

**Mbengue v Jones**

2009 NY Slip Op 31405(U)

June 11, 2009

Supreme Court, New York County

Docket Number: 26966/08

Judge: Eileen A. Rakower

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

**HON. EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_

PART Part 5

Index Number : 400126/2009  
**MBENGUE, ANOUNE**  
 VS.  
**JONES, RICHELLE**  
 SEQUENCE NUMBER : 002  
 DISMISS

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

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

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

MOTION CAL. NO. \_\_\_\_\_

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

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

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

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

PAPERS NUMBERED

12

34

56

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUN 16 2009

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 6/16/09



**HON. 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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
ANOUNE MBENGUE, AWA SYS, individually and as  
representative of MOUHAMED MBENGUE, FATOU,  
MBENGUE, THIerno MBENGUE, and JUNIOR LOUIS,

Plaintiffs,

Index No.  
26966/08

- against -

**DECISION  
& ORDER**

RICHELLE JONES, DIANA UPCHURCH, KEISHA "DOE",  
MELISSA PENABAD, THE CITY OF NEW YORK,  
NEW YORK CITY POLICE DEPARTMENT, DENNIS M.  
O'BRIEN, OFFICERS 1 THRU 99, SCOTT SHEA, BROWN  
& BROWN INC., BROWN & BROWN OF CONNECTICUT,  
CISA MACK, JPMORGAN CHASE & CO., JPMORGAN  
CHASE BANK N.A., and RUDOPH ROBINSON,

Mot. Seq.002  
& 003

Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiffs bring this action in connection with a series of events involving a Subway restaurant franchise opened by Plaintiff Anoune Mbengue ("Mbengue"), Plaintiff Junior Louis ("Louis"), and Defendant Richelle Jones ("Jones"). The following facts are alleged in Plaintiff's Amended Complaint<sup>1</sup>:

In or around May 2007, Mbengue, Louis, and Jones agreed to jointly purchase a Subway restaurant franchise. Mbengue attended and passed the franchisor-mandated training course, and thus was a necessary party to the franchise. Neither Louis nor Jones had successfully completed the training course.

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<sup>1</sup> Plaintiffs annexed the Amended Complaint to their Affirmation in Opposition to the parties' respective motions to dismiss. The First Department has held that when a new set of pleadings is served, a moving party may opt to have its motion to dismiss applied to the amended complaint (*Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.3d 35, 38 [1st Dept. 1998]). The moving parties have elected for such a course here, and the court applies their motions to Plaintiffs' Amended Complaint.

Louis was necessary to the creation of the franchise because he was the only one out of the three who had the necessary credit and collateral to secure bank financing. Mbengue and Jones were each to receive compensation as salaried employees of the restaurant, and were co-sublessees of the business premises under a lease with Subway Real Estate Corp. Mbengue, Louis, and Jones were to conduct business as a partnership in which each had an equal interest. The parties never executed a formal partnership agreement. Louis contributed \$80,000, and the parties obtained a bank loan for \$100,000. The store was opened on September 3, 2007.

Before entering into the partnership, Mbengue and Louis explicitly told Jones that Jones' mother, Diana Upchurch, would not be permitted to participate in any aspect of the partnership. Mbengue's alleges that he knew that Upchurch failed to report transactions at a subway franchise she previously managed and failed to report a substantial amount of sales to both the franchisor and the New York State Tax Department.

Not long after the franchise opened, it became apparent that not all of the money invested by Louis and the lending bank could be accounted for. Despite the \$180,000 investment plus close to \$35,000 in sales, only \$9,000 appeared in the account. Louis withdrew approximately \$8,000. When Louis removed the \$8,000, Jones threatened that she had friends in the NYPD and would have him arrested.

Louis demanded that the bank take his name off the partnership bank account on September 20, 2007. That same day, Mbengue and Louis discovered that Jones had placed Upchurch on the partnership bank account. The partnership bank account was at Defendant JPMorgan Chase Bank. Defendant Cisa Mack was the Chase employee who took Louis off the account and placed Upchurch on the account. In addition, Mbengue's name was subsequently taken off the account but later placed back on; however, the account indicated that Mbengue was not permitted to conduct any transactions on the account. The language about Mbengue being prohibited from conducting transactions was added by Mack.

Chase issued a debit card to Jones in September 2007, enabling her to access the partnership bank account. Money was taken from the partnership account via ATM machines; however, Jones refused to provide any explanation as to the purpose of the withdrawals.

On September 26, 2007, Mbengue found Upchurch at the cash register in the restaurant and demanded that she leave the premises. Upchurch and Defendant Keisha "Doe" then subjected Mbengue to "an offensive and unprivileged touching..." In addition, Upchurch said to Mbengue, "you [expletive] stupid African you are going to [expletive] leave this register. Upchurch called the NYPD from her cellular phone. After calling the franchisor's legal department, the NYPD was advised that Mbengue and Jones were both proper sub-lessees with permission to be on the premises and authority to exclude others from the premises. The NYPD was further advised that Upchurch was neither a sub-lessee or a franchisee. Responding officers also watched surveillance video and observed that Mbengue had not attacked anyone, as Upchurch had alleged. Mbengue then temporarily closed the store.

At about 12:30 that same day, while in front of the store, Upchurch again used derisive language toward Mbengue in reference to his African background. An hour later, Upchurch used a key to re-enter the store and continue business operations. Video surveillance shows Upchurch taking money from customers without properly recording sales on the register.

At 6:30 that evening, Jones called Mbengue and Louis and told them to come to the store to discuss business matters. When they arrived, Jones told them by phone to come down to the basement. When they next returned upstairs, Mbengue was arrested by Defendant NYPD Officer Dennis O'Brien. Mbengue was subsequently photographed, processed, questioned, fingerprinted, and arraigned. He was released at or around midnight on September 27, 2007.

Upchurch spoke with the Manhattan District Attorney's Office and swore a complaint against Mbengue, which formed the basis for his prosecution. ADA Melissa Penabad was the ADA assigned to the case. Penabad proceeded with the prosecution despite what plaintiffs allege was clear evidence of Mbengue's innocence, including video surveillance footage which cleared him of wrongdoing. Plaintiffs also alleged that Penabad assisted Jones and Upchurch by using the criminal prosecution of Mbengue as leverage in defense of a civil suit filed by Mbengue, and to force a sale of the business interests of Louis and Mbengue to Jones and Upchurch. All criminal charges were dismissed on March 17, 2008.

Plaintiffs subsequently commenced this action, bringing the following causes of action: (1) false arrest and imprisonment; (2) malicious prosecution (both against

Upchurch, Jones, Doe, O'Brien, the City, and the NYPD); (3) abuse of process (against Jones, Upchurch, City, and Penabad); (4) intentional and negligent infliction of emotional distress (against Upchurch and Jones – it is unclear if brought against others); (5) negligent hiring, training, supervision and retention (against the City) (6) violation of civil rights (42 U.S.C. §§1981, 1983, 1985, 1986 & 1988, NY Exec Law §296) (against the City; Upchurch and Jones); (7) loss of consortium (no defendants are specifically named); (8) defamation (against Upchurch, Jones, Rudolph Robinson; and (9) tortious interference (against Mack).

Presently before the court are two separate motions to dismiss: one motion is brought on behalf of Defendants Jones, Upchurch, Doe, and Robinson (“Jones Movants”); the other is brought on behalf of Defendants Mack, JP Morgan Chase & Co., and JP Morgan Chase Bank N.A. (“Chase and Mack”).<sup>2</sup> The Jones Movants have submitted an Affirmation in Support of their motion, with a copy of the original Summons and Complaint Annexed as an exhibit. Chase and Mack submit a Memorandum of Law, the Affidavit of Cisa Mack, and an Affirmation in Support of their motion. Annexed to the moving papers exhibits are four Westlaw printouts of court decisions; copies of partnership documents and records pertaining to relevant partnership bank accounts; a November 8, 2007 letter from Louis and Mbengue's attorney; Plaintiff's original Summons and Complaint; and Chase's Account Rules and Regulations. In addition, Chase and Mack argue that, to the extent their motion to dismiss is denied, Plaintiffs should be compelled to arbitrate their claims pursuant to CPLR 7503.

Plaintiffs have submitted an Affirmation in Opposition, annexing its Amended Answer thereto. The City has also submitted an Affirmation in Opposition, arguing that the motions should be denied as premature since no discovery has taken place.

The Jones Movants and Chase and Mack have both submitted Reply Affirmations. Annexed to the Chase and Mack Reply is a Westlaw printout of a court decision.

CPLR 3211 states, in relevant part:

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<sup>2</sup>

Defendants Shea, Brown & Brown Inc., and Brown & Brown of Connecticut had also moved to dismiss but subsequently entered into a stipulation with Plaintiffs discontinuing the action as against them.

- (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.

When deciding a motion to dismiss an action pursuant to CPLR 3211(a)(7), the court 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 complaint 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 NY2d 268 [1977]).

With the exception of Defendant Robinson, Plaintiffs have stated claims for false arrest and imprisonment, and malicious prosecution against the Jones Movants. The four elements of false arrest are: intentional confinement of the plaintiff; the plaintiff was aware of the confinement; the confinement was not consented to; and the confinement was not otherwise privileged (*see Broughton v. State*, 37 N.Y.2d 451 [1975]). “In order to recover for malicious prosecution, a plaintiff must establish four elements: that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice” (*Cantalino v. Danner*, 96 N.Y.2d 391, 396 [2001]).

The Jones Movants contend that they cannot be held liable for either false arrest or malicious prosecution, as they were merely civilian complainants. “It is well settled in this State’s jurisprudence that a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free 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” (*Du Chateau v. Metro-North Commuter R.R. Co.*, 253 A.D.2d 128 [1st Dept. 1999]) (citing *Celnick v. Freitag*, 242 A.D.2d 436, 437 [1st Dept. 1997]; *Schiffren v. Kramer*, 225 A.D.2d 757, 758-59 [2nd Dept. 1996]). Rather, “A plaintiff must demonstrate that the defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act. The defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing

active, officious and undue zeal, to the point where the officer is not acting of his own volition." *Mesiti v. Wegman*, 307 A.D.2d 339 [2nd Dept. 2003]).

Here, Plaintiffs' claims survive as against Jones, Upchurch, and Doe. The Amended Complaint alleges that these individuals lured Mbengue and Louis to the premises and maliciously fabricated the allegations they communicated to the NYPD in order to have Mbengue arrested and prosecuted. Their assertion that the prosecution wasn't terminated in favor of Mbengue is incorrect, since an outcome in a criminal proceeding is considered favorable to the accused when that outcome is not inconsistent with innocence (*see Cantalino* at 395). As the Amended Complaint states that the charges were dismissed against Mbengue, Plaintiffs have sufficiently alleged that the criminal proceedings were terminated in favor of Mbengue.

Plaintiffs have also sufficiently stated a cause of action for abuse of process as against Jones and Upchurch. "Abuse of process has three essential elements: (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 N.Y.2d 113 [1984]) (citation omitted). Plaintiffs' Amended Complaint sufficiently alleges that Jones and Upchurch, (in concert with the City and ADA Penabad) maliciously caused the initiation of criminal proceedings against Mbengue without justification, and with the intention of keeping Mbengue from participating in the business and using the prosecution as leverage to force Mbengue and Louis into selling their shares of the business under unfavorable terms.

Plaintiffs' intentional infliction of emotional distress claim must be dismissed. Providing false information to the police which results in a plaintiff's arrest does not rise to the level of conduct that is "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 society" (*Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205 [1st Dept. 2002]) (*see also Slatkin v. Lancer Litho Packaging Corp.*, 2006 NY Slip Op 7290 [1st Dept. 2006] (faxes and phone calls, including to the plaintiff's parents threatening arrest and criminal prosecution, and instigation of plaintiff's arrest by means of false statements to the police not so outrageous as to be utterly intolerable). In addition, while this claim does not appear to be predicated on Upchurch's derisive language toward Mbengue regarding his African background, it is worth noting that the use of racial epithets, while reprehensible, does not rise to the level of such outrageous conduct absent "a

deliberate and malicious campaign of harassment or intimidation” (*Herlihy v. Metro. Museum of Art*, 214 A.D.2d 250 [1st Dept. 1995]). Plaintiffs’ claim for negligent infliction of emotional distress must also be dismissed, since this claim also requires outrageous conduct which goes beyond all possible bounds of decency and which is intolerable in a civilized society (*Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361 [1st Dept. 2005]).

Plaintiffs’ civil rights claims should be dismissed as against the Jones Movants as well. Plaintiffs’ federal and state constitutional claims do not apply to these individuals since they are not state actors. In addition, Plaintiffs’ claims against Jones and Upchurch under Executive Law §296 must fail. Executive Law §296 forbids an employer from discriminating against an employee on the basis of race. To qualify as an “employer” under the Human Rights Law, the defendant must have the ability to exercise a significant degree of control over the plaintiff (*see Pepler, v Coyne*, 2006 NY Slip Op 7399,\*2 [1st Dept. 2006]) (finding that plaintiff had stated a claim against defendant under Executive Law §296 where complaint portrayed defendant as a cofounder and manager of company who had the power to hire and fire plaintiff). Here, by contrast, the Amended Complaint alleges that Plaintiffs Mbengue and Louis were co-equal partners with Jones in a three-person partnership and thus fails to allege that Jones exercised a level of control over these Plaintiffs which would place their relationship within the purview of the Human Rights Law.

As for loss of consortium, Plaintiffs have sufficiently pleaded a derivative claim as against Jones, Upchurch, and Doe, insofar as Plaintiffs’ have sufficiently alleged false arrest and malicious prosecution.

Turning now to Plaintiffs’ defamation claims, Plaintiffs’ Amended Complaint alleges the following defamatory statements:

- “On September 26, 2007 Defendants UPCHURCH and JONES did state to POLICE DEPARTMENT and to public customers present at the Subway® Sandwich shop and to employees of same, and to numerous employees of the franchisor and lessor, that MBENGUE had ‘assaulted’ UPCHURCH.” (Plaintiffs claim that Upchurch made the accusations on behalf of Jones, and within the scope and course of her agency with Jones).

- “On or about the fall of 2007, UPCHURCH made numerous phone calls to the workplace of LOUIS in which she alleged to the employer of LOUIS that LOUIS was ‘stealing equipment’ from the employer (Time Warner) and that LOUIS had stolen something of value from the employer in that he did attend to personal business by ‘going to court’ ‘while he is on Time Warner’s clock.’”
- “During a recess during the court hearing on receivership, UPCHURCH did approach the wife of LOUIS in the hallway of the courthouse and state that LOUIS was having affairs with 4 other women and that said women came to the Subway ® store.”
- “JONES did inform persons at the franchisor headquarters including but not limited to Denise Hutchinson that MBENGUE had ‘attacked’ UPCHURCH.”
- “JONES did inform persons at the franchisor headquarters including but not limited to Denise Hutchinson that LOUIS had ‘stolen’ money from the partnership bank account.”
- “JONES did inform persons associated with CHASE BANK including but not limited to MACK and the assistant branch manager, that LOUIS had ‘stolen’ money from the partnership bank account.”

It is further alleged that Jones filed documents drafted by Rudolph Robinson with the New York State Department of Taxation, documents in a prior proceeding before Justice Cahn, and documents with the IRS. Plaintiffs allege that Jones and Robinson had knowledge of the falsity of the documents, and that the statements therein contained information which was damaging to the business and personal reputations of Louis and Mbengue. No specific language is set forth in the complaint, nor are any dates noted.

“The elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*.” CPLR 3016(a) requires that a plaintiff alleging defamation plead with sufficient particularity the actual allegedly defamatory words used by the defendant(s); in addition, the plaintiff must set forth the time, place, and manner of the communication (*Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]). Here, Plaintiffs fail to sufficiently plead their defamation claims

because they do not set forth the specific statements allegedly uttered by the defendants. Where a Plaintiff merely paraphrases the alleged defamatory statement in such a way that the actual words are not evident on the face of the complaint, “the longstanding rule is that dismissal is required.” (*Murganti v. Weber*, 248 A.D.2d 208 [1st Dept. 1998]; *MaNas v. VMS Assoc., LLC*, 2008 NY Slip Op 6350 [1st Dept. 2008]). In addition, a number of the allegations of defamatory statements fail to specify the timing of the alleged defamation and/or to whom the statement was made. Accordingly, Plaintiffs’ defamation claims must be dismissed.

Finally, Plaintiffs fail to state a claim against Chase and Mack for tortious interference with business relations or prospective economic advantage. The tort, by definition, involves conduct directed “not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship” (*Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 192 [2004]). Plaintiffs’ allegations against Mack are that she wrongly “interfered in the affairs of the Subway shop.” Accordingly, where Plaintiffs have failed to allege that Mack engaged in any conduct directed toward a third party with whom Plaintiffs had or sought to have a business relationship, Plaintiffs have failed to state a claim for tortious interference.

As Plaintiffs fail to state any other claims against Chase and Mack, they are dismissed from the action. Moreover, the court notes that, if and to the extent that there exists a dispute arising from the agreement between plaintiff and Chase, this court is not the proper forum to raise such claims. The record indicates that Mbengue and Louis, as signatories to the subject Chase bank accounts, are bound by Chase’s “Account Rules and Regulations.” These Rules and Regulations provide, *inter alia*, “Either you or the Bank may, without the other’s consent, elect mandatory, binding arbitration of any claim, dispute or controversy raised either by you or the Bank against the other... arising from or relating in any way to this Agreement, [or] any prior account agreement between you and the bank.”

Wherefore, it is hereby

ORDERED that the motion of the Jones Movants is granted to the extent that the following causes of action are severed and dismissed: Plaintiffs’ false arrest, false imprisonment, and malicious prosecution claims are dismissed as against Defendant Robinson; Plaintiffs’ abuse of process claim is dismissed as against Defendants Doe and Robinson; Plaintiffs’ intentional and negligent infliction of emotional distress claims are dismissed; Plaintiffs’ civil rights claims are dismissed;

Plaintiffs' loss of consortium claim is dismissed as against Defendant Robinson; and Plaintiffs' defamation claims are dismissed; and it is further

ORDERED that Chase and Mack's motion is granted and the causes of action are severed and dismissed as against JP Morgan Chase & Co., JP Morgan Chase Bank N.A. and Cisa Mack; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

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

DATED: June 11, 2009

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
JUN 16 2009  
NEW YORK  
COUNTY CLERK'S OFFICE