

Wilner v Village of Roslyn

2009 NY Slip Op 30837(U)

March 31, 2009

Supreme Court, Nassau County

Docket Number: 16161/07

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 6
NASSAU COUNTY**

HARRY WILNER and JUDITH WILNER,

Plaintiffs,

**MOTION DATE: 1/13/09
MOTION SEQ. NO.: 001, 002**

-against-

INDEX NO.: 16161/07

**VILLAGE OF ROSLYN, RICHARD BARBIERI,
WADE CURRY, JOHN GIBBONS, JR.,**

Defendants.

The following papers read on this motion (numbered 1-4):

- Notice of Motion to Dismiss the Plaintiff's Complaint 1**
- Notice of Cross Motion. 2**
- Affirmation of John P. Gibbons. 3**
- Sur-reply Affirmation in Support of Cross-Motion and
in Opposition to Defendants' Motion to Dismiss. 4**

- Memorandum of Law.....A**
- Memorandum of Law in Support of Cross-Motion
And in Opposition to Defendants' Motion to Dismiss.....B**
- Reply Memorandum of Law.....C**
- Sur-reply Memorandum of Law in Support of Cross-Motion
And in Opposition to Defendants' Motion to Dismiss.....D**

This is an action alleging malicious prosecution, abuse of process, and deprivation of plaintiffs' civil rights in violation of 42 U.S.C. §1983, predicated upon defendants' prosecution of plaintiffs for alleged violations of the Code of the Incorporated Village of Roslyn (the "Village Code"). Defendant JOHN GIBBONS, JR. ("GIBBONS") moves to dismiss the Complaint as against him pursuant to CPLR §3211(a)(7) on the ground that GIBBONS is entitled to absolute prosecutorial immunity, insofar as all acts complained of were within the scope of his authority as prosecutor for the VILLAGE OF ROSLYN. Plaintiffs cross-move pursuant to CPLR §3124 and §3126 to compel disclosure of all communications with GIBBONS which relate to the prosecution of plaintiffs, or in the

alternative, for summary judgment pursuant to CPLR §3212 dismissing GIBBONS' absolute immunity defense.

GIBBONS Motion to Dismiss

The Court refers to the papers listed above for a full recitation of the facts and procedural history of this action. The action is one of a series of actions arising out of a heavy rain storm that commenced on or about October 7, 2005. According to plaintiff, the rainfall overwhelmed the VILLAGE's storm sewers at or near Plaintiff's property, which ultimately caused the hilltop in the rear of Plaintiffs' property to slide downhill toward the Village Hall on Old Northern Boulevard, resulting in damage to Plaintiffs' property and the property of the VILLAGE (the "Occurrence"). On October 11, 2005, the VILLAGE issued to Plaintiffs an Appearance Ticket, summons number 101105-2, together with an Information, charging that the Plaintiffs had installed an illegal storm drainage system at the base of their retaining wall, in violation of the Village Code.

It is undisputed that at all relevant times, GIBBONS held the title of Village Prosecutor for Zoning for the VILLAGE OF ROSLYN (the "VILLAGE"). John Spellman, who is GIBBONS' partner in the law firm of Spellman Rice Schure Gibbons McDonough & Polizzi, LLP (the "Law Firm"), held the title of Village Attorney. The Law Firm was retained by the VILLAGE as Special Counsel in June of 2005 to provide legal representation in various matters, as directed by the VILLAGE.

The Complaint herein alleges that GIBBONS, in conspiracy with the other defendants, filed a Criminal Court Summons and Information without probable cause, and continued to prosecute the plaintiffs for violations of the Village Code, notwithstanding that they knew or should have known that the charges were baseless, in order to advance the VILLAGE's interest in a potential property damage dispute arising from the Occurrence. [Complaint, Motion Exh. A.] For purposes of GIBBONS' motion to dismiss, the Court assumes as true the facts alleged by plaintiffs, and affords plaintiffs the benefit of every possible favorable inference. **EBC I v. Goldman, Sachs**, 5 NY3d 11, 19; **Leon v. Martinez**, 84 NY2d 83, 87-88.

"A prosecutor is entitled to absolute immunity for actions taken within the scope of his official duties in initiating and pursuing a criminal prosecution and in presenting the State's case." **Brenner v County of Rockland**; 67 A.D.2d 901 (citing **Imbler v Pachtman**, 424 U.S. 409). See also **Arzeno v. Mack**, 39 A.D.3d 34; **Shapiro v. Town of Clarkstown**, 238 AD2d 498. Absolute immunity applies notwithstanding allegations of improper motive or malice, so long as the official is acting within the scope of his or her duties. See **Tartar v. State of New York**, 68 NY2d 511, 518; **Rosen & Bardunias**

v. County of Westchester, 158 AD2d 679 (citing **Imbler**, 424 U.S. 409); **Schanbarger v. Kellogg**, 35 A.D.2d 902, *appeal dismissed*, 29 NY2d 649, *cert. denied* 405 US 919.

Plaintiff argues that GIBBONS was acting outside the scope of his prosecutorial authority insofar as “he conspired with other representatives of the Village . . . and employed regularly issued legal process for the collateral purpose of advocating for the Village, not prosecuting for the Village.” [Memorandum of Law in Support of Cross-Motion and in Opposition to Defendants’ Motion to Dismiss, dated October 24, 2008 (“Plaintiff’s Memorandum”), p.31.] If GIBBONS is entitled to immunity at all, plaintiff argues, it is only to qualified immunity, which does not shield an official from allegations of bad faith. [Plaintiff’s Memorandum, p.31-32.]

In determining whether official conduct is entitled to absolute immunity or qualified immunity, courts apply a “functional approach,” which looks to the nature of the function performed, not the identity of the official who performed it. **Buckley v. Fitzsimmons**, 509 U.S. 259, 269; **Arteaga v. State of New York**, 72 NY2d 212, 216. Generally, New York Court of Appeals decisions emphasize the distinction between discretionary or quasi-judicial acts, for which absolute immunity applies, and ministerial or administrative acts, for which only qualified immunity is afforded. *See Arteaga*, 72 NY2d at 216, 220, **Tango v. Tulevich**, 61 NY2d 34, 40-41. With respect to prosecutorial conduct in particular, the crucial distinction is whether or not the conduct complained of is “intimately associated with the judicial phase of the criminal process.” If the conduct is extraneous to the judicial proceedings, as in the nature of investigatory, law-enforcement or other functions that might be performed by other public officials, the conduct is afforded the same qualified immunity granted to those acting in a similar capacity. **Buckley**, 509 U.S. at 270-271; **Claude H. v. County of Oneida**, 214 AD2d 964, 965; **Rosen & Bardunias**, 158 AD2d 679, 680; **Cunningham v. State of New York**, 71 AD2d 181.

In the case at bar, the alleged misconduct consists of (i) the institution of criminal proceedings without probable cause and for an ulterior purpose, (ii) the continuation of a baseless prosecution, and (iii) the withholding of exculpatory evidence. In every instance, this is conduct “intimately associated with the judicial phase of the criminal process.” *See Whitmore v. City of New York*, 80 AD2d 638, 639; **Cunningham**, 71 AD2d at 183. *Compare, Buckley*, 509 U.S. 259 (pre-indictment fabrication of evidence, false out-of-court statements to the press); **Burns v. Reed**, 500 U.S. 578 (giving legal advice to police during the investigation of a suspect); **Cunningham**, 71 AD2d 181 (using a false affidavit to obtain a wiretapping warrant).

Plaintiffs cite the 1924 Court of Appeals decision in **Dean v. Kochendorfer** [237 NY 384], for the proposition that the commencement of a prosecution without probable cause and for an improper motive is conduct outside the scope of prosecutorial authority. Plaintiffs misstate the holding in **Dean**. In reversing a judgment of dismissal and ordering a new trial, the Court of Appeals in **Dean** held only that the conduct described therein set forth a *prima facie* case of malicious prosecution. The issue of immunity was never addressed. It cannot be inferred that by reviving the action, the Court of Appeals necessarily decided the question of immunity, particularly in light of later cases (cited above) upholding prosecutorial immunity regardless of motive or the absence of probable cause.

The crux of plaintiffs' claim is that GIBBONS misused his power as prosecutor in order to advance the interest of the VILLAGE in civil litigation, and, by implication, the interest of his Law Firm as Village Attorney and Special Counsel to the VILLAGE. Plaintiffs proffer a letter dated October 12, 2005 on Law Firm letterhead, signed by GIBBONS, stating that the VILLAGE intended to hold plaintiffs liable for the VILLAGE's property damage. According to plaintiffs, that letter demonstrates GIBBONS' "collateral purpose" for the prosecution, and the conflict of interest inherent in his dual role as Village Prosecutor and advocate for the VILLAGE. Relying upon the principle articulated in **Sedore v. Epstein** [56 AD3d 60, 68] that "even the statutory authority of the District Attorney to prosecute must yield when a conflict of interest potentially impairs the prosecutor's ability to do justice," plaintiffs advance the legal inference that a conflict of interest, "commingling" of roles, improper motive, or even the appearance of impropriety, thrusts the tainted conduct outside the bounds of prosecutorial authority.

The inference is unfounded. Although **Sedore** might have supported an argument to disqualify GIBBONS as prosecutor (or to overturn a conviction, had there been one), **Sedore** does not retroactively strip GIBBONS of his status as prosecutor for purposes of determining whether or not he possesses absolute immunity. The conflict of interest taint, if there is one, does not change the essential nature and function of the conduct in question. To the extent that such conduct is associated with the judicial proceedings and serves a prosecutorial function (as opposed to an investigative, law enforcement or other function), it is protected by absolute immunity under New York law. If anything, the conflict of interest relates to motive. As discussed above, the scope of prosecutorial immunity is not determined by the motive of the actor, but rather, by the function of the alleged acts. To the extent that the conduct is prosecutorial, collateral purpose is irrelevant. **Arteaga**, 72 NY2d at 216.

The Court notes that plaintiffs sought leave to file a sur-reply based upon the VILLAGE's recent disclosure of the Board of Trustee's minutes reflecting the appointments of GIBBONS, his partner and their Law Firm to their respective positions

with the VILLAGE. In plaintiffs' view, this new evidence supports the allegation that "an appearance of impropriety existed with Gibbons in his role as Village Prosecutor." [Sur-Reply Affirmation in Support of Cross Motion and In Opposition to Defendants' Motion to Dismiss, ¶15.] In the Court's view, the new evidence changes nothing. Plaintiffs' sur-reply essentially reiterates the arguments made in the initial submission. It was assumed in the initial papers that GIBBONS was both the Village Prosecutor and the Village Attorney. The apparent conflict of interest and collateral purpose for the prosecution was at the heart of plaintiffs' argument then, as it is now.

Based upon plaintiffs' application for leave to file a sur-reply, the Court anticipated evidence that GIBBONS was not properly appointed as prosecutor, and thus had no authority to act as such at the time in question. The Court finds that, if anything, the new evidence confirms GIBBONS' contention that he was the duly appointed Village Prosecutor, and that he was acting in that capacity and with such authority when he conducted the prosecution of plaintiffs. Accordingly, as discussed above, GIBBONS is entitled to absolute immunity for the conduct alleged in the Complaint. That such conduct may have been affected by improper motives or collateral purpose does not retroactively divest him of his prosecutorial authority or remove such conduct from its scope.

The remaining arguments in the sur-reply reiterate Plaintiffs' view that they have set forth a *prima facie* case of malicious prosecution, abuse of process, and deprivation of plaintiffs' civil rights in violation of 42 U.S.C. §1983. The Court need not address these arguments in the context of the instant motion, insofar as it has determined that GIBBONS, the only movant herein, is entitled to prosecutorial immunity applicable to these causes of action.

Cross Motion to Compel

Plaintiffs seek to compel disclosure of all communications with GIBBONS which relate to the Occurrence and the prosecution of plaintiffs. In particular, Plaintiffs seek to re-depose: (i) GIBBONS; (ii) Wade Curry, the Village Code Enforcement Officer; (iii) RICHARD BARBIERI, a named defendant herein and Superintendent of Buildings/ Public Works; and (iv) Alan King of Cameron Engineering & Associates, the engineer who investigated the Occurrence on behalf of the VILLAGE. Plaintiffs seek to establish GIBBONS' knowledge of exculpatory evidence, and his knowledge regarding the cause and amount of damage to the Village Hall, for purposes of demonstrating his collateral motive for the prosecution. Plaintiffs argue that to the extent that GIBBONS was acting as Village Prosecutor and not as Village Attorney during the time of the prosecution, his conversations with the above-named individuals are not privileged.

In the Affirmation of John P. Gibbons dated March 17, 2009 (the “GIBBONS’ Affirmation”), GIBBONS asserts that he is the attorney who performs most of the work for the VILLAGE under the Law Firm’s retainer as VILLAGE Special Counsel. [GIBBONS’ Affirmation, ¶ 6.] Accordingly, he argues, the communications that he had with VILLAGE officials and VILLAGE employees are entitled to the attorney-client privilege. GIBBONS asserts that the conversations he had with Wade Curry, RICHARD BARBIERI and other VILLAGE officials regarding the Occurrence were in the nature of providing legal advice and are therefore within the scope of the privilege. [GIBBONS’ Affirmation, ¶ 7.]

