

Wiese v Young
2011 NY Slip Op 33312(U)
August 22, 2011
Supreme Court, Queens County
Docket Number: 30085/10
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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William Wiese,

Plaintiff,

- against -

Index
Number: 30085/10

Motion
Date: 8/9/11

Debora Young, The City of New York,
New York City police Department, and
Detective Edwin W. Stuart,

Motion
Cal. Number: 30

Motion Seq. No.: 1

Defendant.

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The following papers numbered 1 to 15 read on this motion by plaintiff to dismiss defendant Debora Young's counterclaims; and cross-motion by defendant Debora Young to amend her answer and counterclaims and to dismiss the plaintiff's claims.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmations-Exhibits.....	5-9
Affirmation in Opposition-Exhibits.....	10-12
Reply-Exhibits.....	13-15

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

As a preliminary matter, that branch of Young's cross-motion to amend her answer with counterclaims is granted and the amended answer annexed to the cross-moving papers is deemed served and filed. Plaintiff's motion is deemed a motion to dismiss Young's counterclaims interposed in her amended answer.

Motion by plaintiff to dismiss Young's counterclaims interposed in her amended answer is granted.

Plaintiff, an employee of the New York Junior Tennis League, Inc., a non-party, was accused by Young, an employee of Sports and Arts in Schools Foundation, Inc. (hereinafter the Foundation), also a non-party whose office adjoins that of the Junior Tennis League,

of battery which she alleges occurred on October 23, 2008 when she was struck by the door to her office as plaintiff pushed it open. Plaintiff was arrested on October 25, 2008 and charged with Assault in the Third Degree and Harassment in the Second Degree based upon Young's complaint to the NYPD and her supporting deposition. Young thereafter commenced a civil lawsuit against plaintiff on October 18, 2009 in Supreme Court, Bronx County, for personal injuries arising out of the alleged battery. Although plaintiff fails to annex a certificate of disposition of his criminal case, Young does not contest his averment that the charges against him were dismissed on April 27, 2010. Plaintiff does not, however, indicate what the basis of the dismissal was.

On April 21, 2010, Young was terminated from her employment at the Foundation for cause upon a determination by the Foundation that she had stolen \$5,579.93 from it by submitting to it false invoices for reimbursement of non-existent expenses. Young was arrested on September 14, 2010 and charged with one count of Grand Larceny in the Fourth Degree and three counts of Falsifying Business Records in the First Degree. Young has subsequently been indicted by the Grand Jury in Queens County (Indictment No. 670/2010) of one count of Grand Larceny in the Third Degree, eight counts of Falsifying Business Records in the First Degree and four counts of Criminal Possession of a Forged Instrument in the Second Degree.

Plaintiff commenced the underlying action against Young on December 2, 2010 asserting causes of action against Young for malicious prosecution, abuse of process, libel and slander in causing him to be arrested and prosecuted. Young interposed an answer with counterclaims on January 13, 2011. Plaintiff thereafter, on March 23, 2011, served the instant motion to dismiss Young's counterclaims, and Young cross-moved to amend her answer with counterclaims and to dismiss plaintiff's causes of action for malicious prosecution, slander and libel.

Young's amended answer contains four counterclaims. The first counterclaim is for abuse of process in commencement of the underlying action, which Young alleges was falsely and maliciously brought solely in retaliation for her commencement of the aforementioned civil lawsuit against him in Bronx County. The second counterclaim alleges that plaintiff, also in retaliation for Young's lawsuit against him, caused the Foundation to terminate her and, thus, tortiously interfered with her contract of employment. The third counterclaim alleges abuse of process in causing her arrest and prosecution, and the fourth counterclaim asserts causes of action for negligent and intentional infliction of emotional harm by virtue of the foregoing.

The first counterclaim for abuse of process in commencement of this action fails to state a cause of action as a matter of law since "the institution of a civil action by summons and complaint is not legally considered process capable of being abused" (Curiano v Suozzi, 63 NY 2d 113, 116 [1984]; Hoppenstein v Zemek, 62 NY 2d 979 [1978]; Williams v Williams, 23 NY 592 [1969]).

Inasmuch as Young has been indicted by the Grand Jury, which necessarily presupposes a finding of probable cause, Young's second and third counterclaims against plaintiff must also fail as a matter of law.

Young's second counterclaim for tortious interference with her employment contract is premised upon Young's allegation that plaintiff caused the Foundation to fire her from her job by making false statements about her and "causing false allegations to be made against her in connection with falsifying records of Sports and Arts in Schools Foundation, Inc."

In the first instance, contrary to the contention of plaintiff's counsel, the mere fact that Young's employment with the Foundation was an at-will agreement rather than a contract for a specific term does not preclude a cause of action for tortious interference. "[A]n agreement terminable at will is a prospective contractual relation, and may be tortiously interfered with through malicious or wrongful conduct" (Smith v Meridian Tech, Inc., 52 AD 3d 685, 687 [2nd Dept 2008]). The case of Ingle v Glamore Motor Sales (73 NY 2d 183 [1989]), cited by plaintiff's counsel, does not stand for the proposition, as counsel contends, that an at-will employment agreement cannot form the basis of a cause of action for tortious interference. That case merely reiterates the well-established rule that no cause of action exists for wrongful termination of an at-will employee by his or her employer. It has nothing to do with the issue of tortious interference with employment by a third party. The Court of Appeals, in Ingle, merely stated that the plaintiff could not evade the rule that a wrongful termination action cannot lie against an at-will employee's employer by "re-casting his cause of action in the garb of a tortious interference with his employment" (id. at 189).

However, as stated by the Appellate Division, Second Department in Smith (supra), a cause of action for tortious interference with employment must be based upon "malicious or wrongful conduct" (52 AD 3d at 687). "Wrongful conduct has been defined to include 'physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure'" (id. at 687) (internal citations omitted).

Here, Young alleges that plaintiff engaged in wrongful conduct by falsely and maliciously accusing her to her employer of falsifying receipts in order to have her fired. However, Joseph Posner, Senior Human Resources Director of the Foundation, avers in his affidavit annexed to the moving papers that Young was terminated for cause after an internal investigation conducted found that she had perpetrated fraud against the Foundation, that she was not terminated as a result of any conversation with plaintiff or any statements or actions taken by him and that the matter was referred to the Office of the District Attorney, Queens County. Moreover, the Court notes that the accusatory instrument filed in Criminal Court, Queens County, by the District Attorney against Young was not based upon any information from plaintiff, but was based upon information offered by Posner, who presented several expense statements and receipts in specific sums, and upon information provided by the merchants who purportedly issued said receipts and who indicated that said receipts were not genuine. Indeed, that criminal prosecution has resulted in an indictment against her, as heretofore described. Therefore, since there is no basis for Young's allegation that her termination from her employment at the Foundation was the result of false accusations by plaintiff that she had falsified receipts, her second counterclaim alleging tortious interference with her employment must be dismissed.

Likewise, her third counterclaim alleging abuse of process in causing her arrest and prosecution must also be dismissed, for the same reasons.

Since the first, second and third counterclaims must fail, there is also no basis for the fourth counterclaim which alleges negligent and intentional infliction of emotional harm as a result of the alleged conduct forming the basis of the first three counterclaims.

That branch of Young's cross-motion to dismiss plaintiff's fifth and sixth causes of action for libel and slander against her is granted. A plaintiff asserting a cause of action for libel or slander must set forth in the complaint the particular words alleged to be defamatory (see CPLR 3016[a]). A cause of action alleging defamation which fails to comply with the special pleading requirements of CPLR 3016(a) mandates dismissal (see Simpson v Cook Pony Farm Real Estate, Inc., 12 AD 3d 496 [2nd Dept 2004]). Plaintiff's complaint fails to state what words were uttered or published by plaintiff so as to support a cause of action for libel or slander.

That branch of the cross-motion to dismiss plaintiff's third

cause of action for malicious prosecution is also granted. The third cause of action fails to state a cause of action for malicious prosecution.

"In order to recover for malicious prosecution, a plaintiff must establish four elements: that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice" (Cantalino v Danner, 96 NY 2d 391, 394 [2001]). "A failure to establish any one of those elements results in the defeat of the plaintiff's cause of action" (id.). Although plaintiff's third cause of action alleges that plaintiff was falsely arrested (citing the arrest number and charges) based upon the supporting deposition of Young, that there was no probable cause for the charges proffered against him and that it was brought to harass, intimidate and embarrass plaintiff and to cause him to expend sums of money for his defense, it fails to allege that the criminal proceeding was terminated in favor of plaintiff. Indeed, nowhere in the complaint is there an allegation that the criminal action against plaintiff was terminated in his favor. Although plaintiff does allege in his third cause of action that "[t]he cause of action for malicious prosecution arose on April 27, 2010, with the dismissal of the criminal action against William Wiese in the County of Queens, City and State of New York", and does aver in his affidavit in opposition to the cross-motion that the criminal charges were "dismissed" against him, as heretofore mentioned, plaintiff fails to allege that the dismissal was a termination of the criminal action in his favor. He also fails to annex a certificate of disposition and otherwise fails to demonstrate or aver what the basis of the dismissal was in his opposition papers.

Where a dismissal is not final (i.e., where the action may be brought again) or where it is inconsistent with the innocence of the accused, it is not considered a "favorable" termination so as to support a cause of action for malicious prosecution (see Smith-Hunter v Harvey, 95 NY 2d 191 [2000]; Cantalino v Danner, supra). Since plaintiff fails to allege that the dismissal was a favorable termination, and since there is otherwise no evidence in the record presented as to whether or not the dismissal was with prejudice and whether or not it was inconsistent with plaintiff's innocence, his third cause of action for malicious prosecution must fail.

Accordingly, Young's counterclaims interposed in her amended answer as against plaintiff are dismissed and plaintiff's third, fifth and sixth causes of action alleged in his complaint as against Young are also dismissed.

Dated: August 22, 2011

KEVIN J. KERRIGAN, J.S.C.