At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 27th day of April 2015

PRESENT:

HON. LARRY D. MARTIN, J.S.C.

HENRY COLEMAN,

Plaintiff,

-against-

AUDRY WORSTER,

Defendants.

MOTION SEQ. # 3

INDEX NO.: 28318/2011

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion and Affidavit	1–2
Answering Affidavit	4
Memorandum of Law	3

HON. LARRY D. MARTIN, J.S.C.:

Upon the foregoing papers, defendant moves this Court for an order granting leave to amend her answer to include a statute of limitations defense, deeming the amended answer served, and dismissing the action as time-barred.

It is well settled that "leave to amend pleadings is generally freely given, and the trial court has discretion in granting such motions" (*Clark v MGM Textiles Indus., Inc.*, 18 AD3d 1006, 1006 [2d Dept 2005]). In opposition to the motion, plaintiff argues that "the general rule for such amendments is that it must be in a timely manner," and defendant does not have any explanation or excuse for her delay (Plaintiff's "memorandum of law in opposition to defendant's petition to amend pleadings" [hereinafter "Memo"] at 2). "While delay alone is insufficient to deny a motion to amend, when unexcused lateness is coupled with prejudice to the opposing party, denial of the motion is justified" (*Clark*, 18 AD3d at 1006 [emphasis added]). As such, timeliness aside, the primary factor for the Court's consideration is prejudice (*Nikac v Rukaj*, 276 AD2d 537, 538–39 [2d Dept 2000] ["Prejudice to the adverse party is the main barrier which prevents granting a motion to amend an answer"], quoting *Bernstein v Spatola*, 122 AD2d 97, 100 [2d Dept 1986]).

Moreover, "it is incumbent on the plaintiff — the party opposing the motion — to demonstrate prejudice" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:7, citing, e.g., *Lermit Plastics Co. v Lauman & Co.*, 40 AD2d 680 [2d Dept 1972]). The Court finds that plaintiff has not demonstrated any prejudice. Plaintiff's Memo conclusorily states that it would be "unjust" for the Court to grant defendant leave to amend, and that plaintiff would be prejudiced by the amendment, but does not state why or how (*see* Memo at 4–5).[1] Plaintiff submits that defendant has not appeared in court, nor complied with court orders, and has "generally failed to fulfill her duties" — but does not state which appearance(s), order(s), or duties. To the contrary, as seen in the so-ordered stipulation from the last compliance conference on August 12, 2014, it appears as though not much discovery has been exchanged by either side, and that plaintiff's response to defendant's discovery demand remained outstanding. Plaintiff also references arguments purportedly made in another motion, which is not before the Court. Additionally, no evidence supporting such allegations are annexed to the opposition papers. The Memo itself and plaintiff's affidavit do not lend any credence to plaintiff's allegations about defendant's alleged failure to appear in court or comply with orders, as the Memo is not an attorney affirmation which can be considered as "evidence" (*see* CPLR 2106 [a]; *see also* CPLR 2309), and the relevant paragraphs of the affidavit are not based on personal knowledge (*see* Memo, exhibit B [hereinafter "Coleman aff"], ¶¶ 8–9 [plaintiff states that "[his] counsel advises [him] that Defendant has failed to" answer, appear, respond, etc.]). In any event, "the absence of substantial progress in this matter during the preceding three years indicates that [defendant's] lateness in amending its answer has not prejudiced plaintiff in any significant way" (*Seda v New York City Hous. Auth.*, 181 AD2d 469, 469–70 [1st Dept 1992]).

With respect to the statute of limitations defense, plaintiff first argues that the defense was not timely raised in the answer or in a pre-answer motion to dismiss, and is thus waived. However, while plaintiff cited

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[1] The Court notes that plaintiff does not mention prejudice in the section of the Memo which discusses leave to amend the answer (Memo at 1–2), yet appears in the section regarding the statute of limitations defense. In viewing the Memo's arguments as a whole, the Court will treat it as if it were raised in the appropriate section because it is vital to the CPLR § 3025 (b) issue.

to *Trayer v State of New York*, for such proposition, the *Trayer* case does not state anything which would prohibit defendant from moving to amend the answer (90 AD2d 263 [3d Dept 1982]); and, even if it did, the *Trayer* case involved the Court of Claims Act which is not applicable here (*see id.*). Rather, "defenses waived under CPLR 3211 (e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay" (*U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 723–24 [2d Dept 2011]; *HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]). Therefore, certain defenses, like the statute of limitations, can be asserted in a defendant's amended answer (*Caruso v Hoyer & Co.*, 79 AD2d 670, 670–71 [2d Dept 1980]; *Seda*, 181 AD2d at 470).

Plaintiff also contests the date of accrual. Here, the complaint does not provide the exact date of when plaintiff was arrested, but in the motion papers and during conference on the motion, the parties appear to agree that plaintiff was arrested on July 3, 2009; and the complaint states that he was released on July 4, 2009. The complaint does not state any specific cause of action but, if read liberally, asserts a false imprisonment claim, which is not in dispute.[2] An action to recover on this claim must be commenced within one year from the date of accrual (CPLR 215). Plaintiff claims that the statute of limitations begins to accrue on the date of a favorable termination of a criminal proceeding and cites to *Whitmore v City of New York*. However, that case clearly states that "the causes of action for false imprisonment accrued upon plaintiff's release from confinement," (*Whitmore v City of New York*, 80 AD2d 638, 639 [2d Dept 1981]); here, that was July 4, 2009. The *Whitmore* case went on to discuss that when a party receives a favorable termination of a criminal proceeding, such date is relevant to the date of accrual in a malicious prosecution claim, which is not alleged

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[2] Plaintiff's affidavit in opposition states that on July 3, 2009, the defendant "filed false allegations against [him], causing . . . false arrest, defamation of character, and emotional distress" (Coleman aff, ¶ 3). These "injuries" are nowhere found in the complaint. Although, upon a most liberal reading, an intentional infliction of emotional distress claim could be inferred if it had all the required allegations. However, all these hypothetical claims have the same statute of limitations period of one year, and would all be time barred (*see* CPLR 215).

here (*see id.* at 639–40).[3] Therefore, because plaintiff commenced this action on December 19, 2011 — after July 4, 2010, when the statute of limitations period expired — the action is time-barred.

Plaintiff's remaining arguments are without merit,[4] and the Court does not find that any tolling or extensions apply (*see e.g.*, CPLR 207).

Lastly, because defendant's notice of motion states that the motion is made pursuant to CPLR Rule 3212, the Court, upon a search of the record, hereby dismisses defendant's counterclaim, which appears to allege assault, battery, and possibly intentional infliction of emotional distress — all of which arise out of the same occurrence and present the same issue of being time-barred (CPLR 215; *Dunham v Hilco Const. Co.*, 89 NY2d 425, 429–30 [1996] ["a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court"]; *cf. Katz v Waitkins*, 306 AD2d 442, 443 [2d Dept 2003]).

For the foregoing reasons, defendant's motion is granted in its entirety; plaintiff's action and defendant's counterclaim shall be dismissed. The foregoing constitutes the decision, order, and judgment of the Court.

ENTER,

For Clerks use only
MG ✓
MD ___
Motion Seq. # 3

APR 27 2015

HON. LARRY D. MARTIN
J.S.C.

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NANCY T. SUNSHINE
Clerk

[3] Even if the Court looked to May 3, 2010, which is the alleged date the criminal case against plaintiff was dismissed (Coleman aff, ¶ 4), plaintiff's action is still untimely.

[4] Plaintiff's Memo appears to argue that, in opposition to defendant's motion, the Court should grant plaintiff's motion for default judgment (MS #4). However, that motion is not presently before the Court. It should be noted that the Court already ruled on the issue of default judgment when plaintiff's application for the same relief was denied by short-form order dated July 3, 2014 (*see* Memo, exhibit C [because it is undisputed that defendant interposed an answer, defendant did not default in answering the complaint, which inherently precludes a motion for default judgment under CPLR § 3215]).