

**Troffo v Police Dept. of City of N.Y.**

2009 NY Slip Op 30310(U)

February 10, 2009

Supreme Court, New York County

Docket Number: 115690/07

Judge: Eileen A. Rakower

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

PRESENT: **EILEEN A. RAKOWER**  
J.S.C. *Justica*

PART 5

Index Number : 115690/2007  
**TROFFO, PETER**  
vs.  
**POLICE DEPARTMENT**  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1  
2  
3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
FEB 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 2/10/09

  
J.S.C.

**EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
TROFFO, PETER,

Plaintiff,

Index No.  
115690/07

Seq No.: 003

- against -

Decision and  
Order

THE POLICE DEPARTMENT OF THE  
CITY OF NEW YORK, THE CITY OF  
NEW YORK, and THE STOP AND SHOP  
SUPERMARKET COMPANY, L.L.C,

Defendants.

**FILED**  
FEB 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for mental and emotional anguish and fright allegedly caused by his unlawful detention and arrest, on May 6, 2006, at the premises 34-51 48<sup>th</sup> Street, Long Island City, New York, owned and operated by the defendant Stop and Shop Supermarket Company L.L.C. ("Stop and Shop") and by his being held in police custody for approximately twenty-six hours thereafter. Stop and Shop asserts a cross-claim for indemnification against defendants the City of New York and the New York City Police Department ("City"). Stop and Shop now moves for an order dismissing the complaint pursuant to CPLR §3211. Plaintiff opposes the motion, and no other party submits papers.

Stop and Shop, in support of its motion, submits: (1) a notice of motion; (2) counsel's affirmation; (3) the summons and complaint; (4) a certification, pursuant to part 130; (5) the answer with cross-claim; (6) Stop and Shop's discovery demands, including its demand for experts, notice re: medicals, demand for collateral source, and notice to take deposition upon oral examination; (7) plaintiff's bill of particulars; (8) and a reply affirmation in further support of the motion. Stop and Shop argues that plaintiff's unlawful arrest and imprisonment claims are barred by the statute of

limitations, and that plaintiff should not be permitted to re-assert these same claims as an action for negligence. Stop and Shop also argues that, to the extent plaintiff has asserted a claim for malicious prosecution, this claim lies against City and not Stop and Shop.

Plaintiff submits an affirmation in opposition, annexing the complaint and plaintiff's bill of particulars. Plaintiff contends first that the statute of limitations on his false arrest and imprisonment claim did not begin to run until termination of the criminal action and second that he has asserted a viable negligence claim against Stop and Shop's employees for their having accused him of shoplifting without basis.

CLPR §215(3) provides that an action for false imprisonment has a one-year statute of limitations. (*Gallagher v. Directors Guild of America, Inc.*, 144 AD2d 261 [1<sup>st</sup> Dept. 1988]; *See also Bonanno v. City of Rye* 280 AD2d 630[2<sup>nd</sup> Dept 2001.] The time within which to file a notice of claim for false arrest/imprisonment begins to run from the date of release from incarceration. (*Allee v. City of New York* 42 AD2d 899 [1<sup>st</sup> Dept. 1973]) The one year statute of limitations also applies to assault, battery, and malicious prosecution, all mentioned in the complaint. The assault and battery are claimed to have occurred on May 6, 2006. Finally, the initiation of the criminal action occurred with Stop and Shop turning plaintiff over to police on May 6, 2006.

The complaint alleges that plaintiff was arrested at approximately 2pm on May 6, 2006 and held in custody for approximately 26 hours thereafter. Thus, the one year statute of limitations on plaintiff's claims for false arrest and/or imprisonment began to run upon his release on May 7, 2006. The statute of limitations for the remaining claims also began to run no later than May 7, 2006, except for the claim of malicious prosecution. Therefore, plaintiff's November 15, 2007 claims, except for the claim of malicious prosecution, must be dismissed as untimely.

Plaintiff's assertions of negligence on the part of Stop and Shop do not require a different result.

CPLR 3211 states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action

The court, on a motion to dismiss an action pursuant to CPLR 3211(a)(7), must accept the factual allegations of the complaint as true, accord the plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v. Martinez*, 84 NY2d 83[1994]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268[1977]).

Where a claimant "...is clearly seeking damages for wrongful arrest and detention...he 'may not recover under broad general principles of negligence but must proceed by way of traditional remedies of false arrest and imprisonment.'" (*Simon v. State of New York* 12 AD3d 171 [1<sup>st</sup> Dept. 2004])

Plaintiff's complaint and bill of particulars allege that while he was going through the check-out, without provocation on his part, employees of Stop and Shop physically assaulted plaintiff by placing a knife at plaintiff's throat, and pointing a taser at him, while threatening plaintiff with physical harm. He further alleges that Stop and Shop employees falsely accused him of shoplifting, resulting in his arrest and prosecution, further stating that "...the actions of the defendants were wrongful, malicious and designed to embarrass and damage the plaintiff." Plaintiff also contends that he was unlawfully arrested, taken into custody to a police station in Queens and arraigned after being held in custody for approximately 26 hours. Additionally, plaintiff's complaint states that, on or about January 5, 2007 both charges against the plaintiff were dismissed and the records sealed, and that, as a result of the aforementioned arrest and prosecution "... plaintiff was compelled to incur attorneys fees and loss of wages as a result of defendants' deliberate and malicious acts and plaintiff was injured in his reputation, name and credit and his standing in the community..."

Plaintiff does not specify negligence in his complaint but does state in his bill of particulars:

15. Plaintiff was detained by security personnel of the defendant, Stop and Shop, physically threatened by them, terrorized with a knife and stun gun, and falsely accused of shoplifting. Plaintiff was then wrongfully turned over to NYC Police personnel and placed under arrest.

16. All the foregoing acts were deliberate, willful, wrongful, tortious and negligent.

Plaintiff's allegation of negligence against Stop and Shop overlaps with and specifically refers to his false imprisonment/arrest claims.

An essential element in an action for malicious prosecution is the termination of the proceeding in favor of the accused. (*Kellermueller v. Port Authority*, 201 AD2d 427 [1<sup>st</sup> Dept. 1994]). Inasmuch as the proceeding against plaintiff did not terminate until January 5, 2007, the statute of limitations on this claim began to run as of that date. Thus, the complaint is not time barred as to that one cause of action. Further, the initiation of a criminal action will be found on the basis of false information provided in bad faith by the defendant (*See, Farnum v. Feeley*, 56 NY 451 [1874]). Taking the allegations of plaintiff as true, plaintiff states a claim as against Stop and Shop.

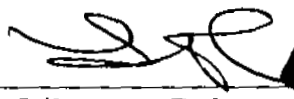
Wherefore, it is hereby

ORDERED that the defendant Stop and Shop's motion to dismiss is granted to the extent that all causes of action except the cause of action for malicious prosecution are dismissed as against Stop and Shop Supermarket Company LLC; and it is further

ORDERED that the remainder of the case shall continue.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 10, 2009

  
Eileen A. Rakover, J.S.C.  
**FILED**  
FEB 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK