Pike v Soyars
2015 NY Slip Op 30922(U)
May 18, 2015
Supreme Court, Suffolk County
Docket Number: 13-28794
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 13-28794

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 - MotD

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LYLE PIKE, Plaintiff, - against - ELSA SOYARS, Defendant.	JEFFREY B. HULSE, ESQ. Attorney for Plaintiff 295 North Country Road Sound Beach, New York 11789 LIEB AT LAW, P.C. Attorney for Defendant 376A Main Street Center Moriches, New York 11934

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Upon the following papers numbered 1 to 59 read on this motion for leave to renew : Notice of Motion/ Order to Show Cause and supporting papers 1 - 54 ; Notice of Cross Motion and supporting papers 55 - 57 ; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers 58 -59 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for leave to renew her motion seeking dismissal of the complaint and the imposition of sanctions against plaintiff, which was denied by order of the Court dated January 17, 2014, is granted; and it is

ORDERED that, upon renewal, defendant's motion is granted to the extent set forth herein, and is otherwise denied.

Plaintiff Lyle Pike and defendant Elsa Soyars are the natural parents of two infant children, Ariana Pike and Zeus Pike. Defendant and her ex-husband, Michael Soyars, are the natural parents of Alexander Soyars, who is approximately nine years older than Ariana Pike. In late 2008, a Family Court proceeding was brought against Alexander Soyars for acts he allegedly committed against Ariana Pike that, if committed by an adult, would constitute the crime of sexual abuse. Plaintiff and defendant were living together with their infant children at the time of the alleged abuse by Alexander Soyars, but separated in 2009. That same year, plaintiff, on behalf of Ariana Pike, brought an action in this Court, assigned index number 41690/2009,

against defendant, Michael Soyars and Alexander Soyars, who was adjudicated a juvenile delinquent in the Family Court proceeding, alleging, among other things, that defendant and Michael Soyars "had reason to know that Alexander had previously exhibited sexually deviate tendencies." Plaintiff also brought a Family Court proceeding seeking custody of Ariana and Zeus Pike.

Subsequently, in January 2011, defendant filed two domestic incident reports against plaintiff, one of which was converted to a misdemeanor information charging him with stalking in the fourth degree. The stalking charge against plaintiff allegedly was dismissed by the Town of Southampton Justice Court on January 26, 2012. Thereafter, on June 13, 2013, defendant filed a family offense petition, assigned docket number O-10038-13, and obtained an ex parte temporary order of protection against plaintiff. The temporary order of protection directed plaintiff, among other things, to stay away from defendant and defendant's residence except to effectuate visitation. Two days later, while coaching a Little League baseball game in which his son was playing, plaintiff was arrested after defendant reported to police that he violated the stay away provision of the temporary order of protection. On June 20, 2013, Family Court Judge Martha Luft, after conducting a hearing on the matter and determining that the events on June 15 did not rise to the level of a family offense, dismissed defendant's Family Court petition and vacated the temporary order of protection against plaintiff. The Court notes that the Supreme Court action brought by plaintiff on behalf of Ariana Pike was discontinued as against defendant in 2011 as part of the settlement of the Family Court custody proceeding brought by plaintiff in 2009; the case remains active as against Michael Soyars and Alexander Soyars.

Thereafter, plaintiff commenced the instant action against defendant. The first cause of action is for malicious prosecution, and alleges defendant "maliciously and wrongfully" filed criminal complaints against him in June 2011. The second cause of action also is for malicious prosecution, but is based on defendant's alleged wrongful filing of the family offense proceeding in June 2013. The third cause of action is for abuse of process, and alleges defendant "abused the process of the courts for the sole purpose of doing harm to the plaintiff and manufacturing negative evidence against the plaintiff for use in the custody dispute between the parties." The fourth cause of action is for false arrest and false imprisonment, and the fifth cause of action is for defamation.

In December 2013, defendant moved for an order dismissing the complaint, arguing that no personal jurisdiction was obtained over her (see CPLR 3211 [a][8]), that the first and fifth causes of action are time-barred, and that complete defenses to the second and fourth causes of action can be established through documentary evidence (see CPLR 3211 [a][1], [5]). Defendant further argued that the first, second, fourth and fifth causes of action should be dismissed for failure to state a cause of action (see CPLR 3211 [a][7]), and that sanctions should be imposed against plaintiff for frivolous conduct, namely, the commencement of the instant action (see 22 NYCRR § 130-1.1 [c]). Plaintiff opposed the motion, asserting, among other things, that personal jurisdiction was obtained using substitute service at defendant's residence, and that the

motion papers were defective, because defendant failed to include copies of the summons and complaint. By order dated January 17, 2014, the undersigned denied defendant's dismissal motion, without prejudice to renewal within 30 days, based on the absence of the summons and complaint and an affidavit regarding the issue of personal jurisdiction. Later that same year, by order dated June 30, 2014, the undersigned denied, without prejudice, leave to renew the dismissal motion based on defendant's failure to include with her motion papers copies of the original moving and opposing papers.

