

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

**PRESENT: HON. WILLIAM FRANC PERRY PART 23**

*Justice*

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ANTONINO DOLCIMASCOLO, MING INFANTE,

Plaintiff,

- v -

BOARD OF MANAGERS OF DORCHESTER TOWERS  
CONDOMINIUM, OGDEN CAP PROPERTIES, KELLY ANN  
WHIPPLE, JOHN MCDERMOTT

Defendant.

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INDEX NO. 150136/2021

MOTION DATE 10/08/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 52

were read on this motion to/for DISMISS.

Plaintiffs Antonino Dolcimascolo and Ming Infante, a married couple, bring this action against Defendants Board of Managers of Dorchester Towers Condominium (Plaintiffs resided at the condo as subtenants from July 2016 to March 2019), Ogden Cap Properties (the property manager thereof), John McDermott (vice president of Ogden), and Kelly Whipple (an employee), for allegedly making false statements to the NYPD, resulting in Dolcimascolo being arrested and charged with stalking and harassment on July 18, 2019.

Plaintiffs commenced this action on January 6, 2021 and filed the amended complaint on August 20, 2021, which sets forth seven causes of action for defamation, false arrest, malicious prosecution, negligence, prima facie tort, intentional infliction of emotional distress, and negligence (on behalf of Infante). (NYSCEF Doc No. 29, Amended Complaint, at ¶¶ 44-105.)

In motion sequence 003, Defendants move to dismiss the amended complaint for failure to state a claim and for violation of the statute of limitations. (NYSCEF Doc No. 35, Ms003 Memo.) For the reasons that follow, the motion is granted.

### Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

“To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm.” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 41-42 [1st Dept 2014].) Pursuant to CPLR 3016[a], “the particular words complained of shall be set forth in the complaint.” “The complaint also must allege the time, place and manner of the false statement and specify to whom it was made.” (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].)

Statements made in good-faith to the police about another’s suspected criminal activity are afforded a qualified privilege, even if the information relayed to the police turns out to be false. (*See Present v Avon Prods.*, 253 AD2d 183, 188 [1st Dept 1999].) To overcome the qualified privilege, a plaintiff is required to “sufficiently allege that the defendant published the statements with actual malice, i.e., that defendant ‘acted out of personal spite or ill will, with reckless disregard for the statement's truth or falsity, or with a high degree belief that [her] statements were

probably false.” (*Sagaille v Carrega*, 194 AD3d 92, 95 [1st Dept 2021], quoting *Sborgi v Green*, 281 AD2d 230, 230 [1st Dept 2001].)

Here, the amended complaint sets forth a lengthy “underlying history” of tension between Plaintiffs and Defendants, with Plaintiffs alleging that between “October 1st and November 30th of 2018, the police were wrongfully called 24 times,” 10 of which “resulted in Dolcimascolo being taken in handcuffs against his will to either jail, Bellevue Hospital or Mount Sinai Hospital.” (NYSCEF Doc No. 29, Am. Cmplt. at ¶¶ 19[i], [j].) Plaintiffs further allege that they were subjected to a multitude of unpleasantries, varying from minor comments (*id.* at ¶ 20 [in November 2017, Defendants stated that Plaintiffs were “anti-social” and “obnoxious”) to further unjustified arrests. (*Id.* at ¶ 22 [“On February 15, 2019, Dolcimascolo was arrested for feeding birds”].) Plaintiffs allege that Defendants, at some point, forced their sublettor, Allison Hwang, to commence an eviction proceeding against them. (*Id.* at ¶ 25.)

After Plaintiffs left the condo, they “began to protest their treatment,” but, on July 10, 2019, Defendants “in retaliation” called the NYPD to arrest Dolcimascolo based on allegations that he “had threatened to kill someone.” (*Id.* at ¶ 29.) After further protests and a subsequent call for police assistance on July 18, 2019, Dolcimascolo was in fact arrested, allegedly based on the “entirely false” statements of Defendants. (*Id.*)

The allegedly false statements forming the basis for this litigation are contained in the charging document of Detective Carlos Pagan, dated July 17, 2019, which charged Dolcimascolo with Stalking in the Fourth Degree and Harassment in the Second Degree (NYSCEF Doc No. 30, Charging Documents, at 4-6); and the affidavit of Defendant Kelly Whipple dated August 16, 2019. (*Id.* at 1-3.)

After review of the Charging Documents, the moving papers, and the amended complaint, the court finds that Plaintiffs' allegations "fall short of alleging actual malice sufficient to overcome the qualified privilege attaching to [Defendants'] statements to the police." (*Sagaille*, 194 AD3d at 96.) There is nothing in the record, particularly with regard to the Charging Documents, "that would support an inference of actual malice" (*id.*) sufficient to overcome the privilege afforded to Defendants' statements made to police. (*Zapata v Tufenkjian*, 123 AD3d 814, 816 [2d Dept 2014].)

Plaintiffs' only argument in opposition is that they are "not obligated to show evidentiary facts to support [their] allegations of malice." (NYSCEF Doc No. 50, Opposition, at 11, citing *Pezhman v City of NY*, 29 AD3d 164 [1st Dept 2006].) However, in *Pezhman*, the First Department found that the "content and context of the statements [were] sufficient to potentially establish malice ... [a]lthough [a plaintiff's] allegations of malice may not rest on mere surmise and conjecture." (*Pezhman*, 29 AD3d at 168-69.) Here, the "content and context of the statements" made to the police are insufficient to establish malice, as the allegations rest "on mere surmise and conjecture." (*Id.*) Accordingly, the cause of action for defamation is dismissed.

Likewise, the related causes of action for false arrest and malicious prosecution, which are also premised on the same allegedly "false" statements, are also dismissed. (*Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003] ["a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution"]; *Zapata*, 123 AD3d at 816.)

The cause of action for IIED is dismissed as duplicative "since the underlying allegations fall within the ambit of the defamation cause[] of action." (*Napoli v New York Post*, 175 AD3d

433, 434 [1st Dept 2019].) The general negligence cause of action, styled as negligence in failing to properly supervise employees (Opposition at 15), is also dismissed as duplicative of the defamation claim (Am. Cmplt. at ¶¶ 74-77 [alleging that Defendants failure to properly supervise their employees caused the employees to make the false statement to police resulting in false arrest]), as is the claim for prima facie tort. (*Matthaus v Hadjedj*, 148 AD3d 425, 426 [1st Dept 2017].) Finally, Infante’s attenuated cause of action for negligence/negligent infliction of emotional distress is dismissed for the same reasons. Accordingly, it is hereby

ORDERED that Defendants’ motion sequence 003 is granted and the amended complaint is dismissed in its entirety, with costs and disbursements to Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the Defendants.

9/29/2022  
DATE

  
WILLIAM FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE