

**Grucci v Grucci**

2007 NY Slip Op 33970(U)

November 27, 2007

Supreme Court, Suffolk County

Docket Number: 0007422/2002

Judge: Robert W. Doyle

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

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 9-5-07  
ADJ. DATE 10-4-07  
Mot. Seq. # 005 MG; CASEDISP

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MICHAEL GRUCCI,	:	ARTHUR V. GRASECK, JR., ESQ.	
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	:		
-- against --	:		
	:		
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	:		
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Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 23 - 30; Replying Affidavits and supporting papers \_\_\_\_\_; Other 31 - 32; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant for summary judgment dismissing the complaint is granted.

Plaintiff Michael Grucci and defendant Christine Marie Grucci were married in 1988 and have two children together. In January 1998, defendant commenced an action, assigned index number 98-732, for a judgment of divorce on the ground of cruel and inhuman treatment. In July 1998, a misdemeanor complaint charging harassment was filed against plaintiff. The harassment charge arose out of an alleged incident between the parties at the former marital home. In November 1999, the Suffolk County District Court (Santorelli, J.) issued an order of protection directing that plaintiff stay away from defendant, and that he refrain from assaulting, harassing or any committing other criminal offense against defendant. That same month, the District Court granted plaintiff an adjournment in contemplation of dismissal on the misdemeanor complaint.

Subsequently, in February 2000, plaintiff was arrested for violating the order of protection. An indictment was handed up by the Grand Jury charging plaintiff with two counts of criminal contempt in the first degree (*see*, Penal Law § 215.51). One count of the indictment alleged that plaintiff violated the order of protection by making repeated telephone calls to defendant with the intent of harassing, annoying, threatening or alarming her (*see*, Penal Law § 215.51 [b][iv]). The second count alleged that plaintiff, with the intent of placing defendant in reasonable fear of death or serious physical injury, told defendant that he had “put out a hit on her” (*see*, Penal Law § 215.51 [b][iii]). Following a bench trial, the Suffolk County Court (Weber, J.) rendered a verdict acquitting plaintiff of both charges on the grounds that defendant’s trial testimony regarding the alleged death threat was not credible, and that the People failed to show that the phone calls at issue were made “without legitimate purpose of communication.” Thereafter, plaintiff brought the instant action to recover damages for malicious prosecution.

Defendant now moves for summary judgment dismissing the complaint, arguing that plaintiff cannot overcome a presumption of probable cause created by the Grand Jury’s indictment. Defendant also asserts that there is no evidence in the record of actual malice. Defendant’s submissions in support of the motion include copies of the pleadings, a transcript of plaintiff’s deposition testimony, various documents related to the parties’ divorce action, and an affidavit by defendant. Plaintiff opposes the motion, arguing that issues of fact exist as to whether the indictment against him for criminal contempt was the result of perjurious testimony by defendant.

“The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation” (*Broughton v State of New York*, 37 NY2d 451, 457, 373 NYS2d 87, *cert denied sub. nom. Schanbarger v Kellog*, 423 US 929, 96 S Ct 277 [1975]). To recover damages for malicious prosecution, the plaintiff has the heavy burden of establishing (1) the commencement or continuation of a criminal proceeding against the plaintiff, (2) the termination of that proceeding in the plaintiff’s favor, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice (*see, Martinez v City of Schenectady*, 97 NY2d 78, 735 NYS2d 868 [2001]; *Smith-Hunter v Harvey*, 95 NY2d 191, 712 NYS2d 438 [2000]; *Broughton v State of New York*, *supra*).

Defendant’s argument that she is entitled to summary judgment dismissing the complaint, because plaintiff cannot establish the lack of probable cause for the underlying criminal proceeding or actual malice, is rejected. “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 or malicious prosecution” (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131, 688 NYS2d 12 [1st Dept 1999]; *see, Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561, 771 NYS2d 170 [2d Dept 2004]; *Goddard v Daly*, 295 AD2d 314, 744 NYS2d 330 [2d Dept 2002]). Instead, a plaintiff must show that the complainant “played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act” (*Du Chateau v Metro-North Commuter R.R. Co.*, *supra*, at 131, 688 NYS2d 12; *see, Lupinski v County of Nassau*, 32 AD3d 997, 822 NYS2d 112 [2d Dept 2006]). Further, while an indictment creates a presumption that there was probable cause for the underlying proceeding (*see, Colon v City of New York*, 60 NY2d 78, 468 NYS2d 453 [1983]; *Strange v County of Westchester*, 29 AD3d 676, 815 NYS2d 155 [2d Dept 2006]), a malicious prosecution claim still can be maintained after an indictment has been handed up if the

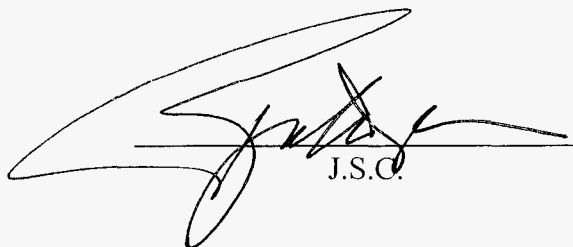
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plaintiff can establish that the indictment was procured by fraud, perjury, misrepresentation or falsification of evidence on the part of the defendant (*see, Maskantz v Hayes*, 39 AD3d 211, 832 NYS2d 566 [1st Dept 2007]; *Lupski v County of Nassau, supra*; *DeFilippo v County of Nassau*, 208 AD2d 793, 618 NYS2d 61 [2d Dept 1994], *lv denied* 85 NY2d 806, 627 NYS2d 323 [1995]).

In addition, to demonstrate the element of actual malice, a plaintiff must show that the defendant initiated the prior criminal proceeding “due to a wrong or improper motive, something other than a desire to see the ends of justice served” (*Nardelli v Stamberg*, 44 NY2d 500, 503, 406 NYS2d 443 [1978]). Although proof of malice may be shown with evidence that the defendant was motivated by spite or hatred, such evidence is not required. In fact, in the context of malicious prosecution, actual malice seldom is shown by direct evidence; rather, it usually is inferred from the facts and circumstances surrounding the underlying criminal proceeding (*see, Martin v City of Albany*, 42 NY2d 13, 396 NYS2d 612 [1977]; *Nardelli v Stamberg, supra*; *Ramos v City of New York*, 285 AD2d 284, 729 NYS2d 678 [1st Dept 2001]). Moreover, a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the criminal proceeding against the plaintiff (*see, Martin v City of Albany, supra*; *Mesiti v Wegman*, 307 AD2d 339, 763 NYS2d 67 [2d Dept 2003]).

Here, plaintiff had the burden of presenting evidence negating the presumption of probable cause created by his indictment on two counts of criminal contempt in the first degree. Contrary to the conclusory allegations by defendant’s counsel, Judge Weber’s finding that defendant was not a credible witness due to the discrepancies between her grand jury testimony and her trial testimony is sufficient to create factual issues as to whether defendant instigated plaintiff’s arrest by giving false information to police, and whether she acted with actual malice (*see, Maskantz v Hayes, supra*; *Weiss v Hotung*, 26 AD3d 855, 809 NYS2d 376 [4th Dept 2006]; *cf., Baker v City of New York*, \_\_ AD3d \_\_, 2007 WL 3211129 [2d Dept, Oct. 30, 2007]; *Du Chateau v Metro-North Commuter R.R. Co., supra*). Accordingly, defendant’s motion for summary judgment dismissing the complaint is denied.

Dated: NOV 27 2007



J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION