

Holmes v City of New York
2018 NY Slip Op 33202(U)
December 11, 2018
Supreme Court, New York County
Docket Number: 150596/2018
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. VERA L. SAUNDERS

PART

IAS MOTION 5

Justice

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THOMAS K. HOLMES,

INDEX NO.

150596/2018

MOTION SEQ. NO.

001 002

Plaintiff,

- v -

THE CITY OF NEW YORK and THE GAP, INC.,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 23

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 20, 22

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Plaintiff commenced this action based upon his arrest on February 10, 2017 alleging false arrest/unlawful imprisonment; malicious prosecution; negligent infliction of emotional distress; intentional infliction of emotional distress; and negligent hiring, supervision and retention.

Gap, Inc. ("Gap") files this pre-answer motion to dismiss the complaint against it pursuant to CPLR § 3211 (a)(1)-(7). Specifically, Gap asserts that plaintiff's false imprisonment and malicious prosecution claims should be dismissed as against it as Gap simply gave law enforcement information which resulted in plaintiff's arrest and plaintiff's conclusory statement that he was falsely accused of theft by Gap is insufficient for a cause of action for false imprisonment and malicious prosecution. Gap further argues that plaintiff's causes of action for negligent and intentional infliction of emotional distress should be dismissed as the allegations fail to assert extreme and outrageous conduct. Lastly, Gap asserts that plaintiff's claim of negligent retention, supervision and hiring should be dismissed pursuant to well-settled case law which holds that an employee acting within the scope of employment renders the employer subject to liability for the employee's negligence and no claim against the employer for negligent, hiring, retention or supervision may thus proceed.

Plaintiff opposes the motion and cross-moves to amend its complaint to further support its claims and to add the City of New York as defendants to its existing negligent and intentional infliction of emotional distress claims. In support of the motion, plaintiff asserts that, without warning, he was thrown to the ground and handcuffed by police officers acting upon the allegations of Ms. Maria Paulino, a Gap employee, who falsely accused plaintiff of being one of

three individuals who stole merchandise from its store. Plaintiff asserts that he pleaded unsuccessfully with the police officers and Ms. Paulino to view store video as he was not in or near the store during the alleged crime. During his arrest, plaintiff began to suffer an asthma attack and asserts that he was denied his medication until several hours later when he was permitted to take his medicine at the police precinct. However, as he was not permitted to properly administer the medication, he suffered a second attack and was rushed to the hospital where he remained for several hours until he was discharged and taken to central booking. After arraignment, he was transported to Rikers Island where he remained for five days.

As to Gap's motion, plaintiff asserts that the charges against him were dismissed on the merits despite the Gap's assertion that a dismissal based upon speedy trial grounds is not a dismissal on the merits. Plaintiff further asserts that he properly plead all elements of every claim stated in his complaint and notes that while defendant The City of New York did not move the court to dismiss the claims asserted against it, it did assert cross-claims against the Gap alleging that Gap instigated plaintiff's arrest and thus, should share in any liability.

Gap opposes the cross-motion to amend arguing that amendment is futile as the proposed amendments fail to add anything substantial and, even were same permitted, dismissal of the complaint would still be warranted.

When considering a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83 [1994].) A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one. (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009].) Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]) however, these considerations do not apply to allegations consisting of bare legal conclusions, as well as, factual claims which are flatly contradicted by documentary evidence. (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

"[W]here an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention." (*Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept, 1997] citing *Eifert v Bush*, 27 AD2d 950 [2d Dept 1967]). The Appellate Division in *Karoon* further held that the only exception to the above is where the individuals have acted with gross negligence and there is a claim for punitive damages. However, such a claim for punitive damages cannot be sustained against municipal defendants. (*Id.*; *Summerville v Lipsig*, 270 AD2d 213 [1st Dept

2000)). In the case at bar, the causes of action against Gap for negligent hiring, supervision and retention are hereby dismissed as Gap, the employer of Ms. Paulino, who allegedly caused plaintiff to be arrested and prosecuted, would be liable for any acts of negligence, and thus there is no basis for a claim based negligent hiring, supervision and retention.

As to the cause of action against Gap for negligent and intentional infliction of emotional distress, plaintiff's allegations fail to show that Ms. Paulino's conduct was "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." (*Howell v NY Post Co.*, 81 NY2d 115 [1993] citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1st Dept 1999]). Specifically, plaintiff failed to assert how Ms. Paulino's conduct of reporting the alleged shoplifting to the arresting officers rose to the level of "outrageous" or "extreme." Therefore, the causes of action against Gap for negligent and intentional infliction of emotional distress are without merit.

As to plaintiff's claim for false imprisonment, the complaint must allege that "(1) the defendant intended to confine [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." (*Broughton v State*, 37 NY2d 451, 456 [1975]). It is not sufficient that the defendant's words or actions caused a police officer to confine plaintiff; plaintiff must show that the defendant "directed an officer to take [him] into custody." (see *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128 [1st Dept 1999] citing *Vernes v Phillips*, 266 NY 298 [1935].) There shall be no liability imposed where the defendant "merely made his statement, leaving it to the officer to act or not as he thought proper." *Id.* While Gap asserts that plaintiff failed to show that Ms. Paulino instigated his arrest or persuaded the officers to arrest him, Gap fails to address plaintiff's assertion that not only was Ms. Paulino present for his arrest which took place approximately half of a block away from the store, but also that she refused to review the store video footage despite plaintiff's pleas to do so. According to plaintiff, Ms. Paulino stated that she already viewed the footage and insisted that plaintiff could be seen shoplifting. On this record, at the pre-answer motion to dismiss stage where discovery has not commenced, a dismissal of the claim against Gap for false imprisonment is not appropriate.

As to plaintiff's malicious prosecution claim, case law pertaining to liability for these claims is similar to that of false arrest/imprisonment, as claims of false arrest and malicious prosecution often go hand in hand. In order to prevail on a claim for malicious prosecution, plaintiff must prove (1) defendant's initiation of a criminal proceeding against him; (2) termination of the proceeding in his favor; (3) lack of probable cause; and (4) malice. (See *Smith-Hunter v Harvey*, 95 NY2d 191 [2000].) Simply providing information to law enforcement authorities, who exercise their own independent judgment as to whether an arrest should be made and criminal charges filed, normally would not result in liability for malicious prosecution. (See *Du Chateau*, supra.) Instead, plaintiff must show that the defendant "played

an active role in prosecution such as giving advice and encouragement or importuning the authorities to act.” (*Present v Avon Prods., Inc.*, 253 AD2d 183 [1st Dept 1999].) However, a person who knowingly provides false evidence to law enforcement authorities or withholds critical evidence affecting law enforcement's determination to make an arrest can be deemed to have initiated a criminal proceeding. (*Moorhouse v Std., NY*, 124 AD3d 1 [1st Dept 2014].) As previously addressed above, Ms. Paulino's actions of departing the store to observe plaintiff's arrest and her insistence that plaintiff was in fact the person she observed participating in the alleged shoplifting coupled with her refusal to review the video footage as requested by the plaintiff may rise to the level of participating or procuring plaintiff's arrest and subsequent prosecution. As such, a dismissal of the claim for malicious prosecution is unwarranted.

Lastly, plaintiff's motion to amend is granted solely to the extent that plaintiff may add the City of New York as defendants to its claim of negligent infliction of emotional distress only, without opposition from the City of New York, as claims of intentional infliction of emotional distress against government bodies are barred as a matter of public policy. (See *Lauer v City of New York*, 240 AD2d 543, *lv denied* 91 NY2d 807[1998]. Based on the foregoing it is hereby

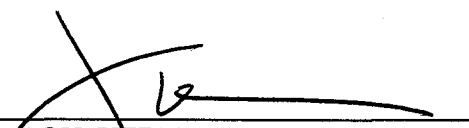
ORDERED that defendant GAP, LLC's motion to dismiss the complaint as against it is granted to the extent of dismissing the causes of action for negligent hiring, supervision and retention and for negligent and intentional infliction of emotional distress as against said defendant, and it is further

ORDERED that plaintiff's cross-motion to amend its complaint is granted solely to the extent of adding the City of New York as a defendant to its claim of negligent infliction of emotional distress; and it is further

ORDERED that plaintiff serve an amended complaint, in compliance with this order, in accordance with the Civil Practice Law and Rules, upon the City of New York within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is hereby denied.

December 11, 2018


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐ DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐ OTHER

☐ REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: