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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Index Number : 112940/2004

GREEN, SHARNA

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2,
Answering Affidavits — Exhibits _____	3, 4,
Replying Affidavits _____	5, 6

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
OCT 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/16/09

HON. EILEEN A. RAKOWER J.S.C.

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

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

----------X

SHARNA GREEN,

Plaintiff,

- against -

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, PATHMARK STORES, INC., "JOHN DOE" and "JANE DOE" said first and last names being fictitious,

Defendants.

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Index No.
112940/04

DECISION & ORDER

Mot. Seq.
002

HON. EILEEN A. RAKOWER

Plaintiff Sharna Green ("Plaintiff") brings this action to recover for false arrest; malicious prosecution; negligent hiring, retention and supervision of employees; assault and battery; and violation of civil rights against Defendants City of New York, the New York City Police Department ("NYPD") (collectively referred to as "City"), and Pathmark Stores, Inc. ("Pathmark"). Plaintiff's claims revolve around an incident at a Pathmark store ("the store") at 125th Street between Lexington and Third Avenues in the City, County, and State of New York on September 13, 2003.

At about 5:30 p.m. on September 13, 2003, Plaintiff was approaching the check-out aisle in the store with a substantial amount of groceries, which were contained in two shopping carts which Petitioner brought from home. During the course of her shopping, Plaintiff's sister arrived in the store, and waited for her by the cash registers. Plaintiff attempted to pay for the groceries with her uncle's electronic food stamp card. However, the card did not swipe properly. While Plaintiff was attempting to pay with her card, Plaintiff's sister was bagging the groceries. After bagging the groceries and loading them into one of the push carts, Plaintiff's sister exited the store with one of the push carts. Plaintiff swiped the card a second time, but again was unsuccessful. Plaintiff called her sister and told her to

return to the store since the groceries had not been paid for due to Plaintiff's difficulty with her uncle's card.

Between the time Plaintiff called her sister and the time that she returned to the store, a member of the store's Loss Prevention unit was summoned by the cashier. When Plaintiff's sister returned to the store, Plaintiff attempted to separate the groceries, so that she could purchase some, but not all of the groceries that she had initially planned to purchase with her own debit card. However, the Loss Prevention employee told her that she could not purchase or separate the items. Plaintiff alleges that the Loss Prevention employee then pushed Plaintiff's sister away from the push cart. Plaintiff claims that the Loss Prevention employee also pushed her once in the chest area. Plaintiff then told the Loss Prevention employee that she was going to call the police. Plaintiff called the police on her cell phone, and told them that the Loss Prevention employee pushed her.

After making the call to police, Plaintiff and her sister waited by the entrance of the store for the police to arrive. Plaintiff leaned against the wall because she began having heart palpitations after she was pushed by the Loss Prevention employee. Two NYPD officers responded to the store, one of whom was Police Officer Greenwood. Plaintiff gave the officers her account of events, and requested an ambulance due to her palpitations. After speaking with Plaintiff, Officer Greenwood went to the Loss Prevention office, where his partner had already gone.

Three additional NYPD officers responded to the store some time thereafter. Plaintiff recounted what had previously transpired to one of these officers. Another one of the officers went to the Loss Prevention office. One of the officers subsequently told Plaintiff that she was being arrested for falsifying a complaint. According to Plaintiff, she was then surrounded by the NYPD officers. One of the officers attempted to take Plaintiff's cell phone from her hand. The officer then twisted her arm around her back while another officer removed an umbrella from her hand. She was then thrown to the ground, and four officers were on her back trying to arrest her. They eventually handcuffed her and picked her up from the ground. Accordingly to testimony from Officer Greenwood, Plaintiff was arrested at approximately 7:30 p.m. Plaintiff states that the physical confrontation with the police officers occurred outside, in front of the entrance to the store.

Plaintiff was taken to an ambulance and driven to the hospital after being handcuffed. She was then taken to the 25th Precinct, where she was fingerprinted

and photographed. Plaintiff was released from Central Booking the following day at approximately 12:00 p.m. The New York County District Attorney's Office declined to prosecute Plaintiff.

Pathmark now moves for summary judgment pursuant to CPLR §3212, asserting that there are no issues of material fact and that Pathmark is entitled to judgment as a matter of law. Pathmark submits an affirmation in support of its motion. Annexed to the affirmation as exhibits are copies of Plaintiff's summons and complaint; Pathmark's answer; Plaintiff's verified bill of particulars; Plaintiff's deposition transcript; Officer Greenwood's deposition transcript; the deposition transcript of Stephen Fosdick, an assistant manager at the store; Plaintiff's note of issue; Plaintiff's arrest report; the NYPD sprint record pertaining to the incident; and Pathmark records indicating that video surveillance records from the store on September 13, 2003 were turned over to NYPD pursuant to an unrelated investigation. Pathmark states that it has been unable to recover copies of the video tape from NYPD.

Plaintiff opposes Pathmark's motion and cross-moves for an order striking both Pathmark and the City's answers pursuant to CPLR §3126 for spoliation of evidence. Specifically, Plaintiff claims that Pathmark and the City's answers should be stricken due to each party's failure to preserve video surveillance footage from the store on the date of the incident, evidence which Plaintiff asserts is vital to her case. Annexed as exhibits to Plaintiff's affirmation are Plaintiff's affidavit; and Plaintiff's pleadings and bill of particulars.

The City submits an affirmation in opposition to both Pathmark's motion and Plaintiff's cross-motion.

Pathmark submits an affirmation in opposition to Plaintiff's motion to strike and in further support of Pathmark's motion for summary judgment. Pathmark states that Pathmark's surveillance tapes for the date of the incident were provided to a NYPD homicide detective in the 25th Precinct pursuant to an unrelated investigation, and that the tapes were never returned to Pathmark, despite Pathmark's numerous attempts to recover the tape, and that NYPD has apparently either lost or destroyed the tape. Annexed as an exhibit to the affirmation are letters from Pathmark's investigator chronicling its efforts to recover the videotape.

Lastly, Plaintiff submits a reply affirmation in response to Pathmark and the City's opposition to Plaintiff's motion to strike.

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118 [1950]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019 [3rd Dept. 1952]), or where the appeal is "arguable" (*Barrett v. Jacobs*, 255 N.Y. 520, 522 [1931]); "issue-finding, rather than issue-determination, is the key to the procedure" (*Esteve v. Abad*, 271 App.Div. 725, 727 [1st Dept. 1947]).' (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957])." (*Ramsammy v. City of New York,* 216 A.D.2d 234, 236-237 [1st Dept. 1995].)

In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 967 [1988].) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

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]).

"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]).

The court finds that issues of fact exist as to Pathmark's involvement in Plaintiff's arrest which preclude summary judgment. While the record indicates that Pathmark employees neither confined Plaintiff in the store against her will, nor took part in the physical arrest of Plaintiff by the NYPD, it is undisputed that the decision to arrest Plaintiff was based largely upon NYPD officers' conversations with Plaintiff, and with Pathmark personnel. Plaintiff alleges that Pathmark personnel knowingly furnished the NYPD with false information which led to her arrest for falsifying a complaint. Such conduct surpasses that of "an uninvolved passive player" who merely supplies the police with information, and instead rises to such a level that Pathmark employees actually "acted in a catalytic role and directly prompted" Plaintiff's arrest (*Ramos v. City of New York*, 285 A.D.2d 284, 299 [1st Dept. 2003]). Accordingly, whether the Loss Prevention employees merely reported information to the police in good faith or deliberately provided the NYPD with false information which led to Plaintiff's arrest is a matter for the trier of fact to resolve at trial.

In addition, issues of fact exist which preclude summary judgment with respect to Plaintiff's assault and battery claims. "To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact" (*Holtz v. Wildenstein & Co.*, 261 A.D.2d 336 [1st Dept. 1999]). "To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen" (*Hughes v. Farrey*, 2006 NY Slip Op 4926, *3 [1st Dept. 2006]). Here, a clear dispute of material fact exists as to whether the Loss Prevention employee committed a battery upon Plaintiff by physically shoving her.

Nothing in General Business Law ("GBL") §218, cited by Pathmark, alters the analysis with respect to Plaintiff's claims of false imprisonment or assault and battery. GBL §218 provides, in pertinent part, as follows:

> In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault,

> trespass, or invasion of civil rights, brought by any person by reason of having been detained on or in the immediate vicinity of the premises of... a retail mercantile establishment for the purpose of investigation or questioning as to... the ownership of any merchandise..., it shall be a defense to such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer acting pursuant to his special duties, police officer or by the owner of the retail mercantile establishment..., his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained was... committing or attempting to commit larceny on such premises of such merchandise....

As noted above, Plaintiff and Pathmark's respective accounts of the incident at the store differ markedly, and a rational finder of fact can conclude that Pathmark's actions were unreasonable.

Turning now to Plaintiff's cross-motion to strike Pathmark and the City's answers, striking a party's pleadings on the grounds of spoliation of evidence is appropriate when "a party alters, loses or destroys key evidence before it can be examined by the other party's expert." The loss or destruction of evidence need not be the result of willful conduct or bad faith on the part of the spoliating party, as courts have recognized that a party's mere negligence can cause equally fatal results to a party's prosecution or defense of an action. Further, the sanction of striking a pleading can be warranted in cases where the destruction or loss of key evidence occurred prior to litigation, if the spoliator was on notice that the evidence might be necessary in future litigation (*Std. Fire Ins. Co. v. Fed. Pac. Elec. Co.*, 14 A.D.3d 213, 218-20 [1st Dept. 2004]). However, where the loss of evidence is not fatal to a party's case, and the party has alternative forms of evidence to prove his or her case, the severe sanction of striking a pleading is not warranted; instead, a lesser sanction such as a missing document charge at trial is appropriate (*see Melendez v. City of New York*, 2 A.D.3d 170 [1st Dept. 2003]).

Here, the court finds that the striking of Pathmark and the City's answers is unwarranted. Plaintiff is not foreclosed from proving her allegations through her

own testimony, and through the testimony of her sister, who was present and witnessed the events underlying this action. Moreover, the loss or destruction of the surveillance video can be remedied at trial by a missing evidence charge permitting the jury to infer that the lost video surveillance contained material which favored Plaintiff and was harmful to the City and/or Pathmark (*See*, PJI2d 1:77.1). Pathmark attempts to absolve itself of the loss or destruction of the tape by claiming that it provided the tape to the NYPD. Pathmark is free to present such evidence to the trial jury in an effort to ameliorate any negative inference, in the event the jury hears a missing evidence charge.

Wherefore, it is hereby

ORDERED that Pathmark's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's cross-motion to strike the answers of Pathmark and the City is denied without prejudice to move for lesser sanctions against Pathmark and the City at trial.

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

DATED: October 16, 2009

EILEEN A. RAKOWER, J.S.C.