Lugo v Corso

2019 NY Slip Op 34992(U)

October 2, 2019

Supreme Court, Orange County

Docket Number: Index No. EF005157-2019

Judge: Catherine M. Bartlett

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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BEBERLY LUGO,

Plaintiff,

-against-

JOANN CORSO, etc.

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF005157-2019
Motion Date: September 30, 2019

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The following papers numbered 1 to 3 were read on Plaintiff's motion for a default judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit 1-3

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for malicious prosecution, abuse of process, and "prima facie tort" arising out of Defendant's filing of a Family Offense Petition against Plaintiff under Article 8 of the Family Court Act, the Family Court's issuance of a Temporary Order of Protection against Plaintiff, and the ultimate dismissal of the Family Offense Petition.

Defendant defaulted in answering Plaintiff's Complaint, and Plaintiff moves herein for a default judgment.

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[* 1]

A. To Obtain A Default Judgment Plaintiff Must Demonstrate The Existence Of A Viable Claim

"A plaintiff's right to recover upon a defendant's default in answering is governed by CPLR 3215 [cit.om.], which requires that the plaintiff state a viable cause of action (*see* CPLR 3215[f]; *Woodson v. Mendon Leasing Corp.*, 100 NY2d 568,572...; *Litvinskiy v. May Entertainment Group, Inc.*, 44 AD3d 627, 628...). In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff (*see Litvinskiy v. May Entertainment Group, Inc.*, 44 AD3d 627...)." *Interboro Insurance Company v. Johnson*, 123 AD3d 667 (2d Dept. 2014).

If the plaintiff fails to carry her burden of establishing the existence of a viable cause of action against the defendant, the motion for a default judgment must be denied. *See, Matter of Csaszar v. County of Dutchess*, 95 AD3d 1009, 1011 (2d Dept. 2012); *Litvinskiy v. May Entertainment Group, Inc., supra*, 44 AD3d 627, 627-628; *Beaton v. Transit Facility Corp.*, 14 AD3d 637, 638 (2d Dept. 2005); *Green v. Dolphy Construction Co., Inc.*, 187 AD2d 635, 636 (2d Dept. 1992).

B. Malicious Prosecution

The elements of the tort of malicious prosecution, as applied with regard to a civil action or proceeding such as a Family Court Article 8 petition, are the institution of an action or proceeding by the defendant, malice as the motivating factor, an absence of probable cause to support the proceeding, and termination of the proceeding in favor of the plaintiff. *See, Burt v. Smith*, 181 NY 1, 5 (1905); *Hornstein v. Wolf*, 109 AD2d 129, 132 (2d Dept. 1985), *aff'd* 67 NY2d 721 (1986); *Butler v. Ratner*, 210 AD2d 691, 693 (3d Dept. 1994).

New York courts have established "stringent requirements" for the tort of malicious prosecution "to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit." *Curiano v. Suozzi,* 63 NY2d 113, 119 (1984). Thus, to plead a cause of action for malicious prosecution, the plaintiff must allege specific facts in support of the allegations of malice and absence of probable cause. As the Second Department held in *Hornstein v. Wolf, supra*:

> "In order to avoid discouraging free resort to the courts for the resolution of controversies, considerations of public policy have resulted in restricting the instances in which the mere bringing of a lawsuit by one party lays the foundation for the bringing of another lawsuit by the one sued" (*Porterfield v. Saffan,* 7 AD2d 987..., *affd.* 7 NY2d 816...). Thus, in order to set forth a cause of action to recover damages for malicious prosecution, more than conclusory, unsubstantiated allegations are necessary.

Hornstein, supra, at 133 (emphasis added). *See also, Alexander v. Scott,* 286 AD2d 692, 693 (2d Dept. 2001); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.,* 168 AD2d 238, 241 (1st Dept. 1990); *Mondello v. Mondello,* 161 AD2d 690, 691 (2d Dept. 1990).

1. Probable Cause

Family Court's issuance of the Temporary Order of Protection gives rise to a presumption of probable cause. *See, Hornstein v. Wolf, supra,* 67 NY2d at 72; *Butler v. Ratner, supra,* 210 AD2d at 693; *Denza v. Diaz,* 5 Misc.3d 1002(A), 2004 WL 2295859 at *3-4 (Sup. Ct. Kings Co, Sept. 30, 2004). In *Butler v. Ratner, supra,* which like this case involved the issuance of a Temporary Order of Protection in a Family Court Article 8 proceeding, the Court held:

> "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 NY2d 78, 82]). Because obviously less in the way of grounds for belief will be required to justify a reasonable man in bringing a civil rather than a criminal suit" (Prosser and Keeton, Torts §120, at 893 [5th ed]), when the underlying action is civil in nature the want of probable cause must be patent [cit.om.]. Significantly, the issuance of

> a temporary injunction or similar judicial recognition of the merit of the underlying case creates a presumption of probable cause and places upon the plaintiff the burden of pleading facts sufficient to overcome it (*see, Hornstein v. Wolf,* 67 NY2d 721...; *Burt v. Smith, supra*). We agree with Supreme Court that insufficient facts have been pleaded to satisfy that burden in this case.

Butler v. Ratner, *supra*, 210 AD2d at 693-694 [emphasis added].

The presumption of probable cause is not overcome by conclusory and factually unsubstantiated allegations. *Hornstein v. Wolf, supra.* The *Hornstein* Court, in an opinion squarely on point here, held:

> In the instant case, the complaint merely alleges that defendants acted "wrongfully, wilfully, recklessly, wantonly and maliciously and without just, reasonable or probable cause: in procuring the temporary restraining orders against plaintiff's personal property. On its face, the complaint demonstrates that [defendants] had probable cause to have plaintiff's bank accounts restrained inasmuch as the restraining orders were issued by a court of appropriate jurisdiction, which first had to pass upon the evidence presented to it in order to ascertain whether or not a temporary restraining order was warranted. To overcome the presumption of probable cause created by virtue of any judicial determination, whether final or preliminary, fraud, perjury or the withholding of evidence in order to obtain the provisional order must be shown (*see,* 36 NY Jur, Malicious Prosecution §42, pp. 311-13). The mere pleading of conclusory allegations does not overcome the presumption of probable cause arising from a decree or order of a judicial officer [cit.om.]. In the instance case, plaintiff has supplied no facts in the pleadings or otherwise to overcome the presumption of probable cause.

Id.

2. Malice

Malice is defined as "conscious falsity." *Hornstein v. Wolf, supra*, 109 AD2d at 133 (citing *Munoz v. City of New York,* 18 NY2d 6, 9). Unsubstantiated and conclusory allegations of malice are insufficient to sustain a cause of action for malicious prosecution. *See, Alexander v. Scott, supra,* 286 AD2d 692, 693 (2d Dept. 2001); *Mondello v. Mondello, supra,* 161 AD2d 690, 691 (2d Dept. 1990); *Hornstein v. Wolf, supra.*

3. Plaintiff Has Failed To Demonstrate The Existence Of A Viable Claim For Malicious Prosecution

As noted above, a plaintiff's right to recover upon a defendant's default in answering is governed by CPLR §3215, which requires that the plaintiff state a viable cause of action. "In evaluating whether plaintiff has fulfilled this obligation, defendant, as the defaulting party, is 'deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them' (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 71...[2003]). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case [cit.om.]. 'Where a valid cause of action is not stated, the party is not entitled to the requested relief, even on default' (*Green v. Dolphy Constr. Co.*, 187 AD2d 635, 636...[1992]; [cit.om.]." *Walley v. Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 (3d Dept. 2010).

Here, Plaintiff's Complaint on its face demonstrates that Defendant had probable cause to commence the Article 8 Family Offense proceeding against Plaintiff. The Complaint includes, as an exhibit, the Family Offense Petition containing a detailed statement by Defendant concerning Plaintiff's conduct. Defendant's statement provided factual support for the allegation of harassment made against Plaintiff in the Petition, and for Family Court's issuance of the Temporary Order of Protection. The Complaint also includes as an exhibit the Family Court's Temporary Order of Protection against Plaintiff, the issuance of which, as shown above, creates a presumption of probable cause.

Neither Plaintiff's Complaint nor her bare bones supporting affidavit address the specific allegations made by Defendant against her. Even viewed in the light most favorable to Plaintiff, the Complaint and affidavit proffer only blunderbuss denials, with conclusory and entirely

unsubstantiated allegations of malice and the absence of probable cause. Under the authority cited above, these allegations are insufficient to overcome the presumption of probable cause arising from Family Court's review of the evidence and issuance of the Temporary Order of Protection. Consequently, Plaintiff has failed to make out a viable cause of action for malicious prosecution. *See, Hornstein v. Wolf, supra; Butler v. Ratner, supra; Crown Wisteria, Inc. v. F.G.F. Enterprises Corp., supra; Denza v. Diaz, supra.*

C. Abuse of Process

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (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, supra,* 63 NY2d 113, 116 (1984). A malicious motive in bringing an action is insufficient: the gist of the action for abuse of process is "the improper use of process after it is issued." *Id.,* at 117 (quoting *Williams v. Williams,* 23 NY2d 592, 596).

The Court of Appeals analyzed this element of the tort of abuse of process at length in *Hauser v. Bartow,* 273 NY 370 (1937). The Court wrote:

> "The gist of the action for abuse of process lies in the improper use of process after it is issued. To show that regularly issued process was perverted to the accomplishment of an improper purpose is enough." [cit.om.]. "The action is not for the wrongful bringing of an action or prosecution, but for the improper use, or rather 'abuse,' of process in connection therewith...for a perversion of legal process. The process of law must be used improperly and this means something more than a proper use from a bad motive. ***If the process is employed from a bad or ulterior motive, the gist of the wrong is to be found in the use which the party procuring the process to issue attempts to put it. If he is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a viscous or vindictive motive. But the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated..." Harper on The Law of Torts, §272, pp. 593-595..

> It is not enough that the actor have an ulterior motive in using the process of the court. It must further appear that he did something in the use of the process outside of the purpose for which it was intended. [cit.om.]. Every one has a right to use the machinery of the law, and bad motive does not defeat that right. There must be a further act done outside the use of the process – a perversion of the process. If he uses the process of the court for its proper purpose, though there is malice in his heart, there is no abuse of the process. He may be liable for malicious prosecution, but the distinction between these two wrongs must be kept in mind. As soon as the actor uses the process of the court, not to effect its proper function, but to accomplish through it some collateral object, he commits this tort. A concrete example may make this more intelligible. If one resorts to legal process to have another declared incompetent, and uses it for that purpose, he does not commit the wrong, though he may be guilty of another wrong, no matter what is motives, hopes or expectations may be. But if he makes use of that process not for the purpose of attaining its proper end, but to extort money, or to coerce action, that is a perversion of process.

Hauser, supra, 273 NY at 373-374. ***See also, Hornstein v. Wolf, supra,*** 67 NY2d 721, 723 (1986) (abuse of process claim fails absent "actual misuse of the process to obtain an end outside its proper scope").

So far as concerns her claim for abuse of process, Plaintiff's Complaint alleges:

> 6. At the time when Corso commenced the aforesaid Family Offense Proceeding, Corso knew that the factual averments asserting Family Offenses contained in the Family Offense Petition were untrue.
>
> ....
>
> 9. At the time of the issuance of the ToP and subsequent thereto, Corso knew that she needed no protection from Lugo.
>
> ....
>
> 12. Corso commenced the aforementioned Family Offense Proceeding and secured the ToP, with malice, out of spite and ill will toward Lugo; to punish Lugo for commencing, prosecuting, and in some instances prevailing, in family court proceedings against Lugo's estranged husband David Lugo who was/is Corso's biological son.
>
> 13. Further, Corso commenced the aforementioned Family Offense Proceeding and secured the ToP, with malice, and out of spite and ill will toward Lugo; to punish Lugo for commencing, prosecuting, and in some instances prevailing in prior family court proceedings against Corso.

14. Corso intended and desired to see Lugo's freedoms and rights stripped, as well as to cause Lugo to hire an attorney at great cost to Lugo, to defend Corso's unlawful Family Offense Proceeding.

15. The ostensive intended purpose of the ToP was to protect Corso from Lugo.

16. Corso corruptly utilized the ToP not for its intended legitimate purpose of protection but to improperly harass, annoy, and alarm Lugo.

17. Corso corruptly utilized the ToP not for its intended legitimate purpose of protection but to improperly strip Lugo or her rights to freedom of movement, freedom of association, and Lugo's right to keep and bear arms.

Plaintiff's allegations fail to make out the third element of abuse of process – use of the process in a perverted manner to obtain a collateral objective. As noted above, the gist of abuse of process is "the improper use of process *after it is issued*." As the Court of Appeals made perfectly clear in *Hauser v. Bartow*, (1) wrongfully bringing the action is insufficient; (2) having an ulterior motive in using the process of the court is insufficient; (3) whatever the defendants motives, hopes or expectations may have been, acting with malice or bad motive in invoking the process of the court is insufficient. To commit the tort of abuse of process, the defendant must have *done something* in the use of the process *after it was issued* outside of the purpose for which it was intended. In the absence of any such allegation, Plaintiff has failed to make out a claim for abuse of process. *See, Hornstein v. Wolf, supra*; *Curiano v. Suozzi, supra*; *Hauser v. Bartow, supra*; *Butler v. Ratner, supra.*

D. Prima Facie Tort

"New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil lawsuit." *Curiano v. Suozzi, supra*, 63 NY2d at118.

> [Prima facie tort] should not "become a 'catch-all' alternative for every cause of action which cannot stand on its legs" [cit.om.]. By using it, plaintiffs seek to avoid the stringent requirements we have set for traditional torts, such as malicious prosecution, requirements which are necessary to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit. To permit plaintiffs' action to continue under these circumstances would create a situation where litigation could conceivably continue *ad infinitum* with each party claiming that the opponent's previous action was meritless and worthless.

Id., 63 NY2d at 118-119. The Court accordingly concludes that a claim for prima facie tort does not lie in the circumstances of this case.

E. Conclusion

In view of the foregoing, Plaintiff has failed to carry her burden of establishing the existence of any viable cause of action against Defendant, wherefore her motion for a default judgment must be denied. *See, Matter of Csaszar v. County of Dutchess, supra; Litvinskiy v. May Entertainment Group, Inc., supra*; *Beaton v. Transit Facility Corp., supra*; *Green v. Dolphy Construction Co., Inc., supra.*

F. The Court's Authority To Review The Sufficiency Of The Complaint

"A court has the authority to review the adequacy of the complaint sua sponte." *Weiss v. Weiss,* 138 AD2d 482 (2d Dept. 1988). It has long been held that "a motion for a temporary injunction opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading." *Guggenheimer v. Ginzburg,* 43 NY2d 268, 272 (1977); *68 Burns New Holding, Inc. v. Burns Street Owners Corp.,* 18 AD3d 857 (2d Dept. 2005). Upon a motion for a default judgment, as shown above, CPLR §3215(f) requires the court to determine whether the plaintiff's complaint states a viable cause of action. "If, despite accepting the allegations as true, no viable cause of action is stated, 'the court may sua sponte dismiss a plaintiff's complaint upon

his or her motion for a default judgment.'" *Apnea v. New York State Board of Elections,* 103 AD3d 1059, 1061 (3d Dept. 2013). *See, Walley v. Leatherstocking Healthcare, LLC, supra,* 79 AD3d 1236, 1238 (3d Dept. 2010) (same).

Here, as stated above, the allegations of Plaintiff's complaint are grossly insufficient to state a viable cause of action against Defendant. Although the Second Department has held that "[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (*Atkins-Payne v. Branch,* 95 AD3d 912 [2d Dept. 2012]), the court finds that dismissal is warranted in the circumstances presented here because (1) the issue of the adequacy of Plaintiff's Complaint is squarely presented by her motion for a default judgment, (2) the allegations of the Complaint are grossly insufficient to state a claim against Defendant, (3) Plaintiff's affidavit of merit is likewise grossly insufficient to remedy the defects of the Complaint, and (4) dismissal is required here "to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit." *Curiano v. Suozzi, supra. See also, Hornstein v. Wolf, supra.*

It is therefore

ORDERED, that Plaintiff's motion for a default judgment is denied, and it is further

ORDERED, that Plaintiff's Complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: October 2, 2019 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

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HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE