

<b>Martin v Saks &amp; Co. LLC</b>
2018 NY Slip Op 33165(U)
December 6, 2018
Supreme Court, New York County
Docket Number: 158089/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

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DENISIA MARTIN,

Plaintiff,

- v -

SAKS & COMPANY LLC, SAKS  
INCORPORATED, SAKS & COMPANY, SAKS  
FIFTH AVENUE LLC, SAKS FIFTH AVENUE  
INC., SAKS FIFTH AVENUE, SAKS  
DEPARTMENT STORES, XYZ CORPORATION 1  
THROUGH 10, JOHN DOE 1 THROUGH 10, JANE  
DOE 1 THROUGH 10,

Defendants.

-----X

HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 26, 27, 28, 29, 30, 31

were read on this motion to \_\_\_\_\_ dismiss \_\_\_\_\_.

By amended notice of motion, defendants move pursuant to CPLR 3211(a)(7) and (5) for an order dismissing the complaint. Plaintiff opposes and requests leave to amend or supplement her complaint, if necessary.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 1)

Plaintiff, an African-American female, was employed by defendants from August 2013 to September 2015 at their flagship location in Manhattan as a Brand Specialist and Sales Associate. In September 2015, she was unjustly and wrongfully terminated from her employment, and thereafter applied for and received New York State Unemployment Benefits.

On February 25, 2016, plaintiff was arrested at her home by the New York Police Department (NYPD), taken to a police precinct, handcuffed, taken to Central Booking, and confined in a holding cell and later a cell at Rikers Island for three days. She was released upon paying a bond of \$2,500. In May and July 2016, plaintiff appeared in criminal court for two appearances, and on September 21, 2016, the charges against her were dismissed and the file sealed.

Upon information and belief, plaintiff alleges that defendants targeted, pursued, and wrongfully and unjustifiably caused criminal charges and proceedings to be brought against her. She advances a cause of action for false arrest, based on defendants' actions, which she claims were solely, intentionally, and maliciously taken to demonstrate and exert their influence, power, authority, command, control and supremacy over her, and absent any evidence that she had committed a crime. She also asserts claims for false imprisonment; malicious prosecution, based on the fact that the criminal charges were dismissed in her favor "because there was no evidence to support a prosecution, nor any witnesses to prosecute the same"; *prima facie* tort; wrongful termination; retaliation; injurious falsehood; vicarious liability; intentional infliction of emotional distress; and negligent infliction of emotional distress. In addition to compensatory damages, plaintiff seeks to recover her attorney fees and punitive damages.

#### B. Procedural history of motion

On December 18, 2017, defendants filed their pre-answer notice of motion to dismiss, which included a memorandum of law in support (motion sequence one). (NYSCEF 5, 6). The motion was adjourned several times in the submissions part, and plaintiff filed her opposition on April 4, 2018. (NYSCEF 12-14).

The parties then agreed to adjourn the motion for defendants' reply, which was finally due on May 25, 2018. (NYSCEF 20). Instead of filing their reply, defendants filed an amended "corrected" notice of motion, adding a statute-of-limitations argument addressed to the intentional infliction of emotional distress claim (the instant motion, sequence two). (NYSCEF 21). With the amended motion, defendants filed a "reply" memorandum of law. (NYSCEF 22).

Oral argument on the motion was held on June 12, 2018, and plaintiff objected to the amended notice of motion, arguing that she had no chance to oppose the arguments set forth therein. (NYSCEF 24). The motion was submitted that day.

On October 13, 2018, plaintiff filed opposition to the amended notice of motion. (NYSCEF 26). Defendants have neither objected nor replied to it. I thus consider the new opposition papers along with defendants' amended notice of motion.

## II. AMENDED MOTION TO DISMISS

### A. Standard

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Children's Magical Garden, Inc. v Norfolk St. Dev., LLC*, 164 AD3d 73 [1<sup>st</sup> Dept 2018]). Thus, the reviewing court must determine whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Kellogg v All Saints Housing Dev. Fund Co., Inc.*, 146 AD3d 615 [1<sup>st</sup> Dept 2017]).

### B. False arrest/imprisonment claims

Defendants contend that plaintiff has not pleaded that they, as opposed to the NYPD, intended to confine her or that the confinement was not otherwise privileged, *ie* was illegal. (NYSCEF 6). Plaintiff denies that her claims are insufficiently pleaded. (NYSCEF 26).

Construing the allegations in the light most favorable to plaintiff, she sufficiently pleads a claim for false arrest and imprisonment, having alleged that defendants knowingly and falsely initiated her unlawful arrest and imprisonment. (*See Matthaus v Hadjedj*, 148 AD3d 425 [1<sup>st</sup> Dept 2017] [plaintiff's allegation that defendant knowingly provided false information sufficiently stated false arrest claim]; *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956 [4<sup>th</sup> Dept 2014] [plaintiff alleged that defendants gave false statements to police with intent of having plaintiff arrested, that she was conscious of confinement and did not consent thereto, and that she was subject to warrantless, unprivileged arrest]; *see also D'Elia v 58-35 Utopia Parkway Corp.*, 43 AD3d 976 [2d Dept 2007] [one who wrongfully accuses another of criminal conduct and induces or procures person's arrest may be liable for false arrest]).

### C. Malicious prosecution

For the same reasons as above (*supra*, II.B.), plaintiff sufficiently states a claim for malicious prosecution. (*Matthaus*, 148 AD3d at 426). Plaintiff's allegations that the charges were dismissed in her favor because there was insufficient evidence to prosecute her suffice to plead the required element that the criminal proceedings terminated in her favor, as do her allegations that defendants acted with malice in making false accusations against her.

### D. *Prima facie* tort and injurious falsehood

Plaintiff's claim for *prima facie* tort is fatally duplicative of her malicious prosecution claim (*Coscia v El Jamal*, 156 AD3d 861 [2d Dept 2017]), as is her claim for injurious falsehood

(*Perez v Violence Intervention Program*, 116 AD3d 601 [1<sup>st</sup> Dept 2014], *lv denied* 25 NY3d 915).

#### E. Wrongful termination

Absent any dispute that plaintiff's employment with defendants was "at will," she has not stated a claim for wrongful discharge. (*Panagouloupoulos v Ortiz*, 143 AD3d 791 [2d Dept 2016], *lv dismissed* 29 NY3d 993 [2017]; *Kamen v Berkeley Co-Op. Towers Section II Corp.*, 98 AD3d 1086 [2d Dept 2012]).

#### F. Retaliation

Plaintiff does not allege that she engaged in protected activity that caused defendants to retaliate against her, and thus does not state a legally cognizable claim. (*See Brunache v MV Transp., Inc.*, 151 AD3d 1011 [2d Dept 2017] [plaintiff did not state claim for retaliation as he did not allege that he engaged in protected activity]).

#### G. Negligence and negligent infliction of emotional distress

Plaintiff's negligence and negligent infliction of emotional distress claims are barred by her receipt of workers' compensation benefits. (*Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169 [2d Dept 2017] [plaintiff's common-law negligence and negligent infliction of emotional distress claims based on alleged sexual harassment and retaliation barred by workers' compensation law]; *Kruger v EMFT, LLC*, 87 AD3d 717 [2d Dept 2011] [negligent infliction of emotional distress claim barred by workers' compensation as exclusive remedy]; *Paisley v Coin Device Corp.*, 5 AD3d 748 [2d Dept 2004] [in action for damages for false arrest/imprisonment, malicious prosecution, wrongful termination, and negligence, court should have dismissed claim to recover damages for negligence as barred by the workers' compensation law]).

#### H. Intentional infliction of emotional distress

Plaintiff's allegations do not state a cause of action for intentional infliction of emotional distress. (*Matthaus v Hadjedj*, 148 AD3d 425 [1<sup>st</sup> Dept 2017] [allegation that defendant made false statements to police, causing her arrest and incarceration, did not constitute extreme and outrageous behavior sufficient to sustain claim]). In any event, it is time-barred. (CPLR 215 [one-year statute of limitations]; *Teller v Galak*, 162 AD3d 959 [2d Dept 2018] [dismissing claim as brought more than one years after claim accrued]; *Bellissimo v Mitchell*, 122 AD3d 560 [2d Dept 2014] [intentional infliction claim accrued on dates of plaintiff's alleged false arrest and prosecution]).

#### I. Vicarious liability, punitive damages, attorney fees

A claim for vicarious liability is properly pleaded as a separate and independent claim (*see Ruggerio v Aetna Life & Cas. Co.*, 107 AD2d 744 [2d Dept 1985] [vicarious liability and breach of contract were separate causes of action]), but the claims for punitive damages and attorney fees are not (*Jean v Chinitz*, 163 AD3d 497 [1<sup>st</sup> Dept 2018] [court correctly dismissed separate claim for punitive damages as not legally cognizable but rather element of total claim for damages]; *La Porta v Alacra, Inc.*, 142 AD3d 851 [1<sup>st</sup> Dept 2016] [claim for attorney fees may not be maintained as separate cause of action]).

#### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing plaintiff's claims for: (1) *prima facie* tort; (2) injurious falsehood; (3) wrongful termination;

(4) retaliation; (5) negligence; (6) negligent infliction of emotional distress; (7) intentional infliction of emotional distress; (8) punitive damages; and (9) attorney fees, and is otherwise denied; it is further

ORDERED, that defendants are directed to serve and file an answer to the remaining claims in the complaint within 20 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on March 6, 2019 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

12/6/2018  
DATE

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

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE