Meringolo v Cullen
2015 NY Slip Op 32546(U)
September 2, 2015
Supreme Court, Albany County
Docket Number: 104-11
Judge: Richard E. Sise
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PRESENT: HON. RICHARD E. SISE
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ROBERT MERINGOLO,

DECISION & ORDER
Index No.: 104-11
RJI No.: 01-14-115544

Plaintiff,

-against-

PATRICK CULLEN and CYNTHIA CULLEN,

Defendants.

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Lee Greenstein, Esq.
Attorney for Plaintiff
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Delmar, New York 12504

Law Office of Thomas M. Gambino & Associates, P.C.
(By: Thomas M. Gambino, Esq.)
Attorneys for Defendants
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Sise, J.

This action involves a dispute between the parties arising from circumstances in which the owner of the Freehold Country Pub in Green County came to believe that his business was being targeted by the State Police. Plaintiff, a friend of the owner, became involved in a campaign to end the perceived harassment. Defendants own a home on property nearby to the pub and Patrick Cullen is a Sergeant in the State Police. There was a sense among those involved

in the campaign that Patrick Cullen was behind the police action directed against the pub. The complaint seeks to recover damages stemming from two arrests and criminal prosecutions of plaintiff related to the dispute. In their answer defendants have asserted six counterclaims. Both parties have moved for summary judgment.

The first and third causes of action, for violation of 42 USC § 1983 and §1985, are asserted against both defendants and are based on a June 21, 2006 arrest of plaintiff at his home. Insofar as these two causes of action are asserted as violations of §1983, there must be proof that defendants, as private citizens, "engaged in a conspiracy with state officials to deprive plaintiff of federal rights" and that probable cause did not exist at the time of the deprivation *(Payne v County of Sullivan*, 12 AD3d 807 [3d Dept 2004]). As alleged in the complaint plaintiff was arrested and charged with stalking, fourth degree, after an accusatory instrument was filed based on oral and written information provided to the State Police by defendant Cynthia Cullen. Plaintiff further alleges that the information provided by Cullen was false and misleading and that both defendants engaged in a conspiracy with the arresting officers to unlawfully charge him with a crime. Defendants, relying on their deposition testimony and that of the two arresting officers, argue that there was probable cause for the June 21, 2006 arrest and that there was not a conspiracy to falsely arrest plaintiff.

Cynthia Cullen testified at her deposition that while she and her husband were at home on April 13, 2006 they saw plaintiff videotaping their residence. Patrick testified that on June 9, 2006 plaintiff began to photograph him and his son while they were eating lunch at a picnic table on the south side of the Freehold Country Store. According to Cynthia, on June 17, 2006 plaintiff parked his car across from the Cullen's residence and sat in his vehicle and stared at the house

for 45 minutes. Cynthia testified that as a result of plaintiff's actions she began to fear for her family's safety and made complaints to the State Police. On June 21, 2006, according to her testimony, Cynthia was stopped at a stop sign seated in her vehicle with plaintiff's vehicle stopped in front of her. Plaintiff refused to move and stared at her for up to 30 seconds while making gestures in a confrontational manner. Cynthia then pulled around plaintiff's vehicle and drove off. Cynthia returned home and when she went out again a few hours later she again encountered plaintiff. This time plaintiff was driving in front of her at 5 mph for about a third of a mile while staring at her in his rearview mirror. That same day, Cynthia went to the State Police in Catskill to file a complaint.

At the State Police barracks an information was drawn up by Investigator Lance Aguiar based on a statement Cynthia had given to Investigator Mario Restivo. The information was then given to Senior Investigator Youngblood. Aguiar testified that thereafter he was told by Youngblood, upon instruction from the District Attorney, to charge plaintiff with stalking, fourth degree. Restivo testified that Youngblood told him, again on instruction from the District Attorney, to get an arrest warrant before arresting plaintiff. An arrest warrant was obtained and plaintiff was taken into custody later that day at his home by Aguiar and Restivo.

The complaint made by Cynthia Cullen to the State Police, together with the deposition testimony of those involved in taking her statement, drawing the information and securing the warrant are sufficient to establish, prima facie, probable cause and the absence of a conspiracy. The prima facie showing by defendants shifts the burden to plaintiff to present proof raising triable issues of fact regarding probable cause and a conspiracy between defendants and the State Police to deprive him of his freedom (*Hackstadt v Hackstadt*, 194 AD2d 908 [3rd Dept 1993]).

The presumption of probable cause created by issuance of the arrest warrant can be overcome by proof that Cynthia Cullen's statement intentionally contained false information (see *Gisondi v Harrison*, 72 NY2d 280, 284[1988]). Plaintiff, in his deposition, regarding the events relied on by Cynthia Cullen in her statement, provided testimony that undermines the stalking charge. However, other deposition testimony relied on by plaintiff in opposing summary judgment, including that of Patrick and Cynthia Cullen, New York State Police Captain Regan, Zone Commander for the area that included Freehold, and Investigator Restivo, fail to raise an issue of fact on the question of whether the State Police conspired with defendants to have plaintiff arrested and prosecuted based on false accusations. Investigator Restivo testified that he believed Cynthia Cullen's recollection of the events of her encounters with plaintiff on June 21, 2006 based on her demeanor during the course of the interview. In addition, the State Police relied on the District Attorney for an assessment of the proper charge and an arrest warrant was obtained using Cynthia Cullen's statement. Although there is proof that the State Police were aware of the ongoing dispute between the parties, plaintiff has not shown any effort by them to orchestrate plaintiff's June 21, 2006 arrest. Similarly, there is an absence of any proof raising a factual issue about the existence of a conspiracy with respect to the prosecution of plaintiff on the stalking charge or the use of process regarding that arrest and prosecution. In the absence of proof sufficient to raise a factual issue regarding a conspiracy between defendants and state actors, defendants are entitled to summary judgment dismissing the first five causes of action to the extent that any of them are based on §1983.

All claims based on 42 USC §1985 are subject to summary dismissal. To state a claim under § 1985 (3) a plaintiff must allege: 1) a conspiracy; 2) for the purpose of depriving, either

directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States *(United Brotherhood of Carpenters and Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 828-829 [1983]).[1] Moreover, the conspiracy must be motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus (*Griffin v Breckenridge*, 403 U.S. 88, 102 [1971]). No such discriminatory intent has been alleged in this action.

The sixth cause of action is for malicious prosecution, against Patrick Cullen only, in relation to plaintiff being charged with criminal contempt and harassment, second degree, arising from an incident that occurred on September 18, 2006. "The elements of such a claim are '(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice'" (*Place v Ciccotelli*, 121 AD3d 1378, 1379 [3d Dept 2014] quoting, *Broughton v State of New York*, 37 NY2d 451, 457 [1975], cert denied sub nom. *Schanbarger v Kellogg*, 423 US 929 [1975]). At that time, an order of protection existed in favor of defendants against plaintiff stemming from the June 21, 2006 stalking charge which had not yet been resolved. On the day of the incident, defendants were in their car in the Lowe's parking lot in Glenmont, Albany County when they were spotted by plaintiff. According to defendants, plaintiff walked toward their car, got within five feet, smiled broadly, played with his

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[1]The other two subdivisions in § 1985 address, respectively, circumstances where a party seeks to prevent an officer from performing his or her duties and intimidating any party, witness or juror. As such, those two subdivisions do not apply to the facts of this case.

pants zipper, jumped up and clicked his heels, displayed his middle finger and walked away. Following the incident defendants sought out the manager of the store and were able to view the surveillance video of the parking lot. The video, which records in five second increments, did not show the complained of actions by plaintiff. Nonetheless, the police were called and based on defendants' statements to the responding officer and the order of protection, plaintiff was charged with criminal contempt and harassment. Defendant Patrick Cullen maintains that he cannot be held liable on this cause of action because he did not commence a criminal proceeding. Moreover, defendant argues that there was probable cause for the criminal proceeding.

"[A] civilian defendant who merely furnishes information to law enforcement authorities who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed will not be held liable for malicious prosecution" (*Lupski v County of Nassau*, 32 AD3d 997, 998 [2d Dept 2006]). By contrast, a complainant who "knowingly provided false information to the police or withheld information from police have been found to be sufficient to state that the complainant initiated the proceeding by playing an active role in the other party's arrest and prosecution" (*Place v Ciccotelli*, 121 AD3d 1378, 1379-1380 [3d Dept 2014]). Although plaintiff concedes that there was an order of protection in place on September 18, 2006, in the course of his deposition he asserted that the information provided to the police regarding the nature of the encounter between himself and the Cullens in the Lowe's parking lot was false. The conflicting testimony raises a triable issue of fact regarding initiation of the proceeding and probable cause and precludes an award of summary judgment on the malicious prosecution claim asserted against Patrick Cullen.

Plaintiff has moved for summary judgment dismissing the six counterclaims asserted by

defendants. However, as defendants point out in opposing the motion, plaintiff has not served a reply to the counterclaims. Thus, issue has not been joined with respect to the counterclaims (CPLR 3011) and consequently, the motion for summary judgment is not ripe (CPLR 3212 [a]). Insofar as plaintiff may have intended the motion to be one to dismiss for failure to state a cause of action, that motion may only be entertained if he successfully moves for an extension of the time to plead (see CPLR 3012 [d]). The motion by defendants for judgment on the counterclaims should also be denied (CPLR 3215 [c]).

In addition, plaintiff has requested an order precluding defendants from offering proof regarding damages from emotional injuries or in the alternative compelling the production of discovery on that issue. However, the order on which plaintiff relies for the motion does not direct defendants to produce the sought after discovery. Plaintiff should serve a demand pursuant to CPLR article 31 and the parties may then pursue the issue in accordance with the terms of the statute.

Accordingly, it is

ORDERED, that the motion by defendants for summary judgment is granted with respect to the first five causes of action asserted in the Amended Complaint filed July 15, 2011 and is in all other respects denied and it is further

ORDERED, that the motion by plaintiff for summary judgment is in all respects denied and it is further

ORDERED, that the motion by defendants for judgment on the counterclaims is denied and it is further

ORDERED, that the motion by plaintiff to compel or preclude is denied.

This constitutes the decision and order of the Court. The original decision and order are returned to the attorney for defendants. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Albany, New York
September 2, 2015

Richard E. Sise
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated February 13, 2015;
2. Affirmation of Lee Greenstein dated February 13, 2015 with Exhibits A-H annexed;
3. Notice of Motion dated February 13, 2015;
4. Affirmation of Thomas M. Gambino dated February 13, 2015 with Exhibits A-O annexed;
5. Memorandum of Law dated February 13, 2015;
6. Memorandum of Law dated March 12, 2015;
7. Affirmation of Lee Greenstein dated April 10, 2015 with Exhibits A-F annexed;
8. Memorandum of Law dated April 10, 2015.