

Rossi v Johnston

2019 NY Slip Op 30461(U)

February 26, 2019

Supreme Court, New York County

Docket Number: 154491/2017

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X **INDEX NO.** 154491/2017

PAOLO ROSSI,

Plaintiff,

MOTION SEQ. NO. 002

- v -

KERRI-ANN JOHNSTON,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 32, 33, 34, 35, 36, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this action by plaintiff Paolo Rossi seeking damages for malicious prosecution, defendant Kerri-Ann Johnston¹ moves for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff and defendant were married in Canada in 2004. Doc. 1 at par. 10. They were separated in 2010 and were divorced in California in 2012. Doc. 1 at par. 11. On April 30, 2015, the Los Angeles Superior Court (“the LA Superior Court”) issued an order (the April 2015 order) permitting defendant to relocate to Montreal, Canada with the couple’s two children, a son

¹ This Court cannot ascertain the precise identity of defendant, since exhibits submitted in support of the motion alternatively reflect that her name is Kerry-Ann Johnston (Doc. 8), Kerry Johnston (Doc. 13) and Kerry-An Johnston (Doc. 18).

and a daughter (“the children”). Doc. 1 at par. 13. The LA Superior Court simultaneously granted defendant’s application for a restraining order prohibiting plaintiff from being within 25 yards of plaintiff, except for “[b]rief and peaceful contact” as required for court-ordered visitation of the children. Doc. 1 at par. 14. The restraining order also prohibited plaintiff from harassing, threatening or molesting defendant. Doc. 1 at par. 14.

In 2017, defendant relocated to New York City with the children. Doc. 1 at par. 15. In accordance with the custody and visitation schedule set forth in the April 2015 order, the children were to be with plaintiff from 4 p.m. on Thursday, February 16, 2017 until 6 p.m. the following Monday, which was Presidents’ Day. Doc. 1 at par. 17. The April 2015 order further required that plaintiff and defendant were to communicate by means of Our Family Wizard (“OFW”), an online service, documenting communications between parties involved in divorce and separation. Doc. 1 at par. 18.

On February 16, 2017, plaintiff advised defendant by OFW that he preferred to pick the children up from school in order to avoid seeing defendant in person. Doc. 1 at par. 19. However, defendant allegedly insisted on bringing the children to the Residence Inn Hotel at 170 Broadway in lower Manhattan, where plaintiff was staying, and plaintiff agreed to this request. Doc. 1 at pars. 20-21. At or about 4 p.m. that day, defendant brought the children to the corner of Broadway and Maiden Lane near the entrance to the hotel. Doc. 1 at par. 21. According to plaintiff, he made no eye contact with defendant and they had no communication at all. Doc. 1 at par. 23. When defendant dropped the children off, she remained in the intersection, never stepped on the sidewalk, and the children were between plaintiff and defendant. Doc. 1 at par. 23.

During the afternoon or evening of February 16, 2017, defendant went to the First Precinct of the New York City Police Department (“NYPD”) to initiate a criminal action against plaintiff based on his alleged conduct at the time the children were dropped off. Doc. 1 at par. 24. In connection with her complaint to the NYPD, defendant provided a copy of the restraining order and maintained that, in violation of the order, plaintiff stood six feet away from her and mouthed the words “arrest me” while staring at her. Doc. 1 at par. 26. Plaintiff alleges that, as a result of defendant’s intentionally false statements, a warrant was issued for his arrest. Doc. 1 at pars. 26-27.

The following day, plaintiff brought his children to their school and remained there for a parents’ visiting day which was also attended by defendant. Doc. 1 at par. 28. Plaintiff claimed that, as a result of his presence at the school, defendant made repeated calls to the NYPD asking that plaintiff be arrested for violating the protective order, and that plaintiff was in fact arrested at the school. Doc. 1 at pars. 29-30. Plaintiff was arraigned under the caption *People v Rossi*, Docket Number 2017NY010955, and was charged with criminal contempt in the second degree in violation of Penal Law § 215.50(3) for violating the restraining order in front of the hotel on February 16, 2017. Doc. 1 at pars. 32-33.

On March 13, 2017, the office of the New York County District Attorney (“the DA”) dismissed the charges against plaintiff on the ground that a surveillance video of the parties’ interaction near the hotel revealed that plaintiff “maintained his distance from the complaining witness and did not do anything to violate the underlying restraining order.” Doc. 1 at par. 37; Doc. 19.

On May 15, 2017, plaintiff commenced the captioned action by filing a summons and verified complaint. Doc. 1. As the sole cause of action, plaintiff alleged malicious prosecution,

claiming that his criminal prosecution “was initiated and pursued by [defendant] with actual malice and without probable cause to believe [plaintiff] was guilty of the crime charged or any other crime.” Doc. 1 at par. 39. Plaintiff further claimed that, as a result of defendant’s actions, he suffered, inter alia, physical and emotional distress and sustained damages in the amount of \$100,000. Doc. 1 at par. 40. Plaintiff further alleged that he was entitled to punitive damages in the amount of \$100,000 and to attorneys’ fees in the amount of \$2,500.

Defendant joined issue by filing a verified answer on June 5, 2017. Doc. 2.

Thereafter, defendant filed the instant motion seeking summary judgment dismissing the complaint pursuant to CPLR 3212. Doc. 5. In support of the motion defendant submitted, among other things, a sworn affidavit, an attorney affirmation, and a memorandum of law. She also submitted the affirmation of Jeanine Launay, an Assistant District Attorney (“ADA”), who states that plaintiff was arrested based on defendant’s account that she had been threatened by plaintiff. Doc. 20. Launay also represents that, after plaintiff was arrested, the charges against him were dismissed because the DA did not believe that the charges could be proven against plaintiff beyond a reasonable doubt. Doc. 20. Defendant argues that her motion must be granted as a matter of law because she has established that plaintiff failed to establish the elements of a claim for malicious prosecution.

In opposition to the motion, plaintiff claims that the complaint cannot be dismissed because material issues of fact exist regarding whether defendant acted with malice, whether probable cause existed for his arrest, and whether defendant initiated a criminal proceeding against him. He submits an affidavit in which he maintains that he did not mouth any words to defendant or threaten her in any way on February 16, 2017. Doc. 32.

LEGAL CONCLUSIONS:

The tort of malicious prosecution:

protects the plaintiff's distinct "interest of freedom from unjustifiable litigation". "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" . . . "The law . . . places a heavy burden on malicious prosecution plaintiffs".

[The Court of Appeals has] "never elaborated on how a plaintiff in a malicious prosecution case demonstrates that the defendant commenced or continued the underlying criminal proceeding". But, 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.

[T]he 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 . . . [g]enerally, 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".

Although burdensome, these barriers to a malicious prosecution plaintiff's recovery are not insurmountable, and in some instances, the plaintiff can simultaneously rebut the presumption of probable cause and satisfy the malice element by demonstrating that the evidence of guilt relied upon by the defendant was so scant that the prosecution was entirely baseless and maliciously instituted. In that sense, "[w]hile lack of probable cause to institute a criminal proceeding and proof of actual malice are independent and indispensable elements of a malicious prosecution action, the absence of probable cause does bear on the malice issue," and "probable cause to initiate a criminal proceeding may be so totally lacking as to reasonably permit an inference that the proceeding was maliciously instituted". 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.

* * *

Considering the aforementioned law in the context of a summary judgment motion, the defendant moving for summary judgment must establish a defense to the plaintiff's malicious prosecution [claim] as a matter of law by submitting sufficient evidence to eliminate any material issues of fact. On such a motion, the facts must be viewed in the light most favorable to the plaintiff, and every available inference must be drawn in the plaintiff's favor. "Once [the movant's prima facie] showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action". Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff on issues of probable cause and malice, the court on a summary judgment motion must indulge all available inferences of the absence of probable cause and the existence of malice.

De Lourdes Torres v Jones, 26 NY3d 742, 760-763 (2016) (citations omitted).

Applying the foregoing principles to this case, this Court is constrained to deny defendant's motion.

Commencement or Continuation of Proceeding

As noted above, a defendant who supplies false information to a prosecutor in furtherance of a criminal prosecution may be deemed to have commenced or continued a prosecution against a plaintiff in a malicious prosecution action. *See DeLourdes*, 26 NY2d at 760. In her affidavit in support of the motion, defendant states, in conclusory fashion, that "nothing I reported to the police was false." Doc. 7 at par. 11. She further states that, when she dropped the children off at the hotel, plaintiff stopped about 2 or 3 yards away from her and mouthed the words "arrest me." Doc. 7 at pars. 15-16. However, on March 13, 2017, a New York County ADA dismissed the charges against plaintiff, stating that:

the assigned ADA was able to obtain video surveillance of the alleged incident, and upon reviewing the video, it appears that the defendant maintained his distance from the complaining witness and did not do anything to violate the [protective order].

Doc. 19 at 2.

This Court has reviewed the videotape (Doc. 11) and it does not show plaintiff within close proximity to defendant. Indeed, it shows plaintiff taking steps backwards as if to avoid going near defendant. Therefore, defendant has failed to establish, as a matter of law, that she did not commence or continue a prosecution of plaintiff based on false information.

Termination in Favor of Accused

It is undisputed that the criminal charge brought against plaintiff was dismissed. Therefore, defendant clearly has failed to establish that the criminal proceeding did not terminate in plaintiff's favor.

Absence of Probable Cause

In conclusory fashion, defendant represents in her affidavit in support of the motion that *she* had probable cause to believe that plaintiff violated the restraining order. Doc. 7 at par. 11. However, the proper inquiry is whether the police, not defendant, had probable cause for the arrest. *See generally De Lourdes*, 26 NY3d at 767-768. Even assuming, arguendo, that defendant established that there was probable cause for plaintiff's arrest, plaintiff, by submitting an affidavit denying that he violated the restraining order by threatening or communicating with defendant, raised an issue of fact precluding summary judgment since "the issue of probable

cause could not be resolved as a matter of law.” *Burgos-Lugo v City of New York*, 146 AD3d 660, 661-662 (1st Dept 2017) quoting *Parkin v Cornell Univ.*, 78 NY2d 523, 530 (1991).

Actual Malice

Defendant states, again in conclusory fashion, that “nothing suggests that [her] reports [to the police] were made with malice.” Doc. 7 at par. 11. However, it would be error to grant summary judgment dismissing the complaint where an issue of facts exists regarding whether there was probable cause for plaintiff’s arrest, since a finding that there was no probable cause could lead a jury to infer actual malice. *See Mendez v City of New York*, 137 AD3d 468, 471 (1st Dept 2016).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Kerri-Ann Johnston seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties are to appear for a preliminary conference on May 7, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

~~_____
KATHRYN E. FREED, J.S.C.~~

2/26/2019
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	