Torpey v Biagini
2020 NY Slip Op 31878(U)
March 5, 2020
Supreme Court, Orange County
Docket Number: EF006781-2019
Judge: Catherine M. Bartlett

[* 1]

Court/County: _____

Case Title: _____

Docket Number: 006781-2019

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

----------x

PATRICK J. TORPEY and 20th CENTURY TOWING,

Plaintiffs,

-against-

EDWARD J. BIAGINI,

Defendant.

----------x

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. EF006781-2019
Motion Date: March 3, 2020

The following papers numbered 1 to 6 were read on Defendant's motion to dismiss the Complaint pursuant to CPLR §3211(a)(5, 7):

Notice of Motion - Affidavit - Affirmation / Exhibits 1-2

Memorandum in Opposition 3

Reply Memorandum 4

Supplemental Brief (Plaintiffs) 5

Supplemental Memorandum (Defendant) 6

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

Plaintiffs Patrick J. Torpey and 20th Century Towing commenced this action on August 26, 2019, asserting causes of action for abuse of process, malicious prosecution and prima facie tort against defendant Edward J. Biagini.

A. Plaintiff's Complaint

The pertinent factual allegations of the Complaint are as follows:

13. At some time prior to June 7, 1997, Defendant Biagini was the titled owner of a 1986 International Dump Truck...

14. On or about June 7, 1997, Biagini transferred and conveyed title to the Truck to Torpey as an *inter vivos* gift. In connection with Biagini's transfer of the Truck, he executed the certificate of title representing the transfer of its ownership to Torpey. Biagini also transferred the bill of sale to Torpey.

....

17. In or around the fall of 2015, Torpey began a romantic relationship with Biagini's adult daughter, Lori McManus...

18. On information and belief, in the fall of 2015, Biagini learned of the relationship, much to his dismay. On or about November 22, 2015, Biagini texted McManus and said "[t]omorrow I will find your boy friend (Torpey) and put him in the ground. You have a nice life."

19. Thereafter, on information and belief, Biagini provided false information to the New York State Department of Motor Vehicles in order to have the DMV re-issue a new title to the Vehicle in Biagini's name. After receiving the new title from the DMV, Biagini registered the Vehicle with the DMV under his name. Biagini did all of this despite knowing that Torpey was the rightful owner of the Truck, and that he possessed the Truck along with the original title that Biagini transferred in 1997.

....

21. ...Biagini contacted the Town Police Department and falsely reported the Truck as stolen. On information and belief, Biagini falsely told the Town Police Department that he owned the Truck, that Torpey stole the Vehicle from him, and that it should be confiscated from Torpey's property and returned to Biagini. Based on the information Biagini provided, the Town Police Department arrived at Torpey's residence, seized the Vehicle, and impounded it.

....

24. From December 22, 2015 through March 18, 2016, the Town Police Department repeatedly refused to release the Vehicle back into Torpey's custody and stone-walled Torpey's many requests seeking information.

....

27. ...on or about March 18, 2016, the Town Police Department released the Vehicle into Biagini's custody. On information and belief, Biagini had a very close personal relationship with certain Town public officials, including the Town Attorney, Mike Blythe, and was able to leverage those relationships to induce the Town Police Department to release the Truck into his custody....

....

29. On or about April 7, 2016, Torpey filed a Complaint against Biagini in the Supreme Court...asserting causes of action under conversion and replevin....

30. On or about May 6, 2016, Biagini filed a counterclaim against Torpey seeking $10,000 in damages....On information and belief, Biagini asserted the counter-claim despite knowing that the Truck belonged to Torpey.

31. On August 23, 2016, the Court issued an order directing Biagini not to sell, transfer, assign or otherwise dispose of the Truck during the Action.

....

33. Following nearly two-and-a-half years of litigation, on or about September 4, 2018, the Court issued an order finding "that [Biagini] had gifted the vehicle to [Torpey, and] it is without question that [Torpey] has a superior right to possession of the truck." The Court ordered that Biagini, within 10 days, release the Truck to Torpey's custody.

Based on the foregoing allegations, Plaintiff alleged causes of action for abuse of process, malicious prosecution and prima facie tort. Defendant moves for dismissal pursuant to CPLR §3211(a)(5, 7), asserting that the claims for abuse of process and prima facie tort are barred by the statute of limitations, and that all three claims fail to state a valid cause of action.

B. The Claim For Abuse of Process Is Barred By The Statute of Limitations

"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,* 63 NY2d 113, 116 (1984); *Goldman v. Citicore I, LLC,* 149 AD3d 1042, 1044 (2d Dept. 2017). Plaintiff herein alleges that Defendant committed abuse of process not only by providing false information and a fabricated title and registration to the New Windsor Police, thereby facilitating the seizure and impoundment of Plaintiff's vehicle, but also by filing a baseless counterclaim in Plaintiff's ensuing replevin action.

However, in *Curiano v. Suozzi,* the Court of Appeals held that "the institution of a civil action by summons and complaint is not legally considered process capable of being abused." *Id.*, 63 NY2d at 116. *See, Goldman v. Citicore I, LLC, supra,* 149 AD3d at 1044-45; *Muro-Light v. Farley,* 95 AD3d 846, 847 (2d Dept. 2012). *See also, McMahan v. McMahan,* 164 AD3d 1486, 1488 (2d Dept. 2018) ("frivolous litigation requiring a party to spend legal fees" does not constitute abuse of process). Perforce, the mere assertion of a counterclaim for monetary damages in Plaintiff's replevin action cannot by itself constitute an actionable abuse of process by Defendant, and Defendant employed no incidental process in the replevin action to restrain the Vehicle. Hence, the sole valid predicate for Plaintiff's claim of abuse of process is the allegation that Defendant induced the Police' seizure and impoundment of the Vehicle in order to obtain possession of a vehicle which he knew rightfully belonged to Plaintiff.

Abuse of process is an intentional tort subject pursuant to CPLR §215 to a one-year statute of limitations. *See, e.g., Bittner v. Cummings,* 188 AD2d 504, 506 (2d Dept. 1992); *10 Ellicott Square Court Corp. v. Violet Realty, Inc.*, 81 AD3d 1366, 1368 (4th Dept.), *lv. denied* 17 NY3d 704 (2011); *Dobies v. Brefka,* 263 AD2d 721, 723 (3d Dept. 1999), *lv. dismissed* 95 NY2d 931 (2000); *Beninati v. Nicotra,* 239 AD2d 242 (1st Dept. 1997).

The chronology of events alleged in Plaintiff's complaint is as follows:

Nov - Dec 2015	Defendant induces Police to seize and impound Vehicle
Dec 22, 2015 - March 18, 2016	Police refuse to release Vehicle to Plaintiff
March 18, 2016	Police release Vehicle to Defendant
April 7, 2016	Plaintiff commences action for conversion and replevin

May 6, 2016	Defendant files counterclaim for monetary damages
Sept 4, 2018	Litigation resolved in Plaintiff's favor
Aug 26, 2019	Plaintiff commences action for abuse of process

When, on these facts, did Plaintiff's cause of action accrue? The caselaw reflects a variance of opinion as to whether a cause of action for abuse of process accrues (1) upon the issuance of the process in question (here, upon the seizure and impoundment of the Vehicle in Nov-Dec 2015); or (2) upon the vacatur or termination of said process (here, upon the release of the Vehicle to Defendant on March 18, 2016); or (3) upon a legal determination favorable to the plaintiff in underlying proceedings (according to Plaintiff, upon the termination of his own replevin action in September 2018).

1. Accrual Upon Issuance Of Process

One federal district court "follow[ed] the rule articulated by a number of New York federal courts", i.e., that a cause of action for abuse of process accrues upon the issuance of process in question:

> An abuse of process claim accrues 'at such time as the criminal process is set in motion, unless the plaintiff is unaware, through no fault of its own, of facts supporting the claim, in which case the cause of action accrues upon discovery.' [cit.om.]. This approach, in my view, best preserves the traditional distinction between malicious prosecution and abuse of process. *See generally Keller v. Butler,* 246 NY 249...(1927) [quoting *Keller*]. And the "discovery" proviso fairly accommodates the atypical case where a defendant does not find out until later that the criminal process was perverted to serve an illegitimate collateral objective.

Aleynikov v. The Goldman Sachs Group, Inc., 2016 WL 6440122 at *10 (D.N.J., Oct. 28, 2016).

Assuming that *Aleynikov* correctly articulates New York law, then Plaintiff's claim for abuse of process accrued in December of 2015 when the Police seized and impounded his

Vehicle, and the one-year statute of limitations expired long before Plaintiff commenced this action in August of 2019.

