

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN

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ROBERT BARRETT and JUNE BARRETT,

Index No.: 948/06

Plaintiffs,

-against-

**NOTICE OF MOTION  
FOR SUMMARY  
JUDGMENT**

MICHAEL B. WATKINS, DAVID ALLEN,  
WOODSTONE LAKES DEVELOPMENT, LLC,  
WOODSTONE TORONTO DEVELOPMENT, LLC,  
WOODSTONE CRESTWOOD DEVELOPMENT, LLC,  
MIRANT NEW YORK-GEN, LLC, and STEVEN M.  
DUBROVSKY,

Assigned to:  
Hon. Robert A. Sackett

Defendants.

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**PLEASE TAKE NOTICE**, that upon the annexed affirmation of MAURICE J.

RECCHIA dated the 7<sup>th</sup> day of May, 2010, the exhibits annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Sullivan County Courthouse, County Government Center Annex, 100 North Street, Monticello, New York 12701, on the 28<sup>th</sup> day of May, 2010, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order pursuant to CPLR §3212 dismissing the complaint of the plaintiff and granting the defendant MICHAEL B. WATKINS summary judgment and for such other and further relief as this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering papers, if any, are required to be served upon the undersigned attorneys at least seven (7) days prior to the return date hereof.

Dated: Suffern, New York  
May 7, 2010

Yours, etc.

KORNFELD, REW, NEWMAN & SIMEONE, ESQS.

By \_\_\_\_\_

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN

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ROBERT BARRETT and JUNE BARRETT,

Index No.: 948/06

Plaintiffs,

-against-

***AFFIRMATION***

MICHAEL B. WATKINS, DAVID ALLEN,  
WOODSTONE LAKES DEVELOPMENT, LLC,  
WOODSTONE TORONTO DEVELOPMENT, LLC,  
WOODSTONE CRESTWOOD DEVELOPMENT, LLC,  
MIRANT NEW YORK-GEN, LLC, and S  
STEVEN M. DUBROVSKY,

Defendants.  
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MAURICE J. RECCHIA, an attorney at law duly admitted to practice before the Courts  
of the State of New York, hereby affirms as follows:

1. I am an associate of the firm of KORNFELD, REW, NEWMAN & SIMEONE,  
attorneys for the defendant MICHAEL B. WATKINS and as such am fully familiar with the  
facts and circumstances of this case.

2. I make this affirmation in support of defendant Michael Watkins' motion for  
summary judgment.

3. This action has been brought by the plaintiffs against defendant Michael  
Watkins alleging malicious prosecution by defendant Michael Watkins and other defendants.

4. Copies of the plaintiffs' summons and complaint and defendant Michael  
Watkins' answer are attached collectively here as **Exhibit "A"**.

5. A copy of the plaintiffs' bill of particulars is attached here as **Exhibit "B"**.

6. Copies of a letter written by defendant Michael Watkins, and a supporting deposition he signed, are attached here as **Exhibit “C”**.

7. Plaintiffs allege that on May 15, 2005 plaintiffs were “lawfully driving their vehicle on Pine Grove Road”, (plaintiffs’ summons and complaint ¶44, attached as **Exhibit “A”**).

8. Plaintiffs further allege that defendant Michael Watkins thereafter wrote a letter to defendant Steven DuBrovsky noting that he had observed plaintiff Robert Barrett trespassing and also signed a supporting deposition “falsely accusing plaintiff Robert Barrett of trespassing”, (see plaintiffs’ bill of particulars ¶1, attached as **Exhibit “B”**, and plaintiffs’ complaint, ¶’s 45 and 46, attached as **Exhibit “A”**).

9. Plaintiffs further allege that defendant Michael Watkins (along with other defendants) started an action for trespass without probable cause, that this action was commenced by the defendants with malice, and that defendant Watkins (along with other defendants) attempted to maliciously prosecute plaintiff Robert Barrett (see plaintiffs’ summons and complaint ¶’s 49-46 attached as **Exhibit “A”**).

10. The plaintiffs’ case should be dismissed and summary judgment should be granted in favor of defendant Michael Watkins because after more than two years of discovery, depositions of all the defendants, plus three non-party witnesses, plaintiffs have failed to produce any evidence either: (1) that defendant Watkins falsely accused plaintiff Barrett of trespassing, or, (2) that defendant Michael Watkins bore any actual malice towards the plaintiffs.

11. Rather than producing any evidence of an absence of probable cause or any evidence of malice, discovery has revealed that plaintiff Robert Barrett was in fact trespassing

on May 15, 2005. If plaintiff Barrett was in fact trespassing, then there was a basis both in fact and in law for Michal Watkins' subsequent actions. Moreover, there hasn't been an iota of proof produced of any malice by defendant Michael Watkins toward either of the plaintiffs.

### **The Elements Of A Malicious Prosecution Claim**

12. In order to succeed on a claim for malicious prosecution, a plaintiff must prove four elements. These elements were outlined by the Court of Appeals in *Broughton et. al. v. State of New York et. al.*, 37 N.Y. 2d 451 (1975). As the Court stated:

“The elements of the tort of 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.”

*Id.* at 457.

13. While it is true that because in part of defendant Michael Watkins' actions, a criminal misdemeanor proceeding for trespass was brought by the Sullivan County District Attorney's office against plaintiff Robert Barrett, and that this case was dismissed on the merits (at a bench trial by a Town Justice in a courtroom packed with plaintiff Robert Barrett's supporters), plaintiffs have not discovered any proof of a lack of probable cause regarding the trespass charge for the incident on May 15, 2005. Indeed, as discussed below, plaintiff Robert Barrett's own testimony establishes that he had in fact trespassed on defendant Woodstone's private property and chose to ignore a large red “no trespass” sign on May 15, 2005 when defendant Watkins saw plaintiff Barrett trespassing on Woodstone's property. Thus, plaintiffs cannot prove the “lack of probable cause” element of a malicious prosecution action.

14. Furthermore, even assuming for the sake of argument that plaintiffs could prove that element, there is absolutely no proof that defendant Michael Watkins was in any way motivated by malice. As discussed below, his testimony demonstrates that though he knew who Robert Barrett was, he had never even met Mr. Barrett or had a conversation with him.

#### **Plaintiff Robert Barrett Trespassed on May 15, 2005**

15. Attached as **Exhibit “D”** is a diagram of an area involving plaintiff Robert Barrett on May 15, 2005. This diagram, although not to scale, depicts both the public road and the private roadway onto which plaintiff Robert Barrett trespassed on May 15, 2005 when he was observed on the private Woodstone property by defendant Michael Watkins. Plaintiff Barrett acknowledged at his deposition held on July 2, 2009, that although this diagram was not to scale, it accurately depicted the layout of the area (deposition July 2, 2009, 399-400, excerpt of deposition transcript attached as **Exhibit “E”**).<sup>1</sup>

16. Plaintiff Barrett testified that earlier in the day, on May 15, 2005, he had gone to the public reservoir with his wife and grown daughter. They had travelled back out from the reservoir and were heading home when they reached the intersection of Town Road 62 and Pine Grove Road as depicted in the diagram (*id.* at 400). As plaintiff Robert Barrett approached the intersection on May 15, 2005, he was on Town Road 62. In order for him to have proceeded home he would have had to make a left turn at this intersection as he testified (*id.* at 403). However, rather than turning left, plaintiff Barrett turned right at that intersection (*id.* at 400). His reason for doing so was because his daughter “wanted to see if the gate was still closed on the Pine Grove Road section” (*id.* at. 401).

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<sup>1</sup> Because three sessions of Mr. Barrett’s deposition were held running close to 1,000 pages, I am including only relevant excerpts of the deposition held on July 2, 2009. I will be happy to provide the Court with a full copy of all three depositions if the court wishes to review them. Although plaintiff Robert Barrett acknowledged the diagram’s essential accuracy, his attorney objected to the diagram numerous times during the deposition of July 2, 2009 (see these objections on pp. 402, 408, 418, 435).

17. Attached as **Exhibit “F”** are two photographs marked as exhibits at plaintiff Robert Barrett’s third deposition, which was held on July 2, 2009. These photographs depict a large red “no trespassing” sign.

18. Mr. Barrett testified that he saw this sign on May 15, 2005 when he chose to turn right instead of left at the intersection and continue to drive past the no trespass sign onto the private Woodstone property (**Exhibit “E”** at 352, 402, 439). Moreover, Mr. Barrett was emphatic about seeing this sign testifying that “you couldn’t miss the signs” and that “I saw it that day” (*id.* at 404-405, 427).

19. Mr. Barrett also testified that he was aware that this no trespass sign was in place before May 15, 2005 and that he had seen the sign “I don’t know, 5, 7, 10” times before May 15, 2005 (*id.* at 406) and that he was “absolutely” aware that the no trespass sign was in place on May 15, 2005 (*id.* at 407).

20. Nonetheless, despite having been aware that the red no trespass sign was in that location before May 15, 2005, and acknowledging having seen it on May 15, 2005, Mr. Barrett testified that he was not aware that the sign’s purpose was to inform visitors to the area that they should not trespass (*id.* at 428).

21. Further questioning revealed that Mr. Barrett chose to interpret the no trespassing sign as referring to the area of the trees but not to the private roadway he was trespassing on on May 15, 2005, and, that the words “No vehicles” on the sign did not refer to his vehicle. An excerpt from his testimony illustrates this:

Q. And you were aware that the purpose of that sign was to inform visitors to that area that they were not suppose to be trespassing, correct?

A. No.

Q. You were not aware that the purpose of that sign was to inform people that they're not suppose to trespass on the property?

A. Nor did it have that import that you could not – that trespassing was off the road, not on the road. I was on the road, not off the road.

Q. What you are saying is that you decided to interpret that sign –

A. No that –

Q. You decided to interpret that sign as applying to an area not on the road, is that correct?

A. That's correct.

Q. Okay. And after you made a right turn from Town Road 62, what road were you on?

A. I was on Pine Grove Road.

Q. Was there a road sign indicating that it was Pine Grove in that area, in the area that you made the right turn from?

A. There are no road signs out there.

Q. Now you had seen that sign more than two and less than ten times before May 15<sup>th</sup> correct, sir?

A. Yes.

Q. Let me show you again Exhibit "M" [a photograph of the no trespass sign]. Just take a look at it. I'll take this one. And do you see that it says "this is private property" Do you see that?

A. Yes.

Q. At the top of the sign?

A. Yes.

Q. And did you see that part of the sign on May 15<sup>th</sup>?

A. I saw the whole sign.

Q. And did you see the part that says “you are trespassing” with two exclamation points?

A. I saw that very clearly.

Q. And did you see the part that says “Violators will be prosecuted”?

A. Oh, yes.

Q. And did you see the big “no” written in the extra bold type there on the sign?

A. Absolutely.

Q. And did you see the word “vehicles” next to the word “no” on May 15<sup>th</sup>?

A. Yes.

Q. Okay. And yet, even though you saw that sign said no vehicles, you interpreted the sign as referring to an area not on the road, is that correct?

A. That’s correct.

Q. Okay. What did you believe the sign referred to?

A. The property on which the tree stood and the property behind that tree, whoever happened to own that property.

Q. Well did you think that the persons that put up the sign expected people to drive their vehicles into the trees?

A. That’s not my decision.

Q. I didn't ask what your decision was, I'm trying to find out the process of your thinking since you said that you didn't think the sign referred to the road. Did you think that the persons that put up that sign about no vehicles expected the vehicles to be driving into the tree area?

A. Yes, because they had ATVs that were not out there and I did not have an ATV nor was I travelling with the ATV and that was the problem that was being, you know, discussed at one point, that off-road vehicles could go in and around that tree.

Q. Okay. So are you telling me that on May 15<sup>th</sup> your interpretation of the word vehicles on the sign referred only to ATVs or all-terrain vehicles?

A. It included.

Q. On May 15<sup>th</sup> did you think that the word vehicles on that sign did not refer to motor vehicles such as the pick-up truck you were driving?

[Objection colloquy by counsel]

Q. That's really a simple yes or no question, sir, if you understand it.

A. I think I understand it.

Q. Okay. Can you answer that question?

A. And I did answer the question.

Q. I don't think you did.

A. And I said I was on the road, my car is a vehicle for the road, I was on the road and I was not off in property which was not included – which was referring to the sign that was referring to [sic].

Q. So is it correct to say that your interpretation on May 15<sup>th</sup> was that the word vehicles on that sign –

A. That's correct.

Q. - did not refer to the kind of vehicle that you were driving?

A. That's correct.

[Excerpt starts at bottom of page 427 to top of page 434]

### **Plaintiff Was Warned Not To Trespass**

22. In addition to plaintiff Barrett's testimony establishing that he was in fact trespassing on May 15, 2005 when he chose to drive past the red no trespass sign, is the testimony from defendant David Allen demonstrating that defendant Allen had met plaintiff Barrett when Barrett had trespassed in another area on Woodstone Property on a prior occasion at which time defendant Allen had warned Barrett that he should not trespass again on Woodstone property.

23. Defendant Allen testified that he had met plaintiff Barrett for the first time some "months" before (Excerpt of defendant David Allen's testimony attached as Exhibit "G", at 11) or in the spring of 2005 (*id.* at 15) at some time before the May 15<sup>th</sup> incident, when Allen was informed by a Woodstone construction worker that there was a problem involving Mr. Barrett trying to travel on a by-pass road located on Woodstone property (*id.* at 13).

24. After being informed of the problem by phone, defendant Allen travelled to the area where he met Mr. Barrett (*id.* at 14). Defendant Allen informed plaintiff Barrett that he was trespassing (*id.* at 14, 48-49). Furthermore, Mr. Allen testified that he told Mr. Barrett that he was not allowed to trespass on Woodstone property, and, that he should not trespass again on Woodstone property (*id.* at 49, 52). Although he could have called police for this earlier incident, Mr. Allen chose not to call them and let the incident pass with his warning to Mr. Barrett not to trespass again (*id.* at 50).

### Testimony of Defendant Michael Watkins

25. Michael Watkins testified that he had just exited a locked gate on Woodstone property to which he had access on May 15, 2005 when he noticed a vehicle nearby, looked inside and recognized plaintiff Barrett (Excerpt of defendant Watkins testimony attached as **Exhibit “H”**, at 12-13). He knew who plaintiff Barrett was because he had seen him at local town board meetings (*id.* at Watkins 21).

26. When he first noticed Barrett’s vehicle “it had just passed the no trespassing sign into the Chapen Estate” (*id.* at 13). Mr. Watkins saw plaintiff Barrett drive up to one of the two closed gates prohibiting access to the private Woodstone property (these gates were located well beyond the no trespass sign, see diagram attached here as **Exhibit “D”**), then turn around and exit the property (**Exhibit “H”** at 14). Mr. Watkins then followed Barrett’s vehicle briefly until it reached a stop sign when Watkins noted the vehicle’s license plate number (*id.* at 14-15).

27. Mr. Watkins further testified that he had begun to stop unfamiliar vehicles which had entered Woodstone property about a month before the May 15, 2005 incident when equipment was stolen from Watkins’ jobsites on Woodstone property (*id.* at 33).

28. Mr. Watkins also testified that he had never had a conversation with plaintiff Barrett (*id.* at 21), and had never discussed the incident or the letter he had written to defendant Dubrovsky with defendant Dubrovsky until years later in 2009 when he spoke with Dubrovsky about his recollection of the events of May 15, 2005 before he gave deposition testimony in July of 2009 (*id.* at 36).

29. Mr. Watkins’ testimony corroborates plaintiff Barrett’s own testimony that plaintiff Barrett had driven past the large, red, no trespass sign on May 15, 2005. The evidence

from both plaintiff Barrett and defendant Watkins establishes that plaintiff Barrett did, in fact, trespass on Woodstone property on May 15, 2005. Thus when Mr. Watkins reported this trespass to defendant Allen, wrote a letter to defendant Dubrovsky, and signed a supporting County Sheriff's deposition stating that plaintiff Barrett was trespassing on May 15, 2005, there clearly was probable cause for Mr. Watkins to do so. Therefore, plaintiffs cannot prove that defendant Watkins committed a malicious prosecution of plaintiff Barrett because plaintiffs cannot prove that there was an absence of probable cause for the trespassing charge brought by the Sullivan County District Attorney's office against plaintiff Barrett.

30. Moreover, even assuming for the sake of argument that defendant Watkins lacked probable cause to report plaintiff Barrett as a trespasser, there is absolutely no evidence to indicate any maliciousness or malicious intent on the part of Mr. Watkins. Indeed, although Mr. Watkins knew who plaintiff Barrett was, Mr. Watkins had never even had a conversation with Mr. Barrett. Mr. Watkins' testimony about equipment having been stolen from his jobsites about a month before the May 15<sup>th</sup> incident, also supports our contention that rather than targeting plaintiff Barrett with malicious intent, defendant Watkins was merely looking out for his property and the property of the other construction companies engaged in work on the private Woodstone property. There is simply no evidence of any malicious intent.

#### **Case Law From The Third Department**

31. In addition to the Court of Appeals case of *Broughton*, cited above, there is ample support in case law from the Third Department to support defendant Watkins' contention that because he in fact had probable cause to report plaintiff Barrett for trespassing, plaintiffs' claim for malicious prosecution must fail. In *Krzyzak v. Schaefer*, 52 A.D. 3d 979 (3<sup>rd</sup> Dept. 2008), the Third Department affirmed a Supreme Court Order which granted defendants' cross

motion for summary judgment in a case of alleged malicious prosecution. In *Krzyzak* the plaintiff and defendant were neighbors. Plaintiff called police and an animal control officer to his home alleging that defendant had poisoned his dog. As a result of that incident defendant filed a harassment complaint against the plaintiff based upon threatening statements plaintiff had allegedly made to the defendant in the presence of the animal control officer. Plaintiff was then charged with criminal harassment but the charge was ultimately dismissed.<sup>2</sup> After the dismissal, plaintiff sued defendant for malicious prosecution. In affirming the Supreme Court's grant of summary judgment to the defendant, Third Department held that:

. . . in the case of a civilian complainant, it is well settled in this state's jurisprudence that . . . *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 or criminal charges filed, [the complainant] will not be held liable for false arrest or malicious prosecution.

*Id.* at 980<sup>3</sup> [emphasis added].

32. Here the actions of defendant Watkins were nearly the same as the actions of the defendant in *Krzyzak* in that Mr. Watkins also merely reported his observations that plaintiff Barrett was trespassing to a Woodstone principal (defendant Dubrovsky) and furnished information by means of supporting deposition to law enforcement authorities – here the Sullivan County Sheriff and district attorney's office. The only difference in this case is that Mr. Watkins also provided testimony at trial. There is absolutely nothing to suggest that Mr. Watkins told anything but the truth in his testimony at the trial.

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<sup>2</sup> The case is silent on the details of the dismissal - whether at trial or other judicial proceeding.

<sup>3</sup> The *Krzyzak* Court further held that: "Here, the record demonstrates nothing more than defendant furnishing information regarding the incident to the police and signing a complaint against plaintiff. Importantly, the record does not reveal any evidence of defendant's active involvement in the prosecution of plaintiff following the signing of the complaint" *id.* at 980. While in *Krzyzak* the Court deemed it important that defendant was not "actively involved" in the prosecution of the plaintiff, without defining precisely what that meant, and here defendant Watkins did testify at plaintiff's trespass trial (and whether or not this would be "active involvement" is not clear), we are aware of no case which holds that simply testifying to the truth of one's factual observations at a trial, as Mr. Watkins did here, could in any way constitute actual malice.

33. In addition to the *Krzyzak* case, there are several other malicious prosecution cases from the Third Department, all of which hold that the four elements outlined by the Court of Appeals in *Broughton* must be proven. In *Perryman v. Village of Saranac Lake*, 41 A.D. 3d 1080 (3<sup>rd</sup> Dept. 2007) plaintiff was a village Police Chief who had been suspended by his village board after an investigation by a private investigation firm indicated misconduct. Disciplinary charges were brought and an administrative hearing was held. The administrative hearing officer recommended that the charges be dismissed, after which the board reinstated the Chief. He then instituted an action for malicious prosecution against members of the board and the private investigation firm. The Supreme Court had denied defendant's motion for summary judgment, finding that although probable cause had supported sixteen of the nineteen disciplinary charges, there were questions of fact whether there was probable cause to support the three remaining charges. The Third Department reversed, agreeing with the defendant's position that because there was probable cause for the disciplinary proceeding as a whole, "Supreme Court erred in refusing to dismiss plaintiff's malicious prosecution claim" *id.* at 1081. The *Perryman* Court further held that "[p]robable cause is defined as such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" *id.* at 1081.

34. Applying that standard to the facts of this case it is clear that even if plaintiff Barrett had not in fact been trespassing - which he was - if defendant Watkins had had an incorrect but reasonable belief that he was trespassing, Mr. Watkins would have been justified in his actions.

35. See also *Fink v. Shawangunk Conservancy, Inc.*, 15 A.D. 3d 754 (3<sup>rd</sup> Dept. 2005) affirming a Supreme Court Order that because there were ambiguities in a property deed, a

defendant's claim for adverse possession, although ultimately unsuccessful, was not frivolous or unsupported and thus defendant's case did not lack probable cause, and therefore that defendant was not liable for malicious prosecution. See also cases from other departments with similar holdings: *Fortunato v. City of New York*, 63 A.D. 3d 880 (2<sup>nd</sup> Dept. 2009) "Probable cause to believe that a person committed a crime is a complete defense to claims of false arrest and malicious prosecution" *id.*; *Grant v. Barnes & Noble*, 284 A.D. 2d 238 (1<sup>st</sup> Dept. 2001); *Reape v. City of New York*, 66 A.D. 3d 755 (2<sup>nd</sup> Dept. 2009).

36. The evidence on the record proves that defendant Michael Watkins had probable cause to report that defendant Barrett was trespassing on May 15, 2005. There is no evidence of any actual malice toward the plaintiffs by defendant Watkins. Therefore, plaintiffs cannot prove their claim of malicious prosecution against defendant Michael Watkins.

WHEREFORE, it is respectfully requested that defendant Michael B. Watkins' motion be granted in its entirety dismissing the plaintiff's summons and complaint, that this Court award costs for the burden of this voluminous litigation, and that this Court grant such other and further relief that this Court deems just and proper.

Dated: Suffern, New York  
May 7, 2010

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MAURICE J. RECCHIA