Thursday, March 17, 2011

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

The quiet man and civil rights, malicious prosecution

Happy St. Patrick's Day. Today, the tale of another brave Irishman, one of my best clients. Call him Mr. B.

When Mr. B paid me a surprise visit last autumn something was bothering him. A veteran New York City trade unionist and federal code compliance official, Mr. B had taken on the mobs in Hells Kitchen, the South Street Seaport and around Boston's big dig, quietly and without breaking a sweat. Standing over six feet four inches tall, weighing 235 pounds, and hailing from the Bronx, very little rattled him, so I was eager to hear what he had to say.

By MICHAEL A. BURGER
Daily Record Columnist

True to character, Mr. B said nothing. Taking off his giant coat, he dropped a document on my desk, sat down in a large chair and waited patiently. I put on my glasses and read. The document was a summons and criminal complaint charging Mr. B with refusing to allow a government official into his house. I stopped reading when I saw the charge, surprised, and addressed Mr. B, "You're lucky you were not taken into custody on the spot for interfering with a police officer executing a warrant."

"Keep reading." He urged.

"There was no warrant and he was no cop, Michael." He explained, continuing, "This man shows up unannounced at the house and tells me he is a housing code enforcement official and that he needed to come in and 'inspect.' He was not polite and he was not my friend, so I asked if he had a warrant. He said he did not need one. I told him to call you."

"Smart. But I did not get a call. Was that all?" I inquired, still holding the partially read document.

"No sir," he said. "The man raised his voice at me threatening that he would count to three and that by then either he would be inside the house or he would prosecute me for refusing to consent."

The way Mr. B pronounced the word "threatened" was foreboding.

"And, how did you handle that?" I asked, cringing internally.

Mr. B paused before explaining, turning up one of his enormous palms, matter of factly.

"Mrs. B was upstairs taking a nap," he said. "So, I gently swung the door open, still standing inside the threshold, and quietly told him that if he entered my house after counting three, he would never hear the man count 10. He seemed to be in an awful hurry as he left."

Nodding, I stared at Mr. B's fist that had clenched into the size of a kickball. He frowned.

"Then I got this criminal complaint charging me with not letting the rude man in my house," he said. Mr. B sat forward, "am I guilty?"

Mr. B was not guilty of refusing to consent to a warrantless search. In fact, this is not even a real offense, see U.S. Const. amends. IV & XIV; N.Y. const. art. 1 § 12.

Since the dawn of our republic, a person's home is his castle. We have the right to admit or bar who we please. And a right is something that even the government cannot legally take away.

Nevertheless, there was a formal criminal charge pending and Mr. B needed a defense. We appeared in court, pled not guilty and adjourned for motion practice. Eventually, the municipality agreed to drop the charge rather than oppose a formal motion in open court.

I notified Mr. B who was relieved. But he called me back the next day to talk some more, understandably annoyed at the trouble and expense he was put to. He wanted to sue. I remonstrated: The case was over, he won and made his point, he didn't need the money and the cost and hassle of a lawsuit were not worth a small and speculative recovery. Mr. B listened and then repeated his question solemnly, "Michael, do I have a case?"

Yes, Mr. B has a case, and here is why. The municipality violated his clearly established constitutional right to decline consent to a warrantless search, actionable under 42 USC § 1983, see *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981); *McLean v. City of Kingston*, 57 A.D.3d 1269 (Third Dept. 2008), appeal dismissed, 12 N.Y.3d 848 (2009); NY PJI 3:60 (listing three elements for pleading a civil rights violation: [1] acting under color of state law; [2] constitutional deprivation; and [3] damages).

The official was acting for the municipality, he had violated Mr. B's Fourth Amendment right to privacy by criminally prose-

Continued ...

Thursday, March 17, 2011

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

cuting him for exercising this right, and Mr. B had incurred damages in the form of modest legal fees defending the criminal prosecution.

Bringing a civil rights lawsuit would of course also cost Mr. B something but, if Mr. B prevails, he may apply to the court for an order directing the municipality to pay these attorney's fees as well, see 42 USC §§ 1983, 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005); *Catanzano v. Doar*, 378 F. Supp. 2d 309, 325 (WDNY 2005); see also *McGrath v. Toys "R" Us Inc.*, 3 N.Y.3d 421 (2004); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 188, 190 n.4 (2d Cir. 2007).

The municipality is also liable to Mr. B for malicious prosecution. To prove malicious prosecution a plaintiff must show that: (1) the criminal action was terminated in his favor; (2) defendant caused the prosecution; (3) defendant lacked of probable cause; and (4) defendant acted with malice, see *Smith-Hunter v. Harvey*, 95 N.Y.2d 191 (2000). Proof of the first three elements were self-evident, *Id*. But the fourth element, "malice," is more complex.

The code official was heavy-handed but probably did not act based upon any particular malice or ill will against Mr. B. Fortunately, proving malice does not require a showing of ill will, see *Nardelli v. Stanberg*, 44 N.Y.2d 500, 502-03 (1978) (actual malice not "spite or hatred" but rather "a wrong or improper motive, something other than a desire to see the ends of justice served"); see also *Britt v. Monachino*, 73 A.D.3d 1462 (Fourth Dept. 2010). Punishment of a citizen for the lawful assertion of a constitutional right can never "serve the ends of justice."

Not only may malice be shown by a reckless or grossly negligent disregard of Mr. B's right not to consent to a warrantless search, see *Putnam v. Steuben*, 61 A.D.3d 1369, 1370 (Fourth Dept. 2009), but the indisputable fact that the municipality lacked probable cause to charge Mr. B is in and of itself *prima facie* proof of legal "malice." see *Id.* ("Actual malice may be inferred from the facts and circumstances of the case"); *Martin v. Albany*, 42 N.Y.2d 13, 17 (1977); *Krissanda v. Miller*, 205 A.D.2d 1029 (Third Dept. 1994); Restatement 2d of Torts § 668.

"Malice" may also include initiating a prosecution in an attempt to force the plaintiff to do something that he is entitled not to do, see, e.g., *Toomey v. Delaware L & WR Co.*, 4 Misc. 392 (N.Y. Sup. Ct. 1893), aff'd, 147 N.Y. 709 (1895) (charge maliciously brought where the purpose was to force the plaintiff to pay a debt). Considering that the municipality had the alternative options of applying for a warrant, see CPL article 690, or a discovery order, see CPLR article 31, its decision to misuse the criminal process strongly implied legal malice.

In the future, maybe the municipality will train this code enforcement official to be humble and polite.

Michael A. Burger is a litigation partner in the law firm of Davidson Fink LLP (www.davidsonfink.com). He dedicates this essay to Mr. and Mrs. B, who walk softly and carry a six-pound hammer.

Wednesday, January 13, 2010

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...