Telsaint v Takdir-2 Inc.
2022 NY Slip Op 33959(U)
November 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 525895/2018
Judge: Consuelo Mallafre Melendez
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At an IAS Term, Part 25 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of November 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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YOUSELINE TELSAINT,

Plaintiff,

DECISION and ORDER

Index No. 525895/2018
Mo. Seq. 002, 003, 004

-against-

TAKDIR-2 INC., THE CITY OF NEW YORK and NYPD OFFICER DANIEL SANDBERG,

Defendants.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s:

SEQUENCE 2: Defendant Takdir-2 Inc.'s motion for summary judgment

76-87; 131(reply)- 88; 89; 118, 119; 120; 121; 125; 126; 128, 129, 131

SEQUENCE 3: City Defendants' motion for summary judgement

90-117; 118; 119; 120; 121; 125; 126; 128

SEQUENCE 4 Plaintiff's cross motion for summary judgment

122-124; 126, 125; 128, 129; 130

Defendant Takdir-2 Inc. moves pursuant to §3212 for summary judgment in their favor dismissing all claims and cross claims as against them.

Defendants The City of New York and NYPD Officer Daniel Sandberg (City Defendants) move pursuant to CPLR § 3212 granting the defendants summary judgment as to: state and federal law false arrest and false imprisonment; 42 U. S.C § 1983 claim of excessive force and state law claim of assault and battery; state and federal malicious prosecution claims; 42 U. S.C § 1983 failure to-intervene claim; 42 U. S.C § 1983 denial of right to fair trial claim;

state and federal law negligent hiring, training, and retention claims; and 42 U. S. C § 1983 ("Monell") claim. Plaintiff submitted opposition to the following claims:

Cause of action against the City Defendants for state and federal false arrest;

Cause of action against the City Defendants for malicious prosecution;

Cause of action against the City Defendants for assault and battery; and

Cause of action against Defendant Sandberg pursuant for excessive force.

Accordingly, the unopposed portions of the City Defendants' motions are Granted.

Under New York Law, in order to establish a claim for false arrest and false imprisonment, a plaintiff must prove the following four elements: (1) the defendant intended to confine him/her; (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 of New York*, 37 N.Y.2d 451, 456 (1975). Thus, a plaintiff asserting a claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged. *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 85 (2001). The elements of a claim of false arrest under §1983 "are substantially the same as the elements of a false arrest claim under New York law." *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995); *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).

Probable cause constitutes a complete defense to a claim of false arrest under both § 1983 and New York law. *Weyant v. Okst*, 101 F.3d at 852. The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim. *Broughton v State of New York*, 37 NY2d, at 458. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender. " *Atwater v. City of Lago Vista*, 532 U. S. 318, 354 (2001); see also *Virginia v. Moore*, 553 U. S. 164, 176 (2008).

Here, probable cause to arrest plaintiff for trespass and disorderly conduct was established by the City defendants. It is undisputed that employees or agents of Takdir-2 called the police complaining that plaintiff remained seated in the eating establishment without ordering

food which is prohibited by its policy. Indeed, a “No Loitering” sign was on the wall above where plaintiff was seated. P.L. § 140. 05 states "A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises." In this case, the police officers upon arrival at the location conferred with the Takdir-2 defendants and established that plaintiff refused to leave the establishment and that she refused to place an order for food. For some time, the officers asked her to vacate the eatery. She repeatedly refused to do so and became combative with the police. Plaintiff’s own testimony establishes that she refused to leave the dining establishment despite requests to do so. The plaintiff also establishes that she entered the premises with the intention to remain in the restaurant without placing an order until such time as she would decide to do so, presumably whenever her husband would show up. The evidence established that Plaintiff possessed the requisite state of mind of knowingly entering or remaining in the restaurant. Based on the complaints of defendants Takdir-2’s agents and conversation with the plaintiff, the City defendants established that there was probable cause to arrest plaintiff.

Ultimately, plaintiff was issued a summons for violating P.L. §240. 20(1) Disorderly Conduct, which states "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: He engages in fighting or in violent, tumultuous or threatening behavior.” The City defendants established that they also had probable cause to arrest plaintiff for disorderly conduct. The video footage submitted with the motions and relied upon by all parties shows that plaintiff quickly became agitated, combative and tumultuous. Her actions caused a disruption and disturbance of the business activity of defendant Takdir-2 and became a threat to the police officers who responded to their complaints. The video footage clearly shows that she attempted to bite the police officer as he was attempting to take off one handcuff from her wrist. She also attempted to bite the second officer. At one point, she kicked one of the officers. Further, the evidence shows that plaintiff exhibited an intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof. Plaintiff engaged in a tumultuous or threatening behavior by refusing to leave the premise when she was politely asked and actively resisting the officers attempts to remove her. Thus, the evidence submitted supports a finding that the officers had probable cause to arrest the plaintiff not only for trespass but also for disorderly conduct. Plaintiff does not raise an issue of fact to warrant denial of summary judgment.

The court notes that plaintiff was not arrested at all, rather she was given a summons. Nevertheless, the fact that the officers chose not to arrest plaintiff does not negate that there was probable cause for the officers to arrest.

Accordingly, as the City defendants established that there was probable cause to arrest, the state and federal false arrest and false imprisonment claims summary judgment is granted.

With regards to the plaintiff's 42 U. S.C § 1983 claim of excessive force and state law claim of assault and battery as against the City defendant, the City defendants established their prima facie burden for summary judgment on the claim of assault and battery. "A claim that a law enforcement official used excessive force during the course of an arrest, investigatory stop, or other 'seizure' of the person is to be analyzed under the 'objective reasonableness' standard of the Fourth Amendment." *Davila v City of New York*, 139 AD3d 890, 891 [2d Dept 2016]. As to this claim, plaintiff raised an issue of fact as the reasonableness of the force used in this incident. Therefore, claims for excessive force, assault and battery are reserved for trial; summary judgement is denied.

The Takdir-2 defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging false arrest, false imprisonment and malicious prosecution claims by tendering evidence that they did not affirmatively induce a police officer to act (but merely supplied information to the police, who determined that an arrest was appropriate. See *DeFilippo v. County of Nassau*, 183 A.D.2d 695 [2d Dept 1992]; see *Wasilewicz v. Village of Monroe Police Dept*., 3 A.D.3d 561 [2d Dept 2004]. "[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." *Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003]; see *Levy v Grandone*, 14 AD3d 660, 661 [2d Dept 2005]; *Boadu v City of New York*, 95 AD3d 918 [2d Dept 2012]; *Zapata v Tufenkjian*, 123 AD3d 814 [2d Dept 2014].

Here, the Takdir-2 defendants established, prima facie, that their agents or employees merely reported the complaint to the police. Plaintiff did not raise an issue of fact as to whether the agents of defendant Takdir-2 Inc or the City defendants "affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active,

officious and undue zeal, to the point where the officer is not acting of his own volition" *Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003]; See, *Boadu v City of New York*, 95 AD3d 918, 91 [2d Dept 2012]; *Perez v. Charter One FSB*, 298 A.D.2d 447 (2d Dept. 2002); see also, *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Indeed, no evidence was submitted to support a claim that the agents or employees of Takdir-2 induced the police to act. Takdir-2 established its prima facie burden, but the plaintiff failed to raise an issue of fact. Summary judgment is granted to Takdir-2 as to these claims.

Defendant Takdir-2 also seeks summary judgment as to §1981 and §1983 claims and claims for violation of NYC Administrative Code § 8-107. The protections of §1981 extend only to the making and enforcement of contracts and that '[w]here an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief.'" *Giaimo & Vreeburg v Smith*, 192 AD2d 41 [2d Dept 1993]. In order for a contract enumerated in §1981 to be created, the customer must actively engage with a restaurant for services. *Giaimo & Vreeburg v Smith*, supra; *Henry v. Lucky Strike Entertainment, LLC*, 2013 WL 4710488, (E.D.N.Y. 2013). In this case, no contract was entered into between plaintiff and the agents or employees of Takdir-2. Further, there is no evidence that the plaintiff was denied a contract because of discriminatory reasons, as is required to support a cause of action under 42 USC § 1981. See, *Chun Suk Bak v Flynn Meyer Sunnyside, Inc.*, 285 AD2d 523 [2d Dept 2001]. Indeed, there is no evidence that defendants denied food services to the plaintiff. On the contrary, the actions of the agents and employees of Takdir-2 Inc evidenced a willingness to take a food order from the plaintiff, yet plaintiff refused to do so. Furthermore, the evidence establishes that no objection was made about plaintiff sitting at a table so long as she placed an order for food. This she persistently refused to do. Accordingly, defendant Takdir-2 established its prima facie showing for summary judgment as to a §1981 claim and dismissal of this claim. Plaintiff's submissions and arguments do not raise an issue of fact. Summary judgment is granted as to this claim.

