

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Kevin J. Kerrigan  
Justice

IA Part 10

Alexander Gitelman, Inna Gitelman, Arvid  
Gitelman, infant by his m/n/g Inna Gitelman,  
Allen Gitelman, infant by his m/n/g Inna Gitelman,  
Vladimir Gorbach, Marina Gorbach, Dajana  
Gorbach, infant by his m/n/g Marina Gorbach,  
Yefim Gorbach, infant by his m/n/g Marina  
Gorbach and Jane Verbitsky,

Index  
Number 22004 2013

Plaintiffs,

- against -

Motion  
Date November 15, 2017

The City of New York, New York City Police  
Department, Det. John Reinle, Sgt. Markey, Det.  
Marotta, Det. Raniolo, and all others involved  
in the arrest and detention of the parties, Real  
Travel inc., d/b/a Real Travel and/or Answer  
Travel, Go Go Worldwide Vacations, Go Go  
Tours, Inc., American Express, Inc. And  
Delta Airlines Corp.,

Defendants.

Motion Seq. Nos. 3,4,5,6

x

The following papers numbered 1 to 38 read on these motions by defendants, Real Travel Inc. d/b/a Answer Travel (Real Travel) (Seq. 3); Delta Air Lines, Inc. Sued herein as Delta Airlines Corp. (Delta) (Seq. 4); Go Go Worldwide Vacations and Go Go Tours, Inc. (Collectively Go Go) (Seq. 5); and American Express Bank FSB, sued herein as American Express, Inc. (AmEx) (Seq. 6), all seeking, among other things, summary judgment dismissing plaintiff's complaint against each of them, pursuant to CPLR 3212.

Papers  
Numbered

Notice of Motion (Seq. 3) - Affirmation - Exhibits .....	1-6
Answering Affirmation .....	7-8
Reply Affirmation .....	9-11
Notice of Motion (Seq. 4) - Affirmations - Exhibits -	

Stipulation .....	12-15
Answering Affirmation .....	16-17
Reply Affirmation .....	18-19
Notice of Motion (Seq. 5) - Affirmations - Exhibits .....	20-24
Answering Affirmation .....	25-26
Reply Memorandum of Law .....	27-28
Notice of Motion (Seq. 6) - Affidavit - Affirmation - Exhibits .....	29-34
Answering Affirmation .....	35-36
Reply Affirmation .....	37-38

Upon the foregoing papers, it is ordered that said defendants' motions are determined as follows:

In this action arising from an incident on March 19, 2009, at John F. Kennedy Airport, Queens, New York, plaintiffs seek to recover damages for negligent infliction of emotional distress, based on the detention and police questioning of plaintiffs due to an alleged "mishandling of plaintiffs' credit card information in the booking of a vacation, which in turn resulted in a third-party's, and not plaintiffs', credit card being charged." Defendant, Real Travel, was plaintiffs' travel agent, which took plaintiffs' AmEx credit card information. Defendant, Go Go, was a wholesaler of vacation packages, who was given the credit card information by Real Travel and conveyed said information to Delta, which processed the credit card number for airline tickets. Somewhere in this process, two numbers on the credit card (a 9 and a 0) were transposed. When the third-party owner of the AmEx card with the transposed numbers was wrongfully billed for plaintiffs' tickets, she notified the police of a possible fraudulent charge on her card, and the police intercepted plaintiffs at the airport on the day of their intended flight, holding them at the airport, and then at the 111<sup>th</sup> Precinct, until investigation revealed the mistake, and fraud was ruled out. Real Travel, Go Go, Delta and AmEx move for summary judgment dismissing the complaint and all cross claims as against them. Plaintiff opposes.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (see *Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (see *Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also, *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

In the case at bar, not one of the moving defendants has demonstrated a prima facie entitlement to summary judgment with regard to a lack of negligence on its part. None of the evidence presented herein permits a finding that the case contains the absence of a material issue of fact as to whether any one of the moving defendants might have been responsible for supplying the incorrect credit card information, which negligent act precipitated the instant causes of action.

However, liberally construing the evidence in a light most favorable to the nonmoving plaintiffs (see *Chojnacki v Old Westbury Gardens, Inc.*, 152 AD3d 645 [2017]; *D'Esposito v Manetto Hill Auto Service, Inc.*, 150 AD3d 817 [2017]), the collective evidence proffered on these motions for summary judgment has demonstrated plaintiffs' inability to succeed in proving the requisite elements of what plaintiffs maintain are causes of action for negligence and for negligent infliction of emotional distress, warranting a granting of defendants' motions for summary judgment dismissing the complaint as against each such defendant.

Plaintiffs admit, in their bill of particulars, that none of them "sustained any physical injury," but allege that "each plaintiff suffered psychological distress, mental distress and emotional distress including fear, irritability, sleeplessness and anxiety," thereby supporting viable causes of action for negligent infliction of emotional distress. While their complaint does not include causes of action delineated as "negligent infliction of emotional distress," plaintiffs' deposition testimony contains sufficiently satisfactory and relevant descriptions of their alleged, resultant "mental anguish" to "preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Corp.*, 40 NY2d 633, 635 [1976]; see *Nilazra, Inc. v Karakus, Inc.*, 136 AD3d 994 [2016]).

In opposition to each of the four motions herein, plaintiffs correctly contend that, in

such a cause of action, “emotional harm is compensable even though no physical injury occurred” (*Kennedy v McKesson Co.*, 58 NY2d 500, 504 [1983]; see *Baumann v Hanover Community Bank*, 100 AD3d 814 [2012]). In order to “filter out petty and trivial complaints and ensure that the alleged emotional distress is real” (*Taggart v Constabile*, 131 AD3d 243, 253 [2015]), breach of a duty of care, without physical injury, is compensable only “when the mental injury is a direct, rather than a consequential result of the breach, and when the claim possesses some guarantee of genuineness” (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008]; see *DiGeronimo v Fuchs*, 101 AD3d 933 [2012]; *Salandy v Bryk*, 55 AD3d 147 [2008]). The element of a “guarantee of genuineness” may be satisfied either by an act of negligence commonly recognized as furnishing an assurance of genuineness, as in the mishandling of a corpse or the giving of false information that a loved one has died (see *Johnson v State of New York*, 37 NY2d 378 [1975]; *Hering v Lighthouse 2001, LLC*, 21 AD3d 449 [2005]), or, in the absence of such particular circumstances, it is generally recognized that such guarantee requires a direct breach of duty which endangered the plaintiff’s physical safety or caused plaintiff to fear for his physical safety (see *Taggart v Constabile*, 131 AD3d 243; *Kennedy v McKesson Co.*, 58 NY2d 500).

In the case at bar, moving defendants have, through the evidence presented, including plaintiffs’ own testimony and pleadings, demonstrated that plaintiffs have, prima facie, failed to satisfy the necessary element of “genuineness,” and, therefore, cannot prove damages in their negligence claims, entitling defendants to summary judgment dismissing such causes of action. Defendants have shown that plaintiffs have suffered no physical injuries, nor have they claimed lost earnings or lost time from work or school as a result of their alleged mental injuries. Defendants have demonstrated that plaintiffs flew to their planned destination the following day, and have flown extensively since the subject incident. Additionally, defendants have demonstrated that plaintiffs have not submitted any medical bills or records of treatment by a medical provider attributable to the subject incident. In opposition, plaintiffs have failed to raise a triable issue of fact to rebut such entitlement. Plaintiffs’ submissions are devoid of medical evidence with regard to any mental or psychological injury, or corroboration of any complaints regarding their alleged “anguish” or “distress” to outsiders, which might bolster the “genuineness” of their allegations. Plaintiffs proffer only mere unsubstantiated claims of “anxiety” while traveling, “sleeplessness”, and/or “fear” of the incident recurring, which claims fail to satisfy either of the above-stated Court of Appeals determined requirements for a “guarantee of genuineness” herein. Further, plaintiffs have failed to include any additional, admissible factors which might persuade this court to expand the ambit of the element of “guarantee of genuineness,” sufficiently to raise a material issue of fact in rebuttal, which could deny judgment to defendants (see *Zuckerman v City of New York Transit Auth.*, 49 NY2d 557 [1980]; *Baird v Four Winds Hosp.*, 140 AD3d 810 [2016]). As such, defendants have resolved all factual issues pertaining to plaintiffs’ ability to prove a cause of action for negligent infliction of mental distress as a matter of law, and conclusively disposed of plaintiffs’ said claims (see *Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953 [2017]; *Town of Huntington v Long Island Power Authority*, 130 AD3d 1013 [2015]).


Plaintiffs' complaint alludes to actions against Real Travel, Go Go, Amlix and Delta for "false arrest," "unlawful detention," and "slander," but does not include causes of action for such intentional torts. The causes of action against the moving defendants, included in the complaint, are couched solely in terms of negligence, and, as has previously been determined, defendants have demonstrated plaintiffs' inability to successfully argue the required element of a resultant injury, without which no action in negligence will lie (*see Kimbar v Estis*, 1 NY2d 399 [1956]).

Even had such intentional torts been pleaded, they would necessarily be dismissed as time-barred, as the statute of limitations for such torts is one year (CPLR 215 [3]), and these actions were commenced almost fifteen months after the subject incident of March 19, 2009. Further, such intentional torts may not simply be designated as actions in negligence, as "[a] plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover ... under broad general principles of negligence, but must proceed by way of the traditional remedies of false arrest and imprisonment" (*Ray v County of Nassau*, 100 AD3d 854 [2012]; *see Santoro v Town of Smithtown*, 40 AD3d 736 [2007]). A complaint in a cause of action for slander must be articulated precisely, and "the particular words complained of shall be set forth" (CPLR 3016 [a]). The complaint herein failed to comply. Finally, defendants have shown, prima facie, that they did not make the subject complaints to the police, nor did they initiate or demand the arrests or detention of plaintiffs. In opposition, plaintiffs have failed to raise an issue of fact in rebuttal. Even had moving defendants made the complaint to the police, such communications would have been protected by a qualified privilege, and plaintiffs have not alleged that any such statements were motivated solely by malice (*see Lemieux v Fox*, 135 AD3d 713 [2016]; *Segall v Sanders*, 129 AD3d 819 [2015]).

Plaintiffs' remaining contentions and arguments either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the motions by defendants, Real Travel, Go Go, Amlix and Delta, all seeking summary judgment dismissing the action against each such defendant, are granted in their entirety.

Dated: February 20, 2018

  
Kevin J. Kerrigan, J.S.C.