

Calastri v Overlock

2014 NY Slip Op 31105(U)

April 28, 2014

Supreme Court, New York County

Docket Number: 152851/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

ALESSANDRO CALASTRI,

Plaintiff,

- v -

HANNAH OVERLOCK,

Defendant.

INDEX NO. 152851/2012

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-4

Answer — Affidavits — Exhibits _____

5, 6

Replying Affidavits _____

Cross-Motion: X Yes No

The instant action is for false arrest and battery commenced by plaintiff Alessandro Calastri (“Calastri”) against defendant Hannah Overlock (“Overlock”). The case arises out of an alleged altercation between the parties that occurred on February 17, 2012, during which Calastri alleges that Overlock hit him and bit him on the shoulder. Calastri alleges that several days after the incident, Overlock made false allegations against Calastri regarding the incident, which led to Calastri’s arrest and criminal charges brought against Calastri.

Overlock now moves, pursuant to CPLR § 3025(b), for leave to file a proposed Second Amended Verified Answer, Affirmative Defenses and Counterclaims to Calastri’s Amended Complaint, to add a counterclaim for malicious prosecution based on Calastri’s recent guilty plea in a related criminal case, and for partial summary judgment to dismiss Calastri’s false arrest claim. Overlock submits the attorney affirmation of Alan S. Lewis.

Calastri opposes, submitting the attorney affirmation of M. Katherine Sherman, and the affidavit of Calastri. Calastri also cross moves for an Order

to strike, preclude and/or compel, and for partial summary judgment.

As set forth in Lewis' affirmation, after the altercation, Calastri was initially charged with one count of criminal obstruction of breathing of blood circulation, four counts of assault of in the third degree, one count of petit larceny, one count of criminal possession of stolen property in the fifth degree, one count of criminal mischief in the fourth degree and two counts of harassment in the second degree. The criminal complaint was subsequently amended, charging Plaintiff with two counts of criminal obstruction of breathing or blood circulation, seven counts of assault in third degree, four counts of petit larceny, one count of criminal mischief in the fourth degree, two counts of unlawful imprisonment in the second degree, one count of coercion in the second degree and one count of computer tampering in the fourth degree.

On September 17, 2013, Calastri plead guilty to one count of criminal mischief in the fourth degree in full satisfaction of all the charges.

Pursuant to CPLR §3025(b), "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time at any time by leave of court.... Leave shall be freely given upon such terms as may be just...." "CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice." (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

Malicious prosecution actions may be based on prior lawsuits involving civil and administrative claims as well as those involving criminal charges. *Perryman v. Village of Saranac Lake*, 41 A.D. 3d 1080, 1081 [3d Dept 2007]. "The elements of the tort of malicious prosecution include initiation or continuation of a proceeding despite the lack of probable cause, termination of that proceeding favorable to the party there sued and now aggrieved as plaintiff, and a showing of malice in the pursuit of that underlying proceeding." *Honzawa v. Honzawa*, 268 A.D 2d 327, 329 [1st Dept 2000].

Here, Overlock is seeking to add a counterclaim of malicious prosecution arising from this action. However, as Overlock's proposed malicious prosecution claim is being made in connection with this still pending action, not a prior action, the proposed amendment to add such a claim is plainly lacking in merit.

Overlock also moves, pursuant to CPLR §3212(a), for partial summary judgment with respect to Plaintiff's fourth cause of action alleging false arrest on the basis that Plaintiff's plea of guilty in the related criminal case estops him claiming false arrest. Overlock contends that Calastri's plea of guilty to the charge of criminal mischief in the fourth degree in full satisfaction of all of the criminal charges he faced establishes Overlock's affirmative defense to Calastri's claim.

Calastri opposes, contending that his guilty plea to one charge of criminal mischief in the fourth degree related to Defendant's allegation that Plaintiff had broken her iPhone in September 2011, not the charges on which Plaintiff was arraigned and charged with on February 11, 2012, which were based on Defendant's allegations that Plaintiff had choked her, pulled her hair, bitten her cheek, pushed her, and hit her.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

"It is settled that a plaintiff asserting a common-law claim for false arrest must demonstrate that: the defendant intended to confine the plaintiff; the plaintiff was conscious of the confinement; the plaintiff did not consent to the confinement; and the confinement was not otherwise privileged." (*Marrero v. City*

of New York, 33 A.D.3d 556, 556-57 [1st Dept. 2006]).

“In an action to recover damages for false arrest based on a warrantless arrest, the defendant has the burden of proving legal justification as an affirmative defense.” *Rakidjian v. County of Suffolk*, 28 A.D.3d 734, 735 [2d Dep’t 2006].

The existence of probable cause is a complete defense to an action for false arrest. (*Marrero*, 33 A.D.3d at 556-57). Probable cause to arrest exists where there is information sufficient to support a reasonable belief that an offense has committed. (*Id.*). To determine whether a police officer has probable cause to arrest, the court looks to the totality of the circumstances at the time of the arrest. (*Id.*).

A plaintiff’s guilty plea and conviction “conclusively establish[es] probable cause for his arrest, thus negating an essential element of his cause of action sounding in malicious prosecution, and establishing the respondent’s affirmative defense to the causes of action sounding in false arrest and false imprisonment.” See *Bennett v. New York City Housing Authority*, 245 A.D. 2d 254, 254-55 [2d Dept 1998] (holding that plaintiff’s plea of guilty to disorderly conduct in satisfaction of the arrest charges which were for assault and resisting arrest “conclusively established probable cause for his arrest, thus negating an essential element of his cause of action sounding in malicious prosecution, and establishing the respondent’s affirmative defense to the causes of action sounding in false arrest and false imprisonment). Cf., *Rakidjian*, 28 A.D.3d at 735 (“Here, the defendants failed to meet their initial burden of demonstrating entitlement to summary judgment based on the existence of probable cause for the plaintiff’s arrest. The defendants failed to establish that the plaintiff’s plea of guilty to the unrelated charge of harassment was also in satisfaction of the criminal contempt charge, which was the offense arising out of the challenged arrest. Therefore, on this record, the plaintiff’s plea of guilty to harassment did not conclusively establish probable cause for his arrest.”)

Here, Calastri’s plea of guilty to the charge of criminal mischief in the fourth degree in full satisfaction of all of the criminal charges involved in this arrest and detention establishes Overlock’s affirmative defense to Calastri’s claim for false arrest. Overlock has conclusively established probable cause for

Plaintiff's arrest and as such, Overlock's motion for partial summary judgment for dismissal of the Plaintiff's false arrest claim is granted.

While Calastri alleges that this case is similar to *Rakidjian*, this Court disagrees. In contrast to *Rakidjian*, it is undisputed that Plaintiff's guilty plea was in satisfaction of the charges in the final charging instrument, which included the arrest charges.

Calastri cross moves, pursuant to CPLR § 3126, for an Order:

- a) striking Overlock's Amended Answer with Counterclaims for violation of a Court Order requiring Overlock to provide authorizations for medical records, subject to a satisfactory confidentiality order, where Overlock demanded that the medical records be for "Attorney's Eyes Only," "an unacceptable and unreasonable condition, especially under the circumstances of this case where the parties were in an intimate relationship and have already shared information regarding medical conditions, and medications for treatments of psychological complaints"; and/or
- b) precluding Overlock from recovery for emotional, psychological, or mental distress, or other psychological or health-related damage, and dismissing all claims that sound in intentional infliction of emotional distress, on the grounds that defendant is in violation of a Court Order requiring her to provide authorizations for medical records;
- c) An Order, pursuant to CPLR § 3124, compelling Overlock to produce authorizations permitting the exchange of medical, psychiatric, and psychological information and directing defendant to appear for a deposition after the medical records are procured; and
- d) An order pursuant to CPLR §§ 2307 and 3120 for the issuance of a Subpoena Duces Tecum and for Testimony, "requiring the City of New York, by and through its Police Department, the New York City Police Department, to appear for a deposition, by its Police Officers, "John" Bradshaw, and Officer Bradshaw's partner, a Police Officer believed to be named Murphy, and requiring said police officers to produce the memo books and other records pertaining to this matter, and requiring the said

officers to appear and give testimony regarding the statements they took from Alessandro Calastri and Hannah Overlock on February 17, 2012"; and

e) An Order, pursuant to CPLR § 3212, granting Calastri partial summary judgment dismissing the fourth and eighth counterclaims contained in defendant's Amended Answer with Counterclaims.

As for Calastri's motion concerning Overlock failure to provide authorizations for medical records and Defendant's unwarranted insistence that they would do so only if the documents were marked for "Attorney's Eyes Only," Overlock is directed to produce the requested authorizations permitting the exchange of medical, psychiatric, and psychological information to appear for a deposition after the medical records are obtained without any "Attorney's Eyes Only" designation.

Calastri's cross-motion further seeks the issuance of a Subpoena Duces Tecum and for Testimony from the Police Department. Defendant opposes only on the basis that Plaintiff has now waived the request. Plaintiff is entitled to the issuance of the Subpoena, and is directed to provide a proposed Subpoena to the Court for issuance of the same.

Calastri's cross motion further seeks partial summary judgment with respect to Overlock's counterclaims for conversion and frivolous claims.

Calastri seeks summary judgment with respect to Overlock's fourth counterclaim for conversion on the ground that it is duplicative of her third counterclaim for trespass to chattel. Calastri argues that the causes of action are duplicative because they both arise out of the same facts and alleged damages. Both Overlock's fourth and third counterclaims may proceed.

Plaintiff also seeks summary judgment with respect to Overlock's eighth counterclaim, which is for "frivolous claims" under CPLR §8303-a. The eighth counterclaim alleges, "The claims brought by Plaintiff have no basis in fact and instead are retaliatory in nature, designed to continue Plaintiff's harassment and malicious injury of Ms. Overlock. Plaintiff's claims against Ms. Overlock are frivolous pursuant to Civil Law and Rules CPLR §8303-a, and entitle Ms. Overlock to an award of costs and reasonable attorneys' fees."

Under CPLR § 8303-a, the court is permitted, in certain actions, to award a successful party costs and attorney's fees if the court determines that the claims or counterclaims brought by the other party are frivolous. *See* CPLR § 8303-a. In light of the balance of the claims still pending, such motion is premature.

Wherefore, it is hereby,

ORDERED that Defendant's motion to amend is denied; and it is further

ORDERED that Defendant's motion for partial summary judgment with respect to Plaintiff's fourth cause of action for false arrest is granted and Plaintiff's fourth cause of action is dismissed; and it is further

ORDERED that Plaintiff's cross motion is granted only to the extent that Defendant is compelled to produce the requested medical authorizations within 30 DAYS of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that the parties are reminded that they must appear for their scheduled conference at 80 Centre Street, Room 327, on May 27, 2014 at 9:30 a.m.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: APRIL 28, 2014


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION... X... NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE