Michaels v MVP Health Care, Inc.
2017 NY Slip Op 33016(U)
August 30, 2017
Supreme Court, Schenectady County
Docket Number: 2017-0760
Judge: Thomas D. Buchanan
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF SCHENECTADY**

NORMAN MICHAELS,

Plaintiff,

vs.

MVP HEALTH CARE, INC.;
JAMES PESCETTI, individually and in his capacity as an agent of MVP HEALTH CARE, INC.;
MATTHEW WALKUSKI, individually and in his capacity as an agent of MVP HEALTH CARE, INC.;
KARRIE ARMSTRONG, individually and in her capacity as an agent for MVP HEALTH CARE, INC.;
JOHN DOES 1-5; and JANE DOES 1-5;

Defendants.

DECISION AND ORDER

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Buchanan, J.:

Defendants have brought a combined motion to change the venue of this action and to dismiss the Complaint. This action was originally commenced in Westchester County Supreme Court. By Decision and Order entered on April 14, 2017, Hon. Mary H. Smith of that court granted Defendants' motion, transferring venue of the action and Defendants' pending dismissal motion to this Court.

Plaintiff's Verified Complaint contains three causes of action, sounding in malicious prosecution, breach of the covenant of good faith and fair dealing, and prima facie tort. Defendants move to dismiss the Complaint pursuant to CPLR 3211(a)(1) & (a)(7). On a motion to dismiss under CPLR 3211(a)(1), the moving defendant must show that the documentary evidence upon which the motion is based resolves all factual issues as a matter of law and definitively disposes of the claims in the complaint (*see e.g. Lopes v. Bain*, 82 AD3d 1553, 1554 [3d Dept 2011]). On a motion under 3211(a)(7), the allegations

in the complaint are presumed to be true and the plaintiffs afforded every favorable inference to determine whether the facts alleged fit within a cognizable legal theory (*id.* at 1555). However, allegations that are "bare legal conclusions" or are "flatly contradicted by documentary evidence" do not receive such favorable consideration (*Simkin v. Blank*, 19 NY3d 46, 52 [2012]).

1. Immunity. Defendants' first argument is that they are statutorily afforded immunity from suit under Financial Services Law §405. That statute grants immunity to persons subject to the Insurance law who "[i]n the absence of fraud or bad faith," report suspected insurance fraud to law enforcement or other appropriate government agencies. While Defendants assert that Plaintiff must *establish* fraud or bad faith through his Complaint, the Court finds that argument to rest on an over-reading of *Zellermaier v. Travelers Indem. Co. of Illinois* (190 Misc. 2d 487 [Sup Ct, NY County 2002]), which is cited by Defendants in support. While the parties here disagree about the importance of the fact that the plaintiff in *Zellermaier* was responding to a cross-motion for summary judgment, the Court finds that Defendant's position on this motion does not take sufficient account of a fairly direct statement in the *Zellermaier* holding. The *Zellermaier* opinion held that the plaintiff there failed to present "evidentiary proof of fraud or bad faith in *either* the allegations of the complaint *or* papers opposing defendant Travelers' cross motion (emphasis added)" (*Id.*, at 490).

In the case at bar, fraud and bad faith are precisely what Plaintiff is alleging. While Plaintiff does not present a separate cause of action for fraud, he does assert a claim of bad faith in his second cause of action. Moreover, in a complaint verified by Plaintiff himself, he makes factual allegations of specific fraudulent conduct - in terms of knowing misrepresentations of material facts (*Id.*, at 489) - by individual defendants during the investigation and prosecution of Plaintiff. As will be seen below, Plaintiff's claims are sufficiently pled to withstand the remaining grounds of Defendants' dismissal motion, so that Plaintiffs' immunity from suit is open to question at this early stage of the action.

2. Malicious Prosecution. Defendants argue that Plaintiff cannot state a claim for malicious prosecution. The parties essentially agree that the elements of a claim for malicious prosecution are (1) a judicial proceeding initiated by the defendant, (2) that

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terminates in the plaintiff's favor, (3) brought without probable cause and (4) with malice (*see e.g. Martinez v. Schenectady*, 97 NY2d 78 [2001]). Defendants argue that they did not initiate Plaintiff's criminal prosecution, that there was probable cause for Plaintiff's prosecution and that Plaintiff has not pled malice sufficiently. To the extent that Defendants' motion is addressed to the face of the Complaint, the Court finds that, presuming the facts alleged in the Complaint to be true and affording Plaintiff every favorable inference, the facts as alleged do fit within a the legal theory of malicious prosecution. In support of their motion, however, Defendants submit an affirmation from their counsel, to which are annexed various documents as exhibits. These documents could support an award of relief to Defendants under Rule 3211(a)(7) if they establish conclusively that Plaintiff has no cause of action for malicious prosecution (*Rovello v. Orofino Realty, Co.*, 40 NY2d 633 [1976]; *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 AD3d 85 [4th Dept 2015]).

a. *Initiating Prosecution*. In order for a civilian individual or organization to be considered to have initiated a criminal prosecution, it must be alleged that they played an active role, such as by importuning the authorities to act, or by knowingly withholding information or providing false information (*Place v. Ciccotelli*, 121 AD3d 1378 [3d Dept 2014]). Plaintiff here has made both types of allegations against Defendants. While the materials offered by Defendants serve to controvert Plaintiff's allegations, they do not establish conclusively that Plaintiff has no cause of action. For example, the parties differ as to whether written statements provided to the Department of Financial Services by defendant James Pescetti contain knowing false statements regarding the terms of the contract between defendant MVP and the Otsego County Chamber or simply contain Pescetti's interpretation of that agreement. The Court's reading of the Pescetti statements and the subject agreement allows for both interpretations, particularly in light of the opinion by the Appellate Division in its decision overturning Plaintiff's conviction, in which "testimony of two MVP employees" was found to contradict the subject agreement (*People v. Michaels*, 132 AD3d 1073, 1076 [3d Dept 2015]).

b. *Probable Cause*. On the question of probable cause, Defendants point to the indictment against Plaintiff handed up by the Otsego County Grand Jury. Defendants note

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that the presence of the indictment establishes a presumption of probable cause, which can only be rebutted through proof that the indictment was procured through fraud, perjury or withholding evidence (*Colon v. City of New York*, 60 NY2d 78 [1983]). Even on a dismissal motion under Rule 3211, the complaint must provide facts to overcome that presumption, not conclusory allegations (*Hornstein v. Wolf*, 109 AD2d 129 [2d Dept 1985]). Defendants argue that the Complaint is fatally deficient on this point, making only two conclusory references to false testimony offered by defendant Armstrong before the grand jury and trial jury.

The Complaint also alleges, however, that Defendants knowingly supplied the Otsego County District Attorney with false accusations against Plaintiff of defrauding MVP, even though no information was concealed from MVP, no false statements were submitted by Plaintiff, and MVP reaped profits from the Chamber policies. Plaintiff has also submitted an affidavit in opposition to Defendants' motion, which he is free to do (*see e.g. Cron v. Hargro Fabrics, Inc.*, 91 NY2d 362 [1998]). In it, he details false statements he alleges to have been made by defendants Pescetti and Armstrong before the grand jury and at trial. While Defendants dispute the veracity and efficacy of Plaintiff's allegations, the Court's reading of the exhibits supplied by Plaintiff shows them to lend support to Plaintiff's allegations. For example, Armstrong did testify before the grand jury at one point that Plaintiff was responsible for verifying the eligibility of enrollees in MVP's insurance program through the Chamber. While there is certainly room to argue the context and particulars of the various statements made by Armstrong and Pescetti, the point on this motion is that Plaintiff has alleged facts which, if assumed to be true and affording Plaintiff every favorable inference, provide rebuttal for the presumption of probable cause.

c. Malice. Defendants also argue that the Complaint is wholly conclusory as to the element of malice. Indeed, just as with probable cause, a complaint must contain more than conclusory allegations of malice (*Hornstein*, 109 AD2d at 133). Defendants further argue that the allegations made in the Complaint should be rejected by the Court under CPLR 3211(a)(7) as being inherently incredible (*see e.g. Fernicola v. New York State Ins. Fund*, 293 AD2d 844 [3d Dept 2002]).

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In contrast to the *Hornstein* case, however, Plaintiff here does not simply plead that Defendants acted with malice. Instead, having alleged (in the Complaint and in his affidavit) particular false statements made by Defendants, Plaintiff goes on to allege that Defendants "knew or had reason to know" that the statements provided to DFS and to the District Attorney, as well as the testimony offered before the grand jury and at trial, were "incomplete, misleading or false" when the statements were given. The Complaint thus appears to the Court to include factual allegations of "conscious falsity" used in the *Hornstein* case as the definition of malice. As noted above, the exhibits reviewed by the Court lend support to the factual allegations made by Plaintiff, so that Plaintiff's claims fall outside the realm of "inherently incredible and wholly unsupported" standard applied in the *Fernicola* case (*Fernicola*, 293 AD2d at 845).

On this record, Defendants' claim of malicious prosecution is sufficiently pled against defendants MVP, Pescetti and Armstrong, the latter two being the primary actors in the reporting and prosecution complained of by Plaintiff. However, there are insufficient factual allegations against defendant Walkuski to sustain all of the elements of Plaintiff's claim against them. Therefore, Defendants' motion must be denied as to defendants MVP, Pescetti and Armstrong, but granted as to defendant Walkuski.

3. Covenant of Good Faith and Fair Dealing. As the parties acknowledge in their papers, the principle is well entrenched in New York jurisprudence that every contract includes an implied covenant of good faith and fair dealing. A party's actions (or inaction) can breach this covenant without breaching the terms of the contract itself when the party exercises a contractual right in order to realize gains which the contract specifically denies or to deprive the other party of the benefit of his bargain (*Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 AD3d 781 [3d Dept 2012]). At the same time, however, the implied covenant is designed to aid and further the express terms of the agreement at issue, so that there must be some contractual underpinning for a claim that the implied covenant was breached (*Fahs Const. Group, Inc. v. State*, 123 AD3d 1311 [3d Dept 2014]).

Defendants argue that the allegations in the Complaint fail to state a cause of action because there was no contract in place when the actions complained of occurred, the contract having been terminated by defendant MVP pursuant to its own terms. Defendants

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also assert that Plaintiff does not assert any applicable term within the contract to support his claim, but instead seeks to imply an inconsistent obligation that MVP not report suspected insurance fraud, something it was legally bound to do.

Taking the second argument first, reading the Complaint to give Plaintiff every favorable inference shows that Plaintiff does reference terms of his contract with MVP. The Complaint references Plaintiff's obligations under the contract and specifically points to Defendants' claim that Plaintiff had effectively stolen the commissions that had been paid to him.

Defendant's first argument is unavailing as to MVP. Plaintiff and MVP had an ongoing contractual relationship. While that contract was terminated by MVP, a reading of the Complaint giving Plaintiff every favorable inference shows that Plaintiff alleges a series of actions by Defendants as constituting a breach of the covenant, including the termination itself.

There appears, however, to be a parallel between the case at bar and *Ahead Realty, LLC v. India House, Inc.* (92 AD3d 424 [1st Dept 2012]) which is cited by Defendants. That case involved disputes arising from a contract between two business entities and involved claims asserted against the individual principals of the defendant corporation. The opinion noted that there was no contract between the plaintiff and the individual defendants, so that a claim of breach of covenant of good faith could not lie against them. For the same reason, Plaintiff's claim of breach of the covenant of good faith and fair dealing lies against MVP, but not against the individual defendants. Without a contract, there is nothing in which to imply a covenant of good faith and fair dealing (*Id.; Fahs Const.*, 123 AD3d 1311). Defendants' motion must be denied as to MVP, but granted as to all three individual defendants.

4. Prima Facie Tort. Prima facie tort is a cause of action intended for situations which merit relief for the plaintiff, but which do not fit within the rubric of a traditional tort. The elements of a claim in prima facie tort are "(1) intentional infliction of harm (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful [citations omitted]" (*Curiano v. Suozzi*, 63 NY2d 113, 117 [1984])

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a. Duplicative Claims. Defendants assert that Plaintiff's prima facie tort claim should be dismissed as duplicative of his claim for malicious prosecution. Plaintiff counters that his prima facie tort claim is simply alternative pleading, which is perfectly acceptable. Defendants' argument is based on the Court of Appeals ruling in *Curiano*, while Plaintiff relies on *Board of Ed. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assn., Inc.* (38 NY2d 397 [1975]). The *Farmingdale* opinion holds that prima facie tort can be pled in the alternative to a specific, recognized tort. While *Farmingdale* is cited with favor in *Curiano* for that very proposition, the *Curiano* opinion also includes a statement that the plaintiffs there should not be allowed to plead prima facie tort in the alternative to malicious prosecution.

The Court's reading of the *Curiano* opinion shows its ruling to be limited to its facts. The basis for the ruling in *Curiano* is that "New York court have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action [citations omitted]" (*Curiano v. Suozzi*, 63 NY2d at 118). The action that was the subject of the appeal in *Curiano* was "in obvious retaliation for defendants' libel suit" (*Id.*). The *Curiano* court found that the true nature of the claim at issue was malicious prosecution and that a malicious prosecution claim was premature while the libel suit was still pending. The opinion then states that even if a malicious prosecution claim would lie after the libel action was concluded, the plaintiffs should not be allowed to plead prima facie tort in the alternative. "To permit plaintiffs' action to continue *under these circumstances* [emphasis added] would create a situation where litigation could conceivably continue *ad infinitum* with each party claiming that the opponents previous action was malicious and meritless" (*Curiano*, 63 NY2d at 119).

While the Court's own research has revealed cases which appear to seek in the *Curiano* holding a bright-line rule against pleading malicious prosecution and prima facie tort in the alternative, this Court does not find such a blanket prohibition in the language actually used in the opinion. Moreover, the situation sought to be remedied by the *Curiano* opinion is not present here. The facts pled here do not lead this Court to conclude that this action is mere retaliation for Defendants' prior actions. Nor does it appear that a danger of litigation *ad infinitum* is present in this case.

b. Immunity. Defendants next argue that they are immune from suit on Plaintiff's claim of prima facie tort under the long-established rule in *Brandt v. Winchell* (3 NY2d 628 [1958]). As applied more recently by the Court of Appeals in *Posner v. Lewis* (18 NY3d 566 [2012]), the *Brandt* rule requires a court to balance "'the conflicting interests of the parties and of the public in order to determine which shall prevail'" (*Id.,* at 570-71). In *Brandt*, the benefit to the public from the exposure of a person guilty of illegal activity was held to outweigh the improper motive of the person making the report to the public authorities. The parties reporting the illegal activity were thus given immunity from suit. In *Posner*, the fact that the reporting individuals also engaged in a scheme to blackmail the plaintiff tipped the balance against immunity. In this case, the Complaint alleges that there was no illegal activity for Defendants to report because Plaintiff was not guilty of anything. Assuming the allegations in the Complaint to be true and affording Plaintiff every favorable inference, the public interest was not advanced by Defendants' actions, so that the balance tips against immunity.

c. Claim Elements. Defendants argue that Plaintiff has failed to plead three of the elements of a prima facie tort claim adequately. Defendants assert that Plaintiff has failed to allege that malevolence was the sole motive for Defendants' actions, failed to plead special damages and failed to allege conduct by Defendants that was "otherwise lawful" in attempting to state his claim.

In addition to the elements of a prima facie tort claim listed above, case law instructs that the acts complained of must be motivated solely by malice (*see e.g. Wiggins & Kopko, LLP v. Masson*, 116 AD3d 1130 [3d Dept 2014]). The third cause of action in the Complaint here alleges that Defendants acted with malice, seeking to humiliate Plaintiff and ruin him financially in retaliation for his objections to the cancellation of all policies purchased through the Otsego County Chamber of Commerce. Defendants point out that the Complaint also alleges that Defendants were seeking to scapegoat Plaintiff in order to cover up their own misdeeds and that Defendants were seeking to gain an advantage in their contract dispute with him – two motivations in addition to malice. Plaintiff responds that this cause of action is pled in the alternative to the first two claims, so that potentially inconsistent facts supporting Plaintiff's alternative theories of recovery are necessarily contained in the same pleading.

Given Plaintiff's the ability to plead prima facie tort in the alternative to traditional torts, and the liberal construction of the Complaint to be used on this motion to dismiss, the facts alleged by Plaintiff in his third cause of action will be considered within the context of that claim, and without incorporating inconsistent allegations from Plaintiff's other claims. Prima facie tort claims pled along with other legal theories have survived Rule 3211 analysis in other cases (*see e.g. Light v. Light*, 64 AD3d 633 [2d Dept 2009]; *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co. Inc.*, 5 AD3d 352 [2d Dept 2004]). The Complaint here contains an adequate allegation that Defendants were motivated solely by malice.

The Complaint also pleads special damages in the third cause of action. Plaintiff alleges that he lost business income, his insurance agency, his license, and his reputation. These allegations are sufficient, in the view of this Court, to plead "'the loss of something having economic or pecuniary value'" (*Tourge v. City of Albany*, 285 AD2d 785, 786 [3d Dept 2001](quoting *Liberman v. Gelstein*, 80 NY2d 429, 434-35 [1992])) that is capable of calculation.

Lastly, Defendants argue that the conduct complained of here was not, by Plaintiff's own allegations, "otherwise lawful". Again, this claim is pled in the alternative, so that just as with the element of malevolence, the facts pled in the third cause of action will be considered within the context of that claim without incorporating inconsistent allegations from Plaintiff's other claims. It is also worth noting that the Court of Appeals has stated (albeit without actually holding) that unlawful acts could logically form a basis for a prima facie tort claim (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314 [1983]). Construing the Complaint liberally, it is possible to find sufficient facts alleged in support of Plaintiff's claims that Defendants acted unlawfully *and* that they acted "otherwise lawfully."

As noted above, there will likely be argument in this case as to whether the complaints filed and testimony given against Plaintiff were "false" or "perjured". The facts pled in the Complaint are susceptible of more than one interpretation and will be borne out, one way or another, through litigation. At this stage, however, the standard for adjudicating Defendants' motion allows Plaintiff considerable latitude to articulate claims. Even so,

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Plaintiff's claim in prima facie tort is based on Defendants' initiation of a criminal prosecution against him, just as in the first cause of action for malicious prosecution. As was the case with the first cause of action, the Complaint does not allege any acts by defendant Walkuski which fall under the elements of Plaintiff's claim in prima face tort. Defendants' motion must, therefore, be granted as to Walkuski

The parties' remaining arguments have been considered, but do not alter the outcome of this motion. Therefore, in consideration of all the foregoing, it is hereby

ORDERED, that the motion by Defendants seeking dismissal of the Verified Complaint pursuant to CPLR 3211(a)(1) & (a)(7) is GRANTED IN PART as follows:

a. the first cause of action alleging malicious prosecution is DISMISSED as against defendant Matthew Walkuski;

b. the second cause of action alleging breach of the implied covenant of good faith and fair dealing is DISMISSED as against defendants James Pescetti, Matthew Walkuski and Karrie Armstrong; and

c. the third cause of action alleging prima facie tort is DISMISSED as against defendant Matthew Walkuski;

and it is further

ORDERED, that the motion by Defendants seeking dismissal of the Verified Complaint pursuant to CPLR 3211(a)(1) & (a)(7) is DENIED in all other respects.

Dated:

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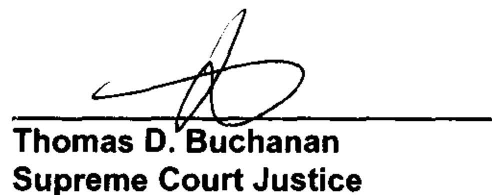

Thomas D. Buchanan
Supreme Court Justice

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Papers considered:

Notice of Motion; Affirmation of Henry M. Greenberg, Esq., with annexed exhibits; Memorandum of Law; Affirmation in Opposition of Jeffrey Briem, Esq., with annexed exhibits; Affidavit of Norman Michaels; Memorandum of Law in Opposition; Reply Memorandum of Law