Page v City of New York
2021 NY Slip Op 31935(U)
February 23, 2021
Supreme Court, Queens County
Docket Number: 716216/17
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Tanzania Page,

Plaintiff,

- against -

The City of New York, Police Officer Evan Gales, Police Officer Christopher Stango, John Doe 1-2, the names being fictitious and currently unknown, and Magnificent 7's Enterprises, Inc.,

Defendants.

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Index Number: 716216/17

Motion Date: 2/8/21

Motion Seq. No.: 4

The following papers numbered E57-E74, E79-E101 and E103 to E106 read on this motion by defendants The City of New York, Police Officer Evan Gales and Police Officer Christopher Stango, for summary judgment; and cross-motion by plaintiff to vacate the note of issue and compel discovery, and for a default judgment against defendant Magnificent 7's Enterprises, Inc., or in the alternative, to strike the answer or, in the alternative, to sever the action against Magnificent 7's Enterprises, Inc.

	Papers Numbered
Notice of Motion-Affirmation-Affidavits-Exhibits.....	E57-74
Notice of Cross-Motion-Affirmation-Affidavits-Exhibits	E79-101
Affirmation in Opposition-Exhibit.....	E103-104
Reply.....	E105-106

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the City, Gales and Stango (hereinafter sometimes referred to collectively as "the City defendants") for summary judgment dismissing plaintiff's state and federal causes of action against them for false arrest and imprisonment, assault and battery, denial of a right to a fair trial, negligent hiring, training and retention, failure to intervene and the Monell claim against the City is granted solely to the extent that the causes of action for assault and battery, negligent hiring, training and retention and the cause of action against the City pursuant to §1983 (Monell claim) are dismissed. In all other respects, the motion is denied.

Plaintiff alleges that she was falsely arrested on August 31, 2016 on Beach Channel Drive and Beach 62nd Street in Queens County when defendant NYPD Sgt. Gales stopped the livery taxi in which she was a passenger and he and defendant NYPD Officer Stango arrested and prosecuted her for criminal possession of marijuana based upon their search of the vehicle and retrieval of marijuana and other controlled substances, including oxycodone. Plaintiff was released from custody on September 1, 2016 and accepted an adjournment in contemplation of dismissal (ACD) on said date, pursuant to which the case was dismissed and sealed on September 30, 2016.

The amended complaint alleges causes of action against the City, Gales and Stango under State law for false arrest and for assault and battery, federal constitutional causes of action under 42 U.S.C. §1983 against the City, Gales and Stango based upon false arrest and upon deprivation of her right to a fair trial for allegedly creating false evidence against plaintiff, a cause of action against the City under State law for negligent hiring, training and supervision of police officers, a §1983 cause of action against the City based upon an official policy or practice designed to deprive plaintiff of her right to be free of unlawful arrest and imprisonment based upon false evidence and based upon the City's practice and custom of failing to discipline and train its police officers, and against Gales and Stango and the John Doe 1-2 NYPD defendants for failure to intervene to prevent the violation of plaintiff's fourth and fourteenth amendment rights to be free of unlawful arrest and imprisonment.

Sgt. Gales avers in his affidavit in support of the motion that he conducted a routine traffic stop of a vehicle observed to have a defective passenger-side brake light. He pulled the vehicle over and when he approached the driver's side to speak to the driver, he noticed the odor of marijuana from within the vehicle. A database search also revealed that the driver's license of the operator of the vehicle had been suspended. Gales asked the driver if there was anything in the car he should be aware of, and Gales responded that he had marijuana in the vehicle. Thereupon, Gales requested all occupants of the vehicle to step out of the vehicle so that it may be searched. A bag of marijuana, a bag containing Oxycodone pills and a bag containing Alprazolam pills were recovered from the center console of the vehicle. He asked the occupants who the owner of the drugs was, and when neither admitted owning any drugs, they were arrested. (This Court notes that, although Gales was the one who stopped the vehicle, allegedly smelled marijuana, and was told by the driver that he had marijuana in the vehicle, it was Stango who performed the arrest and it was he who prepared and signed the arrest report and signed the accusatory instrument).

Officer Stango avers in his affidavit that he and Gales were

members of the Anti-Crime unit, and that he arrived at the scene after Gales had spoken to the driver, and that Gales informed him that the driver had admitted to possessing marijuana in the vehicle. He also avers that the vehicle was thereupon searched and the aforementioned drugs were found. Stango avers that he vouchered this evidence at the 100th Precinct. He further avers that when he conducted an inventory search of the personal items recovered from the vehicle, which included plaintiff's wallet/purse, he recovered a small quantity of marijuana from plaintiff's wallet/purse. He also references his memo book in which he memorialized the incident.

The omnibus arrest report prepared by Stango indicates that plaintiff was arrested on a top count of criminal possession of a controlled substance – narcotics, pursuant to Penal Law 220.16, and a second charge of unlawful possession of marijuana, pursuant to Penal Law 221.05. The complaint report also indicates the most serious charge as being that under PL 220.16. On September 1, 2016, however, plaintiff was arraigned on a single charge of unlawful possession of marijuana, pursuant to PL 221.05, based upon Stango's averment that he recovered a plastic bag containing marijuana from plaintiff's wallet at the 100th Precinct. The case was adjourned on September 1, 2016 and dismissed on September 30, 2016, and the record sealed.

Plaintiff testified in her 50-h hearing that after she had her hair and nails done on Mott Avenue, she walked down the block to the taxi stand and got into the subject cab displaying the name "Magnificent Seven". There were two other passengers in the taxi when she got into it, a male and a female in the 20s. She stated that it was a shared taxi. She did not know and had never seen these people before. She related that she was in the front passenger seat, and the driver first dropped off the other two passengers at Beach 25th Street where another girl, also in her 20s, then got into the cab. Plaintiff avers that her intended destination was 67th Street, but the cab was pulled over on 62nd Street. A plain clothes "detective" approached the driver and asked for his license and registration. He then came back with another "detective" and they talked back and forth with the driver and asked him to step out of the car, and they continued to talk. Plaintiff did not hear the entire conversation but heard the driver ask if they had a warrant, besides hearing the driver inform them that he had marijuana in the vehicle. They then asked everyone to step out of the car and they searched it. After they searched the vehicle, they patted plaintiff down and told everyone that they had to go to the Precinct. She asked why, and they simply replied that all her questions would be answered when they got there. They thereupon searched and handcuffed her. She did not have a purse, but a "clutch" (the referenced wallet) that she had left in the car on the dashboard. They took her wallet and her cell phone and

brought her to the 100th Precinct at approximately 7:00 pm and thereafter transported her to Central Booking at approximately 1:00 am. She did not see a judge until approximately 9:00 pm the following evening. She says that she was then given an "ECD" and sent home.

Plaintiff also testified in her deposition that she did not smell marijuana when she entered the car and did not at any time before she was pulled over see marijuana anywhere inside the vehicle. She testified that after the car was pulled over, the officer approached the driver and had a conversation with him, and that the officer asked him if there is anything in the car that he should be aware of, whereupon the driver informed him that he had marijuana in the glove compartment. Plaintiff also avers in her affidavit in opposition that she does not smoke marijuana and did not smoke marijuana in 2016. She avers that she was a paying taxi passenger and did not possess any marijuana, did not have any marijuana in any of her belongings, did not smell marijuana at any time she was in the car and that she observed the back of the taxi before getting into it and did not notice any burned-out taillight.

When asked in her deposition if she was physically injured as a result of the arrest, she answered in the negative.

With respect to plaintiff's causes of action for false arrest and false imprisonment, a finding of probable cause operates as a complete defense to such causes of action (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2nd Dept 2003]). Likewise, with respect to plaintiff's cause of action against the individual officers under 42 U.S.C. §1983 based upon false arrest, police officers are only entitled to qualified immunity against suit under §1983 if it is established that there was probable cause for the arrest and detention (see Scheuer v. Rhodes, 416 U.S. 232 [1974]; Martinez v. City of Schenectady, 97 NY 2d 78 [2001]). If there is a sharp factual dispute presented as to the question of whether there was probable cause to arrest, the issue of whether the officers are entitled to qualified immunity may not be determined by way of summary judgment (see Murphy v Lynn, 118 F. 3d 938 [2nd Cir. 1997]; Stipo v. Town of North Castle, 205 AD 2d 608 [2nd Dept 1994]).

The City contends that Gales and Stango had probable cause to arrest plaintiff after discovering drugs in the vehicle as occasioned by Gales' routine traffic stop of the vehicle, his detection of the odor of marijuana and the driver's admission to him that he had marijuana in the vehicle, based upon PL 220.25, which provides that "[t]he presence of a controlled substance in an automobile, other than a public omibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was

found."

The City does not argue that, and no statutory or case law has been proffered stating that, this automobile presumption is mandatory so as to require a police officer to arrest every occupant of a vehicle in which controlled substances are found, without inquiry or discretion (see generally Shabazz v Kailer, 201 F. Suypp 3d 386 [S.D.N.Y. 2016]). The undisputed evidence on this record is that plaintiff was a passenger in a taxi for hire. The vehicle bore T&LC license plates (Gales noted the license plate number in his memo book,T696896C) and "Magnificent Seven", and therefore, Gales knew that he was pulling over a taxi. Moreover, it is undisputed that the taxi was a shared taxi carrying multiple passengers, and that plaintiff was merely one such passenger who was not an acquaintance of the taxi driver. It is also undisputed that the controlled substances were retrieved from the center console of the taxi and that such retrieval was occasioned by the taxi driver's admission to Gales that he had marijuana in the vehicle. Therefore, Gales and Stango knew, or reasonably should have known, that the substances Stango retrieved from the center console belonged to the driver and not to plaintiff and, consequently, that no probable cause existed to arrest plaintiff for possession of the drugs. That the driver may have admitted only to having marijuana, and to the extent that he may have denied being in possession of the pills does not compel a finding that Stango had probable cause to arrest plaintiff for possession of the pills under the automobile presumption. In the first instance, Gales' averments in this regard are unclear, as he states first that the driver informed him that he had marijuana in the vehicle and then states that everyone was arrested because no one would admit to being in possession of the "drugs". It is unclear whether Gales, by his use of the general term "drugs", meant only the pills, or whether his averments are contradictory. Assuming that he meant that no one admitted to being the owner of the pills and that all occupants were arrested based upon the finding of the pills alone, this Court still may not find that there was probable cause to arrest plaintiff, as a matter of law, since the evidence raises a question of fact as to whether Gales and Stango had a reasonable probable cause belief that the owner of the pills were the taxi passengers and not the taxi driver who had just admitted that he had marijuana in his vehicle and that marijuana was discovered, together with the pills, in the center console of his taxi vehicle.

The City's counsel's argument that Stango and Gales were entitled to the presumption that the narcotics found in the vehicle belonged to plaintiff even though the vehicle was a taxi because "it is undisputed that the vehicle was not lawfully operating as a car for hire at the time of the arrest" is wholly without merit. The only evidence relating to the operator of the

vehicle is that a check of the DMV database revealed that his driver's license was suspended. This Court is not sure what the City's counsel's argument is, but it appears to be that the driver was not operating his taxi legally because his license was suspended and, therefore, the officers need not have considered the fact that plaintiff was a taxi passenger in their decision to arrest her based upon the automobile presumption. If this is counsel's argument, it is illogical, since the taxi driver's license status is irrelevant to the issue of whether he was in fact, whether legally or illegally, operating the vehicle as a taxi for hire and whether plaintiff was simply an innocent passenger who was being conveyed to her destination as a paying passenger. A person hailing a marked taxi on the street usually does not ask the driver for his license and perform a DMV search before agreeing to ride in the taxi, and whether or not the driver's license was suspended has no bearing on whether he was in fact operating the vehicle as a taxi for hire. It is undisputed that the vehicle was a marked taxi, bearing commercial taxi markings and T&LC license plates. Contrary to counsel's contention, plaintiff does not concede that the officers were permitted to presume that plaintiff was in possession of the narcotics recovered from the vehicle under the specific facts of this case.

The marijuana allegedly found in plaintiff's wallet, which plaintiff denied having and claims that it was planted, was vouchered by Stango under NYPD Property Clerk Invoice No. 425746, which lists it as one quantity of "Alleged Marijuana" and remarks, "Above item being vouchered as arrest evidence". In the box on the Invoice for the entry of prisoners' names and identifying information, it lists as the name of Prisoner 1 "REDACTED", as the name of Prisoner 2, "Page, Tanzania", followed by her identifying information, and as the name of Prisoner 3, "REDACTED". The laboratory analysis report of this alleged marijuana vouchered under Invoice N. 425746 analyzes it as being marijuana measured at .377 grams in weight(which equals .013 oz).

Property Clerk Invoice N. 425739 lists a bag of alleged marijuana, a bag of Alprazolam pills, and a bag of Oxycodone pills. The "Finder" is set forth as as "Stango, Christophe" and the "Owner" is set forth as "REDACTED". The laboratory results associated with these vouchered items analyzes them as being 1.591g of marijuana, 1 tablet Alprazolam, 1 tablet Oxycodone and 6 whole, 4 partial and another 8 tablets with no analysis results.

Likewise, Invoice No. 425748 lists a marijuana grinder containing residue that a field test yielded as positive for marijuana. Again, the Owner is listed as "REDACTED". The lab report associated with this Invoice finds this residue to be

marijuana.

This Court notes that all information as to prisoners 1 and 3 is redacted from the documents disclosed by the City because it does not relate to plaintiff but concerns the other individuals who were also arrested (the driver and the other young woman passenger) and, therefore, the City deemed this information concerning them to be confidential.

The aforementioned documents, therefore, raise a triable issue of fact as to whether Stango, and Gales, knew that the marijuana and pills (plus the grinder) found in the center console of the taxi belonged to the driver and not to plaintiff but chose to arrest plaintiff irrespective of that knowledge and, despite that knowledge, continue to detain and prosecute plaintiff by filing an arrest report and preparing an accusatory instrument charging plaintiff with felony possession of narcotics. This Court further notes that Stango thereafter prepared a desk appearance ticket relating to the secondary charge of unlawful possession of marijuana, pursuant to PL 221.05, and plaintiff was arraigned only on that single violation, further raising the question of whether he knew that the marijuana and pills recovered from the taxi did not belong to plaintiff and, therefore, that there was no basis for plaintiff's arrest and that the top felony charge could not be presented to the court. This Court must point out that this lone charge against plaintiff of unlawful possession of marijuana pursuant to PL 221.05 was only for possession of the minuscule amount of marijuana allegedly recovered from plaintiff's wallet at the 100th precinct during the course of Stango's search of the contents of her belongings for vouchering. It was not for possession of the 1.5 oz of marijuana that was recovered from the taxi. Plaintiff was not arraigned on any of the charges for which she was arrested, those being the possession of the aforementioned narcotics recovered from the vehicle.

Unlawful possession of marijuana, pursuant to Penal Law 221.05, is not a crime subject to arrest but is merely a violation punishable, if a first offense, by only a fine of $100 (under the version of that section that was in effect in 2016 – it is now $50), requiring the issuance of only a desk appearance ticket. One charged under this section may not be fingerprinted or photographed (see Criminal Procedure Law 160.10) and a conviction is not automatically recorded with the Division of Criminal Justice Services. This applies only to possession of up to 1 oz of marijuana. Between 1 and 2 ounces, the fine is $200 (PL 221.10).Possession of more than 2 oz and up to 8 oz is a misdemeanor (PL 221.20), and possession of more than 8 oz is a Class E felony. Since only a small quantity of marijuana was recovered from the vehicle, later weighed as 1.5 oz, no one in

the vehicle, neither plaintiff nor the driver or other passenger, could have been arrested for criminal possession of the marijuana recovered from the vehicle. Moreover, the presumption of possession of controlled substances by every occupant of an automobile pursuant to PL 220.25 does not apply to marijuana, in any quantity, by virtue of PL 220.00(5) which expressly excludes marijuana from the definition of a controlled substance (see Penal Law 220.00[5]; People v Dan, 55 AD 3d1042 [3rd Dept 2008]).

Thus, the only ground for the arrest of anyone in the vehicle would be for possession of the narcotic tablets. Stango indeed filed an accusatory instrument against plaintiff for felony possession of controlled substances even though his own voucher form submitted to the Property Clerk contains his admission that the pills (as well as the 1.5 oz of marijuana and the marijuana grinder) did not belong to plaintiff but belonged to one of the two other prisoners whose identities were redacted, which this Court must presume was the driver of the vehicle who admitted to having the marijuana that was found in the center console of his taxi vehicle, which was his personal space, together with the pills and paraphernalia, and not to the back-seat taxi passenger who had the misfortune of getting into the cab a few minutes before the vehicle was pulled over. It is clear, moreover, that the desk appearance ticket charging plaintiff with a violation of PL 221.05, and her arraignment on that charge was based solely upon the .377g (.013 oz) of marijuana Stango claims he found in her wallet at the 100th Precinct and not the 1.5 oz of marijuana found in the vehicle.

Neither Stango nor Gales aver in their brief affidavits that they ever spoke to plaintiff at the scene to ascertain the circumstances of her presence in the vehicle. Plaintiff's testimony that her inquiry as to why she was being arrested was ignored, and was dismissed with a perfunctory statement that all her questions would be answered at the Precinct is unrebutted, as is her testimony that she was merely a paying taxi passenger and not an acquaintance of the driver. Gales and Stango fail to explain in their affidavits why they determined that passengers in a clearly marked taxi should be arrested for possession of drugs found in the personal space of the taxi driver's center vehicle console, with no further inquiry or interview of the passengers, when that driver admitted that he had drugs, albeit only marijuana, in the vehicle and why Stango chose to prepare a complaint charging plaintiff with felony possession of controlled substances notwithstanding that he did not identify plaintiff as the owner of these controlled substances in his voucher form but rather identified the owner as one of the "REDACTED" prisoners, which could be a reference to none other than the driver. Moreover, Stango fails to explain why plaintiff was arraigned only on a single violation under PL 221.05, for the marijuana he

represents was found in her wallet while he was vouchering its contents, and not on the charges for which she was arrested and were set forth by him in his accusatory instrument.

Stango and Gales will have the opportunity to explain their actions more fully upon direct and cross-examination at the trial of this action. For the evidence presented undoubtedly raises questions of fact as to whether there was probable cause to arrest and detain plaintiff. Consequently, if the jury determines that there was no probable cause to arrest and detain plaintiff, then there would also be no basis for Stango's proffering of the charge of unlawful possession of marijuana against plaintiff for the marijuana allegedly found in her wallet at the 100th Precinct after she was unlawfully arrested, since he would have had no right to search her wallet. In this regard, the submissions on this motion raise questions as to whether plaintiff understood what an ACD was or what its legal significance was when she accepted it. In addition, plaintiff's averment that she did not possess marijuana and did not use marijuana raises a sharp factual question as to whether the .377g bag of marijuana that was vouchered was recovered from plaintiff's wallet or whether it was, as plaintiff alleges, planted, false, evidence so as to support her constitutional due process cause of action for deprivation of the right to a fair trial.

Therefore, movants have failed to establish an entitlement to summary judgment dismissing plaintiff's causes of action for false arrest and unlawful imprisonment either under State law or under 42 U.S.C. §1983 as against Gales and Stango. Likewise, they have failed to establish an entitlement to dismissal of plaintiff's causes of action against Gales and Stango under §1983 based upon due process violation of the right to a fair trial and failure to intervene to prevent the violation of plaintiff's constitutional right to be free of unlawful arrest, detention and prosecution.

However, the City is entitled to dismissal of plaintiff's Monell cause of action against it. A municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a Constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under

§1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original). Plaintiff has failed to show that her arrest and prosecution was as a result of the implementation of an official policy or custom of the City causing her to be deprived of a Constitutional right. Plaintiff's counsel's generalized contention that the City has the practice of condoning police misconduct and failing to discipline and fire bad cops, and his reference to the Mollen Commission investigation of the 1970s does not articulate or prove a specific policy, custom or practice designed to deprive plaintiff of her constitutional rights.

The City is also entitled to summary judgment dismissing plaintiff's cause of action against it for negligent hiring, training, supervision and retention. It is a well-established principle that no action for negligent hiring, training or supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent hiring, training, supervision and retention would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324).

This principle applies to the instant matter, even as to claims alleging assault and battery. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 AD 2d 777 [2nd Dept 1990]). An assault by a police officer who is engaged in police business may be found to be within the scope of his employment (see generally Garcia v. City of New York, 104 AD 2d 438 [2nd Dept 1984]).

Where the employer concedes that its employee was acting within the scope of his employment in the commission of the allegedly tortious act, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]).

Here, the City does not dispute, but concedes, that Gales and Stango were acting within the scope and course of their employment when plaintiff was arrested. Indeed, plaintiff's

entire case against the municipal defendants is that they were acting in their official capacities as NYPD officers in her arrest and prosecution. Therefore, the City is entitled to dismissal of plaintiff's cause of action under §1983 as is premised upon claims of negligent hiring, training, supervision and retention (see Ashley v. City of New York, 7 AD 3d 742, supra).

Plaintiff's claim for assault and battery is predicated merely upon her being handcuffed and physically touched in the course of her arrest and subsequent processing and prosecution. Since plaintiff admits that she was not injured during the arrest or at any subsequent time, there is no basis to an assault and battery claim. The evidence presented is that plaintiff was merely handcuffed, frisked and detained, acts which are merely incidental to arrest. This Court does note that the existence of probable cause does not bar causes of action sounding in assault and battery based upon the use of excessive force (see Bennett v. NYC Housing Authority, 245 AD 2d 254 [2nd Dept 1997]). However, no claim is made that excessive force was used in plaintiff's arrest. Therefore, plaintiff's cause of action for assault and battery must also be dismissed.

That branch of the cross-motion by plaintiff to vacate the note of issue so as to allow the completion of discovery is denied.

That branch of the cross-motion to compel the City, Gales and Stango to comply with plaintiff's outstanding discovery demands is granted as follows: It is hereby ordered that the City furnish complete and unredacted copies of all documents demanded in plaintiff's combined demands within 45 days after entry of this order, inclusive of any disciplinary records and any IAB and CCRB files of Gales and Stango, and the arrest, prosecution and criminal disposition records of the driver of the taxi and the back-seat passenger who were also arrested, in unredacted form, but only if those records are not subject to an existing sealing order. It is further ordered that Gales appear for a deposition on May 6, 2021. And it is further ordered that Stango appear for a deposition on May 7, 2021. Neither the date nor the time of the depositions may be changed without the express, advance permission of this Court.

That branch of the motion for a default judgment against Magnificent 7 or, alternatively, to strike the answer of Magnificent 7 for failure to comply with discovery or, alternatively, to sever the action against Magnificent 7 is denied without prejudice. This Court is at a loss to understand plaintiff's counsel's contradictory requests that a default judgment should be entered against Magnificent 7, pursuant to

CPLR 3215, for failure to answer the complaint or alternatively, to strike its answer for failure to comply with discovery. The record herein reflects that Magnificent 7 did interpose a timely answer. Therefore, it is not in default and a default judgment may not be entered against it. There is also no basis for the alternative request to sever the action against Magnificent 7. As to the remaining alternative branch of the cross-motion, plaintiff may move again for an order to strike Magnificent 7's answer or alternatively to preclude it from offering any evidence at trial for failure to comply with discovery or, alternatively, to compel it to comply with discovery, upon submission of a detailed affirmation of counsel setting forth all the items of discovery that Magnificent 7 was directed to furnish and failed to do so.

This Court need not reach, and will not determine, the remaining and alternative arguments of the parties.

Dated: February 23, 2021

KEVIN J. KERRIGAN, J.S.C.