Terrani v Tourneau, LLC
2018 NY Slip Op 31233(U)
June 12, 2018
Supreme Court, New York County
Docket Number: 150223/16
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon **PART 42**
Justice

KEVIN TERRANI

- v -

TOURNEAU, LLC, TOURNEAU TIME MACHINE and JAMES CARSON

INDEX NO. 150223/16
MOTION DATE 12/13/17
MOTION SEQ. NO. 002

The following papers were read on this motion for summary judgment:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	**No(s). 1**
Answering Affirmation(s) — Affidavit(s) — Exhibits	**No(s). 2**
Replying Affirmation — Affidavit(s) — Exhibits	**No(s). 3**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action to recover damages for false arrest and malicious prosecution, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is denied.

As more fully explained in this court's order dated October 23, 2016, the plaintiff, Kevin Terrani, alleges that he was falsely accused of larceny for stealing items from the watch store of the defendants Tourneau, LLC, and Tourneau Time Machine (the Tourneau defendants), where he was employed, based on statements made by his coworker, defendant James Carson. Although Terrani was indicted in 2014, a jury acquitted him on March 23, 2015. He asserts causes of action against the Tourneau defendants and Carson to recover for false arrest and malicious prosecution, alleging that Carson, who himself pleaded guilty in federal court to fraudulently obtaining more than $300,000.00 in Social Security Benefits between 2004 and 2014, knowingly made false statements to the police while acting on behalf of the Tourneau defendants, which resulted in Terrani's arrest and prosecution.

The proponent of a motion for summary judgment must establish his or her prima facie entitlement to judgment as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish his or her claim or defense sufficiently to warrant a court's directing judgment in the movan'ts favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ.

Med. Ctr., supra; O'Halloran v City of New York, supra. Should the movant meet his or her burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra. "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1st Dept. 1992).

> "A plaintiff may bring suit for false arrest and imprisonment against one who has unlawfully robbed the plaintiff of his or her freedom from restraint of movement. To prevail on such a cause of action, the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged. For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause. Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances."

De Lourdes Torres v Jones, 26 NY3d 742, 759 (2016) (citations and internal quotation marks omitted). "The elements of the tort of malicious prosecution are: (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. Id. at 760. "Just as in the false arrest context, the plaintiff in a malicious prosecution action must also establish at trial the absence of probable cause to believe that he or she committed the charged crimes, but this element operates differently in the malicious prosecution context because [o]nce a suspect has been indicted, ...the law holds that the Grand Jury action creates a presumption of probable cause. Id. at 761 (citations and internal quotation marks omitted).

While the defendants established their prima facie entitlement to judgment as a matter of law by showing that the indictment of Terrani created a presumption that there was probable cause for his arrest and prosecution, Terrani raises a triable issue of fact with his own affidavit as to whether the accusations that were lodged against him were made with malice or, at most, were based on nothing but surmise, and thus rebuts the presumption of probable cause.

> "Generally, the plaintiff cannot rebut the presumption of probable cause with evidence merely indicating that the authorities acquired information that, depending on the inferences one might choose to draw, might have fallen somewhat shy of establishing probable cause. And, even if the plaintiff shows a sufficiently serious lack of cause for the prosecution and rebuts the presumption

> at trial, he or she still must prove to the satisfaction of the jury that the defendant acted with malice, i.e., that the defendant must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served."

De Lourdes Torres v Jones, supra at 761 (citations and internal quotation marks omitted).

Here, as recounted by Terrani, the sum total of the facts supporting Carson's allegations that Terrani stole a valuable watch were that Terrani was acting in a "suspicious" manner by inventorying an item "differently" than other items, that he was "fake typing," and that he placed the subject watch "out of view." Terrani asserts that all of these allegations were demonstrably false, and, in any event, were so scant and vague that they did not rise to the level of probable cause. "[P]robable cause to initiate a criminal proceeding may be so totally lacking as to reasonably permit an inference that the proceeding was maliciously instituted." Martin v City of Albany, 42 NY2d 13, 17 (1977). Terrani raises a triable issue of fact as to whether such cause was totally lacking.

"Moreover, in the alternative, the plaintiff may show malice and overcome the presumption of probable cause with proof that the defendant falsified evidence in bad faith and that, without the falsified evidence, the authorities' suspicion of the plaintiff would not have fully ripened into probable cause." De Lourdes Torres v Jones, supra, at 761. Terrani essentially asserts that the defendants knowingly "gave false statements to the police with the intent of having plaintiff arrested." D'Amico v Correctional Med. Care, Inc., 120 AD3d 956, 961 (4th Dept. 2014). This assertion, along with his assertions that he was then detained, arrested, charged with a criminal offense, and thereafter acquitted, as well as his unrebutted assertion that Carson was acting in the course and scope of his employment for the Tourneau defendants when Carson made his accusations to police, is sufficient to raise a triable issue of fact as to whether the defendants are liable for false arrest and malicious prosecution. See De Lourdes Torres v Jones, supra; Broughton v State of New York, 37 NY2d 451 (1975); Mesiti v Wegman, 307 AD2d 339 (2nd Dept. 2003).

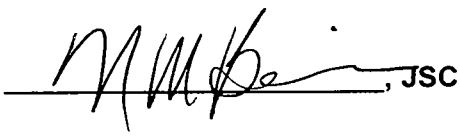
Furthermore, as the plaintiff observes, the motion is premature as discovery is not complete. Where, as here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2nd Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2nd Dept. 2013). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hospital, supra at 526 [internal quotation marks omitted]; see Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012). Since neither document discovery nor depositions have been completed, the questions surrounding Carson's motive and intent have yet to be fully developed. See WPP Group USA, Inc. V Interpublic Group of Companies, 228 AD2d 296 (1st Dept. 1996).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of the court.

Dated: June 12, 2018



, JSC

HON. NANCY M. BANNON

1. Check one: ..... ☐ **CASE DISPOSED** ■ **NON-FINAL DISPOSITION**

2. Check as appropriate: MOTION IS: ☐ **GRANTED** ■ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**