

<p>Pierno v Pierno</p>
<p>2012 NY Slip Op 30778(U)</p>
<p>March 22, 2012</p>
<p>Supreme Court, Suffolk County</p>
<p>Docket Number: 10-084970008497/2010</p>
<p>Judge: W. Gerard Asher</p>
<p>Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.</p>
<p>This opinion is uncorrected and not selected for official publication.</p>

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

P R E S E N T:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-21-11 (#001 & #002)
MOTION DATE 5-24-11 (#003)
ADJ. DATE 10-17-11
Mot. Seq. # 001- MD
002 - MG
003 - XMG
004 - XMG; CASEDISP

-----X-----
RALPH PIERNO,

Plaintiff,

- against -

ROBERT PIERNO and COUNTY OF SUFFOLK,
Defendant.

X

TIERNEY & TIERNEY
Attorney for Plaintiff Ralph Pierno
409 Route 112, P.O. Box 995
Port Jefferson Station, New York 11776

FALLON & FALLON
Attorney for Defendant Robert Pierno
53 Main Street, Suite 1
Sayville, New York 11782

CHRISTINE MALAFI, SUFFOLK COUNTY
ATTORNEY
Attorney for County of Suffolk
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788

X

Upon the following papers numbered 1 to 91 read on this motion for leave to amend the complaint; motion to dismiss counterclaim; cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; 12 - 29 ; Notice of Cross Motion and supporting papers 30 - 55; 56 - 69; Answering Affidavits and supporting papers 70 - 82; Replying Affidavits and supporting papers 83 - 84; 85 - 91; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motions (#001 and #002) by plaintiff, the cross motion (#003) by defendant Robert Pierno, and the cross motion (#004) by defendant County of Suffolk are consolidated for purposes of this determination; and it is

ORDERED that the motion by plaintiff for leave to serve an amended complaint is denied; and it is

ORDERED that the motion by plaintiff for an order dismissing the counterclaim against him is granted; and it is

ORDERED that the cross motion by defendant Robert Pierno for summary judgment dismissing the complaint against him is granted; and it is further



Pierno v Pierno
Index No. 10-08497
Page No. 2

ORDERED that the cross motion by defendant County of Suffolk for summary judgment dismissing the complaint against it is granted.

Plaintiff Ralph Pierno and defendant Robert Pierno are the sons of Lucille Sherkel, who passed away on April 21, 2009. During the first two weeks of March 2009, plaintiff allegedly converted various individual bank accounts in his mother's name to joint accounts with right of survivorship under a power of attorney allegedly granted him by his mother. He also allegedly transferred funds out of a bank account with HSBC Bank maintained by Ms. Sherkel in trust for defendant, and transferred her IRA account from UBS to Synovous Securities and named himself the sole beneficiary of such account. On March 30, 2009, after learning of the various transactions made by plaintiff, Ms. Sherkel allegedly executed a document revoking the prior power of attorney granted to plaintiff. That same day she allegedly executed a new will naming defendant as the executor of her estate, and a durable power of attorney appointing defendant as her attorney-in-fact. Defendant, then, allegedly transferred the bank accounts back into Ms. Sherkel's name and transferred the IRA account back to UBS.

On April 1, 2009, defendant filed a report with the Suffolk County Police Department claiming he had been threatened by plaintiff during a telephone conversation. Plaintiff, who resides in Georgia, was arrested for aggravated harassment in the second degree on April 6, 2009 and released on bail the following day. The Court notes that Ms. Sherkel was suffering from advanced cancer in the spring of 2009, and that both plaintiff and defendant were staying at their mother's home at the time of plaintiff's arrest. In September 2009, the District Court, Suffolk County, granted plaintiff an adjournment in contemplation of dismissal on the harassment charge, and plaintiff served a notice of claim on defendant County of Suffolk. The notice of claim alleges that the County of Suffolk and the Suffolk County Police Department, "without legal cause and justification and with intention to unlawfully deprive [plaintiff] of his constitutionally protected right to liberty, falsely arrested and imprisoned [plaintiff]" for aggravated harassment in the second degree. It also alleges that plaintiff was injured due to the negligent and reckless acts, as well as willful and wanton acts, of the County of Suffolk and the Suffolk County Police Department. By correspondence dated September 24, 2009, the County advised plaintiff's counsel that the notice of claim failed to comply with General Municipal Law § 50-e, as it was served more than 90 days after the date of the alleged incident.

On April 1, 2010, plaintiff commenced the instant action by filing a summons with notice, which states the action seeks compensatory and punitive damages for false arrest, unlawful imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. The complaint, dated August 4, 2010, asserts a cause of action for false arrest and imprisonment against both defendant Pierno and the County of Suffolk, and a cause of action for intentional infliction of emotional distress against defendant Pierno. By his answer, defendant Pierno asserts a counterclaim for breach of fiduciary duty. More particularly, the counterclaim asserts, in relevant part, that plaintiff, by using the power of attorney to transfer certain bank accounts and the IRA account, "abused his fiduciary duty to his mother and tried to subvert her testamentary plan so that he would take all of the liquid funds" upon her death. It also asserts that by engaging in such conduct involving his mother's accounts, plaintiff abused a fiduciary duty owed to defendant. Thereafter, in December 2010, plaintiff and his brother entered into a written stipulation in a proceeding brought in the Surrogate's Court, Suffolk County, wherein they agreed, upon compliance with certain terms, to release each other "from any claims relating to the Estate of Lucille

Pierno v Pierno
 Index No. 10-08497
 Page No. 3

Sherkel, including any claim or potential claim by the estate relating to Ralph placing his name on Lucille Sherkel's bank accounts."

Plaintiff now moves for an order granting him leave to serve an amended complaint that, in addition to the claims for false arrest and intentional infliction of emotional distress, contains causes of action against the County of Suffolk for violations of his civil rights under 42 USC §1983. Plaintiff also moves for an order dismissing the counterclaim against him, arguing that defendant's answer does not allege any damages due to plaintiff's alleged breach of fiduciary duty, and that defendant will be unable to establish at a trial that he suffered any damages due to plaintiff's conduct. Defendant opposes plaintiff's motions and cross-moves for an order granting summary judgment in his favor on the complaint. In an affidavit in support of his cross motion, defendant alleges that bank costs totaling approximately \$1,700 were incurred in connection with the account transfers, and that plaintiff "should pay punitive damages for his actions to prevent other people from trying the same thing." The County of Suffolk opposes plaintiff's motion seeking leave to amend the complaint and cross-moves for an order granting summary judgment dismissing the complaint against it on the ground that plaintiff failed to serve a notice of claim within the 90-day period required by General Municipal Law § 50-e.

The cross motion for summary judgment dismissing the complaint against the County of Suffolk is granted. The timely filing of a notice of claim generally is a condition precedent to an action against various public authorities and municipal entities (see *Crair v Brookdale Hosp. Med. Ctr., Cornell Univ.*, 94 NY2d 524, 707 NYS2d 375 [2000]; *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 484 NYS2d 533 [1984]). The notice of claim requirement is designed to give public corporations an opportunity to timely investigate tort claims against them, and to protect them against stale claims (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 143, 851 NYS2d 218 [2d Dept 2008]; *Casias v City of New York*, 39 AD3d 681, 682, 833 NYS2d 662 [2d Dept 2007]). As relevant to the instant action, County Law §52 requires that a notice of claim be filed prior to instituting a tort action against a county, and that such notice comply with the requirements set forth in General Municipal Law §50-e (see *Freudenthal v County of Nassau*, 99 NY2d 285, 755 NYS2d 56 [2003]; *Bardi v Warren County Sheriff's Dept.*, 194 AD2d 21, 603 NYS2d 90 [3d Dept 1993]). General Municipal Law §50-e (1), in turn, requires that, in any case where the filing of a notice of claim is a condition precedent to the commencement of a tort action against a public corporation, a notice of claim must be served on such public corporation within 90 days of when the claim arises (see *Roche v Village of Tarrytown*, 309 AD2d 842, 766 NYS2d 46 [2d Dept 2003]; *Avgush v Town of Yorktown*, 303 AD2d 340, 755 NYS2d 647 [2d Dept 2003]). Further, while an injured person who fails to timely file a notice of claim may make an application for leave to serve a late notice of the claim, no such relief may be granted after expiration of the one-year-and-ninety-day limitations period established by General Municipal Law § 50-I for the commencement of an action against a public corporation (see General Municipal Law § 50-e [5]; *Pierson v City of New York*, 56 NY2d 950, 453 NYS2d 615 [1982]). "[A] court is without power to authorize the late filing of a claim or to order that a late filed claim be deemed *timely nunc pro tunc* when the statute of limitations has expired" (*Schwinghammer v Sullivan W. Cent. School Dist.*, 2 AD3d 1126, 1126-1127, 768 NYS2d 696 [3d Dept 2003]).

Here, it is undisputed that plaintiff served a notice of claim more than 90 days after the alleged tortious conduct, and failed to seek leave from the court to serve such late notice of claim. Accordingly, as the notice of claim served by plaintiff in September 2010 was a nullity (see *Browne v New York City Tr.*

Pierno v Pierno
Index No. 10-08497
Page No. 4

Auth., 90 AD3d 965, 934 NYS2d 821 [2d Dept 2011]; *Elliot v County of Nassau*, 53 AD3d 561, 862 NYS2d 90 [2d Dept 2008]; *Pierre v City of New York*, 22 AD3d 733, 804 NYS2d 365 [2d Dept 2005]), the complaint must be dismissed as against the County of Suffolk. In view of this determination, plaintiff's motion for leave to serve the proposed amended complaint is denied, as moot.

Plaintiff's motion for an order pursuant to CPLR 3211 (a)(7) dismissing the counterclaim against him is granted. When a party moves for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits, however, may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170, 175 [2005]).

"A fiduciary relation exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation" (Restatement [Second] of Torts § 874, comment a). A fiduciary owes a duty of "undivided and undiluted loyalty to those whose interest the fiduciary is to protect (citation omitted). This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466, 541 NYS2d 746 [1989]). Further, to recover damages for a breach of fiduciary duty, a plaintiff must establish the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (see *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2d Dept 2011]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 901 NYS2d 715 [2d Dept 2010]). Here, the counterclaim fails to allege that defendant Pierno suffered damages that were directly caused by the account transfers made by plaintiff in March 2009 under the power of attorney granted to him by his mother (see *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 901 NYS2d 715; *Daly v Kochanowicz*, 67 AD3d 78, 884 NYS2d 144 [2d Dept 2009]; *Widman v Rosenthal*, 40 AD3d 749, 834 NYS2d 862 [2d Dept 2007]). Defendant Pierno's allegations in opposition to the motion that a penalty of \$1,426 was imposed against his mother's bank account with Washington Mutual Bank due to a transfer made by plaintiff, and that he believes more than \$300 was "lost" from a certificate of deposit are insufficient to demonstrate he personally suffered damages as a direct result of plaintiff's alleged breach of fiduciary duty (see *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 901 NYS2d 715; *Daly v Kochanowicz*, 67 AD3d 78, 884 NYS2d 144).

The cross motion by defendant Pierno for summary judgment dismissing the complaint against him also is granted. Initially, the Court notes that an affirmation by plaintiff's counsel in opposition to defendant Pierno's cross motion and in reply to the papers submitted in opposition to his motion for dismissal of the counterclaim states that plaintiff does not oppose the branch of the cross motion seeking dismissal of the cause of action for intentional infliction of emotional distress. Summary judgment on such claim, therefore, is granted in favor of defendant Pierno.

Pierno v Pierno
 Index No. 10-08497
 Page No. 5

A plaintiff claiming false arrest must establish that the defendant intended to confine him or her, that the plaintiff was conscious of confinement, that the plaintiff did not consent to confinement, and that the confinement was not otherwise privileged (see *Martinez v City of Schenectady*, 97 NY2d 78, 735 NYS2d 868 [2001]; *Broughton v State of New York*, 37 NY2d 451, 373 NYS2d 87 [1975]; *Rivera v County of Nassau*, 83 AD3d 1032, 922 NYS2d 168 [2d Dept 2011]). To establish the liability of a civilian defendant for false arrest, a plaintiff must show more than that the defendant reported the crime or participated in the prosecution (see *Rivera v County of Nassau*, 83 AD3d 1032, 922 NYS2d 168). “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 R.R. Co.*, 253 AD2d 128, 131, 688 NYS2d 12 [1st Dept 1999]; see *Williams v Amin*, 52 AD3d 823, 861 NYS2d 118 [2d Dept 2008]; *Baker v City of New York*, 44 AD3d 977, 845 NYS2d 799 [2d Dept 2007], *lv denied* 10 NY3d 704, 857 NYS2d 36 [2008]; *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561, 771 NYS2d 170 [2d Dept 2004]). Instead, a plaintiff must show that the complainant “played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act” (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131, 688 NYS2d 12; see *Donnelly v Nicotra*, 55 AD3d 868, 867 NYS2d 118 [2d Dept 2009]; *Lupski v County of Nassau*, 32 AD3d 997, 822 NYS2d 112 [2d Dept 2006]).

Defendant Pierno’s submissions in support of his cross motion establish a *prima facie* case of entitlement to judgment dismissing plaintiff’s claim for false arrest. Here, defendant Pierno demonstrated in his moving papers that he furnished information to the police about a threatening phone call he allegedly received from plaintiff, but did not actively induce an officer or officers of the Suffolk County Police Department to arrest plaintiff (see *Leviev v Bebe Stores, Inc.*, 85 AD3d 736, 924 NYS2d 822 [2d Dept 2011]; *Rivera v County of Nassau*, 83 AD3d 1032, 922 NYS2d 168; *Donnelly v Nicotra*, 55 AD3d 868, 867 NYS2d 118; *Williams v Amin*, 52 AD3d 823, 861 NYS2d 118; see also *Krzyzak v Schaefer*, 52 AD3d 979, 860 NYS2d 252 [3d Dept 2008]; *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561, 771 NYS2d 170). The burden, therefore, shifted to the plaintiff to raise a material triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Contrary to the assertions by plaintiff’s counsel, the evidence submitted in opposition to the cross motion, particularly the police report, the misdemeanor information charging plaintiff with aggravated harassment in the second degree filed by Robert Falsi, a Suffolk County Police Officer, and the superseding misdemeanor information filed by Lauren Brancato, an investigator for the Suffolk County District Attorney, fails to raise a triable issue as to whether defendant Pierno actively importuned the police to arrest plaintiff without probable cause to believe in his culpability (see *Leviev v Bebe Stores, Inc.*, 85 AD3d 736, 924 NYS2d 822; *Donnelly v Nicotra*, 55 AD3d 868, 867 NYS2d 118; *Williams v Amin*, 52 AD3d 823, 861 NYS2d 118; cf. *Mesti v Wegman*, 307 AD2d 339, 763 NYS2d 67 [2d Dept 2003]). Accordingly, absent any evidence that he was actively involved in the prosecution of plaintiff for aggravated harassment, defendant Pierno’s cross motion for summary judgment dismissing the complaint against him is granted.

Dated: March 22, 2012

W. Gerard Asher
 J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION