

Fiorito v Sarcone

2025 NY Slip Op 30880(U)

March 18, 2025

Supreme Court, New York County

Docket Number: Index No. 651344/2019

Judge: Debra A. James

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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. DEBRA A. JAMES PART 59

Justice

-----X

TERRENCE FIORITO,

Plaintiff,

- v -

JOHN A. SARCONE, and THE SARCONE LAW FIRM,
PLLC,

Defendants.

-----X

INDEX NO. 651344/2019

MOTION DATE 08/03/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR § 3212, of defendants John A. Sarcone and The Sarcone Law Firm, PLLC, for summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

In this action for breach of a Settlement Agreement, defendants John A. Sarcone and The Sarcone Law Firm, PLLC,

previously moved for summary judgment. By Order dated September 28, 2022, resolving such motion, this court granted partial summary judgment to such defendants, dismissing the second cause of action for an accounting and the fourth cause of action for fraudulent inducement against both defendants, and dismissing the third cause of action for abuse of process against the defendant The Sarcone Law Firm, PLLC, only. See NYSCEF Doc. No. 61.

In Rotante v Advance Transit Co., Inc., 148 AD3d 423, 424 (1st Dept 2017), the Appellate Division First Department, reversed the trial court for having improvidently exercised its discretion in declining to entertain defendants' second summary judgment motion on its merits. In Rotante, the Appellate Division so ruled despite the untimeliness of the motion pursuant to CPLR 3212(a), stating that movants showed good cause given the outstanding discovery. Where here, as in Rotante, defendants sought "to exhaust all their efforts to secure [] depositions of [witnesses]" before making their second motion for summary judgment, this court exercises its discretion to entertain such motion on the merits. Such exercise is warranted, particularly, as, unlike in Rotante, defendants at bar made their second summary judgment motion within the deadline set forth for filing such dispositive motion under CPLR 3212(a).

Defendants' establish, through deposition testimony of those who had any knowledge of defendants and plaintiff and through the police report dated January 10, 2017, that

defendants uttered no words and/or published no statement that disparaged plaintiff "in regard to this [Settlement] Agreement or the Claims [against the Sarcone Parties in connection with money allegedly paid by plaintiff in connection with certain litigation to which plaintiff was not a party]", as specified in the Whereas clause of the Settlement Agreement and paragraph 2 thereof. See NYSCEF Doc. No. 2.

Plaintiff, in his opposition, fails to raise any issue of fact, as he comes forward with absolutely no language or statements by either or both of the defendants made to the police, school officials, or others that disparaged plaintiff, as defined under the Settlement Agreement. See Sage Realty Corp v Klein, 281 AD2d 334 (1st Dept 2001). Nothing in the four corners of the Settlement Agreement even remotely relates to the actions of the individual defendant in making reports to the police, school officials, and others at certain public sporting events, alleging that plaintiff and his wife were stalking the children of the individual defendant and his wife, i.e., harassing plaintiff's niece and nephew, in contravention of such defendant and his wife's directive that plaintiff not interact with such children, who are minors.

Defendants assert the affirmative defense of statute of limitations in their answer. This court agrees with defendants that the claim of abuse of process was untimely brought, interposed

more than one year from the filing of the criminal charges, which took place on January 24, 2017. See Behrens v City of Buffalo, 217 AD3d 1589, 1590 (3rd Dept 2023)). Moreover, the court agrees with defendants that the police report against plaintiff that the individual defendant filed on October 30, 2018, in and of itself, is insufficient to demonstrate an abuse of process claim. As plaintiff puts forth no evidence that tends to show that such police report was improperly used after it was issued, his cause of action for abuse cannot be sustained. See Curiano v Suozzi, 63 NY2d 113, 117 (1984).

Debra A. James

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| <u>3/18/2025</u> | | | <u>DEBRA A. JAMES, J.S.C.</u> | |
| DATE | | | | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | OTHER |
| | | | <input type="checkbox"/> | REFERENCE |