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| <b>Mordukhayev v hilton Times Sq.</b>                                                                                                                                                                                            |
| 2012 NY Slip Op 32429(U)                                                                                                                                                                                                         |
| September 13, 2012                                                                                                                                                                                                               |
| Supreme Court, Queens County                                                                                                                                                                                                     |
| Docket Number: 27405/11                                                                                                                                                                                                          |
| Judge: Howard G. Lane                                                                                                                                                                                                            |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

|                              |                      |
|------------------------------|----------------------|
| -----                        | Index No. 27405/11   |
| IRINA MORDUKHAYEV,           | Motion               |
| Plaintiff,                   | Date August 14, 2012 |
| -against-                    | Motion               |
| HILTON TIMES SQUARE, et al., | Cal. No. 18          |
| Defendants.                  | Motion               |
| -----                        | Sequence No. 2       |

|                                         |                 |
|-----------------------------------------|-----------------|
|                                         | <u>Papers</u>   |
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Upon the foregoing papers it is ordered that this motion by defendant, SECUREWATCH24, LLC pursuant to CPLR 3211(a) dismissing the Complaint of plaintiff, Irina Mordukhayev prior to submission of an Answer is hereby decided as follows:

Plaintiff, Irina Mordukhayev is a former Room Attendant at the Hilton Times Square Hotel whose employment was terminated on December 22, 2009. Plaintiff brings causes of action for: harassment, false imprisonment, violation of search and surveillance and hotel negligence, intentional infliction of emotional distress, wrongful termination/prima facie tort, defamation of character, slander, libel, disparagement in trade, breach of contract/unpaid wages/future wages, and punitive damages. Defendant, SECUREWATCH24, LLC now moves to dismiss the Complaint.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (219 Broadway Corp. v. Alexanders, Inc., 46 NY2d 506 [1979]; Tougher Industries, Inc. v. Northern

Westchester Joint Water Works, 304 AD2d 822 [2d Dept 2003])). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; Hoag v. Chancellor, Inc., 246 AD2d 224 [1<sup>st</sup> Dept 1998])).

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant, Securewatch24, LLC for failure to state a cause of action is decided as follows: "It is well settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999])). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992])). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (Jericho Group, Ltd. v. Midtown Development, L.P., 32 AD3d 294 [1<sup>st</sup> Dept 2006][internal citations omitted])).

Plaintiff alleges in her Verified Complaint, the following causes of action:

- 1) harassment
- 2) false imprisonment
- 3) violation of search and surveillance and hotel negligence
- 4) intentional infliction of emotional distress
- 5) wrongful termination/prima facie tort

- 6) defamation of character
- 7) slander
- 8) libel
- 9) disparagement in trade
- 10) breach of contract/unpaid wages/future wages
- 11) punitive damages

### **Harassment**

There is no common-law cause of action for harassment in New York (Mago v. Singh, 47 AD3d 772 [2d Dept 2008]).

Accordingly, the first cause of action for harassment is dismissed.

### **False Imprisonment**

"To establish a cause of action for false imprisonment the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged (Restatement, 2d, Torts, § 35; but see, Prosser, Torts [4th ed], § 11, which rejects the requirement that the plaintiff must be conscious of the confinement)" (Broughton v. State of New York, 37 NY2d 451 [NY 1975]).

This Court finds that the Complaint states a cause of action for false imprisonment via ¶'s 38-42 of the Verified Complaint.

### **Violation of Search and Surveillance and Hotel Negligence**

Plaintiff alleges a violation of General Business Law § 395-b in that the installation of viewing devices in hotel rooms assigned to guests and patrons of a hotel is prohibited, however, "General Business Law 395-b does not create an independent cause of action for persons harmed by a violation of its provisions" (Hering v. Lighthouse 2001, LLC, 21 AD3d 449 [2d Dept 2005]).

Accordingly, the third cause of action for violation of search and surveillance is dismissed.

### **Intentional Infliction of Emotional Distress**

The Court of Appeals of New York in Howell v. New York Post Company, 596 NYS2d 350 [1993], held:

"The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress..."

That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fourth cause of action is granted as it is barred by the one-year statute of limitations in that the allegations are based on events that occurred on or before December 20, 2009 (CPLR 215[3]; Patterson v. Balsamico, 440 F3d 104 [2d Cir 2006]).

### **Wrongful Termination of Employment/Prima Facie Tort**

"New York does not recognize the tort of wrongful discharge" (Lobosco v. N.Y. Tel Company/NYNEX, 96 NY2d 312 [2001]).

As such, the fifth cause of action for wrongful termination of employment is dismissed.

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (Curiano v. Suozzi, 63 NY2d 113, 117; Burns Jackson Miller Summit & Spitzer v. Lindner, 59 NY2d 314, 332). A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages (see, Curiano v. Suozzi, *supra*, at p 117; ATI, Inc. v. Ruder & Finn, *supra*, at p 458; Morrison v. National Broadcasting Co., 19 NY2d 453, 458; Nichols v. Item Publishers, 309 NY 596, 602; Susskind v. Ipco Hosp. Supply Corp., 49 AD2d 915)" (Freihofer v. Hearst Corp., 65 NY2d 135 [1985]).

As plaintiff's Complaint fails to allege that the moving defendants' actions were motivated by "disinterested malevolence," the fifth cause of action for prima facie tort is dismissed (R.I. Is. House, LLC v. North Town Phase II Houses, Inc., 51 AD3d 890 [2008]).

### **Defamation of Character**

"Under New York law, a claim for defamation must allege: (1) a false statement about the complainant; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; (4) that either constitutes defamation per se or caused special damages" (Fuji Photo Film U.S.A., Inc. v. McNulty, 669 FSupp2d 405 [SDNY 2009]).

As plaintiff has failed to satisfy the second element that statements were published to a third party without authorization or privilege, the sixth cause of action for defamation of character shall be dismissed.

### **Slander**

"To state a cause of action for slander, a plaintiff must allege: (1) a communication casting doubt on the validity of plaintiff's title; (2) that is reasonably calculated to cause harm; (3) resulting in special damages (39 College Point Corp. v. Transpac Capital Corp., 27 AD3d 454, 455, 810 NYS2d 520 [2d Dept 2006]). Moreover, CPLR 3016(a) states that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint. . . ." (Sanger v. Bower, Sanger & Lawrence, PC, 2010 NY Slip Op 30564U [Sup Ct, NY County 2010]; see also, Conley v. Gravitt, 133 AD2d 966 [3d Dept 1987]).

As the plaintiff's Complaint has failed to allege special damages, the seventh cause of action for slander shall be dismissed.

### **Libel**

"The elements of libel are: (1) a false and defamatory statement of fact, (2) regarding the plaintiff, (3) which are published to a third party and which (4) result in injury to plaintiff" (Floyd Harbor Animal Hosp. v. Doran, 2009 NY Slip Op 32868U [Sup Ct, Suffolk County 2009][internal citations omitted]; see also, Idema v. Wagner, 120 FSupp2d 361 [SDNY 2000]).

"In order to state a cause of action for libel, 'the particular words complained of' must be 'set forth in the complaint'" (Sandiford v. City of New York Sept of Educ, 2010 NY Slip Op 50240U [Sup Ct, NY County 2010]; see also, Conley v. Gravitt, supra).

As the Complaint fails to allege the specific words complained of, the eighth cause of action for libel is dismissed.

### **Disparagement in Trade**

As the plaintiff fails to set forth the alleged disparaging statement with the requisite particularity, the ninth cause of action for disparagement in trade is dismissed (White Chocolate Mgt., LLC v. Jackson, 2009 NY Lip Op 33089U [Sup Ct, NY County 2009]; CPLR 3016[a]).

### **Breach of Contract/Unpaid Wages'/Future Wages**

"A complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations . . . ." (Melito v. Interboro Mut. Indem. Ins. Co., 73 AD2d 819, 820 [4<sup>th</sup> Dept 1979]). In the instant cause of action, the plaintiff fails to set forth supporting facts that the terms of a contract were breached.

Accordingly, the tenth cause of action is dismissed.

### **Punitive Damages**

"Plaintiff claims punitive damages as a separate cause of action. New York State does not recognize such a claim as a separate cause of action; rather it is merely one element of the total damages of a cause of action" (Green v. Fischbein Olivieri Rozenholc & Badillo, 119 AD2d 345 [1st Dept 1986]).

Accordingly, the eleventh cause of action for punitive damages is dismissed.

As such, all of plaintiff's causes of action are dismissed except for the second cause of action for false imprisonment.

Defendant may serve an Answer within twenty (20) days of service of a copy of this order with Notice of Entry.

This constitutes the decision and order of the Court.

Dated: September 13, 2012

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Howard G. Lane, J.S.C.