SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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JOHN KENNY,

Plaintiff,

- against -

MICHAEL WILLIAMS and AL-AWDA, THE PALESTINE RIGHT TO RETURN COALITION,

Defendants.

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DECISION AND ORDER

Index No. 303613/2013

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated September 26, 2013 and the affirmation and exhibits submitted in support thereof; the Opposition to Motion to Dismiss and Counter-Motion for Summary Judgment dated October 20, 2013 of defendant Al-Awda, the Palestine Right to Return Coalition and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated October 30, 2013 and the exhibit submitted therewith; plaintiff's affirmation in reply dated October 30, 2013 and the exhibit submitted therewith; and due deliberation; the court finds:

This action alleges assault by defendant Michael Williams ("Williams") during a rally organized by defendant Al-Awda, the Palestine Right to Return Coalition ("Al-Awda"). As to Al-Awda, plaintiff alleges the failures to screen participants, prevent the assault and maintain adequate security to prevent injury to passers-by. Plaintiff moves pursuant to CPLR 3211(a)(7) (failure to state a cause of action) to dismiss Al-Awda's counterclaims, together with its ancillary claims for punitive damages and attorney's fees, relying solely on such pleading.[1]

[1] The court notes that the notice of motion sought an order dismissing "Plaintiff's claims against the Defendant." This obvious error is disregarded, *see* CPLR 2001, as the affirmation clearly identified the relief sought and Al-Awda fully and substantively responded to the motion.

"On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), it is well settled that courts must liberally construe a pleading, accept all the facts alleged therein to be true, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory." *Molina v. Phoenix Sound, Inc.*, 297 A.D.2d 595, 596, 747 N.Y.S.2d 227, 229 (1st Dep't 2002). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20, 401 N.Y.S.2d 182, 185 (1977).

The court has recognized "the right of plaintiffs 'to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint.' If we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient." *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 318, 655 N.E.2d 661, 667, 631 N.Y.S.2d 565, 571 (1995) (internal citations omitted); *see also See EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 832 N.E.2d 26, 799 N.Y.S.2d 170 (2005).

The pleading receives "the benefit of every *plausible* favorable inference, the court's task being only to determine if the facts alleged comport with a cognizable legal theory." *Ramerica Int'l, Inc. v. Mil-Spec Indus. Corp.*, 293 A.D.2d 420, 420, 740 N.Y.S.2d 857, 857-58 (1st Dep't 2002) (emphasis added). The pleading need merely state "in some recognizable form any cause of action known to our law." *Sheroff v. Dreyfus Corp.*, 50 A.D.3d 877, 877-78, 855 N.Y.S.2d 902, 903 (2d Dep't 2008). The proponent is not required to show in response that its allegations will ultimately be proven. *See Leon v Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972

(1994).

"[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 357 N.E.2d 970, 972, 389 N.Y.S.2d 314, 316 (1976). The court may consider "other," *Tenuto v. Lederle Lab.*, 90 N.Y.2d 606, 687 N.E.2d 1300, 665 N.Y.S.2d 17 (1997), or "additional," *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987), documents submitted in opposition to the motion.

However, "the factual allegations [of the complaint] must be enough to raise a right to relief above the speculative level." *Icahn v. Lions Gate Entertainment Corp.*, 2011 N.Y. Misc. LEXIS 1336, at ***17 (Sup Ct N.Y. County 2011). "[C]onclusory allegations - claims consisting of bare legal conclusions with no factual specificity," *Godfrey v. Spano*, 13 N.Y.3d 358, 373, 920 N.E.2d 328, 334, 892 N.Y.S.2d 272, 278 (2009), are not entitled to the presumption of truth and the accord of every favorable inference, *see Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233, 612 N.Y.S.2d 146 (1st Dep't 1994). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Such allegations "are insufficient to survive a motion to dismiss." *Godfrey*, 13 N.Y.3d at 373, 920 N.E.2d at 334, 892 N.Y.S.2d at 278.

The first counterclaim alleges that plaintiff commenced this action "with the intention of harassing, defaming, limiting and punishing Defendant Al-Awda's right and ability to engage in protected free speech activities" and that "Al-Awda has been impaired in its ability to engage in, and secure the participation of others in, protected free speech and free association activities." Plaintiff argues that the claim, containing only legal conclusions unaccompanied by any factual allegations, is insufficiently pled. The absence of factually specific allegations is fatal to Al-Awda's claim, *see*

Godfrey, supra, and defendant's submissions did not bolster the claim.

The second counterclaim alleges that plaintiff "sustains his otherwise frivolous and harassing complaint against Defendant Al-Awda by making knowingly false material statements and claims with reckless disregard for the falsity of the underlying claim so as to cause, and to induce this Court to cause, the obstruction, impediment, delay and prevention of Al-Awda's right to engage in the protected activities of free speech and freedom of association" and that "Al-Awda has been impaired in its ability to engage in, and secure the participation of others in, protected free speech and free association activities." This counterclaim suffers from the same lack of specific factual allegation as the first counterclaim. *See Godfrey, supra*. Even if it did not, the counterclaim must be dismissed as duplicative of Al-Awda's counterclaim alleging malicious prosecution. *See Santoro v. Town of Smithtown*, 40 A.D.3d 736, 835 N.Y.S.2d 658 (2d Dep't 2007); *Yuen v. Yuk Lin Sun*, 32 Misc.3d 1237[A], 938 N.Y.S.2d 231 (Sup Ct N.Y. County 2011).

The third counterclaim alleges that plaintiff "committed a *prima facie* tort against the Claimants herein by filing this action with an intent to cause harm to Defendant Al-Awda without excuse or justification so as to cause Defendant Al-Awda to incur special damages." The cause of action suffers from the same lack of specific factual allegation as the other counterclaims. *See Godfrey, supra*. It alleges no special damages, and is therefore deficient. *See Phillips v. New York Daily News*, 111 A.D.3d 420, 974 N.Y.S.2d 384 (1st Dep't 2013); *Christopher Lisa Matthew Policano, Inc. v. North American Precis Syndicate, Inc.*, 129 A.D.2d 488, 514 N.Y.S.2d 239 (1st Dep't 1987); *Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 520 N.Y.S.2d 764 (1st Dep't 1987). Furthermore, the counterclaim sounds in the traditional tort of malicious prosecution, and "a party will not be permitted to plead *prima facie* tort in the alternative to malicious prosecution, since the former was not designed to 'become a "catch-all" alternative for every cause of action which

cannot stand on its legs.'" *Lemberg v. John Blair Communs.*, 251 A.D.2d 205, 206, 674 N.Y.S.2d 355, 356 (1st Dep't 1998). The cause of action furthermore fails to allege that disinterested malevolence was plaintiff's sole motive in commencing the action. *See Posner v. Lewis*, 18 N.Y.3d 566 n1, 965 N.E.2d 949, 942 N.Y.S.2d 447 (2012); *Christopher Lisa Matthew Policano, Inc.*, *supra*. Al-Awda's submissions in opposition support plaintiff's claim that he was, in fact, assaulted by Williams, a participant in the rally it admits to organizing; plaintiff accordingly had an alternative basis for commencing the action.

The fourth counterclaim alleges malicious prosecution. Such a claim requires proof of the commencement or continuation of a proceeding against the claimant by the defendant, termination of the proceeding in favor of the claimant, the absence of probable cause for the proceeding, actual malice and special injury. *See Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 797 N.Y.S.2d 83 (1st Dep't 2005). The underlying action need not be a criminal proceeding. Notwithstanding the lack of any allegation that any proceeding has terminated in Al-Awda's favor, the counterclaim fails to allege any damage, let alone facts establishing "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit." *Kaye v. Trump*, 58 A.D.3d 579, 580, 873 N.Y.S.2d 5, 6 (1st Dep't 2009), *appeal denied*, 13 N.Y.3d 704, 915 N.E.2d 1179, 887 N.Y.S.2d 1 (2009). Furthermore, "when the underlying action is civil in nature the want of probable cause must be patent." *Perryman v. Village of Saranac Lake*, 41 A.D.3d 1080, 1081, 839 N.Y.S.2d 290, 292 (3d Dep't 2007). Al-Awda admitted to having organized the rally; there was therefore reason to include it as a defendant. *See Wilhelmina Models, Inc.*, *supra*.

All counterclaims alleged that plaintiff acted individually and in conspiracy with others. New York does not recognize a separate cause of action for civil conspiracy, although "a plaintiff

may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." *American Preferred Prescription, Inc. v. Health Mgmt.*, 252 A.D.2d 414, 416, 678 N.Y.S.2d 1, 3 (1st Dep't 1998). The claim stands or falls with the underlying tort. *See Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC*, 82 A.D.3d 1035, 920 N.Y.S.2d 123 (2d Dep't 2011). Inasmuch as the underlying claims are being dismissed, this claim, too, fails.

Furthermore, there can be no claim for punitive damages in the absence of a viable underlying claim. *See Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603, 634 N.E.2d 940, 612 N.Y.S.2d 339 (1994). Finally, "[i]t is well established that in the absence of specific statutory authority counsel fees 'are merely incidents of litigation and thus are not compensable.'" *In re Green*, 51 N.Y.2d 627, 629-30, 416 N.E.2d 1030, 1032, 435 N.Y.S.2d 695, 696 (1980), *reh'g denied*, 52 N.Y.2d 1073 (1981) (citations omitted); *see also Braithwaite v. 409 Edgecombe Ave. HDFC*, 294 A.D.2d 233, 742 N.Y.S.2d 280 (1st Dep't 2002). Al-Awda's opposition did not provide further support for the counterclaims.

Al-Awda cross-moves for summary judgment dismissing the complaint. It argues that plaintiff struck the first blow and that the altercation occurred after and away from the rally. Even assuming that Al-Awda's evidence, including what appears to be excerpted testimony, was all in admissible form, it failed to establish *prima facie* entitlement to summary judgment.

The affirmative defense of self-defense is Williams' to assert, if at all. *See Carp v. Marcus*, 138 A.D.2d 775, 525 N.Y.S.2d 395 (3d Dep't 1988). "The necessity of protecting one's self against attack is a defense against liability for assault and battery as a justification for acts which otherwise would constitute the tort, *provided such acts do not exceed in their nature or force the necessity of the occasion.*" 6A NY Jur Assault - Civil Aspects § 11 (emphasis added). Evidence of self-

defense/provocation may be considered in mitigation of compensatory damages. *See Totaro v. Scarlatos*, 63 A.D.3d 1144, 882 N.Y.S.2d 258 (2d Dep't 2009). "A person is not ordinarily justified in using a dangerous weapon in self-defense where the attacking party is not armed but commits the battery by means of fists or in some other manner not essentially dangerous to life or limb." 6A NY Jur Assault - Civil Aspects § 12. Here it is acknowledged that Williams struck plaintiff with a blunt instrument, and Al-Awda's submissions do not establish the justification of the use of such force.

With respect to the timing of the incident, one purported witness testified to being unsure whether the incident occurred after the rally ended. The witness further testified that the events occurred "in less than an hour," suggesting that the events could have commenced during the course of the rally and continued for a period of time. With respect to the location of the incident, one purported witness testified that he or she walked only two blocks from where he or she was at the rally to a pizza place where the assault occurred and that the pizza place "wasn't right next to" the rally.

The affidavit of a member of Al-Awda who participated in a meeting with the New York City Police Department when securing the permit for the rally averred that "a countless number[] of NYPD officers and Lieutenants and Detectives were present. They set up barricades at the rally points and escorted the rally during the marching portion of the rally," "there were many marshalls also working with the NYPD to ensure everyone's safety" and "the rally began and ended without incident."

"[O]ne who collects large numbers of people for gain or profit must be vigilant to protect them and . . . this duty includes the responsibility of using all reasonable care to protect individuals and property from injury due to causes reasonably to be anticipated." *Monacelli v. Armstrong*, 64 A.D.2d 428, 433, 409 N.Y.S.2d 899, 902 (4th Dep't 1978), *affirmed*, 49 N.Y.2d 971, 406 N.E.2d

804, 428 N.Y.S.2d 949 (1980). It is apparent from its affidavit that Al-Awda affirmatively undertook security functions. *Cf. Plante v. Hinton*, 271 A.D.2d 781, 706 N.Y.S.2d 215 (3d Dep't 2000); *Dinardo v. The City of New York*, 2002 N.Y. Misc. LEXIS 908 (App Term 1st Dep't July 29, 2002).

The mention of a "marching portion" implies that there were other "portions" to the event that were not on the marching route, the only specific place where police officers were averred to be present. Al-Awda's proof, however, fails to mention the size, scope or geographical area of the events organized by Al-Awda such that its "many" marshalls and the hyperbolic "countless" officers may be deemed adequate, nor does it establish that the incident did not occur near any "portion" of the events organized by Al-Awda or near any "rally points." Al-Awda has not demonstrated *prima facie* that its efforts were adequate to discharge its duty, nor has it demonstrated the absence of any material issue of fact. Furthermore, it is apparent that meaningful discovery has yet to take place.

Accordingly, it is

ORDERED, that the motion of plaintiff to dismiss the counterclaims asserted by defendant Al-Awda, The Palestine Right to Return Coalition is granted; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of plaintiff dismissing the counterclaims of defendant Al-Awda, The Palestine Right to Return Coalition; and it is further

ORDERED, that the cross-motion of defendant Al-Awda, The Palestine Right to Return Coalition for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: December 13, 2013

Lucindo Suarez, J.S.C.