

**347 Central Park Assoc., LLC v Pine Top Assoc.,
LLC**

2014 NY Slip Op 31040(U)

March 13, 2014

Sup Ct, Westchester County

Docket Number: 14855/09

Judge: Robert M. DiBella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
347 CENTRAL PARK ASSOCIATES, LLC,

Plaintiff,

-against-

**PINE TOP ASSOCIATES, LLC, BOB LORD,
MAURO VALENTINE and STEPHEN BROTMANN,**

Defendants.

-----X
DIBELLA, J.

FILED
AND
ENTERED
ON March 13, 2014
WESTCHESTER
COUNTY CLERK

DECISION AND ORDER
Motion Seq. No. 005-008

INDEX NO. 14855/09

FILED
MAR 13 2014
TIMOTHY C. IDO
COUNTY CLERK
WESTCHESTER

The following papers have been read and considered on these motions by all parties for summary judgment, pursuant to CPLR 3212, and for an order to substitute an estate representative for a deceased defendant:

- 1) Notice of Motion (seq. no. 005); Affirmation of John H. Somoza, Esq.; Affidavit in Support of Stephen Brotmann, Esq.; Exhibits A–NN; Memorandum of Law in Support;
- 2) Affirmation in Opposition of Leonard Benowitch, Esq.; Exhibits 37–43; Plaintiff’s Memorandum of Law in Opposition;
- 3) Reply Affirmation in Further Support of John H. Somoza Esq.; Exhibit OO;
- 4) Plaintiff’s Notice of Motion (seq. no. 006); Affidavit of Kenneth Piekarski, Esq.; Affidavit of Philip M. Adler; Exhibits 1–36; Plaintiff’s Memorandum of Law in Support;
- 5) Affirmation in Opposition of John H. Somoza, Esq.; Exhibit 1;
- 6) Affirmation in Opposition dated January 16, 2013 of David L. Birch, Esq.; Exhibits A–I; Memorandum of Law in Opposition to Plaintiff’s Motion; Affirmation in Opposition dated January 25, 2013 of David L. Birch, Esq.; Exhibits A–B;
- 7) Reply Affirmation of Leonard Benowich, Esq.; Exhibit 44; Reply Memorandum of Law in Further Support of Plaintiff’s Motion;
- 8) Notice of Motion (seq. no. 007); Affirmation of David L. Birch, Esq.; Exhibits 1–46; Affidavit of Bob Lord; Exhibits A–I; Affidavit of Mauro Valentine; Memorandum of Law in Support;
- 9) Reply Memorandum of Law in Further Support;
- 10) Order to Show Cause (seq. no. 008); Affirmation of Leonard Benowich, Esq.; Exhibit 1.

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

In this malicious prosecution action, defendant Stephen Brotmann moves (seq. no. 005) for summary judgment dismissing the complaint and any cross claims against him, pursuant to CPLR 3212. In motion seq. 006, plaintiff moves for summary judgment in its favor. In motion seq. 007, the remaining defendants also move for summary judgment dismissing the complaint. Subsequent to the submission of the summary judgment motions, defendant Bob Lord died and the matter was stayed. In motion seq. 008, plaintiff seeks to substitute Robin Lord-Cook as Administratrix of the Estate of Bob Lord, which motion was not opposed. The four motions are considered and disposed of in this consolidated decision. Plaintiff's motion to substitute the estate representative for the deceased party is granted and, upon substitution, defendants' motions for summary judgment are granted and plaintiff's motion for summary judgment is denied, for the reasons set forth herein.

This is an action by 347 Central Park Associates, LLC ("347 Central Park") against Pine Top Associates, LLC, ("Pine Top"), its two shareholders Bob Lord and Mauro Valentine, and Pine Top's attorney Stephen Brotmann (collectively, the "Pine Top Defendants") for alleged malicious prosecution of a civil lawsuit against 347 Central Park.

Mr. Lord and Mr. Valentine through Pine Top leased property on Central Avenue in Scarsdale, New York on which they had a shopping center. Prior to the underlying action, Mr. Lord and Mr. Valentine met with the principals of 347 Central Park with regard to an alleged dangerous condition. Pine Top contends that the shopping center's rear parking lot had rocks and boulders fall from the adjacent higher elevation property owned by 347

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

Central Park. According to Pine Top, a large boulder had recently fallen from the 347 Central Park property onto Pine Top's parking lot. Pine Top and its principals were allegedly concerned about the decaying rock face and the potential for serious and dangerous rock falls in the future. Pine Top believed that the cause of the decaying rock face was past construction blasting by 347 Central Park.

In discussing the matter with 347 Central Park's principals, Mr. Lord and Mr. Valentine learned that the 347 Central Park property at issue was being sold. In April 2005, 347 Central Park entered into a contract for the sale of its property at 343-359 Central Park Avenue, Scarsdale, New York to Philip M. Adler for the purchase price of \$23.675 million. Mr. Lord and Mr. Valentine thereafter contacted their attorney, defendant Brotmann to discuss a course of action. They determined that Pine Top should commence an action against 347 Central Park quickly to address the rock wall situation and the damage caused thereby prior to any sale of the property. An action was commenced, *Pine Top Associates LLC v. 347 Central Park Associates, LLC*, under Index No. 9113/05 in June 2005, alleging the following causes of action for past and future damages: negligence, strict liability, trespass, nuisance, and an easement by necessity. In conjunction with the cause of action for easement by necessity, Pine Top filed a *lis pendens*.

The Pine Top Defendants contend that the action was commenced when they found out that 347 Central Park was going to sell the property because they were concerned that 347 Central Park would sell the property, distribute the assets of the corporation, and dissolve, thus providing no recovery for the previous damages that Pine Top was seeking

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

to recover for the rock fall damage. The Pine Top Defendants assert that they believed an easement would be needed to insert rods from the Pine Top property into the adjoining 347 Central Park property, pursuant to the recommendation of an engineer.

Although the parties discussed resolution of the action, or at least the portion which sought an easement by necessity and withdrawal of the *lis pendens*, no agreement could be reached. The sale of the property was scheduled to take place on July 7, 2005, but because of the *lis pendens*, it was adjourned. 347 Central Park then made a motion by Order to Show Cause dated July 8, 2005 to vacate the *lis pendens*. While the motion remained pending, the sale could not be consummated. The buyer, Mr. Adler, eventually served a time-of-the-essence letter dated November 10, 2005 demanding a closing on or before December 10, 2005. By letter dated November 17, 2005, 347 Central Park notified Mr. Adler that it was unable to comply with its obligations under the contract and it was exercising its right to terminate the contract and return Mr. Adler's downpayment.

The Order to Show Cause to cancel the *lis pendens* was ultimately granted by the court (LaCava, J.) on April 20, 2006. On or about December 1, 2006, 347 Central Park entered into an agreement to sell its property to Stone Ridge Manor, LLC for \$19.5 million, and the property was sold on February 21, 2007. The action proceeded to discovery and, following the completion of discovery, 347 Central Park made a motion in October 2008 for summary judgment dismissing the complaint based on statute of limitations grounds. That motion was granted by the court (Leibowitz, J.) on May 15, 2009 and the action was dismissed.

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

Subsequently, 347 Central Park commenced this action on or about July 1, 2009 for malicious prosecution of the underlying action brought by Pine Top. Pine Top made a motion to dismiss the action before this Court, which was denied, and that denial was affirmed. Following completion of discovery, defendants and plaintiff now all move for summary judgment.

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

The essential elements of a civil malicious prosecution action are: (1) prosecution of a civil action against the plaintiff; (2) by or at the instance of the defendant; (3) without probable cause; (4) with malice; (5) which has terminated in favor of the plaintiff; (6) interference with the plaintiff's person or property; and (7) special damages. See *Castro v. East End Plastic, Reconstructive & Hand Surgery, PC*, 47 AD3d 608, 609 (2d Dep't 2008); *Oceanside Enterprises, Inc. v. Capobianco*, 146 AD2d 685 (2d Dep't 1989). The failure to demonstrate any one of the above elements defeats the entire claim. *Maskantz*

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

v. Hayes, 39 AD3d 211, 213 (1st Dep't 2007), quoting *Brown v. Sears Roebuck & Co.*, 297 AD2d 205 (1st Dep't 2002).

