

Davis v Seward Park Hous. Corp.

2009 NY Slip Op 32386(U)

October 8, 2009

Supreme Court, Kings County

Docket Number: 5239/08

Judge: Larry D. Martin

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At an IAS Term, Part 41 of the Supreme Court of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of ~~October~~ 2009.

PRESENT:

HON. LARRY D. MARTIN,

Justice.

JONATHAN DAVIS AND RUTHIE DAVIS,

Plaintiffs,

-against-

Index No. 5239-08

SEWARD PARK HOUSING CORPORATION,
COOPER SQUARE REALTY, INC.,
RUDD REALTY, INC., WILLIAM LOZADA,
MIKE RUBIN, AND ROBERT ECCHIVARIA,

Defendants

The following papers numbered 1 to X read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants Seward Park Housing Corporation, Cooper Square Realty, Inc., Rudd Realty, Inc., William Lozada, Mike Rubin, and Robert Ecchivaria (collectively, the Defendants) move for an order, pursuant to CPLR 3212, granting them

summary judgment dismissing the complaint of plaintiffs Jonathan Davis and Ruthie Davis (collectively, plaintiffs), which asserts common-law tort claims in this action to recover for injuries allegedly sustained following an arrest and termination of Plaintiff's employment with Defendant. For the foregoing reasons stated below, defendant's motion for summary judgment is denied in part and granted in part.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff Jonathan Davis was employed by defendant Rudd Realty, Inc., as a maintenance worker until he was terminated on October 10, 2006, for his alleged failure to obey by the rules and regulations of his union contract, which involved theft. At that time, Rudd Realty, Inc. was the property manager for Seward Park Housing Corporation. This litigation arises out of an incident on September 10, 2006, where plaintiff was allegedly directed by defendant William Lozada, his supervisor, to assist other workers in removing the entire contents of an apartment M1405. The plaintiff and his co-workers did remove items from the apartment and disposed of them. Shortly thereafter, the apartment owner, Martin Eisenberg, filed a complaint with the New York City Police Department that his personal property had been removed from the apartment without his authorization. On March 9, 2007, the plaintiff was arrested and charged with petit larceny for allegedly stealing from the named premises. The charge was dismissed by the New York County District Attorney's office on May 14, 2007.

The plaintiff commenced the instant action on February 19, 2008, where four causes of action are set forth: false arrest, malicious prosecution, intentional infliction of emotional distress, and negligence. The defendants now move the Court for summary judgment, asserting that the plaintiff has presented no triable issues of material fact, pursuant to CPLR 3212.

THE PARTIES' CONTENTIONS

The defendants argue in their motion for summary judgment that they are not liable to plaintiffs for all of the alleged causes of action. First, the defendants assert that the plaintiff's false arrest claim must fail because none of the defendants complained to the police or caused the plaintiff to be charged with the alleged crime. Second, the defendants argue that the plaintiff's malicious prosecution claim must also falter because plaintiffs failed to establish that the plaintiff's petit theft charge was terminated in favor of the accused. Furthermore, defendant contends that the intentional infliction of emotional distress claim must be defeated because an employer, who has the right to discharge an employee and exercises that right, may not be liable for such action. Lastly, the defendants assert that the plaintiff may not seek damages for a negligence claim for injuries resulting from an alleged false arrest.

Plaintiffs oppose the motion, in its entirety, on the ground that it is premature and all discovery has yet to be appropriately obtained. Equally important, plaintiffs contend that there are pertinent issues surrounding defendant's alleged request to have plaintiff remove the contents of apartment M1405, the resulting arrest and petit theft charge, and plaintiff's employment termination following thereafter. Plaintiffs support their opposition with affidavits, the verified bill of particulars, the preliminary conference order, and the notice to admit.

DISCUSSION

Summary Judgment

(a)

The moving party on a motion for summary judgment has the burden of making "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64

N.Y.2d 851, 853 (N.Y. 1985). Upon a prima facie showing, the burden of proof shifts to the opposing party, who must present admissible evidence to establish that material issues of fact exist which requires a trial. *Taylor-Warner Corp. v. Minskoff*, 167 A.D.2d 382 (2nd Dept. 1990); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (N.Y. 1980).

False Arrest Cause of Action

(b)

In regards to the first cause of action, Plaintiff claims that he was falsely arrested on March 9, 2007 as a result of tenant Martin Eisenberg's complaint to local authorities. According to the pleadings, Mr. Eisenberg contacted the New York Police Department, asserting that the plaintiff had removed several items from the apartment without his authorization. Upon filing the police report, local authorities arrested the plaintiff for petit larceny. In order for a civilian defendant to be liable for false arrest, the plaintiff must illustrate that "defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act." *Oszustowicz v. Admiral Insurance Brokerage Corp.*, 49 A.D.3d 515, 516, 853 N.Y.S.2d 584, 586 (2nd Dept. 2008) (citing *Viza v. Town of Greece*, 94 A.D.2d 965, 966, 463 N.Y.S.2d 970). Moreover, "the defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition." *Id.* (citing *Mesiti v. Wegman*, 307 A.D.2d at 340, 763 N.Y.S.2d 67).

Plaintiff has presented no evidence in the record indicating that defendants are responsible for plaintiff's arrest. Since the plaintiff has filed claims against the defendants, and not Mr. Eisenberg, the plaintiff must provide the Court with evidence that a triable issue of fact

exists as to whether or not the defendants induced the arresting officers to further a criminal proceeding against him. *See also Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 281 (N.Y. 1978) (holding to survive a motion for summary judgment, plaintiff was obliged to produce evidence, not just unsubstantiated allegations or assertions). Nonetheless, although defendants demonstrated their prima facie finding for summary judgment dismissing the first cause of action, the motion must be denied as premature. *Betz v. N.Y.C. Premier Properties, Inc.*, 38 A.D.3d 815, 833 N.Y.S.2d 153 (2nd Dept. 2007) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637 (N.Y. 2006)). CPLR 3212(f) states that the Court may deny summary judgment as premature, in the event that parties have yet to obtain sufficient disclosure to obtain essential facts.¹ The plaintiffs have yet to obtain a sworn affidavit from Mr. Eisenberg, who is a party of interest that may provide essential facts to both parties regarding the civilian complaint and its incitement. Therefore, the Defendant's motion for summary judgment is denied in part, without prejudice, pursuant to CPLR 3212(f), for the first cause of action for false arrest.

Malicious Prosecution Cause of Action

(c)

In regards to the second cause of action, Plaintiff claims that he was maliciously prosecuted as a result of the March 9, 2007 arrest. An individual alleging malicious prosecution must establish the following four elements: (1) the commencement or continuation of a criminal

¹ CPLR 3212(f) states, "Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice. *Smith-Hunter v. Harvey*, 95 N.Y.2d 191, 195 734 N.E.2d 750 (N.Y. 2000). Failure to establish any of these elements defeats the entire claim. *Hoyt v. City of New York*, 284 A.D.2d 501, 727 N.Y.S.2d 317 (2nd Dept. 2001). In the present case, at issue is the second element of malicious prosecution and the King County District Attorney's withdrawal of charges against the plaintiff Davis for petit larceny. A criminal proceeding is "terminated favorably to the accused when 'there can be no further proceeding upon the complaint or indictment, and no further prosecution of the alleged offense.'" *Smith- Hunter*, 95 N.Y.2d at 195.

In *Smith-Hunter*, the plaintiff, Andrea Smith-Hunter, parked her vehicle in a private lot near the downtown Albany office of defendant's law firm, in a parking space specifically reserved for defendant Jonathan Harvey. *Id.* at 193. When she later returned to her vehicle, the plaintiff noticed that her car had been blocked in by another vehicle. *Id.* Thereupon, the plaintiff entered the reception area where she requested that the car be moved. *Id.* An argument with defendant Harvey ensued, when he refused to move his car, at which time the defendant physically escorted the plaintiff out of the office. *Id.* While exiting, the plaintiff fell down a nine-step stairway to the sidewalk pavement and was taken by ambulance to the hospital where she underwent surgery. *Id.* On the same day, defendant Harvey filed charges against the plaintiff for trespass, and several days later, plaintiff swore to a complaint charging the defendant with third-degree assault, alleging that he had "recklessly caused her to fall down stairs and fracture a bone in her knee." *Id.* After the court's dismissal of defendant's trespass claim for the prosecution's failure to respond, the plaintiff filed an action against the defendant Harvey for malicious prosecution. *Id.* at 194. The trial court granted defendant's motion for summary

judgment on the ground that dismissal of the criminal proceedings under CPL 30.30 did not constitute a “favorable termination.” *Id.* at 194-95. However, the Court of Appeals reversed, holding that “a termination is not favorable to the accused, additionally, if the charge is withdrawn or the prosecution abandoned pursuant to a compromise with the accused.” *Id.* at 196.

In the present case, neither party has presented evidence in the record that plaintiff Davis was prosecuted for the March 9, 2007 arrest for petit larceny. In fact, both parties assert that they are unknowledgeable as to why the prosecutor’s office did not continue with criminal proceedings against the plaintiff. To satisfy the second element of malicious prosecution, plaintiff must illustrate that the criminal proceeding was finally terminated. *Id.* at 197. Therefore, if the charge is withdrawn or the prosecution abandoned the charges against the plaintiff, the plaintiff has failed to satisfy the second element of the malicious prosecution claim and the cause of action must be dismissed. *Id.* at 196. For the foregoing reasons stated above, the defendant’s motion for summary judgment is granted in part in dismissing the Plaintiff’s claim for malicious prosecution. The District Attorney’s assigned prosecution clearly withdrew or abandoned the petit larceny charges against the plaintiff, which does not demonstrate that the criminal proceeding against the plaintiff was *finally* terminated in his favor.

Intentional Infliction of Emotional Distress Cause of Action

(d)

The plaintiff also brings forth a claim for intentional infliction of emotional distress for causing the plaintiff to be arrested. The tort of intentional infliction of emotional distress consists of four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard

of a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350 (1993). Courts often focus on the outrageous element, which is most susceptible to determination as a matter of law. *Id.* at 121. The tort of intentional infliction of emotional distress “predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society.” *Murphy v. County of Nassau*, 203 A.D.2d 339, 341, 609 N.Y.S.2d 940, 942 (2nd Dept. 1994).

According to the complaint, plaintiffs allege that the defendants intended to specifically subject him to prosecution, which was outrageous and outside the norms of a civilized society. Nonetheless, plaintiffs have failed to provide the Court with evidence establishing that the alleged false arrest and malicious prosecution, in lacking probable cause, was extreme and outrageous. *Mejia v. City of New York*, 119 F.Supp.2d 232, 278 (E.D.N.Y. 2000) (holding that evidence of lack of probable cause that would support a claim for false arrest or malicious prosecution, however, is not sufficient to support an IIED claim, unless there is also evidence that the arrest or prosecution was accompanied by “extreme and outrageous conduct”). There is no evidence in the record that that the arrest was extreme or outrageous. Law enforcement relied on a civilian complainant and was free to exercise their own judgment in apprehending the plaintiff and filing criminal charges. *See Levy v. Grandone*, 14 A.D.3d 660, 789 N.Y.S.2d 291 (2nd Dept. 2005). For the foregoing reasons stated above, the defendant’s motion for summary judgment is granted in part in dismissing the Plaintiff’s claim for intentional infliction of emotional distress.

Negligence Cause of Action


(e)

Lastly, the plaintiffs allege that that the defendants were negligent in not exercising due diligence into their investigation of plaintiff's alleged theft, prior to his employment termination. Plaintiff argues that defendants should have performed an investigation as to the veracity of Mr. Eisenberg's theft complaint prior to ending the Plaintiff's employment with defendant. The fourth cause of action for negligence is hereby dismissed as a matter of law because the plaintiff seeks damages under a broad negligence claim for injuries resulting from an alleged false arrest. *Santoro v. Town of Smithtown*, 835 N.Y.S.2d 658, 661 (holding that the fifth cause of action alleging gross negligence was properly dismissed because the plaintiffs seek damages for injury resulting from false arrest and detention, and, therefore, they cannot recover under broad general principles of negligence but, instead, must proceed by way of the traditional remedy of false arrest.) Accordingly, the defendant's motion for summary judgment is granted in part in dismissing the plaintiff's fourth cause of action for negligence.

CONCLUSION

For the foregoing reasons stated above, defendant's motion for summary judgment, pursuant to CPLR 3212, is granted in part and denied in part. As to the first cause of action, the defendant's motion is denied. As to the second, third, and fourth causes of action, the defendant's motion is granted.

The foregoing constitutes the decision, order, and judgment of the court.

ENTER

J.S.C. HON. LARRY D. MARTIN
Justice of the Supreme Court