

**Donovan v Gordian**

2008 NY Slip Op 30328(U)

February 1, 2008

Supreme Court, New York County

Docket Number: 0103699/2007

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 103699/2007  
DONOVAN, KYLE  
vs.  
GORDIAN, MARIA  
SEQUENCE NUMBER : # 001  
DISMISS COMPLAINT

Justice

INDEX NO. 103699-07  
MOTION DATE 9/12/07  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

are read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-4  
5  
6

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum decision and order.

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

**FILED**  
FEB 06 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/1/08

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 55

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KYLE DONOVAN a/k/a DONOVAN McCRAY,

Plaintiff,

Index No. 103699/2007

-against-

MARIA GORDIAN,

DECISION AND ORDER

Defendant.

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SOLOMON, J.:

In this action, plaintiff Kyle Donovan a/k/a Donovan McCray (Donovan) alleges abuse of process in connection with an underlying dispute concerning the ownership of a commercial cooperative. Defendant Maria Gordian (Gordian) moves under CPLR §§ 3211 and 3212 to dismiss the Complaint for failure to state a claim and as time-barred by the applicable statutes of limitations. In the event that the action is not dismissed, Gordian also moves to consolidate the instant action with the underlying pending case in the Supreme Court, New York County, entitled *Gordian v Donovan, et al.*, Index No. 600377/2005 (the 2005 action). Donovan opposes the motion, which is granted as follows.

**FACTUAL ALLEGATIONS**

This action arises from a dispute concerning ownership of eighty shares of stock in 11825 Owners Corporation and the attendant proprietary lease for a commercial cooperative unit

identified as Unit LL (the Unit) located at 118 East 25<sup>th</sup> Street, New York, New York (the Premises). Donovan is the principal director, officer and shareholder of Envy Publishing Group, Inc., a company which conducts business at the Premises. On December 20, 1994, Donovan became a 50% partner of G & W Photo, which operated a photography business at the premises. Manolo Guevera (Guevera) was the other 50% owner of G & W Photo. From December 20, 1994 until August 23, 2000, Donovan, through G & W Photo, owned 50% of the shares of stock and proprietary lease attendant to the Unit.

In October of 1997, Donovan and Guevera's partnership dissolved after prolonged litigation. Donovan and Guevera entered into a stipulation and order which provided that each owned a 50% interest in the Unit, and that Guevera agreed to sell, and Donovan agreed to purchase, Guevera's entire right, title and interest in and to the shares of stock and proprietary lease attendant to the Unit for \$95,000. The stipulation and order provided that if Donovan could not obtain a loan for the purchase, the cooperative board denied him approval, or the contract of sale was canceled pursuant to its terms, Guevera and Donovan were to sell the Unit and their combined 100% interest and share the proceeds equally.

When Donovan could not obtain a loan, consequently the cooperative board did not approve his purchase. Instead of

Guevera and Donovan selling the Unit on the open market, Gordian (who during 1999 through 2000 allegedly shared an intimate relationship with Donovan and was a 6% shareholder of Envy Publishing Group, Inc.) substituted for Donovan in the transaction. Gordian was able to obtain a loan to finance the purchase of Guevera's interest and consequently obtained the board's approval of the purchase.

On August 23, 2000, Gordian attended a closing for the purchase of the Unit and claims to have purchased a 100% ownership interest in the Unit. Gordian contends that it is undisputed that the stock certificate and proprietary lease name Gordian as the sole shareholder and proprietary lessee,<sup>1</sup> and that Donovan did not obtain the cooperative board's approval to own any of the shares and/or to be named as the proprietary lessee.

Donovan contends that before executing the contract of sale, Gordian prepared an offering statement filed with the Securities and Exchange Commission dated August 23, 1999, for Envy Publishing Group, Inc. which described the then pending litigation and stated that in the event that Donovan prevails, Donovan will purchase Guevera's 50% interest in the Unit for \$95,000. Donovan alleges that at the closing, he purchased

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<sup>1</sup> The Complaint alleges that through a series of errors at the closing, the proprietary lease and stock certificate were allocated in Gordian's name d/b/a Envy Publishing Group, Inc. (Complaint, ¶ 22).

Guevera's 50% interest in the Unit for \$95,000 with the money Gordian borrowed and that Donovan's 50% interest was never subject to a sale or sold at the closing.

In 2003, Gordian sought to terminate Donovan and Envy Publishing Group, Inc.'s right to occupy the Unit as a month-to-month tenancy and commenced a holdover proceeding in the Civil Court of the City of New York, Housing Part. Gordian claimed she was the sole owner of the Unit, which she claimed to have rented to Donovan pursuant to an oral agreement. At the trial before the Honorable Lucy Billings, J.C.C., Donovan argued that he was the owner of the Unit and that summary relief was not appropriate. On October 22, 2004, Judge Billings dismissed the petition and determined that the issue of ownership was "sufficiently cloudy" and that the court may not permit the eviction proceeding to continue. (Chapman Affirm, ex. C, at 14-15). Judge Billings stated "[f]or Donovan thus to establish definitively that he is at least a 50% owner of the unit, let alone the 100% owner, would require an action by him against petitioner and the cooperative board, for reformation of the stock certificate and proprietary lease, to add him as a shareholder and lessee." *Id.* at 12. Judge Billings further stated that she did not have jurisdiction to establish definitively the actual ownership interests of the Unit and indicated that such determination must be made elsewhere.

Following the proceedings in the Civil Court, Gordian commenced the 2005 Action against Donovan and the cooperative in the Supreme Court, New York County on February 1, 2005. Gordian sought a declaration that she was the owner of the Unit and an order of ejectment to remove Donovan from the Unit. Gordian also sought a judgment of partition and the appointment of a referee to sell the Unit and divide the proceeds of such sale in accordance with the parties' proportionate interests as to be determined by the court if Gordian was not determined to be the sole owner.

By order dated October 5, 2005 and decision dated October 6, 2005, the Honorable Richard F. Braun, J.S.C., granted in part Donovan's motion to dismiss to the extent of declaring on the first cause of action that Gordian is not the sole proprietary-lessee of the Unit and dismissed the second cause of action seeking ejectment and use and occupancy. Judge Braun denied the remaining portion of the motion to dismiss upon determining that Gordian may have a 50% interest in the Unit. Judge Braun stated that if Gordian has a 50% interest in the Unit, she may be entitled to partition and sale, pursuant to section 901(1) of the Real Property Actions and Proceedings Law. Judge Braun's order states that "[n]either the documents nor collateral estoppel compel a dismissal of that claim." (Chapman Affirm., ex. E).

Donovan filed an amended verified answer and asserted a counterclaim for sanctions against Gordian. Donovan then moved for "reformation,"<sup>2</sup> sanctions against Gordian and the imposition of a constructive trust. Gordian cross-moved for denial of Donovan's motion pursuant to CPLR §§ 3211 and 3212. By stipulation, Donovan withdrew the portion of his motion seeking sanctions and Gordian withdrew the part of her cross motion seeking denial of Donovan's motion and relief pursuant to CPLR § 3211, relating to sanctions. By order dated May 14, 2007 and decision dated May 15, 2007, Judge Braun refused to grant summary judgment to Donovan on his claim for reformation and held that although there may have been a constructive trust between Donovan and Gordian, no such cause of action was pled. Judge Braun severed and continued the remaining claim which alleges that Gordian is entitled to a judgment for partition and division of the Unit or, alternatively, if partition cannot be made without great prejudice to the parties, then a sale of the shares of stock and the proprietary lease should be ordered with a division of the proceeds between the parties according to their respective rights and interests.

On March 19, 2007, Donovan commenced this action alleging that the 2005 Action sought the same relief which was

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<sup>2</sup> Judge Braun noted that while a party cannot move directly for the relief sought in a cause of action, in Donovan's reply papers, he requested summary judgment on this counterclaim.

denied in the Civil Court and constituted an abuse of process. Donovan also alleges that the attempt to evict him from the Unit was maliciously inspired, and done for the purpose of harassing, intimidating, and interfering with his rights.

Gordian contends that she did not commence the Civil Court action or the action in the Supreme Court out of malice, but is attempting to obtain a judicial determination concerning the ownership of the Unit. Gordian contends that Donovan's complaint fails to state a cause of action and is barred by the statute of limitations. In the event that the dismissal is not granted, Gordian requests that this action should be consolidated with the action already pending.

#### **DISCUSSION**

Gordian argues that the present action is time-barred under the one-year statute of limitations for malicious prosecution and abuse of process. CPLR § 215. Because the 2005 Action was commenced on February 1, 2005 with the filing of the summons and complaint and the first and second causes of action were dismissed by Judge Braun's October 5, 2005 order. She argues that the applicable one-year statute of limitations period expired before Donovan commenced the present action on March 19, 2007.

The statute of limitations for malicious prosecution and abuse of process claims run from the termination of the

underlying action. *Artzt v Greenburger*, 161 AD2d 389, 390 (1st Dept 1990). Despite Judge Braun's dismissal of the first two causes of action in Gordian's complaint, the third cause of action requesting partition has not been dismissed and the action involving both Gordian and Donovan's ownership of the premises has not yet terminated. In Judge Braun's October 6, 2005 order, he states that Gordian may be entitled to partition and sale and a 50% interest in the Unit. Therefore, as the litigation over ownership of the Unit is still pending, the statute of limitations has not yet expired on either cause of action.

Gordian also argues that the motion to dismiss must be granted because the complaint fails to state a cause of action for abuse of process. The elements for a cause of action for abuse of process include regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; the party activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification; and the 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 District v Farmingdale Classroom Teachers Assn., Inc.*, 38 NY2d 397, 403 (1975); see also *Matthews*

*v New York City Dep't of Social Services*, 217 AD2d 413, 415 (1st Dept 1995).

Gordian contends that filing complaints in the Civil Court and the Supreme Court cannot be the basis for an abuse of process claim because the actions were commenced for a determination of her rights as to the ownership of the Unit. Gordian points to the Civil Court's dismissal of the holdover proceeding in which Judge Billings stated that the Civil Court was without jurisdiction to resolve all of the issues between the parties.

Donovan contends that he has alleged facts sufficient to state a cause of action for abuse of process as the Civil Court proceedings and the Supreme Court action were commenced without any basis in fact or law. He also argues that Gordian's attempted eviction was maliciously inspired and done for the purposes of harassing, intimidating, and interfering with his rights. He complains that he has been forced to spend money to retain counsel to defend both actions.

"[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused." *Curiano v Suozzi*, 63 NY2d 113, 116 (1984). Furthermore, "mere commencement of a civil action does not of itself constitute the tort of abuse of process." *Allen v Murray House Owners Corp.*, 130 AD2d 356, 357 (1st Dept 1987).

Here, Gordian brought the 2005 Action as a result of the Civil Court's determination that it lacked jurisdiction to resolve the dispute. Donovan fails to demonstrate that the judicial process was instigated to do harm or that Gordian is seeking a collateral advantage or corresponding detriment to Donovan which is outside the legitimate ends of the process. Although Donovan alleges that Gordian acted maliciously in attempting to evict him through litigation, the Court of Appeals has held that, "[a] malicious motive alone, however, does not give rise to a cause of action for abuse of process." *Curiano v Suozzi*, 63 NY2d at 117; see also *Howell v Davis*, 58 AD2d 852 (2d Dept 1977) (holding that while the complaint alleges that the defendant acted with malice, there is no indication in the pleadings or in the moving papers which substantiates that allegation). Therefore, as Donovan has failed in showing that the required elements of an abuse of process action exist, Gordian's motion to dismiss this cause of action must be granted.

Gordian further contends that Donovan fails to state a cause of action for malicious prosecution. "The elements of the tort of malicious prosecution include initiation or continuation of a proceeding despite the lack of probable cause, termination of that proceeding favorable to the party there sued and now aggrieved as plaintiff, and a showing of malice in the pursuit

of that underlying proceeding." *Honzawa v Honzawa*, 268 AD2d 327, 329 (1st Dept 2000), citing *Colon v City of New York*, 60 NY2d 78, 82 (1983). A cause of action for malicious prosecution also requires a showing of "some special damage to, or interference with, personal or property rights beyond the damages normally attendant upon being sued." *Honzawa v Honzawa*, 268 AD2d at 329.

Donovan fails to demonstrate that there was a lack of probable cause for the initiation of the actions in the Civil Court and in the Supreme Court. "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. Because obviously less in the way of grounds for belief will be required to justify a reasonable [person] in bringing a civil rather than a criminal suit, when the underlying action is civil in nature the want of probable cause must be patent." *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 755 (3d Dept 2005) (quotations and citations omitted). "[P]rior judicial recognition of potential merit of the underlying case creates a presumption that it did not lack probable cause." *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d at 755. Here, Judge Braun's decision creates a presumption that Gordian's complaint in the 2005 Action did not lack probable cause. Also, Gordian's name appears on the stock certificate and on the proprietary

lease for the Unit, adding further support that her litigation was not meritless. Therefore, Donovan does not allege facts sufficient to demonstrate that there was a lack of probable cause in Gordian's commencement of the 2005 action.

Donovan also alleges that Gordian acted with malice. Malice has been defined as "'conscious falsity.'" *Hornstein v Wolf*, 109 AD2d 129, 133 (2d Dept 1985), *affd* 67 NY2d 721(1986), quoting *Munoz v City of New York*, 18 NY2d 6, 9 (1966). In order to set forth a cause of action to recover damages for malicious prosecution, plaintiff must include more than conclusory, unsubstantiated allegations. *Id.* at 133. Here, although Donovan's complaint alleges in a conclusory fashion that Gordian acted with malice in the attempted eviction, neither the pleadings nor the moving papers set forth a factual basis for such an allegation.

A claim for malicious prosecution must also include a claim that plaintiff suffered special damages. *Britt v Nestor*, 17 AD3d 144 (1st Dept 2005). Donovan contends that he was forced to expend funds to retain counsel and to defend the second action brought in the Supreme Court. A cause of action for malicious prosecution "requires a showing of some special damage to, or interference with, personal or property rights beyond the damages normally attendant upon being sued." *Honzawa v Honzawa*, 268 AD2d at 329. Here, Donovan fails to allege facts

which demonstrate that he suffered damages beyond those associated with the normal expenses needed to defend the 2005 case. Although he argues that injury to reputation, character, business, and credit are recoverable damages in actions for malicious prosecution, Donovan fails to allege such damages in the complaint.

Due to Donovan's failure to allege facts demonstrating malice, special damages or a lack of probable cause in bringing both actions, Gordian's motion to dismiss the cause of action for malicious prosecution is granted.

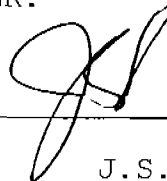
Finally, since the motion to dismiss is granted, that branch of Gordian's motion seeking consolidation is moot. Accordingly, it hereby is

ORDERED that defendant Maria Gordian's motion is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court, including an award of \$100 costs on this motion; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 1, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

**FILED**

FEB 06 2008

NEW YORK COUNTY CLERK'S OFFICE