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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN SMITH PART 44

Index Number : 109891/2005

COURTMAN, BOBB L.

VS

HUDSON VALLEY BANK

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 2/13/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for dismiss and for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits Memorandum	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits Memorandum	4,5

Cross-Motion: ☐ Yes ☒ No

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

decided in accordance with the attached memorandum decision and order.

FILED
APR 14 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/5/06

KAREN SMITH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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BOBB L. COURTMAN,

Plaintiff,

-against-

HUDSON VALLEY BANK, GRIFFIN, COOGAN & VENERUSO, P.C., and MELISSA D. LESCAULT ESQ., Individually and DOES 1-10,

Defendants.

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Index no.: 109891/2005
Motion seq.: 002
Motion date: 02/17/06

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant, Hudson Valley Bank's motion to dismiss the complaint, for summary judgment dismissing the complaint and for summary judgment on its counter-claim is granted in part and denied in part as set forth herein.

As alleged in the complaint, this action arises out of incidents surrounding a letter which was sent, on or about October 23, 2002, by defendants, Griffin, Coogan & Veneruso, P.C. (hereafter referred to as "GCV") and Melissa D. Lescault (hereafter referred to as "Lescault"), on behalf of defendant Hudson Valley Bank (hereafter referred to as "HVB") to the Pasco County, Florida, Sheriff's Office concerning the plaintiff, Bobb L. Courtman (hereafter referred to as "Courtman"). The letter stated, inter alia, that; "Mr. Courtman has knowingly stolen $40,000 that does not belong to him and he has put it to his own use." (see paragraph 11 of the

complaint). The complaint alleges that, contrary to the statements made in the October 23, 2002 letter, the funds in question were being held in escrow, on behalf of Courtman, in an escrow account at HVB and, therefore, were not stolen but, in fact, were Courtman's own funds. As a result of the letter, Courtman alleges that he was falsely arrested by the Pasco County Sheriff and put to the time, expense, effort and embarrassment of having to defend himself against false criminal charges which were ultimately dismissed. Additionally, Courtman alleges that the letter was sent with the intent that Courtman be arrested in order to harass and intimidate him into returning the funds to the escrow deposit at HVB.

This action was commenced by the filing of the summons and complaint on July 18, 2005. In the complaint, Courtman asserts five causes of action, to wit; libel per se, libel, negligent misrepresentation of facts, false arrest and intentional infliction of emotional distress. HVB answered the complaint on or about September 5, 2005. As indicated in its notice of motion, HVB now moves; 1) pursuant to CPLR §3211(a)(1) and (7), to dismiss the complaint as against it, 2) pursuant to CPLR §3212, for summary judgment dismissing the complaint as against it, 3) pursuant to CPLR §3212, for summary judgment against Courtman on the counter-claim HVB asserted in its answer against Courtman, and 4) for such other and further relief as the court may deem just and proper. Additionally, although not set forth in its notice of motion, HVB argues that the causes of action for libel per se, libel and intentional infliction of emotional distress are barred by the one year statute of limitations set forth in CPLR §215.

Courtman opposes the motion. GCV and Lescault have submitted a separate motion to dismiss the complaint as against them and have not joined in or submitted any papers in connection with this motion.

HVB's motion to dismiss the complaint pursuant to CPLR §3211(a)(1) is denied as untimely. CPLR §3211(e) provides that, unless an objection or defense founded upon a ground specified in CPLR §3211(a)(1) is raised by motion prior to the time for a responsive pleading or in the responsive pleading itself, such objection or defense is waived. HVB did not bring a CPLR §3211(a)(1) motion prior to answering Courtman's complaint and HVB's answer did not assert that HVB had any affirmative defense founded upon documentary evidence. Therefore, HVB may not now seek dismissal of Courtman's complaint pursuant to CPLR §3211(a)(1).

The affirmation in support of HVB's motion argues that Courtman's first two causes of action, for libel per se and libel, are barred by a one-year statute of limitations (see paragraphs 21 - 24 thereof). The letter which forms the basis of these causes of action was dated and sent on or about October 23, 2002. The instant action was commenced by the filing of the summons and complaint on July 18, 2005. In its answer, HVB asserts the statute of limitations as an affirmative defense (see Exhibit B to HVB's motion papers at paragraph 25). Accordingly, HVB's has appropriately asserted this objection to these two causes of action and its motion to dismiss the first and second causes of action is granted.

HVB also moves to dismiss Courtman's third, fourth and fifth causes of action pursuant to CPLR §3211(a)(7) for failing to state a cause of action. In the context of such a motion, the Appellate Division for the First Department has stated:

> The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed. The court must 'accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory' (*Marone v Marone*, 50 NY2d 481, 484, 413 N.E.2d 1154, 429 N.Y.S.2d 592 [citation omitted]; see also *Guggenheimer v Ginzberg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). The complaint must be construed 'liberally' (CPLR 3026; see *New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77,

> 85 N.E.2d 873), and the court must accept as true not only 'the complaint's material allegations' but also 'whatever can reasonably be inferred there from' in favor of the pleader (*McGill v Parker*, 179 A.D.2d 98, 105, 582 N.Y.S.2d 91; see also *Cron v Hargro Fabrics*, 91 N.Y.2d 362, 366, 670 N.Y.S.2d 973, 694 N.E.2d 56). In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action."

(*P.T. Bank Central Asia, New York Branch v ABN Amro Bank N.V.*, 301 AD2d 373,375-376 [1st Dept 2003])

With respect to Courtman's third cause of action (negligent misrepresentation). It has long been settled that; "... generally a negligent statement may be the basis for recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage..." (*White v Guarente et al*, 43 NY2d 356 [1977]). In the instant matter, accepting the allegations in the complaint as true, the complaint does not allege (nor may it be inferred from the allegations contained in the complaint), that any misrepresentations were made to Courtman upon which he relied to his detriment. Therefore, this cause of action must be dismissed.

Courtman's fourth (false arrest/imprisonment) and fifth (intentional infliction of emotional distress) causes of action, however, set forth legally cognizable causes of action against HVB, accepting the facts alleged as true and granting them every favorable inference.

"A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged." (Martinez v City of Schenectady et al, 97 NY2d 78, 85 [2001]). "New York ... does permit a

claim for intentional infliction of emotional distress 'for conduct exceeding all bounds usually tolerated by decent society' ... The conduct must, however '[have] been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (internal citations omitted) (*Kaminski v United Parcel Service et al*, 120 AD2d 409, 412 [1st Dept, 1986]).

The complaint in the instant action alleges each of the necessary elements for these two causes of action. Additionally, the complaint alleges actual malice and defendants' reckless disregard of the impact of their actions. Therefore, these causes of action and their demands for punitive damages may not be dismissed pursuant to CPLR §3211 (a) (7).

With respect to Courtman's fifth cause of action, HVB also asserts that it is barred by a one year statute of limitations (paragraph 28 of the affirmation in support of HVB's motion). However it has been held that; "...all the elements of the cause of action for reckless infliction of emotional distress were not present until the plaintiff suffered severe emotional distress,..." (*Dana v. Oak Park Marina, Inc. et al*, 230 AD2d 204, 210 [4th Dept, 1997], cf. *Long v. Sowande, et al*, 2006 NY Slip Op 1561, 2006 NY App Div Lexis 2495 [1st Dept, 2006]). Thus, Courtman's fifth cause of action did not accrue until his arrest on or about August 5, 2004. Since the instant action was commenced July 18, 2005, it is not time-barred and may not be dismissed on this ground.

As for the portions of HVB's motion for summary judgment pursuant to CPLR §3212 seeking to dismiss Courtman's fourth and fifth causes of action.

> [T]he proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues

> of fact ... Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers ... Once this showing has been made, however, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action ...

(*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]) (internal citations omitted).

In addition to the pleadings herein, HVB has attached documentary evidence to its motion papers which establishes the events leading up to the October 23, 2002 letter. The information submitted shows that River City Abstract, LLC received the sum of $72,353.17 to secure the payment of a judgment against Courtman in favor of the New York State Attorney General on behalf of the people of the State of New York. River City Abstract transmitted the funds to Stewart Title who deposited them with HVB. Upon Courtman's request, the New York State Attorney General's Office authorized the release $10,000.00 from the escrow account to Courtman. Although no supporting documentation is provided in HVB's motion papers, the affidavit of HVB's officer indicates that Stewart Title requested HVB to wire transfer $10,000.00 to Courtman's account. An internal "HVB OUTGOING WIRE TRANSFER REQUEST", supported by the affidavit of HVB's officer, indicates that HVB erroneously wire transferred $50,000.00 to Courtman's account. Thereafter, HVB sent a letter to Courtman's, dated July 22, 2002, indicating that HVB erroneously wired $50,000.00 to Courtman when it should have wired only $10,000.00 and demanded the return of the excess $40,000.00. GCV followed up that demand with its letter dated August 6, 2002 in which it also demanded the return of the $40,000.00 wired to Courtman's account in error. The affidavit of HVB's officer also states that, because Courtman refused to return the funds that were wired to his account in error, HVB has deposited $40,000.00 of its own funds into the escrow account, has recouped $22,440.26 of that

sum and remains entitled to the return of $17,559.74 which Courtman continues to refuse to return.

In opposition to the motion Courtman has submitted his affidavit, a copy of the summons and complaint (which includes a copy of the letter dated October 23, 2002 to the Pasco County Sheriff's Office) and a copy of a judgment evidencing Courtman's acquittal on Grand Theft charges in the Sixth Judicial Circuit in and for Pasco County Florida.

HVB has not met its burden to make a *prima facie* showing of its entitlement to judgment as a matter of law by presenting sufficient evidence in admissible form to demonstrate the absence of any material issues of fact with respect to the fourth (false arrest/imprisonment) and fifth (intentional infliction of emotional distress) causes of action set forth in Courtman's complaint. The evidence offered by HVB in support of its motion does not address the salient issues raised in the complaint. Essentially, Courtman's complaint alleges that, when Lescault wrote her October 23, 2002 letter informing the Pasco County Sheriff's Office that Courtman had stolen funds belonging to HVB, Lescault and GCV knew or should have known that Courtman had not stolen any funds from HVB and that, in sending the letter, the defendants engaged in malicious and egregious conduct with the intention of inflicting emotional injuries upon Courtman, which resulted in Courtman being falsely arrested and the infliction of financial and emotional injuries upon Courtman. Instead, the evidence offered by HVB shows that, at the time Lescault wrote the October 23, 2002 letter she knew or should have known that HVB had erroneously wire transferred $50,000.00 to Courtman's bank account instead of the $10,000.00 HVB was authorized to transfer, and that Courtman had refused to return the excess funds. The evidence offers no basis to conclude that Courtman had done anything to coerce or deceive HVB

into transmitting the funds to him or had otherwise affirmatively taken the funds from HVB. In the absence of some affirmative coercion, deception or other act of taking by Courtman, it may not be said that he had stolen the funds. Therefore a question of fact exists as to whether the accusation made by Lescault in her October 23, 2002 letter was false when it was made. Under similar circumstances, it has been held that; "... a wrongful accusation resulting in an arrest is not privileged and can give rise to liability for false imprisonment..." (*Bleau Towing Service, Inc.*, 145 AD2d 816, 817 [3rd Dept 1988]). Therefore, summary dismissal of Courtman's claims for false imprisonment and intentional infliction of emotional distress would be improper (see *Pantazis v Bleau Towing Service, Inc.*, supra; see also *Bhoj et al v Bargold Storage Systems et al*, 276 AD2ds 576 [2nd Dept, 2000]). HVB's motion for such relief must thus be denied.

The sole remaining issue is whether HVB is entitled to summary judgment on its counter-claim for Courtman's alleged conversion of HVB's funds. HVB has not met its burden of making a *prima facie* showing of its entitlement to judgment on its counter-claim as a matter of law. While Courtman has admitted he received $50,000.00 when he should only have received $10,000.00, conspicuously absent from HVB's papers is any proof, other than the assertion of HVB's officer, that HVB has, in fact, covered the funds transferred to Courtman as well as any calculation as to what the funds were applied for, to support HVB's contention that it has been unable to recoup the $17,559.74 it claims remains due it. Since the information necessary to resolve these factual issues is within the control of HVB, it would be premature to grant HVB summary judgment on these issues before Courtman has the opportunity to obtain discovery with respect to the underlying facts. Accordingly, it is;

ORDERED: that the branches of HVB's motion to dismiss Courtman's first, second and

third causes of action are granted, the branches of HVB's motion for summary judgment dismissing Courtman's fourth and fifth causes of action are denied, and the branch of HVB's motion for summary judgment on its counter-claim against Courtman is denied with leave to renew after discovery is completed in this action, and it is;

FURTHER ORDERED: that counsel for all parties are directed to appear before Part 44 of the court in room 581 at 111 Centre Street, New York, New York on May 12, 2006 at 9:30AM for a preliminary conference.

The foregoing constitutes the decision and order of this court.

Dated: April 5, 2006

ENTER:

Hon. Karen S. Smith, J.S.C.