

Fish v City of New York
2009 NY Slip Op 31949(U)
August 13, 2009
Supreme Court, New York County
Docket Number: 116250/07
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Rakower
Justice

PART 5

Index Number : 116250/2007
FISH, WILLIAM
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2
3

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/13/2009

[Signature]
HON. EILEEN A. RAKOWER

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: PART 5

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
WILLIAM FISH and ORLY FISH,

Plaintiffs

Index No. 116250/07

- against -

Decision and Order

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PROBATION, DREW CELENTANO,
NEW JERSEY DEPARTMENT OF PROBATION,
"JANE DOE" and "RICHARD ROE"

Motion Seq. 4 and 5

Defendants.

-----X
HON. EILEEN A. RAKOWER,

William Fish, on June 14, 2006, following a plea of guilty in New York Supreme Court to Attempted Dissemination of Indecent Materials to Minors, was sentenced by the Honorable Rena K. Uviller to a term of probation and was designated a Sex Offender. Mr. Fish was a New Jersey resident, and, pursuant to his application for Interstate Compact Transfer under the Interstate Commission of Adult Offender Supervision, his probation was supervised by the State of New Jersey, with quarterly reports sent to the State of New York. He was assigned a probation officer in New Jersey, Drew Celantano (Celentano). Mr. Celentano initiated proceedings because he deemed Mr. Fish to have violated the terms and conditions of his probation. A violation of probation hearing was held before Hon. William A. Wetzel. Justice Wetzel, by Decision and Order dated December 12, 2007, sustained the violation of probation. Mr. Fish was restored to probation with an additional condition. Mr. Fish then brought the instant action, alleging malicious prosecution, abuse of process, invasion of privacy, defamation, intentional infliction of emotional distress, and negligent supervision. Orly Fish brings a derivative action.

The New Jersey Department of Probation and Celentano ("New Jersey"), bring the instant motion to dismiss the second amended complaint. Plaintiffs oppose. The City of New York and the New York City Office of Probation ("New York") bring a separate motion to dismiss the complaint and any cross claims as against them. Plaintiffs oppose that motion, as well.

Movants, in support of their motions, provide the following: New Jersey provides plaintiff's second amended complaint, the minutes of the Violation of Probation hearing held before the Honorable William A. Wetzel, which took place on December 5, 2007, the transcript of the 50-h hearing, examination of William Fish, dated March 19, 2008, the affidavit of Drew Celentano with accompanying documentation regarding plaintiff's sentencing, conditions of probation and transfer to New Jersey; New York provides the Decision and Order of Hon. Uviller dated December 5, 2007, the Decision and Order of Hon. Wetzel dated December 12, 2007, plaintiffs' notice of claim, and the pleadings.

CPLR §3211 states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, an essential element in a malicious prosecution claim is that the prosecution was terminated favorably to the accused (*see Cantalino v. Danner*, 96 N.Y.2d 391, 396 [2001]). A dismissal in the interest of justice is not a favorable

termination when it is inconsistent with the innocence of the accused. Here, the proceedings at issue were initiated with a Violation of Probation, which was prosecuted in New York County. Justice Wetzel, after a hearing, specifically held:

The Court *sustained the Violation on the merits* that sexually explicit material was found on the defendant's computer. As a result, the defendant was restored to probation with the additional condition that he not own or have access to a computer in his home. [emphasis added]

The holding of the hearing Court sustaining the Violation is not a favorable termination to Mr. Fish, and is inconsistent with the innocence of the accused (*see id.* at 395). Therefore, the First Cause of Action must be dismissed.

Plaintiffs bring a second cause of action for abuse of process for the improper use of process after the Violation of Probation was brought. Favorable termination, which is an element of malicious prosecution, is not required for abuse of process. However, there is no abuse of process where process is used only for its intended purpose. A plaintiff must establish that process was used against him, without justification, and to obtain a collateral objective (*see Curiano v. Suozzi*, 63 N.Y.2d 113 [1984]). Here, plaintiff alleges no purpose in prosecuting the violation of probation *other* than its intended purpose. In this case, the result of the violation was that the Court restored plaintiff to probation, but added a condition that he not have a computer in his home. In light of the circumstances of the original crime, which involved the use of the computer and internet to rendezvous with an underage female; and in light of Justice Uviller's original conditions of probation, which included that Mr. Fish was to "refrain from possessing or viewing pornography or other sexually explicit material;" and in light of the findings of the hearing Court that Mr. Fish possessed on his home computer photographs, which included a photograph of a female's vagina, a photograph of a female's breasts, and a photograph of a female's cleavage, the added condition above is a provident use of Justice Wetzel's discretion. The second cause of action is dismissed.

Plaintiffs, in the third cause of action, allege invasion of privacy. This arises from an incident that occurred during plaintiff's participation in a mandatory therapy session. Mr. Fish alleges that his probation officer revealed Mr. Fish's social security number and home address without lawful excuse or justification.

Mr. Fish explains at his 50-h hearing as follows:

The beginning of the session was a – Dr. Rand stated, he says, all of you in the room have been given the Standards of Probation, the New Jersey Standards of Probation. Does everyone have -- and he held up a copy. And I raised my hand, and he said, Bill? I said, I don't have a copy of that. . . . And then Officer Salantano stood up and said, Bill, you don't have this, and I said, no. And so he left the room, and he came back about four or five minutes later, and he took the document in his hands and he says, are you William Fish? I answered, yes. Do you reside at 0-42 East Amsterdam Avenue, Fair Lawn, New Jersey 07410? Yeah. Is your home phone number 201-794-6166? Yes. Is your Social Security number 041-66-2944? Yes, what's this got to do? Then he came over, put the document in front, opened the page, the second page where I had signed it on June 19th, and he says, is this your signature? Then he took the paper away from me and sat down in the front.

There is no cognizable legal theory alleged here, which constitutes an invasion of privacy. Therefore, the third cause of action must be dismissed.

Plaintiffs' fourth cause of action claims that Mr. Celentano disseminated to third parties that "William Fish sexually abused his, plaintiff's own children." Mr. Fish explains at his 50-h hearing that a Mr. Ithier from the New Jersey Department of Youth and Family Services had come to visit with him and his wife.

And I said, how did you – how did you come in contact with this case? Why would DYFS be involved? And he said, I'm not allowed to say. I said, did Officer Salantano from the Probation Department contact you? And he said, you're a pretty smart man, Mr. Fish. Verbatim, that was his words. . . . this was because my two children born in my first marriage were somehow dragged into this and my ex-wife was called by DYFS.

Later he goes on to explain that an Inspector Gary Donavan from the Morris County office of DYFS called his ex-wife.

As far as Bergen County, they were just contacted by Officer Salantano. It didn't say why they were contacted, but that same week, my ex-wife was receiving calls from Inspector Gary Donavan. . . And I have a letter

here stating that on June 27, 2006, the division of Morris district office received an allegation that Rebecca and Benjamin were sexually abused. . . . the division conducted is [sic] required investigation and determined that the allegation was unfounded.

While Mr. Celentano concedes he contacted the New Jersey Division of Youth and Family Services for screening, such action is immune from liability pursuant to New Jersey Law, N.J.S.A. 9:6-8:13. Actions imputed to Mr. Celentano, even if taken as true, were in his role as Probation Officer in his quasi judicial capacity and pursuant to his supervisory authority. The Court notes that Mr. Celentano admits that he took such action after his initial meeting with Mr. Fish. He indicated that Mr. Fish indicated he was thinking of killing himself. Mr. Celentano put Mr. Fish on the phone with the Psychiatric Emergency Screening Hotline, and they asked the Probation Department to transfer Mr. Fish to Bergen Regional Hospital. "While waiting for the transfer Mr. Fish asked for an officer's gun." Mr. Fish also revealed that he was with his children from his first marriage in a hotel that prior weekend, and that neither his ex-wife or children knew about the charges. "Because of his behavior and the mental state he exhibited, as well as these disclosures, I determined that it was necessary to contact the New Jersey Division of Youth and Family Services."

For the reasons stated above, the fourth cause of action is dismissed.

Plaintiffs, in their fifth and sixth causes of action, allege intentional infliction of emotional distress based on the threats of Probation Officer Celentano. To the extent that these allegations are addressed to the New York defendants, New York correctly points out that public policy bars claims for intentional infliction of emotional distress against a governmental entity (*see Pezhman v. City of New York*, 2008 NY Slip Op 350 [1st Dept. 2008]). To the extent that plaintiffs make these allegations as against Mr. Celentano, New Jersey points out that the "conduct must be 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 civilized community." Plaintiffs recite various threats in the complaint, and as New Jersey ably discusses, none of these rise to this level (*see Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205 [1st Dept. 2002]) (*see also Slatkin v. Lancer Litho Packaging Corp.*, 2006 NY Slip Op 7290 [1st Dept. 2006] (faxes and phone calls, including to the plaintiff's parents threatening arrest and criminal prosecution, and instigation of plaintiff's arrest by means of false statements to the police not so outrageous as to be utterly intolerable)). Therefore, the fifth and sixth causes of action are dismissed.

Plaintiffs allege in their eighth cause of action that New York negligently supervised the New Jersey Probation Officer, Drew Celentano. Specifically, plaintiffs allege that New York should have known that Celentano had no prior experience in dealing with interstate sex offender cases. More specifically, plaintiffs allege Celentano, as a result, handcuffed Mr. Fish against his will. The Court notes that Celentano concedes he handcuffed Mr. Fish for his own safety at the point when he asked for an officer's gun at their initial meeting. Simply, New York did not employ or supervise New Jersey's probation officers. Mr. Fish applied for and was granted permitted to transfer his supervision to New Jersey, where he is a resident. New York also requested such transfer under the terms of the InterState Compact, and *requested* quarterly summaries. New Jersey accepted the transfer, and Mr. Fish consented to additional conditions of probation as a result of that transfer. None of the documents permits New York to direct or supervise the New Jersey Department of Probation or its employees. Accordingly, the eighth cause of action is dismissed.

The seventh cause of action for loss of consortium is a derivative claim, and must fall as a result of the foregoing. Thus, the action is dismissed in its entirety.

Wherefore, it is hereby

ORDERED that the motions to dismiss are granted. The action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 13, 2009



EILEEN A. RAKOWER, J.S.C.

FILED
 AUG 18 2009
 COUNTY CLERK'S OFFICE
 NEW YORK