Defendant now moves again for leave to renew her dismissal motion. Plaintiff opposes the motion on the ground that defendant failed to present any new facts that would change the determination on the prior motion or to provide a reasonable justification for not submitting the summons and complaint and an affidavit discussing the alleged lack of personal jurisdiction.

The application for leave to renew is granted. A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination," and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][2], [3]; see Singh v Avis Rent A Car Sys., Inc., 119 AD3d 768; Doviak v Finkelstein & Partners, LLP, 90 AD3d 696; Ramirez v Khan, 60 AD3d 748). While renewal must be denied when the moving party fails to present a reasonable justification for not submitting the additional evidence on the previous motion (see Deutsche Bank Trust Co. v Ghaness, 100 AD3d 585; Yebo v Cuadra, 98 AD3d 504; Eskenazi v Mackoul, 92 AD3d 828; Rowe v NYCPD, 85 AD3d 1001), "[l]aw office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion" (Nwauwa v Mamos, 53 AD3d 646, 649; see State Farm Fire & Cas. v Parking Sys. Valet Serv., 85 AD3d 761; Cruz v Castanos, 10 AD3d 277; Cole-Hatchard v Grand Union, 270 AD2d 447). Here, a reasonable explanation was offered for defense counsel's inadvertent omissions on the prior motions, and there has been no showing of any prejudice to plaintiff due to such omissions (see Brightly v Liu, 77 AD3d 874; Acosta v Rubin, 2 AD3d 657; Vita v Alstom Signaling, Inc., 308 AD2d 582).

Upon renewal, the branch of the motion seeking dismissal of the complaint for lack of personal jurisdiction is denied. Service of process must be made in strict compliance with the statutory methods for effecting service on a natural person set forth in CPLR 308 (Estate of Waterman v Jones, 46 AD3d 63, 65), and the burden of proving personal jurisdiction was acquired over a defendant rests on the plaintiff at all times (see Castillo v Star Leasing Co., 69 AD3d 551; Wells Fargo Bank, NA v Chaplin, 65 AD3d 588; Bank of Am. Natl. Trust & Sav. Assn. v Herrick, 233 AD2d 351). Although an affidavit of a process server is considered prima facie evidence of proper service under CPLR 308 (LNV Corp. v Forbes, 122 AD3d 805, 807; Deutsche Bank Natl. Trust Co. v Quinones, 114 AD3d 719, 719; Wells Fargo Bank, NA v Chaplin, 65 AD3d 588, 589; Scarano v Scarano, 63 AD3d 716, 716), a sworn denial of service with detailed facts rebutting the process server's affidavit raises an issue of fact as to whether service was properly effected (see Wells Fargo Bank, NA v Chaplin, 65 AD3d 588; Delgado v Velecela, 56 AD3d 515; Balendran v North Shore Med. Group, 251 AD2d 522; cf. 425 E. 26 th

St. Owners Corp. v Beaton, 50 AD3d 845). Further, to warrant a hearing on the issue of service of process, a defendant must swear to detailed and specific facts to rebut the statements in a process server's affidavit (Emigrant Mtg. Co. v Westervelt, 105 AD3d 896, 897; see JP Morgan Chase Bank, N.A. v Todd, 125 AD3d 933; Edwards, Angell, Palmer & Dodge, LLP v Gerschman, 116 AD3d 824).

The affidavit of plaintiff's process server avers that substitute service was effectuated by delivery at defendant's residence to a person of suitable age on November 6, 2013, and by mailing the summons by first class mail to defendant at her residence in an envelope bearing the legend "personal and confidential" six days later. In her affidavit in support of the motion, defendant alleges she was "not served with the summons and verified complaint in this action via personal service, by delivery of the summons and/or verified complaint to a person of suitable age and discretion, by delivery of the summons to my agent, or by having the summons affixed to my door." She further alleges she received the summons and complaint "via first class mail on November 14, 2013" and not "by any other means." Contrary to the assertions by defense counsel, such bare and unsubstantiated statements are insufficient to require a hearing to determine whether defendant was properly served with process (see Youngstown Tube Co. v Russo, 120 AD3d 1409; cf. Emigrant Mtg. Co. v Westervelt, 105 AD3d 896; Wells Fargo Bank, N.A. v Christie, 83 AD3d 824).

The branch of the motion seeking dismissal of the first cause of action under CPLR 3211 (a)(5) is granted. A claim for malicious prosecution is governed by the one-year statute of limitations (*see* CPLR 215 [3]). For purposes of a malicious prosecution claim, a criminal proceeding terminates in favor of the accused when the final disposition involves the merits and indicates the accused's innocence (MacFawn v Kresler, 88 NY2d 859, 860; see Cantalino v Danner, 96 NY2d 391; Hollender v Trump Vil. Coop., 58 NY2d 420; Bellissimo v Mitchell, 122 AD3d 560). The first cause of action, premised on domestic violence complaints against plaintiff filed by defendant with the Southampton Town Police Department in January 2011, one of which resulted in a criminal charge against him and was dismissed that same month, is time-barred (see 10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc., 81 AD3d 1366; Roman v Comp USA, Inc., 38 AD3d 751; Syllman v Nissan, 18 AD3d 221).

The branch of the motion seeking dismissal under CPLR 3211 (a) (7) is granted as to the third, fourth and fifth causes of action. When a party moves under CPLR 3211 (a) (7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (Sokol v Leader, 74 AD3d 1180). A court must determine whether, accepting the facts as alleged in the pleading as true and affording the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (Rovello v Orofino Realty Co., 40 NY2d 633, 635-636). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss"

(EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (Muka v Greene County, 101 AD2d 965, 965; see DiMauro v Metropolitan Suburban Bus Auth., 105 AD2d 236; Melito v Interboro Mut. Indem. Ins. Co., 73 AD2d 819; Greschler v Greschler, 71 AD2d 322). Thus, "factual allegations which are flatly contradicted by the record are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action'" (Deutshe Bank Natl. Trust Co. v Sinclair, 68 AD3d 914, 915, quoting Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 46 AD3d 530, 530).

As to the third cause of action, abuse of process has three essential elements that must be established by a plaintiff: (1) regularly issued process, either criminal or civil, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (Curiano v Suozzi, 63 NY2d 113, 116; see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 38 NY2d 397; Johnson v Kings County Dist. Attorney's Off., 308 AD2d 278). "The key to this tort is not impropriety in obtaining the process, but impropriety in using it" (Matter of Simithis v 4 Keys Leasing & Maintenance Co., 151 AD2d 339, 341). Here, the complaint fails to sufficiently allege that defendant made a perverse use of judicial process after it was issued (see Curiano v Suozzi, 63 NY2d 113; Place v Ciccotelli, 121 AD3d 1378; Perez v Mount Sinai Med. Ctr., 297 AD2d 615; Butler v Ratner, 210 AD2d 691).

As to the fourth cause of action, to establish a false arrest claim, a plaintiff must prove (1) the defendant intended to confine the plaintiff, (2) the defendant was aware of the resulting confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged (Washington-Herrera v Town of Greenburgh, 101 AD3d 986, 987; Rivera v County of Nassau, 83 AD3d 1032, 1033). When seeking establish the liability of a civilian defendant for false arrest, however, a plaintiff must show more than that the defendant reported the crime or participated in the prosecution (see Rivera v County of Nassau, 83 AD3d 1032). Instead, the plaintiff must show that the complainant "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (Du Chateau v Metro-North Commuter R.R. Co., 253 AD2d 128, 131; see Donnelly v Nicotra, 55 AD3d 868; Lupski v County of Nassau, 32 AD3d 997). "A civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" (Du Chateau v Metro-North Commuter R.R. Co., 253 AD2d 128, 131; see Williams v Amin, 52 AD3d 823; Baker v City of New York, 44 AD3d 977; Wasilewicz v Village of Monroe Police Dept., 3 AD3d 561). The complaint, which does not allege defendant played an active role in the prosecution of the charge of violating the temporary order of protection, is insufficient to assert a claim for false arrest (see Zapata v Tufenkjian, 123 AD3d 814; Oszustowicz v Admiral Ins. Brokerage Corp., 49

AD3d 515; cf. Mesti v Wegman, 307 AD2d 339).

As to the fifth cause of action, the making of a false statement which tends to expose a person to public contempt, ridicule, aversion, or disgrace constitutes defamation (Thomas H. v Paul B., 18 NY3d 580, 584; Foster v Churchill, 87 NY2d 744, 751). A plaintiff seeking to recover for defamation must prove the defendant's publication of a false statement to a third-party, without privilege or authorization, which either caused special harm or constituted defamation per se (see Epifani v Johnson, 65 AD3d 224; Salvatore v Kumar, 45 AD3d 560). "Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action'" (Gross v New York Times Co., 82 NY2d 146, 152-153, quoting 600 W. 115 th St. Corp. v Von Gutfeld, 80 NY2d 130, 139; see Thomas H. v Paul B., 18 NY3d 580; Brian v Richardson, 87 NY2d 46). Conversely, expressions of pure opinion – whether false or not, libelous or not, pernicious or not – are protected speech under the First Amendment (see Steinhilber v Alphonse, 68 NY2d 283; Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369; Melius v Glacken, 94 AD3d 959).

Further, pursuant to CPLR 3016 (a), in an action for slander or libel, "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Interpreting such statute, the courts require both "that the defamatory words be set forth in haec verba" (Conley v Gravitt, 133 AD2d 966, 968), and that the time, place and manner, as well as the person or persons to whom such publication was made, be set forth in the complaint (Epifani v Johnson, 65 AD3d 224, 233; Wadsworth v Beaudet, 267 AD2d 727, 729; Dillon v City of New York, 261 AD2d 34, 38). Here, the complaint does not set forth any alleged defamatory statements with particularity (see Martin v Hayes, 105 AD3d 1291; Dobies v Brefka, 273 AD2d 776). In addition, plaintiff failed to plead that he suffered special damages as a result of the alleged defamation (Wadsworth v Beaudet, 267 AD2d 727). Moreover, contrary to the assertions of plaintiff's counsel, the statements made by defendant in the family offense petition are privileged (see Butler v Ratner, 210 AD2d 691, 693; R.W.P. Group v Holzberg, 202 AD3d 410; Dougherty v Flanagan, Kelly, Ronan, Spollen & Stewart, 145 AD2d 461). The Court notes that as no foundation was laid for the admissibility of the video recording annexed to plaintiff's opposition papers, it was not considered in the determination of the motion (see Read v Ellenville Natl. Bank, 20 AD3d 408).

Dismissal of the second cause of action under CPLR 3211 (a)(7), however, is denied. The tort of malicious prosecution "protects the personal interest of freedom from unjustifiable litigation" (Broughton v State of New York, 37 NY2d 451, 457). To recover damages for malicious prosecution arising from a civil action or proceeding, the plaintiff has the burden of establishing (1) the commencement and prosecution of an action or proceeding against the plaintiff, (2) by or at the insistence of the defendant, (3) without probable cause, (3) motivated by actual malice, (4) which terminated in favor of the plaintiff, and (5) "to the plaintiff's injury" (347 Cent. Park Assoc., LLC v Pine Top Assoc., LLC, 83 AD3d 689, 690; see Furgang &

Adwar, LLP v Fiber-Shield Indus., Inc., 55 AD3d 665; Fink v Shawangunk Conservancy, Inc., 15 AD3d 754; Ramos v City of New York, 285 AD2d 284, 298; Ellman v McCarty, 70 AD2d 150; see generally Burt v Smith, 181 NY 1). "For purposes of the tort of malicious prosecution, probable cause has been defined as 'the knowledge of facts, actual or apparent, strong enough to justify a reasonable [person] in the belief that he [or she] has lawful grounds for prosecuting the defendant in the manner complained of'" (Loeb v Teitelbaum, 77 AD2d 92, 102-103). "[W]hen the underlying action is civil in nature the want of probable cause must be patent" (Butler v Ratner, 210 AD2d 691, 693). Furthermore, "the issuance of a "temporary injunction or similar judicial recognition of the merit of the underlying case creates a presumption of probable cause and places upon the plaintiff the burden of pleading facts sufficient to overcome it" (id., at 693-694; see Hornstein v Wolf, 67 NY2d 721). Although defendant was issued a temporary order of protection concomitant with the filing of the family offense proceeding, the allegations in the complaint that defendant deliberately gave false information to the police about plaintiff knowing such information was false, and that such information led to defendant's arrest, are sufficient to state a cause of action for malicious prosecution (see Place v Ciccotelli, 121 AD3d 1378; Kirchner v County of Niagra, 107 AD3d 1620; see also Mesti v Wegman, 307 AD2d 339).

Finally, the application for the imposition of sanctions against plaintiff is denied. Pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR 130-1.1 [a]). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c]; see Mascia v Maresco, 39 AD3d 504). Defendant failed to establish that plaintiff engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (see Perna v Realty Roofing, Inc., 122 AD3d 821; Kaplon-Belo Assoc., Inc. v D'Angelo, 79 AD3d 931; cf. Pronti v Grigoriou, 64 AD3d 869, 882 NYS2d 354).

Dated: May 18, 2015

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION