of termination: (1) one which reflects the opinion of the court that the action lacks merit, for example dismissal for lack of sufficient evidence; (2) one which reflects the opinion of the prosecuting party as to the merits of the case, such as in case of voluntary dismissal of the action; and (3) one which is not reflective of the merits of the case, such is a dismissal for lack of jurisdiction. The Lackner court concluded that, while a dismissal for failure to prosecute is reflective of the merits by reason of, "the natural assumption that one does not simply abandon a meritorious action once instituted," dismissal based on statute of limitations grounds does not bear on the merits of the underlying claim, Lackner, 25 Cal3d at 751, 602 P2d at 394. The statute of limitations is procedural defense, such as the lack of personal jurisdiction or statute of frauds, and is waived if not timely raised, Lackner, 25 Cal3d at 752, 602 P2d at 396. The Lackner court identified policy reasons against maintenance of the malicious prosecution claim based on the dismissal on the statute of limitations grounds, stating that the same the policy underlying a statute of limitations defense, the unjustness in requiring defendant to defend against a stale claim, applies to preclude putting

[* 7]

in question the same stale issues in a malicious prosecution action, id. In addition, the court reasoned that the long-standing principle that the statute of limitations may not be used as a "sword" precludes the use of dismissal based on the statute of limitations to support a claim for malicious prosecution, id.

Other courts have rejected the approach formulated in Lackner, holding that any form of termination is sufficient to satisfy the requirement of favorable termination for purposes of a malicious prosecution claim, Hammond Lead Products, Inc. v. American Cyanamid Co., 570 F 2d 668, 673 (7th Cir 1977) (Applying New Jersey law, a dismissal for lack of venue without prejudice is sufficient), DeLaurentis v. City of New Haven, 220 Conn 225, 597 A2d 807 (1991) (Abandonment of the proceeding after its extended recess was sufficient because any termination without consideration is sufficient to satisfy the element of favorable termination), Parks v. Willis, 121 Or App 72, 835 P2d 1336 (Ct App 1993) (Stipulated judgment of dismissal was sufficient grounds for the claim). Connecticut courts have held that the determination whether the outcome was "favorable" is not relevant for the element of termination, but is relevant for the evaluation of the lack of probable cause, DeLaurentis, 220 Conn at 225, 597 A2d at 807. Contrary to the approach employed by Connecticut courts, New York courts have held that the element of want of probable cause and the element of favorable termination are distinct, and that both have to be satisfied to support the claim for malicious prosecution, Munoz v. City of New York, 18 NY2d 6, 10 (1966).

In deciding on the issue of favorable termination of a criminal action, New York courts have found that a dismissal in the interest of justice, Cantalino v. Danner, 96 NY2d 391 (2001), a dismissal on speedy trial grounds, Smith-Hunter v. Harvey, 95 NY2d 191 (2000), and a dismissal

[* 8]

for failure to prosecute, Loeb v. Teitelbaumm 77 AD2d 92 (2d Dept 1980), are each sufficient to support the claim, unless they are inconsistent with the innocence of the accused. New York courts held that a dismissal for mercy may never support the malicious prosecution claim because it presupposes guilt, Cantalino, 96 NY2d at 391. Also, dismissal by an adjournment, Nadeau v. LaPointe, 272 AD2d 769 (3d Dept 2000), voluntary and discretionary discontinuance or abandonment pursuant to a compromise, Plataniotis v. TWE Advance/Newhouse Partnership, 270 AD2d 627 (3d Dept 2000), or dismissal for facial insufficiency of the criminal information, Ellsworth v. City of Gloversville, 269 AD2d 654 (3d Dept 2000) do not constitute grounds for a malicious prosecution claim because they do not bear on guilt or innocence of the accused.

New York courts apply a similar analysis in civil cases, Freedman v. Freedman, 82 NYS2d 415 (Sup Ct, NY County 1948). A final determination on the merits, "or at least a termination without adjudication against the plaintiff in some way chargeable to the complainant, is a necessary condition precedent to the maintenance of the action," id. at 417. As in criminal cases where the absence of a conviction is not necessarily a favorable termination, see Martinez v. City of Schenectady, 97 NY2d 78, 84 (2001), the mere absence of a determination of liability in the underlying civil proceeding is not sufficient to support the claim. In the criminal context, a dismissal for failure to prosecute represents a favorable termination for plaintiff because, "the societal interest involved cannot extend so far as to compel individuals charged with criminal offenses ... to resist dismissal of the charges against them in the face of the prosecutor's failure to prosecute and the court's desire to dismiss the complaints," Loeb, 77 AD2d at 102. Otherwise, a defendant would have to waive fundamental protections against the application of criminal sanctions in order to preserve a claim for malicious prosecution. A dismissal of a civil suit for

[* 9]

failure to prosecute is not sufficient because it is not on the merits, Sokol v. Sofokles, 136 AD2d 535, 535 (2d Dept 1988), Struve v. Bingham, 244 AD2d 178, 178 (1st Dept 1997). In the civil context, dismissal for failure to prosecute does not bear on liability or non-liability of plaintiff, because such failure to prosecute may be for reasons of cost, time or any number of other considerations personal to the plaintiff.

Viscomi argues that a dismissal based on the statute of limitations is on the merits and can, therefore, constitute a favorable termination. Even though a dismissal on statute of limitations grounds is, "at least sufficiently close to the merits for claim preclusion purposes to bar a second action," Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 AD2d 1 (1st Dept 2000), it is similar to a dismissal for failure to prosecute in that it does not bear on the innocence or non-liability of plaintiff. The statute of limitations is a defense that may be waived if not timely raised. The purpose of the defense is generally to protect the charged party from having to defend stale claims where it would be burdensome to collect evidence and unfair to the extent that memories of witnesses fade. It would be contrary to the purpose of the statute of limitations to allow plaintiff to benefit from the protection of the statute of limitations and then to litigate the same stale issues which litigation the statute of limitations was specifically designed to prevent.

Furthermore, New York courts have held that in the civil context, the key concern is, "[t]he strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit," Sokol, 136 AD2d at 535. Also, termination is significant because, "it cannot be known that the prosecution was unjust or unfounded until it is terminated," Smith-Hunter, 95 NY2d at 197. Defendant should not be placed with burden of showing that he had probable cause to maintain the action where plaintiff did not succeed in obtaining a favorable

termination that would indicate his non-liability. Such favorable termination indicating non-liability in the underlying proceeding is condition precedent to a malicious prosecution claim without which plaintiff has no valid claim. Therefore, dismissal on the statute of limitations grounds which does not bear on liability or non-liability of plaintiff does not satisfy the element of favorable termination.

Defendants also argue that Viscomi failed to state the element of lack of probable cause. However, Viscomi sufficiently states this element. He alleges that the claims against him were known to defendants to have been meritless. Viscomi also alleges that the claims against him were founded on incorrect translation and incorrectly established and misrepresented facts. Viscomi alleges that defendants intentionally attached the April 1998 court decision by this court and the earlier decision by Justice Crane which were based on incorrect facts and a concededly erroneous translation of the key exhibit.

Defendants also argue that Viscomi failed to state special damages. A special injury is, "a highly substantial and identifiable interference with person, property or business and must entail some concrete harm that is considerably more cumbersome that the physical, psychological or financial demands of defending a lawsuit," Dudick, 277 AD2d at 688 (internal quotations and citation omitted). While actual imposition of a provisional remedy is not necessary to satisfy the special injury element of malicious prosecution claim, plaintiff must show burdens substantially equivalent to those imposed by provisional remedy. Engel, 93 NY2d at 203-04. Viscomi alleges that, as a result of this action he suffered damages to his professional reputation and that he lost clients and business in the amount of $1,625,000. He also alleges that he expended $275,000 in order to defend against Guarino's meritless claims, and also suffered damages to his reputation.

[* 11].

Because these allegations fail to state interference substantially equivalent to one imposed by provisional remedy, they are not sufficient to state special damages. Therefore, Viscomi's action fails for this additional reason.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants Intershoe, Inc., Alberto Guarino, Richard A. Martin and Santo F. Russo is granted and the action is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/17/02
SEP 17 2002

ENTER:
IRA GAMMERMAN
J.S.C.

FILED
SEP 23 2002
NEW YORK
COUNTY CLERK'S OFFICE