

Haughland v Bill

2011 NY Slip Op 30716(U)

March 7, 2011

Sup Ct, Suffolk County

Docket Number: 28154/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 28154/2009

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 THERESA HAUGHLAND,

Plaintiff,

-against-

ROBERT C. BILL, COUNTY OF SUFFOLK,
 SUFFOLK COUNTY POLICE
 DEPARTMENT, and DETECTIVE KEVIN
 KEYES in his official and personal capacities,

Defendants.

ORIG. RETURN DATE: OCTOBER 6, 2009
 FINAL SUBMISSION DATE: JUNE 10, 2010
 MTN. SEQ. #: 005(004)(003)(002)(001)
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:

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 AND DETECTIVE KEVIN KEYES:**

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Upon the following papers numbered 1 to 10 read on this motion _____
 TO DISMISS

Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation
 in Opposition and supporting papers 5, 6; Memorandum of Law in Opposition 7; Replying
 Affirmation and supporting papers 8, 9; Memorandum of Law in Reply 10; it is,

ORDERED that this motion by defendant, ROBERT C. BILL ("Bill"), for an Order dismissing the complaint as against Bill: (1) pursuant to CPLR 3211 (a) (7), for failure to state a claim; (2) pursuant to CPLR 3211 (a) (5), based on the statute of limitations; and (3) pursuant to CPLR 3211 (a) (1), based on documentary evidence, is hereby **GRANTED** to the extent set forth hereinafter.

Plaintiff THERESA HAUGHLAND ("plaintiff"), a former employee of Robert C. Bill Associates, Inc. ("RBA"), alleges that Bill, among other things, filed a false criminal complaint against her, resulting in her arrest and prosecution. She pleads seven causes of action, to wit: (1) malicious prosecution; (2) false arrest/imprisonment; (3) abuse of process; (4) intentional infliction of emotional distress; (5) *prima facie* tort; (6) interference with prospective advantage; and (7) interference with employee benefits (ERISA), against Bill only.

According to the complaint filed herein on July 17, 2009, Bill lodged a criminal complaint against plaintiff with defendant SUFFOLK COUNTY POLICE DEPARTMENT on October 10, 2007, in connection with the downloading of "certain historical information" by plaintiff in or about April of 2007 from the computer system of RBA. Plaintiff was ultimately arrested on February 15, 2008 on a felony charge of Computer Trespass (Penal Law § 156.10), and was arraigned on April 10, 2008. Plaintiff alleges that on February 24, 2009, the District Attorney's office asked the Court to dismiss the charge because "they determined there was not enough evidence to indict the plaintiff." The Court thereafter dismissed the charge in the "interest of justice."

Plaintiff informs the Court that she is a licensed New York State Property and Insurance Broker and has been so licensed since the early 1990's. Plaintiff indicates that prior to the subject incident she had never been arrested or charged with a crime. Plaintiff alleges that in 2003, she founded RBA, a commercial insurance brokerage firm in Melville, New York, with Bill, and worked there from 2003 until April of 2007. During that time, plaintiff was the office manager, an account executive, and commissioned salesperson. Apparently, plaintiff and Bill were the only two employees for the first few years.

Plaintiff further informs the Court that in early April, 2007, she made plans to leave RBA to work for a competitor of RBA in Garden City, New York. Plaintiff contends that she did not believe Bill would honor his financial obligations to her, so she proceeded to download certain historical information onto a compact disc during business hours. Plaintiff alleges that she believed she was authorized to download such information, and therefore was violating no laws, rules or regulations. Plaintiff claims that after Bill learned she was leaving, he

“flew into a violent rage, and berated” her. Plaintiff resigned approximately one week later.

The following month, May, 2007, plaintiff alleges that defendant DETECTIVE KEVIN KEYES (“Keyes”) came to her home and demanded that she turn over the aforementioned compact disc as well as her home computer. Plaintiff further alleges that Keyes falsely told her that Bill had filed a criminal complaint against her. As discussed, the criminal complaint was filed by Bill on October 10, 2007, after, according to plaintiff, Bill learned that an employee of plaintiff’s then-current employer began soliciting one of RBA’s largest clients. Plaintiff claims that she would have received no commission if this client left RBA and began dealing with her new employer.

With respect to the criminal complaint, plaintiff contends that it contains many false statements, such as that she did not have access to the information she downloaded. Plaintiff notes that Keyes swore out the felony complaint against her on January 23, 2008, based upon Bill’s statement of October 10, 2007. Plaintiff was thereafter arrested on February 15, 2008, by Keyes and another detective, at her new place of employment in Garden City. Plaintiff believes that this arrest at her workplace was done solely to embarrass and humiliate her, and to get her fired from RBA’s competitor.

By letter dated April 14, 2008, the assistant district attorney handling the matter offered plaintiff a plea deal of six months in jail and five years probation. Plaintiff did not accept this offer as it seemed unduly harsh to her, and, if she pled guilty to a felony, she would lose her insurance broker’s license and be “barred for life” from working in the insurance industry. Plaintiff informs the Court that she nevertheless did lose her new job, and was out of work from January, 2009 through April, 2009.

Plaintiff alleges that Bill was actively involved with her arrest and plea offer, as well as with Keyes and the county defendants, to cause injury to her. Moreover, plaintiff informs the Court that on or about March 18, 2008, Bill’s attorney sent plaintiff’s employer a letter indicating that plaintiff had downloaded confidential information onto the compact disc, and that plaintiff had signed a Confidentiality Agreement dated February 10, 2005 while employed by RBA, in an attempt to get her fired. Plaintiff indicates that no civil action was ever commenced against her for violation of the Confidentiality Agreement. As noted hereinabove, on February 24, 2009, the Court dismissed the felony complaint upon motion of the assistant district attorney.

Based upon the foregoing, plaintiff contends that Bill and Keyes manipulated the criminal justice system in order to get plaintiff fired from Bill's competitor in the insurance brokerage industry. Plaintiff alleges that approximately one month before the assistant district attorney sought to dismiss the charge, plaintiff had been fired from her current employment. Thus, plaintiff claims that Bill and Keyes "had gotten what they wanted," and there was no longer a need to prosecute plaintiff.

Bill has now filed the instant pre-answer motion to dismiss, seeking dismissal of all seven causes of action insofar as asserted against Bill. Bill argues that:

(1) the first cause of action for malicious prosecution must be dismissed pursuant to CPLR 3211 (a) (7), for failure to state a claim;

(2) the second cause of action for false arrest/imprisonment must be dismissed pursuant to CPLR 3211 (a) (7), for failure to state a claim, and pursuant to CPLR 3211 (a) (5), as time barred;

(3) the third cause of action for abuse of process must be dismissed pursuant to CPLR 3211 (a) (7), for failure to state a claim;

(4) the fourth cause of action for intentional infliction of emotional distress must be dismissed pursuant to CPLR 3211 (a) (7), for failure to state a claim, and pursuant to CPLR 3211 (a) (5), as time barred;

(5) the fifth cause of action for *prima facie* tort must be dismissed pursuant to CPLR 3211 (a) (7), for failure to state a claim, and pursuant to CPLR 3211 (a) (5), as time barred;

(6) the sixth cause of action for interference with prospective advantage must be dismissed pursuant to CPLR 3211 (a) (7), for failure to state a claim, and pursuant to CPLR 3211 (a) (5), as time barred; and

(7) the seventh cause of action for interference with employee benefits (ERISA) must be dismissed pursuant to CPLR 3211 (a) (1), based upon documentary evidence.

The Court shall address the arguments proffered by Bill *seriatim*.

I. MALICIOUS PROSECUTION

To obtain recovery for malicious prosecution, a plaintiff must establish that: (1) a criminal proceeding was commenced by the defendant against the plaintiff; (2) it was terminated in favor of the accused; (3) it lacked probable cause; and (4) the proceeding was brought out of actual malice (*Martinez v City of Schenectady*, 97 NY2d 78 [2001]; *Broughton v State of New York*, 37 NY2d 451 [1975], *cert denied sub nom Schanbarger v Kellogg*, 423 US 929 [1975]). Failure to establish any one of these elements defeats the entire claim (*Brown v Sears Roebuck & Co.*, 297 AD2d 205 [2002]). “[A] civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution” (*Levy v Grandone*, 14 AD3d 660, 661 [2005] [internal quotation marks and citation omitted]; see *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128 [1999]), unless the civilian “played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act” (*Mesiti v Wegman*, 307 AD2d 339, 340 [2003] [internal quotation marks omitted]; see *Williams v Amin*, 52 AD3d 823 [2008]; *Levy v Grandone*, 14 AD3d 660, *supra*; *Wasilewicz v Monroe Police Dept.*, 3 AD3d 561 [2004]).

There are circumstances where a dismissal in the “interest of justice” is inconsistent with innocence, for purposes of a malicious prosecution action, because it represents mercy requested or accepted by the accused (see *Cantalino v Danner*, 96 NY2d 391 [2001]). Such is not the case here. On February 24, 2009, the District Court dismissed the felony complaint upon motion of the assistant district attorney in the “interest of justice,” without any reasoning given therefor.¹ This dismissal was not the result of mercy requested and accepted by plaintiff; to the contrary, plaintiff’s counsel initially contested the dismissal of the charges on this ground, and sought a dismissal on the merits. Thus, the Court finds that the dismissal of the criminal charge was not inconsistent with plaintiff’s alleged innocence.

¹ Plaintiff alleges in her complaint that the felony complaint was dismissed upon oral application of the assistant district attorney; however, this Court notes that pursuant to CPL 180.85, dismissal of a felony complaint prior to presentment to a grand jury may only be made by written motion not earlier than twelve months following the date of arraignment on such felony complaint (see CPL 180.85).

A review of plaintiff's complaint reveals that she has pled all of the foregoing elements of a malicious prosecution claim. Further, in opposition to the instant application, plaintiff avers that she "believes that Bill was actively involved in [her] arrest and with the plea offer, and ... was working with and through [Keyes] and other county defendants to harm [her], as retribution." Thus, plaintiff claims that Bill did more than just seek police assistance or furnish information to law enforcement authorities, but rather played an active role in the prosecution.

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). On such a motion, the court may consider affidavits for the limited purpose of remedying any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). The criterion is whether the plaintiff has a cause of action and not whether she may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

Upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether she can ultimately establish the truth of her allegations before the trier of fact, the Court finds that plaintiff has sufficiently pled the elements of a cause of action for malicious prosecution against Bill.

II. FALSE ARREST/IMPRISONMENT

The common law tort of false arrest is a species of false imprisonment. To establish the cause of action of false arrest/false imprisonment a plaintiff must show that: (1) the defendant intended to confine her; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged (*Broughton v State of New York*, 37 NY2d 451, *supra*). A defendant is liable for false arrest if, with the intent to have the plaintiff arrested, he makes false statements to the police and instigates an arrest (see *Russell v Crossland Sav. Bank*, 111 F 3d 251 [2d Cir 1997]).

The statute of limitations for false arrest and false imprisonment is one year (CPLR 215 [3]), and accrues as of the date of the prisoner's release from confinement, not when the charges are dismissed or withdrawn (see *Bonanno v City of Rye*, 280 AD2d 630 [2001]; *Jackson v Police Dep't of New York*, 119 AD2d 551 [1986]; *Redding v County of Westchester*, 59 AD2d 776 [1977]; *Schildhaus v City of New York*, 23 AD2d 409 [1965], *affd* 17 NY2d 853 [1966]).

Here, plaintiff was arrested and released on February 15, 2008, and this action was commenced on July 17, 2009. Therefore, the Court finds this cause of action to be untimely (see CPLR 215 [3]).

III. ABUSE OF PROCESS

There are three essential elements of the tort of abuse of process: (1) there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; (2) the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification; and (3) a defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process (see *Curiano v Suozzi*, 63 NY2d 113 [1984]; *Board of Education v Farmingdale Classroom Teachers Assoc.*, 38 NY2d 397 [1975]; *Panish v Steinberg*, 32 AD3d 383 [2006]). Some examples of collateral objectives are: infliction of economic harm, extortion, blackmail and retribution (*Board of Education v Farmingdale Classroom Teachers Assoc.*, 38 NY2d 397, *supra*). "A malicious motive alone ... does not give rise to a cause of action for abuse of process" (*Brandon v City of New York*, 705 F Supp 2d 261, 275 [SDNY 2010]; see *Curiano v Suozzi*, 63 NY2d 113 [1984]).

In the instant matter, plaintiff has pled that Bill filed a criminal complaint upon which an arrest warrant was ultimately issued, and that Bill's intent in utilizing such legal process was to harass and embarrass plaintiff, to harm her personal and professional reputation, and to make her lose her job. Plaintiff has further pled that defendants' actions have resulted in, among other things, lost earnings from the job she was terminated from, lost earnings from her inability to find subsequent employment, and attorney fees expended in defending herself in the criminal action as well as prosecuting this civil action.

As such, the Court finds that plaintiff has sufficiently pled the elements of a cause of action for abuse of process against Bill.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress has 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.*, 81 NY2d 115 [1993]; *Bernat v Williams*, 2011 NY Slip Op 994 [2d Dept]). An action to recover damages for intentional infliction of emotional distress is subject to a one-year statute of limitations (CPLR 215 [3]; *Ross v Louise Wise Servs., Inc.*, 28 AD3d 272 [2006]; *Brasseur v Speranza*, 21 AD3d 297 [2005]; *Macholz v Weiss*, 279 AD2d 557 [2001]; *Kourkoumelis v Arnel*, 238 AD2d 313 [1997]).

Bill argues that the only claim plaintiff makes regarding acts committed by Bill is the filing of a criminal complaint on October 10, 2007, making this cause of action untimely. In addition, Bill argues that the conduct complained of was not sufficiently outrageous or extreme to support a cause of action for intentional infliction of emotional distress. In opposition, plaintiff claims that Bill "persuaded, encouraged, goaded, and conspired with, the county defendants to harass, embarrass, and harm the plaintiff, to get her fired from her job, and to make it impossible for her to find another job." With respect to the statute of limitations, plaintiff argues that the continuing tort or continuing injury doctrine tolls the statute of limitations, in that the wrongful conduct continued against plaintiff until February 24, 2009, the date the criminal prosecution terminated.

Even assuming, *arguendo*, that the continuing tort or continuing injury doctrine applies herein, the latest alleged conduct on the part of Bill, to wit: "having the county defendants make an outrageous plea offer that would strip the plaintiff of her brokerage license and liberty," occurred on or about April 14, 2008, more than one year prior to the date of commencement of the instant action.

Accordingly, the Court finds that plaintiff's cause of action alleging intentional infliction of emotional distress is time barred (see CPLR 215 [3]).

V. PRIMA FACIE TORT

Plaintiff's fifth cause of action claiming *prima facie* tort consists of four elements: (1) intentional infliction of harm; (2) causing special damages; (3) without excuse or justification; and (4) by an act or series of acts that would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113 [1984]; *Morrison v Woolley*, 45 AD3d 953 [2007]; *Del Vecchio v Nelson*, 300 AD2d 277 [2002]). *Prima facie* tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which cannot stand on its legs (see *Lancaster v Town of E. Hampton*, 54 AD3d 906 [2008]). While *prima facie* tort may be pleaded in the alternative with a traditional tort, once a traditional tort is established the cause of action for *prima facie* tort disappears (*Curiano v Suozzi*, 63 NY2d 113, *supra*).

In this case, plaintiff alleges that "defendants' acted with malice and intended to inflict harm on the plaintiff ... which resulted in special damages to the plaintiff." Therefore, the Court finds this cause of action to essentially be an intentional tort claim subject to a one-year statute of limitations (see *Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356 [2005]; *Havell v Islam*, 292 AD2d 210 [2002]).

Consequently, this cause of action is also time-barred (see CPLR 215 [3]).

VI. INTERFERENCE WITH PROSPECTIVE ADVANTAGE

In order to make out a *prima facie* case for tortious interference with prospective economic advantage, a plaintiff must establish: (1) that [she] had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship (see *Carvel Corp. v Noonan*, 3 NY3d 182 [2004]; *Friedman v Coldwater Creek, Inc.*, 321 Fed Appx 58 [2d Cir 2009]; *Kirch v Liberty Media Corp.*, 449 F 3d 388 [2d Cir 2006]). "As a general rule, a defendant's conduct must amount to a crime or an independent tort" in order to amount to tortious interference with a prospective economic advantage (*Carvel Corp. v Noonan*, 3 NY3d at 190). Indeed, even in its most liberal formulation, the relationships must be specified, as must the defendant's knowledge and the interference (see *Burns Jackson Miller Summit & Spitzer v*

Lindner, 88 AD2d 50 [1982]; see also *Brown v Bethlehem Terrace Associates*, 136 AD2d 222 [1988]; *Susskind v. Ipco Hospital Supply Corp.*, 49 AD2d 915 [1975].

Initially, the Court finds this cause of action to be timely, as it is governed by a three-year statute of limitations (see CPLR 214 [4]; *Legion of Christ, Inc. v Rita Cohen Realty Servs.*, 1 AD3d 572 [2003]; *Spinap Corp. v Cafagno*, 302 AD2d 588 [2003]). Furthermore, the allegations in plaintiff's complaint, as amplified by her opposing submission, indicate that she had a business relationship with a competitor of RBA; that Bill interfered with such relationship, as discussed hereinabove; and that such interference caused plaintiff to be terminated from her employment.

Accordingly, the Court finds that plaintiff has stated a cause of action for interference with prospective economic advantage.

VII. INTERFERENCE WITH EMPLOYEE BENEFITS (ERISA)

Finally, Bill alleges that plaintiff's seventh cause of action for interference with employee benefits (ERISA) must be dismissed based upon the documentary evidence submitted. Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, pursuant to CPLR 3211 (a) (1), the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

Plaintiff alleges that in or about January and February 2007, Bill informed plaintiff that he enrolled her in a 401K plan, and had begun, and would continue, making contributions to it. However, since plaintiff left her employment with RBA in April of 2007, she claims that Bill has "repeatedly refused to give her statements, access to the monies in the account, or other information or documents regarding her 401K plan and the monies in it," in violation of the Employee Retirement Income Security Act (ERISA) (29 USC § 1001 *et seq.*). Plaintiff contends that she is entitled to all the monies in her 401K account, as well as all statements and other documents in connection therewith.

In the instant application, Bill avers that plaintiff was eligible to receive these monies in September of 2009, following a one-year break in service from RBA. Bill has submitted Certificates of Participation for plaintiff in the retirement plan for calendar years 2006 and 2007, along with email correspondence indicating that she received the 2006 Certificate on or about August 28, 2008. In addition, Bill has submitted correspondence, dated November 16, 2009, from his attorney to plaintiff's attorney, which encloses documents for plaintiff to execute in order to receive her vested benefits totaling \$4,570.85. Plaintiff acknowledges that Bill has now provided the kinds of records and information plaintiff had been requesting.

Accordingly, the Court finds that plaintiff's seventh cause of action must be dismissed based upon the documentary evidence submitted pursuant to CPLR 3211 (a) (1).

VIII. CONCLUSION

In accordance with the foregoing, Bill's motion to dismiss is **GRANTED** to the extent that plaintiff's second, fourth, fifth, and seventh causes of action are hereby dismissed. The remaining causes of action shall be severed and continued.

The foregoing constitutes the decision and Order of the Court.

Dated: March 7, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION