

Scott v Kosova Props. Inc.

2019 NY Slip Op 30851(U)

March 26, 2019

Supreme Court, New York County

Docket Number: 155225/16

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

GREGORY SCOTT

INDEX NO. 155225/16

- v -

MOT. DATE

KOSOVA PROPERTIES INC. et al.

MOT. SEQ. NO. 002

The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This action arises from an alleged malicious prosecution. Plaintiff now moves for summary judgment on the issue of liability against defendants Kosova Properties Inc. ("Kosova"), Mulliner Properties, Inc. ("Mulliner"), as well as Hamdi Nezaj ("HN") and Spend Nezaj ("SN"), both in their official capacities. The remaining defendant, Lazer Plumaj ("LP"), has not submitted opposition to the motion and his answer has previously been stricken by the court (see order dated ___). Issue has been joined and the motion was brought before note of issue was filed. Therefore summary judgment relief is available. The court's decision follows.

In this action, plaintiff alleges that beginning in 1998 he resided in an apartment located in a building owned by Kosova. The building is located at 83 Park Terrace West, New York, New York (the "building"). Specifically, plaintiff resided in apartment 3A. At his deposition, plaintiff testified that HN signed his original lease for the apartment on behalf of Kosova and that plaintiff made his rent payment checks out HN care of Kosova. Plaintiff further explained that SN is HN's son. At his deposition, plaintiff was unsure what Mulliner's relationship was to the building, but stated that he believed there was some relationship based upon the fact that he sent his checks to Mulliner. Finally, plaintiff testified that LP was the "super who moved in approximately Janaury of 2015". Defense counsel represents to the court that LP is no longer employed by Kosova.

The building has approximately 35 to 39 apartments. Plaintiff claims that Kosova and HN racially discriminated against new potential tenants by refusing to allow them to reside in the building. Plaintiff also claims that he started a Tenants' Association at the building. Plaintiff admits that he filed a number of complaints against some or all of the defendants, including with DHCR.

Concerning the underlying allegations regarding malicious prosecution, plaintiff claims that a "fire switch" in his apartment was broken and he reported it to the LP on or about September 12, 2015. On

Dated: 3.26.19



HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

September 16, 2015, LP still had not fixed the switch. Meanwhile, plaintiff claims that he received an email that morning from another tenant in the building about "saying he saw a broken window and [plaintiff] might want to take a look at it." Plaintiff then went downstairs and saw LP in the hallway by the mailboxes. LP pointed to a nearby broken window. According to plaintiff, he said to LP "basically that as head of the Tenants' Association, I don't like to see broken windows." Plaintiff also claimed that he also "warned" LP that if LP didn't fix the fire switch by 8:30pm, plaintiff would call the fire department. As for the window, plaintiff did not have any knowledge about how the window became broken. After his conversation with LP, plaintiff again called HN about the broken fire switch in his apartment.

At approximately 7:15pm that same day, plaintiff claims that he was falsely arrested after LP falsely claimed to the police that he personally observed plaintiff break the window at 6pm. Immediately prior to his arrest, plaintiff testified:

Q. What did the [police] say to you?

A. The first words out of her mouth were, she said angrily "what do you have to say for yourself?"

Q. What did you say?

A. I said the kind of thing you would say if an FBI said to you --

Q. What did you say?

A. I said "I have no idea what you are talking about."

Q. What did she say?

A. She said "what do you have to say for yourself?" I was so shocked by that, that I remember those words exactly.

Q. That was said by the woman?

A. Yes.

Q. Then what happened?

A. I said "I have no idea what you're talking about."

Q. What did they say to you?

A. They said the super said you broke the window.

Q. Who said that?

A. She said it.

Q. What did you say?

A. I was shocked and I said "he's lying."

Q. Okay. Did you have a conversation about that?

A. Basically, they told me to step outside and turn around. He was like a rookie. She did all the talking. He didn't say anything else?

Q. Was he a rookie?

A. He was like a rookie. I have no idea what his status was.

Q. She said turn around. Then what happened?

A. She handcuffed me.

Q. Then what happened?

A. [LP], the super, and [SN] were hiding in the stairwell. As soon as they handcuffed me, they called them out and both of them said, yes, that's the guy.

Q. You were taken to the police station at the time?

A. I was...

On February 2, 2016, after three court appearances over the next months, plaintiff's case was dismissed. Plaintiff has provided a copy of a Certificate of Disposition which provides in relevant part "People concede 30.30 – Dismissed & Sealed". This document is not certified and is therefore not in admissible form.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Alvotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The elements of a claim for malicious prosecution are: [1] the commencement of a criminal proceeding by the defendant against the plaintiff; [2] which terminates in plaintiff's favor; and [3] the proceeding was brought with malice and without probable cause (*Torres, supra*). While a defendant other than a public prosecutor may be liable for malicious prosecution, such a defendant must do more than testify or report an incident to police (see i.e. *Barrett v. Watkins*, 82 AD3d 1569 [3d Dept 2011]). Rather, a civilian complainant must "giv[e] advice and encouragement or importun[e] the authorities to act" (*Brown v. Sears Roebuck & Co.*, 297 AD2d 205 [1st Dept 2002]) such as providing false information or playing an active role in the prosecution (*Baker v. City of New York*, 44 Ad3d 977 [2d Dept 2007]).

Here, plaintiff's claim that LP knowingly and intentionally made a false accusation against him to the police is sufficient to allege a *prima facie* cause of action for false arrest and imprisonment as well as malicious prosecution (see i.e. *Brown v. Nassau County*, 306 AD2d 303 [2d Dept 2003]; cf. *Slatkin v. Lancer Litho Packaging Corp.*, 33 AD3d 421 [1st Dept 2006]).

Plaintiff argues that he is entitled to summary judgment on liability against the remaining defendants on a theory of *respondeat superior*. It is true that by virtue of LP's default in this proceeding, he has admitted the factual allegations against him and any reasonable inferences therefrom, (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]). Plaintiff has not, however, actually obtained a

default judgment against LP yet. Nor can the court entertain such relief, since a request for same has not been properly noticed.

In any event, the remaining defendants are certainly not in default in this action. They vehemently dispute plaintiff's claims. Further, plaintiff has not met his burden of proof on this motion by establishing that any one of the defendants should be held vicariously liable for LP's alleged acts. In order to do so, plaintiff would have to establish as a matter of law that LP was acting within the scope of his employment with the defendants when he allegedly falsely reported that plaintiff broke the window. Plaintiff has not clearly stated which defendant actually employed LP. Indeed, Mulliner does not even appear to have any connection to the building, so it is unclear how it could be vicariously liable for LP's acts. As for the individual defendants, unless they personally employed LP or otherwise engaged LP as their agent, allegations absent from this record, it is unclear what plaintiff's theory of liability is against them.

Moreover, issues of plaintiff's own credibility cannot be determined on this record. Indeed, the parties have a long and fact specific history which goes to the issue of whether the underlying claim that plaintiff broke the window was false or not. Finally, many of the documents which plaintiff has submitted to the court are not in admissible form and are therefore not properly before it.

Accordingly, for at least these reasons, it is hereby **ORDERED** that plaintiff's motion for summary judgment is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

3.26.19
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.