

Reina v Gonzales

2019 NY Slip Op 33187(U)

October 21, 2019

Supreme Court, Suffolk County

Docket Number: 43064/2010

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Christine Reina and Edward Hoyt,

Plaintiffs,

-against-

April Gonzales and
April Gonzales Garden Design, Inc.,Defendants.

Motion Sequence No.: 002; MDMotion Date: 3/6/19Submitted: 6/19/19Index No.: 43064/2010Attorney for Plaintiffs:Tarbet & Lester, PLLC
132 North Main Street
East Hampton, NY 11937Attorney for Defendants:Thomas J. DeMayo, Esq.
148 East Montauk Highway
Hampton Bays, NY 11946Clerk of the Court

Upon the following papers numbered 1 to 20 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 19; Other, memorandum of law, 20; it is

ORDERED that the motion by plaintiffs Christine Reina and Edward Hoyt for summary judgment in their favor is denied.

This is an action to recover damages for breach of contract, quantum meruit, abuse of process, malicious prosecution, and prima facie tort. The complaint alleges that plaintiff Christine Reina was retained by defendants April Gonzales and April Gonzales Design, Inc. to provide bookkeeping services pursuant to a written agreement dated October 8, 2008, and that defendants

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breached the agreement by failing to make payment for services rendered. It alleges that defendant Gonzales maliciously filed false criminal complaints against plaintiffs Christine Reina and Edward Hoyt when they attempted to collect the debt. The criminal complaints and related orders of protection issued against plaintiffs were ultimately dismissed.

Plaintiffs now move for summary judgment in their favor, arguing that they have made a prima facie showing that defendants defaulted under the agreement by failing to make payment. They further argue that no triable issues of fact remain as to the causes of action for abuse of process, malicious prosecution and prima facie tort. In support of their motion, plaintiffs submit, among other things, copies of the pleadings, the proposal of Christine Reina Associates for bookkeeping services, the misdemeanor complaints for each plaintiff, the temporary orders of protection as to each plaintiff, and transcripts of the parties' deposition testimony.

Defendants oppose the motion, arguing that there was never any contract between the parties and that a triable issue of fact remains as to whether plaintiff Reina performed the services outlined in the proposal. As to the malicious prosecution claim, defendants argue that there is a triable issue of fact as to the existence of actual malice. With regard to the abuse of process claim, defendants contend that there are triable issues of fact as to whether defendants' actions were justified and whether plaintiffs suffered damages.

At her examination before trial, defendant Gonzales testified that she is the president of April Gonzales Garden Design, Inc., and that she needed someone to provide bookkeeping services for her business. She testified that she spoke with plaintiff Reina and hired her in late April 2009 for a "trial run," and that the agreed upon compensation was \$550 per month for bookkeeping services. She testified that there was no written contract with plaintiff Reina for this work and that the work was performed remotely using a program known as PC Anywhere, which allowed plaintiff Reina access to her computer. She testified that there was no understanding as to how long the arrangement would last and that there were problems with the work that plaintiff Reina provided. Defendant Gonzales testified that in December 2009, because of the problems with the work, she informed one of plaintiff Reina's employees, Tamara, that she hired another person to work on her books in the office. Defendant Gonzales testified that when she received a bill from plaintiff Reina around February 2009, she contacted Tamara to negotiate the bill, but was rejected. She testified that in March 2009, Richard Decker called her, saying that he was affiliated with an attorney in Sag Harbor, and that he wanted to discuss issues relating to the bill. She testified that Decker was erratic and aggressive, and said that "if [she] didn't pay they were going to sue," "what [is] wrong with [you]," and "get it together." She testified that she asked Decker to negotiate the outstanding fees with plaintiff Reina, but does not know if he passed that message along. She testified that Decker called her back again saying that plaintiff Reina would "file suit on Monday, unless [she paid]," and asked "what [is] wrong with [you]?" She testified that she contacted the attorney's office where Decker claimed to be employed, but was told that he does not work there. She further testified that she felt threatened by Decker and called the police. She testified that she did an internet search for Richard Decker and learned that he is a weightlifter, a "tattooed muscle-bound man," and that he is not registered in New York State as a debt collector. Defendant Gonzales also testified that plaintiff

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Edward Hoyt, Reina's husband, sent her an electronic message and text message telling her to pay the bill or they would sue. She testified that Hoyt, Reina, and Decker never physically threatened her and that their conversations were never in person. She testified that some people showed up at her driveway at 2:00 a.m. and left, however, she could not identify those people.

At her examination before trial, plaintiff Reina testified that she met defendant Gonzales in 2008 and sent her an agreement relating to her bookkeeping services. She testified that the agreement set the price at \$6,600, which could be paid in 12 monthly installments of \$550. She testified that the agreement was not signed by defendant Gonzales and that defendant Gonzales has a balance due in the amount of \$3,850. She testified that when defendant Gonzales failed to make payment, she asked Richard Decker, a family friend who owns a company known as Dunrite Collections, to collect the unpaid balance, and had an understanding that he would receive 10% of the collected amount. She testified that her relationship with defendants ended in December 2009, as defendants constantly had computer issues which prevented her from completing the work. She testified that defendant Gonzales did not complain that she was not happy with her bookkeeping services and did not inform her that she was fired. She further testified that Decker informed her that defendant Gonzales said that she was not paying her because the books were a mess and her accountant said the work performed was not worth paying for. Plaintiff Reina testified that as a result of the dispute with defendants, she and her husband were arrested and arraigned in May 2010, but that the charges were dismissed in July 2010.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well established that the essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract and resulting damages (*see Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 921 NYS2d 329 [2d Dept 2011]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]). Here, plaintiff has failed to establish the existence of an agreement and the terms of that agreement. While plaintiff submits a document purported to be the agreement between the parties, the document merely states that it is an "outline of the proposed bookkeeping services," and it was not signed by

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defendant Gonzales. Moreover, defendant Gonzales testified that there was no written contract and that plaintiff Reina was paid monthly.

As to the second cause of action, to succeed on a cause of action to recover in quantum meruit, the plaintiff must prove (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefore, and (4) the reasonable value of the services (*see Tesser v Allboro Equip Co.*, 73 AD3d 1023 [2d Dept 2010]; *Miranco Contr. Inc v Perel*, 57 AD3d 956 [2d Dept 2008]). Here, plaintiff Reina failed to submit evidence demonstrating that the services she rendered to defendant were satisfactorily performed (*see MZM Corp. v Iwaszkiewicz*, 66 AD3d 746, 886 NYS2d 761 [2d Dept 2009]; *cf Miller v Nadler*, 60 AD3d 499, 875 NYS2d 461 [2d Dept 2009]). Moreover, defendant Gonzales testified that plaintiff Reina made mistakes on the tax filings, and that she had to pay another bookkeeper and accountant to correct those mistakes.

With regard to the third cause of action seeking damages for malicious prosecution, the plaintiff has the heavy burden of establishing (1) the commencement or continuation of a criminal proceeding against the plaintiff, (2) the termination of that proceeding in the plaintiff's favor, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice (*see Martinez v City of Schenectady*, 97 NY2d 78, 735 NYS2d 868 [2001]; *Smith-Hunter v Harvey*, 95 NY2d 191, 712 NYS2d 438 [2000]). Probable cause to believe that a person committed a crime is a complete defense to a claim of malicious prosecution (*see Fortunato v City of New York*, 63 AD3d 880, 882 NYS2d 195 [2d Dept 2009]; *Iorio v City of New York*, 19 AD3d 452, 798 NYS2d 437 [2d Dept 2005]). "For purposes of the tort of malicious prosecution, probable cause has been defined as 'the knowledge of facts, actual or apparent, strong enough to justify a reasonable [person] in the belief that he [or she] has lawful grounds for prosecuting the defendants in the matter complained of' [citation omitted] or whether 'a discreet and prudent person would be led to the belief that a crime has been committed by the person charged'" (*Loeb v Teitelbaum*, 77 AD2d 92, 102-103, 432 NYS2d 487 [2d Dept 1980]).

Here, plaintiffs have failed to submit sufficient evidence that defendant Gonzales initiated the criminal action against plaintiffs with actual malice. Defendant Gonzales testified that she contacted the police as she felt threatened by Decker's phone calls where he was erratic and aggressive. Moreover, "a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131, 688 NYS2d 12 [1st Dept 1999]; *see Williams v Amin*, 52 AD3d 823, 861 NYS2d 118 [2d Dept 2008]; *Baker v City of New York*, 44 AD3d 977, 845 NYS2d 799 [2d Dept 2007], *lv denied* 10 NY3d 704, 857 NYS2d 36 [2008]; *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561, 771 NYS2d 170 [2d Dept 2004]). Instead, a plaintiff must show that the complainant "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131, 688 NYS2d 12; *see*

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Donnelly v Nicotra, 55 AD3d 868, 867 NYS2d 118 [2d Dept 2009]; *Lupski v County of Nassau*, 32 AD3d 997, 822 NYS2d 112 [2d Dept 2006]).

Similarly, a cause of action for abuse of process has three essential elements that must be established by a plaintiff: (1) regularly issued process, either criminal or civil, (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, 480 NYS2d 466 [1984]; see *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 380 NYS2d 635 [1975]; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003]). "The key to this tort is not impropriety in obtaining the process, but impropriety in using it" (*Simithis v 4 Keyes Leasing & Maintenance Co.*, 151 AD2d 339, 341, 542 NYS2d 595 [1st Dept 1989]). As defendant Gonzales testified that she contacted the police because she felt threatened by Decker's phone calls and Decker was erratic and aggressive, a triable issue of fact remains as to whether Gonzales had an intent to do harm without excuse or justification.

Finally, a cause of action for prima facie tort consists of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful (see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 464 NYS2d 712 [1983]). There is "no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, in Justice Holmes' characteristically colorful language, unless defendant acts from 'disinterested malevolence', by which is meant that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333, 464 NYS2d 712 [1983](citations omitted)). Here, plaintiffs have failed to submit sufficient evidence to establish that defendant Gonzales' sole motivation for her actions were due to "disinterested malevolence."

Accordingly, plaintiffs' motion for summary judgment in their favor is denied.

Dated: 10/21/2019


HON. WILLIAM B. REBOLINI, J.S.C.