The Court notes, at the outset, that the GIBBONS’ Affirmation is not admissible. Although an attorney’s affirmation may be filed in lieu of an affidavit pursuant to CPLR §2106, this provision does not apply when the attorney is a party to the action. The Court finds, however, that consideration of the GIBBONS’ Affirmation does not affect the outcome of this motion, and thus refers to it for purposes of discussion.

A confidential communication between an attorney and his or her client in the course of the professional employment is protected from disclosure by the attorney-client privilege. CPLR §4503. In order to validly invoke the privilege, it must be shown that an attorney-client relationship existed at the time of the communication in question, and that the information sought to be protected was a confidential communication made to the attorney for purpose of obtaining legal advice or services. **People v. Mitchell**, 58 NY2d 368, 373; **Matter of Priest v. Hennessy**, 51 NY2d 62, 68-69. The burden of proving each element of the privilege rests upon the party asserting it. **Id.** Insofar as the privilege obstructs the truth-finding process, its scope is limited to that which is necessary to achieve its purpose. *See* **Rossi v. Blue Cross & Blue Shield of Greater NY**, 73 NY2d 588, 593.

The inquiry is necessarily fact-specific. **Spectrum Systems International Corp. v. Chemical Bank**, 78 NY2d 371, 378; **Rossi**, at 593. When a claim of privilege is disputed with respect to documents, Courts are authorized to conduct an *in camera* inspection to resolve the issue. **Spectrum**, 78 NY2d at 378. Similarly, with respect to oral communications, the Court may conduct a *voir dire* of the attorney to determine the specific nature and purpose of the communication. **Mitchell**, 58 NY2d at 373-374.

In the case at bar, the Court lacks sufficient information to reach a determination with respect to the alleged communications between GIBBONS and the VILLAGE representatives named above. GIBBONS’ general assertion that he is the attorney who performs most of the work for the VILLAGE is insufficient, in view of his dual role and the absence of a specific chronology of the communications, to demonstrate that he was functioning as the Village Attorney at the time of the communications, or that the communications arose out of, or were in the context of that relationship. Further, the bare

statement that such communications were in the nature of providing legal advice is insufficient, without description of the circumstances, specific subject matter and content of the communication, for the Court to determine that the information sought to be protected was a confidential communication made to the attorney for purpose of obtaining legal advice or services.

Insofar as defendants have failed to meet their burden of proof, the assertion of the attorney-client privilege is denied. In view of the determination that GIBBONS is entitled to absolute immunity, the Court also denies plaintiffs' motion to compel pending a further showing that the case against the other defendants remains viable and specifying the particular subject matter and relevance of any additional discovery sought. The Court has considered the remaining arguments of the parties, and finds them to be without merit.

Conclusion

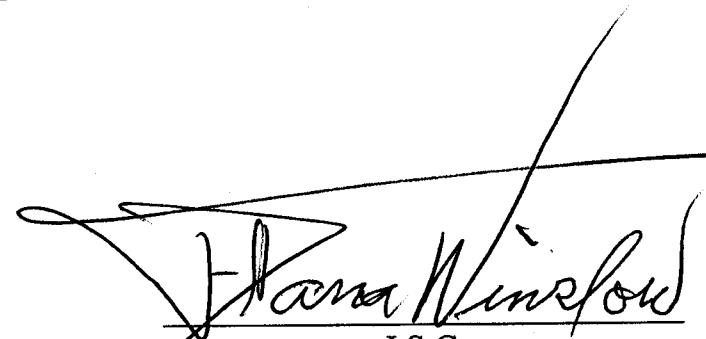
In accordance with the foregoing, it is

ORDERED, that defendant GIBBONS' motion pursuant to CPLR §3211(a)(7) to dismiss the Complaint as against him is **granted**. The Court makes no determination with respect to the remaining defendants; and it is further

ORDERED, that plaintiffs' cross-motion is **denied**.

This constitutes the decision and Order of the Court. Plaintiffs shall serve a copy of this Order upon all parties in this action and related actions, forthwith, upon receipt from any source. All parties shall appear for a conference on **Wednesday, April 22, 2009**.

Dated: March 31, 2009


J.S.C.

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APR 14 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE