

Henriques v Linville

2011 NY Slip Op 31899(U)

July 11, 2011

Sup Ct, NY County

Docket Number: 113110/2005

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 113110/2005

HENRIQUES, GRAIG

vs

LINVILLE, PATRICIA W.

Sequence Number : 004

INDEX NO. 113110/2005

MOTION DATE _____

MOTION SEQ. NO. 504

REARGUMENT/ RECONSIDERATION

T

N

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

~~MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.
THE ANNEXED DECISION AND ORDER.~~

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/11/2011

Paul G. Feinman, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Cross motion is granted

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

GRAIG HENRIQUES,
Plaintiff,

Index Number 113110/2005
Mot. Seq. No. 004

against

PATRICIA W. LINVILLE,
Defendant.

DECISION AND ORDER

-----X

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Papers considered in review of this motion and cross motion seeking to renew and/or reargue:

FILED

Papers	Document Number
Notice of Motion, Affidavits, Exhibits Annexed	1
Notice of Cross Motion, Affirmation	2
Affirmation in Opp, Exhibits	3
Reply Affirmation to Affirmation in Opp	4
Reply Affirmation	5

JUL 12 2011

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PAUL G. FEINMAN, J.:

The motion and cross motion are consolidated for the purposes of this decision and order.

Defendant moves pursuant to CPLR 2221 for leave to renew and/or reargue the portion of the court's decision and order of January 14, 2011, which denied the branch of her motion for summary judgment and dismissal of the cause of action alleging abuse of process (*see Henriques v Linville*, Sup Ct, NY County, Feinman, J., index no. 113110/2005, mot. seq. 003). Plaintiff opposes and cross-moves to reargue the portion of the same order that granted summary judgment and dismissal of the claim of malicious prosecution. Defendant opposes this cross motion. For the reasons that follow, the motion is denied in its entirety, and the cross motion is granted. Upon reargument, the court vacates that portion of its earlier decision and order which

dismissed the 2nd cause of action sounding in malicious prosecution, and now denies summary judgment as to this cause of action.

This is an action arising from an altercation between the parties on December 13, 2003, leading to plaintiff's arrest. The underlying facts and procedural history have previously been set forth in detail and need not be repeated here (*see Henriques v Linville*, Sup Ct, New York County, Feinman, J., index no. 113110/2005, mot. seq. 003). In its decision and order dated January 14, 2011, this court granted defendant's motion for summary judgment dismissing all claims except that of abuse of process on the ground that they were time barred or failed to state a cause of action (*id.*). Both parties have sought leave to renew and or reargue.

1. Defendant's Motion to Renew and/or Reargue

Pursuant to CPLR 2221 (d) (2), a motion for leave to reargue must be based on matters of fact or law overlooked or misapprehended by the court in deciding the prior motion. A motion to renew must be based on new facts not offered in the prior motion, and which would tend to change the determination (CPLR 2221 [e] [2]). The granting of a motion to reargue is discretionary (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Defendant's motion, although nominally seeking to "reargue and renew," offers no new facts and thus is deemed to seek reargument only (*see* CPLR 2221 [d], [e]). A motion for "reargument [does not] serve to provide a party an opportunity to advance arguments different from those tendered on the original application" (*Foley v Roche*, 68 AD2d at 568). Here, defendant has not shown that the court overlooked or misapprehended any matters of fact or law. Accordingly, defendant's motion is denied.

2. Cross Motion to Reargue

Plaintiff cross-moves for leave to reargue the court's ruling dismissing the second cause

of action sounding in malicious prosecution. He argues that the court was mistaken in determining that the cause of action was actually a claim alleging false arrest and then dismissing it as time-barred by the one-year statute of limitation.

The court cited *Broughton v State of N.Y.*, 37 NY2d 451 (1975), in its analysis of the claim of malicious prosecution, and incorrectly held that *Broughton* stands for the proposition that where, as here, an arrest occurs without a warrant, the proper cause of action is false arrest rather than malicious prosecution. In fact, *Broughton* is better understood as holding that when the arrest at issue is made pursuant to a warrant or prior judicial proceeding, a claim of malicious prosecution naturally flows (37 NY2d at 457). It does not hold that an arrest without a warrant cannot be the basis of a claim of malicious prosecution. Therefore, plaintiff's motion to reargue is granted. The court vacates the portion of its prior decision and order that dismissed the 2d cause of action, and substitutes the following, which analyzes defendant's motion seeking summary judgment and dismissal of the 2nd cause of action sounding in malicious prosecution.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). It is not the court's function to assess credibility (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, and a failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 Y2d 851, 853 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial. (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

To claim malicious prosecution, a plaintiff must allege and ultimately prove the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, termination of the proceeding in favor of the accused, absence of probable cause for the criminal proceeding, and actual malice (*Broughton*, 37 NY2d at 457). A claim of malicious prosecution may also be alleged based on a continuation of criminal proceedings without probable cause (*see Kemp v Lynch*, 275 AD2d 1024 [4th Dept. 2000]). The tort is governed by a one-year statute of limitation that commences at the time the criminal proceeding terminates (*see Village of Valley Stream v Zulli*, 64 AD2d 609 [2d Dept 1978]). Here, where the criminal proceeding was not terminated until September 21, 2004, and this action was commenced on September 20, 2005, the cause of action alleging malicious prosecution is not time-barred.

Defendant argues that summary judgment and dismissal of this cause of action is appropriate as plaintiff has failed to make out all the elements of the cause of action. As to the first element, she argues she did not initiate the criminal proceeding, but merely provided information to the police in a fair and truthful manner, and later gave a written statement to the DA's office (Linville EBT 91). Although providing true and full information to the police is not enough to establish the first element (*see, Hopkinson v Lehigh V. R. Co.*, 249 NY 296, 301 [1928]; *Present v Avon Prods., Inc.*, 253 AD2d 183, 189 [1st Dept. 1999], *lv dismissed* 93 NY2d 1032 [1999]; *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128 [1st Dept. 1999]), here the gravamen of the complaint is that defendant's statements to the police were not truthful nor accurate and led to his arrest and prosecution. Notably, this is not a litigation against the arresting officer, but against the complaining witness herself. A civilian complainant will not be held liable for malicious prosecution who provides truthful information and takes no active role in the prosecution (*see Baker v City of New York*, 44 Ad3d 977, 979-980 [2d Dept. 2007]). Here,

where plaintiff disputes defendant's version of the altercation, and both the video evidence and the medical evidence appear to raise questions of fact concerning the criminal allegations, defendant has not shown that she merely provided truthful information to the police and could not be found to have initiated criminal proceedings.¹ It has been held that a defendant can be said to have initiated a criminal proceeding "by providing false evidence to the police or withholding evidence that might affect the determination by the police to make an arrest" (*Brown v Sears Roebuck and Co.*, 297 AD2d 205, 210 [1st Dept 2002]). Plaintiff also argues that her ongoing iteration of her statements prolonged the criminal proceeding. For these reasons, there are material issues of fact surrounding the proof of the first element of malicious prosecution.

The second element of malicious prosecution is established by the fact that the criminal prosecution was dismissed on speedy trial grounds in September 2004. A speedy trial dismissal is a favorable termination (*see Smith-Hunter v Harvey*, 95 NY2d 191, 196 [2000]).

The third element is the absence of probable cause. Probable cause is a question of law for the court when the facts are not in dispute (*Brown v Sears Roebuck and Co.*, *supra*, 97 AD2d 205). Here, of course, the facts are sharply disputed. Plaintiff contends that defendant's statements to the police, which caused the police to arrest him, were false. If this is true, it would establish the third element of lack of probable cause (*see, Viza v Greece*, 94 AD2d 965, 966 [4th Dept 1983] ["plaintiff in a malicious prosecution action must [provide] proof that

¹As noted in the court's previous decision (*see Dec./Ord.*, Jan. 14, 2011, pp 5, 6-7, 8 n. 3), defendant testified that plaintiff grabbed her left arm and chest area, that she felt herself being thrown back, and that her head hit the concrete wall (*See Mot. Ex. A, Def. Orig. Mot, Ex. G, Linville EBT 60*). However, the videotape does not clearly show this series of events. The hospital discharge sheet issued on the following day indicated that defendant had "mild L-spinal tenderness. Bruises medial forearm - no scalp hematoma/tenderness" (*Mot. Ex. A, Def. Orig. Mot. Ex. K*).

defendant has not made a full and complete statement of the facts to . . . the District Attorney, has misrepresented or falsified the evidence . . . which would affect the result”]).

The fourth element requires a showing of malice. There is no requirement that the plaintiff prove that the defendant was motivated by spite or hatred, but rather that the defendant commenced the prior criminal proceeding due to a wrong or improper motive, something other than the desire to see the ends of justice served (*Nardelli v Stamberg*, 44 NY2d 500, 502 [1978]). A demonstration of a reckless or grossly negligent disregard for the plaintiff’s rights will establish malice (*Ramos v City of New York*, 285 AD2d 284, 300 [1st Dept. 2001]). The failure to make a full, truthful and complete statements of the facts is sufficient to establish the element of malice (*see Hopkinson v Lehigh V. R. Co.*, 249 NY at; *Dennis v Ryan*, 65 NY 385, 389 [1875]). Because on the extant record, the court cannot say as a matter of law that the defendant lacked malice, this element is also not conclusively established in defendant’s favor.

Based on the above, defendant’s motion for summary judgment and dismissal of the 2d cause of action sounding in malicious prosecution is denied. It is

ORDERED that the defendant’s motion to reargue or renew is denied; and it is further

ORDERED that the plaintiff’s cross motion to reargue is granted and upon reargument, the court vacates that portion of its January 14, 2011 decision and order holding that the 2d cause should be dismissed based on the running of the statute of limitations, and substitutes the decision and order herein denying the motion for summary judgment and dismissal of the 2d cause of action, with the result that the 2d and 4th causes of action are severed and shall continue under this index number; and it is further

ORDERED that a copy of this order shall be served on the Clerk of Trial Support who vacate any marking in the court’s record that this is a disposed matter and shall schedule this

matter for a jury trial at the earliest date available.²

This constitutes the decision and order of the court.

Dated: July 11, 2011
New York, New York

Paul R. Feinman

J.S.C.

FILED
JUL 12 2011
NEW YORK
COUNTY CLERK'S OFFICE

² According to the Supreme Court Records On-Line Library this matter was marked "disposed/result of motion" after the January 24, 2011 Mediation-1 date. However, this matter was never completely dismissed, as the 4th cause of action had survived summary judgment and any such notation was erroneous. Of course, now the court has also reinstated the 2nd cause of action. Given that there were already 6 mediation sessions, the case should proceed to jury selection.

The court is aware that a related matter, *Linville v Henriques, et al.*, 117399/2004E is stayed due to the Article 74 rehabilitation proceedings for Atlantic Mutual Insurance Co., the insurer of one of the co-defendants in that matter. While a joint trial of the two matters would be preferred, it is unclear to the court how long that matter will remain stayed given that it appears that the plaintiff in that action has not undertaken to vacate the stay or sever out the concerned co-defendant.