SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

CINTHIA CAROLINA REYES ORELLANA, individually and on behalf of all similarly situated retail customers, Plaintiffs,	INDEX NO. 453060/2015
-against-	MOTION DATE 05-25-2016
MACY'S RETAIL HOLDINGS, INC. d/b/a MACY'S f/k/a MACY'S EAST a/k/a MACY'S, INC., and LAW OFFICES OF PALMER, REIFLER and ASSOCIATES, P.A., Defendants.	MOTION SEQ. NO. 001
	MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Macy's motion is granted to the extent of dismissing the fifth cause of action in the Complaint. The remainder of the motion is denied.

Plaintiff Cinthia Carolina Reyes Orellana (herein "Plaintiff") filed a Supplemental Summons and Class Action Complaint on November 12, 2015, asserting causes of action against Defendant Macy's Retail Holdings, Inc. d/b/a Macy's f/k/a Macy's East a/k/a Macy's, Inc. (herein collectively "Macy's") for: (1) false imprisonment/arrest, (2) abuse of process, (3) assault/battery, (4) unjust enrichment, and (5) declaring New York's civil recovery statute under General Obligation Law §11-105 void for vagueness under New York State Constitution Article I, §6 and U.S.C. §1983.

Plaintiff also asserts causes of action one and four against the Law Offices of Palmer, Reifler and Associates, P.A. (herein "Palmer") as the law firm that represents Macy's in its attempts to collect the monetary civil penalties from those individuals Macy's has accused of shoplifting, by sending demand letters for said penalty payments to said individuals.

This action arises out of Plaintiff's detention by Macy's Loss Prevention Officer Luz Baez (herein "Ms. Baez") for an alleged shoplifting incident that occurred on July 18, 2014. Plaintiff commenced this action individually and as a class action asserting the illegality of: (1) Macy's shoplifting prevention practices, including Macy's alleged practice of coercing unsuspecting consumers into signing confessions while being detained for alleged shoplifting, and exacting monetary penalties from accused shoplifters at the time they are detained, and (2) the continued demands by Macy's through Palmer, after the accused shoplifter is released from Macy's detention, for higher civil penalties, attorneys' fees and punitive damages not authorized by the Statute (Mot. Exh. A).

Macy's, a mercantile establishment, is empowered under General Business Law §218 and General Obligations Law §11-105, to use these Statutes as a form of protection of its establishment and merchandise, against shoplifting. Combined, these two statutes give mercantile establishments the ability to detain and demand payment of penalties if the establishment suspects, and upon an internal investigation, determines that the individual was shoplifting.

GBL §218 provides in part that: "In any action for false arrest, false imprisonment...assault, or invasion of civil rights, brought by any person by reason of having been detained on...the premises of

(a) a retail mercantile establishment for the purpose of investigation or questioning...as to the ownership of any merchandise...<u>it shall be a defense to such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by</u>...the owner of the retail mercantile establishment...his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained...was committing or attempting to commit larceny on such premises of such merchandise..." "as used in this section 'reasonable grounds' shall include, but not be limited to, knowledge that a person (i) has concealed possession of unpurchased merchandise... and a 'reasonable time' shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise..." (Emphasis added)

GOL §11-105 provides in part that, "(5) An adult or emancipated minor who commits larceny against the property of a mercantile establishment shall be civilly liable to the operator of such establishment in an amount consisting of:

(b) a penalty not to exceed the greater of five times the retail price of the merchandise or seventy-five dollars; provided, however, that in no event shall such penalty exceed five hundred dollars.

(7) A conviction or a plea of guilty for committing larceny is not a prerequisite to the bringing of a civil suit, obtaining a judgment, or collecting that judgment under this section.

(8) The fact that an operator of a mercantile establishment may bring an action against an individual...shall not limit the right of such merchant to demand, orally or in writing, that a person who is liable for damages and penalties under this section remit the damages and penalties prior to the commencement of any legal action."

Macy's makes this pre-answer motion for an Order (a) dismissing the complaint in its entirety, (b) alternatively, striking and dismissing plaintiff's class action allegations, (c) alternatively, striking Exh. A to plaintiff's complaint and paragraphs 14 and 83-89 of the complaint because they contain prejudicial and irrelevant material, and (d) alternatively, declining to address plaintiff's constitutional attack on General Obligation Law (herein "GOL") §11-105 due to plaintiff's failure to give the statutorily required notice to the Attorney General. Plaintiff opposes the motion.

Macy's argues that the Court should dismiss (1) the false arrest claim because GBL §218 provides an affirmative defense, (2) the abuse of process claim because calling the police and making a criminal complaint is not "process" that can be abused, (3) the assault and battery claim because plaintiff has failed to plead that defendants used excessive force in detaining her, that she sustained some physical injury, or that there was no reasonable cause for detaining her, (4) the unjust enrichment claim because the plaintiff has failed to plead facts to establish that equity and good conscience require the return of the funds at issue , i.e. the civil recovery permitted by GOL §11-105, and (5) the void for vagueness in the statute claim because plaintiff has failed to plead any facts to support such a claim.

CPLR §3211(a) provides that a party may move for a judgment dismissing a cause of action on the grounds that: (1) a defense is founded upon documentary evidence; and (7) the pleading fails to state a cause of action.

On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts alleged in the pleading to be true, afford the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v. Martinez 84 N.Y.S.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511). The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept. 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd. Dept. 2012]).

Applying the liberal pleading standards afforded in CPLR §3211(a)(7), plaintiff has sufficiently stated causes of action one through four within her Complaint, therefore Macy's motion to dismiss the entire complaint must be denied.

Further, CPLR §3211(a)(1), provides that dismissal may be "granted only where the documentary evidence [tendered by defendant] utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" Gomez-Jimenez v. New York Law School, 103 A.D.3d 13, 956 N.Y.S.2d 54 [1st Dept. 2012], citing Goshen v. Mutual Life Ins. Co. Of N.Y., 98 N.Y.2d 314, 746 N.Y.S.2d 858 [2002]).

Here, the evidence tendered by Macy's does not utterly refute the allegations in the Complaint. Plaintiff points to the contradictions in Ms. Baez's supporting deposition regarding the observance of the alleged shoplifting by and subsequent detention of plaintiff. In Ms. Baez's initial statement she notes that she observed the defendant (here the plaintiff) remove two shirts from a rack, she did not observe the defendant conceal the property, she observed the defendant walk past more than one open register and move to another floor, and that after she stopped the plaintiff she recovered two shirts from inside her shoulder bag. (Aff. In Opp. Exh. (1)(c)). However, on a question in the

supporting deposition which asks that "if the officer did not observe the defendant remove or conceal the property, why was the defendant stopped?" Ms. Baez checked the box "Not Applicable." (Id.) Yet, in Ms. Baez's Affidavit attached to the instant motion, she states that she stopped the plaintiff because "she had concealed merchandise in her shoulder bag and was about to enter a ladies' room. I did not stop her because she was taking merchandise from one floor to another." (Mot. Exh. C). This raises issues for the trier of fact to determine whether Macy's had "reasonable grounds" to stop and detain the plaintiff in the first place, and whether the length of the detention was reasonable, thereby defeating Macy's motion to dismiss the complaint in its entirety.

However, Plaintiff's fifth cause of action must be severed and dismissed. Plaintiff alleges in her fifth cause of action that GOL §11-105 is constitutionally vague under the Due Process Clause of the Fourteenth Amendment because the statute allows for monetary penalties to be collected by a merchant upon a simple allegation of larceny and that there is no requirement for a finding of guilt of committing larceny before bringing a civil suit or obtaining a judgment. Further, the plaintiff argues that the statute "lacks standards by which a retail mercantile establishment may demand civil penalties" from persons alleged to have committed larceny. (Mot. Exh. A). Plaintiff also broadly states that "non-white retail customers have indisputably become the primary target of GOL §11-105" (Id.), and only mentions the "void for vagueness under New York State Constitution Article I, §6 and U.S.C. §1983, in the title of the cause of action.

The plain language of GOL §11-105 is valid and specific on its face. GOL §11-105 specifically states that "an adult or emancipated minor who commits larceny against the property of a mercantile establishment shall be civilly liable to the operator of such establishment..." (GOL §11-105(5); "a conviction or a plea of guilty for committing larceny is not a prerequisite to the bringing of a civil suit, obtaining a judgment, or collecting that judgment..." (Id. at (7)). Further, the statute states "...<u>The fact that an operator of a mercantile establishment may bring an action against an individual as provided in this section shall not limit the right of such merchant to demand, orally or in writing, that a person who is liable for damages and penalties under this section remit the damages and penalties prior to the commencement of any legal action.</u>" (Id. at §(8)) (emphasis added). The Statute also provides guidance as to the penalty amounts that may be collected depending on the condition of the merchandise at the time of recovery or non-recovery by the merchant. (Id. at (5)(a) and (b)). GOL §11-105 is not vague and is valid on its face, and does not violate an individual's rights who is subject to the penalties enumerated therein.

Next, Macy's argues that This Court should strike the class action allegations because plaintiff has failed to plead the numerosity, commonality and typicality of claims required by CPLR §901. In opposition, plaintiff argues that Macy's moving to strike the class action allegations prior to a pre-certification motion by the plaintiff is improper and premature because Macy's time for service of an answer has not expired. Therefore, the sixty days in which Plaintiff is to move for class certification has not begun to run yet.

CPLR §901 provides in part, "that one or more members of a class may sue or be sued as representative parties on behalf of all if:

(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

(2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

CPLR §902 provides in part that, "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained..."

Macy's argues its time to Answer has expired. The parties stipulated on November 19, 2015, that Macy's time to answer, or otherwise move, was extended to January 18, 2016. (Mot. Exh. E). Macy's made the instant pre-answer motion to dismiss on January 14, 2016. Macy's contends that, in accordance with the stipulation, its time to Answer expired as of January 18, 2016. Therefore, Macy's argues, plaintiff's time to move for class certification expired as of March 18, 2016, which was sixty days from the expiration of Macy's time to Answer.

Macy's time to Answer has not expired. Macy's made a pre-answer motion to dismiss on January 14, 2016. When a party moves to dismiss before serving a responsive pleading, the time to Answer is tolled until ten days after the decision on the motion to dismiss is rendered. CPLR §3211(f) provides that "Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." Therefore, Macy's time to Answer has not expired since the motion to dismiss it made under CPLR §3211(a) tolled its time to serve an Answer. Hence, the sixty days given to Plaintiff under CPLR §902 to move for class certification has not begun to run.

Further, "CPLR §902 makes clear [that] the time period for making a motion for class certification is not measured from service of the answer but rather from the date on which the defendant's time to answer expires," which in the instant case will be ten days after service of this Order with notice of entry. (Shah v. Wilco Systems, Inc., 27 A.D.3d 169, 806 N.Y.S.2d 553 [1st Dept. 2005]).

To the extent a motion for class certification was made untimely, it is a provident exercise of the court's discretion to deem a motion made under CPLR §902 timely when the delay in making such motion was due largely to the defendants conduct. (Galdamez v. Biordi Const. Corp., 50 A.D.3d 357 [1st Dept. 2008], holding that plaintiff's delay in timely moving for certification was largely the result of the defendants' conduct during discovery). Likewise, here the conduct of Macy's moving to dismiss instead of serving an Answer delays the time in which plaintiff must move under CPLR §902.

Macy's also argues that, regardless of the timeliness issue, Plaintiff has failed to plead the prerequisites of CPLR §901, thereby warranting dismissal of the class allegations. This argument is likewise without merit.

Plaintiff sufficiently pleads the numerosity, typicality and commonality required under CPLR §901. Plaintiff pleads as the common question of law and fact the manner and conditions during detention in which confessions to shoplifting and the simultaneous and/or immediate subsequent demand for payment of penalties from the Plaintiff and the Class Members' is in fact a violation of the Plaintiff's and Class Members' rights. The class, therefore, are those individuals who while detained by Macy's have been coerced into signing confessions, and promises to make payments of civil penalties.

Accordingly, it is ORDERED that Macy's motion to dismiss the complaint is granted to the extent that Plaintiff's fifth cause of action declaring Statute GOL§11-105 void for vagueness is hereby severed and dismissed, and it is further,

ORDERED, that the remainder of the motion is denied, and it is further,

ORDERED, that within 10 days from the date of service of a copy of This Order with Notice of entry, Macy's shall serve an Answer to Plaintiff's Complaint, and it is further,

ORDERED, that within 10 days from the date of entry of this Order, copies of This Order be served upon all parties, and the Clerk of the Court who is directed to enter judgment dismissing the fifth cause of action in the complaint.

ENTER:

Dated: June 24, 2016

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE