

Ifebuzor v Macy's Inc.
2014 NY Slip Op 33187(U)
November 3, 2014
Supreme Court, Bronx County
Docket Number: 303247/2014
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MARY IFEBUZOR,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 303247/2014

MACY'S INC, LAW OFFICES OF PALMER, REIFLER
AND ASSOCIATES, P.A. and SHANIQUA BAILEY,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated September 12, 2014 of defendants Macy's, Inc. s/h/a Macy's Inc and Shaniqua Bailey and the affirmation and exhibits submitted in support thereof (Motion Sequence #1); plaintiff's affirmation in opposition dated September 28, 2014 and the exhibit submitted therewith; the notice of motion dated September 12, 2014 of defendant Law Offices of Palmer, Reifler & Associates, P.C. s/h/a Law Offices of Palmer, Reifler and Associates, P.A. and the affirmation and exhibit submitted in support thereof (Motion Sequence #2); there being no opposition to the application; the affirmation in reply dated October 30, 2014 of defendant Law Offices of Palmer, Reifler & Associates, P.C. s/h/a Law Offices of Palmer, Reifler and Associates, P.A.; and due deliberation; the court finds:

Defendants' motions for dismissal of the complaint are consolidated for decision herein, inasmuch as they involve common questions of fact and law. As a preliminary matter, although no indication of remand has been filed with this court, the court assumes as true, for purposes of entertaining the motions, counsel's assertion as an officer of the court that on August 14, 2014 this action, previously removed to Federal Court, was remanded to Supreme Court.

Plaintiff's complaint alleges "negligent" false arrest and negligent hiring, training and

retention against defendant Macy's, Inc. s/h/a Macy's Inc ("Macy's"); abuse of process against Macy's and defendant Shaniqua Bailey ("Bailey"); and conspiracy against Macy's and defendant Law Offices of Palmer, Reifler & Associates, P.C. s/h/a Law Offices of Palmer, Reifler and Associates, P.A. ("Palmer"). Macy's and Bailey move pursuant to CPLR 3211(a)(5) (statute of limitations) and Palmer moves pursuant to CPLR 3211(a)(5), (7) (failure to state a cause of action) to dismiss the complaint.

False arrest and abuse of process claims are subject to one-year statutes of limitations. *See* CPLR 215(3); *Spinale v. 10 W. 66th St. Corp.*, 291 A.D.2d 234, 736 N.Y.S.2d 879 (1st Dep't 2002). This action was commenced on June 11, 2014 for events occurring on June 12, 2011 (the charges against plaintiff were dismissed on April 19, 2012). Accordingly, such claims are untimely. Plaintiff cannot convert a cause of action for false arrest merely by invoking the word "negligent."

Furthermore, New York does not recognize a separate cause of action for civil conspiracy, although "a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." *American Preferred Prescription, Inc. v. Health Mgmt.*, 252 A.D.2d 414, 416, 678 N.Y.S.2d 1, 3 (1st Dep't 1998). The claim stands or falls with the underlying tort. *See Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC*, 82 A.D.3d 1035, 920 N.Y.S.2d 123 (2d Dep't 2011). As there is no viable underlying cause of action with respect to any conspiratorial act alleged, the conspiracy cause of action must therefore be dismissed.

Plaintiff's only argument in opposition to Macy's and Bailey's motion was as to the cause of action for negligent hiring and retention, claiming that it is subject to a three-year statute of limitations. Plaintiff offered no other argument with respect to any other defendant or any other cause of action, and did not oppose Palmer's motion.

Although Macy's and Bailey's notice of motion cited only CPLR 3211(a)(5) as the basis for the application, their argument regarding the cause of action for negligent hiring, training and retention was clearly premised upon the failure to state a cause of action. Despite the use of headings, courts look to the substance of statutes, *see Dumbarton Oaks Rest. & Bar, Inc. v. New York State Liq. Auth.*, 58 N.Y.2d 89, 446 N.E.2d 128, 459 N.Y.S.2d 564 (1983); regulations, *see Matter of Kirschenbaum*, 29 A.D.3d 96, 812 N.Y.S.2d 54 (1st Dep't 2006); contracts, *see 737 Park Ave. Acquisition LLC v. Shalov*, 106 A.D.3d 513, 964 N.Y.S.2d 533 (1st Dep't 2013); and papers filed in court, *see Dinaburg v. Denihan*, 2013 N.Y. Misc. LEXIS 1412, 2013 NY Slip Op 30685(U) (Sup Ct Suffolk County Apr. 1, 2013); *NRT New York, Inc. v. B&G Hampton Prop. LLC*, 2008 N.Y. Misc. LEXIS 9665 n 1, 2008 NY Slip Op 32351(U) (Sup Ct N.Y. County Aug. 12, 2008), to determine what is truly at issue.

It is generally error to grant a motion on a ground not raised by the moving papers. *See Varo, Inc. v. Alvis PLC*, 261 A.D.2d 262, 691 N.Y.S.2d 51 (1st Dep't 1999). The overriding concerns are a party's notice of the arguments made against him, *see SAF LaSala Corp. v. S&H 88th St. Assocs.*, 138 A.D.2d 241, 525 N.Y.S.2d 206 (1st Dep't 1988); the opportunity to respond to such arguments, *see Dannasch v. Bifulco*, 184 A.D.2d 415, 585 N.Y.S.2d 360 (1st Dep't 1992); and the prejudice resulting from the court's entertainment of the movant's arguments; *see Dean R. Pelton Co. v. Moundsville Shopping Plaza, Inc.*, 173 A.D.2d 201, 569 N.Y.S.2d 424 (1st Dep't 1991).

Bearing those principles in mind, the court sees no prejudice in entertaining Macy's and Bailey's argument regarding the cause of action for negligent hiring, training and retention on the basis of a failure to state a cause of action, even though statute of limitations was the only ground stated in the notice of motion. The argument was explicitly made and plaintiff was given an adequate opportunity to respond to the motion. As to the merits of defendants' argument, claims of

negligent hiring, training and retention cannot support false arrest and/or malicious prosecution claims. *See Medina v. City of New York*, 102 A.D.3d 101, 953 N.Y.S.2d 43 (1st Dep't 2012); *Ramos v. City of New York*, 285 A.D.2d 284, 729 N.Y.S.2d 678 (1st Dep't 2001).

Accordingly, it is

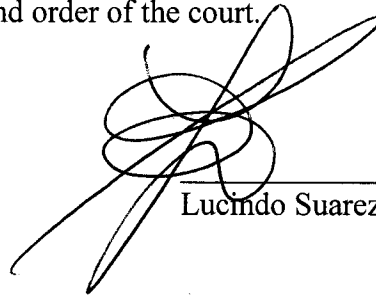
ORDERED, that the motion of defendants Macy's, Inc. s/h/a Macy's Inc and Shaniqua Bailey for dismissal of the complaint is granted (Motion Sequence #1); and it is further

ORDERED, that the motion of defendant Law Offices of Palmer, Reifler & Associates, P.C. s/h/a Law Offices of Palmer, Reifler and Associates, P.A. for dismissal of the complaint is granted, on default and without opposition (Motion Sequence #2); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the complaint.

This constitutes the decision and order of the court.

Dated: November 3, 2014



Lucindo Suarez, J.S.C.