Cain v Parkmed Servs., Inc.

2009 NY Slip Op 33071(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 400871/06

Judge: Eileen A. Rakower

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SCANNED ON 12/30/2009

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER PART 5

Index Number : 400871/2006

CAIN, JOHN

VS

PARKMED SERVICES

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

FILED

DEC 30 2009

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 12/22/09

HON. EILEEN A. RAKOWER J.S.C.

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

----------X

JOHN CAIN,

Plaintiff,

Index No. 400871/06

- against -

Decision/Order
Seq. No.: 002

PARKMED SERVICES, INC., PARKMED, LLC, PARKMED EASTERN WOMEN'S CENTER, and ROBERT DUBOIS, individually and as an agent, servant or employee of, PARKMED SERVICES, INC., PARKMED, LLC, PARKMED EASTERN WOMEN'S CENTER, THE CITY OF NEW YORK, and POLICE OFFICER WENDY JACKSON,

Defendants.

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NEW YORK

HON. EILEEN A. RAKOWER, J.

John Cain was present at the Parkmed Eastern Women's Center (The Center), located at 38-44 East 30th Street in the County and State of New York on November 8, 2003, when he alleges he was arrested. Subsequently, he was charged by a misdemeanor complaint with the following offenses: from October 4, 2003 to November 8, 2003, in front of 44 East 30th Street in the County and State of New York, the Defendant committed the offenses of Criminal Interference with Health Care Services in the Second Degree and Criminal Interference with Health Care Services. The complaint was made by Police Officer Wendy Jackson (Jackson) based on information she received from Robert Dubois (Dubois), security officer for the Park Med Eastern Women's Center. Those charges were dismissed on the motion of the District Attorney before Judge Melissa Jackson in Part C of the Criminal Court on October 25, 2004. The matter was sealed. Plaintiff brings the instant action alleging malicious prosecution, violation of his civil and constitutional rights pursuant to 42 USC §1983, and conspiracy to violate civil and constitutional rights.

Parkmed Services, Inc., Parkmed, LLC, Parkmed Eastern Women's Center (collectively Parkmed) and Dubois move this court to dismiss plaintiff's claims as against them pursuant to CPLR 3212. Plaintiff opposes. The City of New York (City) does not submit papers.

Parkmed and Dubois, in support of their motion, provide: the summons and complaint; their answer (Parkmed answered for Dubois); a prior motion seeking to change venue with the Decision and Order of Justice Paul A. Victor dated February 8, 2006, granting the motion, and transferring the matter from the County of Bronx to New York County; photographs; portions of the transcript of the videotaped deposition of Robert Dubois dated September 12, 2007; portions of the transcript of the deposition taken of John Cain dated July 14, 2008; portions of the transcript of the deposition taken of Wendy Jackson dated November 10, 2008; portions of the transcript of the deposition taken of Dr. Lorna Aguilos, administrator of Parkmed, dated February 5, 2009; the notice of motion for issuance of a judicial subpoena regarding a videotape maintained by Parkmed; correspondence regarding the videotape; and the plaintiff's notice of trial.

It is alleged that plaintiff was present outside The Center on November 8, 2003, and that Dubois was inside on the 5th floor viewing the entrance through a camera. Dubois claims that he saw plaintiff secretively throw a cup of coffee on the door to The Center. This was captured on videotape. Dubois phoned Officer Jackson at a number she had given him, and she viewed the videotape. This led to the arrest of Mr. Cain.

Parkmed and Dubois assert that the evidence disclosed during discovery "cannot meet the legal burden for malicious prosecution and conspiracy." They indicate in their legal memorandum that "the evidence disclosed during discovery clearly demonstrates that Parkmed and Dubois acted reasonably and in good faith at all times."

Importantly, plaintiff previously moved this Court for an order pursuant to CPLR 2307 for the issuance of Judicial Subpoenas Duces Tecum upon the New York City Police Department, through its Legal Liaison Office; the Property Clerk at the 14th (Midtown South) Precinct Station of the New York Police Department ("City"), and the Custodian of Records to the District Attorney for New York County ("DA"), for the purpose of enabling plaintiff to obtain, inspect, view, and duplicate two VHS surveillance video tapes procured by defendant Police Officer Wendy Jackson. That

motion was granted to the extent that, by Decision and Order dated February 23, 2009, the Court Ordered that "the Court will issue a Judicial Subpoena *Duces Tecum* upon the Custodian of Records to the District Attorney for New York County upon presentation to the Court of a signed Subpoena *Duces Tecum*."

Plaintiff, in opposition, provides: a sworn affidavit by John Cain dated October 16, 2009; portions of the transcript of the deposition of Lorna Aguilos dated February 5, 2009; portions of the transcript of the deposition taken of John Cain dated July 14, 2008; portions of the transcript of the videotaped deposition of Robert Dubois dated September 12, 2007; portions of the transcript of the deposition taken of Wendy Jackson dated November 10, 2008; portions of entries in the memo book of Officer Jackson relevant to the arrest of Mr. Cain; a property voucher for 2 vhs video tapes; the arrest report; complaint reports; communication from the assistant district attorney with the misdemeanor complaint sent to Robert Dubois to obtain a supporting deposition, with the signed supporting deposition; Mr. Dubois's return communication with the signed supporting deposition and complaint; a certificate of disposition indicating that the case against Mr. Cain was dismissed on the motion of the DA and sealed on October 25, 2004; a letter memorializing the DA's office compliance with a subpoena for two videotapes that were reproduced into DVDs and vouchered; a letter dated April 7, 2009 from the DA's office indicating that no additional videos and stating "I cannot say why the videotape contained the surveillance of 11/7/2003 when it was marked noting the following day;" two copies of the DA productions of video in its file; a letter dated June 12, 2008 indicating that "ParkMed recently discovered a videotape which may or may not include footage that is relevant," along with the DVD dated October 4, 2003; and finally, a series of orders of protection issued while the prosecution against Mr. Cain was pending.

Plaintiff maintains that video surveillance of the area outside the entrance to The Center must contain the actions claimed by Mr. Dubois. The video tapes, which formed the basis for the prosecution against Mr. Cain, were maintained by Parkmed, but have not been disclosed. The unexplained absence of such material, which is the only material which could corroborate plaintiff's assertion that such actions never took place, plaintiff maintains, qualifies for nothing less than an adverse inference against moving defendants at trial. Thus, plaintiff urges, the facts remain open to a fact finder's ultimate determination.

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]).

Parkmed and Dubois show that Dubois testifies that he saw Mr. Cain throw a substance on the door on more than one occasion. The last instance of Mr. Cain throwing a liquid substance on the door of The Center occurred on November 8, 2003, was captured on video tape, and prompted Mr. Dubois to call Officer Jackson to make a complaint. Officer Jackson arrived at The Center, noted a sticky substance on the door to The Center, alleges she viewed the video tape of the incident, and interviewed an independent witness. The witness, who was waiting inside The Center, claimed to have seen an individual throw the coffee at the glass door. Based on all of the above, Officer Jackson proceeded to arrest Mr. Cain.

Essentially, the elements of a malicious prosecution claim are (1) a judicial proceeding initiated by defendants, such as the criminal action in the instant case, (2) that terminates in plaintiff's favor, such as the dismissal on motion of the DA in the instant case, and (3) that such action was brought without probable cause and (4) with malice. Here, it is the third and fourth elements which movants urge plaintiff cannot prove.

The gravamen of plaintiff's claims is that the complaint was based on false information provided in bad faith by Mr. Dubois. Probable cause is a question of law for the court when the facts are undisputed and only one inference may be drawn. (*Brown v. Sears Roebuck and Co.*, 297 AD2d 205 [1st Dept., 2002])

Plaintiff provides testimony which unmistakably indicates that video tapes of the actions alleged were made, that they were kept at least long enough to show to Officer Jackson, and that, ultimately, at least one (the videotape made on November 8, 2003) was not made available to Mr. Cain. Further, although reproductions of these videotapes were provided by the DA's office, there is no explanation of where and how the originals were kept, or if kept by Parkmed, there is nothing to account for

happen more than once on two different dates.

Movants contend they merely contacted Jackson and provided a video tape to her to view. If a jury were to accept that the November 8th video would not have shown such an act, a permissible inference in light of the missing videotape, then they could conclude that movants actually encouraged the arrest.

Finally, movants contend that there was probable cause for the arrest based on Jackson's independent investigation and plaintiff's statement that he "may have" put Holy water on Parkmed that day. This is misplaced, in light of the permissible inference noted above. It remains a question of fact as to whether the jury believes the allegations, that plaintiff threw coffee, a sticky substance, on the door that day. Indeed, noting that it is permissible for the jury to conclude no such actions took place on November 8th, and that the actions were fabricated for the purpose of constituting an offense for which Cain could be arrested, the jury may well find malice, the final necessary element to a malicious prosecution claim as against moving defendants.

Wherefore it is hereby

ORDERED that the motion is denied in all respects.

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

DATED: December 22, 2009

EILEEN A. RAKOWER, J.S.C.

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