

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D20859  
G/kmg

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Argued - October 2, 2008

STEVEN W. FISHER, J.P.  
JOSEPH COVELLO  
WILLIAM E. McCARTHY  
JOHN M. LEVENTHAL, JJ.

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2007-11022

DECISION & ORDER

Derek Donnelly, et al., appellants-respondents,  
v Fortunato Nicotra, et al., respondents-appellants.

(Index No. 014056/04)

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Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury, N.Y. (Jeffrey B. Gold and  
Melissa B. Levine of counsel), for appellants-respondents.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),  
for respondents-appellants.

In an action, inter alia, to recover damages for private nuisance and malicious prosecution, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Winslow, J.), entered August 17, 2007, as granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging malicious prosecution, and the defendants cross-appeal, as limited by their brief, from so much of the same order as denied that branch of their motion which was for summary judgment dismissing the cause of action alleging private nuisance.

ORDERED that the order is affirmed insofar as appealed and cross-appealed from,  
without costs or disbursements.

The defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging malicious prosecution by presenting evidence that they did no more than furnish information to law enforcement authorities. "[A] civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free

October 28, 2008

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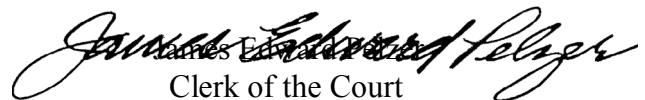
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to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution” (*Levy v Grandone*, 14 AD3d 660, 661 [internal quotation marks and citation omitted]; see *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131). In opposition to the defendants’ prima facie showing, the plaintiffs failed to raise a triable issue of fact as to whether the defendants “played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act” (*Mesiti v Wegman*, 307 AD2d 339, 340 [internal quotation marks omitted]; see *Williams v Amin*, 52 AD3d 823; *Levy v Grandone*, 14 AD3d at 661-662; *Wasilewicz v Monroe Police Dept.*, 3 AD3d 561, 562; *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d at 131). Therefore, the Supreme Court properly granted that branch of the defendants’ motion which was for summary judgment dismissing the cause of action alleging malicious prosecution.

“The elements of a private nuisance cause of action are ‘(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act’” (*JP Morgan Chase Bank v Whitmore*, 41 AD3d 433, 434, quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570). Here, the plaintiffs’ submissions in opposition to the defendants’ prima facie showing of their entitlement to summary judgment, including the affidavit of the plaintiff Derek Donnelly and the affidavit of the plaintiffs’ engineering expert, raised triable issues of fact with respect to the reasonableness of the defendants’ activities and the degree of interference with the plaintiffs’ use and enjoyment of their land. Therefore, the Supreme Court properly denied that branch of the defendants’ motion which was for summary judgment dismissing the cause of action alleging private nuisance (see *Futerfas v Shultis*, 209 AD2d 761, 763; *Murray v Young*, 97 AD2d 958).

FISHER, J.P., COVELLO, McCARTHY and LEVENTHAL, JJ., concur.

ENTER:

  
James Edward Felger  
Clerk of the Court