

**Aponsah v McTee**

2018 NY Slip Op 34498(U)

December 3, 2018

Supreme Court, Bronx County

Docket Number: Index No. 36150/2017E

Judge: Paul L. Alpert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

C

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-29

Index No.: 36150/2017E

-----X

Ladypearl Aponsah and  
Aisha Llewellyn,

Plaintiffs

**DECISION/ORDER**

-against-

Shelly McTee and Ellen Crowley,

Respondents.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the motion as indicated below:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation in Support &amp; Exhibits.....</b>	<b>1</b>
<b>Memorandum of Law in Support of Motion to Dismiss.....</b>	<b>2</b>
<b>Notice of Cross-Motion, Affirmation in Support &amp; Exhibits.....</b>	<b>3</b>
<b>Reply Affirmation and In Opposition to Cross-Motion &amp; Exhibits...4</b>	
<b>Reply Affirmation &amp; Exhibits.....</b>	<b>5</b>

The plaintiffs commenced this suit seeking damages for defamation per se and malicious prosecution. The defendant Ellen Crowley, ( hereinafter “Crowley” ), has not answered the complaint and has instead filed a pre-answer motion to dismiss the action based on the plaintiffs’

failure to plead with particularity pursuant to CPLR §§ 3013, 3016 and for failure to state a cause of action pursuant to CPLR § 3211(a)(7). The plaintiffs oppose the motion and claim that they already amended their complaint as of right subsequent to the defendant's pre-answer motion to dismiss. They seek leave to amend the complaint in the event the court finds that they did not amend their complaint as of right.

The plaintiffs are the former home care aids of Crowley. On or about December 27, 2016, Crowley filed a complaint with the New York City Police Department that the plaintiffs wrote unauthorized checks totaling \$108,000.00 from her personal account. The plaintiffs were arrested on charges of grand larceny in the third degree and endangering the welfare of an incompetent or physically disabled person in the first degree. The charges were subsequently dismissed in criminal court.

Pursuant to CPLR § 3025(a) "a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires". However, under CPLR § 3211(f) "service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order". Courts have held that a motion to dismiss extends the movant's time to answer and in turn, extends the time in which the opposing party may amend his pleading as of right ( see STS Management Development Inc. v. New York State Department of Taxation and Finance, 254 AD2d 409 [ App Div 2<sup>nd</sup> Dept 1998 ]; Johnson v. Spence, 286 AD2d 481 [ App Div 2<sup>nd</sup> Dept 2001 ] ).

The plaintiffs have properly amended their complaint as of right and leave of court is not necessary. The complaint is deemed timely served, nunc pro tunc. The defendant's motion to dismiss extends the time to answer the complaint until ten days after service of notice of entry of the order, therefore the plaintiffs have amended their complaint as of right and leave of court is not necessary. However, the plaintiffs are incorrect in asserting that the current amended complaint renders the motion to dismiss moot. Courts have held that when there is no objection to treating the motion to dismiss as directed to the amended complaint, then the court may address the motion to the amended complaint ( see Sage Realty Corp., v. Proskauer Rose LLP, 251 AD2d 35 [ App Div 1<sup>st</sup> Dept 1998 ]. The Appellate Division held that the preferred rule is "that the moving party has the option to decide whether its motion should be applied to the new pleadings" ( *Id.* at 38 ). Here, the defendant has requested in reply papers that the motion to dismiss be applied to the amended complaint. This court will therefore consider the motion to dismiss with respect to the amended complaint.

The defendant argues that the amended complaint still does not meet the requirements of a proper pleading pursuant to CPLR section 3013. The defendant claims that the claim for defamation per se fails to set forth the specific statements allegedly made by Crowley. The defendants rely on Mbengue v. Jones, 2009 NY Slip Op 31405(U), in which the court held that "where a plaintiff merely paraphrases the alleged defamatory statement in such a way that the actual words are not evident on the face of the complaint, the longstanding rule is that dismissal is required".

In opposition, the plaintiffs state that the defendant has mischaracterized the decision in Mbengue. They argue that the key part of that decision is that the court will dismiss a matter

when the paraphrasing is done “in such a way that the actual words are not evident on the face of the complaint” ( see Mbengue ). The plaintiff argues that although there are no quotation marks around the words in the complaint, the remarks are attributable to the defendant and the plaintiff has sufficiently set forth the words on which their defamation cause of action is premised.

The court distinguishes the amended complaint in this action from the amended complaint in Mbengue. In Mbengue, the amended complaint alleged that the defendants stated to the police department and to public customers present in a Subway Sandwich shop that the plaintiff had assaulted them; informed people at the franchisor headquarters that the plaintiff “attacked” the defendants and “stolen” money from the partnership bank account. The complaint did not allege when these statements were made and to whom they were made. The court determined that a “number of the allegations of defamatory statements fail to specify the timing of the alleged defamation and/or to whom the statement was made” and dismissed the plaintiff’s defamation claim.

In the instant matter the complaint specifies the date the statements were made. It also alleges that the defendant made false, defamatory and malicious verbal statements that the plaintiffs wrote checks from the defendant’s joint personal account without authorization or permission, as set forth in the NYPD Complaint Report. The various amounts of the checks are also alleged. These statements were made to Detective Delwyn Davis of the New York City Police Department. Although the plaintiffs do not put in quotation marks the words they allege were defamatory they do set forth the words on which the defamation cause of action is premised ( see CPLR 3016[a]; Taub v. Amana Imports, Inc., 140 AD2d 687 [ App Div 2<sup>nd</sup> Dept 1988 ]; John Langenbacher Co., Inc., v. Tolksdorf, 199 AD2d 64 [ App Div 1<sup>st</sup> Dept 1993 ] ).

The complaint sufficiently sets forth the words upon which the defamation claim is based on.

The motion to dismiss the claim for defamation per se under CPLR 3013 and 3016(a) is denied.

The defendant also move to dismiss the defamation per se claim pursuant to CPLR 3211(a)(7). They argue that statements made to the police are protected by a qualified privilege unless the plaintiffs can prove malice by presenting evidentiary facts from which it may be reasonably inferred that the defendant was motivated by spite, ill will, or that a statement was made with a high degree of awareness of its probable falsity (see Rivers v. Shanahan, 2011 NY Slip Op 34165[U] [ Sup Ct New York County 2011 ]). They also claim the amended complaint is devoid of any evidentiary facts from which malice can be inferred.

In opposition, the plaintiff argues, and the court agrees, that on a motion to dismiss for failure to state a cause of action, a plaintiff is not required to submit evidentiary proof of malice or to rebut a defendant's claim of qualified privilege ( see Sokol v. Leader, 74 AD3d 1180 [ App Div 2<sup>nd</sup> Dept 2010 ]; Pezham v. City of New York, 29 AD3d 164 [ App Div 1<sup>st</sup> Dept 2006 ] ). The defendant's motion to dismiss the claim for defamation per se for failure to state a cause of action is denied.

The defendant's claim that despite the amendment to the complaint, the cause of action for malicious prosecution should be dismissed because the complaint does not indicate whether the plaintiff's criminal charges were dismissed on the merits or not and therefore fails to state a cause of action. They also argue that "the mere reporting of a crime to police and giving testimony are insufficient; it must be shown that defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (see Brown v. Sears Roebuck & Co., 297 AD2d 205 [ App Div 1<sup>st</sup> Dept 2002 ] ).

The plaintiffs oppose the motion to dismiss arguing that for the purposes of this motion, all allegations of the plaintiffs must be accepted as true and that they did allege that the criminal proceedings were terminated in their favor. They also distinguish Brown from the instant action. The motion before the court in Brown was a motion for summary judgment after the completion of discovery. The court determined that the plaintiff failed to raise an issue of fact that there was a termination of the proceeding in his favor. A different standard applies on a motion to dismiss. Moreover, the plaintiffs rely on Smith-Hunter v. Harvey, 95 NY2d 191 [ Ct App 2000 ] for the proposition that “as a general rule, under the common law any final termination of a criminal proceeding in favor of the accused, such that the proceeding cannot be brought again, qualifies as a favorable termination for purposes of a malicious prosecution action. Moreover, it makes no difference how the criminal prosecution is terminated, provided it is terminated, and at an end.”

On a motion to dismiss pursuant to CPLR §3211, “the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” ( Leon v. Martinez, 84 NY2d 83 [ Ct App 1994 ] ). The plaintiffs have sufficiently alleged that the criminal proceeding was terminated in their favor. The determination in Brown that the plaintiff failed to raise an issue of fact as to the termination of a criminal proceeding is inapplicable here because this is not a motion for summary judgment. Moreover, as the Court of Appeals has opined, any final termination of a criminal proceeding in favor of the accused, such that the proceeding cannot be brought again satisfies the requirements for a malicious prosecution action. The defendant’s argument that the plaintiffs allege in a

separate suit that officer Delwyn Davis knowingly wrote the complaint with omissions of exculpatory information is proof that Crowley could not have played an active role in the prosecution is without merit. The motion to dismiss the malicious prosecution claim for failure to state a cause of action is therefore denied.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendant's motion to dismiss the cause of action for defamation per se based on CPLR §§ 3013, 3016(a) and 3211(a)(7) is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants' motion to dismiss the cause of action for malicious prosecution based on CPLR § 3211(a)(7) is denied, and it is further,

ORDERED AND ADJUDGED, that the plaintiffs, serve a copy of this Order with Notice of Entry upon the defendant within twenty (20) days from the date of entry.

This constitutes the decision and order of the court.

Dated: December 3, 2018



---

Hon. Paul L. Alpert, A.J.S.C

**HON. PAUL L. ALPERT  
A.J.S.C.**