

Freddo v Marchan

2011 NY Slip Op 32794(U)

October 13, 2011

Supreme Court, Suffolk County

Docket Number: 41733/2009

Judge: Joseph Farneti

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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**

CHRISTOPHER FREDDO,

Plaintiff,

-against-

MICHAEL R. MARCHAN, THE COUNTY OF
SUFFOLK, EDWARD CLARK and MICHAEL
BRENNNA,

Defendants.

ORIG. RETURN DATE: FEBRUARY 7, 2011
FINAL SUBMISSION DATE: MARCH 10, 2011
MTN. SEQ. #: 003
MOTION: MOT D

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Upon the following papers numbered 1 to 6 read on this motion _____
TO DISMISS _____

Notice of Motion and supporting papers 1-3; Affirmation in Opposition supporting papers 4,
5; Replying Affirmation in Further Support of Motion 6; it is,

ORDERED that this motion by defendant EDWARD CLARK (“defendant” or “defendant CLARK”), for an Order, pursuant to CPLR 3211 (a) (5) and (7), and 215 (3), dismissing the First, Second, Third, Fourth, and Sixth causes of action in plaintiff’s Second Amended and Supplemental Verified Complaint, is hereby **GRANTED** to the extent provided hereinafter. The Court has received opposition hereto from plaintiff.

Plaintiff commenced this action on October 19, 2009, with the filing of a Summons and Verified Complaint, asserting six causes of action sounding in false imprisonment, malicious prosecution, violation of civil rights under 42 USC § 1983, intentional infliction of emotional distress, negligence, and harassment. Subsequently, plaintiff served and filed an Amended and Supplemental Verified Complaint dated January 8, 2010. According to the complaint, plaintiff seeks recovery for damages sustained as a result of his alleged wrongful arrest, detention, prosecution and harassment by Suffolk County police officers, allegedly instigated by defendant, arising out of activities that occurred both prior to and subsequent to his arrest on September 10, 2008. According to the underlying misdemeanor information, plaintiff was charged with petty larceny in violation of Penal Law § 155.25 for wrongfully taking a printing sheet that belonged to Carlin Graphics valued under \$250, the basis for such charge being the sworn statements of defendant CLARK and defendant MICHAEL BRENNAN. The charges against plaintiff were ultimately dismissed on December 17, 2008.

By Order dated December 1, 2010, this Court denied a motion by defendant to dismiss plaintiff’s initial Verified Complaint as procedurally defective, without prejudice to renew upon proper papers, and granted a cross-motion by plaintiff for leave to serve and file a Second Amended and Supplemental Verified Complaint.

Defendant has now renewed his motion to dismiss, which is directed at plaintiff’s Second Amended and Supplemental Verified Complaint, arguing that the cause of action sounding in false arrest/false imprisonment is barred by the applicable one-year statute of limitations, and that the causes of action for malicious prosecution, violation of civil rights under 42 USC § 1983, intentional infliction of emotional distress, and intentional harassment fail to state a cause of action against defendant.

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

I. FALSE ARREST/FALSE 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 him; (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 September 10, 2008, and this action was commenced on October 19, 2009, over one year later. Therefore, the Court finds this cause of action to be untimely (see CPLR 215 [3]).

II. 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]).

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 he 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 he can ultimately establish the truth of his 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 defendant.

III. VIOLATION OF CIVIL RIGHTS UNDER 42 USC § 1983

42 USC §1983 enables an aggrieved individual to seek a civil remedy against every person who, under color of law, subjects that individual to a deprivation of his or her rights, privileges or immunities secured by the Constitution (see *Monell v New York City Dept. of Social Servs.*, 436 US 658 [1978]; see *Manti v New York City Tr. Auth.*, 165 AD2d 373 [1991]). Although 42 USC §1983 does not provide a substantive right, it does provide a means to redress a deprivation of a right provided elsewhere (*Chapman v Houston Welfare*

Rights Organization, 441 US 600 [1979]). Municipalities and other governmental units are included among those “persons” to whom § 1983 applies (*Monell v New York City Dept. of Social Servs.*, *supra*). However, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes “state action” (*Blum v Yaretsky*, 457 US 991 [1982]; *United States v. International Bhd. of Teamsters*, 941 F 2d 1292 [2d Cir 1991]). “To qualify as state action the conduct in question ‘must be caused by the exercise of some right or privilege created by the State or by a rule conduct imposed by the State or by a person for whom the State is responsible,’ and ‘the party charged with the [conduct] must be a person who may fairly be said to be a state actor’ ” (*Id.* at 1296, quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 [1982]).

Here, plaintiff fails to allege that defendant was a person for whom the State is responsible, and thus a state actor acting under color of law. As such, this cause of action must be dismissed as asserted against defendant CLARK.

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*, 81 AD3d 679 [2011]).

Defendant argues that the conduct complained of was not sufficiently outrageous or extreme to support a cause of action for intentional infliction of emotional distress. This Court agrees (*see Howell v New York Post Co.*, 81 NY2d 115 [1993]; *Doin v Dame*, 82 AD3d 1338 [2011]; *Burton v Matteliano*, 81 AD3d 1272 [2011]). Moreover, a cause of action for intentional infliction of emotional distress should not be entertained where, as here, the conduct complained of falls well within the ambit of other traditional tort liability (*see Fischer v Maloney*, 43 NY2d 553 [1978]; *Doin v Dame*, *supra*).

Accordingly, the Court finds that plaintiff’s cause of action alleging intentional infliction of emotional distress must be dismissed.

V. INTENTIONAL HARASSMENT

Finally, plaintiff's sixth cause of action claiming civil harassment is not a recognized cause of action in New York (see *Daulat v Helms Bros.*, 18 AD3d 802 [2005]; *Broadway Cent. Prop. v 682 Tenant Corp.*, 298 AD2d 253 [2002]; *Goldstein v Tabb*, 177 AD2d 470 [1991]). Consequently, this cause of action must also be dismissed.

VI. CONCLUSION

In accordance with the foregoing, defendant's motion to dismiss is **GRANTED** to the extent that plaintiff's First, Fourth, and Sixth causes of action are dismissed, and the Third cause of action is dismissed as asserted against defendant CLARK.

The foregoing constitutes the decision and Order of the Court.

Dated: October 13, 2011


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION