

**Kaba v Zara USA, Inc.**

2023 NY Slip Op 30930(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 157434/2022

Judge: Dakota D. Ramseur

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR PART 34M**

*Justice*

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SIDIKABAH KABA, ADAMA HAIDARA, MOHAMED HAIDARA

Plaintiff,

**INDEX NO.** 157434/2022

**MOTION DATE** 12/05/2022

**MOTION SEQ. NO.** 001

- v -

ZARA USA, INC., ABC CORP., JOHN OR JANE DOE 1 - 5,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

In August 2022, plaintiffs Sidikabah Kaba, Adama Haidara, and Mohamed Haidara commenced this action against Zara USA (hereinafter “Zara”), an unknown independent contractor (“ABC Corp.”), and the five security guards employed by them (referred to in the complaint as “John or Jane Doe 1-5”) at a Zara apparel store located at 1963 Broadway, New York, New York. Plaintiffs allege that defendants falsely accused them of shoplifting, called the police on them, and caused them to be detained while knowing the identity of the actual shoplifter to be a different customer. Based on these allegations, they have asserted six causes of action against defendants—for slander per se, negligent hiring and supervision, assault and battery, false arrest and imprisonment, and unlawful discrimination under both the New York State Human Rights Law (“NYSHRL”) and the City Human Rights Law (“NYCHRL”). In this motion sequence, Zara has moved pursuant to CPLR 3211 (a) (7) to dismiss each cause of action. Plaintiffs oppose the motion in its entirety. The motion is granted in part.

**BACKGROUND**

On September 9, 2021, plaintiffs, all of whom are black or African American men, purchased items at Zara’s 1963 Broadway, New York store. Around this same time, Zara’s security guards observed another black male attempting to steal items of clothing by secreting them into a shopping bag. According to the complaint, the security guards then observed the shoplifter abandon the bag and leave the store. (NYSCEF doc. no. 1 at ¶ 17-18, complaint.) As alleged, one of the security guards called the New York City Police Department and reported that plaintiffs had been the ones who were attempting to steal or were friends with the shoplifter. The officers who responded to Zara’s report detained and questioned plaintiffs, as well as searched their persons and effects while in the store and within view of the public. (*Id.* at 23-24.) Police questioned and detained plaintiffs “for several minutes” before Zara’s security team allegedly admitted to them that they had watched the shoplifter leave. (*Id.* at ¶25.)

As described above, plaintiffs have brought six causes of action against defendants. Zara now moves to dismiss each cause of action against it pursuant to CPLR 3211 (a) (7).

## DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) However, the court need not accept as true bare legal and factual conclusions. (*Vig v New York Hairspray Co.*, 67 AD3d 140,145 [1st Dept 2009].) The courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

### *Slander Per Se Cause of Action*

On motions to dismiss causes of action for slander per se, in addition to applying the above-described CPLR 3211 (a) (7) principles, courts must also assess whether the plaintiff has included "the particular words complained of" within the complaint. (*See* CPLR 3016, titled "Particularity in specific actions".) The requirement that a plaintiff allege the "exact words" that constitute the cause of action is strictly enforced. (*Abe's Rooms Inc. v Space Hunters, Inc.*, 38 AD3d 690, 693 [2d Dept 2007]; *see Romanello v Intesa Sanpaolo S.P.A.*, 97 AD3d 449 [1st Dept 2012] [holding that allegations of "statements to the effect that" and "or other words synonymous therewith" were not sufficiently particular to make out a cause of action for defamation or slander].)

Plaintiffs' cause of action for slander per se is deficient on its face because it fails to allege the precise, exact words that Zara used in reporting the alleged theft to New York City police officers. The complaint is only so specific as to allege that Zara, the unidentified corporation or one of the security guards at the store "called the New York City Police Department and reported Plaintiff's as having stolen property." (NYSCEF doc. no. 1 at ¶23.) Plaintiffs then admit in their opposition papers that they do not know the precise statements made to the police "because at the time Defendant Zara, by and through its agents...made such statements, Plaintiffs were not within earshot." (NYSCEF doc. no. 10 at ¶17, aff. in opposition.) Elsewhere in their opposition, plaintiffs contend that it has satisfied CPLR 3016's particularity pleading standard because there is a connection between Zara and the responding officers. For them, "the numerous NYPD officers shown in the video who all arrived at the same location did not converge on Plaintiffs accidentally or by coincidence." (*Id.* at ¶20.) That the officers responded to Zara's call, however, is immaterial: at best, it simply suggests that Zara believed plaintiffs were the shoplifters without providing any sort of detail as to what was said. Accordingly, it does not excuse the failure to plead the exact words. (*See BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [1st Dept 2009] [Use of qualifying "words to the effect" and relying on a third-party's paraphrasing of the plaintiff's allegedly false statements do not satisfy the particularity requirement]; *Manas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [1st Dept

2008] [Where defamatory words were only paraphrased in such a manner that the “actual words were not evident from the face of the complaint, the long-standing rule is that dismissal is required”].) Lastly, plaintiffs’ argument that discovery is needed to obtain the exact words, and therefore the cause of action should not be dismissed, is unpersuasive given that several avenues exist for obtaining the sought-after material including through a FOIL request with the New York Police Department.

### *False Arrest and Imprisonment Cause of Action*

Properly pleading a cause of action for false arrest and imprisonment requires plaintiffs to allege: (1) defendant intended to confine them; (2) they were conscious of the confinement; (3) they did not consent to the confinement; and (4) the confinement was not otherwise privileged. (See *Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007].) Here, Zara only challenges whether plaintiff has adequately alleged that it, as opposed to the New York City Police Department, effectuated plaintiffs’ confinement. Where the alleged confinement is undertaken by New York City police officers, as opposed to the private entity/store owner or one of their agents, liability will not be imposed on the private entity if they “merely made [a] statement, leaving it to the officer to act or not as he thought proper.” (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132-133 [1st Dept 1999], quoting *Vernes v Phillips*, 266 NY 298, 301 [1935].) Instead, private actors may become liable for false arrest or imprisonment only where they have “actively participated” in the confinement by directing, encouraging, or instigating the officer to take plaintiff into custody (*Du Chateau*, 253 AD2d 128 at 132; *Celnick v Freitag*, 242 AD2d 436, 437 [1st Dept 1997]), importuning the officers to act (*Wieder v Home Depot U.S.A., Inc.*, 208 AD3d 535, 538 [2d Dept 2022]), or where the private entity has made police officers their agents in effecting arrest (*Carrington v City of New York*, 201 AD2d 525, 527 [2d Dept 1994]).

As pled, there is no indication that Zara’s involvement in plaintiffs’ confinement was anything more than reporting plaintiffs’ possible involvement in the theft to police. There are no allegations that Zara or its agents and employees “affirmatively induced the officer[s] to act” or took any other active role in the confinement. (See *Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003].) Accordingly, plaintiffs have not adequately pled a cause of action for false arrest or imprisonment against Zara.

Plaintiffs’ arguments in opposition are unavailing. “Singling out Plaintiffs to police as purported shoplifters” does not rise to the level of “assisting police in detaining, questioning, and searching Plaintiffs.” (NYSCEF doc. no. 10 at ¶ 27.) The doctrine of transferred intent—whereby, for example, a defendant intends to commit an intentional tort against one individual but, in the process of committing that tort, mistakenly injures another—is inapplicable to false arrests of the type presented here. First, plaintiffs’ theory is internally inconsistent. As alleged in the complaint, Zara knew the identity of the shoplifter throughout the incident but nonetheless intended to confine plaintiffs, using the police to effectuate their purpose. Yet, to apply here, the doctrine of transferred intent requires that Zara’s intentional conduct against *other* individuals unintentionally injured plaintiffs. Put differently, for Zara to be liable to plaintiffs, plaintiffs would have to show that Zara intended for the police officers to (falsely) detain/arrest other individuals but instead, for whatever reason, their conduct unintentionally caused police to

detain/arrest them. Throughout the complaint, however, plaintiffs allege that Zara solely intended to call the police officers' attention to plaintiffs. (*See* NYSCEF doc. no. 1 at 24-25 [While police were detaining plaintiffs, "the shoplifter walked right past the police officers while Defendants John or Jane Doe 1-5 looked on and made no attempt to move or attempt to point the officers to the true perpetrators"].)

Second, and perhaps more importantly, to apply the doctrine of transferred intent here, without anything more, would essentially forgo the rule that private entities are only liable where they actively participate in an arrest effectuated by police. From the four corners of the complaint, the officers, without interference from Zara, made the ultimate decision to detain/confine plaintiffs. Lastly, the Court is unaware of—certainly plaintiffs have not provided any—appellate precedent that applies transferred intent to false arrest cases.

#### *Assault and Battery Cause of Action*

Plaintiffs' claims for civil assault and battery must also be dismissed. To plead a cause of action for civil assault, plaintiffs must allege that defendant put them in "imminent apprehension" of "harmful or offensive contact." (*See Charkhy v Altman*, 252 AD2d 413, 414 [1st Dept 1998]; *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 829 [2d Dept 2015].) Meanwhile, to plead a cause of action for battery, plaintiff must allege defendant made some sort of offensive, i.e., wrongful, bodily contact. (*Nicholson v Luce*, 55 AD3d 416, 416 [1st Dept 2008] [Dismissing claim for battery as insufficiently plead because there were no allegations of offensive bodily contact].) Zara contends, and plaintiffs admit, that none of Zara's security guards or employees made physical contact with plaintiffs nor placed them in imminent apprehension of a harmful or offensive contact. (NYSCEF doc. no. 10 at ¶23-24, aff. in opposition ["While plaintiffs concedes that Defendant did not actually make physical contact with Plaintiffs, the false information they provided to police...caused the responding police officers to stop, seize, and detain Plaintiffs"].)

Nonetheless, plaintiffs assert that it has properly pled these causes of action because it has alleged that Zara is liable based on actions taken by police officers under the doctrine of transferred intent. Yet the doctrine is no more applicable to the plaintiffs' assault and battery causes of action. To reiterate, the complaint does not contain any facts that would indicate the police officers were being pressured or otherwise induced by Zara to effectuate plaintiffs' detainment. The decision to detain and search the plaintiffs was made by the police officers alone. In the absence of allegations that Zara coopted the officers to be its agents for these purposes, liability for assault and battery cannot lie with Zara.

#### *Negligent Hiring, Training, and Supervision Cause of Action*

Plaintiffs may not recover against Zara under a negligent hiring, training, and supervision theory of liability for two independent reasons. First, it is clear from the complaint that the security guards who called and reported plaintiffs to the police were acting within the scope of their employment with Zara. Plaintiffs' entire theory of recovery against Zara is based upon the doctrine of respondeat superior. Yet the general rule is that where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages

under the respondeat-superior doctrine, no claim may proceed against the employer for negligent hiring or retention. (*Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 485 [2014]; *Karoon v New York City Transit Auth.* 241 AD2d 323, 325 [1st Dept 1997]; *Eckardt v City of White Plains*, 87 AD3d 1049, 1051 [2d Dept 2011].) This rule applies regardless of whether it is an employee's negligent conduct or, as here, intentional tort that serves as the underlying basis for the plaintiff's theory of recovery against the employer. (*Compare Karoon*, 241 AD2d at 325 [dismissing claim for negligent hiring where basis for respondeat superior liability is employee's negligence], *with Eckardt*, 87 AD3d at 1051 [dismissal warranted where respondeat superior liability based on assault and battery, intentional infliction of emotional distress, and civil rights violations].) Plaintiff provides no reasons why this rule does not apply here.

The second reason is that plaintiff has not pled any non-conclusory factual allegations that substantiate their claim that defendant negligently hired or supervised the security guards. Paragraph 61 of the complaint alleges that "Zara knew or reasonably should have known of its employees' propensity for committing tortious acts including, inter alia, the complained-of racially discriminatory act" (NYSCEF doc. no. 1 at ¶61.) But the complaint contains no allegations that any of the security guards were involved in other instances of tortious acts against other customers. There is simply nothing but conjecture that these employees had a "propensity" to discriminate against people who look like plaintiffs. (*See Kornfield v Zheng*, 185 AD3d 420, 421 [1st Dept 2020] [Dismissing claim where plaintiff fails to allege that defendant had a propensity to drive negligently]; *Bishop v Best Buy, Co.*, 2011 U.S. Dist. LEXIS 102179 at 29 [SDNY 2011] [Finding that claims of negligent hiring and supervision that are couched "entirely in the abstract" are not sufficient to plead a claim]; *S.C. v New York Dept. of Educ.*, 97 AD3d 518, 519-520 [2d Dept 2012] [Negligent-hiring claim dismissed since plaintiff provided no evidence as to the specific circumstances of employee's hiring].)

As to the plaintiffs' argument that dismissal is premature because discovery has not been conducted, plaintiff has not cited to any cases that allow for a negligent hiring/supervising cause of action to proceed in the complete absence of facts alleging a propensity. The line of cases that the Court uncovered in its own research on the issue suggest that plaintiffs must make at the very least this minimal showing. These cases indicate that discovery is required only to reveal the full extent of a defendant's knowledge of an established propensity or whether the employees were in fact acting within the scope of their employment. (*See K.G. v North Am. Old Roman Catholic Church*, 2023 NYLJ 478 at 10 [Sup. Ct. Kings County 2023] [Dismissal premature where the plaintiffs demonstrated a pastor's history of sexual abuse of minor and alleged that the Diocese where he was employed knew or should have known about the previous abuse allegations]; *Sterk-Kirch v Time Warner Cable Inc.*, 2013 NY Slip Op 32124 [U] at \*3-4 [Sup. Ct. NY County 2013] [Dismissal premature where complaint alleges that defendant's employee had a criminal record and defendant knew about the criminal record before hiring]; *Gardner v Gotham Per Diem, Inc.*, 2022 NY Slip Op 331115 [U] at \*17-18 [Sup. Ct. NY County 2022].) Neither reason for discovery exists here.

#### *Discrimination under NYSHRL and NYCHRL*

The Court, however, is unpersuaded as to Zara's argument that plaintiffs failed to plead discrimination under either the State or City Human Rights Law. The NYSHRL provides that it

shall be an unlawful discriminatory practice for owners, lessees, or proprietors of any public accommodation to deny to any such person on account of their race “any of the accommodations, advantages, facilities, or privileges thereof.” (NY CLS Executive Law § 296 [2].) The NYCHRL is similarly worded: “it shall be an unlawful discriminatory practice for any person” who is the owner, lessee, or proprietor “to refuse, withhold from, or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities, or privileges of the place” on account of that person’s race. (NYC Administrative Code § 8-107 [4].) Plaintiffs have sufficiently alleged that Zara’s security guards, in connecting plaintiffs to the real shoplifter, racially profiled plaintiffs and that because of such racial profiling, plaintiffs were detained by the responding police officers. Based on the plain meaning of the statutes, plaintiff has sufficiently alleged that they were denied the full, equal enjoyment of Zara’s store, on equal terms with the rest of Zara’s customers.

Since plaintiffs have not otherwise moved to amend the complaint and they have not included a proposed amended complaint in the opposition, the Court need not determine whether plaintiffs may do so at a later date.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant Zara USA, Inc’s motion to dismiss pursuant to CPLR 3211 is granted to the extent that plaintiffs Sidikabah Kaba, Adama Haidara, and Mohamed Haidara’s causes of action for slander per se, false arrest and imprisonment, negligent hiring and supervising, and assault and battery is dismissed as against Zara; and it is further

ORDERED that counsel for plaintiffs and defendants shall appear at 60 Centre Street, Courtroom 341 at 10 a.m. on April 25, 2023, for a preliminary conference with the Court; and it is further

ORDERED that counsel for defendant shall service a notice of entry, along with a copy of this order, upon all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.



3/27/2023  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: