Mosbacher v Marks
2005 NY Slip Op 30589(U)
September 9, 2005
Supreme Court, New York County
Docket Number: 102000/2004
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MOSHE MOSBACHER

Plaintiff,

-against-

SAUL MARKS and JOHN GLEASON,

Defendants,

----------X

102000/2004

Index No.: ~~10200/04~~

DECISION and ORDER

FILED
SEP 15 2005
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged false arrest and/or malicious prosecution. Plaintiff and defendant Marks, both engaged in the jewelry business, allegedly made an oral agreement whereby plaintiff subleased part of Mr. Marks' office at 37 West 47th Street, Room 705 (the "Premises"). A dispute arose as to the terms of the agreement, and the relationship apparently became highly contentious.[1] The instant complaint alleges that Mr. Marks, upon advice and counsel of his attorney, co-defendant John Gleason, made a "false complaint and/or accusation against plaintiff" to the New York City Police Department ("NYPD"), with the intention that plaintiff be arrested. Affirmation of J. Gleason, Ex. B. The complaint further alleges that plaintiff was arrested on April 8, 2003, and consequently, suffered physical injury and mental

[1]The sublease dispute was the subject of a previous action by plaintiff in Supreme Court, New York County, against Mr. Marks and his landlord, Axial International Chartered ("Axial"), styled *Moshe Mosbacher & M. Mosbacher Diamond, Corp. v. Axial International and Saul Marks,* Index No. 105770/03. Plaintiff, who sought compensatory damages in the amount of $1.2 million, together with punitive damages of $250,000, discontinued the action, with prejudice, by stipulation recorded before Justice Ira Gammerman. *See* Affirmation of J. Gleason, Exhibit G.

distress. Defendants counterclaimed for recovery of their defense costs, alleging that this action is frivolous.

I. Defendants' Motions

Defendants now move to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7), and for summary judgment on their counterclaim. Defendants submit the affirmation of their attorney (Mr. Gleason), the affidavit of Mr. Marks, copies of pleadings, this Court's Decision and Order dated December 10, 2004, a transcript of proceedings before Justice Gammerman, and copies of correspondence between the parties' respective attorneys. Plaintiff's sole submission in opposition to both motions is his attorney's affirmation.

II. Background

A. Plaintiff's Complaint

Plaintiff's complaint asserts three causes of action. The first alleges that defendant Marks, on advice of his attorney, co-defendant Gleason, "signed a false complaint and/or accusatory instrument against plaintiff," with knowledge and intent that it would lead to his "false arrest," and as a result, the NYPD wrongfully arrested plaintiff. The second alleges that plaintiff was caused to "feel terrorized" by the defendants' actions; and the third alleges that plaintiff suffered mental and emotional injuries as a result.

B. The Affidavit of Mr. Marks

Mr. Marks avers as follows. In August 2001, he agreed to allow plaintiff to use part of the Premises to store his safe, and conduct business. Affidavit of S. Marks, para. 4. Plaintiff agreed to pay Axial, Mr. Marks' employer and landlord, $750 per month beginning in October 2001. *Id.* at para. 5. Marks agreed to perform some construction, for which plaintiff agreed to

pay. *Id.* During construction, in September 2001, plaintiff's mother Adrienne occupied plaintiff's space, answering telephones and performing clerical work. *Id.* at para. 7. Construction was completed in October. *Id.* Plaintiff traveled often and rarely visited the Premises. *Id.* at para. 9. In November 2001, plaintiff came to the Premises, and Mr. Marks presented him with a bill for $1,250 in construction costs, and $1,500 for use of the Premises in October and November. *Id.* Plaintiff responded with invective, and refused to pay anything more than $500 per month. *Id.* at para. 10. Enraged, plaintiff "stormed out of Axial's offices." *Id.* at para. 12.

Thereafter, plaintiff failed to pay for his use of the space, though Marks repeatedly requested payment by telephone. *Id.* at para. 13. Plaintiff's mother came to the space "nearly every day," but plaintiff "avoided contact" with Marks, and replaced the fire door lock, giving himself a private entrance from the outside corridor. *Id.* at 14.

On March 1, 2003, Mr. Marks spoke with plaintiff by telephone, and asked him to leave the space by a date certain. *Id.* at para. 17. Plaintiff said he would speak to his attorney, and promised to call Marks the next day. *Id.* Not receiving any call, Marks, on March 6, 2003, again phoned plaintiff to demand he vacate the space. *Id.* Plaintiff stated that he intended to stay in the space, without paying, for five years, and would seek legal counsel. *Id.* Marks gave plaintiff until March 13 before commencing legal action. *Id.* On that date, Marks called plaintiff, who "began a verbal tirade" promising destruction of Marks' business and expressing his wish that the Premises be "painted in blood." *Id.* at para. 20.