2. Accrual Upon Vacatur Or Termination Of Process

Another federal district court, reviewing New York law, concluded that accrual of the cause of action occurred upon cancellation of the abused process:

> [Defendant] asserts that the statute began to run on July 12, 1989 with the filing of the Public Notice[1] because Grandome might then have asserted its cause of action for abuse of process. *Cunningham v. State,* 440 NYS2d 176 (Ct. App. 1981; *Keller v. Butler,* 246 NY 249...(1927). However, *Cunningham* has been interpreted by the New York courts, in circumstances more closely resembling those before the Court, so that the statutory period accrues upon the vacatur of the object obtained through the alleged abuse of process. *Pico Prods., Inc. v. Eagle Comtronics, Inc.,* [96 AD2d 736 (4th Dept.), *app. dismissed* 60 NY2d 559 (1983)]. In view of *Pico* and the fact that Stillman still brazenly filed the Public Notice after having been ordered to cancel the notice of pendency, the Court measures the statute of limitations from June 1990 when the Public Notice was cancelled....

Grandome Enterprises, Inc. v. Stillman, 1993 WL 119800 at *2 (S.D.N.Y, April 13, 1993).

In *Pico Prods., Inc. v. Eagle Comtronics, Inc., supra,* it was held that a cause of action for abuse of process premised on the issuance of a temporary restraining order accrued when the TRO was vacated, as "[i]t was then that plaintiff had a legal right to relief." *Id.* Much to the same effect is *Village of Valley Stream v. Zulli,* 64 AD2d 609 (2d Dept. 1978). In that case, where the defendant had caused summonses to be issued compelling the plaintiffs' appearance in criminal court, it was held that a cause of action for abuse of process accrued "[a]t the latest... [on] the date upon which [plaintiffs] last appeared under compulsion of the abused process and the criminal complaints were withdrawn." *Id.,* 64 AD2d at 610. *See also, Wolfe v. State of New*

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[1]The "Public Notice" is "the equivalent of a notice of pendency." *Grandome Enterprises, Inc. v. Stillman,* 1993 WL 119800 at *2 (S.D.N.Y, April 13, 1993).

York, 57 Misc.2d 777, 778 (Ct. Cl. 1968) (cause of action for abuse of process accrued when plaintiff was released from jail).

Assuming that these cases correctly articulate New York law, then Plaintiff's claim for abuse of process accrued on March 18, 2016, when the Police released his Vehicle to Defendant – that is, when the Vehicle was no longer held under compulsion of the abused process – and the one-year statute of limitations expired long before Plaintiff commenced this action in August of 2019.

3. Accrual Upon Favorable Determination In Underlying Proceedings

There is authority in New York to the effect that a cause of action for abuse of process is timely if "commenced within one year of the dismissal, on the merits, of the underlying civil lawsuit." *Muro-Light v. Farley,* 95 AD3d 846 (2d Dept. 2012). *See also, 10 Ellicott Square Court Corp. v. Violet Realty, Inc.,* 81 AD3d 1366, 1369 (4th Dept. 2011). Both of these cases involved parallel claims for malicious prosecution. As the Court in *Aleynikov, supra,* observed, they are of dubious authority in the present context because they conflate abuse of process and malicious prosecution in contravention of *Keller v. Butler, supra,* and rest primarily on "inapposite malicious prosecution caselaw."[2] *See, Aleynikov v. The Goldman Sachs Group, Inc., supra,* 2016 WL 6440122 at *9-10 and n. 9.

A malicious prosecution claim cannot accrue until the underlying litigation is resolved in the plaintiff's favor because that is an essential element of a malicious prosecution claim. *See,*

[2]Of the six cases cited as authority in *Muro-Light* and *10 Ellicott Square*, only one involved a claim for abuse of process: *Village of Valley Stream v. Zulli, supra*, the significance of which is discussed in Section "2" above. Of the remaining five cases, four involved claims for malicious prosecution, and the last a claim for the government's unlawful retention of property under color of law.

Burt v. Smith, 181 NY 1, 5 (1905); *Teller v. Galak,* 162 AD3d 959 (2d Dept. 2018); *Hornstein v. Wolf,* 109 AD2d 129, 132 (2d Dept. 1985), *aff'd* 67 NY2d 721 (1986). However, that is simply not the case with a claim for abuse of process. The Court of Appeals flagged this fundamental distinction between the two causes of action in *Keller v. Butler, supra,* 246 NY 249 (1927):

> [B]oth in malicious prosecution and in the malicious abuse of process, malice and want of probable cause must be shown..., the difference being that in one the initial litigation must be terminated, while in the other it is the abuse of an incidental process which has caused the unjustifiable damage and the initial proceedings need not be terminated to give a cause of action.

Id., at 255 (emphasis added). The Court of Appeals thereafter held that "the accrual of a cause of action for abuse of process need not await the termination of an action in the claimant's favor." *Cunningham v. State of New York, supra,* 53 NY2d 851, 853 (1981) (emphasis added).

Keller and *Cunningham* notwithstanding, the Court in *Dobies v. Brefka,* 263 AD2d 721 (3d Dept. 1999), *lv. dismissed* 95 NY2d 931 (2000), ruled that a cause of action for abuse of process did not accrue until the favorable termination of criminal proceedings in which the abused process was issued. The Court wrote:

> This cause of action is based on appearance tickets issued against plaintiff in May and June 1996 and apparently the criminal charges were not dismissed until September 1996. While a one-year limitations period pursuant to CPLR 215(3) is applicable [cit.om.], there is no conclusive determination as to when such a cause of action accrues [cit.om.]. While the Court of Appeals has held that in an action under Court of Claims Act §10, "accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor" (*Cunningham v. State of New York....*), here the abuse of process would not have been actionable until the proceeding was concluded since plaintiff would not have been able to allege that he suffered an injury without justification until the proceeding was terminated in September 1996.

Id., 263 AD2d at 723. The rationale of *Dobies* is dubious: it is not at all clear why the plaintiff could not have alleged that he suffered an injury without justification before the criminal

proceeding was terminated. *Dobies'* result was nevertheless correct; indeed, the case is practically indistinguishable from *Village of Valley Stream v. Zulli, supra.* In both cases, the plaintiff's appearance in the criminal proceeding was compelled by incidental process – the summons or appearance tickets – and that compulsion lasted until the proceeding was terminated, whereupon the abused process was vacated or terminated. Upon the vacation or termination of the abused process – if not sooner but certainly no later – the plaintiff's cause of action for abuse of process accrued. (*See*, Section "2" above)

4. Conclusion

Here, then, Plaintiff's cause of action for abuse of process accrued no later than March 18, 2016, when the Police released Plaintiff's Vehicle to Defendant and the abused process – the Police' seizure and impoundment of the Vehicle – came to an end. Plaintiff's subsequent replevin action, and per *Curiano v. Suozzi* the counterclaim alleged therein by Defendant, had nothing whatever to do with the alleged abuse of process, as the Vehicle was no longer being restrained by process incidental to that litigation or otherwise. Indeed, there was no reason why Plaintiff could not have asserted the abuse of process claim in 2016 when he commenced the action for replevin. Plaintiff instead delayed taking action until August of 2019, at which point the cause of action for abuse of process was barred by the one-year statute of limitations.

C. The Complaint Fails To State A Cause Of Action For Malicious Prosecution

1. The Complaint Fails To Allege Defendant's Commencement Of A Criminal Proceeding Against Plaintiff

"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 (Prosser, Torts [4th ed.], §119)." *Broughton v. State of New York,* 37 NY2d 451, 457 (1975). *See, Martinez v. City of Schenectady,* 97 NY2d 78, 84 (2001); *Colon v. City of New York,* 60 NY2d 78, 82 (1983).

Regarding the first element – commencement or continuation of a criminal proceeding – the Court of Appeals in *Broughton* observed:

> The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation [cit.om.]. The essence of malicious prosecution is the perversion of proper legal procedures. Thus, it has been held that some sort of prior judicial proceeding is the *sine qua non* of a cause of action in malicious prosecution [cit.om.]. Such a judicial proceeding may be either an evaluation by a Magistrate of an affidavit supporting an arrest warrant application, or an arraignment or an indictment by a Grand Jury...

Broughton v. State of New York, supra, 37 NY2d at 457 (emphasis added). *See also, Stile v. City of New York,* 172 AD2d 743, 744 (2d Dept. 1991) (claim for malicious prosecution "may arise only after an arraignment or indictment or some other 'evaluation by a neutral body that the charges [were] warranted'") (quoting *Broughton,* 37 NY2d at 459). Administrative proceedings may be treated as judicial proceedings for purposes of malicious prosecution claims where the administrative proceeding contains sufficient attributes of judicial proceedings. *See, Manti v. NYCTA,* 165 AD2d 373, 381 (1st Dept. 1991); *Groat v. Town Bd. of Town of Glenville,* 73 AD2d 426 (3d Dept.), *appeal dismissed* 50 NY2d 928 (1980).

There is authority to the effect that the issuance of an appearance ticket requiring a person to appear in court is sufficient judicial activity to support a claim for malicious prosecution, even if an accusatory instrument is never filed. *See, Snead v. Aegis Sec., Inc.,* 105 AD2d 1059 (4th Dept. 1984); *Rosario v. Amalgamated Ladies' Garment Cutters Union,* 605 F.2d 1228

(2d Cir. 1979). However:

> An arrest without a warrant followed by an information and preliminary hearing before a magistrate initiates a judicial proceeding [cit.om.], but an arrest without a warrant that is not followed by further proceedings does not, Stile v. New York, 172 AD2d 743... (2d Dept. 1991); Barry v. Third Ave. R. Co., 51 App Div 385...(1st Dept. 1900); see Doran v. District Court of Nassau County, 45 Misc.2d 212...(Sup 1965).

2A NY PJI3d 3:50, at 533 (2020) (emphasis added).

The principle that a seizure without a warrant that is not followed by further proceedings does not constitute the commencement of a judicial proceeding for purposes of a malicious prosecution claim is exemplified, on facts akin to those of the case at bar, by the Second Department's decision in *Zapata v. Tufenkjian,* 123 AD3d 814 (2d Dept. 2014). *Zapata*, like this case, involved a dispute over the right to possession of a vehicle and the defendant's causing the police to effect a seizure thereof. The Court wrote:

> ...[T]he defendants sought New York City Police Department assistance in retrieving their vehicle. The defendants followed the police car to the plaintiff's home, and while the defendants waited nearby in a parked car, two police officers approached the plaintiff and his spouse. According to the plaintiff, a police officer accompanied him into his home to retrieve the key to the vehicle, which was then given to a friend of the defendants. Several minutes later, the officers arrested both the plaintiff and his spouse, and both were held overnight at the police precinct station house. The next day, the plaintiff was released, and no criminal charges were ever brought against him based on the arrest.
> .....
> Accepting the allegations in the complaint as true, affording the plaintiff the benefit of every favorable inference, and considering the evidentiary material submitted by the parties [cit.om.], dismissal of the complaint was proper. The plaintiff has no cause of action to recover damages for malicious prosecution since, among other things, no criminal proceeding was ever commenced against him....

Zapata v. Tufenkjian, supra, 123 AD3d at 815, 816.

The foregoing authority is dispositive of Plaintiff's claim for malicious prosecution. The material allegations of the Complaint are as follows:

> 21. ...Biagini contacted the Town Police Department and falsely reported the Truck as stolen. On information and belief, Biagini falsely told the Town Police Department that he owned the Truck, that Torpey stole the Vehicle from him, and that it should be confiscated from Torpey's property and returned to Biagini. Based on the information Biagini provided, the Town Police Department arrived at Torpey's residence, seized the Vehicle, and impounded it.
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> ....
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> 24. From December 22, 2015 through March 18, 2016, the Town Police Department repeatedly refused to release the Vehicle back into Torpey's custody and stone-walled Torpey's many requests seeking information.
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> ....
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> 27. ...on or about March 18, 2016, the Town Police Department released the Vehicle into Biagini's custody. On information and belief, Biagini had a very close personal relationship with certain Town public officials, including the Town Attorney, Mike Blythe, and was able to leverage those relationships to induce the Town Police Department to release the Truck into his custody....

In short, Plaintiff alleges that the Vehicle seized by the police, impounded, and ultimately released to Defendant. There is no allegation that the seizure was made pursuant to a warrant. There is no allegation that Plaintiff was issued any process to appear in court. There is no allegation that any criminal (or administrative) proceedings occurred before or after the seizure. Accepting the allegations in the Complaint as true, and affording the plaintiff the benefit of every favorable inference, the Complaint fails to allege what *Broughton* termed the *sine qua non* of a malicious prosecution claim – the commencement or continuation of a criminal proceeding by the Defendant against the Plaintiff.

2. The Complaint Fails To Allege That Plaintiff Sustained "Special Injury" As A Result Of Defendant's Prosecution Of His Counterclaim For Monetary Damages In Plaintiff's Replevin Action

There are circumstances where a claim for malicious prosecution may arise out of the defendant's malicious commencement or continuation of *civil* proceedings against the plaintiff. "The elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil

action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury." *Teller v. Galak,* 162 AD3d 959, 960 (2d Dept. 2018).

