

**Place v Ciccotelli**

2013 NY Slip Op 33853(U)

July 8, 2013

Supreme Court, Saratoga County

Docket Number: 2013-1564

Judge: Ann C. Crowell

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ORIGINAL

STATE OF NEW YORK  
SUPREME COURT  
PETER PLACE,

COUNTY OF SARATOGA

Plaintiff,

**DECISION and ORDER**

RJI #45-1-2013-0757

Index # 2013-1564

-against-

MICHAEL CICCOTELLI,

Defendant.

2013 JUL 15 PM 1:27  
SARATOGA COUNTY  
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BALLSTON SPA, NY

FILED

**APPEARANCES:**

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Saratoga Springs, New York 12866

The Dalton Law Firm, LLC  
Attorneys for Defendant  
112 Spring Street, Suite 307  
Saratoga Springs, New York 12866

ANN C. CROWELL, J.

The defendant, Michael Ciccitelli ("Ciccitelli"), moves pursuant to CPLR § 3211(a)(1) & (7) for an order dismissing the three causes of action alleged in the plaintiff Peter Place's ("Place") Complaint. Place opposes the requested relief. Place's Complaint is inartfully drawn without any clear delineation of the exact causes of action asserted. Place's response to the instant motion to dismiss contends three causes of action are asserted by plaintiff: (1) malicious prosecution; (2) abuse of process; and (3) defamation.

Ciccotelli's motion to dismiss based upon the documentary evidence attached to plaintiff's complaint is denied. The statement allegedly made by Place to the police officer that took Ciccotelli's complaint does not establish a defense to the asserted claims as a matter of law and conclusively dispose of Place's claims. *Leon v Martinez*, 84 NY2d 83, 87 [1994].

In considering a motion to dismiss for failure to state a cause of action, the question is whether the plaintiff has a cause of action, not whether he has stated one. *Torok v Moore's Flatwork & Foundations, LLC*, 106 AD3d 1421 [3rd Dept. 2013]. The facts pleaded are presumed to be true and the plaintiff is to be accorded every favorable inference. *Id.*; *Esposito-Hilder v SFX Broadcasting, Inc.*, 236 AD2d 186 [3rd Dept. 1997]. The Court must determine whether the facts as alleged fit within any cognizable legal theory. *Id.*

The elements of an action for malicious prosecution are “the defendant commenced or continued a criminal proceeding against the plaintiff; that the prosecution terminated in plaintiff’s favor; the absence of probable cause; and actual malice.” *Grucci v Grucci*, 20 NY3d 893, 896 [2012]; *Barrett v Watkins*, 82 AD3d 1569, 1572 [3rd Dept. 2011].

A civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities will not be held liable for false arrest or malicious prosecution. *Du Chateau v Metro-North Commuter Railroad Co.*, 253 AD2d 128 [1st Dept. 1999]. The Saratoga Springs Police and the Office of the Saratoga County District Attorney based upon their investigations were free to exercise their own judgment as to whether an arrest should be made and criminal charges filed and prosecuted. *Id.* “A plaintiff must demonstrate that the defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act.” *Robles v City of New York*, 104 AD3d 829, 830 [2nd Dept. 2013]).

Place’s complaint generically states that Ciccotelli “caused” him to be arrested (Complaint, paragraphs 9 & 11). The Complaint also alleges that Ciccotelli signed a criminal complaint against him, requested an Order of Protection and testified against him at trial. Even construing the complaint liberally and according Place the benefit of every favorable inference, nothing in the Complaint or Place’s affidavit in opposition to this motion contain any

allegations that Ciccotelli played any active role in the prosecution or arrest, such as giving advice and encouragement or importuning the authorities to act. *Robles v City of New York*, *supra*. In the absence of any allegations that Ciccotelli had any other active role in the prosecution and arrest of Place other than making his complaint to the Saratoga Springs Police, Place's first cause of action for malicious prosecution and/or false arrest is dismissed. *Krzyzak v Schaefer*, 52 AD3d 979 [3rd Dept. 2008].

The elements of an abuse of process cause of action are: (1) regularly issued process, either civil or criminal; (2) an intent to do harm without excuse or justification; and (3) use of process in a perverted manner to obtain a collateral objective. *Curiano v Suozzi*, 63 NY2d 113 [1984]. Paragraph 22 of the Complaint alleges that: "Michael Ciccotelli created this situation and pursued it to further help his civil case against the plaintiff herein in a deliberate and wrongful manner." Paragraph 24 of the Complaint alleges: "That the action of the defendant Michael Ciccotelli by virtue of making the complaint and seeking to use the criminal legal system to bolster his civil case is an abuse of process." Paragraph 32 of the Complaint alleges: "That the action of the defendant Michael Ciccotelli was done intentionally to harm the plaintiff Peter Place and to get Peter Place's gun permit revoked." Place's allegations of falsity and malicious motive are insufficient in themselves to give rise to a cause of action for abuse of process. *Butler v Ratner*, 210 AD2d 691, 693 [3rd Dept. 1994]. There are no allegations in the Complaint that the arrest warrant was used in any manner to benefit Ciccotelli in the dissolution proceeding. While Place alleges Ciccotelli sought the Order of Protection in order to get Place's pistol permit revoked, there is no allegations in the Complaint that Ciccotelli improperly used the Order of Protection for that purpose. *Geller v Harris*, 258 AD2d 421 [1st Dept. 1999]. Malicious motive alone does not give rise to a cause of action for abuse of process.

*Curiano v Suozzi, supra.*

CPLR § 3016(a) requires that any cause of action sounding in defamation must set forth the “particular words complained of” in the Complaint. *Martin v Hayes*, 105 AD3d 1291 [3rd Dept. 2013]; *Nieminski v Cortese-Green*, 74 AD3d 1550 [3rd Dept. 2010]. The Complaint must also state the particular person or persons to whom the allegedly defamatory statements were made. *Simpson v Cook Pony Farm Real Estate, Inc.*, 12 AD3d 496 [2nd Dept. 2004]; *Gill v Pathmark Stores*, 237 AD2d 563 [2nd Dept. 1997].

Paragraph 37 of the Complaint states: “That the defendant Michael Ciccotelli has at a meeting of [t]he Wilton Rod and Gun Club stated to other members that Peter Place was dishonest and cheated him in a business transaction.” Paragraph 39 of the Complaint states: “That the accusations made against Peter Place at the Saraspa Rod and Gun Club and Fish Creek rod and Gun Club were done intentionally by the Defendant to defame Peter Place.” In response to the instant motion to dismiss, Place and his counsel state: “That defendant made remarks about deponent (the Plaintiff) to the Saraspa Rod and Gun Club and Fish Creek Rod and Gun Club.”

That “Peter Place was dishonest and cheated him in a business transaction” does not appear to be the “particular words complained of.” CPLR § 3016(a). Regardless of whether these are, or are not, the particular words allegedly used by Ciccotelli, Place’s inadequate description of the particular person or persons to whom the allegedly defamatory comments were made warrants the dismissal of Place’s defamation cause of action. *Simpson v Cook Pony Farm Real Estate, Inc., supra*; *Gill v Pathmark Stores, supra*). Unless Ciccotelli gave a speech regarding Place to the entirety of the membership of two separate Rod and Gun Clubs, the identification of the entire membership of such Rod and Gun Clubs as the persons to whom

such comments were made lacks sufficient particularity. The Court declines to address whether special damages must be pled in this case since the particular words used do not appear to be clearly set forth in the Complaint and the issue of plaintiff's "business" has not been briefed by the parties. *Rufeh v Schwartz*, 50 AD3d 1002 [2nd Dept. 2008]; *Epifani v Johnson*, 65 AD3d 224 [2nd Dept. 2009].

Ciccotelli's motion to dismiss the complaint is granted in its entirety. Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to the attorney for the defendant for filing and entry. The underlying papers will be filed by the Court.

Dated: July 8, 2013  
Ballston Spa, New York

  
ANN C. CROWELL, J.S.C.

Papers Received and Considered:

- Notice of Motion dated May 23, 2013
- Affirmation of Alisa M. Dalton, Esq. dated May 23, 2013, with Exhibit A
- Affirmation of John M. Hogan, Jr., Esq., dated June 5, 2013
- Affidavit of Peter Place sworn to June 5, 2013
- Reply Affirmation of Alisa M. Dalton, Esq., dated June 12, 2013 (Exhibit A not considered).
- Complaint [Affirmation] of John M. Hogan, Jr., Esq., dated June 14, 2013 with Exhibits

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Peter R. Martin  
  
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