After the March 13 conversation with plaintiff, Mr. Marks "felt imminent threat of physical harm." *Id.* at para. 21. He "reported Mosbacher's threat with the New York City Police

Department by telephone, explaining the recent threats made by Mosbacher and other aggravating circumstantial facts." *Id.* On April 1, 2003, Mr. Marks received a call from plaintiff, wherein plaintiff made further threats, including a death threat. *Id.* at para. 22. Marks took no further action with respect to plaintiff's threats. On April 8, 2003, NYPD arrested plaintiff and filed an aggravated harassment charge against him. *Id.* at para. 25. On May 1, 2003, Marks "was deposed and gave accounts of the incidents leading to the threats and the threats made by Mosbacher." *Id.* at para. 27. "On May 7, Hon. E. Koretz of Criminal Court of the City of New York issued a Temporary Order of Protection ordering Mosbacher to stay away from Axial, [Marks'] family and [Marks]." *Id.* at para. 28.

C. The Affirmation of Mr. Gleason

Appearing on behalf of his co-defendant, as well as *pro se,* Mr. Gleason affirms that the instant proceeding was commenced on February 5, 2004, while the action before Justice Gammerman was "in full swing." Affirmation of J. Gleason, para. 61. This Court issued a preliminary conference order dated May 6, 2004. *Id.* at 62; Ex. F. In contravention of that order, and a subsequent compliance conference order dated October 14, 2004, plaintiff failed to appear for his deposition and physical examination, and failed to produce requested documents. According to Mr. Gleason, plaintiff's only response to the discovery demands and court orders, was a motion to disqualify him as counsel, which the Court denied, on default. *Id.* at 66.

III. Conclusions of Law

A. Motion to Dismiss

The Court's task in a CPLR 3211 motion to dismiss is "to determine whether [the] plaintiff's pleadings state a cause of action." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,*

98 N.Y.2d 144 (2002). In making its determination, the Court must "accept the facts as alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). Plaintiff's complaint speaks of a "false arrest." Plaintiff's attorney refers, in his affirmation, to causes of action for false arrest and/or false imprisonment. *See* Affirmation of T. Alatsas, para. 23. Therefore, the Court will consider both causes of action.[2]

B. False Arrest

"A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged." *Martinez v. City of Schenectady,* 97 N.Y.2d 78, 85 (2001) citing *Broughton,* 37 N.Y.2d at 458 n. 2. The First Department has held 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*

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[2]In *Broughton v. State,* 37 N.Y.2d 451 (1975), the Court of Appeals held that "[t]he distinction between false imprisonment and malicious prosecution in the area of arrest depends on whether or not the arrest was made pursuant to a warrant. As noted in the Restatement, 2d, an unlawful detention gives rise to a cause of action for false imprisonment 'except where the confinement was by arrest under a valid process issued by a court having jurisdiction'. When an unlawful arrest has been effected by a warrant an appropriate form of action is malicious prosecution. This distinction is critical not only because it affects the allegations and proof but also because it brings the prima facie rule into operation." *Id.* at 457-458 citing Restatement 2d, Torts, § 35, comment a; Prosser, Torts [4th ed], § 11. Here, the parties do not indicate whether or not the police had a warrant for Mr. Mosbacher's arrest.

R.R. Co., 253 A.D.2d 128, 131 (1st Dept. 1999) citing *Celnick v. Freitag,* 242 A.D.2d 436, 437 (lst Dept 1997); *Schiffren v. Kramer,* 225 A.D.2d 757, 758-759 (2d Dept). Thus, a private individual will not be held liable for false arrest for reporting unlawful conduct to the police unless the plaintiff demonstrates that "the defendant took an active role in the (arrest) of the plaintiff, such as giving advice and encouragement or importuning the authorities to act, and that the defendant intended to confine the plaintiff." *Lowmack v. Eckerd Corp.*, 303 A.D.2d 998, 999 (4th Dept. 2003) citing *Quigley v. City of Auburn,* 267 A.D.2d 978, 980 [1999] (citations omitted).

Here, plaintiff's complaint does not allege facts sufficient to state a cause of action for false arrest. The complaint merely recites that Mr. Marks signed a "false complaint" but does not state with any precision what was false about Mr. Marks' report to the NYPD, nor allege any facts demonstrating that defendants took an "active role" in the arrest. *See Gorman v. Gorman,* 88 A.D.2d 677, 678 (2d Dept. 1982) ("[e]ssential material facts must appear on the face of a complaint") citing *Greschler v. Greschler,* 71 A.D.2d 322, 325 (2d Dept. 1979).

Moreover, even if the Court were to find plaintiff's allegation of a "false complaint" sufficient to state a cause of action for false arrest, defendants' averments that plaintiff threatened Mr. Marks with violence "undermines a material fact upon which plaintiff's claim depends." *See Wilhelmina Models, Inc. v. Fleisher,* 797 N.Y.S.2d 83, 85 (1st Dept. 2005) ("[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence") citing *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept. 1999) *affd* 94 N.Y.2d 659 (2000); Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25 at 43 (motion lies under paragraph CPLR 3211(a)(7)

where defendant "successfully undermines a material fact upon which plaintiff's claim depends"). Plaintiff puts in no affidavit to contest defendants' assertion that he threatened Mr. Marks with violence. Thus, it appears that Mr. Marks was justified in reporting the threats. *See Du Chateau v. Metro-North Commuter R.R. Co.*, 253 A.D.2d 128, 131 (1st Dept. 1999) (train conductor not liable for false arrest for reporting altercation with passenger to transit police); *Celnick v. Freitag,* 242 A.D.2d 436, 437 (lst Dept 1997). Plaintiff's attorney, in response, affirms that the District Attorney investigated and failed to find "any actual evidence that the plaintiff had ever called the defendant on the date he alleged in the complaint." Alatsas Aff. at para. 9. However, it is well settled that the affirmation of an attorney with no personal knowledge of the matter affirmed is "without evidentiary value and thus unavailing." *See Zuckerman v. New York,* 49 N.Y.2d 557, 563 (1980). Thus, plaintiff has successfully refuted plaintiff's allegation that he made a false report to the NYPD. Consequently, plaintiff's claim for false arrest must be dismissed.

C. Malicious Prosecution

"To prevail on a malicious prosecution claim, a plaintiff must establish four elements: (1) the initiation of a criminal proceeding by the defendant against the plaintiff, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) malice. *Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205, 208 (1st Dept. 2002) citing *Smith-Hunter v. Harvey,* 95 N.Y.2d 191, 195; *Broughton v State of New York,* 37 N.Y.2d 451, 457 *cert denied sub nom. Schanbarger v. Kellogg,* 423 US 929; *Hoyt v. City of New York,* 284 AD2d 501, 502, *lv denied* 97 N.Y.2d 603.). As discussed above, the complaint does not allege that defendants actively initiated a criminal proceeding against plaintiff, nor does plaintiff provide any evidence to that

effect. *See Brown,* 297 A.D.2d at 209 (providing police with information and signing criminal complaint held "insufficient to support a claim for malicious prosecution") citing *Du Chateau v. Metro-North Commuter R.R. Co.,* 253 A.D.2d 128, 131 (civilian complainant will not be held liable for malicious prosecution by merely seeking police assistance or turning information over to law enforcement authorities, who are then free to exercise their own judgment as to whether an arrest is warranted). Nor does the complaint allege facts demonstrating actual malice. Plaintiff must demonstrate that defendant "'commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served.'" *Du Chateau,* 253 A.D.2d at 132 quoting *Nardelli v. Stamberg,* 44 N.Y.2d 500, 503 (1978). Malice cannot be inferred from the fact that the criminal case against plaintiff was discontinued. *See id.* Thus, plaintiff has failed to state a cause of action for malicious prosecution, and the complaint must be dismissed.

D. Defendants' Counterclaim for Frivolous Action

Pursuant to 22 NYCRR § 130-1.1(c), conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

22 NYCRR § 130-1.1

The Court has discretion to impose sanctions for frivolous conduct under 22 NYCRR § 130-1.1. *See Premier Capital v. Damon Realty Corp.,* 299 A.D.2d 158 (1st Dept. 2002) (court's award of costs to reimburse plaintiff for defendants' frivolous conduct, wilfully disobeying court orders, was proper exercise of discretion). As discussed above, plaintiff's complaint makes only

conclusory allegations, which defendants have properly negated. Moreover, plaintiff's attorney does not dispute Mr. Gleason's assertions that plaintiff has failed to engage in discovery in this action, in defiance of two court orders. The Court concludes, in its discretion, that plaintiff has conducted himself "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," and therefore has engaged in frivolous conduct pursuant to NYCRR § 130-1.1(c)(2). *See Jalor Color Graphics, Inc. v. Universal Adver. Sys.*, 2 A.D.3d 165, 166 (1st Dept. 2003) ("baseless threats constituted frivolous conduct undertaken primarily to harass and intimidate an adversary, and to frustrate resolution of this commercial litigation"); *Timoney v. Newmark & Co. Real Estate, Inc.*, 299 A.D.2d 201, 202 (1st Dept. 2002) ("[t]he proper use of sanctions is a desirable and appropriate way to discourage abusive litigation tactics"). Accordingly, it is

ORDERED that defendants' motion is granted, the plaintiff's complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the issue of defendants' reasonable attorneys fees and costs in defending this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of

the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing on the issue of damages.

The foregoing constitutes the decision and order of the Court.

Date: September 9, 2005
New York, New York

SHIRLEY WERNER KORNREICH