

FILED: NEW YORK COUNTY CLERK 07/17/2018 INDEX NO. 153314/2012 10:55 AM

NYSCEF DOC. NO. 278 RECEIVED NYSCEF: 07/17/2018  
SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. GERALD LEBOVITS  
PRESENT: J.S.C.  
*Justice*

PART 1

Index Number : 153314/2012  
DEJESUS, FAUSTO  
VS.  
MOSHIASHVILI, TATIANA  
SEQUENCE NUMBER : 013  
DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_  No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_  No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*DECIDED for the attached decision/ order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 7-11-18

*G*  
HON. GERALD LEBOVITS  
J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION

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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

FAUSTO DEJESUS,

Plaintiff,

Index No.: 153314/2012

DECISION/ORDER

Motion Seq. No. 013

-against-

TATIANA MOSHIASHVILI and MICHAEL MOSHIASHVILI,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for a directed verdict and motion to set aside the verdict.

<b>Papers</b>	<b>Numbered</b>
Defendants' Notice of Motion.....	1
Defendants' Affirmation in Support.....	2
Plaintiff's Affirmation in Opposition.....	3
Defendants' Affirmation in Reply .....	4

*Sivin & Miller, LLP*, New York (Edward Sivin of counsel), for plaintiff Fausto Dejesus.

*Nicolini, Paradise, Ferretti & Sabella*, New York (John J. Nicolini of counsel); for defendants Tatiana and Michael Moshiashvili.

Gerald Lebovits, J.

Plaintiff, Fausto Dejesus, filed a claim against defendants Tatiana and Michael Moshiashvili on May 30, 2012, seeking compensatory damages, punitive damages, special damages, attorney fees, and costs for claims involving abuse-of-process, malicious-prosecution, intentional infliction of emotional distress, defamation, and *prima facie* tort. (Complaint, at ¶ 1.)

This court held a jury trial that began on February 20, 2018. After plaintiff rested, defendants moved for a directed verdict on the abuse-of-process and malicious-prosecution claims against Mr. Moshiashvili. This court reserved decision. The jury awarded compensatory damages of \$200,000, jointly and severally, against Mr. and Ms. Moshiashvili, \$200,000 against Ms. Moshiashvili in compensatory damages, \$100,000 against Ms. Moshiashvili in punitive damages, and \$50,000 against Mr. Moshiashvili in punitive damages.

Mr. and Ms. Moshiashvili now move post-trial under CPLR 4401, 4404, and 5501 to (1) grant Mr. Moshiashvili's motion for a directed verdict dismissing plaintiff's causes of action.

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prosecution claim against Ms. Moshiashvili; (3) dismiss plaintiff's claim for abuse of process as to both defendants; (4) dismiss plaintiff's claim for false arrest as to Ms. Moshiashvili; (5) set aside the jury award for compensatory damages as excessive and duplicative; (6) set aside the jury verdict for punitive damages as excessive; and (7) direct the clerk to amend the jury extract, dated March 5, 2018, accurately to reflect damages the jury awarded. (Defendants' Affirmation in Support, at ¶ 3.)

It is well-settled that “[a] trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party.” (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997].) CPLR 4404 (a) allows the court to set aside jury verdicts. When a party argues the jury verdict is not supported by sufficient evidence, “rationality is the touchstone for legal sufficiency.” (105 NY Jur 2d Trial § 462 [2d ed. 2018].)

A court must review whether the jury verdict is sufficiently supported by the law and the trial evidence. (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978].) If the evidence is not “utterly irrational,” then “then it survives a legal sufficiency challenge.” (Higgett, N.Y. Prac. § 4404.2 [2017 ed.].) It fails when “no valid line of reasoning and permissible inferences . . . could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.” (*Cohen*, 45 NY2d at 499.) When reviewing this motion, “the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.” (*Szczerbiak*, 90 NY2d at 556.) When viewing the evidence in the light most favorable to the nonmoving party, sufficient evidence was presented at trial for a rational jury to find defendants liable on plaintiff's claims.

Defendants' motion is defective because he failed to provide a trial transcript for review. Given that defendant “seeks to set aside the verdict as against the weight of the evidence, ‘the absence of a transcript, or relevant portions thereof, preclude[s] a meaningful review.’” (*Frank v City of New York*, 161 AD3d 713 [1st Dept 2018], quoting *Gorbea v DeCohen*, 118 AD3d 548, 549 [1st Dept 2014].) Despite defendants' omission, this court sets forth its reasoning below.

**I. Defendants' Motion for a Directed Verdict Dismissing Plaintiff's Malicious-Prosecution and Abuse-of-Process claims against Mr. Moshiashvili, Motion to Set Aside the Verdict on Plaintiff's Malicious-Prosecution Claim Against Ms. Moshiashvili, and Defendants' Motion to Set Aside the Verdict on Plaintiff's Claim for Abuse-of-Process as to Both Defendants.**

Mr. Moshiashvili's motion for a directed verdict dismissing plaintiff's causes of action for malicious prosecution and abuse of process is denied. Defendant argues that insufficient evidence supports the malicious-prosecution claim against him. According to Mr. Moshiashvili, the only evidence against him at trial is that he reviewed the criminal complaint and made phone calls to the District Attorney's Office. (Defendants' Affirmation in Support, at ¶ 22.) This court disagrees.

FILED: NEW YORK COUNTY CLERK 07/17/2018 10:55 AM

NYSCEF DOC. NO. 278

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To have a viable claim for malicious prosecution, “[t]he plaintiff must establish that (1) the defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted in actual malice.” (*Martin v City of Albany*, 42 NY2d 13, 16 [1977].) Defendants argue “it must be shown that defendant played an active role in the prosecution, such as giving advice and encouraging or importuning the authorities to act.” ([Defendants’ Affirmation in Support, at ¶ 38], quoting *Williams v CVS Pharmacy, Inc.*, 126 AD3d 890 [2nd Dept 2015].) But defendants cite only persuasive authority on the first element. The Court of Appeals has noted that it has “never elaborated on how a plaintiff in a malicious prosecution case demonstrates that the defendant commenced or continued the underlying criminal proceeding.” (*Grucci v Grucci*, 20 NY3d 893, 896 n [2012].) Rather, the commencement of a criminal action depends on the circumstances of each case. In *Torres v Jones* (26 NY3d 742, 760 [2016]), the Court of Appeals held that “by suggesting that a defendant other than a public prosecutor may be liable for supplying false information to the prosecutor in substantial furtherance of a criminal action against the plaintiff, we have implicitly recognized that such conduct may, depending on the circumstances, constitute the commencement or continuation of the prosecution.”

The second element is satisfied when plaintiff can prove “that the criminal proceeding allegedly instigated by the defendant terminated in favor of the accused.” (*Hollender v Trump Vil. Co-op., Inc.*, 58 NY2d 420, 425 [1983].)

To satisfy the third element, “a plaintiff must allege that the underlying action was filed with a purpose other than the adjudication of a claim.” (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015] [internal quotation marks and citations omitted]; *accord* Restatement (Second) of Torts § 674 [1977]; *cf. Medina v City of New York*, 102 AD3d 101, 104 [1st Dept 2012] [“Probable cause is established *absent materially impeaching circumstances*, where, as here, the victim of an offense communicates to the arresting officer information affording a *credible* ground for believing the offense was committed and identifies the accused as the perpetrator . . .”] [internal citation omitted] [emphasis in original].) If the plaintiff has established the third element, then “a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding . . . which permits the jury to infer one fact from other facts already established.” (*Martin v City of Albany*, 42 NY2d 13, 17-18 [1977] [internal citation omitted].)

Plaintiff established these elements by proving that defendants commenced a criminal action against plaintiff. Defendants were the only ones who supplied the police with information that led to plaintiff’s arrest. Mr. Moshiaishvili repeatedly called the DA to find out what was going on in plaintiff’s case. He pressured the People to prosecute. Mr. Moshiaishvili, by working along with his wife, assisted in continuing a false criminal action against plaintiff. There is no question that the criminal action was terminated in plaintiff’s favor. The People moved to dismiss the criminal action and told the criminal court judge that they could not prove Dejesus guilty beyond a reasonable doubt. Therefore, the jury in this action was permitted to infer actual malice.

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NYSCEF DOC. NO. 278

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Likewise, defendants' motion to set aside the verdict on plaintiff's malicious-prosecution claim against Ms. Moshiashvili is denied. Defendants argue that plaintiff failed to establish that Ms. Moshiashvili commenced a criminal action against plaintiff. Defendants argue they did not affirmatively induce an officer to act by taking an active part in the arrest or showing active and undue zeal. Malicious-prosecution claims do not require affirmative induction. The elements of a malicious-prosecution claim are outlined above. Further, "[a] person can also be said to have initiated a criminal proceeding by knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's determination to make an arrest." (*Moorhouse v Std. New York*, 124 AD3d 1, 8 [1st Dept 2014].)

Defendants' motion for a directed verdict dismissing plaintiff's abuse-of-process claims against Mr. Moshiashvili is denied, and defendants' motion to set aside the verdict on plaintiff's claim for abuse of process as to both defendants is denied. The Court of Appeals has held that "abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." (*Bd. of Ed. of Farmingdale Union Free Sch. Dist. v Farmingdale Classroom Teachers Ass'n, Inc.*, Local 1889 AFT AFL-CIO, 38 NY2d 397, 400 [1975].) The elements of an abuse-of-process claim are "(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].) By intentionally instigating a false criminal action against plaintiff, the jury could rationally find defendants liable for abusing legal process. Defendants also argue that plaintiff did not plead or prove actual or special damages required for an abuse-of-process claim. (Defendants' Affirmation in Support, at ¶ 64.) The requirements of actual or special damages are satisfied when a plaintiff testifies of legal costs. (See *Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 530 [1991] ["We also conclude that the Appellate Division erred in dismissing plaintiffs' cause of action for abuse of process. We note first our disagreement with that court's conclusion that plaintiffs failed to plead and prove actual or special damages. To the contrary, both plaintiffs testified that they had incurred legal expenses in connection with their defense of the criminal charges brought against them."].) Plaintiff's abuse-of-process claim is valid. Plaintiff and his wife testified of his legal expenses at trial.

Further, Mr. Moshiashvili had the opportunity to defend himself but chose not to testify at trial. Mr. Moshiashvili is not required to testify, but "[w]hile a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding . . . [and] a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege." (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51, 53 [1st Dept 2002].) When a defendant invokes a privilege, "a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination." (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 37 [2015].) Mr. Moshiashvili forewent his right to refute the claims made against him. Without testimony to persuade the jury otherwise, the jury found sufficient evidence to hold Mr. Moshiashvili liable. (See e.g. *Mar. Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 42 [1980] ["Whether a jury in the context of a conventional civil case may be instructed to consider a party's invocation of the

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