Thus, where the underlying action was civil in nature, "special injury" is an essential element of the claim for malicious prosecution. *See, Engel v. CBS, Inc.,* 93 NY2d 195 (1999); *Curiano v. Suozzi, supra,* 63 NY2d 113, 118 (1984). "The prior judicial proceeding is 'to the plaintiff's injury' if it resulted in interference with the plaintiff's person or property." *347 Central Park Assoc., LLC v. Pine Top Assoc., LLC,* 83 AD3d 689, 690 (2d Dept. 2011). *See, Curiano v. Suozzi, supra.* Defining "special injury", the Court of Appeals in *Engel v. CBS, Inc.* held:

> [B]urdens substantially equivalent to those imposed by provisional remedies are enough. Actual imposition of a provisional remedy need not occur, and a highly substantial and identifiable interference with person, property, or business will suffice [cit.om.]. Since the role that the special injury requirement fulfills is that of a buffer to insure against retaliatory malicious prosecution claims and unending litigation, we are satisfied that a verifiable burden substantially equivalent to the provisional remedy effect can amount to special injury. Put another way, what is "special" about special injury is that the defendant must abide some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit.

Id., 93 NY2d at 205 (emphasis added).

Plaintiff alleges that in the course of his own replevin action, Defendant "filed counter-claims to further prolong and continue the proceeding against Plaintiff" (Complaint ¶44), and asserts in conclusory fashion that "[a]s a direct and proximate result of Defendant's malicious prosecution, Plaintiffs have been harmed and suffered special damages and economic loss, for which Plaintiff seeks damages, both compensatory and punitive" (Complaint ¶47). However, Defendant's counterclaim was only one for monetary damages. There is no allegation that the

Vehicle was restrained during the course of Plaintiff's replevin action by a provisional remedy granted Defendant, nor of any "highly substantial and identifiable interference with person, property, or business" (*see, Engel v. CBS, Inc., supra*). The Court perceives here nothing more cumbersome that the physical, psychological or financial demands of defending a counterclaim in what was, after all, Plaintiff's own lawsuit, not Defendant's. Under the circumstances, the Complaint fails as a matter of law to allege the "special injury" required for Plaintiff to predicate any claim for malicious prosecution on the Defendant's interposition of his civil counterclaim in Plaintiff's replevin action.

3. Conclusion

In view of the foregoing, the Plaintiff's claim for malicious prosecution fails to state a valid cause of action, and must therefore be dismissed.

D. Plaintiff's Claim For "Prima Facie Tort" May Not Be Predicated On Defendant's Prosecuting His Counterclaim In Plaintiff's Replevin Action

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." *Curiano v. Suozzi, supra,* 63 NY2d 113, 117 (1984). As the Court of Appeals observed in *Curiano,* "New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action." *Id.,* 63 NY2d at 118 (citing cases). *See, Muro-Light v. Farley,* 95 AD3d 846, 847 (2d Dept. 2012) (same). Consequently, the Plaintiff's claim for "prima facie tort" may not be predicated on Defendant's prosecuting his civil counterclaim for monetary damages in Plaintiff's replevin action.

E. Insofar As The Claim For "Prima Facie Tort" Is Predicated On The Alleged Wrongs Perpetrated By Defendant In 2015-2016, It Is Barred By The Statute Of Limitations

"Prima facie tort" is essentially an intentional tort claim subject to a one-year statute of limitations. *See, Teller v. Galak, supra,* 162 AD3d 959, 960 (2d Dept. 2018); CPLR §215(3). Since Plaintiff may not predicate his claim for "prima facie tort" on Defendant's prosecution of his counterclaim (*see,* Point D above), the claim rests solely on Defendant's actions, in 2015-2016, whereby he causing the police to seize and impound Plaintiff's Vehicle, and ultimately to release it to Defendant himself. Since those acts were complete as of March 18, 2016, when Defendant obtained possession of the Vehicle, and this action was commenced over three years later on August 26, 2019, the cause of action for "prima facie tort" is barred by the one-year statute of limitations.

It is therefore

ORDERED, that Defendant's motion for dismissal of the Complaint is granted in its entirety, and the Complaint is hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: March 5, 2020 ENTER
Goshen, New York

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

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