

Holst v Holst

2022 NY Slip Op 30339(U)

February 3, 2022

Supreme Court, New York County

Docket Number: 153297/2020

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

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RAYMOND HOLST

Plaintiff,

- v -

TRACY HOLST,

Defendant.

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INDEX NO. 153297/2020
MOTION DATE 11/24/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29

were read on this motion to/for DISMISS

Defendant moves to dismiss the action under CPLR § 3211(a)(7). Plaintiff opposes.

As with all motions to dismiss, the complaint is afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (id.; Anderson v. Edmiston & Co., 131 AD3d 416, 417 [1st Dept 2015]; Askin v. Department of Educ. of City of N.Y., 110 AD3d 621, 622 [1st Dept 2013]). Under CPLR § 3211(a)(7), the motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Polonetsky v. Better Homes Depot, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action

exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Here, providing every favorable factual inference, and considering plaintiff’s affidavit, the complaint properly makes out a claim for malicious prosecution and abuse of process. Plaintiff concedes that his claims for false arrest and false imprisonment are time barred and therefore same are properly dismissed. The Court issues the below discovery schedule related to the surviving claims of malicious prosecution and abuse of process.

Accordingly, it is

ORDERED that the motion is granted solely to the extent of dismissing the claims for false arrest and false imprisonment, and otherwise denied; and it is further

ORDERED that the parties shall serve courtesy copies of any outstanding demands not otherwise addressed herein within 14 days; all parties shall respond thereto within 20 days of receipt of courtesy copy; and it is further

ORDERED that all document discovery in this matter shall be completed by September 2, 2022; and it is further

ORDERED that party depositions shall occur either in-person or via electronic means and shall be completed by September 30, 2022; and it is further

ORDERED that non-party depositions shall occur either in-person or via electronic means and shall be completed by November 18, 2022; and it is further

ORDERED that all depositions shall be noticed at least 30 days in advance of deposition date; and it is further

ORDERED that the failure to timely notice a deposition shall constitute waiver of same; and it is further

ORDERED that the failure to timely appear for a timely noticed deposition shall result in sanctions, including but not limited to the striking of pleadings in the Court's discretion, upon further application; and it is further

ORDERED that all post-deposition demands shall be served no later than 20 days following the date of deposition giving rise to demand; responses thereto shall be served no later than 20 days from the receipt of demand and it is further

ORDERED that the failure to timely serve post-deposition demands shall constitute waiver of same; and it is further

ORDERED that the failure to timely serve responses to timely post-deposition demands shall result in sanctions, including but not limited to the striking of pleadings in the Court's discretion, upon further application; and it is further

ORDERED that the end date for discovery shall be January 13, 2023; and it is further


ORDERED that the note of issue shall be filed by January 27, 2023; and it is further

ORDERED that no further conference is scheduled, at this time; counsel are referred to the Part Rules for directives regarding requests for further conferences; and it is further

ORDERED that the parties are reminded of the Part Rules, annexed hereto, including those prohibiting post-note of issue discovery and requiring extension of the note of issue by motion, returnable prior to the note of issue deadline date and; it is further

ORDERED THAT DATES SET FORTH HEREIN MAY NOT BE ADJOURNED, EXTENDED, OR OTHERWISE MODIFIED ABSENT FURTHER ORDER OF THE COURT.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

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|-------------------------|--------------------------|----------------------------|--------------------------|--------|--|-----------------------|--------------------------|-----------|
| <u>2/3/2022</u> DATE | | | | |  FRANK NERVO, J.S.C. | | | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | | <input type="checkbox"/> | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |