

**Ruscito v County of Suffolk**

2016 NY Slip Op 32678(U)

May 19, 2016

Supreme Court, Suffolk County

Docket Number: 32131/2002

Judge: Andrew G. Tarantino, Jr.

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.

**ORIGINAL**  
**WHEN BLUE**

NEW YORK STATE SUPREME COURT  
COUNTY OF SUFFOLK - PART 50

PRESENT

Hon. Andrew G. Tarantino, Jr.,  
A.J.S.C.

-----  
Ruscito, Raymond Sr

Plaintiff(s)

-against-

Suffolk, County of

Defendant(s)

Index No: 32131/2002  
Cal No:

**DECISION AND ORDER**

-----

Upon the Supplemental Bill of Particulars, dated September 21, 2011 (Index No 32131/2002); and upon the Complaint in this action, dated April 15, 2003; and upon Defendant's Affirmation in Support of *In Limine* Motion, dated October 19, 2015; and upon Defendant's Memorandum of Law, dated October 16, 2015; and upon Plaintiff's Memorandum of Law, dated November 13, 2015; and upon Defendant's Reply Memorandum of Law, dated December 1, 2015; and upon the Transcript of the Probable Cause Hearing conducted on May 21, 2003, in the Suffolk County District Court; it is

ORDERED and ADJUDGED that so much of the Defendant's motion to dismiss the causes of action for false imprisonment, false arrest, abuse of process, malicious prosecution and negligence is granted, and the Defendant's motion is otherwise denied; and it is further

ORDERED that the parties are to appear before this Court on **JUNE 14, 2016 at 9:30am** for the purpose of scheduling the trial by jury.

**NATURE OF THIS MOTION**

In this action Plaintiff is suing the County for abuse of process, malicious prosecution, assault, false imprisonment, false arrest, battery and negligence. After jury selection, the action was transferred to this Court for trial on October 19, 2015. The County made an *in limine* motion based upon a probable cause hearing conducted in an underlying criminal action against Plaintiff, and also that Plaintiff alleged the same permanent injuries in an action 10 years prior but failed, in this action, to specifically plead aggravation of a pre-existing condition. The Court dismissed the jury and permitted Plaintiff's counsel an opportunity to respond, in writing, to the County's motion.

The Plaintiff opposed the County's application on several grounds:

- Plaintiff claims that the *in limine* motion is for evidentiary rulings, not for determination of Plaintiff's claims.
- Because Plaintiff was acquitted after trial in the criminal action, he had no avenue to appeal the probable cause ruling. Therefore, according to Plaintiff, the probable cause ruling has no estoppel effect on Plaintiff's claims.
- The Court should refuse to hear Defendant's collateral estoppel defense because Defendant has waited an inexcusable amount of time between learning of the fact and the first assertion of the defense in this litigation.

- Even if the Court dismissed the wrongful arrest, wrongful imprisonment and malicious prosecution claims, Plaintiff's cause for assault would still be viable together with the "numerous" categories of damages, including
  - Pain and injuries immediately apparent from the assault
  - Mental and physical anguish as a result of wrongful arrest, imprisonment and malicious prosecution
  - Attorney's fees incurred in defending the malicious prosecution
  - Multiple contusions
  - Momentary paralysis

Plaintiff claims that Defendant has offered no proof that any of the foregoing injuries were pre-existing. The Court now has reviewed each party's submission.

### FACTS

The Court was provided a copy of the complaint in this action, a copy of Defendant's verified answer, and the Plaintiff's Bill of Particulars. According to the Bill of Particulars (BP), on September 19, 2001, at a County Park, the Plaintiff was assaulted and battered by a County employee causing the Plaintiff to sustain severe personal injuries including loss of consciousness for a period of time. The Plaintiff was transported to a local hospital for treatment of the injuries sustained as a result of the alleged assault and battery. The Plaintiff was then arrested by the County Police Department for an alleged assault by the Plaintiff upon the County employee. The Plaintiff was issued an appearance ticket. The bill of particulars then continues that the Plaintiff was not incarcerated for any period of time following the incident. The Plaintiff was required to appear in criminal court about 27 times. The Plaintiff claimed the following injuries:

- Loss of height of the C4-5 and C5-6 intervertebral discs
- Disk osteophytes, narrowing of neural foramens, narrowing of central canals, between C2 and C7
- Cervical and lumbar sprains and strains
- Left trapezius spasms
- Bilateral erect or spine spasms
- Sciatic neuritis
- Multiple contusions
- Severe cervical lumbar chest and left arm pain
- Diminished sensation on the right side of face
- Weakness and numbness in the right leg
- Continual and repeated episodes of momentary paralysis.

Plaintiff also claims that the Plaintiff's legs gave out causing him to fall and fracture his ribs. According to the BP, the foregoing injuries are permanent except those which may be of a superficial nature.

According to another Supplemental BP, filed in a 1993 action, Plaintiff suffered:

- C4-5 disc herniation with spinal cord impingement
- C5-6 disc herniation
- C4-5 narrowing of neural foramen
- L4-5 bulging disc

- L5-S1 bulging disc
- Poor prognosis

According to that prior Supplemental BP, Plaintiff alleged that his 1993 injuries were permanent, accompanied by permanent pain, permanent swelling, permanent stiffness, permanent numbness, permanent tenderness, permanent discomfort, permanent restriction of motion, and permanent loss of use of the injured portions of Plaintiff's body.

In a February 2002 report provided by the Plaintiff's neurologist, the only past medical history noted was "notable for myocardial infarction 1996, hypertension and sleep apnea". Under "social history" the doctor noted Plaintiff is "currently on disability from a motor vehicle accident in 1992". The doctor reported that the Plaintiff was experiencing lower cervical neck pain and pain radiating along the left trapezius and into his left arm. Plaintiff also suffered from numbness in the right hand and swelling in both hands which the doctor believed was unrelated to the cervical spine problems. Based on the doctor's review of an MRI, the doctor found:

- Overall congenital narrowing of the cervical spine
- Disk osteophyte complex at C4-5 which compresses the spinal cord
- C5-6 central disc osteophyte complex which compresses the spinal cord centrally causing moderate to severe stenosis at that level
- C3-4 and C4-5 mild stenosis

The doctor did not review any thoracic or lumbar studies, nor any EMG studies; Plaintiff apparently informed the doctor that these were conducted. The neurologist report provided no causal connection between the incident of this action and Plaintiff's medical condition.

In a February 2003 report, Plaintiff's chiropractor reported that Plaintiff's prognosis was poor, but offered no opinion causally connecting Plaintiff's condition to the incident alleged in this action.

The hospital medical record, dated September 19, 2001, indicated that the Plaintiff's chief complaint was chest pain, noted by the staff as "severe" with no reported loss of consciousness or seizures. Past history reflected MI (which the Court presumes is myocardial infarction) and sleep apnea. Initially there is no mention of the prior injuries from 1993. However, in a note time stamped two hours after admission, the Plaintiff related to the nurse about the "C" and "L" level herniated discs. On physical examination, the Plaintiff was alert with no trauma about the head and neck. No other observations were noted, for example, skin was intact, the back had no vertebral tenderness, Plaintiff's eyes were normal, there was no dental injury, and there was no abdominal tenderness. There were no notations in the chart under "wound description/repair" nor in the chart under "contusion". The clinical impression was neck and lumbar sprain, and Plaintiff was discharged as "stable".

#### THE PROBABLE CAUSE HEARING

At the probable cause hearing a Parks Department Officer testified that he was called to the park about a complaint of a person not moving his vehicle which was blocking others from accessing the entrance. When the officer arrived, he observed Plaintiff lying on the ground and another gentlemen sitting on a seat with a compress over his eye. The officer reported that the seated gentleman explained that:

he turned and asked [Plaintiff] why not move the vehicle to the other side of the building to allow the traffic to pass [...] and that

[Plaintiff] refused to move the vehicle and at that time became irate. [The Plaintiff] began to push the gentleman then used his stomach to push the gentleman away (the hospital record indicated that the Plaintiff was obese). After about two or three times of this, [the gentleman put his hands out to stop [Plaintiff] from proceeding pushing with his stomach, again at which time [Plaintiff] grabbed him around the neck and punched him in the left eye.

The Officer then described his interview of the person who was working in the guard booth at the time of the incident who explained that:

Plaintiff was pushing the gentleman with his stomach and that he reached around – when the gentleman put his hands up to stop him from doing that [Plaintiff] reached around and grabbed him by the neck and punched [the gentleman] in the eye.

According to the Officer, a statement was taken by another officer of a third witness who was in the gentleman's vehicle, and who reported basically the same scenario. The officer issued a field appearance ticket to the Plaintiff. On cross examination, the Officer stated that he learned that the seated gentleman was a park employee and was wearing a park employee uniform.

The criminal court held:

Based on the statements and observation of the complainant with respect to the injuries and the statements of the people that were present at that time, I think the police officer [...] had probable cause to arrest [Plaintiff] and charge him with assault.

## ANALYSIS

### The *in limine* motion

The Court first addresses the issue of whether Defendant's *in limine* motion was appropriate. Referring to the case cited by Plaintiff, the court in *Rondout Elec. v Dover Union Free School Dist.*, 304 A.D.2d 808, 758 N.Y.S.2d 394 (2d Dep't 2003) stated:

It is correct to say that an order, made in advance of trial, which merely determines the admissibility of evidence is an unappealable advisory ruling (*see Chateau Rive Corp. v Enclave Dev. Assoc.*, 283 AD2d 537 [2001]; *Brennan v Mabey's Moving & Stor.*, 226 AD2d 938 [1996]). Indeed, according to Black's Law Dictionary, a motion *in limine* is defined as “[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial” (*id.* at 1033 [7th ed]). However, despite the fact that Dover styled its motion as one *in limine*, the foregoing definition underscores that Dover's motion sought far more than an advisory evidentiary ruling. Dover's motion sought to limit the amount of the Plaintiff's recovery. An order which limits the scope of issues to be tried is appealable (*see Ferrara v Kearney*, 285 AD2d 890 [2001]; *Hargrave v Presher*, 221 AD2d 677 [1995]; *Siewert v Loudonville Elementary School*, 210 AD2d 568 [1994]).

This Court similarly finds that although Defendant's motion was styled as *in limine*, it seeks to limit Plaintiff's recovery and limit the scope, if not all, of Plaintiff's issues to be tried. Having provided both sides an opportunity to submit their arguments on paper, and based upon the scope of the motion, this Order, based upon decisional authority, is appealable.

### False Arrest and False Imprisonment

The Court dismisses the causes of action alleging false arrest and false imprisonment. According to Plaintiff's Bill of Particulars, Plaintiff was never imprisoned, nor was he arrested. He was merely given an appearance ticket to appear in court. The causes of action for False Arrest and False Imprisonment are dismissed.

### Abuse of Process

The four elements of abuse of process are:

- (1) regularly issued legal process, civil or criminal, compelling performance or forbearance of some act,
- (2) the person activating the process was moved by an ulterior purpose to do harm, without economic or social excuse or justification,
- (3) the person activating the process sought some collateral advantage or corresponding detriment to the Plaintiff that is outside the legitimate ends of the process, and
- (4) actual or special damage.

See, *Board of Ed. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO*, 38 NY2d 397, 380 NYS2d 635, 343 NE2d 278 (1975). Abuse of process and malicious prosecution, although closely related and often confused, are substantially different. *Board of Ed. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO*, 380 NYS2d 635. The gist of abuse of process is the improper use of process after it is regularly issued. *Place v Ciccotelli*, 121 AD3d 1378, 995 NYS2d 348 (3d Dept 2014), while the essence of malicious prosecution is the initiation of an action or the causing of process to be issued improperly, that is, without proper basis. See, *Assets Collecting Co. v Myers*, 167 App Div 133, 152 NYS 930 (1st Dept 1915); *Pagliarulo v Pagliarulo*, 30 AD2d 840, 293 NYS2d 13 (2d Dept 1968). In this case, the Plaintiff has failed to allege any specific supporting facts on this issue. The complaint fails to set forth requisite elements for an abuse of process claim, and the Plaintiff's Bill of Particulars fails to expand upon the claim. Based upon the facts, the Court finds that the Plaintiff fails to state a cause of action for abuse of process. Accordingly, the abuse of process cause of action is dismissed.

### Malicious Prosecution

The elements of a malicious prosecution action are:

- (1) a judicial proceeding initiated by Defendant,
- (2) that terminates in Plaintiff's favor,
- (3) brought without probable cause and
- (4) with malice.

See, *Martinez v Schenectady*, 97 NY2d 78, 735 NYS2d 868, 761 NE2d 560 (2001); *Cantalino v Danner*, 96 NY2d 391, 729 NYS2d 405, 754 NE2d 164 (2001); *Smith-Hunter v Harvey*, 95 NY2d 191, 712 NYS2d 438, 734 NE2d 750 (2000); *Curiano v Suozzi*, 63 NY2d 113, 480 NYS2d 466, 469 NE2d 1324 (1984); *Colon v New York*, 60 NY2d 78, 468 NYS2d 453, 455 NE2d 1248 (1983); *Broughton v State*, 37 NY2d 451, 373 NYS2d 87, 335 NE2d 310 (1975); *Munoz v New York*, 18 NY2d 6, 271 NYS2d 645, 218 NE2d 527 (1966); *Halsey v New York Soc. for Suppression of Vice*, 234 NY 1, 136 NE 219 (1922); *Halberstadt v New York Life Ins. Co.*, 194 NY 1, 86 NE 801 (1909); *Burt v Smith*, 181 NY 1, 73 NE 495 (1905); *Lee v Mount Vernon*, 68 AD2d 902, 414 NYS2d 215 (2d Dept 1979), *aff'd*, 49 NY2d 1041, 429 NYS2d 557, 407 NE2d 404 (1980). An acquittal of the criminal charges against Plaintiff definitely establishes favorable termination. *Maskantz v Hayes*, 39 AD3d 211, 832 NYS2d 566 (1st Dept 2007).

However, in order to recover, the Plaintiff must establish that, at the time the prosecution was initiated, the Defendant did not have probable cause to believe that the Plaintiff was guilty. The question on the issue of probable cause is not whether the Plaintiff was in fact guilty or innocent, or whether the Defendant was in fact mistaken or correct, but rather whether, on the facts known to or reasonably believed by Defendant, a reasonably prudent person would have believed the Plaintiff was guilty. In this case, probable cause was established by the criminal court. Plaintiff must also establish that in initiating the prosecution, the Defendant acted maliciously. A prosecution is initiated maliciously if it is brought for a purpose other than bringing an offender to justice or out of personal ill will. Even where a proceeding was commenced in good faith and with probable cause, a person may be held liable for actively continuing the proceeding after learning that it lacks merit. *See, Broughton v State*, 37 NY2d 451, 373 NYS2d 87, 335 NE2d 310 (1975). In this case, the Plaintiff has failed to allege any specific supporting facts on this issue. The complaint fails to set forth the requisite elements for malicious prosecution, and the Plaintiff's Bill of Particulars fails to expand upon the claim. Accordingly, the malicious prosecution cause of action is dismissed.

### Negligence

Except for the conclusory statement that Defendants' conduct was negligent, Plaintiff failed to allege the requisite elements for a negligence cause of action. Similarly, the Bill of Particulars failed to expand upon the claim. Accordingly, the cause of action for negligence is dismissed.

### Assault and Battery

Plaintiff's remaining causes of action set forth issues of fact to be determined by a jury. Defendant can make the appropriate applications at the conclusion of the Plaintiff's case in chief for dismissals of the remaining causes of action.

As for damages, the jury will be charged that the Plaintiff may recover only for such increased or augmented suffering or damage as are caused by the Defendant's act. *Ortiz v Mendolia*, 116 AD2d 707, 497 NYS2d 761 (2d Dept 1986). However, the aggravation of pre-existing disease or infirmities must be pleaded before recovery therefor can be allowed. *Anderson v Dainack*, 39 AD3d 1065, 834 NYS2d 564 (3d Dept 2007); *Behan v Data Probe Intern., Inc.*, 213 AD2d 439, 623 NYS2d 886 (2d Dept 1995); *De Mento v Nebi Beverages, Inc.*, 55 AD2d 794, 389 NYS2d 909 (3d Dept 1976). Plaintiff admits in his Bill of Particulars that he never sought any treatment for mental anguish. Therefore, Plaintiff will be prevented from making such a claim to the jury. As to whether the injuries were pre-existing, that issue is best left for the jury to decide. Here, too, Defendant can make the appropriate motions at the conclusion of the Plaintiff's case in chief.

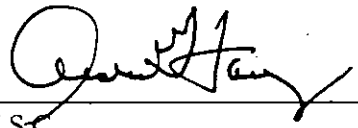
The Court is not persuaded by Plaintiff's argument that this Court should refuse to hear Defendant's collateral estoppel defense because Defendant has waited an inexcusable amount of time between learning of the fact and the first assertion of the defenses in this litigation. To the contrary, the Defendant in 2003, not the eve of trial, plead its eighth affirmative defense that "the arrest and/or detention, if any, were reasonable and based upon probable cause to believe that the Plaintiff had committed a crime". Additionally, although *in limine* motions are decided upon their making, this Court provided Plaintiff an opportunity to submit written opposition to the Defendant's application, which Plaintiff did submit. Plaintiff cannot claim surprise or prejudice on this issue.

The parties are directed to appear before the Court on **JUNE 14, 2016** at **9:30am** for the purpose of scheduling the trial by jury.

This constitutes the decision and order of the Court.

ENTER

Dated: May 19, 2016

  
\_\_\_\_\_  
A.J.S.C.