

**Ricicio v Marks**

2007 NY Slip Op 30610(U)

April 3, 2007

Supreme Court, Suffolk County

Docket Number: 0029614/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:**

**Hon. Paul J. Baisley, Jr.**

RONALD C. RICCIO,

Plaintiff,

-against-

RENEE MARKS, STEVE MARKS, GLEN  
PONZINI and CLEARVIEW SUPPLY, INC.,

Defendants,

**ORIG. RETURN DATE:** January 24, 2007  
**FINAL RETURN DATE:** February 14, 2007  
**MTN. SEQ. #:** 001 - WDN, 002 - MD, 003 - MotD

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Upon the following papers numbered 1 to 26 read on this motion, amended motion and cross motion; Notice of Motion and supporting papers 1 - 6; Amended Notice of Motion and supporting papers 7 - 13; Affirmation in Opposition and supporting papers 14 - 22; Notice of Cross Motion and supporting papers 23 - 26; it is,

**ORDERED** that the motion (001) by the defendant Renee Marks is deemed withdrawn in view of the amended motion submitted herein; and it is further

**ORDERED** that this amended motion (002) by the defendant Renee Marks for dismissal pursuant to CPLR 3211 is denied; and it is further

**ORDERED** that this cross motion for leave to file an amended complaint is decided to the extent that it is denied as academic as to the defendant Renee Marks as the amended complaint has already been served upon her as a matter of right in accordance with CPLR 3025(a); and this motion is granted as to the other defendants in the event that the provisions of CPLR 3025(a) do not apply to them; and it is further

**ORDERED** that the defendant Renee Marks' time to serve an answer to the amended complaint is extended, pursuant to CPLR 3211(f), until 10 days after service upon her of a copy of this order with notice of entry and the same is ordered as to any of the other defendants who have not yet served an answer to the amended verified complaint; and it is further

**ORDERED** that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on April 18, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

The defendants Renee Marks and Steve Marks are purported to be in the midst of a contentious divorce proceeding. The plaintiff, apparently a friend and co-worker of Steve Marks, alleges that Steve Marks, along with the co-defendants Clearview Supply, Inc, the employer of the plaintiff and of Steve Marks, and the co-defendant Glen Ponzini, the owner of Clearview and the supervisor of Steve Marks, were involved, in one way or another, in an alleged scheme to have people call and harass Renee Marks. As a result of this alleged scheme, Renee Marks filed a report and written statement with the Suffolk County Police Department in which she identified the plaintiff as the primary caller. This resulted in criminal charges being filed against the plaintiff. Those charges were subsequently dismissed. The plaintiff now brings this action for damages resulting from and arising in regard to the underlying incidents.

In the original complaint, the plaintiff alleged eight causes of action, six of which were against Renee Marks, either solely or collectively, and five of which alleged causes of action which included an element of malice or intentional harm.

Renee Marks' original pre-answer motion to dismiss focused on the absence of any allegations of malice in the original complaint and moved to dismiss the complaint in its entirety (although the negligence causes of action did not have malice as an element).

The plaintiff then served an amended verified complaint as a matter of right since, at least with regard to the defendant Renee Marks, it was before her answer had been served (*see* CPLR 3025[a]). This amended complaint added language alleging malice and added a ninth cause of action for intentional infliction of emotional distress.

The defendant then served an amended notice of motion (002) addressing the amended complaint. And notwithstanding the service of the amended complaint as a matter of right, at least as to the defendant Renee Marks<sup>1</sup>, the plaintiff moved (003) for leave to serve an amended verified complaint. None of the defendants opposes this motion for leave.

In general, in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1<sup>st</sup> Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

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<sup>1</sup> There is no indication in the submitted papers if any of the other defendants had answered before the service of the amended verified complaint.

121, 12).

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In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

In the instant case, in looking within the four corners of the complaint and considering the plaintiff's affidavit submitted in opposition to the cross motion to dismiss, the court notes sufficient support for finding that the defendant Renee Marks knowingly and falsely accused the plaintiff of being part of the criminal scheme allegedly put forth by her husband.

On a motion to dismiss pursuant to CPLR 3211, such a showing is sufficient to establish the element of malice or intentional harm and, thus, the causes of action based upon said elements are sufficiently pleaded for purposes of maintaining this action (*see Frank v Daimler Chrysler Corp, supra*).

The defendant Renee Marks also argues that, in any event, the cause of action for filing a false instrument (i.e., her written statement to the police) is not recognized in New York and, moreover, there is a qualified privilege regarding such statements. These arguments are rejected. While, as a general rule, such statements are privileged, such a privilege does not attach if malice can be shown (*see Foster v Churchill*, 87 NY2d 744, 751, 642 NYS2d 583, 587 [1996]).

In addition, the fact that the filing of a false police report is a crime along with an allegation linking it to slander, as here, are enough to survive a motion to dismiss pursuant to CPLR 3211 (*see Fusco v Fusco*, \_\_\_ AD3d \_\_\_, 829 NYS2d 138, 2007 NY Slip Op 116 [2d Dept 2007]).

Accordingly, the motion to dismiss pursuant to CPLR 3211 is denied.

As to the cross motion for leave to file an amended verified complaint, the court notes that the defendant Renee Marks brought her motion to dismiss before serving her answer and, thus, the plaintiff's service upon her of the amended verified complaint before her answer was served as a matter of right without leave of the court (CPLR 3025[a]). Accordingly, this cross motion seeking leave of the court as to serving the amended verified complaint upon Renee Marks is denied as moot.

As to the remaining defendants, the submissions on these motion do not indicate if any of them has already answered but, in any event, in view of there being no opposition to this cross motion from any of the defendants, in the event that service of the amended complaint requires leave of the court pursuant to CPLR 3025(b) as to any of them, it is hereby granted.

This decision constitutes the decision of the court.

Dated: April 3, 2007

HON. PAUL J. BAISLEY, JR.  
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HON. PAUL J. BAISLEY, JR. J.S.C.