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### **Mintz & Gold LLP v. Zimmerman, 102758/2007** **Decided: February 25, 2009**

Justice Emily Jane Goodman

NEW YORK COUNTY  
Supreme Court

For Plaintiff: The Lax Lawfirm

For Defendants Daniel Zimmerman and Steven Cohn PC - Steven Cohn PC

For Defendant Dean Evan Hart - Lewis, Jons, Avaloni & Brino attn Milton Thurm

#### **Justice Goodman**

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In this action alleging a claim under Civil Rights Law Â§70 and 71, defendants Daniel Zimmerman and Steven Cohn, P.C. move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them on the ground that plaintiff's claim is time-barred. Defendant Dean Evan Hart cross-moves, on the same ground, for summary judgment dismissing the complaint as against him. Once again, this action raises interesting and novel issues for the Court.<sup>1</sup>

#### **BACKGROUND**

Dean Hart and his sister Penny Hart each owned 50 percent of Tri-State Consumer, Inc. (TSC), of which Penny was the president and Dean the vice-president. Dean brought an action against Penny and TSC in Supreme Court, Nassau County (the First Action), which alleged that Penny, in her capacity as TSC's president, had mismanaged the corporation's affairs. The trial court granted a motion by Dean for summary judgment directing specific performance of an arbitration agreement which he and Penny had executed and, as the result of a subsequent arbitration award (the Award), Dean was elected to replace Penny as TSC's president. Penny appealed an order by the trial court that confirmed the Award.

On or about December 2, 2004, the Appellate Division, Second Department, granted a motion by Penny for a stay of enforcement of the Award, pending the Second Department's determination of Penny's appeal.

Dean thereafter retained the firm of Steven Cohn, P.C. and Daniel Zimmerman, an attorney associated with that firm (both, collectively, Z&C) to represent TSC in an action (the Second Action) against plaintiff Mintz & Gold LLP (M&G), which sought to recover monies that M&G had received from TSC, for legal services rendered by M&G to Penny.

On or about May 16, 2005, in the First Action, the Second Department vacated the trial court's order directing arbitration, reversed the order confirming the Award, vacated the Award, and denied Dean's motion to compel arbitration. By letter dated May 19, 2005, addressed to Z&C, Penny asserted that she was TSC's president, and directed Z&C to discontinue the Second Action. By order dated October 26, 2005, entered October 31, 2005, the trial court dismissed the complaint in the Second Action.

M&G asserts that defendants knew, at the time when they initiated the Second Action, that Penny rather than Dean was the actual president of TSC, and, therefore, that Dean did not have the authority to decide to bring the Second Action in TSC's name. M&G further asserts that, although defendants lacked authority to act on TSC's behalf, defendants wrongfully continued to prosecute the Second Action in TSC's name even after the complaint in that action was dismissed, by prosecuting an appeal seeking reinstatement of the action. By order dated November 7, 2007, the Second Department granted a motion by M&G to dismiss TSC's appeal of the dismissal of the Second Action.

The complaint as amended (the Complaint) originally asserted two causes of action alleging: (1) that, because defendants commenced, maintained and continued to prosecute the Second Action against M&G in TSC's name, but without TSC's consent, defendants are liable for damages pursuant to Civil Rights Law Â§70 (Section 70) and treble damages pursuant to Civil Rights Law Â§71 (Section 71); and (2) that, in the course of litigating the Second Action, defendants libeled and defamed M&G. The second cause of action for libel was dismissed by the Prior Order, which was affirmed by the First Department.

## **DISCUSSION**

The motion by Z&C, and the cross motion by Dean, are each granted to the extent that the portion of the first cause of action which is based on allegedly wrongful acts in violation of Sections 70 and 71, that occurred more than one year prior to the filing of this action, is dismissed, as time-barred.

Defendants maintain that Section 70 is governed by the one year statute of limitations set forth in CPLR 215 (3), while plaintiff maintains that the three year statute of limitations set forth in CPLR 214 (2) governs. CPLR 215 (3) provides that "an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander,

false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law" must be commenced within one year (CPLR 215 [3]). CPLR 214 (2) provides that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215" must be commenced within three years (CPLR 214 [2]).

Section 70 provides, in relevant part, that:

[i]f a person vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record or not of record, or a special proceeding before a judge . . . ; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court . . . , either before or after judgment or other final determination; an action to recover damages therefor may be maintained against him by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used (Civil Rights Law Â§70).

The Court concludes that a one year statute of limitations governs this action because the Section 70 cause of action is either a type of malicious prosecution claim or an intentional tort claim governed by CPLR 215 (3). CPLR 215 (3) specifically refers to actions for "malicious prosecution." Similarly, Section 70 refers to an action or proceeding being commenced or continued "vexatiously or maliciously." Litigation has been defined as vexatious where it is "instituted maliciously and without probable cause" (Paramount Pictures, Inc. v. Blumenthal, 256 App Div 756, 760 [1st Dept 1939]).<sup>2</sup> Thus, Section 70 is directed against a subset of the class of actions and proceedings that are prosecuted with malice, specifically, those which are prosecuted "in the name of another but without [the other's] consent, or in the name of an unknown person."

This conclusion finds support in various diverse authorities and treatises. A Yale Law Journal Note, which traces the historical development of the tort of malicious prosecution, cites historical evidence supporting the proposition that the tort, in fact, had its origins in the efforts of early English courts to address malicious "straw-party" suits, i.e., groundless suits which, because they were brought by one person in the name of another, did not place the first person before the court or subject that person to the court's jurisdiction (see Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 Yale LJ 1218, 1223-1227 [1979]). As set forth in the Note, the writ of conspiracy came into being in England in 1293, solely as a means of responding to such "straw-party" suits, and "the action on the case in the nature of conspiracy evolved into the English Rule for malicious prosecution" (*id.* at 1227). The Note proposes that the tort of malicious prosecution should in the future be "curtailed in scope," but that it should continue to be "used in its traditional role" against "groundless litigation unreachable through . . . internal sanction - including [inter alia] . . . straw-party actions" (*id.* at 1237).

The Michigan State Supreme Court decided a case involving a Michigan statute which may have been derived from a predecessor statute of New York's Sections 70 and 71, described by the court as "parallel" to, resembling in phraseology, and "aimed at remedying the same type of situation" as those sections (Camaj v. S.S. Kresge Co., 393 NW2d 875, 877 n 1, 878 [Mich Sup Ct 1986]). In its decision, the Michigan State Supreme Court repeatedly referred to the actions which are the focus of the Michigan statute and Sections 70 and 71 - that is, actions brought vexatiously or maliciously in the name of a nonconsenting or unknown person - as a "type" of malicious prosecution action (see id. at 877-879).<sup>3</sup>

M&G argues that a Section 70 claim is not a type of malicious prosecution claim and therefore, that it is not governed by CPLR 215 (3). According to M&G, there is "no serious resemblance" between a Section 70 claim and a malicious prosecution claim, and the "critical features of the two causes of action - lack of probable cause (for malicious prosecution) and use of another's name without consent (for [a Section 70] cause of action) - are completely different" (Lax Affirm. in Opp., ¶13). However, Section 70 is applicable where an action is prosecuted "vexatiously" and, as previously stated, litigation has been defined as vexatious where it is "instituted maliciously and *without probable cause*" (Paramount Pictures, Inc. v. Blumenthal, 256 App Div at 760 [emphasis added]). To that extent, at least, Section 70 encompasses the prosecution of an action without probable cause. Moreover, merely because the "use of another's name without consent" is an element of a Section 70 claim, but not of a malicious prosecution claim, that does not mean that Section 70 claims are not a type of malicious prosecution claim.

Further, even assuming that Section 70 claims were not a subset of all malicious prosecution actions, the one year limitations period would, in any event, govern a Section 70 claim, because the cause of action is in the nature of an intentional tort.<sup>4</sup> Courts have held that claims for damages for intentional torts, including torts not specifically enumerated in CPLR 215 (3), are subject to that subsection's one year limitations period (see Havell v. Islam, 292 AD2d 210, 210 [1st Dept 2002]; Gallagher v. Directors Guild of Am., 144 AD2d 261, 262-263 [1st Dept 1988]; Hansen v. Petrone, 124 AD2d 782, 782 [2d Dept 1986]).

M&G unpersuasively argues for the application of the three year limitations period prescribed by CPLR 214 (2), which governs actions "which would not exist but for a statute." The Court of Appeals has held that CPLR 214(2):

only governs liabilities which would not exist but for a statute. It does not apply to liabilities existing at common law which have been recognized or implemented by statute . . . [I]f the [statute which is the alleged basis of liability] merely codifies or implements an existing liability, the three-year statute would be inapplicable.

(Aetna Life & Cas. Co. v. Nelson, 67 NY2d 169, 174 [1986] [citations omitted].) Thus, a claim that is brought pursuant to a statute will be governed by CPLR 214 (2) only if "the statute creates a liability for wrongs not recognized in the common or decisional law, and

which would not exist but for the statute" (Hartnett v. New York City Tr. Auth., 86 NY2d 438, 444 [1995] [citation and internal quotation marks omitted]). "A proper test of whether a particular liability is one that was created by statute is to determine whether the liability is a governmental statutory denouncement of a human action heretofore undenounced" (id. [citation and internal quotation marks omitted]).

Sections 70 and 71, and their predecessor statutes, did not create liability for a wrong which was not otherwise recognized in the common or decisional law, and which would not exist but for those statutes. Sections 70 and 71 became effective in 1921, replacing identically worded sections 1900 and 1901 of the Code of Civil Procedure (L. 1920, ch. 924, Â§Â§2, 4, 5). Notes to sections 1900 and 1901 of the Code of Civil Procedure, which were contained in the Laws of 1880, indicate that those sections were derived, largely unchanged in substance, from 2 Revised Statutes 1829, 550, ch. 8, tit. 17, Â§1 (see Laws of 1880, ch. xv, Â§Â§1900-1901, notes). In 1813, the legislature had enacted legislation which included a provision from an act passed in 1801, which appears to have been a predecessor statute, and which stated:

[t]hat if any person shall . . . maliciously or for vexation and trouble, cause or procure any other person to be arrested or attached to answer in any court at the suit or in the name of any person, where there is no such person known or without the consent or agreement of such person, in such case every such person who shall so cause or procure any such arrest or attachment, shall for every such offence, forfeit and pay to the party so arrested or attached treble the costs, damages and expences that the party so arrested and attached shall be put to, by reason of such arrest or attachment . . . .

(Revised Laws of 1813, Vol. I, Ch. LXXXVII, Â§X, p. 174.)

However, notwithstanding the statutory lineage of Sections 70 and 71, the wrong which those sections are intended to address was recognized as a wrong in the common or decisional law, apart from and independently of those sections and their predecessor statutes. The writ of conspiracy came into being in England in 1293 solely as a means of assessing penalties for groundless or malicious suits which were brought by one person in the name of another, indicating that such actions were recognized as a wrong even at that time (see Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 Yale LJ at 1224).

In New York, beginning at least as early as the early 1800s, courts recognized it as a wrong for one person to bring a suit in the name of another without the other person's consent. Thus, in 1801, the Supreme Court of New York considered a case in which one person had brought a suit in the name of another, without his consent, and found, without citing to any statutory authority, that "[t]his is . . . an abuse of the process of the court. It is a contempt to bring a fictitious suit, or to use the name of another, without his privity or consent" (Butterworth v. Stagg, 2 Johns Cas 291 [Sup Ct 1801]). So, too, in 1835, the Chancery Court of New York stated that "[i]t is not necessary to refer to any authority, to show that one person has no right to institute a suit in the name of another, without his

consent, either express or implied . . . " (In the Matter of Merritt & Lyon, 5 Paige Ch 125 [NY Chancery Ct 1835], affd Merritt & Dyckman v. Merritt & Lyon, 16 Wend 405 [NY Court for the Correction of Errors 1836]).

Therefore, inasmuch as the vexatious or malicious prosecution of a suit in the name of another person, without that person's consent, was recognized as a wrong in the common or decisional law, independently of Sections 70 and 71 and their predecessor statutes, CPLR 214 (2) cannot govern M&G's claim under Sections 70 and 71. Rather, M&G's claim is governed by the one year limitations period set forth in CPLR 215 (3).

Another novel issue concerns when M&G's Section 70 cause of action accrued. Relying on malicious prosecution cases, defendants assert that the claim accrued no later than October 31, 2005, when the trial court's order dismissing the Second Action was entered. A claim for malicious prosecution accrues when the underlying action which is the basis for the claim is terminated in the plaintiff's favor by dismissal (see e.g. Nunez v. City of New York, 307 AD2d 218, 219 [1st Dept 2003]; Hessel v. Goldman, Sachs & Co., 281 AD2d 247, 248 [1st Dept 2001]; Spinale v. Guest, 270 AD2d 39, 40 [1st Dept 2000]), and the pendency of an appeal does not toll or suspend the running of the statute of limitations (see Spinale v. Guest, 270 AD2d at 40; Voluntary Benefit Sys., Inc. v. Israel, 2003 WL 22299211, \*4 [SD NY 2003] [applying New York law]). Thus, according to defendants, the applicable one year limitations period expired no later than October 31, 2006, approximately four months before M&G commenced this action by the filing of the summons and complaint on February 27, 2007.

M&G contends that its Section 70 claim is not time-barred, even if a one year statute of limitations applies, and, despite the trial court's order dismissing the Second Action, entered on October 31, 2005. Applying the continuing wrong or continuing tort doctrine, M&G claims that the final actionable event was defendants' oral argument in support of the appeal (see Lax Affirm., ¶18 n 6). Thus, M&G asserts that it is entitled to damages for defendants' conduct occurring more than one year prior to the commencement of this action, citing Harvey v. Met. Life Ins. Co. (34 AD3d 364 [1st Dept 2006]) and Shannon v. MTA Metro-N. R.R. (269 AD2d 218, 219 [1st Dept 2000]).

However, under the continuing tort doctrine, the allegedly wrongful acts related to the Second Action are time-barred. No continuing course of tortious conduct, a prerequisite for application of the doctrine, has been, or could be, alleged between October 31, 2005, when the order dismissing the Second Action was entered, and November 21, 2005, when defendants filed a notice of appeal. Section 70 requires a litigation as it is applicable only where a person "commences or continues, or causes to be commenced or continued, an action or special proceeding" or "takes, or causes to be taken, any proceeding,<sup>5</sup> in the course of [such] an action or special proceeding . . . , either before or after judgment or other final determination" (Civil Rights Law §70). Because no litigation existed during the period between October 31, 2005 and November 21, 2005, the continuous tort doctrine does not apply.

With respect to the appeal, while defendants correctly note that causes of action for malicious prosecution accrue when the underlying action is terminated in the plaintiff's favor by dismissal (Spinale v. Guest, 270 AD2d 39, 40, supra), application of those cases here is not appropriate. Section 70 refers to unauthorized litigation, which is "continued" either "before or after judgment." Thus, the statute enumerates separate wrongful acts/injuries and therefore, does not envision only one accrual date. Plaintiff's attempt to include wrongful conduct which occurred more than one year prior to this lawsuit, based on the last wrongful act, is also inappropriate. Instead, as the statute speaks of conduct which "continues," it envisions a cause of action which accrues anew each and every day. Thus, a new cause of action accrued when the notice of appeal was filed on November 21, 2005 and continued anew through dismissal of the appeal on November 7, 2007 (see e.g. 1050 Tenants Corp v. Lapidus, 289 AD2d 145, 147 [1st Dept 2001] [cooperative was not barred by a six year statute of limitations when it sought to enjoin a shareholder from operating an air conditioning system as its operation was "a continuous and recurring wrong which permits the accrual of a new cause of action for each day that the air-conditioning unit operates in this manner"]; see also 75A NY Jur 2d, Limitations and Laches Â§265, at 83 [the rule "that a cause of action accrues anew every day . . . applies whenever one unlawfully produces some condition which is not necessarily of permanent character, and which results in intermittent and recurring injury to another"]).

Applying the one year statute of limitations, the portion of M&G's claim which is based on allegedly wrongful acts, that occurred more than one year prior to the filing of this action is dismissed as time-barred.

## **CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

ORDERED that the motion by defendants Daniel Zimmerman and Steven Cohn, P.C. and the cross motion by defendant Dean Evan Hart are each granted to the extent that defendants are granted summary judgment dismissing so much of the first cause of action as seeks damages pursuant to Civil Rights Law Â§70 and 71, for defendants' allegedly wrongful prosecution and appeal of the action entitled Tri-State Consumer, Inc. v. Mintz & Gold, LLP, based upon defendants' conduct occurring more than one year prior to the filing of this action; and it is further

ORDERED that the action shall continue as to the remainder of the first cause of action.

This Constitutes the Decision and Order of the Court.

1. The First Department affirmed this Court's prior decision and order dated September 10, 2007 (the Prior Order) holding that the complaint stated a cause of action under Civil Rights Law Â§70 (see Mintz & Gold LLP v. Zimmerman, 56 AD3d 358 [1st Dept 2008]).
2. Corpus Juris Secundum discusses vexatious suits under the heading of malicious

prosecution and states that "[a] 'vexatious suit' is a type of malicious prosecution . . . " (54 CJS, Malicious Prosecution ¶3).

3. A reading of various New York legal research and reference materials also suggests that causes of action under Sections 70 and 71 are generally understood to be a type of malicious prosecution claim. For example, in New York Jurisprudence, Second Edition, the "Research References" which are listed under the heading "Vexatious or Malicious Suits Filed in Name of Unknown or Nonconsenting Person" - the heading under which Sections 70 and 71 are discussed - relate primarily to malicious prosecution (see 59 NY Jur 2d, False Imprisonment and Malicious Prosecution, part V). In McKinney's Consolidated Laws of New York Annotated, all of the "Library References" which are listed for Sections 70 and 71 refer to articles concerning malicious prosecution and those sections are also cross-referenced under CPLR 215 (see McKinney's Cons Laws of NY, Book 8, Civil Rights Law ¶70, 71; Book 7B CPLR 215).

4. Section 70 is implicated where a person prosecutes litigation "vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person." Litigation is prosecuted "vexatiously," as previously indicated, when it is prosecuted "maliciously and without probable cause" (Paramount Pictures, Inc. v. Blumenthal, 256 App Div at 760). A malicious act is "a wrongful act, done intentionally without just cause or excuse" (Jestic v. Long Is. Sav. Bank, 81 AD2d 255, 257 [2d Dept 1981]). The Complaint alleges that defendants knew when the Second Action was commenced that Penny, and not Dean, was the president of TSC; that Dean was "knowingly pretending to be the president of TSC"; and that, "as president of TSC, [Penny] and not [Dean] had the authority to determine whether or not a lawsuit should be commenced in [TSC's] name" (Complaint, ¶27-29). The Complaint alleges, further, that defendants commenced, maintained and continued to prosecute the Second Action "maliciously and with the intent to harass M&G" (id., ¶46).

5. The word "proceeding," in this context, is presumably used in its general sense, to mean any "step[], or measure[], adopted in the prosecution . . . of an action" (Morewood v. Hollister, 6 NY 309, 319-320 [1852] [citation omitted]).