INDEX 16-620225

CAL. No. 19-00962OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 10-17-19
ADJ. DATE 3-19-20
Mot. Seq. # 001 - MD

CAREYANN FILIPPI,

Plaintiff,

- against -

ROBERT FILIPPI,

Defendant.

PLAINTIFF'S ATTORNEYS:
RAY, MITEV & ASSOCIATES
Attorney for Plaintiff
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Miller Place, New York 11764

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DEFENDANT'S ATTORNEYS:
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Upon the following papers read on this motion for summary judgment by defendant: Notice of Motion and supporting papers by defendant, filed September 18, 2019; Notice of Cross-Motion and supporting papers; Answering Affidavits and supporting papers by plaintiff, filed December 11, 2019;and Replying Affidavit and supporting papers, filed May 28, 2020, it is,

ORDERED that the motion by defendant for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint is denied.

Plaintiff commenced this action against the defendant, her former husband and the father of their two children, asserting claims for malicious prosecution, abuse of process and relief pursuant to 42 USC § 1983. Plaintiff alleges that the defendant, who at the time was a New York City Police Department detective, wrongfully brought about, and in one instance himself effectuated, her arrest in 2013 and 2014 and her prosecution on a number of charges, including alleged violations of temporary orders of protection that he had obtained against the plaintiff and in favor of himself and the parties' children, that were ultimately dismissed or which culminated in her acquittal at trial. Plaintiff alleges, among other things, that the defendant knew that the charges were groundless and that he used his status as an NYPD detective and his law enforcement connections to press the case against her both to cause her harm and to advance his separate efforts further to reduce her parenting time with their two children. Among other things, the plaintiff further alleges that the defendant, who at the time had sole and residential custody of the two children and was seeking a further restriction on plaintiff's parenting time with the children[1], who were then twelve years old, "induced, coerced, cajoled, threatened, importuned and otherwise pressured the . . . two children into signing false supporting statements" in connection with the complaint he made to police at that time and which led to plaintiff's arrest and prosecution. According to plaintiff, the defendant abandoned the prosecution after it had served his ulterior purposes and before it would have become necessary for him and the two children to testify at trial. The defendant denies plaintiff's allegations and now moves for summary judgment in his favor dismissing the complaint.

In support of his motion, defendant has submitted, among other things, his affidavit; the transcript of his deposition and of plaintiff's deposition; copies of an August 27, 2013 temporary order of protection and amended temporary orders of protection dated October 24, 2013, June 6, 2014 and May 15, 2015; the unsworn New York State Park Police depositions signed by each of the children on August 22, 2013; defendant's unsworn Suffolk County Police Department statement, dated January 27, 2014, identifying the two children as his; and the certificate of disposition showing that plaintiff was acquitted of charges of criminal contempt and endangering the welfare of a child and that the other charges against her were dismissed by Judge Bean on December 14, 2015. In substance, he argues that he merely reported the two incidents to the police and provided them with the information that led to the plaintiff's arrests and subsequent prosecution. In opposition, plaintiff contends, based upon essentially the same submissions, that issues of fact preclude the relief defendant is seeking.

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). However, "[a] movant fails to satisfy its prima facie burden by merely pointing out gaps in the plaintiff's case (*see Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223 [2011]; *Shafi v Motta*, 73 AD3d 729, 730 [2010]; *Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 388 [2004])" (***Blackwell v. Mikevin Management III***, 88

[1] It appears to be undisputed that the 2013 report was made shortly after the plaintiff brought the children back to defendant's house after a visitation that included a beach outing and which, according to plaintiff, began with defendant delaying the delivery of the children to her at his house so that he, or his lawyer, could have her served there with his order to show cause and petition seeking to curtail or eliminate her parenting time with the children.

A.D.3d 836 [2d Dept 2011]). Further, the credibility of the parties is not an appropriate consideration for the court on a motion for summary judgment (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in the light most favorable to the party opposing summary judgment (***Benincasa v Garrubo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

The following facts are largely undisputed: The parties have been divorced since January 6, 2006. They have two children, Angelina and Robert, twins who were born in July 2001. Initially, the plaintiff had residential custody of both children, but by order dated January 31, 2012 (a copy of which is annexed as an exhibit to defendant's motion), the Special Referee, citing in particular plaintiff's straitened financial circumstances[2], granted defendant's application and gave sole legal and residential custody of the children to him and allowed the plaintiff visitation according to a set parenting schedule. On June 6, 2013, alleging that an incident had occurred at his home, defendant sought and obtained an *ex parte* temporary order of protection against the plaintiff (Lechtrecker, J.) (a copy of the June 6, 2013 temporary order of protection is annexed as an exhibit to his motion), requiring plaintiff, among other things, to stay away from him and his home except for curbside pickup and drop off of the children and to refrain from harassing or endangering him or the children. On October 17, 2013, an Order Vacating Order of Protection was entered by the court (Burke, J.), vacating the June 6, 2013 order of protection[3] (a copy of

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[2] While noting some of instances of questionable judgment on plaintiff's part, Special Referee Buetow concluded that

> Although both parents can provide for the children emotionally, educationally and medically only the plaintiff can provide for them financially. As has been previously stated, the defendant can quite simply not afford the children to reside with her.

(Order of January 31, 2012 at 4.) The proceeding that culminated in the January 31, 2012 ruling was far from the first post-divorce dispute litigated by the parties; as the Special Referee noted, "[t]he parties have been in constant litigation in both Supreme and Family Court since the entry of the initial Judgment of Divorce" (*id.*, at 1).

[3] Judge Burke recognized in his order the risk that defendant, who still had physical possession of the vacated June 6, 2013 temporary order, "might attempt to have the Order of Protection executed," and cautioned plaintiff in such event to produce the October 17, 2013 order "for the Peace Officer to certify that the Order of Protection has been vacated" (*id.*). However, as discussed in text, *infra*, by the time Judge Burke's order was entered in Family Court, a separate

Judge Burke's October 17, 2013 order is annexed as an exhibit to Plaintiff's Response to Defendant's Combined Demands and Request for Discovery and Inspection, which is an exhibit to defendant's current motion).

First arrest. After he had obtained the June 6, 2013 temporary order of protection, and before it was vacated by Judge Burke, defendant moved in Supreme Court, by order to show cause dated and entered August 20, 2013 – a day prior to a scheduled visitation by plaintiff with the children – to terminate plaintiff's parenting time with the twins until she provided him with her then current residential address. It appears to be undisputed that defendant had made arrangements to have a process server come to his home on the day of that visitation, August 21, 2013, so that service of the order to show cause could be made upon plaintiff when she came to pick up the children.[4] Plaintiff testified that the defendant would not allow the children to leave with her until the process server arrived and effected service of the order to show cause upon her (which defendant testified occurred in his presence), but once she and the children left defendant's home, the visitation – which included a beach outing to Robert Moses State Park – proceeded normally and uneventfully. However, after plaintiff returned the children to defendant's home, he called 911, reporting that when the children arrived, both were crying and told him that she had driven dangerously and erratically and severely berated them throughout the day and that at one point, she was punching the steering wheel and the arm rest where Angelina had her arm resting – as a result of which, Angelina's arm was also struck – and punching the back of the headrest of Angelina's seat – causing the headrest to strike the back of Angelina's head. Defendant testified that he called 911 to "document" what the children had told him and that because the physical portion of the alleged incident happened as plaintiff and the children were leaving Robert State Moses Park, he was instructed to call the New York State Park Police. Subsequently, two State Park Police officers came to defendant's home. According to defendant, the officers spoke with the children privately and separately at his house and took their statements (the statements, which are dated August 22, 2013, are annexed as exhibits to defendant's motion). Defendant avers that the Park Police officers told him the "stories each of the children relayed were nearly identical and that they intended to arrest the plaintiff based upon the children's reports." Plaintiff testified that the events recounted by defendant and described in the children's statements did not occur, that "[n]othing happened," and that the children's accounts were the result of coercion and inducement by the defendant, who, she testified, knew the statements were false. On August 26, 2013, plaintiff was arrested and charged with two counts of endangering the welfare of a child, one count of harassment in the second degree and one count of criminal contempt in the second degree for violating the June 6, 2013 temporary order of protection. District Court records annexed to defendant's moving papers as exhibits to

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temporary order of protection had been entered in favor of the children in the District Court criminal proceeding.

[4] As is further discussed in text, *infra*, plaintiff' visitation was suspended until December of that year, when she provided her address to the defendant and at the same time, restrictions on her involvement in the children's school activities, among other things, were lifted.

plaintiff's response to defendant's request for discovery and inspection show that plaintiff was acquitted of the charges of criminal contempt and endangering the welfare of a child and that the other charges against her were dismissed on December 14, 2015.

Second arrest. On August 27, 2013, a temporary "stay-away" order of protection (Hensley, J.) was issued against the plaintiff in the criminal proceeding that was initiated following the August 21 visitation (a copy of Judge Hensley's order is annexed as an exhibit to defendant's submission). On October 24, 2013, an amended temporary stay away order of protection was issued (Bean, J.), interlineating the word "valid," in place of "subsequent," so that the decretal paragraph that had rendered the provisions of the August 27, 2013 temporary order of protection "subject to any *subsequent* Supreme Court or Family Court order of custody and/or visitation," was made to read "subject to any *valid* Supreme Court or Family Court order of custody and/or visitation" (emphasis added) (a copy of the amended temporary order of protection is also annexed as an exhibit to defendant's moving papers).

In fact, on December 13, 2013, both parties appeared in Supreme Court in connection with the August 20, 2013 order to show cause. At that time, the parties entered into an on-the-record, court-ordered stipulation (Behar, J.), among other things restoring the parties' prior visitation schedule "automatically" upon verification that plaintiff had obtained suitable quarters and explicitly permitting the plaintiff to attend all school events and to interact with teachers, administrators and other professionals, except that visitations were to commence and conclude curbside at defendant's home and not at school. As stated to the court by defendant's attorney in that proceeding:

> Judge[,] one of the bases of this agreement is that the mother shall not, and I repeat, shall not pick the children up or drop the children off at their school. That does not mean that she doesn't have the right to attend all public functions at the school. It doesn't mean she doesn't have the right to communicate with teachers, principals, school psychologists, any professional that comes into contact with the children. It just means she will not commence nor conclude her visitation periods at the school premises.

(December 13, 2013 transcript of proceedings at 5-6 (emphasis supplied); copies of relevant portions of the transcript of the December 13, 2013 proceedings before Justice Behar are attached to a subpoena duces tecum and to plaintiff's response to defendant's discovery demands and notice for discovery and inspection, both of which, in turn, are annexed as exhibits to defendant's moving papers). Defendant was specifically charged with the "obligation" to provide a certified copy of the transcript of the December 13, 2013 proceedings to the principal of the children's school (*id.*).

It was in the context of these orders that the second pair of arrests about which plaintiff complains occurred, on May 19, 2014, when, by plaintiff's account, she went to her son's middle school to observe him at track practice. She testified that her son had just sat down to drink

water in her motionless car, its motor off, when defendant, who had also been observing track practice[5], called to him, and the child left his mother's car and entered defendant's truck. The plaintiff then sought to exit the parking lot, but defendant prevented her from doing so by blocking her car with his vehicle, at which point she called 911. For his part, defendant claims that when he pulled into the school parking lot, he saw the plaintiff driving with their son in her car, leaving the parking lot. He testified that after he drove around the lot, he saw that his son had exited plaintiff's vehicle. After he drove his son home, he returned to the school to query the principal, but he was unable to find him and then went to the administration building to talk with the district superintendent and, when he learned that the latter was not there, he called 911 to report the plaintiff's alleged violation of the October 2013 amended temporary order of protection[6]. When the police arrived, he learned that the plaintiff had already called 911 and that other officers were present on school grounds with her as well. Plaintiff was arrested and charged with criminal contempt in the second degree for allegedly violating the October 24, 2013 amended temporary order of protection[7]. Again, the defendant concedes, and the District Court records (copies of which are annexed to plaintiff's response to defendant's document request) show, that on December 14, 2015, plaintiff was acquitted of that charge, as well as the earlier charges of endangering the welfare of a child, and that all of the other charges against her were dismissed.

Discussion. The elements of a cause of action alleging abuse of process are regularly issued process, either civil or criminal, an intent to do harm without excuse or justification and use of the process in a perverted manner to obtain a collateral objective (*see* ***McMahan v McMahan***, 164 AD3d 1486, 84 NYS3d 510 [2d Dept 2018]). The elements of a cause of action alleging 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' (***Broughton***

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[5] Defendant testified that it was his regular practice to pick his son up in that same parking lot after track practice, that he always picked up his son at track practice and that it was unnecessary for his son to call or text him because he "wouldn't be late."

[6] In his verified bill of particulars, defendant averred that he spoke with the principal, Mr. Markwood, and unsatisfied with Markwood's response, he drove to the school district's administrative offices to speak with the superintendent and, when he did not find him there, called the police.

[7] An unsigned "Prosecution Worksheet," dated May 20, 2014 and annexed to defendant's moving papers, recites that plaintiff stated to the complaining police officer that "I went to watch my son (Bobby Filippi) run at his practice at Udall School and I asked him if he needed a ride home. When we were leaving parking (*sic*) my ex-husband saw us and Bobby got in the car with him." Plaintiff testified that she had made no such statement and, again, that she had merely permitted her son to sit in her motionless car as he drank water. Defendant provided a signed statement to the police recounting his version of the incident dated May 19, 2014.

v State of New York, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg,* 423 US 929)" (***Smith-Hunter v Harvey***, 95 NY2d 191, 195 [2000]; *see* ***Smith-Hunter v Harvey***, 95 NY2d 191, 195 [2000]). Although it has been said that "'[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'" (***Levy v Grandone***, 14 AD3d 660, 661, 789 NYS2d 291, 291 [2d Dept 2005]), "allegations that a complainant has knowingly provided false information to the police or withheld information from police have been found to be sufficient to state that the complainant initiated the proceeding by playing an active role in the other party's arrest and prosecution" (***Place v Ciccotelli***, 121 AD3d 1378, 1379-80 [3d Dept 2014], *citing, inter alia,* ***Kirchner v. County of Niagara***, 107 A.D.3d 1620, 1622, 969 N.Y.S.2d 277 [4th Dept 2013]; ***Lupski v. County of Nassau***, 32 A.D.3d 997, 998, 822 N.Y.S.2d 112 [2d Dept 2006]; ***Brown v. Nassau County***, 306 A.D.2d 303, 303, 760 N.Y.S.2d 655 [2d Dept 2003]; ***Ramos v. City of New York***, 285 A.D.2d 284, 299–300, 729 N.Y.S.2d 678 [1st Dept 2001]; ***Grucci v. Grucci***, 20 N.Y.3d at 901–902, 957 N.Y.S.2d 652, 981 N.E.2d 248 [2012] [Pigott, J., dissenting]; and PJI 3:50.2). *See* ***Brown v Sears Roebuck and Co.***, 297 AD2d 205, 210 [1st Dept 2002] (". . . it is true that a defendant may be said to have initiated a criminal proceeding by providing false evidence to the police or withholding evidence that might affect the determination by the police to make an arrest")). With respect to the element of malice, "a showing of lack of probable cause may be sufficient to support an inference of actual malice" (***Colegrove v City of Corning***, 54 AD2d 1093, 1094 [4th Dept 1976], *citing* ***Munoz v. City of New York***, 18 N.Y.2d 6, 11 [1966] , 271 N.Y.S.2d at 650, 218 N.E.2d at 530); thus, "where it is demonstrated that there is a dispute about either the true state of facts, or the inferences to be drawn by a reasonable person from the facts which led to the prosecution, the uniform rule has been to require there be a factual resolution at a trial" (***Munoz v City of New York***, *supra*, 18 NY2d at 11). As the Second Department has stated, "[t]he existence of malice is usually a question of fact to be resolved by the jury where the plaintiff provides sufficient evidence raising a factual issue for submission to the jury" (***Misek-Falkoff v Keller***, 153 AD2d 841, 841 [2d Dept 1989]; *see generally* ***Feinberg v Saks & Co.***, 56 NY2d 206, 211 [1982]).

Here, it is undisputed that the criminal proceedings that were instituted against plaintiff following defendant's summoning of the police on August 20, 2013 and again on May 19, 2014 were terminated favorably to plaintiff. Further, plaintiff testified that the information defendant provided, or caused to be provided, to the police on both occasions was materially false and that the defendant knew that the information he was providing, or causing to be provided, to the police was false. Plaintiff contends that the defendant did so in furtherance of his ongoing campaign to limit or eliminate the time she was permitted to spend with the children, an objective that was advanced by the pendency of criminal charges against plaintiff for allegedly jeopardizing the safety and welfare of the children and that achieved an appreciable measure of immediate realization by operation of the orders of protection against plaintiff that attended the criminal proceedings. Thus, although defendant argues that plaintiff is unable to show that he "'played an active role in the prosecution, such as giving advice and encouragement or

importuning the authorities to act' or that []he 'affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer [wa]s not acting of his own'"(***Levy v Grandone***, 14 AD3d 660, 661-662, 789 NYS2d 291, 292 [2d Dept 2005]), where, as here, the plaintiff alleges that the defendant knowingly provided false information to the police and had an ulterior motive for doing so, the courts have found the "commencement" element satisfied sufficiently to resist summary judgment (***Place v Ciccotelli***, *supra*; ***Kirchner v. County of Niagara***, *supra*; ***Lupski v. County of Nassau***, *supra*; ***Brown v. Nassau County***, *supra*). Similarly, with respect to probable cause, where, as here, "it is demonstrated that there is a dispute about either the true state of facts, or the inferences to be drawn by a reasonable person from the facts which led to the prosecution, the uniform rule has been to require there be a factual resolution at a trial" (***Colegrove v City of Corning***, 54 AD2d 1093, 1094 [4th Dept 1976], *quoting* ***Munoz v City of New York***, 18 NY2d 6, 11 [1966]). And because proof of lack of probable cause can be summoned "to support an inference of actual malice" (***Colegrove v City of Corning***, *supra*, 54 AD2d at 1094), the parties' competing averments here likewise present a question of fact "to be resolved by the jury" (***Misek-Falkoff v Keller***, 153 AD2d 841, 841 [2d Dept 1989], *citing* ***Toker v. Pollak***, 44 NY2d 211, 219, 405 NYS2d 1, 376 N.E.2d 163 [1978], and ***Ashcroft v. Hammond***, 197 NY 488 [1910]).

On a motion for summary judgment, the court is not empowered to judge the credibility of the parties (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, *supra*), and it must view all receivable evidence in the light most favorable to, and draw all permissible inferences in favor of, the party opposing summary judgment (***Benincasa v Garrubo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). In short, a motion for summary judgment should be denied where, as here, the facts are in dispute, conflicting inferences may be drawn from the evidence and there are issues of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

Accordingly, the defendant's motion for summary judgment dismissing the complaint is denied.

The forgoing constitutes the decision and order of the court.

Dated: 10/22/2020
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION**	__X__ **NON-FINAL DISPOSITION**