SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

ROBERT BARRETT and JUNE BARRETT,

Plaintiffs,

-against-

Decision & Order

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

Defendants.

Motion Return Date: July 9, 2010
RJI No.: 52-25551-06
Index No. 948/06

Appearances:

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By: Maurice J. Recchia, Esq.

Craig P. Curcio, Esq.
Attorney for Defendants David Allen, Woodstone Lakes Development, LLC, Woodstone Toronto Development, LLC, Woodstone Crestwood Development LLC and Steven M. Dubrovsky
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Foley & Lardner, LLP
Attorneys for Defendant Mirant NY-Gen, LLC
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Sackett, J.:

The defendant, Michael Watkins(Watkins) moves for summary judgment pursuant to CPLR 3212 and seeks the dismissal of the complaint. The remaining defendants (Woodstone),with the exception of Mirant NY-GEN, LLC, also move for summary judgment and seek the dismissal of the complaint. The plaintiffs oppose the motions.

The plaintiffs commenced this action for malicious prosecution against defendants Watkins, David Allen and the Woodstone Companies. The plaintiffs also commenced and action for unlawful imprisonment against defendants Mirant, Dubrovsky and the Woodstone Companies.

On May 15, 2005, the plaintiffs and their daughter had gone to the public reservoir using Pine Grove Road. Defendants Woodstone own real property located near the intersection of Town Road 62 and Pine Grove Road. Woodstone erected no trespassing and warning signs on their property advising travelers that they would be trespassers if they entered Woodstone's property. There was also an electronic gate at the entrance of the Woodstone property. Defendant Watkins alleges he saw the plaintiff enter the Woodstone property beyond the no trespassing sign. Watkins called defendant David Allen, an employee of Woodstone and informed him of plaintiffs' trespass. Allen claims he had an encounter with the plaintiffs several months earlier when he informed them that they were trespassing on Woodstone property and to refrain from doing so in the future. The plaintiff, Robert Barrett, was arrested for the crime of criminal trespass by the Sullivan County Sheriff pursuant to Penal Law § 210.45 upon the complaint of David Allen. Defendant Watkins admits that he called Allen about Barrett's alleged trespass, sent a letter to defendant Dubrovsky of Woodstone Companies detailing his observation of plaintiffs' trespass, signed a supporting deposition with the police and testified at the trial. A trial was held on February 6, 2006 in the Town of Bethel Justice Court. After the presentation of the evidence by the District Attorney's Office, plaintiff moved to dismiss the trespass complaint for lack of evidence and the motion was granted by the Court.

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact (*Zuckerman v City of New York*, 49 NY 2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Barr v County*

of Albany, 50 NY 2d 247 [1980]), and all evidence must be viewed in the light most favorable to the opponent to the motion (*Crosland v New York City Transit Auth.*, 68 NY 2d 165 [1986]).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . .mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v City of New York, supra*, at 562). It is incumbent upon the non-moving party to lay bare their proof in order to defeat summary judgment *(O'Hara v Tonner*, 288 AD2d 513 [2001]). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on a motion for summary judgment as is reliance upon surmise, conjecture or speculation (*Banco Popular North America v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

In order to succeed on a claim for malicious prosecution, the plaintiff must prove (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 (*Martinez v City of Schenectady*, 97 NY2d 78 [2001]; *Colon v City of New York*, 60 NY2d 78 [1983]).

Although the trespass action was dismissed by the Bethel Justice Court with prejudice, this Court concludes the plaintiffs have not sustained their burden of proof for a claim of malicious prosecution. Defendant Watkins observed the plaintiffs traveling on the posted lands of Woodstone. Watkins notified defendant Allen of his observations and Allen filed a criminal complaint against the plaintiffs for criminal trespass. The District Attorney prosecuted the case until it was dismissed at trial for lack of evidence. To succeed on a claim for malicious prosecution, a plaintiff must show that the defendant initiated a proceeding that terminated in favor of the plaintiff, an entire lack of probable cause in the prior proceeding, malice and special injury (*Engel v CBS*, 95 NY2d 195 [1999]). Probable cause is defined as "such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe the plaintiff was guilty" (*Perryman v Vil. of Saranac Lake*, 41 AD3d 1080 [2007]). The search for an adequate definition of malice has historically been troublesome as it appears that there must be a showing of some deliberate act punctuated with awareness of "conscious falsity" to establish malice (*Best v Genug's Inc.*, 46 AD2d 550 [1975]; *Munoz v City of New York*, 18 NY2d 6 [1966]). In establishing actual malice, "a plaintiff

need not demonstrate the defendant's intent to do him or her personal harm, but need only show a reckless or grossly negligent disregard for his or her rights" (*Putnum v County of Steuben*, 61 AD3d 1369 [2009]). The defendants and the Sullivan County Sheriff had probable cause that the plaintiffs trespassed upon the lands of the defendants based upon the observations of defendant Watkins. Although the criminal complaint was dismissed, the plaintiffs have not shown that the defendants acted with malice.

Plaintiffs allege on April 25, 2005 the defendants Mirant, Dubrovsky and the Woodstone Companies instructed an employee to block plaintiffs' vehicle at the Toronto Dam public recreation area parking lot. The plaintiffs maintain their vehicle was prevented from being able to leave the area and they were intentionally detained by the defendants. Plaintiffs claim as a result of the confinement, the defendants are liable for unlawful imprisonment. Plaintiffs contend the actions of the defendants were wanton, malicious and intentional entitling them to compensatory and punitive damages.

Plaintiffs allege Wade Ebert, who is not a named party in this action, blocked their vehicle in the parking lot at the direction of the defendants. The defendants allege they believed the plaintiffs were trespassing on their property and called the police to escort the plaintiffs out of the area. The defendants allege they did not instruct Wade Ebert to block plaintiffs' vehicle. The defendants maintain the plaintiffs could have moved their vehicle around Wade Ebert's vehicle and they were not confined. The defendants contend they only wanted the plaintiffs off their property and did not file criminal charges against them.

To establish a cause of action to recover damages for false imprisonment the plaintiffs must prove (1) the defendant intended to confine him or her, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged (*Broughton v. State*, 37 NY2d 451 [1975]). The plaintiff has the burden to demonstrate that the defendants intended to confine them (*Secard v. Dept. of Social Servs. of County of Nassau*, 204 AD2d 425 [1994]). A review of the record reveals the plaintiffs were never arrested by the authorities based on a complaint of the defendants for this incident. Moreover, the plaintiffs have failed to tie Wade Ebert to the defendants or prove Wade Ebert intended to confine them. Thus, plaintiffs' cause of action for false imprisonment must be dismissed.

Therefore, it is

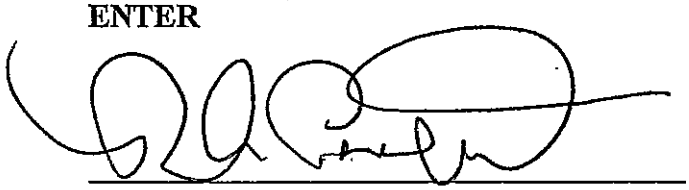
ORDERED that the motions for summary judgment are granted and the complaint is dismissed in its entirety against the defendants with the exception of defendant Mirant Ny-Gen, LLC who did not appear or move on the motions.

This shall constitute the decision and order of the Court. The original Decision & Order and all papers are bing forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service and notice of entry.

SO ORDERED.

Dated: Monticello, New York
August 9, 2010

ENTER



HON. ROBERT A. SACKETT, JSC

Papers Considered:

Notice of Motion dated May 7, 2010; Affirmation of Maurice J. Recchia, Esq. dated May 7, 2010 with exhibits A-H; Affirmation of Russell A. Schindler, Esq. dated June 4, 2010 with exhibits A-E; Plaintiff's Memorandum of Law; Notice of Motion dated June 4, 2010; Affirmation of Kevin P. Ahrenholz, Esq. dated June 4, 2010 with exhibits A-D; Affirmation of Russell A. Schindler, Esq. dated July 2, 2010 with exhibits A-I; Plaintiffs' Memorandum of Law; Reply Affirmation of Kevin P. Ahrenholz, Esq. dated July 8, 2010 with exhibit E.