

Montegari v Miller
2023 NY Slip Op 35269(U)
August 29, 2023
Supreme Court, Oneida County
Docket Number: Index No. EFCA2016-000874
Judge: William F. Ramseier
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At a term of Supreme Court held in and
for the County of Oneida, in the City of
Utica, New York on the 11th day of July
2023.

PRESENT: HONORABLE WILLIAM F. RAMSEIER
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

ALFRED P. MONTEGARI,

Plaintiff,

-vs-

MARK J. MILLER,
DANIEL F. MARTUSCELLO III,
ANTHONY J. ANNUCCI,

Defendants.

MEMORANDUM
DECISION
AND
ORDER

Index No. EFCA2016-000874

Defendants have moved to dismiss on the grounds of subject matter jurisdiction and failure to plead a sufficient cause of action, or, in the alternative, summary judgment on all causes of action. Plaintiff opposes the motion.

The Court has considered all documents filed under NYSCEF Index number EFCA2016-000874.

Defendants' first contention is a broad assertion that this Court lacks subject matter jurisdiction over each, and every cause of action alleged. Defendants' second contention

is a broad assertion that the complaint does not sufficiently allege the personal involvement of each Defendant. Defendants raised both of these contentions in a prior motion to dismiss and these arguments were rejected without prejudice. The Court finds neither argument persuasive.

Constitutional Causes of Action

Plaintiff's first four causes of action sound in constitutional violations. The first two in violation of 42 U.S.C. 1983 for violations of First Amendment and Fourteenth Amendment of the United States Constitution. The second two in violation of the free speech and equal protection rights enumerated in the New York State Constitution. The Court notes that the first and third, and the second and fourth, causes of action are analogous.

Defendants argue that these causes of action are analyzed under the same legal framework and are therefore duplicative, requiring the dismissal of the New York State Constitution causes of action. See *Novak v. Bd. of Educ. of Fayetteville–Manlius Cent. Sch. Dist.*, No. 05-CV-0199, 2007 WL 804679, at *7 n. 8 (N.D.N.Y. Mar. 14, 2007) (Scullin, J.) (noting that Art. I, § 8 of the New York State Constitution “contains free speech protections that are analogous to those in the federal constitution, and the same legal standards apply”); *Fishman v. Cty. of Nassau*, No. 10-CV-3231, 2011 WL 3919713, at *10 (E.D.N.Y. Sept. 7, 2010); *Carter v. Inc. Vill. of Ocean Beach*, 693 F. Supp. 2d 203, 212 (E.D.N.Y. 2010); *Housing Works, Inc. v. Turner*, 179 F. Supp. 2d 177, 199 n.25 (S.D.N.Y. 2001). Plaintiff argues that free speech rights are more broadly interpreted

under New York law, citing to *Immuno AG v. J. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991), and therefore, the New York State Constitution cause of action should stand. Plaintiff also notes that a federal's court's dismissal does not preclude a plaintiff from litigating his or her equal protection claims in state court. See *Brown v. State of New York*, 9 A.D.3d 23 (3d Dept 2004).

While New York may provide greater freedom of press or a second bite at the apple on a state equal protection claim, neither is at issue here. From a practical standpoint, the free speech and the equal protection causes of action are analyzed the same under federal and state law, making the New York State causes of action duplicative. Therefore, the third and fourth causes of action are dismissed.

First Amendment Retaliation

To state a cause of action for a First Amendment retaliation claim, a "plaintiff must show (1) the speech at issue was made as a citizen on matters of public concern rather than as an employee on matters of personal interest; (2) he or she suffered an adverse employment action; and (3) the speech was at least a substantial or motivating factor in the adverse employment action." *Garcia v Hartford Police Dept.*, 706 F3d 120, 130 (2d Cir 2013). The Court finds that the defendant has adequately alleged he engaged in protected speech (concerning fiscal abuse and mismanagement within DOCCS) and that he was subsequently retaliated against because of that speech. Further, the Court finds that there are many questions of fact to be decided by a jury with respect to these allegations. Accordingly, Defendants motion for dismissal and/or summary judgment with respect to the first cause of action is denied.

Fourteenth Amendment Equal Protection

To state a cause of action for violation of equal protection based upon a claim of selective enforcement of a statute or regulation, the plaintiff must allege that first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *Westover Car Rental, LLC v Niagara Frontier Transp. Auth.*, 133 AD3d 1321, 1323 (4th Dept 2015). With respect to the second cause of action, the Court finds that the Plaintiff has adequately alleged that the Defendants maliciously subjected him to selective enforcement of DOCCS department rules and laws on the basis that he exercised his right to free speech raising concerns of fiscal abuse and mismanagement. Further, the Court finds that there are many questions of fact to be decided by a jury with respect to these allegations. Accordingly, Defendants motion for dismissal and/or summary judgment with respect to the second cause of action is denied.

Tortious Interference

Plaintiff's sixth cause of action alleges "tortious interference with contractual rights." It is undisputed that Plaintiff was an at will employee for DOCCS. Generally, an at will employment relationship cannot be the basis for a tortious interference with a contract claim. *Am. Recycling & Mfg. Co., Inc. v Kemp*, 165 AD3d 1604, 1606 (4th Dept 2018). A claim for tortious interference with an at will employment relationship is actually a claim for tortious interference with economic relations. *Emmons v City Univ. of New York*, 715

F Supp 2d 394, 425 [EDNY 2010], mod (July 2, 2010). The elements of a tortious interference with economic relations are: (1) that the plaintiff had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party. *106 N. Broadway, LLC v Lawrence*, 189 AD3d 733, 741 (2d Dept 2020). The first element is undisputed, Plaintiff and DOCCS had a business relationship. Plaintiff also alleges that the Defendants intentionally interfered with the business relationship by seeking his termination based on false charges and did so with malicious intent. Defendants argue that they were merely acting within the scope of their duties. Whether Defendants were motivated by malice or were simply doing their jobs is a question for the finder of fact. Plaintiff also alleges that Defendants actions caused lost earnings, including the withholding of a two-percent raise. Accordingly, Defendants motion for dismissal and/or summary judgment with respect to the sixth cause of action is denied.

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*, 63 NY2d 113, 116 [1984]. Process that is subject to complaint for abuse of process must be issued by or filed in court. See *Glaser v. Kaplan*, 5 A.D.2d 829, 170 N.Y.S.2d 522 (2d Dep't 1958); 86 N.Y. Jur. 2d Process and Papers § 162. Administrative proceedings

generally do not fall within the definition of process for the purpose of an abuse of process claim. See *Walia v Holder*, 59 F Supp 3d 492, 512 (EDNY 2014); *Nickerson v. Commc'n Workers of Am. Local 1171*, No. 04-CV0875, 2005 WL 1331122, at *8 (N.D.N.Y. May 31, 2005). Here, Plaintiff bases an abuse of process action on a Civil Service Law Section 75 hearing, which is neither a criminal or civil court proceeding. Accordingly, Plaintiff's cause of action for abuse of process is dismissed.

Malicious Prosecution

The elements of an action for malicious prosecution, as repeatedly stated by New York courts, are: (1) prosecution of a civil action against the plaintiff by or at the instance of the defendant; (2) without probable cause; (3) with malice; (4) which terminated in favor of the plaintiff; and (5) causing special injury. *Sapienza v Notaro*, 172 AD3d 1418, 1419 (2d Dept 2019). Plaintiff relies on the Civil Service Law Section 75 hearing, where "he was acquitted of all the serious charges," but "found responsible for speeding on the Thruway." However, Civil Service Law Section 75 is not a sufficient basis upon which to allege malicious prosecution. See *Groat v Town Bd. of Town of Glenville, Schenectady County*, 100 Misc 2d 326, 328 (Sup Ct 1979). Furthermore, although not necessary under the analysis here, Plaintiff's own pleadings acknowledge that the proceeding was not terminated in favor of the Plaintiff which is also fatal.

Prima Facie Tort

Prima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort theory provides a remedy. "That

principle has developed into the specific cause of action of prima facie tort consisting 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*, 63 NY2d 113, 117 (1984). The allegations in Plaintiff’s complaint taken in the light most favorable to Plaintiff support a cause of action for prima facie tort. However, this cause of action cannot be viewed in a vacuum.

Where a complaint alleges a specific unlawful and tortious act, the remedy is in traditional tort and not in prima facie tort. *Ruza v Ruza*, 286 AD 767, 769 (1st Dept 1955). Thus, conduct actionable under a traditional tort category cannot be made the subject of an action for prima facie tort and, similarly, an inadequately plead traditional tort cannot form the basis for prima facie tort. *Curiano v Suozzi*, 63 NY2d 113, 117 (1984); *Knapp Engraving Co. v Keystone Photo Engraving Corp.*, 1 AD2d 170, 172 (1st Dept 1956). Indeed, where traditional specific torts account for all the damages sustained the question of whether prima facie tort applies is academic and a cause of action for the same does not lie. *Bd. of Ed. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass’n, Inc., Local 1889 AFT AFL-CIO*, 38 NY2d 397, 406 (1975); *Ruza v Ruza*, 286 AD 767, 770 (1st Dept 1955). Prima facie tort cannot be used as “catch-all alternative for every cause of action which cannot stand on its legs.” *Curiano v Suozzi*, 63 NY2d 113, 118 (1984).

Here, Plaintiff’s complaint asserts *prima facie* tort as a “catch-all” to all the other traditional torts mentioned above, including an already dismissed claim for libel. Plaintiff’s

complaint and cause of action for prima facie tort is vague and does not specifically refer to any intentional acts of a specific defendant that would otherwise be unlawful that are not already covered by the traditional torts pleaded. Plaintiff's failure to adequately plead and raise triable issue of fact with respect to the causes of action for tortious interference, abuse of process, malicious prosecution, and libel does not entitle Plaintiff to assert a cause of action for prima facie tort that combines all the aforementioned torts into one. In any event, Plaintiff has pleaded a valid cause of action for tortious interference, which accounts for the special damages that would be recoverable under prima facie tort except for attorney's fees for representation in the Civil Service Section 75 hearing, which are not recoverable as special damages. See *Ginsberg v Ginsberg*, 84 AD2d 573, 574 (2d Dept 1981); *Howard v Block*, 90 AD2d 455 (1st Dept 1982). Accordingly, Plaintiff's cause of action for prima facie tort is dismissed.

It is therefore

ORDERED that Defendants motion to dismiss and for summary judgment is granted in part and denied part.

August 29, 2023
Utica, New York

ENTER



WILLIAM F. RAMSEIER
Supreme Court Justice