SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL WOOTEN J.S.C. PART 7

Justice

AKEA ROYAL,

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

INDEX NO. 100082/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits— Exhibits _____ No(s). _____

Replying Affidavits — Exhibits _____ No(s). _____

Cross-Motion: ☐ Yes ■ No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Before the Court is a pre-answer motion by the New York City Housing Authority (defendant or NYCHA) to dismiss Akea Royal's (plaintiff) complaint in its entirety, pursuant to CPLR 3211(a)(3), (5) and (7) and to convert the motion pursuant to CPLR 3211(c) to one for summary judgment. Plaintiff is in opposition to the herein motion.

BACKGROUND

In her complaint, plaintiff asserts causes of action against the defendant for, *inter alia*, negligence, false arrest, false imprisonment and malicious prosecution stemming from personal injuries allegedly sustained by her on October 7, 2010. She alleges that after spending the night, she was present in Apartment 8E at 27 Warren Street, in Staten Island, New York at 9:30 a.m. with her friend Jonathan Dunn (Dunn) visiting Dunn's friend Vonta Santiago (Santiago), who allegedly lived in 8E. 27 Warren Street is a NYCHA housing project. Plaintiff alleges that she was awakened by the

police banging on the door. Plaintiff testified at her 50-H hearing that she had spent the night in 8E approximately ten times previously (Affirmation in Support of Motion to Dismiss, exhibit 2, p. 39). Plaintiff avers that personnel of the New York Police Department (NYPD), under the direction of NYCHA, forced open the door of the apartment. Subsequently, Dunn allegedly climbed out of the eighth floor bathroom window, onto an exposed cable affixed to the structure of 27 Warren Street, and climbed down that cable. Plaintiff, who was almost 20 years old at the time of the accident, followed Dunn because she claims she was afraid of being arrested. However, when plaintiff climbed out of the window she lost her grip and fell multiple stories, and landed on construction scaffolding. Plaintiff was almost 20 years old at the time of the accident and she suffers from cerebral palsy.

NYCHA states that Santiago was a squatter in apartment 8E and was living in the apartment without NYCHA's knowledge after the prior tenant vacated on July 29, 2010 (*see* Affirmation in Support of Motion to Dismiss, Ravelo Affidavit at 2). NYCHA argues that its motion to dismiss must be granted as plaintiff's intentional act was the cause of her injuries. Specifically, plaintiff did not fall out of the window, she intentionally went out of the window of apartment 8E in an attempt to flee the NYPD officers that had entered the apartment and lost her grip while trying to climb down the cable wire. Moreover, NYCHA argues that plaintiff's causes of action for false arrest and false imprisonment are time-barred.

STANDARDS

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. "The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]). The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court" (*id.* at 279). A motion to dismiss, pursuant to CPLR 3211(a)(5), will granted when "the cause of action may not be maintained because of statutes of limitations."

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64).

DISCUSSION

As the Appellate Division, First Department, noted in *Shah v Shah* (215 AD2d 287, 289 [1st Dept 1995]), CPLR 3211(c) permits the court to treat a pre-answer dismissal motion as one for summary judgment; "1) where the action in question involves no issues of fact but only issues of law which are fully appreciated and argued by both sides; 2) where a request for summary judgment

pursuant to CPLR 3211(c) is specifically made by both sides; and 3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course." None of these three considerations have been met herein and as such, defendant's request to convert its motion to dismiss into one for summary judgment is denied. However the Court will consider the remaining portions of defendant's motion to dismiss.

"To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury" (*Howard v Poseiden Pools,* 72 NY2d 972, 974 [1988]), quoting *Derdiarian v Felix Contr. Corp.,* 51 NY2d 308, 315 [1980]). "When an intervening act also contributes to the plaintiff's injuries liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*Boltax v Joy Day Camp,* 67 NY2d 617, 619 [1986] [internal citations and quotations omitted]). "Although it is ordinarily for the trier of fact to determine legal cause, "where only one conclusion may be drawn from the established facts * * * the question of legal cause may be decided as a matter of law" (*Howard,* 72 NY2d at 974, quoting *Derdiarian,* 51 NY2d at 315). Assuming for purposes of this motion to dismiss that NYCHA's alleged negligence of a non-working front door lock on the entrance of the building, in failing to properly secure the unrented apartment thereby allowing a squatter to inhabit a vacant apartment, in failing to have a window guard on the bathroom window in 8E and in having a cable wire affixed to the outside of the building were causative factors in plaintiff's injuries, the reckless conduct of plaintiff, an adult, who climbed out of the window in order to avoid being arrested, was an unforeseeable superceding event that absolves defendant of liability (*Boltax,* 67 NY2d at 620; *see* Prosser and Keeton, Torts § 44, at 313-314 [5th ed 1984]). Thus, it is plaintiff's conduct of deliberately climbing out of the eighth story window, rather than any negligence by the defendant in entering the abandoned apartment with NYPD officers, that was the sole proximate cause of her injuries (*see Howard,* 72 NY2d at 974; *Boltax,* 67 NY2d at 620; *Smith v Stark,* 67 NY2d 693). As such, plaintiff's claim against NYCHA for negligence must be dismissed.

The Court now turns to plaintiff's claims for false arrest and false imprisonment. NYCHA, with a NYPD escort, was taking over an apartment that should have been vacant for several months and plaintiff was unlawfully trespassing in the apartment. "A plaintiff alleging a claim for false arrest or false imprisonment must show that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged" (*Hernandez v City of New York*, 100 AD3d 433, 433 [1st Dept 2013]. Probable cause was long ago "defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged" (*Carl v Ayers*, 53 NY 14, 17 [1873]). Defendant's probable cause is self-evident from plaintiff's unlawful presence in 8E, and probable cause is complete defense to a claim for false arrest and false imprisonment (*see Hernandez,* 100 AD3d at 433; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006]). Additionally, plaintiff was never arrested, confined or imprisoned as a result of the incident, she only was issued a desk appearance ticket to appear in criminal court. As such, those claims must be dismissed.

To prevail on a claim for malicious prosecution, a party is required to prove four elements: (1) initiation of a criminal proceeding, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) the proceeding was brought out of malice (*see Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]; *Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]). Plaintiff's claim for malicious prosecution also fails because of the existence of probable cause, as discussed above, as well as the absence of actual malice (*Arzeno v Mack*, 72 AD3d 341 [1st Dept 2007]; *see also Maskantz*, 39 AD3d at 213 ["Failure to establish any one of these elements (for malicious prosecution) defeats the entire claim"]). In light of the foregoing, the Court need not address the parties' remaining contentions.

CONCLUSION

Upon the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a) is granted and the complaint is dismissed in its entirety without costs or disbursements to defendant; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 12/18/13

PAUL WOOTEN J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE