

Masciello v Incorporated Vil. of Lloyd, Harbor

2015 NY Slip Op 30918(U)

May 19, 2015

Supreme Court, Suffolk County

Docket Number: 7793/14

Judge: Joseph C. Pastorella

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS/TRIAL PART 34 – SUFFOLK COUNTY**

PRESENT:

HON. JOSEPH C. PASTORESSA

JUSTICE OF THE SUPREME COURT

Mot Seq: #001-MG

#002-MD

#003-Mot-d

MICHAEL MASCIELLO, x

Plaintiff(s),

ATTYS FOR PLAINTIFF(S):

ANTHONY J. MONTIGLIO, ESQ.
300 OLD COUNTRY RD., SUITE 11
MINEOLA, NEW YORK 11501

-against-

ATTYS FOR DEFENDANT(S):

MORRIS DUFFY ALONSO & FALEY
2 RECTOR STREET, 22nd FLOOR
NEW YORK, NEW YORK 10006

INCORPORATED VILLAGE OF LLOYD,
HARBOR, POLICE DEPARTMENT OF
THE INCORPORATED VILLAGE OF
LLOYD HARBOR, KARL R. KIENINGER,
GREGORY R. MULLER and MICHELLE
MASCIELLO,

THE SALLAH LAW FIRM, P.C.
110 WASHINGTON AVENUE
HOLTSVILLE, NEW YORK 11742

Defendant(s).

x

Pages Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (affirmations) Annexed	_____ 125
Opposing Affidavits (Affirmations)	_____ 4673
Reply Affidavits (Affirmations)	_____ 83
_____ Affidavit (Affirmation)	_____
Other Papers	_____

Upon the foregoing papers, the defendants, Incorporated Village of Lloyd Harbor, Police Department of the Incorporated Village of Lloyd Harbor, Karl R. Kieninger, and Gregory R. Muller (hereinafter collectively referred to as "the Village"), move for an order (motion sequence #001) dismissing plaintiff's summons and complaint as against the defendant Village pursuant to CPLR §3211(a)(7) on the grounds that plaintiff has failed to state a cause of action for false arrest and malicious prosecution. The defendant, Michelle Masciello, cross- moves for an order (motion sequence #003) to dismiss the complaint pursuant to CPLR §3211(a)(7) on the grounds that plaintiff failed to state a cause of action for false arrest and malicious prosecution. The plaintiff, Michael Masciello, cross-moves for an order (motion sequence #003) granting

summary judgment on the issue of liability against all defendants herein pursuant to CPLR §3212. It is,

ORDERED, that the defendant Village's motion to dismiss is granted; and it is further

ORDERED, that the defendant Michelle Masciello's motion to dismiss pursuant to CPLR §3211(a)(7) is denied; and it is further

ORDERED, that the plaintiff's motion for summary judgment pursuant to CPLR §3212 against the defendant Village is denied as moot and as to the defendant Michelle Masciello is denied.

This is an action sounding in false arrest (first cause of action) and malicious prosecution (second cause of action) arising out of an incident that allegedly occurred on April 21, 2013 between plaintiff, Michael Masciello, and defendant, Michelle Masciello, at the marital home located at 14 Mallard Drive, Lloyd Harbor, New York. The plaintiff avers that on April 21, 2013 he was lawfully present in the marital home when he began videotaping his wife while telling her to leave the kitchen area of the marital home so that he could cook breakfast for his son on his parenting day. The defendant, Michelle Masciello, avers that she also was lawfully present in the marital home when plaintiff began videotaping her and that after a short while he left her presence and then returned, again videotaping her, naked with an erection; then returned a third time with his underwear on gyrating his hips while still videotaping her. The defendant, Michelle Masciello, claims that these actions made her feel threatened and alarmed. The plaintiff denies such actions and avers that he merely continued to record her because in the past she had made false allegations against him which lead to him being arrested. The defendant, Michelle Masciello, subsequently went down to the Lloyd Harbor Police Department and filed a formal complaint where she signed a statement alleging that plaintiff's actions made her feel threatened and alarmed and signed an information related to the charge of harassment in the 2nd degree pursuant to Penal Law §240.26(3).

The defendant Village avers that upon receipt of both those documents signed by defendant, Michelle Masciello, Sergeant Gregory Muller called the Suffolk County District Attorney's office and spoke with Assistant District Attorney (ADA) William Reynolds who determined the District Attorney (DA) would prosecute the plaintiff under harassment theory. The defendant Village further avers that it played no role in determining whether harassment charges would continue against plaintiff. The defendant Village avers that after the DA decided to prosecute the matter, it called plaintiff instructing him to come down to the Lloyd Harbor Police Department, whereby it issued him a desk-appearance ticket to appear in village court on May 1, 2013 to answer harassment charges brought by his wife. The plaintiff was charged with violation of Section 240.26, Subdivision 3 of the Penal Law, to wit: harassment in the second degree. The defendant Village avers that at no point in time was plaintiff ever in the custody of the police. The defendant Village further avers that the sworn statements by defendant, Michelle Masciello, gave them probable cause to arrest the plaintiff. The plaintiff was tried on or about July 3, 2013 before the Village Justice of the Incorporated Village of Lloyd Harbor which resulted in a verdict of not guilty.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851). Failure to make such a

showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014). In addition, it is well established that the court may search the record and grant summary judgment in favor of the nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court such as the case at bar (see, CPLR 3212(b); see also, East End Cement & Stone, Inc. v Carnevale, 73 AD3d 974; Whitman Realty Group, Inc. v Galano, 52 AD3d 505; Netjets, Inc. v Signature Flight Support, Inc., 43 AD3d 1014; Ey v Mecca, 41 AD3d 534).

“To establish a cause of action for false arrest, the plaintiff must show: (1) the defendant intended to confine him, (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” (Gebbie v Gertz Div. of Allied Stores of New York, Inc., 94 AD2d 154, 168-169, citing Broughton v State of New York, 37 NY2d 451, cert. den. *sub. nom.* Schanbarger v Kellogg, 423 US 929). The defendant has the burden of proving legal justification, which may be established by proving probable cause existed at the time of the arrest (see, Broughton v State of New York, 37 NY2d 451, 458). In addition, it is well established that “a plaintiff cannot prevail on causes of action based upon false arrest . . . against police officers if the police officers had probable cause to believe that the plaintiff committed the underlying crime” (Wasilewicz v Monroe Police Dept, 3 AD3d 561; see also, Carleton v Nassau County Police Dept, 306 AD2d 365; Broughton v State of New York, supra). Furthermore, as a general rule, it is legally sufficient for the police to rely on information provided by an identified citizen accusing another individual of a specific crime as probable cause to arrest (Minott v City of New York, 203 AD2d 365 ; Mercado v City of New York, 269 AD2d 576; Wasilewicz v Monroe Police Dept, supra). In addition, a civilian defendant will not be held liable for false arrest if he/she merely “furnishes information to law enforcement authorities who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed” (Petrychenko v Solovey, 99 AD3d 777, 779; see also, Henderickson-Brown v City of White Plains, 92 AD3d 638, 639-40). Rather, for a civilian to be liable for false arrest, the civilian “must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition” (Oszustowicz v Admiral Ins Brokerage Corp, 49 AD3d at 516).

To assert a cause of action for malicious prosecution, the plaintiff must establish: “(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice” (Broughton v State of New York, 37 NY2d 451, 457; see also, Johnson v Kings County Dist. Attorney’s Office, 308 AD2d 278, 286; Smith-Hunter v Harvey, 95 NY2d 191). This burden is a heavy burden for the plaintiff (see, Smith-Hunter v Harvey, supra). Probable cause is a complete defense to the claim of malicious prosecution (Fortunato v City of New York, 63 AD3d 880; MacDonald v Town of Greenburgh, 112 AD3d 586). “The existence or absence of probable cause becomes a question of law to be decided by the court only where there is not real dispute as to the facts or the proper inferences

to be drawn surrounding the arrest” (Fortunato v City of New York, supra; see also, Fausto v City of New York, 17 AD3d 520, 521). To satisfy the “actual malice” element, the plaintiff must establish that the defendant engaged in some “deliberate act punctuated with awareness of conscious falsity” (Santoro v Town of Smithtown, 40 AD3d 736, 738; Best v Genung’s Inc., 46 AD2d 550, 552 ; Munoz v City of New York, 18 NY2d 6).

Here, upon searching the record, the defendant Village demonstrated its prima facie entitlement to judgment as a matter of law dismissing the plaintiff’s false arrest claim and malicious prosecution claim. The defendant Village based their arrest of the plaintiff on probable cause that arose out of the complaint sworn to under oath by defendant Michelle Masciello. Specifically, the defendant Village submitted evidence that they acted upon information provided by a known citizen informant that provided them with probable cause to arrest the plaintiff (see, Rivera v County of Nassau, 83 AD3d 1032; Martinez v City of Schenectady, 97 NY2d 78; Wasilewicz v Village of Monroe Police Dept., 3 AD3d 561; Du Chateau v Metro-North Commuter R.R. Co., 253 AD2d 128; Eisenkraft v Armstrong, 172 AD2d 484). The defendant Michelle Masciello stated in her sworn statement that plaintiff exposed himself to her with an erection while videotaping her and then later only wearing underpants began gyrating his hips in a sexual manner while still videotaping her. She also stated that this conduct made her feel threatened and alarmed. The defendant Village’s reliance on these sworn statements was justified as probable cause to arrest the plaintiff for violating section 240.26 subdivision 3 of the New York Penal Law which provides that “[a] person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person...[h]e or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose” (N.Y. Penal L. §240.26). Since there was probable cause to believe that plaintiff had committed the crime of harassment in the second degree, there was also probable cause to prosecute plaintiff on that charge. In addition, with regard to the malicious prosecution claim, the defendant Village established that they did not engage in actual malice in prosecuting the plaintiff. The defendant Village submitted evidence showing the absence of any knowledge of the alleged falsity of the claim. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the defendant Village’s motion to dismiss the complaint against them is granted and the plaintiff’s cross-motion against the defendant Village is denied as moot.

As to plaintiff’s cross-motion for summary judgment on liability against the defendant Michelle Masciello, a court should only grant summary judgment if the pleadings and supporting documents, when viewed in the light most favorable to the nonmoving party, “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c) The requirement of a “genuine” issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party (Anderson v. Liberty Lobby, 477 U.S. 242, 248). Essentially, a court must decide “whether the evidence presents a sufficient disagreement to require submission to a trier of fact or whether it is so one-sided that one party must prevail as a matter of law” (Id. at 251-252.) The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden is only met if the moving party can prove there is a lack of evidence to support the nonmoving party’s case (Celotex Cor. v Catrett, 477 U.S. 317, 325). Here, the plaintiff failed to tender sufficient evidence to eliminate any material issues of fact from the case against the defendant Michelle Masciello establishing liability as a matter of law. In particular, as to the false arrest claim, there are material issues of fact as to whether defendant Ms. Masciello induced the

Village of Lloyd Harbor Police Department to act. As to the malicious prosecution claim, there material issues of fact as to whether the defendant Michelle Masciello deliberately made false allegations against the plaintiff. In the absence of eliminating material issues of fact, it is unnecessary to address the sufficiency of the opposing papers (see, Winegrad v N.Y.U. Medical Center, supra, at p 853. Accordingly, the plaintiff's motion for summary judgment on liability against the defendant Michelle Masciello pursuant to CPLR §3212 is denied.

Finally, the defendant Michelle Masciello's motion to dismiss the complaint for failure to state of a cause of action is denied. On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences" (Leon v Martinez, 84 NY2d 83, 87; see, Carillo v Stony Brook Univ., 119 AD3d 508, 508-509). The court is limited to "an examination of the pleadings to determine whether they state a cause of action," and the "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (Migliano v Bally Total Fitness of Greater N.Y., Inc., 20 NY3d 342, 351). "The test of the sufficiency of a pleading is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (V. Groppa Pools, Inc. v Massello, 106 AD3d 722, 723, quoting Pace v Perk, 81 AD2d 444, 449). "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" (Sokol v Leader, 74 AD3d 1180, 1181), and, if it does so, "the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one" (id. at 1181-1182, quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (Bokhour v GTI Retail Holdings, Inc., 94 AD3d 682, 683; Dolphin Holdings, Ltd. v Gander & White Shipping, Inc., 122 A.D.3d 901, 901-902). Here, accepting the facts as alleged as true and according the plaintiff every possible inference, the plaintiff has stated claims for false arrest and malicious prosecution against the defendant Michelle Masciello. Accordingly, the defendant Masciello's motion to dismiss the complaint is denied.

This shall constitute the decision and order of the court

DATED: May 19, 2015



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION ___ NON-FINAL DISPOSITION X