

**Wilhelmina Models, Inc. v Fleisher**

2004 NY Slip Op 30012(U)

July 27, 2004

Supreme Court, New York County

Docket Number: 0117865/2003

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

WILHELMINA MODELS, INC., WILHELMINA ARTIST  
MANAGEMENT, LLC, and WILHELMINA  
INTERNATIONAL, LTD.

Plaintiffs,

- v -

ERIC FLEISHER, ASSIST SPORTS MANAGEMENT,  
INC., DAVIDOFF & MALITO, LLP., LARRY  
HUTCHER, and RACHEL WARREN,

Defendants.

Index No.: 117865/03

Motion Date: 03/12/04

Motion Seq. No.: 02

Motion Cal. No.: 118

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhiblts \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhiblts \_\_\_\_\_

PAPERS NUMBERED
1 - 3
4
5

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendants Eric Fleisher and Assist Sports Management

(herein referred to as the "defendants") move to dismiss

plaintiff's complaint as against them in this action alleging  
malicious prosecution.

As stated by the Court of Appeals, "the elements of the tort  
of malicious prosecution are: (1) the commencement or  
continuation of a [proceeding] by the defendant against the  
plaintiff, (2) the termination of the proceeding in favor of the

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

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AUG 05 2004  
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[plaintiff], (3) the absence of probable cause for the [proceeding] and (4) actual malice. Where the plaintiff institutes a malicious prosecution action he must plead the lack of probable cause." Broughton v State, 37 NY2d 451, 457 (1975). The plaintiff is also required to allege and prove "special injury" as part of the claim. Engel v CBS, Inc., 93 NY2d 195, 201 (1999) ("it seems clear that New York law has deemed special injury to be a necessary consequence of a malicious prosecution").

This action arises out of prior litigation between these parties and others before this court in Fleisher v Miller, Sup Ct, NY County, Index No. 605590/1999 (the "prior action"). Plaintiffs herein were co-defendants in the prior action. It is uncontroverted that following a jury trial, the plaintiffs herein were found not liable to defendants. The defendants argue that because the plaintiffs are controlled by and related to parties that were found liable in the prior action, plaintiffs are barred from maintaining this suit.

Defendants arguments on this issue are meritless. It is conceded that the plaintiffs herein were not found liable and therefore prevailed in the prior action. Defendants fail to show how any relationship the plaintiffs herein had with other parties in the prior action affects their separate adjudication in the prior action or their independent ability to bring the claims asserted in this action on their own behalf. Therefore, the

court finds that the plaintiffs have adequately pled the first two elements of their cause of action.

The prior action was brought by defendants to recover for a tortuous scheme to steal clients from defendants' professional sports management agency. The complaint in this action alleges that as to the plaintiffs herein, defendants knew there was no factual basis to support their claims based upon the deposition testimony of defendants and the sworn affidavits of other entities sued in the prior action (complaint, paragraphs 29 - 33). The complaint further alleges that defendants exhibited actual malice in bringing and prosecuting the prior action against them by disseminating copies of the complaint to the press prior to its filing. Defendants argue that the complaint fails to establish that they did not have probable cause to pursue their allegations in the prior action or that there was any malice on the part of the defendants. Defendants also assert that the allegations against plaintiffs in the prior action should be viewed in the context of that entire litigation wherein defendants were able to prevail against parties related to the plaintiffs.

This court's "role in a motion to dismiss pursuant to CPLR 3211 (a) (7) is limited to determining whether the complaint states a cause of action, not whether there is evidentiary support for the complaint. We must liberally construe the complaint in favor of the plaintiff and accept as true all

factual allegations." Bernstein v. Kelso & Co., Inc., 231 AD2d 314, 318 (1<sup>st</sup> Dept 1997) (citations omitted). Applying this standard, the court finds that the complaint adequately alleges that the defendants brought the prior action without probable cause and with malice. The allegations in the complaint set forth that they are based on defendants' deposition testimony and other specific actions of the defendants, such as disseminating the complaint to the press, that if proved could lead a trier of fact to find a lack of probable cause and the presence of actual malice.

Similarly in paragraphs 37 and 38 of the complaint, plaintiffs allege that they suffered special injury in that they lost the opportunity for millions of dollars of financing because of the allegations made by defendants in the prior action. Contrary to defendants' arguments, such an allegation is sufficient to satisfy the pleading requirements for special injury. "Since the role that the special injury requirement fulfills is that of a buffer to insure against retaliatory malicious prosecution claims and unending litigation, we are satisfied that a verifiable burden substantially equivalent to the provisional remedy effect can amount to special injury. Put another way, what is 'special' about special injury is that the defendant must abide some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit." Engel v. CBS, Inc., 93 NY2d 195, 205

(1999). Defendants' argument that the lost opportunity to borrow money is insufficient as a matter of law to constitute special injury is unsupportable based upon the standard set forth in Engel. Furthermore, this court declines defendants invitation to follow the Fourth Department's decision in Niagara Mohawk Power Corp. v Testone (272 AD2d 910, 913 [4<sup>th</sup> Dept 2000] ["counterclaims fail to allege interference with Testone's person or property through the use of a provisional remedy, a necessary element of causes of action for both malicious prosecution"]) as this court is bound by the Court of Appeals decision in Engel which states that "burdens substantially equivalent to those imposed by provisional remedies are enough. Actual imposition of a provisional remedy need not occur, and a highly substantial and identifiable interference with person, property, or business will suffice." Engel, 93 NY2d at 205. Plaintiff's claim of lost investors is akin to the loss of business asserted in the bill of particulars in Dudick v Guylas, 277 AD2d 686, 688 (3d Dept 2000), which the court held met the special injury pleading requirement.

Therefore, defendants' motion shall be denied.

Accordingly, it is

ORDERED that the motion by defendants Eric Fleisher and Assist Sports Management to dismiss the complaint is DENIED; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on September 10, 2004, at 11:00 A.M., at

ORDERED that the parties are hereby directed to attend a preliminary conference on September 10, 2004, at 11:00 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York 10013.

This is the decision and order of the court.

Dated: July 27, 2004

ENTER:

~~\_\_\_\_\_~~ J.S.C.

**DEBRA A. JAMES**

**FILED**  
AUG 05 2004  
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