

Rich v GNH Lbr. Inc.
2009 NY Slip Op 32108(U)
September 16, 2009
Supreme Court, Greene County
Docket Number: 08-892
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

ELENA RICH,

Plaintiff,

DECISION and ORDER
INDEX NO. 08-892
RJI NO. 19-09-3743

-against-

GNH LUMBER INC. D/B/A PIONEER
LUMBER and LYLE TOMPKINS,

Defendants.

Supreme Court Greene County All Purpose Term, September 1, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff commenced this action seeking damages due to Defendants' alleged malicious prosecution and abuse of process. Issue was joined by Defendants, discovery is complete and a jury trial date certain has been set. Defendants now move for summary judgment dismissing Plaintiff's complaint. Because Defendants demonstrated their entitlement to judgment as a matter of law dismissing Plaintiff's malicious prosecution cause of action, and no issue of fact was raised, that portion of Defendants' motion is granted. However, Defendants failed to

demonstrate their entitlement to judgment as a matter of law dismissing Plaintiff's abuse of process claim.

Viewing the facts in a "light most favorable to plaintiff, the party opposing summary judgment" (Pakenham v. Westmere Realty, LLC, 58 AD3d 986, 987 [3d Dept. 2009]), Plaintiff's complaint alleges that she ordered, and paid for, a patio door from Defendants. It is uncontested on this record, that prior to delivery of the door Plaintiff requested Defendants change its color. Defendants changed the order and increased the price by \$268.07. Plaintiff accepted the increase in price and when the door was delivered, issued a check payable to Defendants for the \$268.07 charge. Soon thereafter, Plaintiff contacted Defendants telling them that the door size and color were incorrect seeking to return the door with a full refund. Defendants refused a full refund, and in response Plaintiff placed a stop payment on the \$268.07 check. Plaintiff alleges, and Defendants admit, that when the check was not paid by the bank the Defendants contacted the local police department. Plaintiff was thereafter arrested for violating Penal Law §190.05, Issuing a Bad Check. Due to such arrest and later dismissal of the charges, Plaintiff commenced this action.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law." (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). "It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor." (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b]

[stating that a summary judgment motion “shall be supported by affidavit, [which] shall be by a person having knowledge of the facts...”]). A movant fails to meet their burden by “pointing to gaps in... proof”, rather the movant’s obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 [3d Dept.1996]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

“To succeed on a claim of malicious prosecution, a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice.” (Krzyzak v. Schaefer, 52 AD3d 979, 980 [3d Dept. 2008] quoting Martinez v. City of Schenectady, 97 NY2d 78 [2001] [internal quotations omitted]). “A termination is not favorable... where a prosecution ends because of a compromise with the accused.” (Martinez v. City of Schenectady, 97 NY2d 78, 84 [2001]). For Defendants to succeed on their motion for summary judgment they must affirmatively demonstrate, as a matter of law, that Plaintiff cannot establish at least one of the above elements. (Rush v. County of Nassau, 51 AD3d 762 [2d Dept. 2008]).

Defendants support their motion with an attorney’s affidavit, a copy of the pleadings, Plaintiff’s Bill of Particulars, Defendants’ Response to Document Demand, the unsigned deposition transcript of Elena Rich and the unsigned deposition transcript of Lyle Tompkins. The Defendants have provided no explanation for the use of unsigned deposition transcripts. Nor

have Defendants demonstrated compliance with CPLR §3116(a)'s 60 day exchange provision, to justify the use and consideration of these unsigned deposition transcripts. As Defendants failed to demonstrate the admissibility of the unsigned depositions, neither is properly before this Court and neither is considered.

Defendants have, however, demonstrated their entitlement to judgment as a matter of law on Plaintiff's malicious prosecution claim, by properly submitting Plaintiff's Bill of Particulars. While the deposition transcripts will not be considered, an attorney's affidavit may properly support a motion for summary judgment if its attachments are based upon personal knowledge that are otherwise admissible. (Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]). Plaintiff's Bill of Particulars amplifies her pleadings and constitutes an admission, properly considered on this motion, as "admissible proof" made by a "person having knowledge of the facts". (CPLR §3212(b) and Alvarez v. Prospect Hospital, supra). Defendants demonstrate that Plaintiff's Bill of Particulars admits that "Plaintiff paid the [Defendant] \$268 after the second [criminal] court date because plaintiff's attorney informed her that if the check were made good, that the charges would be dropped..." This admission amply demonstrates that the criminal proceeding was not terminated in Plaintiff's favor, because it was terminated upon an agreement with the District Attorney's Office and the Criminal Court that she pay the disputed funds. Such agreed upon disposition is not "a disposition on the merits [that] indicates [Plaintiff's] innocence." (Christenson v. Gutman, 249 AD2d 805, 809 [3d Dept. 1998]; see also Martinez, supra, Prober v. Yousef, 5 AD3d 204 [1st Dept. 2004], Ward v. Silverberg, 85 NY2d 993 [1995]).

In opposition, Plaintiff failed to raise an issue of fact. Plaintiff's affidavit fails to squarely address the disposition of the criminal proceeding. While she states that the criminal prosecution

was dismissed, she does not deny nor disprove her agreement to pay the disputed \$268 in consideration of the dismissal, as she alleged in her Bill of Particulars. As such, no issue of fact remains and Defendants' motion for summary judgment, dismissing Plaintiff's malicious prosecution claim, is granted.

Turning to Defendants' motion for summary judgment of Plaintiff's abuse of process claim, Defendants failed to demonstrate their entitlement to judgment as a matter of law. "The elements of abuse of process are regularly issued process, either civil or criminal, an intent to do harm without excuse or justification, and use of the process in a perverted manner to obtain a collateral objective." (Minasian v. Lubow, 49 AD3d 1033, 1035-36 [3d Dept. 2008] quoting Plataniotis v. TWE Advance/Newhouse Partnership, 270 AD2d 627 [3d Dept. 2000]).

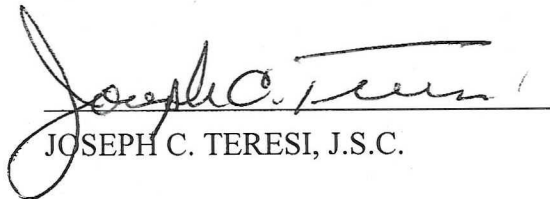
On this record, Defendants have failed to address and refute, as a matter of law, Plaintiff's abuse of process claim. Without considering the deposition transcripts, with no sworn allegations of fact and no admissions contained within Plaintiff's Bill of Particulars, Defendants have failed to demonstrate their entitlement to judgment as a matter of law. Contrary to Defendants' contention, the Complaint's Second Cause of Action, liberally construed, contains all of the necessary allegations to set forth an abuse of process claim. Although the Complaint's Second Cause of Action is not entitled "Abuse of Process", an apparent ministerial error as both the First and Second Causes of Action are entitled "Malicious Prosecution", construing it liberally the pleading does allege abuse of process. Accordingly, Defendants failed to demonstrate their entitlement to judgment as a matter of law dismissing Plaintiff's abuse of process claim.

The parties' remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 16, 2009
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 2, 2009, Affidavit of Maria Ascenzo, dated June 2, 2009, with attached Exhibit "A" - "F".
2. Affirmation of Eugenia Brennan Heslin, dated August 25, 2009, Affidavit of Elena Rich, dated August 24, 2009, Affidavit of Kenneth Rossimini, dated August 26, 2009, with attached unnumbered exhibits.
3. Reply Affirmation of P. Baird Joslin, dated August 31, 2009.