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Lucille Galtieri, Plaintiff v. Uptown Communications & Electric, Inc., and Jonathan Smokler, individually and in his individual capacity, Defendants, 19589/2012

February 26, 2015

Cite as: Galtieri v. Uptown Communications & Electric, Inc., 19589/2012, NYLJ 1202718867147, at *1 (Sup., QU, Decided February 19, 2015)

19589/2012

Justice Robert McDonald

[Read Summary of Decision](#)

Decided: February 19, 2015

ATTORNEYS

Attorney for Plaintiff: Law Office of Matthew S. Porges.

Attorneys for Defendants: Steven J. Harfenist, Esq., Harfenist Kraut & Perlstein LLP.

The following papers numbered 1 to 18 were read on this motion by defendants, Uptown Communications & Electric, Inc., and Jonathan Smokler, for an order, pursuant to CPLR 3212, granting summary judgment in favor of said defendants and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law 1-8

Affirmation in Opposition-Exhibits-Memo of Law 9-15

Reply Affirmation 16-18

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This is an action commenced by plaintiff, Lucille Galtieri, a process server, for damages she allegedly sustained as a result of assault, battery, false imprisonment, and defamation, when she attempted to serve a summons and complaint on defendant, Jonathan Smokler.

According to the complaint, on December 15, 2011, plaintiff entered the premises of Uptown Communications & Electric, Inc. located at 55-40 44th Street, Maspeth, Queens, in order to serve Jonathan Smokler, the president of the company with service of process. Galtieri alleges that upon entering the warehouse, she proceeded to Smokler's office where she found Smokler at his

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desk. She alleges that Smokler told her that she was trespassing. She touched his hand with the papers, placed the papers on his desk, and announced that he had been served. Smokler then demanded that she take the papers and leave the premises. He allegedly told her she could not leave unless she took the papers with her. She claims he blocked her from leaving his office preventing her from exiting the property through the warehouse. When she attempted to leave the warehouse he continued to request that she take the papers, blocked her again from leaving and bumped her with his stomach. When she managed to get around him to leave the premises, Smokler stated he was calling the police and ordered her not to move. At that point she ran out of the warehouse and entered a waiting car operated by her colleague. Smokler then jumped in front of the car and asserted that plaintiff and her colleague would have to drive over him in order to leave the area. The complaint states that a company employee then threw the papers back into the car. Smokler continued to stand in front of the car and instructed an employee to close the gates to the parking lot so plaintiff's vehicle could not leave. However, they escaped the parking lot and called the police themselves. When the police arrived they spoke with Smokler who told the police that the plaintiff illegally entered the warehouse and threw the papers at him.

The plaintiff commenced the instant action by filing a summons and complaint on September 21, 2012. The complaint contains causes of action for assault, battery, false imprisonment and defamation. Issue was joined by service of defendant's verified answer with affirmative defenses and counterclaims dated November 9, 2012. The affirmative defenses include qualified privilege with respect to defamation and self-defense. The counterclaims include assault, battery, trespass and an application for a permanent injunction barring plaintiff from entering the premises. Defendant asserts that the plaintiff entered the premises without consent, entered his private offices without consent, brandished a metal rod, raised it as a weapon, made harmful and offensive bodily contact with him, and struck him with her arm while serving the papers.

Plaintiff filed a Note of Issue on February 21, 2014. The matter is presently on the calendar of Trial Scheduling Part on April 22, 2015.

Counsel for defendant, Steven J. Harfenist, Esq., now moves for an order granting summary

judgment and dismissing the plaintiff's complaint on the ground that the complaint fails to set forth sufficient factual allegations to constitute a cause of

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action for assault and battery. He contends that Galtieri's deposition testimony demonstrates that to the extent Smokler subjected her to any physical contact he did not do so intentionally and he did not engage in harmful and offensive behavior (citing *Tillman v. Nordon*, 4 AD3d 467[2d Dept. 2004][the plaintiff failed to establish, as a matter of law, that the bodily contact was offensive, that is, "wrongful under all the circumstances"]). Counsel contends that any contact between Smokler and Galtieri was unintentional and accidental and there are no issues of fact regarding whether Smokler's contact with the plaintiff was intentional. Further, counsel points to Smokler's testimony in which he stated that Galtieri bumped into him.

Secondly, defendant claims that the factual allegations that Smokler preventing the plaintiff from leaving the warehouse and the parking lot are insufficient to state a cause of action for unlawful imprisonment because the plaintiff testified that she was able to move freely about the warehouse and that her vehicle exited the premises through an unlocked parking lot gate. As such, it is claimed, the false arrest claim lacks the essential element of confinement or that Galtieri was conscious of her confinement (citing *Martinez v. City of Schenectady*, 97 NY2d 78 [2001][a plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged]).

With respect to the plaintiff's cause of action for defamation based upon remarks made by Smokler to the police, the defendant asserts that the cause of action for defamation must be dismissed because Smokler did not speak with the police following the incident and no formal police report was generated. In addition, the defendant asserts that any statements made to the police in connection with the incident are protected by qualified privilege (citing *Present v. Avon Prods., Inc.*, 253 AD2d 183 [1st Dept. 1999][the qualified privilege extends to reports to the police or the District Attorney's office about another's suspected crimes. If the person passing on the information has a good-faith belief in its truth, he is shielded from liability for defamation, even if a more prudent person would not have reported it or the information turns out to be false]).

In her examination before trial, taken on March 4, 2014, the plaintiff testified that she is a self-employed licensed process server. On December 15, 2011, the date of the incident in

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question she stated that she drove to the location with her colleague Mark Eisenberg. They pulled into the parking lot at 55-40 44th Street. She entered the warehouse and went upstairs to the administrative offices. She stated defendant Smokler was in his office. She walked up to his

desk, touched his hand with the papers and put the papers down on the desk. He then told her that she was trespassing and she should take the papers back. She then proceeded to leave and he started coming after her. He brushed past her and got in front of her on the stairs. As she reached the bottom of the stairs he stood in the doorway and told her she was not allowed to leave the building and that he will not let her leave the building unless she goes upstairs and takes the papers and leaves with them. She told him that she would not take the papers back and that he was obstructing her service of process and that he should get out of the way and let her go. He continued to block her telling her she was trespassing. She stated that every time she would try to get past him he would bump her with his stomach. She stated that she did a lot of dodging back and forth to try to get by, but he was right on her as soon as she moved. She stated if she tried to move forward he would bump her back with his stomach. When he went to call the police she was able to run towards the exit of the warehouse.

When she got to the parking lot she entered the vehicle being operated by Mark Eisenbeg. Smokler ran outside and stood in front of the vehicle and told the driver that the only way they were getting out of the parking lot was to run over him. One of his employees went to get the papers and Smokler told the employee to throw them in the vehicle. The employee opened the back door of the vehicle and threw the papers in. Smokler had one gate of the parking lot closed so they couldn't leave but they were able to exit the parking lot through a second exit. When they got out to the street the plaintiff called the police telling them she was bumped by the defendant and held in the parking lot and in the warehouse. When the patrol car arrived on the scene the police went to speak to Smokler. When the officers came out they stated that Smokler told them that she had stormed into the warehouse and she had a lead pipe wrapped in newspaper and she attempted to assault him with it and she threw papers at his face. He also told the officer he had the incident recorded on tape. However he did not produce the tape for the officers. She did not file a complaint. She also testified that she did not possess a metal rod.

The defendant, Jonathan Smokler, testified on March 24, 2014. In the excerpts of his pre-trial testimony provided by respective counsel, he states that the plaintiff had a stick or

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pipe in her hand. He told her she was not supposed to be in the building but she was argumentative and kept bumping into him. He kept his hands behind his back so as not to have a physical confrontation. When she left he told her she was trespassing and he would call the police but she left. He stated she was trespassing because she entered through a gated door.

In opposition, the plaintiff submits an affirmation from counsel, Matthew Porges, Esq; an affidavit from Police Officer Jeff Peattie, the affidavit of plaintiff, Lucille Galtieri, the full transcript of the plaintiff's examination before trial, and additional excerpts of the defendant's examination before trial.

In his affidavit, Police Officer Jeff Peattie states that he is a New York City Police Officer assigned to the 108th Precinct in Queens County. He states that on December 15, 2011, he and his partner responded to a call from Uptown Communications in Maspeth. He learned that a 911 call had been made by two process servers who had allegedly been detained when they

attempted to leave the warehouse and parking lot. He states that when they arrived at the scene they spoke to both sides of the dispute. Ms. Galitieri told him she had been assaulted by Jonathan Smokler and that she had been prevented from leaving the premises. Smokler claimed that plaintiff had trespassed, and thrown papers at him. He states that he informed Smokler that plaintiff was permitted to enter his property to serve legal papers. Neither party desired to file a criminal complaint so they left without arresting anyone.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see *Zuckerman v. City of New York*, 49 NY2d 557[1980]).

This Court finds that the defendant has failed to meet its prima facie burden of proving entitlement to judgment as a matter of law with respect to the causes of action for assault, battery and false imprisonment in that the defendant's own proof raises issues of fact.

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To establish a claim for civil assault, there must be proof of intentional conduct by the defendant placing the plaintiff in apprehension of imminent harmful or offensive contact (see *Marilyn S. v. Independent Group Home Living Program, Inc.*, 73 AD3d 892 [2d Dept 2010]).

To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent (see *Guntlow v. Barbera*, 76 AD3d 760 [3rd Dept. 2010]; *Fugazy v. Corbetta*, 34 AD3d 728 [2d Dept 2006]; *Higgins v. Hamilton*, 18 AD3d 436 [2d Dept. 2005]; *Siegell v. Herricks Union Free Sch. Dist.*, 7 AD3d 607 [2d Dept. 2004]).

Here the evidence submitted clearly demonstrates that triable issues of fact exist as to whether the defendant, Mr. Smokler intentionally pushed the plaintiff as he was following her out of the building. In light of plaintiff's testimony that she was intentionally bumped and intimidated by the defendant as well as her testimony regarding his berating, offensive and aggressive conduct toward her, including following her out of the office and then preventing her from leaving, it is clear that triable issues of fact exist as to the causes of action for assault and battery. Defendant failed to meet his burden on the motion as to the conflicting deposition testimony he submitted regarding the alleged incident in his office and the differing versions as to which party bumped the other, demonstrates the existence of a triable issue as to whether plaintiff was subjected to intentional offensive contact (see *Ciminello v. Sullivan*, 65 AD3d 1002 [2d Dept 2009]; *Fugazy v. Corbetta*, 34 AD3d 728 [2d Dept 2006]).

To establish a cause of action alleging false imprisonment under New York common law, a plaintiff must show that (1) the defendant intended to confine him or her, (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 (see *Williams v. City of New York*, 114 AD3d 852 [2d

Dept. 2014]; *Holland v. City of Poughkeepsie*, 90 AD3d 841 [2d Dept. 2011]). Here, the evidence submitted on the motion raises issues of fact and credibility as to whether the defendant intended to confine the plaintiff in the warehouse when he blocked and prevented her from leaving until she took the papers back and when he stood in front of her vehicle stating she would have to run him over to leave the parking lot. Each party testified to differing versions of the incident (see *McRedmond v. Sutton Place Rest. & Bar, Inc.*, 95 AD3d 671 [1st Dept. 2012];

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Arrington v. Liz Claiborne, Inc., 260 AD2d 267 [1999]). Although Defendant argues that plaintiff was free to leave the office at all times, there is a question of fact as to whether the defendant intended to confine her in the building and parking lot and whether he intentionally prevented her from leaving the premises.

With respect to the cause of action for defamation as to the statements made by defendant to the police officer, the plaintiff produced an affidavit from the police officer who spoke to Smokler at the scene. He states that Smokler told him that plaintiff trespassed and threw papers at him. Here, the defendant demonstrated his prima facie entitlement to judgment as a matter of law by presenting evidence that the challenged statements were protected by a qualified privilege. A good faith communication upon any subject matter in which the speaker has an interest, or in reference to which he has a duty, is qualifiedly privileged if made to a person having a corresponding interest or duty. The qualified privilege also extends to reports to the police or the District Attorney's office about another's suspected crimes (see *Present v. Avon Prods., Inc.*, 253 AD2d 183 [1st Dept. 1999]). Here, the defendant was obligated to report his version of what happened during the incident to the police. In opposition, to this showing, the plaintiff failed to raise a triable issue of fact with respect to whether the statements were motivated solely by malice (see *Burns v. Palazola*, 22 AD3d 779 [2d Dept. 2005]).

Therefore, for all of the above stated reasons, it is hereby,

ORDERED, that the motion by defendant, for an order granting summary judgment dismissing the plaintiff's complaint is granted only to the extent that the cause of action for defamation is dismissed, and it is further,

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the plaintiffs causes of action for assault, battery, and false imprisonment, is denied.

Dated: February 10, 2015

Long Island City, N.Y.

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