

Pierre-Paul v Family Dollar Stores of N.Y., Inc.

2020 NY Slip Op 35381(U)

June 29, 2020

Supreme Court, Kings County

Docket Number: Index No. 519720/17

Judge: Edgar G. Walker

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At an IAS Term, Part 90 of the Supreme Court of the State of New York held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of June, 2020.

PRESENT:

HON. EDGAR G. WALKER,
Justice

-----X
KENSER PIERRE-PAUL,

DECISION AND ORDER

PLAINTIFF,

INDEX NO. 519720/17

-AGAINST-

MOTION SEQUENCE NOS. 9-10

FAMILY DOLLAR STORES OF NEW YORK, INC.,
FAMILY DOLLAR SERVICES LLC., FAMILY DOLLAR,
JASMINE TUMMINGS AND FAMILY DOLLAR JOHN AND
JANE DOE #1-10

DEFENDANTS.

-----X

The following e-filed papers read herein:
Notice of Motion/Cross Motion/Affidavits (Affirmations)
and Exhibits Annexed
262-280, 286 Affirmation in Opposition and Exhibits Annexed
280, 286, 287-292
Reply Affirmation

NYCEF Doc. Nos.¹

224-240, 242-260,
262-

294-295,301

Upon the foregoing papers in this action to recover for personal injuries as a result of false arrest etc., defendants Family Dollar Stores of New York, Inc., Family Dollar Services LLC., Family Dollar and Jasmine Tummings (Tummings) (collectively, Family Dollar or defendants), move, in motion (mot.) sequence (seq.) 9 for an order, pursuant to CPLR 3212, granting them summary judgment, dismissing the amended

¹ New York State Courts Electronic Filing Document Numbers

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complaint² of plaintiff, Kenser Pierre-Paul (Pierre-Paul or plaintiff). He, in turn, cross-moves, in mot. seq. 10, for, among other requested relief, an order, pursuant to CPLR 3126, striking defendants' answer as a sanction for their alleged spoliation. The motion is granted in part and denied in part, and the cross motion is referred to Part JCP as discussed below.

Background Facts and Procedural History

This case results from an attempted robbery on September 20, 2016 at about 9:50 p.m. at a Family Dollar store located at 224-11 Linden Boulevard in Queens. Defendant Tummings, a cashier, was working at the front desk when the attempted robbery occurred. Two other people were then occupying the store, and the manager was downstairs. The attempted robber (suspect), according to Police Department records and Tummings' deposition testimony, was described as a young, five-foot eight inch African-American male, wearing a mask over his face, gloves, and a grey hoody. The suspect allegedly entered the store at the front entrance, approached the front desk cash register, where Tummings was working, and said, while standing an arms length away from her, "give me the money, give me the money" (*see* NYCEF Doc. No. 240, Tummings deposition tr at 39, lines 2-6, annexed as exhibit O to defendants' mot. seq. 9 papers).

² Defendants' motion papers inadvertently reference dismissing the complaint, which has been superseded by an amended complaint (*see R & G Brenner Income Tax Consultants v. Gilmartin*, 166 AD3d 685, 688 [2d Dept. 2018] ["When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case"] [citation omitted]). In addition, plaintiff has raised no objection or prejudice concerning this oversight and opposed without regard to this technical mistake. Hence, CPLR 2001 allows correcting or disregarding this mistake and treating defendants' motion as directed against the amended complaint.

The two customers screamed, the store manager appeared in response and the suspect fled. The police were called, responded and took the information about this incident, which was over in minutes. The store was equipped with a video camera, and a notation in the police records indicated that they were to retrieve the videotape. However, retrieval did not occur, and the videotape was not produced (*see* NYCEF Doc. Nos. 236, FOIL request, at 39, annexed as exhibit k to defendants' mot. seq. 9 papers).

Tummings' duties to Family Dollar included cooperating with law enforcement. Some three weeks later, on or about October 11, 2016, she went to a Queens police precinct and told the investigating officers that while scrolling through her facebook feed she noticed a friend request from a "King Kaz." She recounted that she had not reviewed her facebook account since the attempted robbery. Tumblings testified that she had never met King Kaz before or after the attempted robbery and, using a police facial identification program matched his picture from facebook with plaintiff's DMV photo. She signed her name next to words indicating that she was certain of the identification.

The police contacted Pierre-Paul and asked him to come to the Queens precinct near the Family Dollar store. He voluntarily appeared for the interview, consistently testified that he denied knowing anyone associated with the Family Dollar store, denied knowing about the attempted robbery and denied any involvement in the attempted robbery. The interview lasted five hours, and he was placed under arrest without a warrant.

Plaintiff subsequently testified about his alleged mistreatment and resulting physical and mental injuries while in three days of police custody. The criminal charges against plaintiff were dismissed after three court appearances and after his legal aide counsel provided the prosecutor with a surveillance video from a Sheepshead Bay,

Brooklyn gym showing him there during the time of the Queens robbery (*see* NYSCEF Doc. No. 228, plaintiff's amended complaint at 7, ¶s 29-32, annexed as exhibit C to defendants' mot. seq. 9 papers; NYSCEF Doc. No. 237, plaintiff's General Municipal Law § 50-h notice of claim transcript at 26, lines 5-19, annexed as exhibit L to defendants' mot. seq. 9 papers; and NYSCEF Doc. No. 238, plaintiff's deposition tr at 54, line 3 through 55, line 15, annexed as exhibit M to defendants' mot. seq. 9 papers).

Plaintiff, as referenced above, filed a notice of claim against the City of New York, but has not pursued an action against the City. Instead, a summons and complaint was filed in this case on October 11, 2017, and an amended complaint was served on November 15, 2017. The amended complaint contains nine causes of action: false arrest and imprisonment (first cause of action); assault and battery (second and third causes of action); gross negligence and negligent hiring and retention (fourth and fifth causes of action); slander per se (sixth cause of action); negligence and intentional infliction of emotional distress (seventh and eighth causes of action); and malicious prosecution (ninth cause of action).³

³ The amended complaint occurred after defendants filed a notice of removal in federal court on November 3, 2017. The parties' so-ordered stipulation remanded the case to Kings County Supreme Court, and defendants served their answers with affirmative defenses on January 24, 2018. On June 21, 2018 plaintiff filed his first of two notes of issue (NOI), and, on June 27, 2018 defendants' filed a notice of motion to vacate the NOI. The Hon. Martin Schneier granted defendants' motion on July 12, 2018, vacated the note, and ordered an immediate preliminary conference (PC).

The parties subsequently and collectively filed seven motions and cross motions from June 12, 2018 until June 19, 2019, when plaintiff filed his second note of issue. The motions and cross motions resulted in various judicial hearings, orders, and interim orders signed by two judges and two judicial hearing officers.

Plaintiff, since June 19, 2019, filed two additional discovery motions, the instant cross motion and a motion to vacate a default order from the final pre-note conference part for a total of 10 discovery motions herein.

Defendants made the instant summary judgment motion on August 16, 2019, and plaintiff filed its cross motion herein with the Kings County Clerk's Office on October 3, 2019 for various sanctions for defendants' alleged failure to comply with court-ordered discovery.

The Parties' Positions

Defendants argue that they enjoy qualified immunity from any suit sounding in false arrest, malicious prosecution, or any other tort based upon reporting a crime and identifying a suspect to law enforcement. Hence, they urge dismissing plaintiff's entire amended complaint and argue (in their memorandum of law, NYSCEF Doc. No. 241, at 12-13) that it is well settled New York law "that 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" (*O'Connell v Luebs*, 264 AD2d 385 [2d Dept 1999] [internal citations omitted]).

Defendants further assert that, as a logical consequence of this qualified immunity, New York State does not recognize an action for negligent false arrest or negligent false imprisonment. "A plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover under broad general principles of negligence . . . but must proceed by way of the traditional remedies of false arrest and imprisonment (*Antonious v Muhammad*, 250 AD2d 559, 559-60 [2d Dept 1998], *lv dismissed* 92 NY2d 913 [1998] [internal citations omitted]).

Defendants note that “[a] plaintiff alleging a claim for false arrest or false imprisonment must show the defendant[s] intended to confine [him], that [he] was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged” (*Roberts v City of New York*, 171 AD 3d 139,145-146 (1st Dept 2019), *affd* 34 NY3d 991 [2019], *rearg denied* 34 NY3d 1150 [2020] [internal citation omitted]). Defendants contend that plaintiff has failed to provide proof that they intended to procure plaintiff’s confinement when defendant Tummings went to the police and that plaintiff’s arrest and arraignment created a presumption of probable cause in the criminal proceeding and thus conferred privilege on defendants in this civil proceeding (*see, Colon v New York*, 60 NY2d 78, 82–83 [1983], *rearg denied* 61 NY2d 670 [1983]).

Plaintiff claims probable cause was lacking herein and that a jury should decide such issue. He challenges defendant Tummings’ identification of the suspect’s face, as she acknowledges never having met the suspect, who was masked during the entire attempted robbery.⁴ Plaintiff argues that defendants commenced or caused the criminal prosecution by giving false and patently flawed information to the police. He contends that New York courts have held that a private citizen can be found to have initiated or caused the arrest when the private citizen “supplies the prosecutor with falsified evidence that the defendant knows or should know will cause the prosecutor to prosecute the plaintiff” (*De Lourdes Torres v Jones*, 26 NY3d 742, 761 [2016]).

⁴ His counsel also alleges that Pierre-Paul “was nearly three hundred pounds and over six feet tall at the time of his arrest” (*see* NYSCEF Doc. No. 261, plaintiff’s memorandum of law, annexed to his mot. seq. 10 papers).

Defendants contend that there was no assault (the third cause of action) because plaintiff had no imminent apprehension of harmful contact (i.e. his arrest) and knew nothing about defendant Tummings (*see Gabriel v Scheriff*, 115 AD3d 791, 792 [2d Dept 2014]), and that plaintiff's claim for battery (the fourth cause of action) must also be dismissed because only the police had contact with plaintiff (*see Roe v Barad*, 230 AD2d 839, 840 [2d Dept 1996], *lv denied* 89 NY2d 938 [1997]).

Defendants further argue for dismissing plaintiff's gross negligence claim (the fourth cause of action) regarding Tummings interaction with the police, which plaintiff has made under a respondeat superior theory, and for dismissing the negligent hiring claim (the fifth cause of action) as, in their view, representing inconsistent claims (*see Antonious*, 250 AD2d at 559-560).

The defamation and slander (sixth) cause of action, defendants' posit, are protected by qualified immunity for statements to police about suspected crimes. Such immunity, defendants submit, can only be and have not been overcome by showing actual malice, i.e. Tummings' sole intent to defame plaintiff.

Defendants separately argue that they cannot be held liable for either negligent infliction of emotional distress (the seventh cause of action) because defendants had no special duty to plaintiff (*see Capellupo v Nassau Health Care Corp.*, 97 AD3d 619, 623 [2d Dept 2013]) nor for intentional infliction of emotional distress (the eighth cause of action) because New York courts hold false statements to law enforcement resulting in arrest and incarceration are "insufficient as a matter of law to constitute extreme and

outrageous behavior to sustain the claim” (*Matthaus v Hadjedj*, 148 AD3d 425, 425–426 [1st Dept 2017] [internal citation omitted]).

Defendants recognize that to sustain a cause of action for malicious prosecution (the ninth cause of action) plaintiff must prove "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]); *Hoffman v Town of Southampton*, 167 AD3d 582, 583 [2d Dept 2018]). Here, defendants submit, plaintiff has offered no proof of malice.

Plaintiff argues that defendants' summary judgment motion is inadequate and contains no evidence that defendants lacked malicious intent. Moreover, plaintiff claims that defendants withheld discovery which should result in denying summary judgment as a matter of law.

Discussion

Summary Judgment Standard

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see*

Alvarez, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (see CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562).

Applying summary judgment principles requires denying defendants' motion as to both the false arrest and imprisonment (first) and malicious prosecution (ninth) causes of action in the amended complaint. The Court of Appeals decision in *Broughton* (37 NY2d at 457-458) explains that

“[t]he *distinction* between false imprisonment and malicious prosecution *in the area of arrest depends on whether or not the arrest was made pursuant to a warrant*. As noted in the Restatement, 2d, an *unlawful detention gives rise to a cause of action for false imprisonment “except where the confinement was by arrest under a valid process issued by a court having jurisdiction”* (Restatement, 2d, Torts, § 35, comment a; Prosser, Torts [4th ed], § 11) [emphasis added]. . . Whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful . . .” [internal citations omitted].

Here, no warrant preceded plaintiff's arrest thus negating any probable cause presumption regarding his false arrest and imprisonment cause of action.

In addition, “the defendant moving for summary judgment must establish a defense to the plaintiff's malicious prosecution and false arrest claims as a matter of law by submitting sufficient evidence to eliminate any material issues of fact” (*De Lourdes Torres*, 26 NY3d at 762-763). Furthermore, “even if the jury at a trial could, or likely

would, decline to draw inferences favorable to the plaintiff on issues of probable cause and malice, *the court on a summary judgment motion must indulge all available inferences of the absence of probable cause and the existence of malice (id. at 763 [emphasis added]).*⁵

Here, defendants have failed to show the absence of factual issues regarding plaintiff's false arrest and imprisonment (first) and malicious prosecution (ninth) causes of action. Defendants have thus not met their prima facie burden, under *Alvarez's* summary judgment requirement, of eliminating factual issues as the record fails to resolve how defendant Tummings thought she could identify the suspect from a facebook friend request when the suspect was masked for the entire robbery. In addition, uncertainty remains as to how and why she responded or failed to respond to attempts by the district attorney's office to have her testify. Hence probable cause and malice issues negate granting defendants' summary judgment as to the false arrest and imprisonment (first) and malicious prosecution (ninth) causes of action.

The (second) cause of action in the amended complaint sounding in assault, on the other hand, is dismissed as plaintiff was never in fear of contact from the defendants and the (third) case of action for battery is dismissed as there was never physical contact between the plaintiff and defendants (*see Gabriel*, 115 AD3d at 792).

⁵ "While lack of probable cause to institute a criminal proceeding and proof of actual malice are independent and indispensable elements of a malicious prosecution action, the absence of probable cause does bear on the malice issue," and "probable cause to initiate a criminal proceeding may be so totally lacking as to reasonably permit an inference that the proceeding was maliciously instituted" (*De Lourdes Torres*, 26 NY3d at 761-762 [internal quotation marks and citation omitted]).

The (fourth and fifth) causes of actions sounding in gross negligence and negligent hiring are also both dismissed. Negligence, as previously mentioned, cannot substitute for utilizing, as here, false arrest and imprisonment to recover (*see Antonious*, 250 AD2d at 559-560). This inapplicability of negligence claims against Tummings, in turn, is inapplicable against the employer defendants (*see Karaduman v Newsday, Inc.*, 51 NY2d 531, 546 [1980], *rearg denied* 52 NY2d 531 [1980] ["it is manifest that there can be no vicarious liability on the part of the employer if the employee himself is not liable, except perhaps in certain unusual circumstances not here present"]; *Pfeiffer v General Elec. Co.*, 7 AD3d 598, 599 [employer not liable where "there was no primary liability upon which a claim for vicarious liability might rest"]⁶).

The sixth cause of action states a valid cause of action for slander per se as New York courts have sustained such a cause of action for filing a false report accusing a plaintiff of a crime (*Light v Light*, 64 AD3d 633, 634 [2d Dept 2009]). Defendants claim qualified privilege, lack of actual malice and plaintiff's failure to specifically address their arguments. However, plaintiff's arguments and the above discussion (including n 4) as to probable cause and actual malice inferences relating to false arrest and imprisonment and malicious prosecution equally apply to the slander per se (sixth) cause of action. Hence, those unresolved issues also result in denying this branch of defendants' summary judgment motion.

⁶ In addition, "[g]enerally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention" (*Tangalin v MTA Long Is. Bus.*, 92 AD3d 766, 767 [2d Dept 2012]). Hence, plaintiff's fourth and fifth causes of action are internally inconsistent, and dismissible for this reason as well.

The seventh and eighth causes of action of negligent/intentional infliction of emotional distress are dismissed because New York courts do not recognize negligent or intentional infliction of emotional distress from facts constituting false arrest or malicious prosecution (*see Capellupo*, 97 AD3d at 623 and *Matthaus*, 148 AD3d at 425-426). Accordingly, it is

ORDERED that defendants' summary judgment motion, mot. seq. 9, is granted to the extent that plaintiff's second, third, fourth, fifth, seventh and eighth causes of actions are dismissed, and is otherwise denied as to the first, sixth and ninth causes of action; and it is further

ORDERED that plaintiff's cross motion, mot. seq. 10, to strike defendants' pleadings and for common-law spoliation is referred to Part JCP.

ENTER,



J. S. C.

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