

Memmos v Ananiadis
2012 NY Slip Op 31420(U)
May 23, 2012
Sup Ct, Queens County
Docket Number: 21168/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

VASILIOS MEMMOS

Index No.: 21168/2011

Plaintiff,

Motion Date: 03/08/12

- against -

Motion No.: 29

Motion Seq.: 1

EFSTATHIA ANANIADIS, MIRELA PERAICA
 and GUL KARAN,

Defendants.

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The following papers numbered 1 to 12 were read on defendants' motion for an order dismissing the plaintiff's complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action:

Papers Numbered

Notice of Motion-Affidavits-Memorandum of Law.....1 - 5
 Affirmation in Opposition-Affidavits-Exhibits.....6 - 10
 Reply.....11 - 12

On September 12, 2011, plaintiff commenced an action seeking monetary damages against the defendants by filing a summons and complaint which asserts causes of action for libel, slander, abuse of process and malicious prosecution.

The plaintiff is the President of Mediterranean Foods Manufacturers & Imports, Inc. The defendants were female employees of Mediterranean. The factual recitation set forth in the complaint states that defendant MIRELA PERAICA alleged in a supporting deposition filed with the New York City Police Department that on November 11, 2010, the plaintiff Vasilios Memmos grabbed her buttocks, touched her breasts, forcibly kissed her and reached his hand down her pants. Defendant ESTATHI ANANIADIS alleged in a formal complaint that on November 11, 2010

the plaintiff also lifted her shirt and touched her breasts. Defendant GUL KARAN alleged in a formal complaint that on October 1, 2010, the plaintiff attempted to kiss her on the mouth and moved his hand under her shirt and touched her breast. The complaint states that the Queens County District Attorney dismissed the charges in the complaint relating to GUL KARAN on the ground that the plaintiff was not in the State of New York on October 1, 2011.

Plaintiff alleges that the statements contained in the supporting depositions filed with the police constitute libel in that the accusations contained therein were false. Moreover plaintiff claims that the defendants' actions in publishing the false accusations were actuated by actual malice in that the defendants knew that the statements were false and untrue or were published with reckless and wanton disregard of whether they were false and untrue. Plaintiff seeks punitive damages based upon the willful, wanton and malicious acts of the defendants. With respect to the second cause of action for slander, plaintiff alleges that the words spoken by the defendants were false and defamatory, were known by defendants to be false and defamatory, and were spoken willfully and maliciously with the intent to damage the plaintiff's good name, business and trade reputation and credit.

The third cause of action for abuse of process is based upon the plaintiff's assertion that he was wrongfully arrested on November 11, 2010 and charged with forcible touching, a violation of Penal Law § 130.52 and multiple counts of sexual abuse in the third degree a violation of Penal Law § 130.55. Plaintiff asserts that the charges were recklessly and maliciously lodged by the defendants without probable cause or justification and were designed to harass and intimidate him. The fourth cause of action for malicious prosecution is based upon the fact that plaintiff was wrongfully arrested and detained by the Police Department.

Defendants now move, prior to filing an answer, to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) on the ground that the allegations in the complaint arise solely out of the filing of the criminal complaint by the defendants against the plaintiff. Plaintiff claims that defamatory statements allegedly made by the defendants in relation to criminal complaints are absolutely privileged. Defendants maintain that the plaintiff cannot maintain a cause of action for libel or slander as statements made in the course of legal proceedings are absolutely privileged (citing Kaye v Trump, 58 AD3d 579 [1st Dept. 2009]; Lacher v Engel, 33 AD3d 10 [1st Dept. 2006]).

With respect to the cause of action for malicious prosecution defendants contend that the plaintiff failed to state that all of the criminal proceedings terminated in his favor and cannot establish that the defendants initiated the criminal proceedings against him. With respect to the cause of action for abuse of process defendants contend that the mere reporting of a crime to the police and giving testimony are not sufficient to maintain an action for abuse of process since the process was not issued by the defendants nor used in a perverted manner to obtain a collateral objective.

In opposition, plaintiff's counsel, Si Aydiner, Esq., states that the complaint is based upon the sworn supporting depositions of the defendants which served as the basis of a criminal complaint filed by Police Officer Joseph Esposito dated March 18, 2011. Counsel contends that the charges brought by defendant Karan were dismissed by the Queens District Attorney as a result of a notice of alibi served by the defendant as to the date of October 1, 2010. Counsel also submits that the charges brought by defendants Ananiadis and Peraica were also subsequently dismissed.

Plaintiff's counsel states that although the statements communicated to the police are subject to qualified privilege the privilege is not absolute and a claim of libel and slander may be established where it can be shown that the statements were published with malice. Counsel claims that the complaint is sufficient as it alleges that the defendants made the sworn statements to the police with knowledge of their falsity. Counsel states that the notice of alibi proved that plaintiff was not in New York State at the time of the alleged sexual assault on Karan.

With respect to the cause of action for abuse of process the plaintiff contends that the complaint contains factual allegations which are sufficient to meet the three essential elements for an abuse of process claim namely (1) regularly issued process, either civil or criminal (2) an intent to harm without excuse or justification and (3) use of process in a perverted manner to obtain a collateral objective (citing Panish v Steinberg, 32 AD3d 383 [2d Dept. 2007]).

With respect to malicious prosecution, plaintiff asserts that the complaint sets forth the four essential elements of a claim for malicious prosecution, namely, the initiation or continuation of an action against him; the termination of the proceeding in his favor; the absence of probable cause to

commence the proceeding; and actual malice as a motivation for the defendant's actions (citing Cantalino v Danner, 96 NY2d 391 [2001]). Counsel claims that the complaint asserts that the claims in the depositions were knowingly false, and that the defendants civil suit is sufficient to provide a basis to infer that the motivation of the defendants was borne by malice.

Upon review and consideration of the defendants' motion, the plaintiff's affirmation in opposition and the defendants' reply thereto this Court finds as follows:

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; also see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83[1994]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679[2d Dept. 2011]; Peery v United Capital Corp., 84 AD3d 1201 [2011]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]).

With respect to the causes of action for libel and slander the Court of Appeals has held that communications to a police officer or District Attorney does not enjoy an absolute privilege as would a communications made as a part of the actual judicial proceeding (see Toker v Pollak, 44 NY2d 211[1978][absolute immunity applies only to a proceeding in court or one before an officer having attributes similar to a court]). The Court held that communications to a police officer are protected by a qualified privilege because a policeman is not a judicial officer and the communication of a complaint, without more, to a district attorney or police officer does not constitute or initiate a judicial proceeding(see Toker, supra); also see Wilson v Erra, 942 NYS2d 127 [2d Dept. 2012]; Levy v. Grandone, 14 AD3d 660 [2d Dept. 2005]). However, the shield provided by a qualified privilege can be pierced by a showing that the defendant acted with malice (see Liberman v Gelstein, 80 NY2d 429 [1992]). Therefore, this court finds that the complaint sufficiently pleads a cause of action for libel and slander as the complaint alleges that the defendants' statements were made with knowledge that they were false and that the defendants actions were motivated by actual malice (see Light v Light, 64 AD3d 633 [2d Dept. 2009]; Mohen v Stepanov, 59 AD3d 502 [2d Dept. 2009]

With respect to plaintiff's cause of action for malicious prosecution, the courts have held that a plaintiff must establish that a criminal proceeding was commenced based on the strength of

the complaining witness's complaints; that the criminal action terminated in favor of the accused, lacked probable cause, and was initiated on the basis of actual malice (see Martinez v City of Schenectady, 97 NY2d 78 [2001]; Cantalino v Danner, 96 NY2d 391 [2001]; Mohen v Stepanov, 59 AD3d 502 [2d Dept. 2009]; Nieminski v Cortese-Green, 74 AD3d 1550 [3rd Dept. 2010]). Here, this Court finds that all of the specified elements were pled sufficiently to sustain the cause of action for malicious prosecution.

With respect to the cause of action for abuse of process, the courts have held that (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 Panish v Steinberg, 32 AD3d 383 [2d Dept. 2006]). Here, the court finds that all the elements were satisfied in the pleading in that the allegedly false charges filed by the defendants led to the plaintiff's arrest. The complaint also alleges that the defendants were seeking a detriment against the plaintiff in that the charges were lodged without probable cause and the defendants sought to use the charges to harass and intimidate the plaintiff as well as to subject him to a possible term of imprisonment.

Accordingly, for all of the above-stated reasons, it is hereby,

ORDERED, that the defendants' motion to dismiss the complaint for failure to state a cause of action is denied, and it is further

ORDERED, that the defendants are directed to serve an answer within 20 days of service of a copy of this order with notice of entry thereof.

Dated: May 23, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.