Some of the above elements are undisputed. For instance, there is no dispute that defendant commenced and prosecuted an action against plaintiff which terminated in plaintiff's favor.

Defendants contend that summary judgment dismissing the complaint should be granted in their favor because plaintiff cannot show a patent lack of probable cause for bringing the action, cannot show that it was brought with actual malice, and cannot prove special damages proximately caused by the action.

In reviewing the evidence presented on these motions, plaintiff has not demonstrated as a matter of law the elements of a lack of probable cause and malice and, in fact, the evidence supports defendants' position that there was probable cause for the commencement of the action and the action was brought without malice.

A plaintiff alleging malicious prosecution must prove that the underlying action was filed with "a purpose other than the adjudication of a claim" and that there was "an entire lack of probable cause in the prior proceeding." *Engel v. CBS, Inc.*, 93 NY2d 195, 204 (1999). "[W]hen the underlying action is civil in nature the want of probable cause must be patent." *Butler v. Ratner*, 210 AD2d 691 (3d Dep't 1994).

Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in a similar situation to believe plaintiff guilty. Where there is no real dispute as to the facts or the proper inferences to be drawn from such facts, the issue of probable cause is a question of law to be decided by the court.

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

Brown v. Sears Roebuck and Co., 297 AD2d 205 (1st Dep't 2002) (internal citations omitted).

The basis for the action commenced by Pine Top related to blasting done by 347 Central Park, which allegedly caused rocks and boulders to fall from the 347 Central Park border rock face onto Pine Top's property, causing damage. According to the deposition testimony, the principals of Pine Top met with the principals of 347 Central Park to discuss the rock fall and Pine Top's belief that 347 Central Park was responsible to pay for the damage and that corrective measures were needed to prevent further rock fall. It was at that time that Pine Top discovered that the property was to be sold. When no agreement could be reached, between these friendly neighbors who had a good relationship over the years, the Pine Top Defendants determined that commencing an action was appropriate to ensure recovery for the damages and to allow them access to the property to prevent future rock falls and damage. The factual evidence provides a reasonable basis for commencing the action, even though the action was ultimately dismissed after being litigated for four years. Plaintiff has not submitted proof of a patent lack of probable cause.

Plaintiff argues that there was no probable cause for the easement cause of action. Plaintiff contends that the affirmance of this Court's decision and order denying dismissal of the action pursuant to CPLR 3211 by the Appellate Division Second Department is law of the case that plaintiff was not required to assert and prove that defendants' damages claims were asserted without probable cause. Instead, plaintiff contends that plaintiff need only allege and prove that the easement claim was commenced without probable cause.

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

However, this Court disagrees. This Court found, and the appellate court affirmed, that, upon viewing the evidence in the light most favorable to plaintiff, plaintiff had sufficiently stated a cause of action for malicious prosecution. The motion to dismiss by defendants addressed whether the complaint was time-barred and whether the complaint failed to state a cause of action because Pine Top alleged the claim was really one for slander of title. The standard, however, is different on a motion for summary judgment. And upon reviewing the evidence submitted and the case law presented, plaintiff has not proven that the entire action lacked probable cause.

In its memorandum of law, plaintiff states that the “Appellate Division . . . expressly and necessarily held that no such allegation, and no such proof [of lack of probable cause of the entire complaint as a whole] is required in this case.” Memo of Law in Opp at 5. However, a review of the appellate court decision reveals that no where did the appellate court expressly state that plaintiff was not required to allege or prove probable cause as to all the causes of action. See *347 Central Park Assocs., LLC v. Pine Top Assocs., LLC*, 83 AD3d 689 (2d Dep’t 2011).¹

In this case, “there existed probable cause for the underlying action as a whole.” *Wilhelmina Models, Inc. v. Fleisher*, 19 AD3d 267, 270 (1st Dep’t 2005). It is undisputed that rocks and boulders from the rock face wall fell from 347 Central Park’s property onto

¹ Moreover, the issue of whether 347 Central Park was required to prove a patent lack of probable cause as to the entire action as a whole or whether it could satisfy its burden by showing the lack of probable cause as to only the cause of action for an easement, was not raised in the prior motion to dismiss before this Court.

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

Pine Top's property. Pine Top alleges it was from blasting that 347 Central Park did earlier. Pine Top was seeking monetary relief for the damage caused by that occurrence. In addition, Pine Top was concerned with remedying the rock wall, so that in the future, no further rock fall occurred. The engineer hired by Pine Top made alternative proposals to remedy the rock face, one of which included putting rods from Pine Top's property to 347 Central Park's property. There was sufficient factual and legal support for the action, as a whole, against 347 Central Park with regard to the falling rock face of its property.

Although plaintiff seeks to limit the discussion to whether defendants had probable cause with regard to only one cause of action (for an easement), the underlying complaint must be viewed as a whole. "[A] defendant may meet its burden with respect to that element of a civil malicious prosecution claim by demonstrating that probable cause existed for the prior proceeding as a whole." *Perryman v. Village of Saranac Lake*, 41 AD3d 1080 (3d Dep't 2007); see also *Black v. Green Harbour Homeowners' Assn., Inc.*, 37 AD3d 1013 (3d Dep't 2007). Thus, as the action considered as a whole was not entirely without probable cause, the malicious prosecution action should be dismissed. See *Perryman*, 41 AD3d at 1082.

Further, there is no showing of actual malice. Malice means "a wrongful act, done intentionally without just cause or excuse" and requires a finding of "conscious falsity." *Hornstein v. Wolf*, 109 AD2d 129, 133 (2d Dep't 1985), *aff'd* 67 NY2d 721 (1986); *Jestie v. Long Island Sav. Bank*, 81 AD2d 255 (2d Dep't 1981). The evidence of malice must be more than conclusory, unsubstantiated allegations. See *Hornstein*, 109 AD2d at 133.

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

Evidence of negligence does not support a cause of action for malicious prosecution.

Greer v. National Grid, 89 AD3d 1059 (2d Dep't 2011).

Plaintiff contends that defendants' claims that they acted without malice are contradicted by their own admissions and conduct. Plaintiff relies on the Pine Top Defendants' assertions that they "needed to act soon" because 347 Central Park "was going to sell the Property and [they] feared that Plaintiff would then be dissolved and its assets dissipated beyond the reach of any judgment . . . [and they needed] to be made whole for the damages [they] were suffering from its blasting activities." PI's Memo of law in Opp at 18. The Court finds that such statements do not compel a finding of malice, as argued by plaintiff, but instead support defendants' position that they did not maliciously prosecute the underlying action but were only seeking redress from harm caused by 347 Central Park.

Accordingly, it is

ORDERED that plaintiff's motion for substitution of the estate representative in place of the deceased party (seq. 008) is granted and the stay is lifted, and that Robin Lord-Cook, as Administratrix of the Estate of Bob Lord, deceased, be substituted as defendant in the above-entitled action in the place and stead of the defendant, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Robin Lord-Cook, as Administratrix of the Estate of Bob Lord, deceased, as defendant in the place and stead of said decedent, without

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
347 CENTRAL PARK ASSOCIATES, LLC,

Plaintiff,

-against-

Index No. 14855/09

PINE TOP ASSOCIATES, LLC, ROBIN LORD-COOK,
as ADMINISTRATRIX of the ESTATE OF BOB LORD,
Deceased, MAURO VALENTINE, and
STEPHEN BROTMANN,

Defendants.
-----X

and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk, who is directed to amend the records to reflect such change in the caption herein; and it is further

ORDERED that, upon substitution, defendants' motions for summary judgment (seq. 005 and 007) are granted in their favor and the complaint is dismissed, and plaintiff's motion for summary judgment (seq. 006) is denied, and the Clerk of the Court is directed to enter judgment in favor of defendants.

This is the Decision and Order of the Court.

Dated: March 13, 2014
White Plains, New York



Hon. Robert DiBella, JSC

347 CENTRAL PARK ASSOCS., LLC v. PINE TOP ASSOCS., LLC
INDEX NO. 14855/09

To: Benowich Law, LLP
1025 Westchester Avenue
White Plains, NY 10604

Melito & Adolfsen PC
233 Broadway, Suite 1010
New York, NY 10279

Hofheimer Gartlir & Gross, LLP
530 Fifth Avenue
New York, NY 10036