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VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

KASEEM BOSTIC and CORDELL JONES, Plaintiffs v. THE SPORN COMPANY, INC., d/b/a PERRYWINKLES FINE JEWELRY, Defendant	Docket No. 483-6-16 Cncv

RULING ON DEFENDANT'S MOTION TO DISMISS

In this civil rights action, Plaintiffs Kaseem Bostic and Cordell Jones claim a Public Accommodations Act violation (Count I) and false imprisonment (Count II) against Defendant The Sporn Company, Inc. ("Perrywinkles") for an allegedly race-motivated phone call to the police while Plaintiffs were shopping at Perrywinkles Fine Jewelry. Defendant moves to dismiss, pursuant to V.R.C.P. 12(b)(6). David Bond, Esq. represents Plaintiffs. Tristram J. Coffin, Esq. represents Defendant.

Facts

The following facts are alleged in the Complaint. The court assumes their truth for purposes of this motion.[1]

Plaintiffs are both African-American residents of Burlington, Vermont. Defendant The Sporn Company, Inc. is a New York corporation doing business in Burlington as Perrywinkles

[1] In a lengthy footnote in its motion to dismiss, Perrywinkles notes that it disputes Plaintiffs' allegations, and goes on to outline its version of events. While the court appreciates Perrywinkles' desire to explain its side of the story, a motion to dismiss is not the proper context for such explication. As it has absolutely no bearing on a motion to dismiss, where the court must deem all facts alleged in the complaint as true, the court must disregard the footnote.

Fine Jewelry. On June 3, 2016, Plaintiffs visited Perrywinkles to look at and potentially purchase wristwatches for themselves, as well as other items for sale. A store employee assisted Plaintiffs, who remained on the premises for 20 minutes or more, and who comported themselves in a "respectful" and "gentlemanly" manner. After gathering information, Plaintiffs left without purchasing anything.

Upon exiting the store, Plaintiffs noticed a large number of police cars pulled up outside the front entrance. The police officers beckoned them over, and proceeded to check Plaintiffs for weapons, question them, and run background checks. The officers detained Plaintiffs for over 20 minutes before releasing them, during which Plaintiffs understood they were not free to leave, while Perrywinkles employees watched the incident from inside the store. Plaintiffs were not carrying any illegal weapons, had not committed any illegal acts, nor did they enter the store with the intent or purpose of committing any illegal act. Apart from racial stereotyping, there was no reason to suspect that Plaintiffs intended to commit any illegal acts. The officers explained to Plaintiffs that Perrywinkles employees had called the police because they believed Plaintiffs were going to rob the store. Plaintiffs allege that store employees called police to the scene and caused them to detain Plaintiffs based on racially motivated discriminatory animus.

Discussion

I. The Pleading Standard

In addressing Perrywinkles' motion to dismiss pursuant to Rule 12(b)(6), the court considers whether "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Davis v. American Legion, Dept. of Vermont, 2014 VT 134, ¶ 12 (quoting Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309). The burden on plaintiffs under Vermont law is "exceedingly low" at the pleading stage. Prive v. Vermont

Asbestos Group, 2010 VT 2, ¶ 14, 187 Vt. 280. Motions to dismiss for failure to state a claim are "disfavored and should be rarely granted." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575. Complaints are intended to give enough notice to the defendant to allow a response, but need not lay out every detail of the facts supporting the claim. *See* Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1 ("The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it."). As our Supreme Court has noted, the goal is to "strike a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped causes of action and discouraging baseless or legally insufficient ones." Id.

II. Violation of Public Accommodations Act (9 V.S.A. § 4502)

Perrywinkles contends that Plaintiffs' Public Accommodations claim fails as a matter of law because the complaint does not allege that Plaintiffs were refused, withheld, or denied any accommodations, advantages, facilities, or privileges of a store visitor. Plaintiffs respond that an "obvious privilege[] afforded by any place of public accommodation is the freedom to leave the establishment without being publicly collared, detained, and grilled for nothing" and that such conduct is "almost certain to ensure that the individual who was detained never returns." Pls.' Opp'n at 2. Thus, Plaintiffs contend, this is the "type of conduct that Vermont's public accommodations law was intended to prevent." Id. at 3.

Vermont's Public Accommodations Act provides:

> An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.

9 V.S.A. § 4502(a). The Supreme Court has recognized that, "[a]s a remedial statute, the [Public Accommodations Act] must be liberally construed in order to suppress the evil and advance the

remedy intended by the Legislature." Washington v. Pierce, 2005 VT 125, ¶ 13, 179 Vt. 318 (quoting Human Rights Comm'n v. Benevolent & Protective Order of Elks, 2003 VT 104, ¶ 13, 176 Vt. 125).

As Perrywinkles acknowledges, the Vermont Supreme Court has not addressed the showing required to allege or prove a denial of public accommodations under the Act. However, Perrywinkles points to decisions considering analogous federal and state anti-discrimination statutes that have purportedly held that one is denied a public accommodation only where he or she is prevented from accessing goods or services made available to the public *within* a particular establishment.

In Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001), Asian-American and African-American plaintiffs sued a restaurant pursuant to federal law (42 U.S.C. § 1981 and 42 U.S.C. §§ 2000a and 2000a–2),[2] alleging they were victims of racial discrimination and retaliation when employees failed to serve them and ejected them after they complained. The Second Circuit affirmed the district court's grant of summary judgment for defendant. The quotation cited in Perrywinkles' memorandum refers to the court's conclusion that there was no evidence of racial animus or discrimination at the summary judgment stage. Id. at 104 ("However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.") (internal citation omitted).

In Acey v. Bob Evans Farms, Inc., No. 2:13-CV-04916, 2014 WL 989201 (S.D.W. Va. Mar. 13, 2014), an African-American plaintiff entered a restaurant and asked to be seated near the

[2] 42 U.S.C. § 2000a(a) provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

front, where space was available. The hostess led plaintiff to a table in the back of the restaurant, slammed the menus down on the table, and called him a "damned idiot." Id. at *1. Plaintiff sued the restaurant under the federal Civil Rights Act (42 U.S.C. § 1981 and 42 U.S.C. §§ 2000a) and the West Virginia Human Rights Act (W. Va. Code, § 5-11-9).[3] The district court granted defendant's motion to dismiss, concluding that the alleged facts were "too sparse" to support any discriminatory intent against plaintiff based on his race, nor did plaintiff "allege facts indicating that any accommodations or services were withheld, denied, or refused." Id. at *4–*5, *11.

The Acey court compared its factual scenario to Bobbitt by Bobbitt v. Rage Inc., 19 F. Supp. 2d 512 (W.D.N.C. 1998), where the restaurant manager had called for a police presence and required African-American patrons to prepay for their meal because a different group of African-American patrons had left without paying the day before. Id. 518–20. The district court denied defendant's motion to dismiss, concluding that plaintiffs had alleged "something more than poor service." Id. at 518, 522. However, the court granted a motion to dismiss as to a different set of plaintiffs in the same case, who had experienced poor service in the form of a long wait time and inferior-quality pizza, but had not been required to prepay like the other plaintiffs. Id. at 517–18, 521–22. The court distinguished between mere "poor service" and the "alter[ing of] a fundamental

[3] The language of West Virginia Human Rights Act is substantially similar to Vermont's Public Accommodations Act. The West Virginia law makes it an unlawful discriminatory practice:

> For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to . . . [r]efuse, withhold from or deny to any individual because of his or her race, religion, color, national origin, ancestry, sex, age, blindness or disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations;

W. Va. Code § 5-11-9(6)(A).

characteristic of the service provided by the public accommodation solely on the basis of race." Id. at 520.

Perrywinkles also relies upon Hamidi v. City of Kirksville, Mo., No. 2:14CV00087 ERW, 2015 WL 1928753, at *1 (E.D. Mo. Apr. 28, 2015). There, an Iranian-American plaintiff petitioned the city to rezone his property. The zoning board determined it would approve his request only pursuant to certain stipulations, some of which were apparently not contained in the municipal code. Plaintiff refused the stipulation, and the rezoning request was denied. Plaintiffs brought a 14th Amendment equal protection claim pursuant to 42 U.S.C. § 1983, and also alleged violation of a state statute that prohibits discrimination in public accommodations. *See* Mo. Rev. Stat. § 213.065.[4] The court granted the city's motion to dismiss to dismiss those claims, concluding that, as Perrywinkles quoted in its memorandum:

> [E]ven under a broad interpretation of the statute, Plaintiff's claim does not constitute discrimination in a place of public accommodation. Simply because the allegedly discriminatory decision was made by the Commission in City Hall does not mean Plaintiff was denied any of the "accommodations, advantages, facilities, services or privileges" made available in City Hall. The opposite occurred. Plaintiff's application was heard by the Commission and he had access to a service provided by City Hall. Although he may disagree with the result of the hearing, and the decision may constitute a discrimination claim under a different statute or the Constitution, he was not denied "full and equal use and enjoyment" of City Hall. If Plaintiff had not been allowed to file an application for rezoning, or if he was denied a hearing, the result may be different.

[4] That statute provides, in pertinent part:

> It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, . . . or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.

Mo. Rev. Stat. § 213.065.

Id. at *3.[5]

Plaintiffs, for their part, cite no cases with analogous factual scenarios. Instead, Plaintiffs rely on the clearly established but general propositions that Vermont's Public Accommodations Act must be construed broadly, *see* Washington, 2005 VT 125, ¶ 13, and that Vermont laws may provide greater protection than their federal counterparts. *See, e.g.*, Baker v. State, 170 Vt. 194, 202 (1999). Plaintiffs also note that the Vermont statute is facially broader than its federal counterpart, 42 U.S.C. § 2000a, in that it accords protection on account of sexual orientation, while the federal statute does not. Finally, Plaintiffs contend that this is a "novel" theory because the Vermont Supreme Court has not addressed the showing required to allege or prove a denial of public accommodations under the Act. Consequently, they argue, the court should allow the claim to develop by construing the Act to include the privilege to leave a place of public accommodation without being publicly detained by the police as a result of an unjustified report by a store employee.

The question now before the court is primarily a matter of statutory interpretation: does 9 V.S.A. § 4502(a) apply to the factual scenario alleged by Plaintiffs? While the court is guided by "similar statutes in other jurisdictions," *see* Delta Psi Fraternity v. City of Burlington, 2008 VT 129, ¶ 7, 185 Vt. 129, those interpretations are by no means binding on this court. While Plaintiffs' Opposition and Sur-reply are devoid of significant, meaningful analysis, this court agrees that the

[5] Perrywinkles also cites K-Mart Corp. v. West Virginia Human Rights Comm'n, 181 W. Va. 473, 477–78 (1989), which concluded that Syrian nationals could not prove discrimination in violation of the West Virginia Human Rights Act where the store had summoned police to observe plaintiffs shortly after they headed toward the store. That case is not particularly helpful here. K-Mart involved a decision on the merits and, furthermore, the plaintiffs there were never actually detained. Along a similar vein is Perrywinkles' citation of Ross v. Flo Foods, Inc., Civ. No. 3:10CV356–DSC, 2011 WL 3422657, at *2–3, 5 (W.D.N.C. Aug. 4, 2011) (finding that African–American plaintiffs were not denied the opportunity to contract for goods or services at defendant restaurant where, after being physically assaulted by the restaurant's owner, they were given a refund and offered a complimentary meal which they were unable to eat before eventually leaving). Ross was a summary judgment decision, where judgment was granted for defendants because plaintiffs had "not presented any *evidence* that white patrons received preferential treatment." Id. at *5 (emphasis added).

alleged conduct here effectively denied Plaintiffs the "accommodations, advantages, facilities, and privileges" of Perrywinkles Fine Jewelry which the Public Accommodations Act is designed to protect. 9 V.S.A. § 4502(a).

"Privilege" is alternatively commonly referred to as a "right," "freedom," or "liberty." One of the privileges that the Act protects is the right of every shopper to reasonable access to retail establishments, unimpeded on the basis of race. Any action by a store owner or employee that discourages or impedes customers of color from accessing the establishment violates the Act. Perrywinkles' alleged act of profiling and treating Plaintiffs as thieves solely because of their race therefore violates the Act. Surely, any shopper of color would hesitate to enter a retail establishment knowing that he or she might be treated this way. *See* In re Carroll, 2007 VT 19, ¶ 9, 181 Vt. 383 (noting that Vermont courts determine legislative intent by considering "the whole statute, the subject matter, its effects and consequences, and the *reason and spirit of the law*") (emphasis added).

While the cases cited by Perrywinkles and discussed above provide useful points of analysis, the court ultimately finds them unpersuasive. Of those decided at the motion to dismiss stage, notably Acey, Bobbitt, and Hamidi, they involve the federal pleading standard, which is arguably more stringent than Vermont's standard, and which the Vermont Supreme Court has twice declined to adopt. *See* Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 n.1, 184 Vt. 1 ("[W]e . . . are in no way bound by federal jurisprudence in interpreting our state pleading rules. We recently reaffirmed our minimal notice pleading standard . . . and are unpersuaded by the dissent's argument that we should now abandon it for a heightened standard.") (citations omitted); Bock v. Gold, 2008 VT 81, ¶5 n.*, 184 Vt. 575 ("As we noted recently, our dissenting colleagues' reliance on [Twombly] is misplaced.").

Moreover, none of those cases involved an allegation of a false report to the police resulting in detention by police upon leaving a retail establishment. This appears to be a novel theory of liability under the Public Accommodations Act, which would be improper to dispose of on a motion to dismiss without allowing further development. *See* Girouard v. Hofmann, 2009 VT 66, ¶ 6, 186 Vt. 153 (quoting Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309, 917 A.2d 508) ("A motion to dismiss . . . is not favored and rarely granted. This is especially true when the asserted theory of liability is novel or extreme, as such cases should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations."). Without more explicit direction from the Vermont Supreme Court concerning the construction of the statute, and given that this is a remedial statute which must be construed broadly, *see* Washington, 2005 VT 125, ¶ 13, this court must conclude that Plaintiffs' Complaint sufficiently alleges a violation of the Public Accommodations Act.

III. False Imprisonment

Perrywinkles next argues that Plaintiffs' false imprisonment claim fails because Plaintiffs were detained by the police rather than any store employees. False imprisonment is the "unlawful restraint by one person of the physical liberty of another." State v. May, 134 Vt. 556, 559 (1976) (quotations omitted). "The restraint placed upon the person must not only be unlawful, but must also be total." Id. (citing Restatement (Second) of Torts § 36(1) (1965)). Traditionally, one is liable for false imprisonment if: "(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." Restatement (Second) of Torts § 35(1) (1965).

One who instigates a confinement may be subject to liability to the person confined for false imprisonment. As further explained in the Restatement:

> Instigation consists of words or acts which direct, request, invite or encourage the false imprisonment itself. In the case of an arrest, it is the equivalent, in words or conduct, of "Officer, arrest that man!" It is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them.

Restatement (Second) of Torts § 45A (1965), cmt. c. Thus, generally, "a defendant who furnishes information to police will not generally be held liable for false arrest when the police exercise independent judgment to arrest a plaintiff." TADCO Constr. Corp. v. Dormitory Auth. of State of N.Y., 700 F. Supp. 2d 253, 268 (E.D.N.Y. 2010). However, an exception to that rule exists where a defendant "instigates" an arrest by taking "an active role in the arrest of the plaintiff, such as giving advice and encouragement or importuning the authorities to act," with the intent to confine the plaintiff. TADCO Constr. Corp. v. Dormitory Auth. of State of N.Y., 700 F. Supp. 2d 253, 269 (E.D.N.Y. 2010) (quoting Lowmack v. Eckerd Corp., 757 N.Y.S.2d 406, 408 (N.Y. App. Div. 4th Dep't. 2003)). "The defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition[.]" Mesiti v. Wegman, 763 N.Y.S.2d 67, 69 (N.Y. App. Div. 2d Dep't 2003).

Consistent with the "instigation" rule, courts have found the possibility for liability where a defendant knowingly provides false information to the police, which leads to an arrest. The Missouri Supreme Court has succinctly summarized this approach as follows:

> Merely reporting facts to a police officer, and leaving it to that officer's discretion whether to make an arrest, does not subject the reporter to liability for false arrest. Even reporting incorrect

> information may not subject the reporter to liability, if the intent was not to direct the police to arrest a specific individual. *See* . . . Snider v. Wimberly, 357 Mo. 491, 209 S.W.2d 239, 242 (1948) (defendant not liable for false arrest where he "did not say that plaintiff was the prowler, but only said he *thought* plaintiff was the prowler"). It "requires something more than only furnishing wrong information" to be liable for instigating an arrest. For example, evidence that a defendant "knowingly provided false, incomplete, or misleading information" may support a false imprisonment action. Jacobs v. Bonser, 46 S.W.3d 41, 48 (Mo. App. 2001).

Highfill v. Hale, 186 S.W.3d 277, 280–81 (Mo. 2006) (some citations omitted). For instance, in Jacobs v. Bonser, the appellate court affirmed a plaintiff's verdict on a false imprisonment claim where defendant had reported to police that plaintiff had assaulted defendant. Although defendant argued that plaintiff failed to prove that defendant's statements to police were the sole cause of the arrest because there was another outstanding arrest warrant for plaintiff at that time, the court rejected that argument. Police officers informed plaintiff he was under arrest and then placed him in handcuffs because defendant had accused him of assault, and the outstanding warrant was not discovered until after plaintiff was placed in a jail cell. 46 S.W.3d at 48.

Despite Plaintiffs' meager defense of its false imprisonment claim, the Complaint here sufficiently alleges that Perrywinkles *instigated* Plaintiffs' confinement by the police as that term is understood in the false imprisonment context. The allegations are that a Perrywinkles employees called the police and reported their suspicion that Plaintiffs were going to steal something, that there was no reason to suspect that Plaintiffs intended to commit any illegal acts, and that store employees actually called police to the scene and caused them to detain Plaintiffs based on a racially motivated discriminatory animus. Thus, the Complaint does more than allege that Perrywinkles reported mere facts or incorrect information. It sufficiently alleges that Perrywinkles "knowingly provided . . . incomplete, or misleading information" to the police, which instigated the subsequent confinement. Highfill, 186 S.W.3d at 280–81. The fair and reasonable inference

from the alleged facts is that there was no reason to suspect Plainttiffs would steal something, but that an employee misled the police by failing to mention that they had not observed any action to support their suspicion. *See* Dernier v. Mortgage Network, Inc., 2013 VT 96, ¶ 23, 195 Vt. 113 ("We assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiffs pleadings, and assume that all contravening assertions in defendant's pleadings are false."). If the employee had been honest and provided complete information—that the sole reason for the suspicion was Plaintiffs' race—the police likely would not have responded, and Plaintiffs would not have been confined. Accepting those allegations as true as well as all reasonable inferences from those allegations, the court concludes that the Complaint sufficiently states that Perrywinkles knowingly provided incomplete or misleading information in a police report, and by doing so instigated the confinement.

That question is irrelevant, however, if the court determines that the brief detention of Plaintiffs here was not sufficient to constitute a confinement. But the court cannot reach that conclusion. Courts have held that even a temporary detention can establish confinement for purposes of a false imprisonment claim. *See*, *e.g.*, Pinnock v. City of New Haven, 553 F. Supp. 2d 130, 143 (D. Conn. 2008) (Under Connecticut law, [f]alse imprisonment . . . is an intentional tort, and any period of restraint, no matter how brief in duration, is sufficient to constitute a basis for liability."); Smith v. State, 314 Ga. App. 583, 584–85 (2012) "[T]his [false imprisonment] statute on its face does not require that the imprisonment be for a specific length of time; . . . [a] brief detention is sufficient. Whether the detention amounted to false imprisonment was for the jury to decide."); Ware v. Dunn, 80 Cal. App. 2d 936, 943, 183 P.2d 128, 132 (1947) ("Temporary detention is sufficient, and the use of actual physical force is not necessary. The essential thing in false imprisonment is the restraint of the person.") (citation omitted).

The Vermont Supreme Court in a three-justice memorandum decision has concluded that where "a defendant is issued a citation but never physically arrested, a claim for false arrest will not lie." Connary v. Field, No. 2012-276, 193 Vt. 681 (Table) (Feb. 2013) (unpub. mem.). At first blush, this suggests that the Court would not permit a false imprisonment claim here, as the circumstances do not suggest a de facto arrest, nor were Plaintiffs even cited. But, upon closer scrutiny, that decision's application to the facts alleged in the present case is not readily apparent. In Connary, a police officer asked plaintiff to come to the barracks for questioning about the use of someone else's social security number on a tax return without that person's permission. After questioning, the officer cited plaintiff for false pretenses, and the Court held that did not constitute confinement. But, the decision provides no discussion of how long the plaintiff was at the barracks or other details regarding the questioning, other than that plaintiff was never physically arrested. The decision relies on two federal cases which similarly involved a citation but no physical arrest, and which similarly contain little discussion of the length or nature of the encounter. *See* Johnson v. Barker, 799 F.2d 1396, 1399 (9th Cir. 1986) (officer "landed his helicopter, approached appellants, issued citations, and departed"); White v. City of Laguna Beach, 679 F. Supp. 2d 1143, 1158 (C.D. Cal. 2010) (plaintiff was "never physically arrested and was merely given a citation" by officer). Arguably, Plaintiffs' alleged detention, where they were searched and which lasted 20 minutes, was more substantial than the police encounters in Connary, Johnson, and White, even though Plaintiffs were not cited in the end. As Plaintiffs allege they understood that they were not free to leave, the court must conclude that the alleged confinement is sufficient for purposes of pleading a false imprisonment claim.

Order

Defendant's Motion to Dismiss is denied. The parties are directed to submit a proposed discovery schedule by February 1st.

Dated at Burlington this 12th day of January, 2017.

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Robert A. Mello
Superior Court Judge