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INDEX No. 08-18796
CAL No. 12-02067OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 4-2-13
ADJ. DATE
Mot. Seq. # 002 - MotD
003 - XMG; CASEDISP

JOHN T. BOUCHER,

Plaintiff,

- against -

TIMES-REVIEW NEWSPAPERS, INC., and BRANDON R. JOCHUM,

Defendants.

WICKHAM, BRESSLER, GORDON & GEASA
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Upon the following papers numbered 1 to 24 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 20; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 21 - 22, 23 - 24; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment against the defendant Brandon R. Jochum, dismissing the counterclaim in said defendant's answer, and striking said defendant's answer is granted to the extent that said defendant's counterclaim is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion by the defendant Brandon R. Jochum for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the causes of action against him, and directing an immediate trial of his counterclaim, is granted to the extent that the complaint is dismissed, and is otherwise denied.

This action was commenced as the result of an incident which occurred between the plaintiff and the defendant culminating in the plaintiff being arrested and accused of assaulting the defendant. Approximately two months later the charges were dropped. The complaint sets forth four causes of

action against the defendant including malicious prosecution, false arrest, abuse of process and defamation, respectively. The defendant's counterclaim seeks damages for personal injuries alleged to be the result of the plaintiff's assault and battery of the defendant. By order dated August 6, 2010, the Court (Baisley, J.) dismissed the complaint against the defendant Times-Review Newspapers, Inc. The plaintiff now moves for summary judgement against the defendant Brandon R. Jochum (defendant). However, the Court will first address the defendant's cross motion, as this will resolve many of the issues herein.[1]

The defendant cross-moves, in essence, to dismiss the complaint, alleging that there are no issues of fact regarding his liability in this action. 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In support of his motion, the defendant submits, among other things, the pleadings, the transcript of his deposition testimony, his affidavit, and a copy of the misdemeanor information and attached witness statements regarding the incident. In his sworn misdemeanor information, the defendant states that the plaintiff "on or about Sunday, May 20, 2007 at about 4:33 am, ... along with Steven Cook and Thomas Clark, did punch and kick the [defendant] about the face, head and body ..." In a sworn statement given to the police regarding this incident, the defendant states that he was at a bar with his ex-girlfriend Sarah and his sister, and that he and the plaintiff were joking about the plaintiff's beard. His group went to a second bar at approximately 2:30 a.m., and saw the plaintiff there. The defendant gestured "call me," and the plaintiff's friend, Thomas Clark (Clark), took offense and started yelling at the defendant. The defendant asked the plaintiff to tell Clark that it was a joke, and the plaintiff responded that "He's my friend, I'll back him up." The defendant states that he was upset and went outside to sit in Sarah's car "to cool off for 5-10 minutes," but still felt "antsy" and took a walk towards the local high school. He heard people talking behind him, saying "I was going to kick his ass," and similar comments, and turned around to see the plaintiff and his friends. He heard one of them say "that is him" and, as they walked quickly towards him, he called Sarah on his phone to ask her to come to the school because "they were starting with him." Clark started calling him names, and "before [the defendant] knew it" Steven Cook (Cook) was on top of him. The defendant states that "I had my eyes closed and felt hits coming from both sides of my head. I don't know if it was punches or kicks but it

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[1] The record reveals that the motion and cross motion, along with the respective reply papers, are essentially in opposition to the other, and raise or refute the salient issues herein.

was definitely coming from another person. I got kicked in the chest, I was in the fetal position." He then saw police cars arrive.

In his sworn statement given to the police, Cook states that he was at a bar with the plaintiff and Clark, they then walked to a second bar and had a few drinks. At the second bar, "a kid there started to pick on [the plaintiff] because of his appearance," and Clark "started an argument with this kid because he was making fun of us." He indicates that he did not recall seeing the guy leave. However, the three of them decided to walk to his house in Cutchogue. As they were walking towards the high school, he noticed a person across the street, who started yelling at them, and he realized that it was the guy from the bar. Cook states that he and the plaintiff kept walking, but Clark stopped. The "guy came over to [Clark] in the middle of the road. I tried to stop the argument. The guy pushed me away and I fell down. The guy took a swing at [Clark]," and the two of them were fighting on the ground. He states that while he was on the ground he kicked the guy with his right foot.

Sarah Kaufman (Sarah) also gave a sworn statement to the police on the day of this incident. In her statement she states that she was in a bar with the defendant and his sister at about 2:30 to 3:00 a.m. They started complimenting a guy with a beard because the defendant "used to have one." The guy with the beard and the defendant "joked about the beard to each other a few more times." She indicates that her group finished their drinks and left the bar, and that the guy and his friends had left approximately 20 minutes earlier. They went to a second bar and saw the plaintiff and his friends there. Just before last call, the defendant waved to the plaintiff, and one of the plaintiff's friends got mad, and the defendant walked over to see why the guy was upset. An argument started, and the defendant went outside to calm down. She saw the plaintiff and his two friends follow the defendant outside. When she walked outside, the defendant had already walked away. A few minutes later, the defendant called her cell phone and said "You better get over here, I am up by the high school and these guys are starting with me." The cell phone went dead, so she ran up to the high school where she saw the defendant, three other guys and the police. The police had handcuffed the three and put them into police cars.

At his deposition taken on May 23, 2012, the defendant testified that he did not recall when he signed the subject misdemeanor information, if anyone explained its purpose, or if he read it prior to signing it. He gave a sworn statement to the police, read it, and initialed any changes that were made. He stated that he told the police the truth, and everything that happened on the night of this incident. However, he did not recall if he told the police that there were details about the event missing from his statement. He indicated that, as he now reads the statement at this deposition, he has become aware that some details about the event are missing. The defendant further testified that he recalls telling the police officer who took his statement that he had been pulled down from behind, that the plaintiff had snuck behind him, that he remembers being kicked "from behind," and that the plaintiff was behind him at the time. He acknowledged writing a letter to a judge to obtain an order of protection against the plaintiff based on advice from a clerk at the court. However, he does not know if an order of protection was ever issued. The defendant testified that the first physical contact in this fight was when Clark punched him, that he then felt himself being pulled down from behind by a hand on his shoulder, and that he was then on the ground with Clark on top of him. He stated that he felt himself being hit from behind, and that the plaintiff was the only person behind him. He did not see the plaintiff strike him, and he did not recall where the injuries to his head were located.

In his affidavit in support of the cross motion, the defendant essentially repeats his account of the incident. He states that Cook's statement to the police is incomplete as it leaves out "details of the assault as I testified to in my deposition," and the plaintiff's "role in the fight."

First Cause of Action for Malicious Prosecution

In order to state a claim for malicious prosecution, the plaintiff must establish the following four elements: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of proceedings in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice (*see* ***Smith-Hunter v Harvey,*** 95 NY2d 19, 712 NYS2d 438 [2000]). It is well settled that in regard to the first element, the mere reporting of a crime to the police is insufficient to sustain the claim. Here, the defendant reported the alleged assault to the police department. A civilian complainant, who furnishes information, concerning what he at the time considers to be a crime, to law enforcement authorities, who are free to exercise their own judgment as to whether as arrest should be made and criminal charges filed, will not be held liable for false arrest and malicious prosecution (*see* ***Quigley v City of Audburn,*** 267 AD2d 978, 701 NYS2d 580 [4th Dept 1999]; ***DeChateau v Metro-North Commuter R. Co,*** 253 AD2d 128, 688 NYS2d 12 [1st Dept 1999]). It must be shown that the defendant played an active role in the prosecution, such as giving advice and encouragement or importuning to the authorities to act. The mere act of reporting a crime to the police is insufficient to support an assertion that an individual caused a proceeding to be commenced (*see* ***Present v Avon Prod.,*** 253 AD2d 183, 687 NYS2d 330 [1st Dept 1999]; *lv app dism* 93 NY2d 1032, 697 NYS2d 555 [1999]; ***Viza v Town of Greece,*** 94 AD2d 965, 463 NYS2d 970 [4th Dept 1983]).

Here, the defendant provided the police authorities with information and cooperated in their investigation. In this regard the defendant has established his prima facie entitlement to summary judgment on the issue. The plaintiff has failed to provide any evidence of the defendant's alleged malice in reporting this incident to the police department beyond mere conclusions and unsubstantiated allegations which are insufficient to raise any triable issues of fact (***Zuckerman v City of New York***, *supra*). Thus, the Court need not proceed any further to consider the other elements of malicious prosecution. A failure to establish any of the required elements defeats the entire claim (*see* ***Brown v Sears Roebuck and Co.***, 297 AD2d 205, 746 NYS2d 141 [1st Dept 2002]). Accordingly, the defendant's motion for summary judgment seeking to dismiss the plaintiff's first cause of action is granted.

Second Cause of Action for False Imprisonment

To establish a cause of action alleging false arrest and false imprisonment, a plaintiff must show that (1) the defendant intended to confine him or her, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged (*see* ***Broughton v State of New York***, 37 NY2d 451, 373 NYS2d 87 [1975]; ***Petrychenko v Solovey***, 99 AD3d 777, 952 NYS2d 575 [2d Dept 2012]; ***Holland v City of Poughkeepsie***, 90 AD3d 841, 935 NYS2d 583 [2d Dept 2011]; ***Rivera v County of Nassau***, 83 AD3d 1032, 922 NYS2d 1032 [2d Dept 2011]). A plaintiff cannot prevail on causes of action based upon false arrest and false imprisonment if there was probable cause to believe that the plaintiff committed the underlying offense

(*see* ***Petrychenko v Solovey***, *supra;* ***Whyte v City of Yonkers***, 36 AD3d 799, 828 NYS2d 218 [2d Dept 2007]).

Here, the defendant provided the police authorities with information sufficient to establish probable cause for the plaintiff's arrest and confinement. In this regard the defendant has established his prima facie entitlement to summary judgment on the issue. The plaintiff has failed to raise a question issue of fact requiring a trial of the issue. Accordingly, the defendant's motion for summary judgment seeking to dismiss the plaintiff's second cause of action is granted.

Third Cause of Action for Abuse of Process

In ***Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assoc., Inc., Local 1889, AFT-CIO***, 38 NY2d 397, 380 NYS2d 635 (1975), the Court of Appeals stated the necessary elements of an abuse of process claim. The elements are: (1) there must be a 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 an economic or social excuse or justification, and (3) the defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process (*see* ***Parr Meadows Racing Assn. V White***, 76 AD2d 858, 428 NYS2d 509 [2d Dept 1980]). The defendant utilized the legal system in a manner consonant with the purpose for which that particular legal system was designed (*see e.g.* ***Raved v Raved***, 105 AD2d 735, 481 NYS2d 170 [2d Dept 1984] *citation omitted).* The plaintiff has failed to allege any evidentiary facts sufficient to demonstrate that the defendant knowingly and willingly contrived and abused the criminal justice system to the detriment of the plaintiff (*see* ***Zuckerman v City of New York***, *supra*; *see also* ***W.I.L.D. W.A.T.E.R. Ltd. v Martinez***, 152 AD2d 799, 543 NYS2d 579 [3d Dept 1989]; ***Williams v Pinks, Feldman & Brooks***, 141 AD2d 723, 530 NYS2d 162 [2d Dept 1988]; ***Hornstein v Wolf***, 109 AD2d 129, 491 NYS2d 183 [2d Dept 1985], *affd* 67 NYS2d 721, 499 NYS2d 938 [1986]; ***Iovinella v General Elec. Credit Corp.***, 79 AD2d 748, 434 NYS2d 806 [3d Dept 1980] *app dism* 53 NY2d 937, 440 NYS2d 1029 [1981] *app den* 53 NY2d 607, 440 NYS2d 1027 [1981]). Accordingly, the defendant's motion for summary judgment seeking to dismiss the plaintiff's third cause of action is granted.

Fourth Cause of Action for Defamation

"Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. The elements are a false statement, published without a privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). "In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven" (***Gatz v Otis Ford,*** 274 AD2d 449, 711 NYS2d 467 [2d Dept 2000]). The per se categories consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business or profession; and (3) the plaintiff has contacted a loathsome disease among others (*see* ***Matherson v Marchello,*** 100 AD2d 233,

473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages" (***60 Minute Man, Ltd. v Kossman,*** 161 AD2d 574, 555 NYS2d 152 [2d Dept 1990]).

Here, the defendant contends that he is entitled to summary judgment because his statements about the alleged assault were protected by a qualified privilege. A qualified privilege arises when a person makes a good faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest. The underlying rationale of this common interest privilege is that, so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded (***Williams v County of Genesee***, 306 AD2d 865, 762 NYS2d 724 [4th Dept 2003]; ***Sanderson v Bellevue Maternity Hosp.***, 259 AD2d 888, 686 NYS2d 535 [3d Dept 1999]). The interest must be expressed in a reasonable manner and for a proper purpose (***Cucinotta v Deloitte & Touche, LLP***, 20 Misc3d 1144A, 872 NYS2d 689 [Sup Ct, New York 2008]; *see also* ***Toker v Pollack***, 44 NY2d 211, 405 NYS2d 1 [1978]). Generally, statements to police officers and district attorneys are protected by "qualified immunity," as long as they are given in "good faith" (***Present v Avon Products, Inc.***, 253 AD2d 183, 687 NYS2d 330 [1st Dept 1999]). However, the privilege will be lost where the statement was not made for its stated purpose or if it was made with malice, that is to say with ill will, spite, or culpable recklessness (***Lieberman v Gelstein,*** 80 NY2d 429, 590 NYS2d 857 [1992]; ***Cucinotta v Deloitte & Touche, LLP,*** *supra*).

The defendant has established his prima facie entitlement to summary judgment regarding writings and statements made by him to law enforcement officials, based on a qualified privilege. It is therefore incumbent upon the plaintiff to show that the writings and statements are nonetheless actionable because they were false and motivated by malice (***Park Knoll v Schmidt***, 59 NY2d 205, 464 NYS2d 424 [1983]; ***Toker v Pollack***, *supra*). However, conclusory allegations of malice, or statements based upon surmise, conjecture, and suspicion are insufficient to defeat a claim of qualified privilege (***Shover v Instant Whip Processors***, 240 AD2d 560, 658 NYS2d 661 NYS2d 661 [2d Dept 1997]; ***Grier v Johnson***, 295 AD2d 888, 686 NYS2d 535 [3rd Dept 1999]; *see also* ***Christenson v Gutman***, 249 AD2d 804, 671 NYS2d 835 [3d Dept 1998]). The plaintiff has not submitted any evidence that the defendant's written or oral statements to the police were made with malice, ill will, or culpable recklessness. Accordingly, the defendant's motion for summary judgment which seeks to dismiss the fourth cause of action is granted.

The complaint is dismissed in its entirety. However, that portion of the defendant's motion for an order directing an immediate trial of his counterclaim is denied for the reasons set forth below.

The plaintiff moves for summary judgment and dismissal of the defendant's counterclaim and affirmative defenses on the grounds, in essence, that the plaintiff did not assault the defendant, and that the defendant knew that such an accusation was false. In support of his motion, the plaintiff submits the pleadings, his affidavit, the affirmation of his attorney, the misdemeanor information and attached witness statements regarding the incident, and the order of protection issued against him. In his affidavit, the plaintiff swears that he never struck or kicked the defendant, that the defendant has falsely

accused him of assault, and that the defendant and Clark fought each other. He states that any interaction that he had with the defendant on the evening of the incident was "casual and friendly, stemming primarily from [the defendant's] compliments about a beard that I had at the time." He indicates that the statements to the police show that the defendant and Clark got into an argument, that he and Cook decided to walk home, and that "Clark also walked away from the bar with us." The plaintiff further swears that when his group was three to four blocks from the bar, the defendant appeared, approached them, and began fighting with Clark, and that he walked away. He states that the defendant obtained an order of protection against him, despite the fact that he did not know where the defendant lived or worked, and he suggests that the reason was to harass him and subject him to "unreasonable and unlawful restraint." He states that "the absence of any evidence of assault against me supported the dismissal of the criminal charge on the motion of the District Attorney at my first appearance in court following arraignment."

The Court finds that the plaintiff has failed to submit evidence sufficient to raise a question of fact regarding the critical issues which are determinative of his four causes of action, as set forth above. That is, with respect to those four causes of action, whether the defendant acted with actual malice, the alleged lack of probable cause herein, that the defendant acted outside the legitimate ends of the legal process, or that his sworn statement was not made for its stated purpose or was made with malice, ill will, spite, or culpable recklessness. The Court further finds that the plaintiff's contentions in support of his request to dismiss the plaintiff's affirmative defenses are without merit or academic. The motion and cross motion being directly contrary to the other, the Court finds that the plaintiff has failed to establish his right to summary judgment in his favor.

In addition, the plaintiff's attorney contends that the defendant's counterclaim should be dismissed on the ground that the defendant has failed to submit any evidence that the plaintiff assaulted him. The defendant's counterclaim seeks damages for personal injuries alleged to be the result of the plaintiff's assault and battery of the defendant. The record reveals that the sworn statements given to the police, including that of the defendant, do not contain any factual allegations against the plaintiff. The Court finds that the defendant's recent affidavit, and his deposition testimony, given five years after this incident, that he just became aware that his sworn statement lacked certain details, and that the plaintiff pulled him down and kicked him to be incredible as a matter of law. While the determination of a witness' credibility is, in general, within the province of the trier of fact, it is also recognized that when evaluating testimony, a court should not discard common sense (***Sexstone v Amato***, 8 AD3d 1116, 778 NYS2d 635 [4th Dept 2004]; ***Loughlin v City of New York***, 186 AD2d 176, 587 NYS2d 732 [2d Dept 1992]). Testimony which is incredible and unbelievable, that is, contrary to experience or self-contradictory, should be disregarded as being without evidentiary value, even though it has not been contradicted by other testimony (***Malanga v City of New York***, 300 AD2d 549, 752 NYS2d 391 [2d Dept 2002]). Given the defendant's testimony that he told the police everything that happened on the night of this incident, and the importance of the details allegedly missing from the defendant's statement, the Court finds the defendant's recent claims to be simply incredible (*see* ***Cruz v Port Authority of New York***, 243 AD2d 251, 664 NYS2d 514 [1st Dept 1997]; ***Phillips v Katzman***, 90 AD3d 436, 933 NYS2d 859 [1st Dept 2011]).

Accordingly, the plaintiff's motion for summary judgment, dismissing the defendant's counterclaim, and striking said defendant's answer is granted to the extent that said defendant's counterclaim is dismissed, and is otherwise denied

Dated: JUNE 10, 2014.

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION