

STATE OF NEW YORK }  
COUNTY OF QUEENS } ss.:

I, **GLORIA D'AMICO**, Clerk of the County of Queens and also Clerk of the Supreme Court in and for said County,

**DO HEREBY CERTIFY, that** a Short Form Order was filed in the Office of the County Clerk, County of Queens on July 29, 2010, Index Number 16874/2008, in the Matter of Salvador Torres, against DHL Express (USA, INC.), et al.,

**IN TESTIMONY WHEREOF**, I have hereunto set my hand and official seal of the said County and Court at Jamaica, N.Y. this 4th day of August, 2010.



*Gloria D'Amico*  
-----  
Clerk

**ORIGINAL**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31  
Justice

2008 JUL 29 11:01 AM  
QUEENS COUNTY CLERK  
FILED

\_\_\_\_\_  
SALVADOR TORRES x

Index  
Number 16874 2008  
Motion  
Date April 22, 2010

- against -

DHL EXPRESS (USA, INC.), et al. .  
\_\_\_\_\_ x

Motion  
Cal. Number 31  
Motion Seq. No. 1

The following papers numbered 1 to 15 read on this motion by DHL Express (USA, Inc.) ["DHL"], Chris Sheedy, Tim Black, Iggy Garcia, Bill Santiago and Dominick Scardilli ("defendants"), for summary judgment in their favor dismissing the complaint.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
Answering Affidavits - Exhibits.....	8-13
Reply Affidavits.....	14-15

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff in this false imprisonment, false arrest, assault and defamation action seeks damages based upon his termination from employment at DHL. The termination was based upon an allegation of theft. Defendants move to dismiss the complaint on the ground that plaintiff cannot establish every element of the above-noted charges. Plaintiff opposes the motion.

### Facts

Plaintiff was employed at DHL's 500 Tenth Avenue facility in New York City as a courier driver. He was a member of the Local 295 union. As a union member, the terms and conditions of his employment, including his termination and the Step meetings associated with the grievance process, were governed by the Local 295 collective bargaining agreement ("CBA"). During plaintiff's employment, Chris Sheedy was the Regional Director, Dominic Scardilli was the District Field Service Manager, Tim Black and William Santiago were union shop stewards and Iggy Garcia was a business agent for Local 295 at the 500 Tenth Avenue facility. James Quinlan was the regional security investigator for the New York City area.

On December 24, 2007, a meeting was held during plaintiff's regular work shift in the office of Scardilli. Plaintiff was escorted to the meeting by Tim Black, his shop steward. Plaintiff, Scardilli and Black were present at the meeting. Plaintiff alleges that "Tom Carcilio" also came into the meeting. However, according to defendants, "Tom Carcilio" does not and did not work at the 500 Tenth Avenue facility, he was not present at the meeting, and no one, including plaintiff, knows who he is or where he can be found.

At the December 24, 2007 meeting, plaintiff's employment with DHL was terminated for a Category A offense, namely because Airbill #15169332684 (a laptop computer) went missing while in plaintiff's possession on December 18, 2007. Plaintiff alleges "Tom Carcilio" locked the door so no one could come inside the meeting. Defendants counter that even if "Tom Carcilio" existed, the door does not lock from the inside. The meeting lasted about ten minutes. Plaintiff did not ask to leave the meeting. No one from DHL frisked plaintiff, patted him down, asked him to undress or undressed him, during or after this meeting. Plaintiff's termination was upheld at the Step II meeting which was held at the same time and place as the December 24, 2007 meeting. Thereafter, pursuant to the CBA, the union filed a Step III grievance regarding plaintiff's termination.

At a Step III grievance, the union argues for a reversal of adverse employment decisions (such as termination) affecting their members. Tim Black contacted plaintiff and informed him that a Step III grievance meeting would be held on January 8, 2008. Although plaintiff's attendance at the Step III grievance meeting was not required under the CBA, plaintiff voluntarily appeared for his Step III meeting. The Step III grievance meeting was held in a conference room at the 500 Tenth Avenue facility that DHL regularly uses for these meetings. At the Step III grievance meeting, plaintiff was represented by three union officials - Iggy Garcia (the Business Agent), William Santiago (a Shop Steward) and Tim Black (Shop Steward). Plaintiff's union representatives were seated around him during the Step III meeting.

Chris Sheedy and Dominic Scardilli attended the Step III meeting on behalf of DHL. Plaintiff alleges that "Tom Carcilio" also attended the Step III meeting and locked the door so no one could come inside during the meeting. Defendants contend that the door cannot be locked from the inside and that the door to a termination meeting is always shut (but not locked) to preserve confidentiality and reduce outside noise disruptions. The Step III meeting lasted approximately 43 minutes. Plaintiff did not ask to leave the meeting. Even if the door was locked, plaintiff did not ask anyone to unlock the door. Plaintiff did not ask to take a break, use the restroom or get a drink during the meeting. Defendants contend that plaintiff did not leave the room because he was waiting to hear the result of the Step III meeting and hoped to get his job back.

Following the Step III meeting, plaintiff was handed a document entitled "Section 22, Step Three Meeting/Decision" which confirmed his termination was upheld. Although the union may pursue binding arbitration at Step IV of the grievance process under the CBA, the union did not do so on plaintiff's behalf. No one from DHL frisked plaintiff, patted him down, asked him to undress, or undressed him during or after the Step III meeting.

At some time following the Step III meeting on January 8, 2008, plaintiff was arrested and escorted from the premises by two detectives from the New York Police Department. Plaintiff was charged with grand larceny, however, the case was subsequently dismissed upon a motion by the District Attorney.

#### Summary Judgment

On a motion for summary judgment the movant must demonstrate entitlement to judgment as a matter of law by the submission of competent admissible evidence (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once this burden has been met, it becomes the obligation of the opponent to lay bare his evidence in admissible form sufficient to raise a triable issue of fact (*Shaw v Time-Life Records*, 38 NY2d 201 [1975]).

Defendants sustained their initial burden, as noted below, with evidence that plaintiff cannot establish one or more elements of the causes of action alleged in the complaint. In opposition, plaintiff submitted the affidavit of his attorney who avers that there is sufficient evidence upon which to raise an issue of fact for trial. Plaintiff's proof, however, must come from a person with actual and personal knowledge of the facts (*GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 [1985]). An affidavit from an attorney who has no personal knowledge of the facts lacks any probative value in opposition to a motion for summary judgment (*Zuckerman v City of New York, supra*). The Court cannot rely on speculative issues to allow the matter to go to trial in the hope that the trial may disclose some evidence which has not been produced on the motion (*Andre v Pomeroy*, 35 NY2d 361

[1974]). The assertion of the plaintiff's lawyer that a jury would find that plaintiff was falsely imprisoned, falsely arrested, assaulted and defamed lacks any probative force in opposition to the motion of defendants.

#### False Imprisonment

In order to sustain a cause of action for the tort of false imprisonment, plaintiff must prove: (1) the defendant intended to confine him (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 (*Broughton v State of New York*, 37 NY2d 451 [1975], citing Restatement, 2d, Torts § 35). In the present case, plaintiff failed to prove any elements of this cause of action.

As for the first element of this tort, plaintiff failed to show that the defendant either: (a) confined or intended to confine the plaintiff or (b) affirmatively procured or instigated the plaintiff's arrest (*King v Crossland Sav. Bank*, 111 F3d 251 [2d Cir 1997], citing *Carrington v City of New York*, 201 AD2d 525 [1994]; *Williams v State of New York*, 90 AD2d 861 [1982]). Plaintiff must make a prima facie showing of confinement or the cause of action must be dismissed (*Elson v Consolidated Edison Co. of N.Y.*, 226 AD2d 288 [1996]). Summoning an employee into an interview in familiar surroundings in an employer's office does not prove an intent to confine (*Lee v Bankers Trust Company*, 1998 WL 107119 [SDNY 1998], citing *Malanga v Sears, Roebuck & Co.*, 109 AD2d 1054 [1985], *aff'd* 65 NY2d 1009 [1985]). In *Lee (supra)*, an employee who was questioned for five hours by the defendant's security personnel was found not to be falsely imprisoned. In *Malanga (supra)*, the plaintiff was a part-time employee of the defendant who was questioned during regular business hours in familiar surroundings about the loss of merchandise. The Court held that she was not falsely imprisoned.

In the case at bar, the actions of defendant's employees do not indicate an intent to confine plaintiff. Step II and Step III meetings were held pursuant to the CBA grievance process for plaintiff's benefit. Plaintiff was represented by his union at each stage of the proceeding, including representation by three union officials at Step III. Plaintiff was free to leave the meetings, and also could have elected not to show up at the Step III meeting. The meetings were held in an office and conference room at plaintiff's normal place of business. The first meeting lasted 10 minutes and the second meeting lasted 43 minutes.

To establish confinement, plaintiff alleges that "Tom Carcilio" locked the door during the Step meetings. However, defendants contend that a "Tom Carcilio" does not exist, and plaintiff cannot locate "Tom Carcilio." Furthermore, defendants submit, the door does not lock from the inside. Even if the door was locked, plaintiff admits the door was not locked

during the entirety of the meetings and others came and went freely. No one ever told plaintiff that he was not free to leave the room. Plaintiff never asked to leave the room or take a break, and plaintiff did not leave the room even when he was in there alone with his union representatives and others had left. Furthermore, even if the door was locked, that fact would not necessarily mean that there was an intent to confine plaintiff, or for that matter, that plaintiff was truly confined (*see Fernandez v State*, 2002 WL 31955397).

The record reveals that plaintiff consented to the confinement so that he could participate in Step II and Step III grievance meetings in order to save his job (*see e.g. Blumenfeld v Harris*, 3 AD2d 219 [1957] (where employee voluntarily entered and chose to remain in back room of employer's store to discuss charges of theft made against him, and only restraint was that if he left he risked the indignity and consequences of an arrest, there was no restraint as would constitute false imprisonment). Plaintiff voluntarily appeared at the Step III meeting although he was not required to do so under the CBA. The record reveals that plaintiff remained in the room because he wanted to hear the result of the Step III meeting and hoped to get his job back.

Finally, any alleged confinement was privileged because the Step II and Step III meetings were held pursuant to Local 295's CBA (*see Fernandez v State, supra* [Employer had privilege to detain employee for questioning where labor agreement authorized questioning of employees, thus barring employee's false imprisonment claim]; *Diesel v Town of Lewisboro*, 232 F3d 92 [2d Cir. 2000] [dismissing false imprisonment claim and noting that requiring employee's continued presence for purposes of an administrative investigation of his official conduct was privileged by virtue of the collective bargaining agreement]).

#### False Arrest

Defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging false arrest by tendering evidence that they did not affirmatively induce a police officer to act (*see Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475 [2005]; *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561 [2004]; *Cobb v Willis*, 208 AD2d 1155 [1994]), but merely supplied information to the police, who determined that an arrest was appropriate (*see DeFilippo v County of Nassau*, 183 AD2d 695 [1992]). In opposition, plaintiff failed to raise a triable issue of fact. Therefore, the cause of action which allege false arrest is dismissed.

#### Assault

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" (*Bastein*

*v Sotto*, 299 AD2d 432, 433 [2002]). Plaintiff testified that he was never frisked, patted-down, asked to undress or undressed by any DHL employee at any time. Since there is no evidence of any physical contact or conduct between plaintiff and defendants, this claim is dismissed (*Id.*).

### Defamation

Defamation has long been recognized to arise from “the making of a false statement which tends to ‘expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society’ ” (*Foster v Churchill*, 87 NY2d 744, 751 [1996], quoting *Rinaldi v Holt, Rinehart, & Winston, Inc.*, 42 NY2d 369, 379 [1977], *cert. denied* 434 US 969 [1977], quoting *Sydney v MacFadden Newspaper Publishing Corp.*, 242 NY 208 [1926]). The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se (Restatement of Torts, Second § 558). CPLR 3016(a) requires that in a defamation action, “the particular words complained of ... be set forth in the complaint.” The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Arsenault v Forquer*, 197 AD2d 554 [1993]; *Vardi v Mutual Life Insurance Co. of New York*, 136 AD2d 453 [1988]).

The defamation cause of action rests entirely on plaintiff’s allegation that he heard Scardilli on one occasion whisper the word “spic” to “Tom Carcilio” before the January 8, 2008 Step III meeting began. Other than plaintiff, Scardilli, and “Tom Carcilio,” no one else was in the room when the comment was allegedly made. At the outset, it is noted that plaintiff alleges that only Scardilli made the defamatory statement. Thus, to the extent that there is no allegation or proof that the remaining defendants made the defamatory statement, the causes of action which allege defamation against Santiago, Sheedy, Garcia and Black, are dismissed.

In any event, defendants submit that a “Tom Carcilio” does not and did not work at the 500 Tenth Avenue facility, was not present at any meetings and no one, including plaintiff knows who he is or where he can be found. Scardilli denies making the comment and plaintiff does not mention such a comment being made in his handwritten notes. Since there is no evidence that the alleged statement was “published,” the claim must fail (*see Garcia v Puccio*, 62 AD3d 598 [2009]; *Kovac v Xerox Corp.*, 119 AD2d 986 [1986]).

Furthermore even assuming, arguendo, that the statement was whispered to “Tom Carcilio,” where an alleged defamatory statement is unrelated to the employee’s work, the

employee must allege special damages under New York law (see *Arnson v Wiersma*, 65 NY2d 592 [1985]). Special damages contemplate a loss that is economic or pecuniary in nature (Prosser and Keeton, Torts § 112, at 794 [5th ed. 1984]). General conclusory allegations of some impairment to plaintiff's reputation are insufficient to show actual damages (*Newsday, Inc. v C.L. Contractor, Inc.*, 87 AD2d 326 [1982] (citing *Cohn v National Broadcasting Co. Inc.*, 67 AD2d 140 [1979], *aff'd*, 50 NY2d 885, *cert. denied*, 449 US 1022 [1980])). Plaintiff has not alleged, nor do the facts indicate, any special damages resulting from this statement. Therefore, the defamation causes of action are dismissed.

Accordingly, the motion to dismiss is granted.

Dated: July 19, 2010

No. 183431

STATE OF NEW YORK,  
COUNTY OF QUEENS,  
SS: I, GLORIA D'AMICO,  
COUNTY CLERK AND  
CLERK OF THE SUPREME  
COURT, QUEENS COUNTY,  
DO HEREBY CERTIFY  
THAT I HAVE COMPARED  
THIS COPY WITH THE  
ORIGINAL FILED OR  
RECORDED IN MY OFFICE  
ON

7-29-2010  
AND THAT IT IS A  
CORRECT TRANSCRIPT  
THEREFROM AND OF  
THE WHOLE OF THE  
ORIGINAL.

WITNESS MY HAND  
AND SEAL OF SAID  
COUNTY AND COURT ON

08.03.2010

*Gloria D'Amico*

CLERK

*[Signature]*  
J.S.C.

1 2010 JUL 29 A 11:01

QUEENS COUNTY CLERK  
FILED