SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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DERRICK JONES,

Plaintiff,

- v -

BEST YET MARKET OF HARLEM INC., d/b/a BEST MARKET, SECURITY USA, INC. and SHAMEEK BOYCE,

Defendants.

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INDEX NO. 151258/2016

MOTION DATE

MOTION SEQ. NOS. 2, 3

DECISION AND ORDER

By pre-answer notice of motion, defendant Best Yet Market of Harlem Inc. d/b/a/ Best Market moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff's amended complaint (motion seq. two). Security USA, Inc. and Boyce move pursuant to CPLR 3211(a)(7) for an order dismissing the amended complaint (motion seq. three). Plaintiff opposes both motions and seeks leave to replead if the motions to dismiss are granted.

The amended complaint contains three causes of actions: (1) false arrest and imprisonment, (2) malicious prosecution, and (3) intentional infliction of emotional distress. (NYSCEF 32). It is undisputed that the incident underlying plaintiff's claims occurred on the premises owned by Best Yet, which contracted with Security to provide security services to the premises, and that Boyce was an employee of Security.

A. CPLR 3211(a)7)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court in deciding the motion must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez,* 84 NY2d 83, 87 [1994], *affd* 84 NY2d 83). Only the complaint and any affidavits submitted in opposition may be considered (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *Ashwood Cap., Inc. v OTG Mgt., Inc.*, 99 AD3d 1 [1st Dept 2012]), and the affidavits may be used to remedy any pleadings defects (*Carlson v Am. Intern. Group, Inc.*, NY3d , 2017 NY Slip Op 08163 [2017]; *Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]).

1. False imprisonment

To plead a cause of action for false imprisonment, the movant must allege that the defendant intended to confine him, the plaintiff was conscious of the confinement, the plaintiff did not consent to the confinement, and the confinement was not otherwise privileged. (*Torres v Jones*, 26 NY3d 742, 742 [2016]; *Broughton v State*, 37 NY2d 451, 456 [1975]). Threats of physical harm, especially if made after the victim was already allegedly harmed, may constitute a confining force sufficient to establish a false imprisonment. (*Gibson v Campbell*, 16 Misc 3d 1123[A], *2 [Sup Ct, New York County 2007]).

Here, while plaintiff does not plead sufficient details in his amended complaint, in his affidavit he states that several of defendants' employees physically forced him into the store bathroom, presumably to await the arrival of the police, and that he feared that they would physically harm him if he tried to leave. (*See D'Amico v Corr. Med. Care, Inc.*, 120 AD3d 956, 991 [4th Dept 2014] [former employee's allegations that former employer and supervisors gave

false statements to police with intent of having her arrested, that she was conscious of confinement and did not consent thereto, and as a result was subjected to warrantless, unprivileged arrest stated a claim for false imprisonment]; *cf. Cecora v De La Hoya*, 106 AD3d 565, 566 [1st Dept 2013] [false imprisonment claim properly dismissed where plaintiff did not allege defendant intended to confine her and nothing in complaint suggested defendant did anything to make her believe she could not leave]).

2. False arrest and malicious prosecution

Plaintiff's allegation that defendants made false statements to the police to induce his arrest and prosecution sufficiently state a claim for both false arrest and malicious prosecution. (*See Matthaus v Hadjedj*, 148 AD3d 425, 425–26 [1st Dept 2017] [allegation that party knowingly provided false information to police sufficient to demonstrate that party initiated criminal proceeding]; *DeMarzo v DeMarzo*, 150 AD3d 1202 [2d Dept 2017] [claims for malicious prosecution and false arrest sufficiently stated, as evidence in record, viewed in light most favorable to plaintiff, supported view that defendant affirmatively induced police to act by intentionally providing them with false evidence that defendant knew, or should have known, would result in plaintiff's arrest]; *Harrison v Samaritan Med. Ctr.*, 128 AD3d 1469, 1471 [4th Dept 2015] [complaint and plaintiff's submissions in opposition to motion to dismiss sufficiently alleged that defendant's employees made false statements to investigators with the intent of having plaintiff arrested and confined]).

The dismissal of the criminal case against plaintiff on speedy trial grounds constitutes a "favorable termination" sufficient to state a claim of malicious prosecution. (*Smith-Hunter v Harvey*, 95 NY2d 191 [2000]; *Murphy v Lynn*, 118 F3d 938 [2d Cir 1997]).

3. Intentional infliction of emotional distress

Even accepting all of plaintiff's allegations as true, defendants' conduct in making false statements to the police which caused his arrest and incarceration do not constitute the type of outrageous conduct required to sustain a claim of intentional infliction of emotional distress. (*See Matthaus*, 148 AD3d at 425–26 [allegation that defendant made false statements to the police, causing arrest and incarceration, insufficient as matter of law to constitute extreme and outrageous behavior necessary to state claim of intentional infliction of emotional distress]; *Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 422 [1st Dept 2006] [instigation of arrest by means of false statements to police not so outrageous as to sustain claim]).

Nor does defendants' confinement of plaintiff in the store bathroom for approximately ten minutes, as alleged by plaintiff, sufficiently constitute extreme and outrageous conduct. (*See Waynes v BJ'S Wholesale Club, Inc.*, 97 AD3d 659 [2d Dept 2012] [acts by defendant's employees, including detention for one to one-and-half hours for alleged shoplifting, insufficiently extreme and outrageous conduct]; *Arrington v Liz Claiborne, Inc.*, 260 AD2d 267 [1st Dept 1999] [dismissing claim of false imprisonment based on allegations, among others, that employer questioned employees about fraudulent time sheets in locked office, where employees feared arrest or termination of employment should they leave]; *Villacorta v Saks, Inc.*, 32 Misc 3d 1203[A], 2011 NY Slip Op 51150[U], *2 [Sup Ct, New York County 2011] [allegations that plaintiff was questioned for four hours without cause insufficient to support claim for intentional infliction of emotional distress]).

4. Assault

To the extent that plaintiff alleges that he has asserted a claim for assault, the amended complaint contains no allegation related to the assault, and plaintiff may not rely on his affidavit

to remedy the omission as he only asserts therein an entirely new theory, without attempting to amplify an existing theory.

5. Liability of Best Yet

Best Yet offers no evidence establishing that Security is an independent contractor, and in any event, whether it is an independent contractor or an employee for the purpose of tort liability is usually a question of fact. (*See Chichester v Wallace*, 150 AD3d 1073 [2d Dept 2017] [factual issue raised as to whether company exercised control over employee of independent contractor; service agreement contained provisions related to company's authority, supervision, and control over employee]; *Wright v Esplanade Gardens*, 150 AD2d 197 [1st Dept 1989] [party may be held liable for acts of independent contractor if it controls contractor's work]).

Moreover, plaintiff alleges that Best Yet's employees participated in the alleged tortious acts at the store, including forcing him into the store bathroom and directing Boyce to pursue criminal charges against plaintiff, and did so within the scope of their employment with Best Yet, thereby establishing a basis for holding Best Yet liable here.

B. CPLR 3211(a)(1)

To the extent that Best Yet also moves to dismiss pursuant to CPLR 3211(a)(1), the documents on which it relies do not constitute "documentary evidence" (*see Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] [affidavits not documentary evidence]), including the statement notice from the criminal proceeding as it is not a sworn statement and Best Yet offers no authority to support its contention that it constitutes documentary evidence in this context. Moreover, the statement attributed to plaintiff in the notice is disputed by plaintiff.

C. Leave to replead

Plaintiff's request to replead is denied absent a copy of the proposed amended complaint. (CPLR 3025[b]; *M & T Bank v Benjamin*, 145 AD3d 1519 [4th Dept 2016]).

D. Conclusion

ACCORDINGLY, it is hereby

ORDERED, that defendant Best Yet's motion to dismiss (sequence two) is granted to the extent of dismissing plaintiff's claims for intentional infliction of emotional distress, and is otherwise denied; it is further

ORDERED, that the motion of defendants Security USA and Boyce (sequence three) is granted to the extent of dismissing plaintiff's claims for intentional infliction of emotional distress, and is otherwise denied; it is further

ORDERED, that plaintiff's request for leave to replead is denied; it is further

ORDERED, that defendant Best Yet serve and file an answer to the amended complaint, as modified herein, within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a status conference on February 28, 2018 at 2:15 pm instead of the conference currently scheduled for January 17, 2018.

1/9/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE