

<b>Rong Chen v Nan Yang</b>
2021 NY Slip Op 30383(U)
February 9, 2021
Supreme Court, New York County
Docket Number: 158182/2020
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM**

*Justice*

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RONG CHEN,

Plaintiff,

- v -

NAN YANG,

Defendant.

INDEX NO. 158182/2020

MOTION DATE 12/17/2020

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, and 17 (Motion 001)

were read on this motion to/for DISMISS COMPLAINT.

In this action to recover damages for breach of contract, wrongful withholding of an interest in real property, unjust enrichment, conversion, false arrest, false imprisonment, abuse of process, and malicious prosecution, the defendant moves pursuant to CPLR 3211(a) dismiss the complaint. The plaintiff opposes the motion. The motion is granted to the extent that the causes of action to recover for wrongful withholding of an interest in real property and abuse of process are dismissed, and the motion is otherwise denied.

In his complaint, the plaintiff alleges that he was the tenant of record of an apartment in building located on East 44th Street in Manhattan. He asserts that, during 2019, he and the defendant became boyfriend and girlfriend and, because he spoke little English, while the defendant was more fluent, he relied upon her in communicating with the managing agent of the building. The plaintiff avers that, sometime in late 2019, the defendant moved in to live with him in the apartment. He states that, without his knowledge, the defendant convinced the managing agent to list her as an "occupant" of the apartment, and moved into the apartment permanently, despite paying no rent to the landlord or reimbursing the plaintiff for any portion of the rent that the plaintiff paid to the landlord.

In his complaint, the plaintiff asserts that, on October 6, 2019, he learned that the defendant had several other boyfriends, one of whom had paid for some of her tuition at New York University and subsidized the rent for her prior apartment. According to the plaintiff, he confronted the defendant on that date about her other relationships, and asked her to leave the apartment, but that the defendant, in response, called the police and falsely accused him of physically attacking and injuring her. As recounted in the complaint, the police arrested the plaintiff, a court issued an order of protection against him, he was removed from the apartment, and he was prohibited from lawfully returning to the apartment, while the defendant remained in possession of the apartment and had sole use and possession of all of the plaintiff's personal property, including furniture and appliances. The plaintiff asserts that, when he returned to the building on October 7, 2019 to speak with the managing agent about having the defendant removed from the apartment, he again was arrested and charged with violating the order of protection. He also states that, when he retained real estate counsel to challenge the defendant's occupancy, he learned for the first time that the defendant had arranged for herself to be listed as an "occupant" of the subject apartment.

In the complaint, the plaintiff asserts that all criminal charges were dismissed against him in early 2020. The plaintiff further alleges that, in late 2019, he commenced a proceeding entitled *Matter of Chen v Yang*, in the Housing Part of the Civil Court, New York County, under Index No. L&T 074042/2019, seeking to obtain sole possession of the subject apartment. He asserts that the defendant "entered into a Stipulation of Settlement with the Plaintiff agreeing to a judgment of possession in Plaintiff's favor and agreeing to vacate the apartment no later than May 31, 2020," but that, as of October 2020, the defendant had yet to vacate the apartment. He also avers that, as part of the settlement in the Civil Court proceeding, the defendant agreed to pay him rent for the period that she occupied the apartment while he was not in possession, but that she failed to pay him in accordance with that agreement.

The plaintiff asserts eight causes of action---breach of contract (first cause of action), wrongful withholding of an interest in real property pursuant to RPAPL 601 (second cause of action), unjust enrichment (third cause of action), conversion (fourth cause of action), false arrest (fifth cause of action), false imprisonment (sixth cause of action), abuse of process (seventh cause of action), and malicious prosecution (eighth cause of action). The defendant moves, pre-answer, to dismiss the complaint on two grounds. She asserts that all of the causes of action must be dismissed pursuant to CPLR 3211(a)(4) because there are prior actions pending in which the claims are being or have been litigated---the first four in the Civil Court proceeding, and the second four in an action entitled *Yang v Chen*, pending in the Supreme Court, New York County, under Index No. 158011/2020. She also asserts that the second, fourth, fifth, sixth, seventh, and eighth causes of action fail to state a cause of action, and should thus be dismissed pursuant to CPLR 3211(a)(7).

CPLR 3211(a)(4) provides a court with discretion to dismiss an action where there is “another action pending between the same parties.” This action was commenced subsequent to the 2019 possession proceeding in the Civil Court, and New York courts generally follow a “first-in-time rule.” That rule is a “general rule that should not be applied in a ‘mechanical’ way,” and that “special circumstances may warrant deviation from this rule where the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage” (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dept 2007]). “Civil Court is the strongly preferred forum for resolving such landlord-tenant disputes,” and “[o]nce a summary proceeding has been commenced in Civil Court where complete relief can be afforded to [a party] there is no further basis for invoking the equitable jurisdiction of Supreme Court.” *Brecker v 295 Central Park W., Inc.*, 71 AD3d 564, 565 [1st Dept 2010]). The court agrees that, inasmuch as the RPAPL 601 cause of action could have been asserted in the Civil Court proceeding, it should be dismissed here, but that the remaining causes of action either were not,

or could not have been, asserted in either the Civil Court action or the other Supreme Court action, and should not be dismissed here pursuant to CPLR 3211(a)(4).

RPAPL 601 provides, in relevant part, that

“In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years.”

The plaintiff in fact commenced a proceeding to recover possession of real property, and could have sought damages therein for the defendant's withholding of the real property. He nonetheless failed to assert such a claim in that proceeding, and “the rule against splitting a cause of action precludes plaintiff from recovering in a later action any part of a debt that could have been recovered in an earlier action,” as long as the debt was due at the time that the prior action was litigated (*Golden v Ramapo Improv. Corp.*, 78 AD2d 648, 649 [2d Dept 1980]).

Application of that rule militates in favor of dismissing the second cause of action here.

The remaining causes of action are unrelated to the two prior matters.

Contrary to the defendant's contention, the first, third, and fourth causes of action were not asserted, and could not have been asserted, in the Civil Court proceeding. The breach of contract cause of action relates to the defendant's alleged failure to comply with the settlement agreement reached in the Civil Court proceeding. Inasmuch as a final disposition of the Civil Court proceeding has been entered, the plaintiff was obligated to enforce the settlement agreement by way of a plenary action, and not in the context of the settled proceeding (see *Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51 [1979]). The unjust enrichment cause of action is unrelated to the withholding of the real property from the plaintiff. The conversion cause of action relates to the defendant's alleged exercise of dominion over the plaintiff's personal belongings, not the leasehold interest.

The court rejects the defendant's contention that the fifth, sixth, seventh, and eighth causes of action were asserted, or should have been asserted, in the previously commenced Supreme Court action. In that action, commenced by the defendant against the plaintiff, the

defendant sought to recover damages against the plaintiff for assault and battery. “New York does not have a compulsory counterclaim rule” (*Henry Modell & Co. v Minister, Elders & Deacons of the Reformed Protestant Dutch Church*, 68 N.Y.2d 456, 461 [1986]). Hence, unless the plaintiff’s instant claims to recover for false arrest, false imprisonment, abuse of process, and malicious prosecution---all of which arise from the defendant’s alleged false statements concerning the events of October 6 and 7, 2019---would result in a judgment inconsistent with one that could be entered in the defendant’s action against him, the plaintiff was not obligated to assert those causes of action as counterclaims in that action. The court concludes that these causes of action were not compulsory counterclaims and, hence, CPLR 3211(a)(4) does not bar the plaintiff from asserting them here.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; CPLR 3026). “The motion must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

The defendant does not argue that the complaint fails to state a cause of action to recover for breach of contract or unjust enrichment. She does, however, challenge the other

causes of action on that ground. The court has already determined to dismiss the RPAPL 601 cause of action pursuant to CPLR 3211(a)(4) even though it states a cognizable cause of action. With respect to the remaining contested causes of action, the court concludes that the complaint states a cause of action to recover for conversion, false arrest, false imprisonment, and malicious prosecution, but that the claim to recover for abuse of process does not state a cause of action.

“A plaintiff may bring suit for false arrest and imprisonment against one who has unlawfully robbed the plaintiff of his or her freedom from restraint of movement. To prevail on such a cause of action, the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged. For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause. Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances”

(*De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016] [citations and internal quotation marks omitted]).

“The elements of the tort of malicious prosecution are: (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 (*id.* at 760).

“Just as in the false arrest context, the plaintiff in a malicious prosecution action must also establish at trial the absence of probable cause to believe that he or she committed the charged crimes, but this element operates differently in the malicious prosecution context because [o]nce a suspect has been indicted, . . . the law holds that the Grand Jury action creates a presumption of probable cause”

(*id.* at 761) (citations and internal quotation marks omitted).

“[T]he plaintiff may show malice and overcome the presumption of probable cause with proof that the defendant falsified evidence in bad faith and that,

without the falsified evidence, the authorities' suspicion of the plaintiff would not have fully ripened into probable cause”

(id.).

The plaintiff essentially asserts that the defendant knowingly “gave false statements to the police with the intent of having plaintiff arrested” (*D’Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 961 [4th Dept 2014]). This assertion, along with his assertions that he was then detained, arrested, charged with a criminal offense, and thereafter secured a favorable disposition of the charges against him, is sufficient to state a cause of action that the defendant is liable for false arrest, false imprisonment, and malicious prosecution (see *De Lourdes Torres v Jones*, 26 NY3d at 761; *Broughton v State of New York*, 37 NY2d 451 [1975]; *Mesiti v Wegman*, 307 AD2d 339 [2d Dept 2003]). In any event, since depositions have yet to be conducted, the questions surrounding the defendant’s motive and intent have yet to be fully developed (see *WPP Group USA, Inc. v Interpublic Group of Companies*, 228 AD2d 296 [1st Dept 1996]).

Hence, the complaint states a cause of action to recover for false arrest, false imprisonment, and malicious prosecution.

A cause of action to recover for abuse of process “has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; see *Board of Educ. v Farmingdale Classroom Teachers Assoc.*, 38 NY2d 397 [1975]). “The mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process” (*Greco v Christoffersen*, 70 AD3d 769, 770 [2d Dept 2010]; see *Curiano v Suozzi*, 63 NY2d at 117). Here, it cannot be said that the defendant commenced her Supreme Court action against the plaintiff with an intent to do harm without excuse or justification. Rather, regardless of the merits of the claims that she

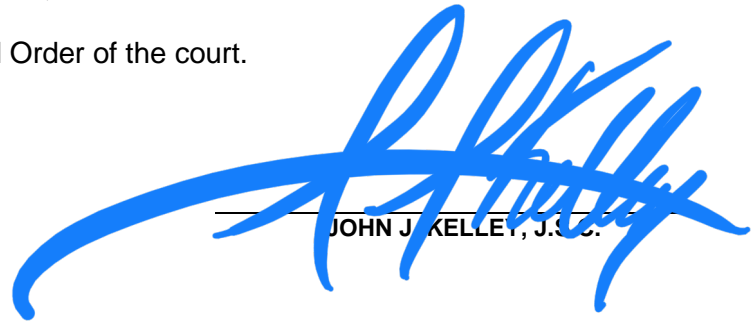
asserts in that action, they are based on her founded belief that the defendant was physically abusive to her. Hence, the cause of action to recover for abuse of process must be dismissed.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted to the extent that the second cause of action, which seeks to recover pursuant to RPAPL 601 for the wrongful withholding of an interest in real property, and the seventh cause of action, which seeks to recover for abuse of process, are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

2/9/2021  
DATE

  
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JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: