

**Karim v Cohen**

2007 NY Slip Op 30273(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0117223

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 5

Justice

Lincoln Karim,

Plaintiff,

- v -

INDEX NO. 117223/05

MOTION DATE 1/17/07

MOTION SEQ. NO. 01

MOTION CAL. NO. 67

Richard Cohen, personally and in his capacity as President and/or Director of 927 Fifth Avenue Corp., Paula Zahn, and the Board of Directors of 927 Fifth Avenue Corp.,

Defendants.

**FILED**  
MAR 21 2007  
NEW YORK COUNTY CLERK'S OFFICE  
*dismiss*

The following papers, numbered 1 to 3 were read on this motion to/for dismiss of claim.

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

PAPERS NUMBERED  
1-2  
3

Cross-Motion: [ ] Yes [X] No

Motions seq. 01 and 02 are consolidated for disposition and decided in accordance with the attached memorandum.

**MICHAEL D. STALLMAN**  
J.S.C.

MICHAEL D. STALLMAN, J.S.C.

Dated: 3/9/07  
New York, New York

Check one: [X] FINAL DISPOSITION

[ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

[ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X

LINCOLN KARIM,

Index No. 117223/05

Plaintiff,

Decision and Order

-against-

RICHARD COHEN, personally and in his capacity as President and/or Director of 927 Fifth Avenue Corp., PAULA ZAHN, and the Board of Directors of 927 Fifth Avenue Corp.,

Defendants.

-----X

**MICHAEL D. STALLMAN, J.:**

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants Richard Cohen (Cohen) and Paula Zahn (Zahn) move to dismiss the complaint for failure to state a cause of action. In motion sequence number 002, defendant the Board of Directors of 927 Fifth Avenue Corp. (the Board) moves for the same relief.

BACKGROUND

This action arises out of the arrest of plaintiff Lincoln Karim (Karim), which took place in December 2004, during the time that there were protests near 927 Fifth Avenue, after that building removed the nest of the well-known red-tail hawk, Pale Male, and his partner. The nest, on the facade of the building, attracted much attention from the press and the public. Cohen was the president of the Board during this time, and is married to Zahn,

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NEW YORK  
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who is a CNN television program host.

Karim participated in the December 2004 protests against the removal of the nest. In his complaint, Karim acknowledges that Zahn was easily recognizable because of her celebrity status, and asserts that it was known that her husband was largely responsible for the removal of the nest. Plaintiff alleges that protesters focused their vocal protests on the couple when either or both emerged from or entered the building. Complaint, ¶ 9.

Karim contends that, on December 9, 2004, at approximately 7:00 P.M., plaintiff and other protesters chanted "bring back the nest" and "honk for hawks" as a woman and child left the building. Karim avers that he did not know who these people were, but found out later that the child was the son of Cohen and Zahn. *Id.*, ¶ 10. On December 12, 2004, also at approximately 7:00 P.M., the same activity occurred as a man and child entered the building's service entrance. Plaintiff maintains that he did not know who they were, but later learned that they were Cohen and his son. Karim alleges that Cohen cursed at the protesters and threatened them. *Id.*, ¶ 11. Plaintiff alleges that the following evening a similar incident occurred as Cohen and his son stood in front of the building. *Id.*, ¶ 12. The next afternoon, at approximately 12:20 P.M., Karim saw Zahn leave the service entrance of the building on 74<sup>th</sup> Street. "He repeated the protesters' chant, 'bring back the nest,' while he walked down 74<sup>th</sup> Street toward" the service

entrance. *Id.*, ¶ 13.

Karim alleges that, starting on December 14, 2004, Cohen and Zahn began to tell members of the public, news media and law enforcement officers that Karim had threatened them and their children with physical harm; that he knew that the child he saw on December 9, 2004 was their child; that he physically menaced them; that he targeted them specifically; that he yelled "house of shame" and "Paula Zahn, you're no good" at them; and that he repeatedly followed them about in public places. *Id.*, ¶ 14.

Karim was arrested on the evening of December 14, 2004. Plaintiff contends that the prosecutors hesitated to authorize charges because the conduct took place during permitted protest hours and because Karim's speech was not offensive or threatening. He maintains that Cohen and Zahn then told the police and prosecutors that plaintiff had also exited a motor vehicle in front of 927 Fifth Avenue at midnight on the night of December 13 into the morning of December 14, when Cohen and Zahn were returning to their building, and that plaintiff yelled at them and harassed them. Karim avers that it was on the strength of these allegations that the police and prosecutors authorized the filing of charges against him. *Id.*, ¶ 15. Karim does not state the basis of his allegations, and denies having been near the building at that time. Nonetheless, he was arrested and charged with endangering the welfare of a child, harassment and stalking based upon the events

of December 9, 12, 13, and 14 2004.

Karim alleges that he was subjected to shame and humiliation, and that his employer terminated him summarily, later changing the action to suspension without pay. He does not say who his employer was, or his position, or the amount of income that he allegedly lost. Karim asserts that defendants acting individually and in concert, and Cohen acting in both his individual and official capacities, maliciously and willfully entered a wrongful and illegal scheme, plan and conspiracy to defame and cause plaintiff's arrest, and to remove him from the protest at 927 Fifth Avenue. The criminal charges were dropped in January 2006 when plaintiff returned to court and defendants allegedly did not corroborate or substantiate the allegations.

The complaint alleges four causes of action: abuse of process, based upon plaintiff's allegation that defendants initiated a public arrest and prosecution of plaintiff in the form of a complaint to the Police Department and to the District Attorney's office; defamation, based upon statements contained in the Criminal Court complaint and statements made to members of the news media; false arrest and imprisonment, based upon defendants and those in their employ allegedly falsely and wrongfully accusing plaintiff of crimes which resulted in his arrest; and prima facie tort, based upon defendants' alleged scheme and conspiracy to have plaintiff publicly arrested, prosecuted, shamed, ridiculed, and terminated

from his employment. Karim seeks \$1 million in compensatory damages, \$1 million in punitive damages, attorneys' fees, and costs and disbursements.

#### DISCUSSION

##### Abuse of Process

Defendants contend that plaintiff's allegations fail to include any facts to support a finding that process was abused, i.e., that there was any improper use of process after it was issued. Also, defendants maintain that registering a complaint with the police does not satisfy the "process" necessary to sustain a cause of action for abuse of process.

Karim responds that he has adequately pled abuse of process or an analogous tort. He maintains that the temporary order of protection that was issued against him was a regularly issued criminal process, which improperly interfered with his liberty and which satisfies the requirement for abuse of process. Plaintiff maintains that the court should either allow the abuse of process claim to continue or to denominate the cause of action as maliciously causing process to issue without justification. He also asks the court to permit him to amend his complaint to add a cause of action for malicious prosecution.

The three elements of the tort of abuse of process are: (1) there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act;

(2) the person activating the process must be motivated by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification; and (3) defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process. *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 403 (1975). Additionally, the plaintiff must allege "the deliberate premeditated infliction of economic injury without economic or social excuse or justification." *Walentas v Johnes*, 257 AD2d 352, 354 (1<sup>st</sup> Dept 1999), quoting *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, *supra* at 405. Finally, the plaintiff must allege special damages. *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 NY2d at 405.

While his opposition papers, consisting of his attorney's affirmation, argue that the temporary order of protection constitutes the process which was abused, plaintiff did not raise that as an issue in his complaint. In fact, he does not mention the order of protection in the complaint at all. Rather, the complaint bases the cause of action for abuse of process on the arrest. The arrest cannot form a basis for abuse of process as against defendants because they did not arrest Karim, and they did not use the arrest for a collateral purpose. Furthermore, Karim

failed to plead special damages as required.

In order to properly plead special damages, a plaintiff must plead the damages with specificity, and not in conclusory vague approximations. *Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 (1<sup>st</sup> Dept 2002); *DiSanto v Forsyth*, 258 AD2d 497, 498 (2d Dept 1999). Plaintiff did not state any dollar amount for any of the specific damages that he allegedly sustained. He merely demanded \$1 million in compensatory damages, without stating the monetary basis for that number. In the absence of a proper pleading of special damages, the cause of action must be dismissed. See *Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 486 (1<sup>st</sup> Dept 1984).

Karim requests that this Court allow him to amend his complaint. However, he has not moved for such relief, nor has he included a copy of a proposed amended complaint. Therefore, such relief is inappropriate. Plaintiff also asks that the Court denominate the abuse of process cause of action as maliciously causing process to issue without justification. Again, plaintiff has failed to move for such relief. Even if he had, however, his position would not be compelling. "[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 AD2d 128, 131 (1<sup>st</sup> Dept 1999). There is no allegation or evidence that defendants directed the police to effectuate the arrest, or that they had any control over the actions of the police after they made their complaint.

Furthermore, a claim for malicious prosecution must assert that the criminal action ended in a manner that demonstrates the innocence of the person arrested. *MacFawn v Kresler*, 88 NY2d 859, 860 (1996). Here, Karim merely states that the charges were dropped, but does not offer any allegations to support the conclusion that they were dropped on the basis of his innocence. "Mere dismissal of a charge does not, in and of itself, establish the element of favorable termination." *Romero v State of New York*, 294 AD2d 730, 732 (3d Dept 2002). A dismissal that leaves the underlying merits of the charges unresolved, as is the case here, cannot form the basis of a malicious prosecution claim. *Hollender v Trump Vil. Coop., Inc.*, 58 NY2d 420 (1983); *Buccieri v Franzreb*, 201 AD2d 356, 358 (1st Dept 1994).

#### Defamation

Defendants maintain that the defamation cause of action must be dismissed because the complaint does not set forth the particular words complained of, does not allege the particular person to whom publication was made, or the time, place and manner of the publication. Additionally, the words spoken to the law

enforcement officials are entitled to a qualified privilege, and there is no evidence that ill-will was the only cause for publication.

Plaintiff acknowledges that he has been unable to ascertain the specific words, time and place regarding statements made to members of the media. He contends, however, that the statements reflected in the criminal complaint are adequate for defamation per se to law enforcement officials. He argues that the question of malice and lack of good faith must be determined at trial.

"CPLR 3016 (subd [a]) requires that in an action for libel or slander 'the particular words complained of shall be set forth in the complaint.'" *Geddes v Princess Props. Intl., Ltd.*, 88 AD2d 835, 835 (1<sup>st</sup> Dept 1982). If the complaint paraphrases the words said, it is insufficient. *Id.* Here, Karim failed to set forth the words stated in haec verba. Therefore, his defamation cause of action must be dismissed.

Karim contends that the statements in the criminal complaint are adequate. His position is not compelling. The criminal complaint does not even profess to quote Cohen or Zahn. Therefore, it cannot fulfill the requirement of CPLR 3016. Consequently, this Court need not address the extent to which defendants' statements are shielded by a qualified privilege, or whether there was any malice.

False Arrest/ False Imprisonment

Defendants assert that they cannot be held liable for false arrest or false imprisonment, because they merely furnished information to the police. The police made the ultimate decision whether to arrest plaintiff. Additionally, defendants did not actually arrest or imprison plaintiff; there is no evidence that they were even present at the arrest.

Karim cites a case from the Third Department to support his proposition that a private actor can be sued for false arrest and imprisonment when that person made a complaint to the police. In that case, *Ruggerio v New York Racing Assn.* (14 AD3d 976 [3d Dept 2005]), an employee was arrested based upon allegedly false statements made by her employer to the police in order to obtain a warrant. Karim contends that similarly, here, Cohen, aided by doormen and building employees, provided embellished and outright false accusations to the police and prosecutor.

Initially, it should be noted that the allegations of the criminal complaint regarding three of the four incidents do not differ markedly from plaintiff's own description of them in his complaint. The differences that do exist are more a matter of the individual's perception than objective accuracy. The only real disagreement is whether there was an encounter between plaintiff and Cohen and Zahn on the night of December 13-14, 2004. While Karim posits that this alleged encounter was the deciding factor in

the police determining that they would arrest him, there is no evidence to that effect, and the other contacts resulted in charges that were not dependant on the midnight episode.

In any event, the Appellate Division, First Department has held 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 false arrest ... ." *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d at 131. Plaintiff does not allege that defendants did anything other than provide the police with information. Therefore, the false arrest and false imprisonment cause of action must also be dismissed.

#### Prima Facie Tort

Defendants contend that plaintiff's cause of action for prima facie tort is defective in that plaintiff has failed to plead that malevolence was the sole motive of defendants' actions or to properly plead special damages. Plaintiff maintains that the complaint pleads malice as the sole motive, because the defendants' object, to have him arrested and removed from lawful protest, was part of the malevolent motive. He further avers that although he did not plead special damages with sufficient particularity, that should be excused because the special damages were not available with specificity at the time the action was commenced, but can be

supplied in a bill of particulars.

In order to plead a cause of action for prima facie tort, a plaintiff must plead special damages with particularity, or else the cause of action is subject to dismissal. *Broadway & 67th St. Corp. v City of New York*, 100 AD2d at 486; see also *Vigoda v DCA Prods. Plus*, 293 AD2d at 266; *DiSanto v Forsyth*, 258 AD2d at 498. Here, plaintiff has not pled special damages. His contention that the information could be supplied in a bill of particulars instead is not supported by any cases that permitted such a deviation from the rule. Instead, he points to a case where the court noted that neither the pleading nor the bill of particulars included special damages with particularity. *Broadway & 67th St. Corp. v City of New York*, *supra*. That case, however, dismissed the cause of action for failure to plead special damages with specificity, and does not provide adequate basis for denying dismissal of the cause of action in light of the well-established law that special damages must be pleaded, not merely provided during discovery.

In order to comply with the pleading requirements of a prima facie tort, plaintiff was also required to plead that defendants were motivated solely by malice, or disinterested malevolence. *Simae v Levi*, 22 AD3d 559, 563 (2d Dept 2005). While plaintiff contends that he has so pleaded, in the complaint he states that, in addition to seeking to harm plaintiff, defendants sought to deter plaintiff and others from continuing their protests.

Complaint, ¶ 14. That does not constitute disinterested malevolence, because, allegedly, defendants had a motive other than harming plaintiff in allegedly orchestrating his arrest.

Motion 002

In view of the foregoing analysis, which compels dismissal of all the causes of action, the Board's motion is also granted, dismissing the complaint as to it. It also bears noting that the complaint did not plead any actions by or on behalf of the Board that would justify any of the causes of action brought against it. While there is some reference to people who spoke to the police at Cohen and Zahn's behest, there is no allegation to support the conclusion that such statements were made at the behest of the Board, or that Cohen was acting in his capacity as a Board member. Thus, even had any causes of action remained as against Cohen and Zahn, they would have been dismissed as against the Board.

CONCLUSION

Accordingly, it is hereby

**ORDERED** that motion sequence number 001 is granted, and the complaint is dismissed as against defendants Richard Cohen and Paula Zahn, with costs to these defendants as taxed by the Clerk of the Court; and it is further


**ORDERED** that motion sequence number 002 is granted, and the complaint is dismissed as against defendant the Board of Directors of 927 Fifth Avenue Corp., with costs to this defendant

as taxed by the Clerk of the Court; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

DATED: March 9, 2007  
New York, New York

ENTER:

  
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J.S.C.

**FILED**  
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NEW YORK  
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