5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

ANTONY SMITHIE,

Plaintiff,

-against-

KRISTIN SMITHIE,

Defendants.

----------x

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 11
Index No.:016631/09
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

Plaintiff's Notice of Motion	01
Defendant's Notice of Cross Motion	02
Plaintiff's Reply & Opposition to Cross Motion	xx
Defendant's Reply Affidavit in Support of Motion and Opposition to Cross-Motion	xx

In motion sequence number one, the plaintiff moves for an order pursuant to CPLR §3212 granting partial summary judgment on the First, Second, Third, Fourth and Fifth Causes of Action set forth in the Verified Complaint, together with costs and disbursements. In motion sequence number two, defendant moves for an order pursuant to CPLR §3025(b) granting defendant permission to amend the Answer in this action to reflect the proposed Amended Answer which asserts the affirmative defense of the expiration of the statute of limitations. The defendant also requests an order dismissing the plaintiff's complaint, in its entirety, pursuant to CPLR §3211; or in the alternative, pursuant to CPLR §3212 granting summary judgment in defendant's favor with respect to the Complaint in its entirety; and awarding defendant the costs and fees, including reasonable attorneys' fees.

The parties are involved in a matrimonial action under Index No. 202520/2007; Calendar No. 2011CM0103 in the Supreme Court Nassau County. By short form order dated December 16, 2010, under index no. 202520/2007, the within tort action was not consolidated with the pending matrimonial action.

On or about December 23, 2010, the within tort action was randomly assigned to the undersigned.

The plaintiff's motion had an initial return date of August 5, 2010. The cross-motion had an initial return date of September 24, 2010.

After conferences and oral arguments in March and April, 2011, the motions in the within tort action were submitted for decision on May 23, 2011.

This court notes at the outset that although the parties are not strangers to litigation against each other in prior and concurrent judicial proceedings, a Preliminary Conference Stipulation and Order pursuant to sections 22 NYCRR 202.8 and 22 NYCRR 202.12 of the Uniform Rules of the Court has not been executed by the respective counsel in the within tort action. Moreover, it does not appear that any discovery has taken place.

The allegations in the within tort action arise out of numerous domestic incidents, as well as Supreme Court, Family Court and Criminal Court proceedings in which the parties have been or are presently involved. The complaint sets forth the following causes of action:

First:	False Imprisonment/False Arrest
Second:	Malicious Prosecution
Third:	Abuse of Process
Fourth, Fifth & Sixth:	Defamation and Libel
Seventh:	*Prima facie* tort
Eighth:	Intentional Infliction of Emotional Distress

The court will first address the defendant's application to serve an Amended Answer to assert an affirmative defense based on the statute of limitations.

This action was commenced on August 18, 2009. The motion to serve an Amended Answer was initially calendared for a return date of September 24, 2010. Defendant asserts the plaintiff's cause of action for false imprisonment and false arrest relate solely to the plaintiff's arrest and period of confinement that occurred on June 28, 2008, the date he was arraigned and released from court. *Charnis v Shohet*, 2 AD3d 663 [2d Dept 2003]. Since this action was not commenced until August 18, 2009, defendant asserts the cause of action for false imprisonment and false arrest would be time barred.

Pursuant to CPLR §3025(b), a court, in its discretion, may permit a party to amend an answer. "If the adverse party fails to demonstrate that the proposed amendment will unduly prejudice that party, the court should exercise its jurisdiction in favor of the movant." *Getz v Getz*, 130 AD2d 710 (2d Dept 1987). Plaintiff argues that assuming *arguendo*, the defendant is correct and the plaintiff's cause of

action for false arrest occurred on June 20, 2008, at the time the defendant interposed her original Answer, September 10, 2009, the plaintiff still had a cause of action against Nassau County for false arrest, since the statute of limitations is not one year but one year and ninety days, citing General Municipal Law § 50-i(1)(C) and *Shannon v Westchester County Health Care Corp.*, 76AD3d 680 (2d Dept 200). However, if a complaint served after the expiration of 90 days but within the statutory period for the commencement of an action could be deemed to be a notice of claim, then the entire statutory scheme requiring the filing of notices of claim within 90 days would be obviated. *Tarquinio v City of New York*, 84 AD2d 265 (1st Dept 1982) *aff'd Pierson v City of New York*, 56 NY2d 950 [1982]. In considering the definition of "prejudice" that would operate to prevent a court from granting leave to amend, David Siegel, Esq. in *New York Practice* (§ 237) stated as follows:

> So, the showing of prejudice that will defeat the amendment must be traced right back to the omission from the original pleading of whatever it is that the amended pleading wants to add – some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add.

The belated expectation that the plaintiff might have had a putative claim against Nassau County for false imprisonment/arrest had the affirmative defense of statute of limitations been raised sooner is not sufficient prejudice to deny the motion to amend the complaint to assert a defense alleging the statute of limitations.

Defendant's application pursuant to CPLR §3025(b) for permission to serve an Amended Answer asserting the affirmative defense of the statute of limitations is ***granted***. The Amended Answer, a copy of which is annexed to the Notice of Cross-Motion is deemed served. Plaintiff shall have 20 days from service of a copy of this order with Notice of Entry to serve a reply.

The complaint sets forth viable causes of action sounding in false imprisonment/false arrest; malicious prosecution; abuse of process; defamation and libel; *prima facie* tort; and infliction of emotional distress. On a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept as

true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference, "determining only" whether the facts as alleged fit within any cognizable legal theory *(Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *see Polonetsky v Better Homes Depot*, 97 NY2d 46 [2001]; *Leon v Martinez*, 84 NY2d 83 [1994]. On a motion to dismiss, the plaintiff has no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint *(see Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455 [2d Dept 2002]; *Paulsen v Paulsen*, 148 AD2d 685 [2d Dept 1989]; *Palmisano v Modernismo Pub., Ltd.*, 98 AD2d 953 [4th Dept 1983]).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2d Dept 2001]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656 [2 Dept 2004], *Rudinsky v Robbins*, 191 AD2d 488 [2d Dept 1993]). Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust, supra: Greco v Posillico*, 290 AD2d 532 [2d Dept 2002], *Gniewek v Consolidated Edison Co.*, 271 AD2d 643 [2d Dept 2000]; *Judice v DeAngelo*, 272 AD2d 583 [2 Dept 2000]). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v Glove Mfg. Corp.*, 34 NY2d 338 [1974]; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655 [2d Dept 2004]; *Greco v Posillico, supra; Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445 [2d Dept 2001]), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *Glover v City of New York*, 298 AD2d 428 [2d Dept 2002]; *Perez v Exel Logistics*, 278 AD2d 213 [2d Dept 2000]; *see Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902 [4 Dept 2001]; *Russell v Kraft, Inc.* 284 AD2d 386 [2 Dept 2001]; *Pace v International Bus. Mach. Corp.*, 248 AD2d 690, 691 [2 Dept 1998]; *Antonucci v Emeco*

Indus., 223 AD2d 913 [3 Dept 1996]. Moreover, where issues are disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts. *Kriz v Schum*, 75 NY2d 25 [1989]. A party does not carry its burden in moving for summary judgment by pointing to gaps in the opponent's proof, but must affirmatively demonstrate the merits of his or her claims or defenses. *Fromme v Lamour*, 292 AD2d 417 [2 Dept 1002]; *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 183 AD2d 614 [1st Dept 1992]. The respective parties characterization of events and the motivation preceding them are so disparate, that to even summarize the conflicting factual positions might be misconstrued by the litigants as unfairly favoring the other, without enhancing the resolution of the matter. Except as to the application to serve an Amended Answer, all relief not specifically granted is ***denied***.

The parties and their counsel are admonished that this court will not permit unfettered delay in concluding discovery and certifying this action ready for trial. Counsel are precluded from making further summary judgment motions. In the interests of the financial resources of the litigants, in the event the parties cannot stipulate as to those factual issues relating to the statute of limitations, such as the date when the cause of action for false imprisonment accrued, they shall be referred to the trial of this action for determination by the trier of the facts. For example, if its is established the defendant was arrested, arraigned and released on June 20, 2008, the statute of limitation would preclude the assertion of a cause of action sounding in false arrest. Moreover, to the extent any of the alleged defamatory statements were made prior to August 18, 2008 – one year prior to the commencement of this action – those claims would be time barred. Bassim v Hassett, 184 AD2d 908 [1982].

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on June 30, 2011, at 9:30 a.m. This directive, with

respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendant.

The Preliminary Conference Stipulation and Order (¶ 11) shall provide for a Compliance/Certification Conference date of August 30, 2011, at which time counsel for each party familiar with the case must be present and certify that discovery has been completed, settlement discussions have been unsuccessful and the case is ready for trial. Failure to comply with the terms and conditions of this order, may result in sanctions and orders of preclusion may ensue.

This constitutes the Decision and Order of the Court.

DATED: June 22, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

F:\Smithie v Smithie DEG.wpd

ENTERED
JUN 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE