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SHORT FORM ORDER

INDEX No. 03-12741
CAL. No. 07-00255-OT

COPY

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-30-07
ADJ. DATE 6-29-07
Mot. Seq. # 004 - MG
005 - XMG

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ANN MARIE PROSCIA and JOHN PROSCIA,

Plaintiffs,

- against -

DONNA SHULAR,

Defendant.

----------X

DONNA SHULAR,

Third-Party Plaintiff,

- against -

TOWN OF ISLIP,

Third-Party Defendant.

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 33 ; Answering Affidavits and supporting papers 34 - 35 ; Replying Affidavits and supporting papers 36 - 37 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion(#004) for summary judgment by third-party defendant Town of Islip is granted.

ORDERED that the motion(#005) for summary judgment by defendant/third-party plaintiff Donna Shular is granted.

This is an action by plaintiff Ann Marie Proscia to recover damages for injuries allegedly sustained as the result of defendant's alleged defamation, malicious prosecution, intentional infliction of emotional distress and prima facie tort. The action against defendant Donna Shular was commenced on May 30, 2003. A third-party action was instituted against the Town of Islip on June 9, 2004. The plaintiff John Proscia is deceased. His estate has not been substituted for him as a party.

Defendant Town of Islip ("the Town") has moved for summary judgment on the grounds the Town and its prosecuting attorney(s) are immune from any civil liability under the circumstances. In support, they offer, *inter alia*, the pleadings, and the deposition testimony of defendant's representatives T. Timothy Shea, Jr.,and Donna Shular. Shular moves for summary judgment on the grounds plaintiff has failed to state a cause of action and relies on essentially the same evidence offered by the Town.

The adduced evidence shows that defendant Donna Shular made complaints to the Town of Islip about a barking dog owned by plaintiffs which ultimately led to a trial in District Court. At her deposition, plaintiff testified that when she let the dog out, it was only for 15 minute intervals and that she was the only person in her home that would do so. She also noted that Shular ran against John Proscia for Central Islip School Board in a very contentious race and that the two had previously been involved in other incidents at the school and in their neighborhood where the police were called.

According to defendant Donna Shular's affidavit, plaintiff's dog would bark nonstop and loudly whenever he was outside. She states that the situation went on for years. For several years prior to filing the complaint, Shular stated she tried to resolve the situation privately with plaintiffs. When nothing was resolved, Shular called the Islip Town Attorney's Office Department of Law Enforcement. She was advised by Dee Kepler, a secretary in that office, to continue trying to work the problem out informally and to keep a log. In March 2000, Shular stated the problem still had not been resolved so she again contacted the Town for the procedure for filing a formal complaint. She was advised to pick out two dates when the dog had been barking for half an hour and note them on a form Dee would be sending her. Then Shular would need to go to the Town and sign some papers. She received "Request for Dog Noise Summons" in the mail with a letter from the Town Attorney's Office instructing her how to fill it out. Defendant listed two instances of barking that she personally witnessed, March 6, 2000 and March 7, 2000. Shular mailed in the Request and was then contacted by the Town to come into their office. There she was shown a document titled "Accusatory Instrument for Town Ordinances." The document was already typed and listed only the March 7, 2000 incident. She read and signed the document. At this time, Shular avers she had no idea that John or Ann Marie Proscia would actually be prosecuted by the town for the dog's barking. As far as she knew, she was simply making a record of her complaint to the Town so the Town would contact plaintiffs with respect to the situation. Thereafter, plaintiffs were prosecuted in criminal court for a violation of a Town code noise ordinance. The trial resulted in a conviction of plaintiffs; however, the conviction was later reversed by the Appellate Term, reasoning that "the accusatory instrument failed to establish that the alleged disturbance amounted to anything more than a private nuisance, which cannot be the subject of a criminal prosecution."

Timothy Shea, Esq. was employed by the Town as Director of Law Enforcement and Assistant Town Attorney from 1997 to 2002. His duties consisted of overseeing prosecution of town code violations. He testified that the procedures for filing a dog noise complaint were followed properly in this case and that the complaint was based upon reasonable grounds. In a dog noise complaint situation it would be

custom and practice to tell the complaining citizen to document the noise. Here, the complainant/defendant Shular maintained a log. If there was a situation where there was no probable cause to believe a violation had taken place, then the Assistant Town Attorney would decline to prosecute.

The Town's motion for summary judgment is granted. It is well settled that a prosecutor is entitled to absolute immunity for actions taken within the scope of his official duties in initiating and pursuing a criminal prosecution (*see*, ***Shapiro v Town of Clarkstown***, 238 AD2d 498, 656 NYS2d 682 [1997]; ***Rosen & Bardunius v County of Westchester***, 158 AD2d 679, 552 NYS2d 1334[1990]). At bar, the adduced evidence demonstrates that the Town acted prudently and believed there was reasonable cause to prosecute the matter. The Town prosecuted the matter in response to the complaints and accusatory instrument signed by the defendant Shular. The plaintiff did not institute any cause of action against the Town. Defendant Shular impleaded the Town as a third-party defendant in this action for prosecuting the underlying matter which was based on her complaints.

With respect to the defamation claim, "[w]here a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation" (***Armstrong v Simon & Schuster***, 85 NY2d 373, 380, 625 NYS2d 477, 481 [1995]). Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (***Aronson v Wiersma***, 65 NY2d 592, 593-594, 493 NYS2d 1006, 1007 [1985]).

Language will be considered defamatory, i.e., injurious to one's reputation, if it tends "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society" (***Kimmerle v New York Evening Journal***, 262 NY 99, 102 [1933]). Even where a derogatory statement has been made, it remains well established that truth is an absolute, unqualified defense to a civil defamation action ... Provided that the defamatory material on which the action is based is substantially true (minor inaccuracies are acceptable), the claim to recover damages ... must fail" (***Ingber v Lagarenne***, 299 AD2d 608,609, 750 NYS2d 172). Here, plaintiff has not come forward with any proof that anything Donna Shular told the Town about the dog barking situation was false or that anything that was put into the accusatory instrument by employees of the Town was false. Plaintiff was convicted, beyond a reasonable doubt, of the noise ordinance based upon Shular's testimony. Shular was subjected to cross-examination at the trial and to extensive questioning during the deposition for this case. Further, statements to police officers, district attorneys, or a Town Attorney's Office, are protected by "qualified immunity," as long as they are given in "good faith" (***Present v Avon Products, Inc.***, 253 AD2d 183, 687 NYS2d 330[1999]). To overcome the privilege of qualified immunity, plaintiff needs to show that defendant acted with malice, i.e., either (1) knowing it was false; or (2) with reckless disregard as to whether it was false. Plaintiff has not met her burden here.

To plead a cause of action for malicious prosecution a plaintiff must show the initiation of a criminal action that terminated in the favor of the plaintiff, lack of probable cause for the prior action, malice and special injury (***Williams v Barber***, 3 AD3d 695, 770 NYS2d 477 [2005]; ***Gisondi v Harrison***, 72 NY2d

special injury (***Williams v Barber***, 3 AD3d 695, 770 NYS2d 477 [2005]; ***Gisondi v Harrison***, 72 NY2d 280, 532 NYS2d 234 [1988]). Failure to establish any one of the elements required to bring a an action for malicious prosecution defeats the entire claim (***Maskantz v Hayes***, 2007 NY Slip Op 2799; ***Brown v Sears Roebuck and Co.***, 297 AD2d 205, 746 NYS2d 141 [2002]).

Defendant has established her entitlement to summary judgment. First, plaintiff was convicted of the noise ordinance. While her conviction was subsequently reversed, it was not based on the insufficiency of the evidence but rather on the grounds that criminal court was not the proper forum (*see*, ***Cahill v County of Nassau***, 17 AD3d 497,498, 793 NYS2d 190[2005]). Further, the Town Attorney's Office evaluated the case for probable cause before prosecuting the matter. Finally, the evidence demonstrates that defendant did not complain to the Town simply out of malice. According to the evidence, she did attempt to work out the matter privately for a lengthy period of time and followed the advice, direction and procedures of the Town Attorney's Office before bringing the formal complaint. Accordingly, defendant's motion for summary judgment dismissing plaintiffs' complaint is granted.

The plaintiffs' fifth cause of action, alleging prima facie tort, is dismissed. The requisite elements of a cause of action for prima facie tort include "(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" (***Curiano v Suozzi***, 63 NY2d 113, 117, 480 NYS2d 466, 469 [1984]). Moreover, a plaintiff seeking to establish a claim for prima facie tort must plead and prove that the "sole motive" for the defendants' actions was "disinterested malevolence," that is, a malicious motive "unmixed with any other and exclusively directed to injury and damage of another" (***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 333, 464 NYS2d 712, 721 [1983]). Here, plaintiff has failed to show that the defendant's sole motive was to harm the plaintiff. Accordingly, the complaint is insufficient to support a cause of action for prima facie tort (***Hessel v Goldman, Sachs & Co.***, 281 AD2d 247, 722 NYS2d 21, *lv dismissed in part, denied in part* 97 NY2d 625, 735 NYS2d 485 [2001]).

As to the allegations of intentional infliction of emotional distress, a cause of action for intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (***Freihofer v Hearst Corp.***, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). The conduct alleged by plaintiff is defendant's complaining about her barking dog. This conduct does not rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (*see*, ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]). Accordingly, defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated: Aug 29, 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION