

Trevino v Sandler

2015 NY Slip Op 31934(U)

October 19, 2015

Supreme Court, New York County

Docket Number: 157843/2012

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 35

-----X
 MIGDALIA TREVINO,

Plaintiff,

Index No. 157843/2012

-against-

DECISION/ORDER

WILLIAM SANDLER,

Defendant.

-----X
 HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, wrongful eviction and false arrest, defendant William Sandler (“defendant”) moves for summary judgment dismissing the complaint of the plaintiff Migdalia Trevino (“plaintiff”), for judgment against plaintiff on his counterclaim, and for costs, disbursements and expenses. Defendant also requests that this matter be referred to a Special Referee on the issue of reasonable attorney’s fees, that a report and/or recommendation of said Special Referee be accepted, and that defendant be awarded attorney’s fees. In the alternative, defendant requests that plaintiff, a resident of the State of Georgia, be ordered to post a security bond with the Clerk of the Court.

In response, plaintiff moves for partial summary judgment on her first cause of action for wrongful eviction, and to dismiss defendant’s counterclaim pursuant to CPLR §3211 for failure to state a cause of action.

Factual Background

This action arises out a studio cooperative apartment owned by defendant in New York, New York (the “apartment”).

Plaintiff and defendant first met at a Starbucks in Manhattan in the Spring of 2008

through an advertisement on Craigslist. Plaintiff claims it was an advertisement for a room rental; defendant states it was an advertisement for “casual encounters” or “men seeking women.”

After some time, defendant gave plaintiff keys to the apartment, and allowed her to use two drawers for clothing and personal items. Defendant often traveled, leaving the apartment for weeks or months at a time. It is uncontested that defendant never asked plaintiff to return the keys.

According to defendant, in the Fall of 2011, when it was brought to his attention that plaintiff was using the apartment to sell drugs and for prostitution, defendant confronted plaintiff about news he received that she was using the apartment for drugs and prostitution. Defendant undertook to monitor information concerning the building and searched the internet, which revealed photographs of plaintiff in his apartment related to advertisements for sexual services.

After the disagreement, and when defendant was unable to gain entry into his apartment, defendant filed a petition in Housing Court for possession of the apartment, and obtained a temporary order granting him access to the apartment (for the purpose of obtaining his possessions). Plaintiff states that she was unable to access the apartment because defendant changed the locks and filed a police report for the alleged illegal lockout. Defendant also filed a police report alleging that plaintiff threatened to “cut” him if he returned to the apartment.

Upon plaintiff’s later return to the apartment to retrieve her belongings, she was arrested.

Consequently, plaintiff commenced this action, alleging that she had been renting defendant’s apartment for approximately three years, until he changed the locks on November 10, 2011 and refused her access to the apartment. Defendant allegedly made false statements to the

police which caused her to be arrested and prosecuted without cause. After being held in jail for 55 hours, all charges were dismissed. Further, her personal belongings in the apartment were never returned to her. Plaintiff asserts the following causes of action: (1) wrongful eviction; (2) false arrest; (3) malicious prosecution; (4) intentional infliction of emotional distress; (5) negligence; and (6) conversion of plaintiff's personal property.

In response, defendant counterclaim for damages allegedly arising from plaintiff's negligence and intentional conduct, and defamation based on the allegations in her complaint.

Discussion

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 (Supreme Court, New York County 2012), *aff'd*, 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra*, *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

Wrongful Eviction

As to plaintiff's wrongful eviction claim, as cited by plaintiff in opposition, New York City Admin. Code § 26-521 provides, as relevant herein:

Unlawful eviction.

a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling

unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer . . . except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:

- (1) using or threatening the use of force to induce the occupant to vacate the dwelling unit; or
- (2) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or
- (3) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

As also cited by plaintiff (in opposition), RPAPL 853, entitled "Action for forcible or unlawful entry or detainer; treble damages," provides:

If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.

Whether plaintiff is entitled to damages for unlawful eviction pursuant to Admin. Code § 26-521 or RPAPL 853 turns on whether she was a "lawful occupant" or "tenant," respectively (see, *Tantaro v Common Ground Community Housing Dev. Fund, Inc.*, 2015 WL 1227944, 2015 N.Y. Slip Op. 30379(U) (Trial Order) [Supreme Court, New York County 2015] McKinney's RPAPL § 853, Practice Commentaries, by Rudolph de Winter and Larry M. Loeb).

Defendant failed to establish, as a matter of law, that plaintiff was a mere invitee or licensee who was not entitled to legal process prior to being restricted from access to the apartment (cf. *Tantaro v Common Ground Community Housing Dev. Fund, Inc.*, *supra*).

Defendant's contention, that plaintiff was never a party to lease agreement is not

dispositive, given that recovery for wrongful eviction is not limited to those who are parties to a lease agreement. Defendant failed to cite to any authority requiring the existence of lease in order to pursue a wrongful eviction claim. Thus, defendant's response that plaintiff did not "lawfully occupy" the apartment because she did not have a lease is insufficient, especially given defendant's acknowledgment that plaintiff "was permitted to stay" at the apartment (Affirmation in Opposition to Cross-Motion, ¶6; defendant's EBT, p 56 "she had my permission to be there. I am not alleging that she broke in."). Further, defendant's contention that plaintiff "didn't even pay rent" (Affirmation in Support of Motion, ¶30) is disputed. And, that such rent was "paid on her behalf" is also inconsequential. Plaintiff's inability to provide proof of rental payments does not defeat her claim that she made such payments, given her testimony that such receipts remained in the apartment and that she was unable to access them due to actions undertaken by defendant.

And, plaintiff's failure to respond to defendant's Notice to Admit dated May 28, 2014 does not warrant a different result. A party is deemed to have admitted the facts contained in a notice to admit when he or she fails to timely respond to same (*Hernandez v City of New York*, 95 AD3d 793945 NYS2d 292 [1st Dept 2012] citing CPLR 3123 [a]). The notice to admit essentially requires plaintiff to admit that certain photographs attached thereto depict plaintiff inside defendant's apartment and were posted on the internet site "mybackpage.com," that plaintiff resided at another address on 121st Street, New York, New York from July 2009 through 2010, and that a notice of petition for nonpayment of rent concerning such address dated April 2010 was filed against plaintiff in Civil Court. Even assuming the truth of the matters alleged in defendant's notice to admit, such facts do not establish that plaintiff was a invitee or

licensee or that she committed prostitution in the unit *during the 30-day period prior to her alleged illegal lock out on November 10, 2011.*

In addition, defendant failed to set forth any caselaw indicating that, even assuming plaintiff's use of his apartment for prostitution some time prior to the 30-day period leading to the alleged illegal lockout bars her claim as a matter of law.

And, while defendant challenges plaintiff's deposition testimony as incredulous, issues as to plaintiff's credibility cannot be resolved on a motion for summary judgment (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 744 NYS2d 20 [1st Dept 2002] ("While defendant questions [plaintiff's] credibility, issues as to witness credibility are not appropriately resolved on a motion for summary judgment"); *Yaziciyan v Blancato*, 267 AD2d 152, 700 NYS2d 22 [1st Dept 1999] ("deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact"))).

Furthermore, defendant failed to establish that plaintiff's claim is barred by the Statute of Frauds, General Obligations Law §5-703(2), which provides:

A contract for the leasing for a longer period than one year . . . is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

Although it is uncontested that the parties never entered into a written lease, the existence of a written lease is not required to maintain an action for wrongful eviction. Nevertheless, plaintiff raised an issue of fact as to the length of her occupancy at the apartment. Plaintiff submits documentation indicating that she was evicted from her prior residence in May 2010, and asserts that she rented the apartment on a *weekly* basis and had no other residence (other than the

subject apartment) up until the date defendant changed the locks to the apartment. It is noted that defendant testified that during the times he was not traveling, plaintiff stayed at the apartment “maybe one out of every five nights or so”; however, defendant also stated that he traveled for long periods of time, and therefore, did not know when plaintiff was at the apartment while he was traveling. Therefore, it cannot be said as a matter of law that General Obligations law § 5-703(2) applicable to leases more than one year applies so as to bar plaintiff’s wrongful eviction claim.

Therefore, the branch of defendant’s motion to dismiss the wrongful eviction claim is denied.

Based on issues of fact regarding whether plaintiff was a lawful occupant of the apartment dwelling unit for 30 consecutive days prior to November 10, 2011 or a “tenant” when she was allegedly illegally locked out, summary judgment in her favor is also denied.

False Arrest and Malicious Prosecution

The elements of a false arrest and false imprisonment claims require allegations that: (1) the defendant intended to confine the plaintiff, (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 (*Clifford v DeCurtis*, 22 Misc. 3d 1103(A) [Supreme Court, New York County 2008] citing *Broughton v State*, 37 N.Y.2d 451, 456, cert denied 423 U.S. 929 [1975]).

To establish a cause of action for malicious prosecution, the plaintiff must allege (1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the proceeding, and (4) actual malice (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 797

NYS2d 83 [1st Dept 2005] citing *Broughton v State of New York*, 37 NY2d 451, 457, 373 NYS2d 87 [1975], cert. denied sub nom. *Schanbarger v Kellogg*, 423 US 929, 96 SCt 277 [1975]). An action brought with actual malice is one brought with “conscious falsity” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, *supra*). Furthermore, the plaintiff must allege that the underlying action was filed with “a purpose other than the adjudication of a claim,” and that there was “an entire lack of probable cause in the prior proceeding” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, *supra*).

Defendant’s contention that “it was not [him] who arrested or imprisoned the plaintiff” is insufficient to warrant dismissal of the false arrest and malicious prosecution claims.

However, to the degree defendant argues that he cannot bear civil liability for the actions of law enforcement and public officials, who made the determination of probable cause, dismissal is warranted, inasmuch as the determination rested with the police as to whether an arrest should be made. “[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” (*Clifford v DeCurtis*, 22 Misc 3d 1103(A) *supra*, citing *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 688 NYS2d 12 [First Department 1999]). Identifying plaintiff as the perpetrator of a crime, signing the summons or testifying at trial does not give rise to tort liability (*Du Chateau v Metro-North Commuter R.R. Co.*, *supra* citing *Collins v Brown*, 129 AD2d 902, 514 NYS2d 538; *Pugach v Borja*, 175 Misc 2d 683, 670 NYS2d 718 and *Eisenkraft v Armstrong*, 172 AD2d 484, 486, 567 NYS2d 840 [defendant “merely provided information to the police and there is nothing to indicate that she

commenced the proceeding against the plaintiff or that she instigated the arrest”). Here, all that has been shown is that defendant reported the phone call wherein plaintiff threatened to “cut” defendant and signed the supporting deposition (*Du Chateau v Metro–North Commuter R.R. Co.*, *supra* (reporting the incident, identifying plaintiff, signing the summons as a complaining witness and testifying at the original trial held insufficient)).

Plaintiff’s conclusory assertion that defendant gave false information in retaliation to her own police report, and her denial of making threats, is insufficient. It “must be shown that defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act” and the record does not indicate that defendant “did anything other than provide the police with information and sign the criminal complaint at the request of the police. Such conduct by a civilian complainant is insufficient to support a claim for malicious prosecution” (*Brown v Sears Roebuck and Co.*, 297 AD2d 205, 746 NYS2d 141 [1st Dept. 2002]).

As such, the false arrest and malicious prosecution claims are dismissed.

Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are (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 (*Graupner v Roth*, 293 AD2d 408, 742 NYS2d 208 [1st Dept 2002] *citing Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized

community" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978]). This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, "every one has failed because the alleged conduct was not sufficiently outrageous" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [citations omitted]). Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff (*Seltzer v Bayer*, 272 AD2d 263 [1st Dept 2000]; see, e.g., *Shannon v MTA Metro-North R. R.*, 269 AD2d 218, 219 [1st Dept 2000] ["a pattern of harassment, intimidation, humiliation and abuse, causing him unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years"]; *Warner v Druckier*, 266 AD2d 2, 3 [1st Dept 1999] ["through various specified acts, deliberately, systematically and maliciously harassed him over a period of years so as to injure him in his capacity as a tenant"]).

Although medical treatment or psychological counseling is not essential to the claim, but relevant as to damages, the absence of medical treatment or psychological counseling is not fatal to a claim seeking to recover for emotional distress (see *Massaro v Charles J. O'Shea Funeral Home, Inc.*, 292 AD2d 349, 738 NYS2d 384 [2d Dept 2002]; *Garcia v Lawrence Hosp.*, 5 AD3d 227, 773 NYS2d 59 [1st Dept 2004]), the record fails to establish sufficient extreme and outrageous conduct to support the claim.

In this case, defendant established that his conduct of seeking Housing Court relief to regain entry into his apartment, filing a report with the police and district attorney concerning plaintiff's alleged threats, and changing the locks, does not rise to the level of outrageous conduct

to support this claim (*see Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 822 NYS2d 507 [1st Dept 2006] (finding that faxes and phone calls, including to the individual plaintiff's parents, threatening his arrest and criminal prosecution; instigation of the individual plaintiff's arrest by means of false statements to the police concerning plaintiffs' indebtedness to defendants—was not so outrageous as to be utterly intolerable to support an intentional infliction of emotional distress claim.

Therefore, the intentional infliction of emotional distress claim is dismissed.

Negligence

“Negligence consists of a breach of a duty of care owed to another” (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). Thus, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide (*De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

Notwithstanding the theory that permits a party to assert causes of action in the alternative, and assert alternative theories of liability, the record fails to establish any duty owed by defendant apart from the (intentional) wrongful eviction claim and a negligence claim has

been considered an incognizable cause of action under similar circumstances (*Mayer v UVI Holdings, Inc.*, 280 AD2d 153, 723 NYS2d 151 [1st Dept 2001] (stating that a negligence claim “did not constitute [a] cognizable cause[] of action but merely state demands for damages to be considered as elements of the statutory [RPAPL 853] cause of action upon which summary relief is sought”).

Thus, plaintiff’s negligence claim is dismissed.

Conversion

Under New York law, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 NYS2d 637, 774 NE2d 702 [2002]). Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006], internal citations omitted); *Employers’ Fire Ins. Co. v Cotten*, 245 NY 102 [1927]; see also Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed.]; *Vigilant Ins. Co. of America v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36 [1995]; *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 590 NYS2d 201 [1st Dept 1992]).

Contrary to defendant’s contention, that plaintiff has no documentary proof of ownership and value of the items allegedly converted is not fatal to her claim (see *Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786, 428 NYS2d 246 [1st Dept 1980] (where testimony as to value came from a

general supervising accountant of the telephone company who testified to the cost, and no records existed or were introduced to support the figures stated other than a quote from Western Electric over the telephone, plaintiff's proof was sufficient to establish the value of the items)).

That one of plaintiff's computers was a gift is of no moment to her claim for conversion, inasmuch as plaintiff's possessory right or interest in such computer is uncontested, and plaintiff claims that defendant exercised dominion over such computer in derogation of plaintiff's rights.

Therefore, dismissal of plaintiff's conversion claim is denied.

Costs and Attorneys' Fees

Under the general rule, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 906 NYS2d 205 [1st Dept 2010]; *Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Weiss v NYG Capital LLC*, 2014 WL 6882417 [Supreme Court, New York County 2014]).

CPLR § 8106 provides that "Costs upon a motion may be awarded to any party, in the discretion of the court, and absolutely or to abide the event of the action." Based on the above, and the submissions, it cannot be said that plaintiff's complaint is "completely frivolous" as defendant argues.¹ Defendant failed to establish that plaintiff commenced this action in revenge and with the sole purpose of harassing and extorting money from defendant. Nor can it be said that plaintiff perpetuated a fraud on the Court.

¹ It is also noted that 22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct."

Thus, defendant's request for costs and attorneys' fees is denied.

Security pursuant to CPLR 8501(a), 8502, and 8503

CPLR 8501(a) states that “[e]xcept where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion ... the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is ... a resident of the state when the motion is made.” Under CPLR 8503, “Security for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York” It is uncontested that plaintiff is a resident of Georgia, and plaintiff does not assert that she was granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding. Therefore, at plaintiff's request, plaintiff shall provide security for costs by filing an undertaking in the amount of \$500 and serving a copy thereof. All proceedings herein are stayed until such security is provided (CPLR 8502).²

Plaintiff's Cross-Motion

Plaintiff's motion to dismiss defendant's counterclaim pursuant to CPLR §3211 for failure to state a cause of action is granted.

Defendant's counterclaim initially alleges that plaintiff committed negligence and engaged in intentional conduct, which caused him damages. Immediately preceding this allegation are general denials of the allegations of the Complaint. Therefore, the counterclaim states no facts from which it may be inferred that plaintiff breached a duty owed to defendant,

² CPLR 8502 provides:

Until security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor.

which breach was a proximate cause of any injury he sustained, or that she committed an intentional tort resulting in any damages sustained by defendant. Nor does defendant sufficiently allege facts giving rise to a claim for an “intentional” tort; the elements of a cause of action for *prima facie* tort are “the infliction of intentional harm resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful” (*Maruki, Inc. v Lefrak Fifth Ave. Corp.*, 161 AD2d 264, 555 NYS2d 293 [1st Dept 1990]). Absent from defendant’s counterclaim are allegations of any damages or any facts indicating that plaintiff was “motivated solely by the intent to harm” defendants (*Maruki, Inc. v Lefrak Fifth Ave. Corp.*, *supra*).

Defendant further alleges that plaintiff’s statements in public and to public authorities “amount to defamation resulting in harm to defendant’s reputation and thereby damaging defendant.” The elements of a defamation claim are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation *per se*. (*Dillon v City of New York*, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999] *citing* Restatement of Torts, Second § 558). CPLR 3016(a) requires that in a defamation action, “the particular words complained of ... be set forth in the complaint.” The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Dillon citing Arsenault v Forquer*, 197 AD2d 554, 602 NYS2d 653 [2d Dept 1993]; *Vardi v Mutual Life Ins. Co. of New York*, 136 AD2d 453, 523 NYS2d 95).

In evaluating whether a cause of action for defamation is successfully pleaded, [t]he words must be construed in the context of the entire statement or publication as a whole, tested

against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Dillon citing Silsdorf v Levine*, 59 N.Y.2d 8, 462 NYS2d 822 [1983], *cert. denied* 464 U.S. 831, 104 S.Ct. 109 [1983]). “Courts will not strain” to find defamation “where none exists” (*Dillon citing Cohn v National Broadcasting Co.*, 50 NY2d 885, 887, 430 NYS2d 265, 408 NE2d 672, *cert. denied* 449 US 1022, 101 SCt 590, 66 LEd2d 484).

Defendant fails to allege which statements by the plaintiff form the basis of his claim, as well as the time, place and manner of any alleged false statement or whom such statements were made. To the degree defendant claims that plaintiff’s allegations in her Complaint are defamatory, such statements, as pointed out by plaintiff, are protected under an absolute privilege (*see Missick v Big V Supermarkets, Inc.* 115 AD2d 808, 495 NYS2d 994 [3d Dept 1985] (“Statements made during or for judicial proceedings, if pertinent, are absolutely privileged and cannot be used later in an action alleging defamation”)). And, to the degree defendant asserts that plaintiff’s statements to the police concerning defendant’s alleged illegal lockout are defamatory, it has been held that “the qualified privilege also extends to reports to the police” about another’s suspected crimes (*see Present v Avon Products, Inc.*, 253 AD2d 183687 NYS2d 330 [1st Dept 1999]). And, inasmuch as plaintiff failed to show that plaintiff acted with malice, defendant failed to overcome the qualified privilege (*id.*).

Therefore, defendant’s counterclaim is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendant’s motion for summary judgment dismissing the

complaint of the plaintiff is granted solely as to false arrest, malicious prosecution, intentional infliction of emotional distress, and negligence and such claims are severed and dismissed;

ORDERED that the branch of defendant's motion for summary judgment dismissing the wrongful eviction and conversion claims is denied; and it is further

ORDERED that the branch of defendant's motion for summary judgment against plaintiff on his counterclaim, and for costs, disbursements and expenses, is denied; and it is further

ORDERED that the branch of defendant's motion for an order referring to a Special Referee the issue of reasonable attorney's fees, that a report and/or recommendation of said Special Referee be accepted, and that defendant be awarded attorney's fees, is denied; and it is further

ORDERED that the branch of defendant's motion for an order directing plaintiff, a resident of the State of Georgia, to post a security bond with the Clerk of the Court, is granted, and plaintiff shall provide security for costs by filing an undertaking in the amount of \$500 and serving a copy thereof. All proceedings herein are stayed until such security is provided (CPLR 8502); and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment on her first cause of action for wrongful eviction is denied; and it is further

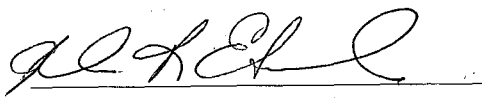
ORDERED that the branch of plaintiff's cross-motion to dismiss defendant's counterclaim pursuant to CPLR §3211 for failure to state a cause of action is granted, and the

counterclaim is severed and dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 19, 2015



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD