

Cleary v Bloomingdale's, Inc.

2009 NY Slip Op 33027(U)

December 28, 2009

Supreme Court, New York County

Docket Number: 101067/07

Judge: Michael D. Stallman

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SCANNED ON 12/29/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 101067/2007

PART 7

CLEARY, GAIL P.

vs.

BLOOMINGDALE'S

INDEX NO. 101067/07

SEQUENCE NUMBER : 002

MOTION DATE 7/17/09

DISMISS

MOTION SEQ. NO. 002

MOTION CAL. NO. 26

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-Q

PAPERS NUMBERED

Answering Affidavits — Exhibits A-L

1-2

Replying Affidavits _____

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the court's Madrandam decision and order.

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

FILED
DEC 28 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/28/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
GAIL P. CLEARY,

Plaintiff,

-against-

BLOOMINGDALE'S, INC., and FEDERATED
DEPARTMENT STORES, INC.,

Defendants.

FILED

DEC 28 2009

NEW YORK
COUNTY CLERK'S OFFICE

Index No. 101067/07

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

Plaintiff was detained, prosecuted and convicted of attempted petit larceny (P.L. § 110/155.25) at the main Bloomingdale's Inc. department store in New York county (Bloomingdale's). Plaintiff's conviction was reversed on appeal. Plaintiff claims that Bloomingdale's' employees fabricated a story that plaintiff switched price tags on a pair of pants and a shirt in order to pay a lower price for the merchandise. Plaintiff seeks damages from defendants on causes of action for malicious prosecution, false imprisonment, abuse of process, intentional infliction of emotional distress and negligence. Defendants move, pursuant to CPLR 3212, for summary judgment and dismissal of the complaint.¹

BACKGROUND

Plaintiff, an attorney, contends that she purchased the bottom half of a bathing suit in a shop that did not have the other half in her size, and was, at the shop, advised that Bloomingdale's might

¹Plaintiff has withdrawn her third, sixth and seventh causes of action and those causes of action are dismissed.

carry the matching top. Plaintiff further contends that in an attempt to purchase the other half of the suit, she went to Bloomingdale's with the bathing suit bottom she had recently purchased. Plaintiff claims that she was stopped by a Bloomingdale's detective who mistakenly believed that plaintiff had concealed the bathing suit bottom in her purse. Plaintiff further claims that after having been brought down to the Bloomingdale's security office, she produced a receipt showing that she had bought the bathing suit bottom elsewhere. Plaintiff maintains that showing the store detective the receipt, in conjunction with the information that plaintiff was a lawyer, caused the store detective to panic. Plaintiff alleges that in order for the store detective to justify the detention, and cover her mistake, the detective invented a story about plaintiff switching price tags on a pair of pants and shirt that plaintiff had just purchased from the store to price tags that bore a lower price. Plaintiff asserts that her detention at the store, arrest and later conviction at trial were predicated on the wrongful conduct and false testimony of the store detective, who claimed that she observed plaintiff through the slatted dressing room door and witnessed plaintiff changing the tags on the pants and shirt to lower priced tags.

The plaintiff's criminal conviction was later vacated, "on the facts, and as a matter of discretion in the interest of justice," and the accusatory instrument was dismissed (*People v Cleary*, 12 Misc 3d 129(A), 2006 NY Slip Op 51008 (U) *1 [App Term, 1st Dept 2006]). The Appellate Term found it appropriate to exercise its statutory discretion under CPL 470.15 [3] [b] and [c] "to reverse defendant's conviction on misdemeanor attempted shoplifting charges as against the weight of the evidence and in the interest of justice" (*id.*). In reversing the conviction and dismissing the information as against the weight of the evidence, the Appellate Term found, among other things, that the trial court's determination concerning credibility and the weight to be accorded the evidence

* 4]
was not supported by the record. The Appellate Term also expressed concern of a grave risk that an innocent person had been convicted.

DISCUSSION

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the moving party has made this showing, the burden is on the opposing party to demonstrate “evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 560). “If there is any doubt as to the existence of a triable issue, the motion should be denied” (*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1st Dept 2002]).

In moving for summary judgment, defendants argue that they are entitled to dismissal of the complaint because probable cause to detain plaintiff was established through the criminal court’s denial of plaintiff’s motion to dismiss at the close of the People’s case and the guilty verdict. Defendants further argue that these determinations are not vitiated by the conviction’s reversal, which they characterize as principally on “interest of justice” grounds, and not an exoneration.

For these reasons, defendants move to dismiss the malicious prosecution cause of action. Defendants also argue that plaintiff cannot make out any element of the malicious prosecution cause of action and further contend that the claim should be dismissed because plaintiff is judicially estopped from claiming that she was innocent due to a position she took in a post-trial motion after her conviction.

5] The elements of a malicious prosecution claim are: (1) the initiation of a criminal proceeding by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) lack of probable cause; and (4) malice (*Brown v Sears Roebuck and Co.*, 297 AD2d 205, 208 [1st Dept 2002]). “Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in a similar situation to believe plaintiff guilty”(id., at 210).

Defendants argue that they did no more than call the police and make the tag switching complaint. Such conduct, without more, does not support a malicious prosecution claim (*see Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 129 [1999] [essential underlying facts not in dispute]). However, a “defendant may be said to have initiated a criminal proceeding by providing false evidence to the police or withholding evidence that might affect the determination by the police to make an arrest” (*Brown*, 297 AD2d at 210;² *see Farnam v Feeley*, 56 NY 451 [1874] [initiation of a criminal action will be found on the basis of false information provided in bad faith by the defendant]; *Maskantz v Hayes*, 39 AD3d 211, 213-14 [1st Dept 2007]). Here, plaintiff submits her sworn testimony (Op. Aff., Exh. C, Exh. G, at 4), and verified complaint, from which, for purposes of this motion, in conjunction with the grounds of the reversal; sufficiently raises a factual question as to whether defendants’ employee fabricated the tag-switching claim, and sufficiently sets forth the initiation element of plaintiff’s claim.

An essential element in an action for malicious prosecution is the termination of the

²The court notes that defendants, in arguing that plaintiff cannot make out the initiation element, cite to the *Brown* case, but do not discuss the court’s statement that the record in that case conclusively demonstrated that the allegedly false evidence provided by the store’s employee *did not contribute* to the determination to arrest plaintiff (*see Brown*, 297 AD2d at 210). Here, plaintiff maintains that it was the false evidence provided by the store detective that was the basis for her arrest.

proceeding in favor of the accused (*Kellermueller v Port Auth. of N.Y. & N.J.*, 201 AD2d 427 [1st Dept 1994]). Defendants argue that the reversal was not an exoneration, as the Appellate Term vacated the conviction as a matter of discretion and in the interests of justice. “[A] plaintiff need not prove actual innocence in order to satisfy the favorable termination prong of a malicious prosecution action (*Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001] [termination not in plaintiff’s favor where felony conviction reversed not because of lack of culpability, but because the evidence was obtained pursuant to a faulty search warrant]). A dismissal in the interest of justice is not a favorable termination when it is inconsistent with the innocence of the accused (*Cantalino v Danner*, 96 NY2d 391 [2001]). However, where it is not inconsistent with the innocence of the accused, it may constitute a favorable termination (*see Hankins v Great Atl. & Pac. Tea Co.*, 208 AD2d 111 [1st Dept 1995]). The Court of Appeals has stated that “any termination of a criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination, so long as the circumstances surrounding the termination are not inconsistent with the innocence of the accused” (*Cantalino*, 96 NY2d at 395).

This court would not routinely regard a dismissal in the interests of justice, which generally encompasses mercy or fairness considerations, without more, as consistent with innocence and a determination in favor of the accused. However, in the instant reversal by the Appellate Term, while the definitive categorization of the Court’s reasoning is somewhat difficult, the Appellate Term explicitly stated that the reversal was not only in the interests of justice, but also as against the weight of the evidence. The Appellate Term also explicitly commented on the store’s substantially divergent accounts of the price tag switching conduct, and noted plaintiff’s apparent initial detention upon alleged suspicions that she was trying to steal a bathing suit. Furthermore, the Appellate Term

dismissed the Criminal Court information, and the case could not be brought again on that accusatory instrument.³ In light of the reversal on both grounds, the fact that the Appellate Term did not direct a new trial, but dismissed the information, and the unusual circumstances presented, the reversal cannot be fairly said to be inconsistent with plaintiff's innocence, and this court interprets the reversal as having been a termination in plaintiff's favor. Accordingly, defendants' argument for dismissal on this ground is unpersuasive.

Defendants argue that probable cause was established, because the trial court did not dismiss the case upon the close of the People's case, and found plaintiff guilty. Probable cause is presumed established by conviction. While it has been held that this presumption pertains even though later reversed on appeal, this presumption may be overcome by showing that the conviction was obtained by fraud, perjury or other undue means (*Lester v Solotaroff*, 273 App Div 32, 34 [1st Dept 1947]), and generally, probable cause is a jury question when the facts are in dispute or there exist conflicting evidence (*Maskantz*, 39 AD3d at 214; *Parkin v Cornell Univ.*, 78 NY2d 523 [1991]). Moreover, a presumption of probable cause does not attach to the denial of a motion made during the criminal trial for an order of dismissal on the ground that the evidence is legally insufficient (*Landsman v Moss*, 133 AD2d 359, 360 [2d Dept 1987] ["Evidence may be legally sufficient to support a charge although it does not provide reasonable cause to believe that the defendant committed the crime charged"]). Plaintiff has submitted evidence that raises a factual issue as to whether the conviction was obtained by improper means.

³"Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the weight of the trial evidence, the court must dismiss the accusatory instrument or any reversed count" (McKinney's CPL § 470.20 [5])

Defendants contend that plaintiff cannot make out the element of malice. Malice may be shown by a reckless or grossly negligent disregard of plaintiff's rights, as when defendant makes a false charge, as "[m]alice, in the malicious prosecution context, exists where the malicious prosecution defendant commences a criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (*Maskantz v Hayes*, 39 AD3d at 215 [citation and internal quotation marks omitted]; *Nardelli v Stramberg*, 44 NY2d 500, 502 [1978]). Because "a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding," and plaintiff has raised a fact issue as to whether there was probable cause, summary judgment dismissing plaintiff's claim is not warranted on this ground (*Maskantz*, 39 AD3d at 215 [citation and internal quotation marks omitted]).

Defendants argue that plaintiff should be judicially estopped from now claiming that she was not guilty because she moved to vacate her conviction on the ground of ineffective counsel, arguing that her criminal trial counsel failed to convey to the Criminal Court, and the District Attorney, her desire to accept a purported plea offer for disorderly conduct during trial. "Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995]). Defendants argue that plaintiff's position on the trial motion, that she would have agreed to a plea bargain for disorderly conduct, is consistent with guilt, and that plaintiff may not here change her position.

The Judge, who presided over the criminal trial and decided the trial motion against plaintiff, stated that plaintiff had consistently rejected a plea offer before trial, steadfastly maintaining her

innocence, and that no plea offer was available to her once the trial had begun (*People v Cleary*, 2 Misc 3d 1006(A), 2004 NY Slip Op 50158 (U) [NY City Crim Ct 2004]). Moreover, on this motion the evidence must be viewed in a light most favorable to the non-moving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007), that is, plaintiff. Thus, without addressing whether the application of judicial estoppel is even appropriate in this context, the court will not deem plaintiff's statement that she desired a plea to a violation, rather than risking conviction of a crime, where she claims the store employees were going to lie under oath against her in a shoplifting case, as establishing that plaintiff's prior position was that she was guilty. Although, perhaps, defendants at trial may attempt to offer plaintiff's affidavits for impeachment or other purposes, or plaintiff may have difficulty proving her claim at trial, in light of some of her own statements, these are not grounds for summary judgment.

Defendant raises section 218 of the General Business Law (GBL § 218) as a defense to the malicious prosecution claim. "[GBL § 218] gives a retail merchant a defense in an action for false arrest and imprisonment for its detention of a suspect shoplifter *if reasonable* even when the criminal actions are dismissed" (*Richardson v New York Univ.*, 202 AD2d 295, 296 [1994] [emphasis added]). Where there are reasonable grounds for detention, irrespective of the outcome of the criminal action, or the actual guilt or innocence of the accused, the merchant generally has a defense to a civil action based on the reasonableness of the detention. Whether there were reasonable grounds for the detention, however, is generally a question of fact to be determined by a fact finder (*Haggerty v Federated Dept. Stores, Inc.*, 65 Ad2d 617 [2d Dept 1978]), and defendants have not demonstrated that GBL § 218 bars the malicious prosecution claim as a matter of law, especially in light of plaintiff's contentions that defendants' employees invented the story about her shoplifting.

Defendants seek dismissal of plaintiff's false imprisonment claim arguing, among other things, that it is time barred, pursuant to CPLR 215 (3), because plaintiff did not commence her action within one year after the termination of her confinement. Plaintiff's conviction, until reversed, was a presumptively valid conviction, and thus dispositive of both guilt and probable cause. Consequently, until that conviction was reversed, plaintiff did not yet have a colorable claim for false imprisonment, as she did not yet have a colorable claim that her confinement by defendants was without privilege, an essential element of the claim. In *Britt v Legal Aid Soc., Inc.* (95 NY2d 443 [2000]), the Court noted that where a civil plaintiff (former criminal defendant) would not have a colorable claim for legal malpractice until the indictment was dismissed against him, the statute of limitations should be viewed as having begun to run at that point. The Court's reasoning in *Britt*, as well as the vital issue of judicial economy, apply here, and the accrual date for the false imprisonment claim is the date of the reversal of plaintiff's conviction. There is no dispute that the complaint in this action was filed within a year of such reversal. Consequently, plaintiff's cause of action is timely.

Defendants argue for dismissal of plaintiff's false imprisonment claim based on their GBL § 218 argument, and their contention that they had probable cause. As previously discussed, plaintiff has demonstrated triable issues of fact sufficient to defeat summary judgment concerning these arguments. Accordingly, to the extent that defendants raise such arguments concerning the other causes of action of the complaint, they will not be addressed again.

Defendants argue that they are entitled to summary judgment on plaintiff's abuse of process claim, because plaintiff cannot make out the elements of the claim. Defendants state that plaintiff claims only that a criminal information was issued against her, and that defendants intended to cause

her harm by misrepresenting the initial reason for the erroneous stop and by crafting subsequent false claims that she had switched tags on the merchandise. In addition, in the complaint, plaintiff alleges that by providing numerous inconsistent versions of testimony of the events, defendants used the criminal process in a perverted manner to cover their initial mistaken arrest of plaintiff, and that they subsequently fabricated claims.

Defendants argue that given its most liberal reading, plaintiff is alleging only that defendants acted maliciously in reporting her crime to the police, that the District Attorney made an independent decision to prosecute plaintiff, and plaintiff has not demonstrated lack of justification. Defendants further argue that plaintiff's claim that her counsel had been ineffective, because he failed to communicate to the People plaintiff's willingness to enter into a guilty plea, bars her from now claiming that she is not guilty.

In order to prevail on a claim of abuse of process, the plaintiff must establish that the defendants: (1) used regularly-issued process, either civil or criminal, (2) intended to do harm without excuse or justification, and (3) used the process in a perverted manner to obtain a collateral objective (*Matthews v New York City Dept. of Social Servs.*, 217 AD2d 413, 415 [1st Dept 1995], *lv denied* 87 NY2d 812 [1996]; *see generally Parkin v Cornell Univ.*, 78 NY2d 523 [1991], *supra* ["nothing in this Court's holdings would seem to preclude an abuse of process claim based on the issuance of process itself" (*id.*, at 531)]). A malicious motive alone does not give rise to a cause of action for abuse of process (*Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). "[D]efendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process" (*Board of Educ. of Farmingdale v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 403 [1975]). In her complaint plaintiff contends that defendants used process,

initiating a criminal complaint, for the purpose of covering up that they had mistakenly detained plaintiff concerning the bathing suit and fabricated claims about the tag switching. Determinations as to the defendants' interactions with the district attorney concerning the criminal trial, and the objective underlying defendants' alleged conduct, cannot be disposed of on this motion. Moreover, the complaint appears to speak to the use of process for purposes other than for which process is intended, that is, for an ulterior motive, and not merely for a malicious motive. Thus, the claim is sustained at this juncture.

Defendants argue that plaintiff's negligence claim (fourth cause of action) should be dismissed because it is nothing more than a recast claim for false imprisonment and malicious prosecution, and is time barred as an intentional tort.⁴ In the complaint, plaintiff alleges that defendants owed duties of care to detain her in a reasonable manner, for a reasonable time and for reasonable belief, and failed to meet this duty in their detention of plaintiff and their subsequent reporting of false claims to the police. Plaintiff further alleges that the proximate cause of both her conviction and the resulting injuries was defendants' conduct in knowingly carrying out, supervising and proceeding with the mistaken arrest and false claims. In her brief, plaintiff argues that there is a fact issue for trial as to whether defendants negligently supervised and trained their personnel, and engaged in a continuing tort by permitting a corporate culture that removed all incentive to report improper employee activity. Plaintiff argues that Bloomingdale's' negligent supervision permitted its employees to present fundamentally inconsistent testimony in the criminal case, and then to repudiate that testimony in this civil proceeding, without fear of jeopardizing their jobs.

“[A] lack of care does not convert [an] action from intentional tort to negligence” (*Salemeh*

⁴Plaintiff's withdrawn third cause of action also sounds in negligence.

v Toussaint, 25 AD3d 411 [1st Dept 2006] [citation and internal quotation marks omitted]). The gravamen of plaintiff's complaint concerns her claim of wrongful detention by defendants' store detective and defendants' wrongful conduct in initiating and participating in the prosecution against her based on falsehood. Such allegations speak of intent, and not negligence. Defendant is correct that plaintiff may not merely recast her claims.⁵ Accordingly, although plaintiff's malicious prosecution and false imprisonment claims have not been dismissed, plaintiff does not state a negligence claim, and that cause of action is dismissed.

Defendants move to dismiss plaintiff's claim for intentional infliction of emotional distress as time barred pursuant to the CPLR 215 (3) one year statute of limitations. Defendants also argue that the claim should be dismissed, because the complained of conduct does not rise to the level of extreme and outrageous behavior required to state such a claim, and because plaintiff did not suffer any emotional distress, based on when plaintiff claims she sought treatment. In the complaint, plaintiff alleges that she suffered physical and psychic manifestations of stress, including a severe case of shingles, caused by the proceedings, based on false accusations, which required her to seek medical assistance. In opposition, plaintiff does not dispute defendants' claim that the statute of limitations has expired, but argues that defendants' false accusations and failure to admit or correct matters were sufficiently extreme and outrageous to sustain her claim. The plaintiff was convicted in April 2003 and plaintiff does not state any acts on the part of defendants or injury caused by those acts that first occurred after that date. As plaintiff commenced her case in January 2007, defendants demonstrated their entitlement to summary judgment in their favor on the intentional infliction of

⁵The court also notes that the store's 100% prosecution policy of shoplifters is not negligence.

emotional distress cause of action as time barred. As plaintiff has not raised an issue of fact, the claim is dismissed. Consequently, the court need not address defendants' other arguments for dismissal of that claim.

Defendants move to dismiss plaintiff's demand for punitive damages. "[P]unitive damages may be awarded in an action for malicious prosecution if the party so charged was motivated by actual malice" (*Maskantz*, 39 AD3d at 215). Defendants' motion is denied.

Furthermore, the court notes that, in reply, defendants argue that plaintiff's version of events is illogical, because plaintiff testified that defendants did not carry the particular brand of bathing suit that plaintiff claims initially caused the store detective to detain her, and therefore, defendants contend, the store detective could not have detained plaintiff on suspicion of shoplifting because the detective could not have seen plaintiff "steal" a bathing suit that defendants did not have in their store. Defendants were aware of plaintiff's version of events prior to submitting their motion, yet raise this factual argument for the first time on reply, where plaintiff has not had an opportunity to respond. This is impermissible (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Even had defendants properly asserted this argument, it would have been unavailing. It is dependent on a resolution of factual issues, particularly credibility, and is more appropriate as argument in summation. Thus, whether and how plaintiff will address this argument must await trial.

Defendants also argue, in their reply, that plaintiff's claim that defendants' testimony was inconsistent is based on her distorted view of the testimony, and addresses only non-material issues that cannot support summary judgment. Defendants further argue that as the inconsistencies involve events that occurred after the detective observed plaintiff switching price tags, they do not detract

from the store detective's testimony that she observed plaintiff switching tags. First, questions of credibility are not susceptible to summary disposition (*see Glazer & Gottlieb v Nachman*, 233 AD2d 275, 275-276 [1st Dept 1996]) and defendants' argument presumes the truth of the detective's testimony, which is what plaintiff is challenging here. Second, the court has not relied on the alleged inconsistent testimony concerning the characteristics of the merchandise, such as the color of the pants, in making its decision.

Finally, in the moving papers, and also in reply, defendants rely on the *Richardson* case (202 AD2d 295, *supra*), to support their probable cause argument. Defendants also rely on *Richardson* to support their argument that "acquittal on appeal—whether in the interests of justice or because the evidence was deemed insufficient to meet the stringent 'beyond reasonable doubt' standard that applies in criminal actions—cannot overcome the establishment of probable cause that arises from the denial of a motion to dismiss at the close of the People's case" (Def. Reply Aff., at 22-23).

Richardson involved a plaintiff who, after trial, was acquitted of charges of petit larceny and possession of stolen property. The Appellate Division, First Department noted that the trial court found that, in a case where the criminal defendant was accused of stealing a computer by putting it under his jacket, the prosecution had failed to offer in evidence either the allegedly stolen computer or the jacket, and thus had not proved plaintiff's guilt beyond a reasonable doubt (*Richardson*, 202 AD2d at 296). The Appellate Division also noted that the trial court's refusal to dismiss the criminal action, after hearing the testimony of the store detective, supported the conclusion that there were reasonable grounds for the arrest of plaintiff and, thus, that defendants had met their summary judgment burden of demonstrating reasonable cause. *Richardson* is distinguishable from this case as in it the Appellate Division found only that defendant met its summary judgment burden regarding

probable cause, and that no issue of fact was raised by plaintiff's short affidavit, in which plaintiff did no more than repeat his claim that he did not intend to steal the computer. This does not speak to whether the criminal case at issue here terminated in plaintiff's favor, or whether plaintiff has here raised a fact issue for trial as to probable cause.

CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the third, fourth, sixth, seventh and eighth causes of action of the complaint are dismissed and is otherwise denied.

Dated: December 28 2009
New York, NY

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