

**Silverman v Leibowitz**

2023 NY Slip Op 31358(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 158678/2022

Judge: Mary V. Rosado

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART **33M****

*Justice*

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JOEL SILVERMAN

Plaintiff,

- v -

HEIDI S LEIBOWITZ,

Defendant.

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INDEX NO. 158678/2022

MOTION DATE 12/19/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on January 31, 2023, where Robert Fantone, Esq. appeared for the Plaintiff Joel Silverman (“Plaintiff”) and Michael Cilento, Esq. appeared for Defendant Heidi S. Leibowitz (“Defendant”), Defendant’s motion to dismiss pursuant to CPLR 3211 § (a)(7) is granted in part and denied in part. Defendant’s motion for sanctions is denied. Defendant’s motion to dismiss based on improper venue is denied.

**I. Background**

This is a lawsuit between former spouses for malicious prosecution. Plaintiff has been employed by the New York Police Department (“NYPD”) for seventeen years (NYSCEF Doc. 1 at ¶ 6). Plaintiff and Defendant were married for approximately six and a half years, but in 2015, began experiencing marital issues (*id.* at ¶¶ 9-10). In December of 2015, Plaintiff notified Defendant that he sought a rabbinical divorce (a “Get”) (*id.* at ¶ 12). Allegedly, Defendant attempted to convince Plaintiff to remain in the marriage, but Plaintiff refused (*id.* at ¶ 13).

Plaintiff alleges that on December 28, 2015, the parties went to a rabbinical court in Rockland County to receive a Get, but Defendant refused (*id.* at ¶ 14). After this, Defendant

allegedly went to Good Samaritan Hospital and made a false report that Plaintiff punched her in the stomach on December 27, 2015 (*id.* at ¶ 15). It is alleged that Defendant was pregnant (*id.* at ¶ 16). However, the staff allegedly concluded there were no injuries to Defendant or the unborn child (*id.* at ¶¶ 17-18).

The month prior, Plaintiff alleges Defendant had numerous rabbis and other unknown individuals harass Plaintiff to drop the rabbinical divorce (*id.* at ¶ 22). Plaintiff filed for secular divorce on January 21, 2016 (*id.* at ¶ 25). Plaintiff alleges that in response, Defendant accused Plaintiff in Rockland County Family Court of several violent acts (*id.* at ¶ 26). Plaintiff alleges that Defendant spread false accusations in “several venues with more than 100 false documents in numerous courts and other governmental agencies” over the “course of six years.” (*id.* at ¶ 27). Plaintiff alleges that this led to the removal of his firearms and his placement on modified duty (*id.* at ¶ 28).

Allegedly, on July 12, 2016 at 10:45 p.m., Defendant filed a false domestic incident report (“DIR”) at the 72nd Precinct, alleging that Plaintiff followed her in a vehicle while she was walking for approximately 15-20 blocks in Brooklyn (*id.* at ¶ 30). Plaintiff alleges that the NYPD’s Internal Affairs Bureau (“IAB”) reviewed the DIR and arrested Plaintiff on July 27, 2016 (*id.* at ¶ 31). Plaintiff was charged with criminal contempt and harassment (*id.*). Plaintiff alleges that also on July 27, 2016, Defendant filed another DIR with the Ramapo Police Department (the “Ramapo DIR”) regarding allegedly false accusations of assault from December 27, 2015 (*id.* at ¶ 32). The Ramapo DIR allegedly contained false statements which Plaintiff alleges is contradicted by medical evidence from Good Samaritan Hospital and Mount Sinai (*id.* at ¶ 35).

Plaintiff alleges that Defendant repeated these false allegations to members of IAB and the Department Advocate’s Office, which caused the initiation of NYPD administrative proceedings

against Plaintiff (*id.* at ¶ 36). Plaintiff alleges that Defendant played an active role in the administrative prosecution of Plaintiff by continuously providing and reiterating false allegations (*id.* at ¶ 37). Plaintiff alleges that other than the false information received from Defendant, the NYPD's department advocate's office had no other evidence on which to act in initiating the prosecution of Plaintiff (*id.* at ¶ 40). Plaintiff alleges Defendant's sole motive in making these false allegations was to harass Plaintiff because he sought a divorce (*id.* at ¶ 41).

Allegedly, the pending criminal and family proceedings against Plaintiff which were purportedly initiated by Defendant's false allegations were dismissed. Plaintiff also alleges that the NYPD who investigated him were provided with a wealth of exculpatory evidence establishing the falsity of the allegations against Plaintiff (*id.* at ¶ 48). Plaintiff then alleges that IAB maliciously delayed prosecuting Plaintiff and did not bring charges before a tribunal for more than six years (*id.* at ¶ 53). Plaintiff alleges that the NYPD<sup>1</sup> did this maliciously to intentionally and maliciously extend the time Plaintiff was placed on modified duty (*id.* at ¶ 57). Plaintiff alleges that the Department Advocate's Office either knew of the falsity of Defendant's allegations or acted recklessly in not realizing the falsity of Defendant's allegations (*id.* at ¶ 62).

Plaintiff alleges that the administrative charges were finally brought before a tribunal in the Spring of 2022 (*id.* at ¶ 64). Plaintiff alleges that Defendant refused to testify at the hearing, but the Department Advocate's Office admitted into evidence her allegations against the Plaintiff (*id.* at ¶ 65). The tribunal found Plaintiff not guilty (*id.* at ¶ 65).

Prior to this action, on July 21, 2021, Plaintiff initiated an action in Queens County Supreme Court against Defendant as well as two of her relatives for defamation (*see Joel Silverman v Heidi S Leibowitz, et. al.* Sup. Ct., Queens Co. Index No.: 716529/2021). That action

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<sup>1</sup> The NYPD, IAB, and Department Advocate's Office, are named defendants despite this allegation.

was dismissed by Order and Decision dated June 29, 2022 and uploaded to NYSCEF on July 5, 2022 (*id.* at NYSCEF Doc. 30).

Plaintiff then initiated this action against Defendant on October 7, 2022 alleging malicious prosecution (NYSCEF Doc. 1)<sup>2</sup>. On December 15, 2022, Defendant filed the instant motion to dismiss (NYSCEF Doc. 2). Defendant argues that the malicious prosecution claim must be dismissed because it requires a defendant to have initiated a legal proceeding against a plaintiff (NYSCEF Doc. 3). Here, Defendant argues that she did not play any active role in the disciplinary proceeding brought against Plaintiff. Defendant also argues that Plaintiff failed to sufficiently plead a lack of probable cause or a showing of malice.

Defendant argues that although she provided a witness statement to NYPD, this does not equate to initiating a legal action. Defendant argues that since NYPD acted independently she is not the proper target of a malicious prosecution action. Defendant also asserts that the Complaint fails to establish that the investigation was without probable cause, as Plaintiff was arrested and charged with criminal contempt and harassment. Finally, Defendant argues that Plaintiff has failed to establish actual malice, since it only includes a conclusory and unspecified assertion that Defendant gave a statement to NYPD. Defendant also moves to dismiss because venue is improper as Plaintiff lives in Rockland County and Defendant lives in Kings County. Defendant seeks costs incurred for defending what they allege as a frivolous lawsuit.

In opposition, Plaintiff argues that New York law supports a cause of action for malicious prosecution where a private individual provides false information to the prosecuting authorities (NYSCEF Doc. 10). Plaintiff also argues that because Defendant's allegations were fabricated, Plaintiff is entitled to an inference of malice. Plaintiff also argues that venue is proper because the

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<sup>2</sup> Plaintiff has abandoned his second cause of action which alleges abuse of process.

administrative proceedings against Plaintiff took place in New York County, and in any event, Defendant has not made a proper challenge to venue because she failed to serve a demand for change of venue.

In reply, Defendant raises a host of fact issues regarding where Plaintiff was on the date Defendant complained she was being followed, as well as an issue of fact regarding the reason the administrative proceeding was terminated against him (NYSCEF Doc. 11). Defendant also argues the cases cited in support of Plaintiff's arguments that a complaint to the police can give rise to a malicious prosecution claim are distinguishable from the facts alleged here. Defendant argues that the lack of probable cause element "must be patent" for a malicious prosecution claim to survive, but that is not the case here. Defendant also asserts that Plaintiff has failed to support his choice of venue.

## **II. Discussion**

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A claim for malicious prosecution requires proof of each of (1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the plaintiff, (3) the absence of probable cause for the proceeding and (4) actual malice (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613-614 [1st Dept 2015]). A plaintiff also must plead special injury (*Engel v CBS, Inc.*, 94 NY2d 195, 201 [1999]). The Court of Appeals has imposed stringent requirements for bringing a malicious prosecution claim, and failure to show any one of the aforementioned elements will defeat the entire claim (*Moorhouse v Standard, N.Y.*, 124 AD3d 1 [1st Dept 2014]).

Here, the element of termination of the proceeding in favor of the plaintiff, is not in dispute. However, there are disputes as to the sufficiency of the remaining three elements. To establish the element of initiation of a criminal proceeding, it must be shown that the defendant did more than merely report a crime to the police and cooperate in its prosecution (*Moorehouse, supra* at 7). However, knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's determination to investigate and prosecute can satisfy the element of initiation (*id.* at 8 citing *Maskantz v Hayes*, 39 AD3d 211, 212 [1st Dept 2007]). Plaintiff has alleged that Defendant provided false evidence to law enforcement which resulted in the initiation of the disciplinary proceedings against him. At this juncture, on a pre-answer motion to dismiss, where the Court must accept all factual allegations as true, the Court cannot resolve the issue of fact regarding whether the evidence Defendant provided was indeed false (*see also Torres v Jones*, 26 NY3d 742 [2016] [summary judgment inappropriate where there was issue of fact as to whether detectives falsified plaintiff's confession and provided it for use in prosecuting plaintiff]). Moreover, the Complaint contains allegations that Defendant did more than just provide statements to the NYPD, she also allegedly encouraged her family members to contact

the NYPD and urge them to institute disciplinary proceedings. Therefore, given the procedural posture, the Court finds the first element has been sufficiently pled.

Regarding the actual malice element, this may be sufficiently alleged based on inferences which can be reasonably drawn from the surrounding facts and circumstances (*Cardoza v City of New York*, 139 AD3d 151 [1st Dept 2016]). The Court highlights that on a pre-answer motion to dismiss, all favorable inferences which may be drawn from the Complaint are to be given to the Plaintiff. Here, Plaintiff alleged that the false allegations were made in retaliation for Plaintiff requesting a divorce despite Defendant's opposition. There are allegations, which this Court must accept as true, that Defendant utilized other means of retaliating against Plaintiff, including sending rabbis and other individuals to Plaintiff's house, making complaints in family court, and making complaints to multiple police stations. Based on the context surrounding which Defendant allegedly provided false information to the NYPD, and given this is a pre-answer motion to dismiss, the Court finds an inference of actual malice has been sufficiently pled.

Finally, the last element requires a showing the absence of probable cause. Here, Plaintiff alleges the written complaints Defendant made to IAB and the NYPD about Plaintiff were completely fabricated, and therefore without probable cause. Plaintiff alleges, and Defendant has not provided any evidence to the contrary, that all Court proceedings and complaints made by Defendant against Plaintiff were ultimately dismissed. Plaintiff also claims to have evidence which shows Defendant's complaints were without probable cause, including cellular site data which indicates Defendant was not in the location she alleges when she claimed that Plaintiff was essentially stalking her. Thus, whether the evidence was fabricated, and therefore whether probable

cause existed, is an issue of fact which cannot be resolved on this motion to dismiss based on the allegations pled in the Complaint<sup>3</sup>.

As Plaintiff has sufficiently pled malicious prosecution, this claim survives and the branch of Defendant's motion seeking to dismiss the malicious prosecution cause of action is denied. Likewise, the branch of the motion seeking sanctions is denied. However, as Plaintiff has abandoned his cause of action for abuse of process, the motion to dismiss that cause of action is granted.

Defendants motion to dismiss based on improper venue is also denied. Pursuant to CPLR § 503(a), "the place of trial shall be in the county in which...a substantial part of the events or omissions giving rise to the claim occurred". Moreover, pursuant to CPLR § 511(b), the "defendant shall serve a written demand that the action be tried in a county [she] specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand". Defendant has not complied with CPLR § 511(b) because she never sent a written demand that the action be tried in a county she specifies as proper. Therefore, her motion as to improper venue is premature and procedurally improper. Based on the procedural impropriety of Defendant's motion challenging venue, the Court does not address the merits of Defendant's argument, namely, that Plaintiff's allegations do not meet the "substantial part of the events" language contained in CPLR § 503(a). As the motion to dismiss is denied with the exception of dismissing Plaintiff's abandoned abuse of process claim, an award of sanctions would be wholly improper. Therefore, that branch of the motion is also denied.

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<sup>3</sup> The Court makes no judgment as to whether Plaintiff may ultimately satisfy his heavy burden on a summary judgment motion after discovery.

Accordingly, it is hereby,

ORDERED that Defendant's motion to dismiss is granted to the extent Plaintiff's second cause of action alleging abuse of process is dismissed; and it is further

ORDERED that Defendant's motion is otherwise denied in its entirety; and it is further

ORDERED that within twenty days of entry of this Decision and Order, Defendant shall serve an Answer to Plaintiff's Complaint; and it is further

ORDERED that on or before May 24, 2023, the parties shall submit a proposed preliminary conference order to the Court via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov). In the event the parties are unable to agree to a proposed preliminary conference order, they are directed to appear for an in-person conference with the Court on May 31, 2023 at 9:30 a.m. in 60 Centre Street, Room 442; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order with notice of entry on Defendant; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/25/2023  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
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