Elkaim v Lotte N.Y. Palace Hotel
2019 NY Slip Op 32911(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 150124/2017
Judge: Verna Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 5**
Justice

----------X

INDEX NO. 150124/2017

ERNA DE SAINT GEORGE ELKAIM,
Plaintiff,

MOTION SEQ. NO. 001

- against -

LOTTE NEW YORK PALACE HOTEL, FRANCESCA PIRRONE and THE CITY OF NEW YORK,
Defendants.

DECISION + ORDER ON MOTION

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for **DISMISSAL**.

Plaintiff commenced this action to recover damages arising from her arrest on January 4, 2016 at the Lotte New York Palace Hotel located at 455 Madison Avenue, New York, NY. Plaintiff alleges numerous causes of action, including false imprisonment; violations under Civil Rights Law § 8; assault; battery; malicious prosecution; breach of contract; unlawful eviction; negligence (hiring, training, supervision of Lotte Hotel employees); negligence (as to New York City police officers in the performance of their duties); negligence (negligent training, supervision and retention as to The City of New York).

Defendants, Lotte New York Palace Hotel and Francesca Pirrone, (hereinafter collectively "Lotte,") now move the court for an order seeking a pre-answer dismissal of plaintiff's complaint as against it pursuant to CPLR § 3012(b) for plaintiff's failure to timely serve her complaint; pursuant to CPLR § 3216 for plaintiff's purported failure to prosecute this action; pursuant to CPLR § 3404 for plaintiff's purported abandonment of the action; and pursuant to CPLR § 3211(7) on the grounds that plaintiff has failed to state a cause of action as to all alleged claims. Additionally, Lotte moves the court pursuant to 22 NYCRR § 130 seeking an order awarding legal fees and costs to the defendant for plaintiff's purported filing of a frivolous lawsuit.[1]

The City cross-moves for an order seeking dismissal of plaintiff's complaint as against it pursuant to CPLR § 3012(b) on the grounds that plaintiff failed to timely serve her complaint. Additionally, the City seeks an order converting the City's cross-claims against Lotte into third-party claims provided the court does not dismiss plaintiff's complaint as against it.

The City does not oppose Lotte's motion for dismissal.

[1]In support of its position, Lotte asserts that the statute of limitations for some of plaintiff's claims have expired, plaintiff failed to plead any legally cognizable cause of action, and in consideration of plaintiff's seven additional lawsuits pending, with similar claims, the record suggests that the instant action is a part of plaintiff's pattern and practice of filing frivolous lawsuits.

Plaintiff opposes Lotte's motion and the City's cross-motion. In opposition to Lotte's motion, plaintiff maintains that all claims were timely filed on January 4, 2017. Specifically, plaintiff contends that as she was released from custody on January 5, 2016, the statute of limitations for false arrest and false imprisonment expired on January 5, 2017; the alleged assault and battery occurred on January 4, 2016 and thus, the limitations period expired on January 4, 2017; that her causes of action for unlawful eviction and violations under Civil Rights Law § 8 accrued on January 4, 2016 and thus, the statute of limitations expired on January 4, 2017; and, finally, that as her criminal case was dismissed by motion of the District Attorney on January 19, 2016, she was within the one year statute of limitations on January 4, 2017.[2] Plaintiff further avers that neither CPLR §§ 3216 or 3404 are applicable here as defendants failed to serve a 90-day notice, as required by § 3216 and the case was never marked off or struck from the calendar, as required by the latter. Finally, plaintiff avers that the complaint sufficiently pleaded all causes of action and that defendants have not demonstrated that plaintiff's conduct in commencing suit was frivolous so as to warrant sanctions.

With respect to both Lotte's motion and the City's cross-motion, plaintiff concedes that she failed to serve the complaint within the twenty-day period prescribed by CPLR § 3012(b) as the complaint was not served until December 30, 2018. However, plaintiff asserts that the court has discretion to permit the late service of her complaint as she has demonstrated a meritorious cause of action and a reasonable excuse for her failure to timely serve the complaint.

Now, plaintiff cross-moves pursuant to CPLR § 3012(d) seeking to permit service of the Complaint, the *nunc pro tunc*. (Plaintiff's *Exhibit D.*) In support of the cross-motion, plaintiff asserts ill health, distance from her attorney's office,[3] and law office failure as the basis for her failure to timely file the complaint herein. Plaintiff contends that she has a reasonable excuse here and further, that as to law office failure, that the due date of the complaint was not calendared by a law office employee who subsequently left employment without including same in a list of outstanding assignments. Plaintiff maintains that the delay in serving the complaint will not result in prejudice to any of the defendants and finally, that her Notice of Claim, filed *pro se*, was timely.

Lotte and the City oppose plaintiff's cross-motion arguing that the plaintiff has not proffered a reasonable excuse nor demonstrated that her claims are meritorious.

As an initial matter, the statutory meaning of "one year" is three hundred and sixty-five days. And, as it pertains to a leap year the added day of the leap year, along with the immediately preceding day are counted as one day. Thus, a leap year, for the purpose of the computations herein, is still counted as three hundred and sixty-five days. See *General Construction Law* (GCL) § 58. As such, plaintiff's causes of action for false arrest and false imprisonment are timely, as both accrued on January 5, 2016 and expired three hundred and sixty-five days later on January 4, 2017, the same day plaintiff filed the summons with notice. However, plaintiff's causes of action for assault, battery, unlawful eviction, violations of Civil Rights Law § 8, are untimely as they accrued on January 4, 2016 and expired three hundred and sixty-five days thereafter, on January 3, 2017,[4] prior to plaintiff's

[2] See Certificate of Disposition, annexed as Plaintiff's *Exhibit I.*
[3] Plaintiff resides in Florida.
[4] The year 2016 was a leap year, which does not the increase the amount of days, i.e, 366, but rather results in a year later being January 3, 2017 and not January 4, 2017 because there is another day in the calendar.

filing of the summons with notice on January 4, 2017. Accordingly, plaintiff's causes of action for assault, battery, unlawful eviction, Civil Rights Law § 8 are hereby dismissed as untimely.

As to Lotte's argument that the complaint should be dismissed pursuant to CPLR §§ 3216 and 3404, plaintiff correctly asserts in opposition, that CPLR §§ 3216 and 3404 are inapplicable to the case at bar. CPLR § 3216 requires, in part, that issue be joined in the action and a ninety-day notice of demand to resume prosecution be sent to the party against whom relief is sought as conditions precedents to dismissal for want of prosecution. Here, there is no record demonstrating that a ninety-day notice was sent to the plaintiff and as the instant motion is a pre-answer motion to dismiss, issue has not yet been joined. In addition, the record is devoid of any facts to support dismissal under CPLR § 3404 which requires that an action be struck from the calendar or unanswered and not restored within a year thereafter to be deemed abandoned and thereafter, dismissed.

However, pursuant to CPLR § 3012(b), if a complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time frame provided in subdivision (a) of rule 320. Service of the complaint shall be made within twenty days of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. Further, pursuant to CPLR § 3012(d) upon application of party the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just or upon a showing of reasonable excuse for delay or default.

Dismissal of an action pursuant to CPLR § 3012(b) is based upon several factors. Plaintiff must demonstrate a reasonable excuse for the delay in noncompliance and the claims alleged against the defendant must have legal merit. See *Barasch v Micucci*, 49 NY2d 594 (1980); see also *Nolan v Lechner*, 60 AD3d 473 (1st Dept 2009). The court may also consider the length of delay, the complexity of the facts underlying plaintiff's claim, and the existence of prior settlement negotiations. *Barasch,* supra. However, the absence of prejudice to the defendant and law office failure do not serve as bases for withholding relief under CPLR § 3012(b). *Id.*

After careful review of the papers and arguments advanced by the parties, plaintiff's complaint is dismissed pursuant to CPLR § 3012(b). Here, it is undisputed that plaintiff's complaint was untimely. On January 4, 2017, plaintiff filed a *pro se* Summons with Notice as against Lotte only. On March 31, 2017, plaintiff served a Supplemental Summons with Notice adding the City as a defendant. Thereafter, on May 24, 2017, Lotte served upon plaintiff a Notice of Appearance and Demand to serve a complaint within twenty (20) days. On June 21, 2017, the City also served plaintiff with a Notice of Appearance and Demand to serve a complaint within twenty (20) days. On December 30, 2018, plaintiff filed her complaint. This was well over a year after the respective statutory twenty-day deadlines had elapsed. In dispute is whether the plaintiff has proffered a reasonable excuse for the delay and whether the alleged claims are meritorious.

The court finds that plaintiff has failed to proffer a reasonable excuse for her delay of well over a year in filing the complaint. Plaintiff asserts law office failure, but law office failure cannot serve to defeat a motion to dismiss made pursuant to CPLR § 3012(b). See *New York v AFA*

Protective Systems, Inc., 80 AD2d 820, 821 (1st Dept 1981). Plaintiff also contends that plaintiff's residency in Florida made communication with her attorney difficult, but plaintiff's removal of herself from the court's jurisdiction and failure to maintain adequate communication with her own counsel is not a justifiable excuse. See *Martinez v Belanger*, 186 AD2d 40 (1st Dept 1992). Plaintiff maintains that the delay is reasonable in that there is no prejudice to the defendants but that is insufficient. See *Barasch,* supra. Further, plaintiff relies upon her purported illness as a basis for the delay but, as the City points out in opposition, the plaintiff fails to provide any medical documentation as to this and relies instead on a self-serving affidavit attesting same.

In addition, plaintiff has failed to plead a meritorious claim. Plaintiff alleges causes of action for false imprisonment; false arrest; and malicious prosecution as against Lotte. Plaintiff also alleges breach of contract as against Lotte; negligence as against Lotte for the hiring, training, supervision of Lotte Hotel employees; negligence as against the City for alleging that the police officers negligently performed their duties; and negligence as against the City for negligent training, supervision and retention.

To prevail on a claim of false arrest/false imprisonment, the complaint must allege that "(1) the defendant intended to confine [plaintiff]; (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*, 37 NY2d 451, 456 [1975]). It is not sufficient that the defendant's words or actions caused a police officer to confine plaintiff; plaintiff must show that the defendant "directed an officer to take [him] into custody." (See *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128 [1st Dept 1999] citing *Vernes v Phillips*, 266 NY 298 [1935].) There shall be no liability imposed where the defendant "merely made his statement, leaving it to the officer to act or not as he thought proper." *Id.* Here, Lotte merely reported information to the police.

Specifically, plaintiff incurred charges at defendant's hotel for occupancy, room service, and items "purchased" in the hotel's gift shop amounting to approximately $10,911.26. Plaintiff's credit card was declined on multiple occasions and while plaintiff alleged that she had a payment arrangement with a member of Lotte's staff. On January 4, 2016, the hotel requested that the outstanding balance be paid. Thereafter, plaintiff's daughter came to the reception desk and a dispute arose. Defendant, Francesca Pirrone, along with hotel security knocked on plaintiff's hotel door and upon hearing screaming from the occupants, alerted the police. Lotte advised the responding officers of the outstanding balance of $10,911.26 and the failed attempts to collect payment. Upon the officer's arrival, plaintiff's daughter asserted that she would pay the balance and the officers advised if payment was not rendered then the person whose name was registered with the hotel would be arrested. Thus, plaintiff's confinement was independent of Lotte as the police made the decision to effectuate an arrest. Additionally, it is well established that "probable cause existing at the time of arrest will validate the arrest and relieve the defendant of liability" as the officers had probable cause in that they received an eyewitness complaint and there is nothing in the record to suggest that the officers should have questioned the complainants' credibility in that neither plaintiff nor her daughter controverted the allegations. Thus, here the confinement was privileged. See *Grimes v City of New York*, 106 AD3d 441 (1st Dept 2013); see also *Medina v City of New York*, 102 AD3d 101 (1st Dept 2012); *Broughton,* supra.

Regarding plaintiff's malicious prosecution claim as against Lotte, case law pertaining to liability for these claims is similar to that of false arrest/imprisonment, as claims of false arrest and malicious prosecution often go hand in hand. In order to prevail on a claim for malicious prosecution, plaintiff must prove (1) defendant's initiation of a criminal proceeding against him; (2) termination of the proceeding in his favor; (3) lack of probable cause; and (4) malice. (See *Smith-Hunter v Harvey*, 95 NY2d 191 [2000].) Simply providing information to law enforcement authorities, who exercise their own independent judgment as to whether an arrest should be made and criminal charges filed, normally would not result in liability for malicious prosecution. (See *Du Chateau*, supra.) Instead, plaintiff must show that the defendant "played an active role in prosecution such as giving advice and encouragement or importuning the authorities to act." (*Present v Avon Prods., Inc.*, 253 AD2d 183 [1st Dept 1999].) Here, the plaintiff fails to meet the elements of a malicious prosecution claim. The record does not support a finding that Lotte had any involvement with the criminal proceeding which ensued against plaintiff beyond calling the police and reporting the dispute. The police spoke with both parties and made an independent determination that arrest was warranted.

As to plaintiff's claim of malicious prosecution as against the City, plaintiff has failed to show any malice on the party of the City.

With regard to plaintiff's various claims of negligence, the court finds that that these claims are also all without merit. Plaintiff's alleges negligent hiring, training and retention as against Lotte and the City. "[W]here an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention." (*Karoon v New York City Tr. Auth.*, 241 AD2d 32 [1st Dept, 1997], *citing Eifert v Bush*, 27 AD2d 950 [2d Dept 1967]). In the case at bar, the officers in question who are accused of falsely arresting plaintiff were acting in the scope of their employment and thus, there is no basis for a claim based on negligent hiring and retention.

As to the negligent hiring, training and retention claim as against Lotte, the Appellate Division in *Karoon* further held that the only exception to the above is where the individuals have acted with gross negligence and there is a claim for punitive damages. Here, plaintiff alleges no facts to suggest that any of Lotte employees acted with gross negligence.

Plaintiff's claim of negligence as against the City pertaining to the police officer's performance of their duties is redundant and also without merit for the reasons asserted herein.

Lastly, plaintiff asserts a claim of breach of contract as against Lotte. The elements of breach of contract are (1) the existence of a valid contract, (2) plaintiff's performance of its obligations under the contract, (3) defendant's breach, and (4) resulting damages (see *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). In opposition to the instant motion, plaintiff asserts that the plaintiff contracted for a long-term daily rate with an agreement that periodic payments would be made. The complaint lacks any factual specificity as to existence of this purported contract. Accordingly, dismissal of plaintiff's complaint pursuant to CPLR § 3012(b) is warranted.

Finally, movant's request for sanctions is denied as it has not established bad faith.

Based on the foregoing, it is hereby

ORDERED that defendants' (Lotte New York Palace Hotel and Francesca Pirrone) motion to dismiss the complaint as against it is granted; and it is further

ORDERED that defendant, The City of New York's, cross-motion to dismiss the complaint as against it is granted; and it is further

ORDERED that defendant, The City of New York's motion to convert the City's cross-claims against Lotte into third-party claims is denied as moot; and it is further

ORDERED that within twenty days of entry, defendants Lotte New York Palace Hotel and Francesca Pirrone shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of this Court and the Trial Support Office; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties the Clerk or this Court is directed to enter judgment dismissing the complaint in its entirety against all defendants, Lotte New York Palace Hotel, Francesca Pirrone, and The City of New York; and it is further

ORDERED that this action is dismissed in its entirety.

This constitutes the final decision and order of the court and any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

October 4, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**