

Feinberg v Lalicata

2019 NY Slip Op 32004(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 650582/2013

Judge: Kelly A. O'Neill Levy

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.

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

PRESENT: HON. KELLY O'NEILL LEVY PART IAS MOTION 19

Justice

-----X

CANDICE FEINBERG,

Plaintiff,

- v -

STEVEN LALICATA, DIANA FERNANDEZ, JAMES HART,
BRIAN MARTINEZ

Defendant.

-----X

INDEX NO. 650582/2013

MOTION DATE 05/08/2019

MOTION SEQ. NO. 018

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 018) 161, 162, 163, 164, 166, 167, 168, 169, 170

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

HON. KELLY O'NEILL LEVY:

In this action to recover damages for fraud, aiding and abetting fraud, conversion, unjust enrichment, false arrest, and malicious prosecution, Defendant Diana Fernandez ("Fernandez") moves for summary judgment pursuant to CPLR § 3212 to dismiss the complaint on the theory that there are no issues of material fact in the case and thus no trial is necessary. Plaintiff Candice Feinberg ("Plaintiff") opposes this motion for summary judgment.

"The drastic remedy of summary judgment may only be granted where, viewing the facts in the light most favorable to the non-movant, 'the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact,"' and the non-moving party has subsequently 'fail[ed] "to establish the existence of material issues of fact which require a trial of the action"'... Summary judgment disposition is inappropriate where varying inferences may be drawn, because in those cases it is for the factfinder to weigh the evidence and resolve any issues necessary to a final conclusion." *Dormitory Authority v. Samson Constr. Co.*, 30 N.Y.3d 704, 717 (2018) (citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012)).

Background

Plaintiff's complaint alleges that on or about April 21, 2010 she met co-defendant Steven Lalicata ("Lalicata"). The two began a relationship shortly thereafter and married on March 29,

2011. In the ensuing months, Lalicata began to disappear for long periods of time and eventually attributed the absences to gambling trips. From September 2011 to June 2012, Plaintiff transferred or withdrew a total of \$739,105 for Lalicata's alleged gambling debts, in one instance handing \$145,000 in cash to an alleged organized crime associate. Around March 2012, Plaintiff allegedly discovered that Lalicata had an ongoing sexual relationship with Fernandez and that the money was being used for Lalicata and Fernandez's personal purchases. Plaintiff alleges that Fernandez was purchasing jewelry, luxury goods, home furnishings, and travel accommodations during the period of alleged fraud and housing Lalicata during his long periods of absence.

Following these discoveries, Plaintiff and Fernandez exchanged a series of text messages, during which Fernandez admitted to having a relationship with Lalicata and Plaintiff made it known that Lalicata had taken money from her. After these exchanges, Fernandez made her first formal complaint to the New York City Police Department ("NYPD") and the New York County District Attorney's Office ("DANY"). On November 27, 2012, Plaintiff was arrested and charged with two counts of Aggravated Harassment in the Second Degree in violation of New York Penal Law §§ 240.30(1)(a) and (2). Throughout the course of the legal action, Fernandez repeatedly contacted DANY regarding the prosecution against Plaintiff. On November 20, 2013, the case against Plaintiff was dismissed and sealed.

Plaintiff commenced her action in the current case in February 2013, alleging three causes of action against Fernandez: conversion, unjust enrichment, and false arrest. Fernandez filed a motion to dismiss the causes of action against her on June 11, 2013, which this Court denied. Fernandez then submitted another written statement to law enforcement officials complaining of harassing contact from Plaintiff. Plaintiff was arrested for a second time on March 24, 2014. On July 12 and 13, 2016, Fernandez testified at the bench trial against Plaintiff, but the second criminal matter was ultimately dismissed and sealed as well.

In January 2018, Plaintiff filed an amended complaint, making Fernandez party to two causes of action previously alleged against the other defendants—fraud and aiding and abetting fraud. The amended complaint also added a malicious prosecution cause of action against Fernandez. On May 25, 2018, this Court denied Fernandez's motion to dismiss the fraud and malicious prosecution causes of action against her. Fernandez now moves for summary judgment on all causes of action against her.

Fraud

The elements of a cause of action for fraud are “a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages.” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (2009). Plaintiff has not established a prima facie case of fraud against Fernandez as there is no allegation that Plaintiff relied on any material misrepresentation of fact made by Fernandez. However, there remains a triable question of fact as to whether Fernandez should be liable on Plaintiff’s theory of civil conspiracy to defraud.

Civil conspiracy to commit a tort is not recognized as an independent cause of action. *See Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep’t 2011). Conspiracy allegations are permitted, however, to connect an individual defendant with an underlying, actionable tort – which exists in this case due to the allegation of fraud. *See Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968 (1986). In order to establish a claim of civil conspiracy, “the plaintiff ‘must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury.’” *Abacus Fed. Sav. Bank v Lim*, 75 A.D.3d 472, 474 (1st Dep’t 2010) (quoting *World Wrestling Fedn. Entertainment v. Bozell*, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001)).

Regarding the underlying tort of fraud, there are numerous questions of fact that are best left for trial. Plaintiff alleges that Lalicata, along with co-defendants James Hart and Brian Martinez, knowingly made material misrepresentations of fact which induced Plaintiff to transfer money. Many of the same questions of fact relating to the underlying fraud are questions of fact relating to the civil conspiracy considerations of whether an overt act was made and whether there are resulting damages or injury.

Establishing agreement is less straightforward. Plaintiff does not assert that Fernandez expressly communicated with the other defendants regarding any plan to defraud Plaintiff, but a finder of fact is permitted to make a reasonable inference of fraudulent intent and knowledge based on the surrounding circumstances. *See, e.g., Pludeman v Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 (2008) (“we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud”); *see*

also *Oster v. Kirschner*, 77 A.D.3d 51, 55-56 (1st Dep't 2010) ("Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud."). For example, Plaintiff cites to receipts which may indicate that, just two days after Lalicata's alleged co-conspirator took \$145,000 in cash from Plaintiff, Fernandez bought shoes for \$845 in cash and then two weeks later purchased another \$3,189 worth of shoes in cash. Fernandez also deposited \$3,500 in cash into her personal bank account during the period when Plaintiff was supplying Lalicata with large sums of cash. Plaintiff alleges that Fernandez received gifts and travel opportunities from Lalicata and that this may indicate conspiratorial coordination. For example, Plaintiff produces receipts for Fernandez's cash purchases which have Lalicata's phone number printed on them. Plaintiff argues that these surrounding circumstances raise questions as to whether there was an understanding between Fernandez and Lalicata that more money was to be secured from Plaintiff and whether Fernandez furthered the fraud by harboring Lalicata during his absences or otherwise. It is not for this court to opine on the persuasiveness of these arguments at this stage. In a motion for summary judgment, "the court's role is limited to issue finding, not issue resolution." See, e.g., *Kriz v. Schum*, 75 N.Y.2d 25, 33 (1989). Fernandez has not met her burden of establishing that there exist no triable questions of fact pertaining to Plaintiff's theory of civil conspiracy to defraud and thus Fernandez's motion for summary judgment on fraud is denied.

Aiding and Abetting Fraud

Unlike conspiracy to commit fraud, an aiding and abetting cause of action can stand alone. See, e.g., *Oster* at 57; see also *Agostini v. Sobol*, 304 A.D.2d 395 (2003). In order to succeed on an aiding and abetting fraud cause of action, "[a] plaintiff...must allege the existence of the underlying fraud, actual knowledge, and substantial assistance." *Oster*, 77 A.D.3d at 55; see also *William Doyle Galleries, Inc. v. Stettner*, 167 A.D.3d 501 (1st Dep't 2018).

As previously noted, there are material questions of fact as to whether there was underlying fraud and whether the surrounding circumstances can establish actual knowledge. See, e.g., *Pludemun*, 10 N.Y.3d at 486. A question of fact also remains as to whether Fernandez provided substantial assistance.

"Substantial assistance exists 'where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is

predicated.” *Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep’t 2009) (citing *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003), quoting *McDaniel v. Bear Stearns & Co., Inc.*, 196 F. Supp. 2d 343, 352 (S.D.N.Y. 2002)). Plaintiff alleges that but for Fernandez’s relationship with Lalicata the fraud would not have persisted as long as it did. Plaintiff alleges that Fernandez provided a home away from home and an alternative sexual relationship for Lalicata, that Fernandez in turn would spend money that Lalicata took from Plaintiff and thereby encouraged the taking of more money, and that Fernandez pursued malicious prosecution against Plaintiff in an effort to prevent recovery. Plaintiff identifies specific instances during Fernandez’s testimony at Plaintiff’s criminal trial where Fernandez admits to lying to law enforcement about Plaintiff. See Plaintiff’s exhibit 12; 13 at 3-4; 22, 86:7-87:17, Fernandez Dep. 171:23-172:17. Yet again it is important to emphasize that, in a motion for summary judgment, “the court’s role is limited to issue finding, not issue resolution.” *Kriz*, 75 N.Y.2d at 33. Fernandez has not met her burden of establishing that there exist no triable questions of fact pertaining to aiding and abetting fraud and thus Fernandez’s motion for summary judgment on aiding and abetting fraud is denied.

Conversion

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50 (2006). To succeed on a conversion claim, a plaintiff should demonstrate “(1) plaintiff’s possessory rights or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights.” *Id.* (internal citations omitted). Significantly, “[w]rongful intent is not a necessary element of conversion.” *Suzuki v. Small*, 214 A.D. 541, 557 (1st Dep’t 1925).

There are material questions of fact best left for the determination of a fact finder as to whether Plaintiff voluntarily turned over money to Lalicata under the circumstances of the alleged fraud. For example, there is a question of fact as to whether the total of \$3,500 in cash that Fernandez deposited into her bank account during the time period in which Lalicata allegedly defrauded Plaintiff was in fact Plaintiff’s money. Plaintiff’s exhibit 14. There is an additional question of material fact as to whether Fernandez used Plaintiff’s defrauded money to

purchase personal items, such as furniture and shoes. Plaintiff's exhibit 12; 13. Therefore, Fernandez's motion for summary judgment on the conversion cause of action is denied.

Unjust Enrichment

Unjust enrichment may be found where the defendant has obtained a benefit bestowed by the plaintiff, and the plaintiff was not adequately compensated. *See Swain v. Brown*, 135 A.D.3d 629 (1st Dep't 2016). "Unjust enrichment [] does not require the performance of any wrongful act by the one enriched." *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978). Unjust enrichment may only succeed where the defendant has not breached a contract or committed an underlying tort and "circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777 (2012).

While Plaintiff's unjust enrichment claim can only succeed if Plaintiff's other claims fail, that does not mean it should be dismissed. Whether Fernandez was actually enriched and possessed Plaintiff's property is an open question best left to finders of fact. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 (2011). Whether it is against "equity and good conscience" to permit defendant to retain the property is also a question of fact. *See Paramount Film Distributing Corp. v. State*, 30 N.Y.2d 415 (1972). Therefore, Fernandez's motion for summary judgment on the unjust enrichment cause of action is denied.

False Arrest and Malicious Prosecution

Fernandez moves for summary judgment on the false arrest cause of action on the theory that Fernandez did not place Plaintiff under arrest or cause her to be arrested falsely, citing that NYPD and DANY determined there was sufficient evidence and probable cause to arrest Plaintiff. Fernandez also moves for summary judgment on the malicious prosecution cause of action on the theory that there is no issue of fact regarding whether probable cause existed for the arrest of Plaintiff and Fernandez did not make any false misrepresentations to NYPD or DANY about Plaintiff. Fernandez further argues that even if it is believed to be true that she gave false information to NYPD and DANY, the alleged misrepresentations concerned collateral matters that have nothing to do with the central issues and threats made by Plaintiff.

While false arrest and malicious prosecution are "kindred actions," each "protects a different personal interest and is composed of different elements." *Broughton v. State*, 37 N.Y.2d 451, 456 (1975). "The unique elements of malicious prosecution typically present a greater obstacle to recovery than the elements of false arrest... 'The law... places a heavy burden on

malicious prosecution of plaintiffs.” *De Lourdes Torres v. Jones*, 226 N.Y.3d 742, 760 (2016), quoting *Smith-Hunter v. Harvey*, 95 N.Y.2d 191, 195 (2000).

“To prevail on [a false arrest claim], 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.” *De Lourdes Torres* at 759. “Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty.” *Colon v. City of New York*, 60 N.Y.2d 78, 82 (1983). However, in *Warner v. Druckier*, the First Department held that the “plaintiff had adequately stated a cause of action for unlawful arrest/imprisonment premised on his allegations that defendant Druckier ‘instigated’ plaintiff’s arrest with knowledge that there was no lawful basis therefor and took an active role in plaintiff’s prosecution by encouraging or importuning the authorities to act, with the intent to confine him.” 266 A.D.2d 2, 3 (1st Dep’t 1999) (citations omitted). By speaking with DANY and NYPD, Fernandez intended for Plaintiff to be charged with a crime. Fernandez also submitted a written statement to NYPD that outlined her complaints of Plaintiff’s alleged harassment. Plaintiff’s exhibit 19. Plaintiff was also conscious of the confinement and did not consent to it, as she was physically arrested twice by NYPD. The salient question is whether the arrest stemmed from probable cause.

It is Plaintiff’s contention that there would not have been probable cause to arrest her had Fernandez not instigated the action and falsified evidence. For example, Fernandez stated in her testimony in the criminal trial against Plaintiff:

Q: And when Detective Buddin interviewed you, you lied to Detective Buddin about her relationship with Steven Lalicata, correct?

...

A: Yes.

Q: You lied to him, right?

A: Yes.

Q: You told Detective Buddin numerous times that you and Steven are only friends. And that you had known each other since high school, correct?

A: Since Junior high school.

Q: Since Junior high school.

A: Yes.

Q: And that was a lie, right? That wasn’t true?

...

A: Yes.

Q: You also told Detective Buddin that you and Steven are mutual friends, you hang out together and that you don't know why Candice is sending you threatening e-mails or voicemail's [sic], correct?

A: What date is that from?

Q: November 26 of 2012 do you recall telling Detective Buddin that you had no idea why Candice was reaching out to you?

...

A: Yes.

Q: And that wasn't true, was it? You knew why she was reaching out to you, correct?

A: Yes.

Q: So you lied to the detective about that as well, correct?

A: I was embarrassed to say that I was -

The Court: Did you lie to the detective?

A: Yes. Yes.

Plaintiff's exhibit 22, 86:7-87:17. Viewing the evidence in the light most favorable to the non-movant, whether Fernandez "instigated" Plaintiff's arrest by supplying DANY and NYPD with false information, indicating that there was no probable cause to begin with, is a question of fact best left to a finder of fact at trial. *See Warner*, 266 A.D.2d at 3.

In order to succeed on a malicious prosecution cause of action, a plaintiff must prove "(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." *Broughton* at 457. "[T]he 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." *Nardelli v. Stamberg*, 44 N.Y.2d 500, 503 (1978). "[T]he 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." *Id.* at 762; *see e.g. Boose v. City of Rochester*, 71 A.D.2d 59, 70 (4th Dep't 1979) ("[I]t has been said that it is difficult to conceive how a prosecution initiated without probable cause could be initiated with any[thing] other than bad motives...[t]he issue is a matter for the jury...and it may infer malice from the lack of probable cause insofar as it tends to show that defendant did not believe in the guilt of the accused and that he did not initiate the proceedings for a proper purpose.")

In *De Lourdes Torres*, the Court of Appeals held that, when a confession to a murder was potentially coerced by the interviewing detectives, "a triable issue of fact exist[ed] as to whether the confession increased the detectives' suspicion to the level of probable cause, for by her account, they invented a false confession and forced her to sign it." 226 N.Y.3d at 765. In her 2018 deposition, Fernandez testified regarding an alleged voicemail that she had told NYPD Detective Buddin she had received prior to Plaintiff's second arrest:

Q: Did you tell Detective Buddin that you had a voice mail from Candice that said I have enough money to make you disappear?
A: Yes.
Q: You had that recording?
A: I believe the assistant district attorney has that recording.
Q: How did you make that recording?
A: It was - no, I'm sorry, I take that back. She called me while I was - she had called me and she told me that why did I get an attorney and that I think I'm so smart and that she has enough money to make me disappear.
Q: So there was never any recording, right?
A: No.

Plaintiff's exhibit 5, Fernandez Dep. 171:23-172:17. It is Plaintiff's contention that this voicemail was part of the basis for her second arrest, but that in fact this voicemail never existed. If Fernandez falsified this evidence, there could be a basis for a malicious prosecution cause of action against Fernandez. See *De Lourdes Torres* at 762; *Colon* at 82-83. This is a material issue of fact best determined by a fact finder at trial. Fernandez's motion for summary judgment on the issues of false arrest and malicious prosecution is therefore denied.

Conclusion

Because there are material issues of fact regarding each cause of action against Fernandez best determined by a fact finder, Fernandez's motion for summary is denied.

7/8/2019
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

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