

**Wood v Miller**

2015 NY Slip Op 32286(U)

December 4, 2015

Supreme Court, New York County

Docket Number: 160408/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
AMBER WOOD,

Plaintiff,

Index No. 160408/13

-against-

**DECISION/ORDER**

CAROL MILLER, et al.,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

| Papers                                       | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | 1        |
| Answering Affidavits.....                    | 2        |
| Replying Affidavits.....                     | 3        |
| Exhibits.....                                |          |

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Plaintiff Amber Wood commenced the instant action against defendant Carol Miller asserting a cause of action for malicious prosecution stemming from plaintiff's arrest in or around February 2012. Defendant Miller now moves for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint on the ground that it fails to state a cause of action. For the reasons set forth below, defendant's motion is denied.

The relevant facts according to the complaint are as follows. In or around February 2012, plaintiff was arrested pursuant to a complaint filed by defendant Miller. Specifically, in that complaint, Miller stated that the plaintiff had assaulted, attacked and harassed her on January 31, 2012 at a restaurant called Fetch in New York City at approximately 5:45 p.m. Based on the

complaint, plaintiff was charged with assault, menacing, attempted assault and harassment and made numerous appearances to face said charges in Criminal Court. On or about November 13, 2012, all charges were dismissed against the plaintiff with prejudice. Thereafter, the plaintiff commenced the instant action asserting one cause of action for malicious prosecution. Miller now moves to dismiss the complaint.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the instant action, Miller's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint is denied. To state a claim for malicious prosecution, a party must plead "(1) the commencement or continuation of a...proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the...proceeding and (4) actual malice." *Broughton v. State of New York*, 37 N.Y.2d 451, 457 (1975); see also *Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 269 (1<sup>st</sup> Dept 2005). Here, the court finds that the complaint sufficiently states a claim for malicious prosecution against Miller as it alleges that a criminal proceeding was commenced against the plaintiff based on Miller's complaint to the police; that the criminal proceeding was terminated

by the District Attorney with prejudice in favor of the plaintiff; that there was no probable cause to bring the criminal proceeding; and that Miller initiated the criminal proceeding against plaintiff based on malice. Thus, as plaintiff sufficiently states a claim for malicious prosecution against Miller, Miller's motion to dismiss the complaint is denied.

Miller's assertion that the complaint must be dismissed on the ground that a civilian defendant cannot be said to have "commenced" a criminal proceeding against a plaintiff is without merit. Specifically, Miller relies on First Department case law which states 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...malicious prosecution." *Du Chateau v. Metro-North Commuter R.R. Co.*, 253 A.D.2d 128, 131 (1<sup>st</sup> Dept 1999).

However, the First Department has also held that "a [civilian] defendant may be said to have initiated a criminal proceeding by providing false evidence to the police or withholding evidence that might affect the determination by the police to make an arrest." *Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205, 210 (1<sup>st</sup> Dept 2002). Here, as the complaint asserts that Miller initiated the proceeding against plaintiff by providing false information to the police, namely that the plaintiff assaulted, attacked and harassed Miller, which plaintiff asserts never happened, and that the arrest occurred solely because of Miller's complaint, the complaint sufficiently asserts a claim against Miller for malicious prosecution.

Additionally, to the extent Miller moves to dismiss the complaint based on documentary evidence, such motion is denied. In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of

plaintiff's claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). In support of her motion, defendant Miller provides an Order of Protection, dated February 14, 2012, pursuant to which she was granted a temporary order of protection against the plaintiff following plaintiff's arrest; and a signed statement by the arresting police officer stating, *inter alia*, that he was "informed by Carol Miller...that [she] observed [plaintiff] inside the above stated location" and that Miller informed him that plaintiff assaulted, attacked and harassed her. Miller asserts that said documentary evidence proves that the criminal proceeding was commenced by the District Attorney's office and not Miller and that there was probable cause for the arrest. However, the court finds that the documentary evidence fails to definitively dispose of plaintiff's claim or resolve all factual issues as a matter of law, as they do not establish that the District Attorney's office commenced the proceeding without information or help from Miller or that there was probable cause for the arrest.

The court considers Miller's remaining arguments and finds them unavailing as they are only relevant on a motion for summary judgment and not on a motion to dismiss pursuant to which the court must only look to the complaint to determine if it states a cause of action against the defendant.

Based on the foregoing, Miller's motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 12/4/15

Enter: \_\_\_\_\_

J.S.C.

CYNTHIA S. KERN