

Dejesus v Moshiashvili
2018 NY Slip Op 31665(U)
July 11, 2018
Supreme Court, New York County
Docket Number: 153314/2012
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

FAUSTO DEJESUS,

Plaintiff,

-against-

TATIANA MOSHIASHVILI and MICHAEL MOSHIASHVILI,

Defendants.

Index No.: 153314/2012
DECISION/ORDER
Motion Seq. No. 013

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for a directed verdict and motion to set aside the verdict.

Papers	Numbered
Defendants' Notice of Motion.....	1
Defendants' Affirmation in Support.....	2
Plaintiff's Affirmation in Opposition.....	3
Defendants' Affirmation in Reply.....	4

Sivin & Miller, LLP, New York (Edward Sivin of counsel), for plaintiff Fausto Dejesus.

Nicolini, Paradise, Ferretti & Sabella, New York (John J. Nicolini of counsel); for defendants Tatiana and Michael Moshiasvili.

Gerald Lebovits, J.

Plaintiff, Fausto Dejesus, filed a claim against defendants Tatiana and Michael Moshiasvili on May 30, 2012, seeking compensatory damages, punitive damages, special damages, attorney fees, and costs for claims involving abuse-of-process, malicious-prosecution, intentional infliction of emotional distress, defamation, and prima facie tort. (Complaint, at ¶ 1.)

This court held a jury trial that began on February 20, 2018. After plaintiff rested, defendants moved for a directed verdict on the abuse-of-process and malicious-prosecution claims against Mr. Moshiasvili. This court reserved decision. The jury awarded compensatory damages of \$200,000, jointly and severally, against Mr. and Ms. Moshiasvili, \$200,000 against Ms. Moshiasvili in compensatory damages, \$100,000 against Ms. Moshiasvili in punitive damages, and \$50,000 against Mr. Moshiasvili in punitive damages.

Mr. and Ms. Moshiasvili now move post-trial under CPLR 4401, 4404, and 5501 to (1) grant Mr. Moshiasvili's motion for a directed verdict dismissing plaintiff's causes of action against him for malicious prosecution and abuse of process; (2) dismiss the malicious-

prosecution claim against Ms. Moshiaashvili; (3) dismiss plaintiff's claim for abuse of process as to both defendants; (4) dismiss plaintiff's claim for false arrest as to Ms. Moshiaashvili; (5) set aside the jury award for compensatory damages as excessive and duplicative; (6) set aside the jury verdict for punitive damages as excessive; and (7) direct the clerk to amend the jury extract, dated March 5, 2018, accurately to reflect damages the jury awarded. (Defendants' Affirmation in Support, at ¶ 3.)

It is well-settled that "[a] trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997].) CPLR 4404 (a) allows the court to set aside jury verdicts. When a party argues the jury verdict is not supported by sufficient evidence, "rationality is the touchstone for legal sufficiency." (105 NY Jur 2d Trial § 462 [2d ed. 2018].)

A court must review whether the jury verdict is sufficiently supported by the law and the trial evidence. (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978].) If the evidence is not "utterly irrational," then "then it survives a legal sufficiency challenge." (Higgett, N.Y. Prac. § 4404:2 [2017 ed.].) It fails when "no valid line of reasoning and permissible inferences . . . could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen*, 45 NY2d at 499.) When reviewing this motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." (*Szczerbiak*, 90 NY2d at 556.) When viewing the evidence in the light most favorable to the nonmoving party, sufficient evidence was presented at trial for a rational jury to find defendants liable on plaintiff's claims.

Defendants' motion is defective because he failed to provide a trial transcript for review. Given that defendant "seeks to set aside the verdict as against the weight of the evidence, 'the absence of a transcript, or relevant portions thereof, preclude[s] a meaningful review.'" (*Frank v City of New York*, 161 AD3d 713 [1st Dept 2018], quoting *Gorbea v DeCohen*, 118 AD3d 548, 549 [1st Dept 2014].) Despite defendants' omission, this court sets forth its reasoning below.