"In order to state a claim under §1983, a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law. (Internal citation omitted). Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the

challenged conduct constitutes 'state action.'" *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 941 F.2d 1292, 1295–96 (2d Cir.1991) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Ciambriello v County of Nassau*, 292 F3d 307 [2d Cir 2002]. A private actor acts under color of state law when the private actor "is a willful participant in joint activity with the State or its agents." *Ciambriello v County of Nassau*, 292 F3d 307, 324 [2d Cir 2002]. "In some circumstances, the actions of a private citizen can become the actions of the State for purposes of the due process clause. (Internal citation omitted). For instance, State action, or action under color of State law, has been readily found in racial discrimination cases. (Internal citations omitted)." *Blye v Globe-Wernicke Realty Co*., 33 NY2d 15, 19-20 [1973].

Here, Defendant Takdir-2 established, through its submissions, its prima facie showing that its acts were not committed by any person acting under color of state law and that they did not violate any constitutional right of the plaintiff. Plaintiff's conclusory assertions in opposition fail to raise an issue of fact. Summary judgment is granted to Takdir-2 as to this claim.

Takdir-2 established its prima facie burden for summary judgment to dismiss claims of violation of NYC Administrative Code 8-107 and N.Y. State Human Right Law. Plaintiff does not submit opposition other than a conclusory statement that these must not be dismissed. Plaintiff therefore does not raise an issue of fact while Takdir-2 established its prima facie showing on summary judgment. Accordingly, these claims are dismissed and summary judgment is granted to Takdir-2.

Plaintiff's cross motion will not be considered as it is untimely. "Pursuant to CPLR 3212 (a), courts have "considerable discretion to fix a deadline for filing summary judgment motions" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]), so long as the deadline is not "earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown." *Brill v City of New York* at 651; see CPLR 3212 [a]; *Lanza v M-A-C Home Design & Constr. Corp*., 188 AD3d 855, 856 [2d Dept 2020]. Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits (*Brill v City of New York*, 2 NY3d at 652). However, an untimely cross motion for summary judgment may nevertheless be considered by the court "where a

timely motion was made on nearly identical grounds" (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K & K 7619, Inc*., 144 AD3d 87, 890 [2d Dept 2016])." *Dojce v 1302 Realty Co., LLC*, 199 AD3d 647, 649-650 [2d Dept 2021]. In this case, as in *Dojce v 1302 Realty Co., LLC*, the cross motion was made months after the deadline imposed by the court and beyond the time stipulated by the parties. Here, as in *Dojce v 1302 Realty Co., LLC*, there was no explanation or excuse offered for the delay. While good cause may be found where a late motion for summary judgment is made on identical grounds as a timely filed one, that portion of plaintiff's cross motion seeking summary judgment for the illegal search claim is based on matters not brought up in either of the timely filed motions. See, *Williams v Wright*, 119 AD3d 670 [2d Dept 2014]. The request for summary judgment as to this claim will not be entertained.

Therefore, plaintiff's cross motion seeking summary judgement on the unlawful search claim is denied as untimely. The other requests for relief in Plaintiff's cross motion were covered in defendants' motions and were decided accordingly. The court accepts the arguments made in Plaintiff's cross motion as opposition to defendants' timely filed motions.

Accordingly, defendants Takdir-2 Inc.'s motion for summary judgment is Granted in its entirety. The City defendants' motion is Granted to the extent that summary judgment is granted as to all claims brought up in its motion except for claims based upon use of excessive force and assault and battery, as an issue of fact was raised in opposition. Plaintiff's cross motion is Denied as untimely pursuant to *Brill* and its progeny.

This constitutes the decision and order of the court.

ENTER.

Hon. Consuelo Mallafre Melendez
J. S. C