

Redash v Rofelsohn

2008 NY Slip Op 32150(U)

July 10, 2008

Supreme Court, Nassau County

Docket Number: 2285-08/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
CHERYL REDASH,

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 2285/08

**MOTION DATE: 6-9-08
SUBMIT DATE: 6-30-08
SEQ. NUMBER - 001**

LINDA J. ROFELSOHN,

Defendant.
-----X

The following papers have been read on this motion:

- Notice of Motion, dated 5-19-08.....1**
- Affidavit in Opposition, dated 6-9-08.....2**
- Reply Affirmation, dated 6-25-08.....3**

Defendant's motion for summary judgment on plaintiff's complaint pursuant to CPLR §3212 is granted and plaintiff's action against defendant is dismissed. That portion of plaintiff's motion which seeks summary judgment on defendant's counterclaims pursuant to CPLR §3212 is denied.

Plaintiff and defendant were friends, and for a time, defendant lived in plaintiff's residence while defendant was awaiting a move to new quarters. After defendant moved out from plaintiff's residence and into her own, the friendship deteriorated and ultimately

defendant made a criminal complaint with respect to plaintiff's conduct which was supported by a deposition signed by defendant under penalties of perjury on September 5, 2005. The complaint resulted in the issuance on September 22, 2005 of a District Court Information charging plaintiff with a violation of Penal Law §240.30(2), aggravated harassment in the second degree, a class A misdemeanor.

The deposition and information allege that plaintiff telephoned the defendant at certain times and dates intentionally to harass and annoy the defendant. Thereafter, in December 2005, a Stay Away Order of Protection was issued under the same case number in favor of defendant and against plaintiff.

Subsequently defendant alleged that plaintiff violated the Order of Protection on February 5, 2006 and September 17, 2006. These complaints led to the lodging against plaintiff of additional charges of violating the Order of Protection pursuant to Penal Law §215.50, criminal contempt in the second degree, also class A misdemeanor.

While the criminal cases were pending, plaintiff, in October 2007, initiated a small claims action against defendant for monies allegedly lent to the defendant by the plaintiff. The small claims action was settled and is not in issue in this case, except that defendant alleges that plaintiff's attorney intimated to her that settlement of the small claims action would make this action "go away", a claim disputed by plaintiff and not otherwise documented.

On December 11, 2007, on the charge of aggravated harassment, pursuant to a negotiated plea bargain, plaintiff pleaded guilty to the reduced charge of disorderly conduct, Penal Law §240.20(7), a violation, in satisfaction of all charges. The two charges of criminal contempt were dismissed in satisfaction of her plea.

Plaintiff commenced this action for malicious prosecution and emotional distress within the ensuing two months and defendant has counterclaimed on causes of action for abuse of process (first counterclaim), *prima facie* tort (second counterclaim), emotional distress (third counterclaim), property damage (fourth counterclaim) and sanctions (fifth counterclaim).

The first, second and fifth counterclaims for abuse of process, *prima facie* tort and sanctions are based on the bringing of this action. The third and fourth counterclaims for emotional distress and property damage are based on undesignated prior conduct of the plaintiff which is catalogued and spread out over a period of nearly four years prior to commencement of this action.

No reply from plaintiff to these counterclaims has been submitted although defendant's attorney mentions the existence of an "untimely response" by plaintiff.

Defendant now moves for summary judgment in her favor on plaintiff's complaint and summary judgment in her favor with respect to her counterclaims.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment

motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a

defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

The elements of an action for malicious prosecution are (i) a judicial proceeding initiated by defendant that (ii) terminates in plaintiff's favor (iii) brought without probable

cause and (iv) with malice. *Martinez v. Schenectady*, 97 NY2d 78 (2001); *Maskantz v. Hayes*, 39 AD3d 211 (1st Dept. 2007); *Lupski v. County of Nassau*, 32 AD3d 997 (2d Dept. 2006).

Defendant has established its entitlement to summary judgment by making a *prima facie* showing that none of the foregoing elements are satisfied as to her and plaintiff has failed to submit evidence sufficient to create a triable issue of any material facts.

Generally, a civilian defendant who merely furnishes information to law enforcement authorities who are then free to exercise their own independent judgment as to whether to make an arrest will not be held liable for malicious prosecution. In order to satisfy the first requirement of initiating a criminal proceeding, it must be shown that a defendant played an active role in the prosecution such as giving advice and encouragement or importuning authorities to act. Here defendant did not take an active part in the arrest or show undue zeal. Defendant's role in reporting the incidents to the police does not constitute initiation of the proceeding. *Lupski v. County of Nassau*, *supra*; *DeFilipo v. County of Nassau*, 183 AD2d 695 (2d Dept. 1992).

The second element of the claim is that the criminal proceeding be terminated in plaintiff's favor. The criminal prosecution against the plaintiff was not resolved in plaintiff's favor. Plaintiff allocuted to the Penal Law violation of Disorderly Conduct in satisfaction of all charges against her, pursuant to a negotiated plea bargain. Such an arrangement is not a termination of the criminal action in plaintiff's favor. *See e.g. Maloney v. Anton Community News Papers, Inc.*, 16 AD3d 465 (2d Dept. 2005); *People v. Spooner*, 174 AD2d

795 (3rd Dept. 1991); *Gartenberg v. Mellan*, 106 Misc. 2d 113 (Sup. Ct. Nassau County 1980).

A criminal proceeding terminates favorably to the accused when its termination is consistent with innocence of the accused. Here, the circumstances surrounding the termination of the criminal action against plaintiff are not inconsistent with her innocence. *Cantalino v. Danner*, 96 NY2d 391 (2001). In short, there is no favorable termination where, as here, the prosecution ends by compromise or settlement, *Smith-Hunter v. Harvey*, 95 NY2d 191 (2000), or where a district attorney voluntarily discontinues prosecution without a determination on the merits. *Brown v. Sears Roebuck and Co.*, 297 AD2d 205 (1st Dept. 2007); *Vail-Ballou Press Inc., v. Tomosky*, 266 AD2d 662 (3d Dept. 1999).

It is plain from the evidence presented that dismissal of the two contempt charges was conditioned upon the plea of guilty to disorderly conduct. This is a dismissal which is not inconsistent with innocence but rather with guilt and was knowingly and consciously accepted by plaintiff on that basis. Plaintiff's contentions to the contrary are not supported by any legal authority and her current protestations of innocence are not relevant to the present legal analysis.

The third prong of absence of probable cause is lacking. Probable cause has been held to mean the presence of such facts and circumstances as would lead a reasonable person in like circumstances to conclude that plaintiff was guilty of a crime. *Colon v. New York*, 60 NY2d 78 (1983). The information obtained by defendant from others and her own observations and encounters which were relayed to police authorities establishes that

probable cause existed to lodge the charges against plaintiff. See *O'Donnell v. County of Nassau*, 7 AD3d 590 (2d Dept. 2004).

Finally, there has been no showing of malice on the part of defendant. Malice has been defined as commencing a proceeding based on a wrong or improper motive, something other than a desire to see the ends of justice served. *Nardelli v. Steinberg*, 44 NY2d 500 (1978); *Shapiro v. County of Nassau*, 202 AD2d 358 (1st Dept. 1994). Malice may be shown by a reckless or grossly negligent disregard of plaintiff's rights that may be established by circumstantial evidence. *Ramos v. New York*, 285 AD2d 284, 300 (1st Dept. 2001). There are no facts and no evidence to suggest that defendant acted other than in a restrained reaction to the conduct of plaintiff and that she followed the advice of police authorities in lodging her complaint. Plaintiff's conclusory allegations of defendant's motives are not supported by any competent evidence.

Here, defendant has established the absence of any malice on her part in making her complaint and plaintiff has not submitted any competent evidence sufficient to raise an issue of fact with regard to the presence of malice on the part of defendant.

Liability may be imposed for the intentional infliction of emotional distress only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *Zimmerman v. Carmack*, 292 AD2d 601 (2d Dept. 2002) [internal citations omitted].

For the same reasons as noted above, there are no facts or evidence to support the claim that defendant acted with the intent to cause injury to plaintiff. Defendant's actions

were measured, defensive of, reactive to and provoked by plaintiff's conduct. Plaintiff has not submitted sufficient evidence to overcome defendant's *prima facie* showing of entitlement to relief.

Based on the foregoing, the Court grants summary judgment to the defendant on plaintiff's complaint against the defendant and the action by plaintiff against defendant is dismissed. CPLR §3212.

Plaintiff's contention that summary judgment should be denied because discovery is incomplete is insufficient to deny summary judgment. To defeat a motion for summary judgment pursuant to CPLR 3212(f), a party claiming ignorance of critical facts must demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover facts which would give rise to a triable issue (*Lumbsy v. Gershwin Theater*, 282 AD2d 578 [2d Dept. 2001]) and mere hope is not sufficient (*Lightfoot v. City of New York*, 279 AD2d (2d Dept. 2001)). Plaintiff has failed to make any evidentiary showing to support the conclusion that there may be facts available that would defeat the motion and speculation or conjecture is insufficient. *Falkowitz v. Peters*, 294 AD2d 330 (2d Dept. 2002); *Firth v. State*, 287 AD2d 771 (3d Dept. 2001).

The portion of the motion of defendant for costs 22 NYCRR 130-1.1 and CPLR §8303-a is also granted, and defendant is awarded as costs, her attorney's fees and other expenses incurred in connection with this motion and all such amounts shall be paid by plaintiff's attorneys. A hearing is necessary to assess the quantum of costs to be awarded to defendant in accordance with this decision and order.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing on August 28, 2008, at 9:30 A.M., to assess damages in accordance with this decision.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect the hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

As noted above, the elements for a case of malicious prosecution and intentioned infliction of emotion distress are now and have been well settled law. In opposing this motion, except for cases dealing with the nature of summary judgment, plaintiff has not submitted any legal authority to support the causes of action in the complaint and has not offered any cogent arguments in support of a deviation from settled law on this subject. Moreover, plaintiff's attorney was asked to discontinue this action by telephone on March 11, 2008 and by letter from defendant's attorney to him citing applicable law, dated March 17, 2008, more than two months before this motion was made. Follow up calls were made in March and May 2008. The court has not been directed to any response to this request. Minimally, this placed defendant's counsel on notice that plaintiff's claims might be lacking in merit and imposed some duty of inquiry.

Under these circumstances, our courts have recognized that a party who is subjected to a frivolous claim is entitled to recover her legal expenses. *Engel v. CBS, Inc.*, 93 NY2d 195, 203 (1999); *Zysk v. Kaufman, Borgeest & Ryan, L.P.*, 2008 WL 2608433 (2d Dept. 2008).

CPLR §8303-a provides in substance that if a claim such as this is commenced or continued and is found to be frivolous, the Court shall award costs and reasonable attorneys fees up to \$10,000 to the successful party. In order to find the action to be frivolous the court must find that there was no reasonable basis in law or fact for the action or its continuance that it could not be supported by a good faith argument for a change of existing law. CPLR §8303-a (c) (ii).

The Rules of the Chief Administrator, 22 NYCRR 130-1.1 also provide that an award of costs maybe made for frivolous conduct §130-1.1(c) (1), lack of merit in law or facts. *Yan v. Klein*, 35 AD3d 729 (2d Dept. 2006). There is a duty upon the attorney to make an analysis of the case in the context of the entire record and make a determination of merit independent of the wishes of the client. *Heilbut v. Heilbut*, 18 AD3d 1 (1st Dept. 2005).

Although at times an evidentiary hearing is required to make a determination of whether costs should be imposed (*Walker v. Weinstock*, 213 AD2d 631 [2d Dept. 1995]), that requirement is not necessary here because the request for costs was a separate and distinct prayer for relief on this motion, plaintiff has been afforded the opportunity to respond with reasons for its conduct, the parties have submitted documentary evidence, there are no relevant factual disputes and plaintiff has not requested a hearing. Hence, in this instance it

is not necessary to hold an evidentiary hearing on the issue of whether plaintiff's conduct was frivolous. *Gordon v. Marrone*, 202 AD2d 104 (2d Dept. 1994).

The Court finds that there came a time during this litigation, prior to the making of this motion when a cursory analysis of the well settled legal principles and rudimentary facts should have made apparent to plaintiff's counsel that there was no merit to the claims against defendant and thus the action should not have been instituted or continued as to defendant. *Mitchell v. Herald Company*, 137 AD2d 213 (4th Dept. 1988). To continue this action and to require defendant to make this motion was thus frivolous, within the meaning of the above statutes and regulations, thereby entitling defendant to recover costs from plaintiff's counsel.

Giving plaintiff every benefit of the doubt the Court finds that by March 17, 2008, after defendant's counsel had made her written request for a dismissal, plaintiff should have discontinued this action and that defendant is entitled to recover from plaintiff's attorneys named below, statutory costs, CPLR 8301(a), the reasonable and necessary expenses of this motion CPLR §8301(b) and all costs, expenses and reasonable attorneys fees (such fee not to exceed \$10,000) incurred since the above mentioned date, CPLR §8303-a, 22NYCRR §130-1 *et seq.*

Defendant has counterclaimed for abuse of process, *prima facie* tort, (arising out of this action) intentional infliction of emotional distress, property damage and sanctions.

Defendant has not made a *prima facie* showing of entitlement to relief on these claims, with the exception of sanctions, dealt with above, which exists as a remedy and not as a cause of action.

Defendant's claim of property damage to her home and automobile is lacking in both specificity and evidentiary support and has been sufficiently denied by plaintiff so as to raise an issue of fact as to whether she caused the damage claimed. Moreover, since the reply to the counterclaims has not been submitted, this Court is not able to ascertain whether any affirmative defenses have been raised with respect to the incident claimed to have occurred. The damage claimed to the car of defendant's son in April 2005, and to defendant's car in April 2007, was not witnessed and is based on conjecture and surmise.

The description of the incident in the parking lot in August 2005 is lacking in the detail necessary to determine whether the claim is one of intentional battery or negligence, and whether affirmative defenses have been asserted.

The principal focus of defendant's counterclaim, namely abuse of process, are (i) regularly issued legal process (ii) activated by an ulterior purpose to do harm without economic or social excuse or justification, (iii) by a person seeking some collateral advantage or corresponding detriment that is outside the legitimate ends of process and (iv) actual damage. *Panish v. Steinberg*, 32 AD3d 383 (2d Dept. 2006).

On the evidence presented thus far, defendant has not made a *prima facie* showing of entitlement to relief on this counterclaim.

The causes of action for intentional infliction of emotional harm and *prima facie* tort are cognizable but for summary judgment purposes, defendant has not satisfied her burden. Intentional infliction of emotional distress requires *inter alia* causal connection between conduct and severe emotional distress. *Howell v. New York Post Co., Inc.*, 81 NY2d 115, 119 (1983); *Probst v. Cacoulidis*, 295 AD3d 331 (2d Dept. 2002). Here, there is a lack of

evidentiary support for the requirement that defendant suffered severe emotional distress as a consequence of plaintiff's conduct. There is no evidence of medical treatment, medications, inability to work or other indicia of a tangible consequence. Although outrage, inconvenience, annoyance and the like are not to be treated lightly, the grant of summary judgment requires more. Because the foregoing essential element has not been satisfied on these papers, the Court does not address the remaining elements. *See Walentas v. Johnes*, 257 AD2d 352 (1st Dept. 1999) [commencement of litigation alone insufficient and medical evidence required].

Defendant's claim of prima facie tort suffers from similar infirmities. The elements required are (i) intentional infliction of harm, (ii) that results in special damages (iii) without excuse or justification, (iv) by an act or series of acts that would otherwise be lawful. *Freihofer v. Hearst Corp.*, 65 NY2d 135 (1985). For purposes of establishing a *prima facie* showing of entitlement to summary judgment, defendant has not satisfied these elements. *See Del Vecchio v. Nelson*, 300 AD2d 277 (2d Dept. 2002).

Based on the foregoing defendant's motion for summary judgment on her counterclaims is denied.

In sum, plaintiff's action is concluded by summary judgment against her and the case continues on the counterclaims of defendant.

All parties shall appear at a Preliminary Conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on August 25, 2008, at 9:30 a.m., lower level. No adjournments of this conference will be permitted absent the permission of or Order of this

Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 10, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**