

<b>Gandolfo v Gandolfo</b>
2009 NY Slip Op 30051(U)
January 7, 2009
Supreme Court, Suffolk County
Docket Number: 13237-2007
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

**Present:**

HON. EMILY PINES  
J. S. C.

Original Motion Date: 11-06-2008  
Motion Submit Date: 11-06-2008  
Motion Sequence No's.: 001 MOTD

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JOSEPH E. GANDOLFO,

X  
**Plaintiff,**

-against-

CELESTE GANDOLFO,

**Defendant.**

Attorney for Plaintiff

TOR JACOB WORSOE, JR., ESQ.  
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Holtsville, New York 11742

Attorney for Defendant

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**ORDERED**, that the motion (motion sequence number 001) by defendant for summary judgment dismissing the complaint and for counsel fees is considered under CPLR Rule 3212 and determined as follows:

The parties to this action are former spouses who were divorced by Judgment of Divorce (KENT, J.) entered February 22, 2005. On or about December 6, 2004, the parties entered into a Stipulation of Settlement of their divorce action, which was subsequently incorporated but not merged into the Judgment of Divorce. Both parties were represented by counsel during the divorce action and the settlement negotiations. The submissions reflect that during the pendency of the divorce action, certain alleged incidents occurred between the parties, resulting first in an Order of Protection<sup>1</sup> being issued against defendant on March 2, 2004, and later, his arrest for a violation of the Order of Protection on May 17, 2004.

Notwithstanding the foregoing, as set forth above, on December 6, 2004, the parties settled the divorce action, signed the Stipulation of Settlement in Court and were allocuted on the record by Justice Kent as to their agreement to the Stipulation, their understanding of the Stipulation and the satisfaction

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<sup>1</sup>The Order of Protection (DOUNIAS, J.) required plaintiff to "refrain from" certain acts against defendant, including assault, stalking, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any other criminal offense.

of the representation by counsel. Additionally, according to the transcript of the proceedings, defendant herein agreed that she would cooperate and use her best efforts to get the criminal charges against plaintiff either reduced or dismissed. As relevant herein, the Stipulation contained the following provision:

**ARTICLE 13**  
**GENERAL RELEASE**

Except as herein to the contrary provided, the parties shall and do hereby mutually remise, release and forever discharge each other from any and all actions, suits, demands and obligations whatsoever, both in law and in equity, that either of them ever had, now has, or may hereafter have against the other upon or by reason of any matter, cause or thing up to the date of the execution of the stipulation, except all causes of action for Divorce or Separation. It is the intention of the parties that henceforth there shall be, as between them, only such rights and obligations as are specifically provided in this Stipulation.

Plaintiff then commenced the instant action on or about May 11, 2007 by the filing of a Summons and Verified Complaint and issue was joined by defendant's service of a Verified Answer dated June 1, 2007. The Complaint sets forth six causes of action: malicious prosecution; abuse of process and breach of the Stipulation of Settlement; false arrest, punitive damages, attorney's fees and lost wages. The gravamen of the Complaint is that defendant, in violation of the Stipulation of Settlement, "continued the prosecution against the plaintiff", improperly abused the legal process and illegally caused plaintiff to be detained. Plaintiff seeks compensatory and punitive damages, lost wages and counsel fees.

Defendant now moves for summary judgment dismissing the Complaint and pursuant to 22 N.Y.C.R.R. §130-1.1 for counsel fees. Defendant argues that this action is barred by the general release contained within the Stipulation of Settlement. Moreover, defendant asserts in her affidavit that plaintiff has failed to demonstrate that she made any promise regarding using her best efforts to insure the criminal charges against plaintiff were dismissed or reduced. The Court notes, however, that such assertion is belied by the transcript of the proceedings held before Justice Kent, which is attached to the opposition papers. Defendant further alleges that she merely contacted the police and signed a criminal complaint against plaintiff alleging a violation of the Order of Protection, and that as a civilian, she cannot be held responsible for malicious prosecution or false arrest. Thus, defendant seeks dismissal of the Complaint in its entirety, with prejudice and an award of counsel fees as a sanction for frivolous litigation pursuant to Part 130 of the Uniform Rules.

Plaintiff opposes the motion and submits a copy of the aforementioned transcript and an

affidavit. Plaintiff states that, contrary to the defendant's promise to assist in having the criminal charges dismissed or reduced, she actually contacted the District Attorney's office and demanded that he be prosecuted. Plaintiff states that he went to trial on the criminal charges and was ultimately acquitted. With regard to the general release contained in the Stipulation of Settlement, he states that it was "never my intent to hold the defendant harmless for having me falsely imprisoned and prosecuted." Plaintiff's Affidavit at ¶9. Moreover, he argues that such general release must be read in light of defendant's agreement to insure the criminal charges were reduced or dismissed. Plaintiff argues that there are factual issues surrounding defendant's actions and obligations regarding the criminal charges precluding summary judgment.

In reply, defendant states that she did use her best efforts to have the criminal charges dismissed but that the District Attorney refused to dismiss the case. Additionally, defendant argues that the events leading up to the arrest occurred prior to the execution of the Stipulation, and thus are barred by the general release contained therein. Thus, defendant urges the Court to dismiss the Complaint in its entirety.

The law is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996).

It is beyond cavil that stipulations of settlement are favored by the courts and not lightly cast aside. *Langer v. Krivitzky*, 147 A.D.2d 687, 538 N.Y.S.2d 294 (2d Dept. 1989). Additionally, the "general rule is that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties. Where the language with respect to the parties' intent is clear and unambiguous, it will be given effect, regardless of one party's claim that she intended something else." *Falconieri v. A & A Discount Auto*, 262 A.D.2d 446, 692 N.Y.S.2d 137 (2d Dept. 1999) (internal citations omitted).

In the case *sub judice*, the plain and unambiguous terms of the general release contained within the parties' Stipulation of Settlement bars any claims by plaintiff herein arising out of the events surrounding his arrest for the violation of the Order of Protection. Plaintiff was represented by counsel on the execution of the Stipulation and the allocution by Justice Kent. *See, e.g.*,

*Langer, supra*. Thus, any later interposed claim by plaintiff that it was not his intent to release defendant from such claims are without merit. Therefore, the first cause of action for malicious prosecution and the third cause of action for false arrest are dismissed with prejudice.

Turning to the second cause of action for abuse of process, the Court finds that this claim essentially asserts that defendant breached her agreement to use her best efforts to have the criminal charges against plaintiff reduced or dismissed. Here, however, the Court finds that questions of fact exist as to the actions taken by plaintiff subsequent to the execution of the Stipulation and defendant's promise in this regard. Moreover, the Court is troubled by defendant's initial assertion in the moving papers that there was no documentation of such promise, although same was clearly recorded in the transcript of the proceedings before Justice Kent. Faced with such documentation, defendant then asserted that she did use her best efforts but the District Attorney refused to accede to her requests. Based on the conflicting representations, the second cause of action for abuse of process and breach of the Stipulation may continue.

The fourth cause of action seeks punitive damages based upon the alleged conduct of the defendant, however, the law is clear that no separate cause of action for punitive damages exists for pleading purposes. *Osborne v. Zornberg*, 16 A.D.3d 643, 792 N.Y.S.2d 183 (2d Dept. 2005); *Paisley v. Coin Device Corp.*, 5 A.D.3d 748, 773 N.Y.S.2d 582 (2d Dept. 2004); *Paroff v. Muss*, 171 A.D.2d 782, 567 N.Y.S.2d 502 (2d Dept. 1991). Moreover, "punitive damages are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton, or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives." *Dolan v. Morales*, 8 Misc.3d 1013(A), 801 N.Y.S.2d 777 (Sup. Ct. Kings Co. 2005), *citing, Boykin v. Mora*, 274 A.D.2d 441, 711 N.Y.S.2d 904 (2d Dept. 2000). Here, as the Complaint sets forth a separate cause of action for punitive damages, that cause of action must be dismissed. Additionally, even considering the merits of plaintiff's claim, the Court finds that the alleged conduct complained of by plaintiff does not rise to the level required to recover punitive damages. Thus, the fourth cause of action is dismissed.

With regard to the fifth cause of action for attorneys' fees, the general rule is that an "attorney's fee is an incident of litigation and is not recoverable by a prevailing party in a lawsuit unless such an award is authorized by agreement between the parties, statute, or court rule." *American Motorists Insurance Co. v. Trans International Corp.*, 265 A.D.2d 280, 696 N.Y.S.2d 186 (2d Dept. 1999). *See also, Matter of Hayevsky*, 302 A.D.2d 524, 757 N.Y.S.2d 47 (2d Dept. 2003). Here, Article 36 of the Stipulation provides for the payment of counsel fees to a prevailing party in an action to enforce performance of a provision of the Stipulation. Accordingly,

the fifth course of action is properly stated.

Plaintiff's sixth cause of action seeks recovery for lost wages as a result of the criminal proceeding; this is actually an element of damages for the alleged breach of contract. Thus, the Court will allow the request to stand as part of the second cause of action rather than stated as a separate claim.

Based on the foregoing, the first, third and fourth causes of action are dismissed and the second cause of action including the request for lost wages as well as the fifth coause of action are are severed and continued. The application for sanctions is denied.

Counsel are reminded that a status conference is scheduled for January 8, 2009 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: January 7, 2009  
Riverhead, New York

  
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EMILY PINES  
J. S. C.