I. Defendants' Motion for a Directed Verdict Dismissing Plaintiff's Malicious-Prosecution and Abuse-of-Process claims against Mr. Moshiaashvili, Motion to Set Aside the Verdict on Plaintiff's Malicious-Prosecution Claim Against Ms. Moshiaashvili, and Defendants' Motion to Set Aside the Verdict on Plaintiff's Claim for Abuse-of-Process as to Both Defendants.

Mr. Moshiaashvili's motion for a directed verdict dismissing plaintiff's causes of action for malicious prosecution and abuse of process is denied. Defendant argues that insufficient evidence supports the malicious-prosecution claim against him. According to Mr. Moshiaashvili, the only evidence against him at trial is that he reviewed the criminal complaint and made phone calls to the District Attorney's Office. (Defendants' Affirmation in Support, at ¶ 22.) This court disagrees.

To have a viable claim for malicious prosecution, “[t]he plaintiff must establish that (1) the defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted in actual malice.” (*Martin v City of Albany*, 42 NY2d 13, 16 [1977].) Defendants argue “it must be shown that defendant played an active role in the prosecution, such as giving advice and encouraging or importuning the authorities to act.” ([Defendants’ Affirmation in Support, at ¶ 38], quoting *Williams v CVS Pharmacy, Inc.*, 126 AD3d 890 [2nd Dept 2015].) But defendants cite only persuasive authority on the first element. The Court of Appeals has noted that it has “never elaborated on how a plaintiff in a malicious prosecution case demonstrates that the defendant commenced or continued the underlying criminal proceeding.” (*Grucci v Grucci*, 20 NY3d 893, 896 n [2012].) Rather, the commencement of a criminal action depends on the circumstances of each case. In *Torres v Jones* (26 NY3d 742, 760 [2016]), the Court of Appeals held that “by suggesting that a defendant other than a public prosecutor may be liable for supplying false information to the prosecutor in substantial furtherance of a criminal action against the plaintiff, we have implicitly recognized that such conduct may, depending on the circumstances, constitute the commencement or continuation of the prosecution.”

The second element is satisfied when plaintiff can prove “that the criminal proceeding allegedly instigated by the defendant terminated in favor of the accused.” (*Hollender v Trump Vil. Co-op., Inc.*, 58 NY2d 420, 425 [1983].)

To satisfy the third element, “a plaintiff must allege that the underlying action was filed with a purpose other than the adjudication of a claim.” (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015] [internal quotation marks and citations omitted]; *accord* Restatement (Second) of Torts § 674 [1977]; *cf. Medina v City of New York*, 102 AD3d 101, 104 [1st Dept 2012] [“Probable cause is established *absent materially impeaching circumstances*, where, as here, the victim of an offense communicates to the arresting officer information affording a *credible* ground for believing the offense was committed and identifies the accused as the perpetrator”] [internal citation omitted] [emphasis in original].) If the plaintiff has established the third element, then “a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding . . . which permits the jury to infer one fact from other facts already established.” (*Martin v City of Albany*, 42 NY2d 13, 17-18 [1977] [internal citation omitted].)

Plaintiff established these elements by proving that defendants commenced a criminal action against plaintiff. Defendants were the only ones who supplied the police with information that led to plaintiff’s arrest. Mr. Moshiazhvili repeatedly called the DA to find out what was going on in plaintiff’s case. He pressured the People to prosecute. Mr. Moshiazhvili, by working along with his wife, assisted in continuing a false criminal action against plaintiff. There is no question that the criminal action was terminated in plaintiff’s favor. The People moved to dismiss the criminal action and told the criminal court judge that they could not prove Dejesus guilty beyond a reasonable doubt. Therefore, the jury in this action was permitted to infer actual malice.

Likewise, defendants' motion to set aside the verdict on plaintiff's malicious-prosecution claim against Ms. Moshiaashvili is denied. Defendants argue that plaintiff failed to establish that Ms. Moshiaashvili commenced a criminal action against plaintiff. Defendants argue they did not affirmatively induce an officer to act by taking an active part in the arrest or showing active and undue zeal. Malicious-prosecution claims do not require affirmative induction. The elements of a malicious-prosecution claim are outlined above. Further, "[a] person can also be said to have initiated a criminal proceeding by knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's determination to make an arrest." (*Moorhouse v Std., New York*, 124 AD3d 1, 8 [1st Dept 2014].)

Defendants' motion for a directed verdict dismissing plaintiff's abuse-of-process claims against Mr. Moshiaashvili is denied, and defendants' motion to set aside the verdict on plaintiff's claim for abuse of process as to both defendants is denied. The Court of Appeals has held that "abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." (*Bd. of Ed. of Farmingdale Union Free Sch. Dist. v Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO*, 38 NY2d 397, 400 [1975].) The elements of an abuse-of-process claim are "(1) regularly issued process, either civil or criminal, (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 [1984].) By intentionally instigating a false criminal action against plaintiff, the jury could rationally find defendants liable for abusing legal process. Defendants also argue that plaintiff did not plead or prove actual or special damages required for an abuse-of-process claim. (Defendants' Affirmation in Support, at ¶ 64.) The requirements of actual or special damages are satisfied when a plaintiff testifies of legal costs. (*See Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 530 [1991] ["We also conclude that the Appellate Division erred in dismissing plaintiffs' cause of action for abuse of process. We note first our disagreement with that court's conclusion that plaintiffs failed to plead and prove actual or special damages. To the contrary, both plaintiffs testified that they had incurred legal expenses in connection with their defense of the criminal charges brought against them."].) Plaintiff's abuse-of-process claim is valid. Plaintiff and his wife testified of his legal expenses at trial.

Further, Mr. Moshiaashvili had the opportunity to defend himself but chose not to testify at trial. Mr. Moshiaashvili is not required to testify, but "[w]hile a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding . . . [and] a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege." (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51, 53 [1st Dept 2002].) When a defendant invokes a privilege, "a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination." (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 37 [2015].) Mr. Moshiaashvili forewent his right to refute the claims made against him. Without testimony to persuade the jury otherwise, the jury found sufficient evidence to hold Mr. Moshiaashvili liable. (*See e.g. Mar. Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 42 [1980] ["Whether a jury in the context of a conventional civil case may be instructed to consider a party's invocation of the privilege against self incrimination when called to the stand . . . the parties are on an equal footing and the only disadvantage threatened is liability to compensate an adversary for damages. We therefore decline to extend to civil cases a rule originally designed as a safeguard in criminal

prosecutions.”.) Accordingly, the jury was not irrational in its conclusion that both Mr. and Ms. Moshiazhvili are liable for malicious prosecution and abuse of process.

II. Defendants’ Motion to Set Aside the Verdict on Plaintiff’s Claim for False Arrest as to Ms. Moshiazhvili.

Defendants’ motion to dismiss the false arrest claim against Ms. Moshiazhvili is denied. Defendants argue that plaintiff never alleged “false arrest” and that it was duplicative for the jury to consider both false arrest and malicious prosecution. (Defendants’ Affirmation in Support, at ¶ 51.) Defendants also argue that “the civilian must have acted so dominantly such to divest the police of their free will.” (Defendants’ Affirmation in Support, at ¶ 53.)

Plaintiff sufficiently pleaded false arrest. Under CPLR 3013, a plaintiff is required to state a pleading sufficiently particular to give the court and the parties notice. Since defendants argued that summary judgment should be granted in their favor on the claim of false arrest, they must have had sufficient notice of the pleading. This issue, in any event, is not a trial issue.

Defendants are mistaken about duplication. The Court of Appeals has held “while false arrest and malicious prosecution are ‘kindred actions’ insofar as they often aim to provide recompense for illegal law enforcement activities, each action ‘protects a different personal interest and is composed of different elements.’” (*Torres*, 26 NY3d at 760 [internal citation omitted].)

Further, plaintiff need not prove that an officer was divested of his free will. Rather, false arrest occurs “[w]henver a person unlawfully obstructs or deprives another of his freedom to choose his own location.” (*Broughton v State*, 37 NY2d 451, 456 [1975].) When a citizen, and not an officer, is accused of false arrest, it has been “said that if the defendant directed an officer to take the plaintiff into custody, he was liable for false imprisonment.” (*Vernes v Phillips*, 266 NY 298, 301 [1935].) Here, also, the jury was not irrational in finding Ms. Moshiazhvili liable for false arrest.

III. Defendants’ Motion to Set Aside the Jury Award for Compensatory Damages as Excessive and Duplicative and Defendants’ Motion to Set Aside the Jury Verdict for Punitive Damages as Excessive.

Defendants’ motion to set aside the jury award for compensatory and punitive damages as excessive and duplicative is denied. The jury awarded \$200,000 against both Mr. and Ms. Moshiazhvili for malicious prosecution and abuse of process and \$200,000 against Ms. Moshiazhvili for false arrest and defamation/slander. The jury also awarded punitive damages of \$100,000 against Ms. Moshiazhvili, and \$50,000 against Mr. Moshiazhvili. This court does not find any basis for defendants’ assertion that the compensatory award for abuse of process and defamation/slander are excessive. Defendants’ motion on these two claims is denied.

The compensatory award for malicious prosecution and false arrest was not excessive. For damages to be excessive, they must “deviate[] materially from what would be reasonable compensation.” (CPLR 5501 [c].) Reasonable compensation is determined by evaluating

“whether the appealed award deviates materially from comparable awards.” (*Donlon v City of New York*, 284 AD2d 13, 14 [1st Dept 2001].) However, comparable awards are not dispositive. Despite “possessing the power to set aside an excessive jury verdict, a trial court should nonetheless be wary of substituting its judgment for that of a panel of fact finders whose peculiar function is the fixation of damages. Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible.” (*So v Wing Tat Realty, Inc.*, 259 AD2d 373, 374 [1st Dept 1999].)

The facts of this case are similar to *Maxwell v City of New York* (156 AD2d 28 [1st Dept 1990].) In *Maxwell*, the court held that the jury’s monetary award of \$175,000 for malicious prosecution was not excessive where “[p]laintiff, who had worked steadily for seven years . . . to build a reputation for honesty and responsibility, was arrested on the job and escorted out in front of numerous colleagues to be placed in a police vehicle In addition to his substantial emotional pain and humiliation, he incurred a not insignificant loss in wages and was compelled to pay counsel fees.” (*Id.* at 35.) Here, Ms. Moshiaashvili’s allegations affected plaintiff’s personal and professional reputation. Plaintiff was accused and arrested in front of building, in front of the residents and his co-workers. He was held in jail for 25 hours before being released on bail. He was suspended from work for nine months, he had to spend time going back and forth to court; he suffered from lost wages (later reimbursed), and accumulated attorney fees. At trial, testimony revealed that Ms. Moshiaashvili, while wearing her NYPD Auxiliary Police uniform and possessing a gun, had accused and intimidated other residents and employees by threatening to arrest them for being noisy and not completing repairs to her satisfaction. Given the similarity to *Maxwell*, the compensatory award was not unreasonable. (*See also Sital v City of New York*, 60 AD3d 465 [1st Dept 2009] [awarding \$150,000 for false arrest for 20 hours in custody]; *Vitale v Hagan*, 132 AD2d 468 [1st Dept 1987] [upholding jury award of \$750,000 for malicious prosecution], *modf’d on other grounds*, 71 NY2d 955 [1988].)

To reduce punitive-damage awards, a court must be able to say that the award was unwarranted as a matter of law. (*See Cardoza v City of New York*, 139 AD3d 151, 166 [1st Dept 2016] [“Although the jury’s punitive damages awards may be excessive, it cannot be said that plaintiff is not entitled to these damages as a matter of law.”].) Punitive damages are given based on “the sound discretion of the original trier of the facts . . . and such an award is not lightly to be disturbed.” (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978] [internal citation omitted].) Along with reviewing comparable awards, the First Department has looked at whether the award of punitive damages is in proportion to the compensatory damages award. (*See Manolas v 303 W. 42nd St. Enterprises, Inc.*, 173 AD2d 316, 317 [1st Dept 1991] [reducing damages where “[t]he jury awarded punitive damages in an amount almost eighty times that awarded for compensatory damages”].) The jury awarded \$100,000 in punitive damages against Ms. Moshiaashvili, half the amount the jury awarded in compensatory damages.¹ The jury awarded \$50,000 in punitive damages against Mr. Moshiaashvili. This is a quarter of the award for compensatory damages. When a wrongdoer is found liable, “malicious prosecution precludes a determination as a matter of law that punitive damages are improper, for the actual malice necessary to support an action

¹ Defendants state that “[a]s to Tatiana Moshiaashvili, the punitive damages award was not disproportionate to the compensatory damages award, but was nonetheless excessive in and of itself” (Defendants’ Post-Trial Notice of Motion, at ¶ 93.)

for malicious prosecution also serves to justify an award of exemplary damages.” (*Nardelli*, 44 NY2d at 503.) Defendants were found liable for malicious prosecution, and the punitive damages awarded are appropriate on this claim.

Despite defendants’ contention otherwise, it is not duplicative for plaintiff to recover on separate and distinguishable tort claims. Rather, a plaintiff cannot recover on both prima facie tort and traditional tort arising from the same issue. (*See Bd. of Ed. of Farmingdale Union Free Sch. Dist.*, 38 NY2d at 406 [“[A] cause of action in prima facie tort cannot exist where all the damages sustained are attributable to a specific recognized tort”]; *accord Ruza v Ruza*, 286 AD 767, 769 [1st Dept 1955] [“Where specific acts, recognized as tortious in the law, are asserted, the remedies lie only in the classic categories of tort There is, then, no occasion for invoking the doctrine of prima facie tort”].) Plaintiff’s claim of prima facie tort was dismissed on summary judgment. Therefore, no prima facie tort is at issue in this post-trial motion. Accordingly, this court finds there is no duplication in the jury’s award of damages.

IV. Defendants’ Motion to Direct the Clerk to Amend the Jury Extract, Dated March 5, 2018 Accurately to Reflect Damages Awarded by the Jury.

Defendants’ motion to direct the clerk to amend the Jury Extract dated March 5, 2018 to accurately reflect damages awarded by the jury is granted per the parties’ joint stipulation. Defendant correctly states that the jury awarded \$200,000 against Tatiana and Michael, and \$200,000 against Tatiana individually, not \$400,000 against both of them together.

Accordingly, it is hereby

ORDERED that defendants’ motion for a directed verdict dismissing plaintiff’s causes of action against for malicious-prosecution and abuse-of-process is denied; and it is further

ORDERED that defendants’ motion to set aside the verdict on plaintiff’s malicious-prosecution claim against Tatiana Moshiashvili is denied; and it is further

ORDERED that defendants’ motion to set aside the verdict on plaintiff’s claim for abuse-of-process as to both defendants is denied; and it is further

ORDERED that defendants’ motion to set aside the verdict on plaintiff’s claim for false arrest as to Tatiana Moshiashvili is denied; and it is further

ORDERED that defendants’ motion to set aside the jury award for compensatory damages as excessive and duplicative is denied; and it is further

ORDERED that defendants’ motion to set aside set aside the jury award for compensatory damages as excessive and duplicative is denied; and it is further

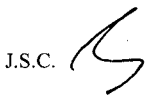
ORDERED that defendants’ motion to set aside the jury award for punitive damages as excessive is denied; and it is further

NYSCEF DOC. NO. 278

RECEIVED NYSCEF: 07/17/2018

ORDERED that defendants' motion to direct the clerk to amend the jury extract dated March 5, 2018 to accurately reflect damages awarded by the jury is granted.

Dated: July 11, 2018



J.S.C.

HON. GERALD LBOVITS
J.S.C.