Pellegrini v Duane Reade Inc.
2015 NY Slip Op 31352(U)
July 22, 2015
Supreme Court, New York County
Docket Number: 156317/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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GORDON PELLEGRINI and KEITH CERVONE,

Plaintiffs,

Index No. 156317/2012

-against-

DECISION/ORDER

DUANE READE INC., SOTTILE SECURITY CO. and JOHN DOES 1-5,

Defendants.

--x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : ____

Papers	Numbered
Notice of Motion and Affidavits Annexed................................	1
Answering Affidavits...	2
Replying Affidavits..	3
Exhibits..	4

Plaintiffs bring this action to recover for assault; battery; false arrest and imprisonment; malicious prosecution; abuse of process; negligent training; negligence; and intentional and negligent infliction of emotional distress. Defendant Duane Reade Inc. ("Duane Reade") now moves for partial summary judgment dismissing plaintiffs' causes of action for false arrest and imprisonment; malicious prosecution; abuse of process; intentional infliction of emotional distress; negligent infliction of emotional distress and negligent training and striking plaintiffs' demand for punitive damages. Defendant Sottile Security Co. ("Sottile") cross-moves for partial summary judgment dismissing plaintiffs' causes of action for intentional infliction of

emotional distress; negligent infliction of emotional distress and negligent training and to strike plaintiffs' demand for punitive damages. As set further below, Duane Reade's motion is granted only in part and Sottile's motion is granted in its entirety.

The relevant facts are as follows. Plaintiffs' claims revolve around an incident at a Duane Reade store ("the store") located at 194 East 2nd Street, New York, New York on the night of October 29, 2011. On that night, plaintiffs Gordon Pellegrini ("Pellegrini") and Keith Cervone ("Cervone") planned to attend a Halloween party in Brooklyn. Before heading to the party in Brooklyn, Cervone testified that they decided to go to a corner deli and buy beers. Cervone testified that at the deli he purchased two 22 ounce cold Miller Genuine Draft bottles of beer and put them in his jacket's front pocket. The plaintiffs then decided to go to the Duane Reade store directly across the street to get snacks. At the time the plaintiffs entered the store, plaintiffs were carrying tennis rackets, which they claim were part of their Halloween costumes.

Cervone testified that he walked around the store looking for snacks and at one point he picked up a "Jason" Halloween mask that Duane Reade had for sale, put it on and walked around the store wearing the mask. Cervone testified that he was in the store for about 15 minutes. As Cervone attempted to leave the store with the beers and Halloween mask, security guard Jyotish Chakraborty ("Chakraborty"), who worked for defendant Sottile, stopped Cervone. Cervone testified that Chakraborty yelled at him, accused him of shoplifting the beers and grabbed his right arm and pushed him up against the wall. Cervone further attests that at this time he told Chakraborty the he did not steal anything and that he had purchased the beers across the street. According to Chakraborty, Cervone never told him that he purchased the bottles before he came to the store. Rather, Chakraborty testified that he saw Cervone take the bottles from the Duane

Reade cooler. The surveillance footage of the incident shows that after Chakraborty stopped Cervone, Cervone began dancing around and playing "air guitar." Cervone eventually took off the mask and tried to leave again with the bottles in his pocket. At this point, Chakraborty removed the bottles from Cervone's pocket and placed them on the register counter. Chakraborty then told the cashier to call the manager and Cervone exited the store where co-plaintiff Pelligrini was waiting outside.

Plaintiffs allege they were standing outside the store discussing what had happened and what they should do when Chakraborty and Duane Reade employee Richard Arnold ("Arnold") came outside. A Duane Reade customer wearing a plaid shirt also exited the store at this time (the "customer"). The parties dispute what occurred next. According to Pelligrini, Arnold, without provocation, punched him in the face. Cervone also testified that Arnold punched Pelligrini in the face. Cervone further testified that the other "guard," believed to be Chakraborty, along with the customer grabbed Cervone and pulled him back into the vestibule of the store. He testified that the customer was trying to pull his jacket over his head and the security guard was hitting him from behind. He further testified that he fell down at this point and both Chakraborty and Arnold kicked him until he lost consciousness. He then woke up on the curb with no pants on and no jacket. Surveillance footage from the store shows that at one point Cervone and the customer were fighting within the store. Chakraborty testified that he was not outside at this time and he watched as Arnold, one of the plaintiffs and the customer entered the vestibule. According to Chakraborty, they were all punching each other when they came into contact with him and he got punched in the face.

After this altercation, the police were called and plaintiffs left the area of the store.

However, when plaintiffs were about a block from the store, they were stopped by squad cars and arrested. According to the criminal complaint, an employee of Duane Reade told the police that he had observed two men enter the Duane Reade store; at the time of their entry, neither of them was carrying any beer; a short while later the two men attempted to leave the store without paying while one of them was carrying several beers; he attempted to prevent the men from exiting the store's property, whereupon one of them men punched him about the face and body and the other man struck him about the head with a tennis racket. Plaintiffs were charged with (a) one count of first-degree robbery; (b) two counts of second-degree assault; and (c) one count of fourth-degree criminal possession of a weapon. All charges were eventually dismissed.

Plaintiffs now bring the instant action asserting nine causes of action: (1) assault; (2) battery; (3) false arrest and imprisonment; (4) malicious prosecution; (5) abuse of process; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress; (8) negligent training; and (9) negligence. The first, second, fifth, sixth, seventh, eighth and ninth causes of action are asserted against both defendants, while the second, third and fourth causes of action are asserted against Duane Reade only. Both defendants now move for partial summary judgment dismissing plaintiffs' sixth, seventh and eighth causes of action and striking plaintiffs' demand for punitive damages. Duane Reade also seeks summary judgment dismissing the third, fourth and fifth causes of action asserted against it.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49

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N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, as an initial matter, Duane Reade's motion for summary judgment dismissing plaintiffs' third cause of action for false arrest and imprisonment is granted as Duane Reade has established that there is no issue of fact as to its liability under this claim. To establish a claim for false arrest or false imprisonment, plaintiff must establish that: "(1) the defendant intended to confine him, (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). "It is well settled in this State's jurisprudence that 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." *Du Chateau v. Metro-North Commuter R. R. Co.*, 253 A.D.2d 128, 131 (1st Dept 1999). "Nor does identifying plaintiff as the perpetrator of a crime, signing the summons or testifying at trial give rise to tort liability." *Id.* Rather, there must be evidence that defendant "encouraged the police to arrest plaintiff or intended to confine him." *Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 362 (1st Dept 2005).

Here, the court finds that no issues of fact exist as to Duane Reade's involvement in plaintiffs' arrest as the undisputed evidence demonstrates that Duane Reade did not encourage the police to arrest plaintiffs or intend to confine them. As an initial matter, the record indicates

that Duane Reade employees neither confined plaintiffs in the store against their will, nor took part in the physical arrest of plaintiffs by the NYPD. Further, according to the criminal complaint, it is clear that plaintiffs' arrest was based upon NYPD's conversations with Chakraborty and the customer who was also involved in the altercation. Although the criminal complaint does not identify Chakraborty by name, it is clear from the record as a whole that the Duane Reade employee identified in the complaint must be Chakraborty as it is undisputed that he was the only individual who stopped plaintiff Cervone from exiting the store. As Chakraborty is not actually a Duane Reade employee but employed by Sottile, his actions cannot be attributed to Duane Reade to hold it liable. Thus, there is no evidence that Duane Reade encouraged the police to arrest plaintiffs and plaintiffs cannot maintain a claim for false arrest and imprisonment against Duane Reade.

Similarly, Duane Reade's motion for summary judgment dismissing plaintiffs' fifth cause of action for abuse of process is granted as Duane Reade has demonstrated that plaintiffs cannot maintain this claim as a matter of law. "Abuse of process has three elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Id.* As the Court of Appeals has recognized, this tort "is frequently confused with malicious prosecution." *Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assn., Local 1889, AFT FL-CIO*, 38 N.Y.2d 397, 400 (1975). Thus, the Court clarified the distinction between abuse of process and malicious prosecution claims by explaining that abuse of process is when process is issued lawfully but to accomplish some unjustified purpose, while malicious prosecution is when one maliciously causes process to issue without justification. *Id.*

Here, plaintiffs fail to identify any lawful process used by Duane Reade to accomplish some unjustified purpose to sustain a claim for abuse of process. Plaintiffs claim that Duane Reade committed an abuse of process by (1) making intentionally false and misleading statements to the police; (2) providing incomplete and misleading video to the District Attorney's Office; and (3) failing to produce any evidence of the beer other than what appears on the video. However, none of these assertions, even accepting them as true, is a lawful process used to accomplish an unjustified purpose. Rather, these assertions, if supported by adequate evidence, would support a malicious prosecution claim. Thus, plaintiffs' claim for abuse of process must be dismissed.

However, Duane Reade's motion for summary judgment dismissing plaintiffs' fourth cause of action for malicious prosecution is denied as there remain issues of fact as to whether Duane Reade failed to provide a complete and unaltered copy of the store's surveillance footage to the District Attorney. "In order to recover for malicious prosecution, a plaintiff must establish four elements: that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice." *Cantalino v. Danner*, 96 N.Y.2d 391, 394 (2001). "New York law has long equated the civil defendant's failure to make a full and complete statement of the facts to the District Attorney or the court, or holding back information that might have affected the results, with that defendant's initiation of a malicious prosecution." *Ramos v. City of New York*, 285 A.D.2d 284, 299 (1st Dept 2001).

Here, the record sufficiently supports plaintiffs' claim, for purposes of denying Duane Reade's motion for summary judgment, that Duane Reade did not turn over complete and

unaltered surveillance footage to the District Attorney. The footage provided to the District Attorney included several clips from the night in question. Indeed, there was footage from at least three different camera angles, including from camera "1" that was pointed directly on the entrance of the store. However, mysteriously absent from what was provided was the footage of plaintiffs entering the store. While Duane Reade provided footage from camera "1" starting at 1:16, there is no footage from this camera prior to that time, which is when plaintiffs entered the store allegedly with the beers they were being charged with stealing. Footage from this time period was provided for other cameras within the store, but not for camera "1." Duane Reade offers no real explanation for this missing footage. Rather, Duane Reade argues that plaintiffs' argument as to the missing video is disingenuous as plaintiffs never moved for spoliation. However, the absence of a motion for spoliation does not, contrary to Duane Reade's contention, negate the reality that no such footage has been produced and no explanation has been given to account for the missing video that could have showed Cervone entering the store with the beer. Thus, on its face, the video footage presented to the District Attorney raises an issue of fact as to whether Duane Reade provided a full and complete copy of its surveillance footage to the District Attorney precluding summary judgment as to plaintiffs' claim for malicious prosecution.

Both Duane Reade and Sottile's motions for summary judgment dismissing plaintiffs' sixth and seventh causes of action for intentional and negligent infliction of emotional distress are granted as defendants have demonstrated that plaintiffs cannot recover under these claims as a matter of law. Both intentional and negligent infliction of emotional distress require allegations that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly

intolerable in a civilized community." *Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 362 (1st Dept 2005). In the present case, upon review of the record, the court finds that neither defendant's conduct rises to level of conduct that is so shocking and outrageous that it exceeds all reasonably bounds of decency.

Additionally, both Duane Reade and Sottile's motions for summary judgment dismissing plaintiffs' eighth cause of action for negligent training is granted as plaintiffs do not seek punitive damages for defendants' alleged negligent training of their respective employees. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Talavera v. Arbit*, 18 A.D.3d 738 (2nd Dept 2005). "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." *Karron v. New York City Tr. Auth.*, 241 A.D.2d 323, 324 (1st Dept 1997). "An exception exists where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee." *Id.* (internal citations omitted).

Here, plaintiffs cannot maintain a claim for negligent hiring against either defendant as plaintiffs do not seek punitive damages based on defendants' alleged negligent training of their respective employees. In their complaint, plaintiffs do not seek an award of punitive damages based on defendants' alleged negligent training of their employees. Indeed, although plaintiffs seek punitive damages in regard to their other seven causes of action, they seek only

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compensatory damages for their negligent training claim. Thus, defendants' motions for summary judgment dismissing plaintiffs' claim for negligent training must be granted.

Finally, the remainder of defendants' motion seeking summary judgment striking plaintiffs' demand for punitive damages is granted as defendants' employees conduct was not aimed at the public generally. "Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrate such wanton dishonesty as to imply a criminal indifference to civil obligations." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007) (internal quotations omitted). "[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Rocanova v. Equitable Life Assurance Society*, 83 N.Y.2d 603, 613 (1994); *see also 1 Mott St., Inc. v. Con Edison*, 33 A.D.3d 531, 532 (1st Dept 2006). Here, defendants' employees conduct cannot, as a matter of law, support an award of punitive damages as the record contains no evidence that the conduct of either employee was aimed at the public generally. Rather, the evidence in the record demonstrates that the complained about conduct in this proceeding was directed only at plaintiffs.

Accordingly, it is hereby

ORDERED that Duane Reade's motion for partial summary judgment dismissing plaintiffs' third, fifth, sixth, seventh and eighth causes of action and to strike plaintiffs' demand for punitive damages is granted but is otherwise denied; and it is further

ORDERED that Sottile's motion for partial summary judgment dismissing plaintiffs' sixth, seventh and eighth causes of action and to strike plaintiffs' demand for punitive damages is

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granted. This constitutes the decision and order of the court.

Dated: 7/22/15

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.