

STATE OF MICHIGAN
COURT OF APPEALS

EMMA T. THOMPSON,

Plaintiff-Appellee,

v

SOUTHFIELD POLICE SGT. L. PORTER and
POLICE OFFICER LOSH,

Defendants-Appellants.

UNPUBLISHED

March 18, 2008

No. 276887

Wayne Circuit Court

LC No. 06-608689-NO

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendants Porter and Losh appeal from an order of the circuit court denying their motion for summary disposition based upon governmental immunity. We reverse and remand.

Plaintiff's claims arise out of a traffic stop initiated by Sgt. Porter of a vehicle in which plaintiff was a passenger. According to Sgt. Porter's report, he observed the vehicle driving at a speed he estimated to be 50 to 55 mph in a 35 mph zone. Before he could establish the vehicle's actual speed, however, the vehicle had slowed. But he did observe that the driver was not wearing his seat belt and Sgt. Porter initiated the traffic stop on that basis. In talking with the driver through the side window of the vehicle, Sgt. Porter observed a "green leafy substance" that he suspected to be marijuana on the floor on both the driver and passenger sides. Without alerting the occupants of the vehicle to his observations, Sgt. Porter returned to his patrol car, did a LEIN check on the driver, and requested back up. According to the report, although the driver had a criminal history, there were no outstanding warrants and the driver had a valid license.

After the back up units arrived, the occupants were ordered out of the vehicle. The officers encountered some resistance by the driver, including an attempt to flee. According to Sgt. Porter's report, a LEIN check on plaintiff revealed an outstanding misdemeanor warrant from the City of Detroit. The report further indicated that because the warrant could not be confirmed at that point with the Detroit Police Department, Sgt. Porter chose to arrest plaintiff for suspected possession of marijuana. At the police station, a field test of the green leafy substance was negative for marijuana. Plaintiff was released at that time. In their brief on appeal, defendants state that plaintiff was at the jail for forty minutes. In her complaint, plaintiff alleges that she was in custody for two hours.

Thereafter, plaintiff filed a complaint alleging false arrest, false imprisonment, assault and battery and ethnic intimidation against Sgt. Porter and the other three officers at the scene. Defendants moved for summary disposition under MCR 2.116(C)(7) (claim barred by immunity) and (C)(10) (no genuine issue of material fact). The trial court dismissed all claims against officers Kennedy and Freeman. Additionally, the trial court dismissed the claims of assault and battery and ethnic intimidation against Sgt. Porter and all claims except for ethnic intimidation against Officer Losh. Defendants Porter and Losh claim this appeal from the denial of summary disposition based upon governmental immunity under MCR 7.202(6). Thus, the only issue before us is whether the trial court erred in denying summary disposition based upon governmental immunity on the three remaining claims.

In order to survive a motion for summary disposition under MCR 2.116(C)(7) based upon governmental immunity, the plaintiff must “allege facts justifying the application of an exception to governmental immunity.” *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). We consider all documentary evidence submitted and accept as true the allegations of the complaint unless specifically contradicted by affidavits or other appropriate documents. *Id.* Our review is de novo. *Id.*

With respect to the claims of false arrest and false imprisonment against Sgt. Porter, defendants argue that Sgt. Porter was entitled to immunity under MCL 691.1407(2), which provides in pertinent part as follows:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer’s, employee’s, member’s, or volunteer’s conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

A person suing a governmental defendant must plead in avoidance of immunity. *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). In the case at bar, according to defendants, a LEIN check revealed an outstanding warrant for plaintiff’s arrest. This Court has held that an arresting officer may reasonably rely upon information provided by LEIN in making an arrest decision. *People v Freeman*, 240 Mich App 235, 236-237; 612 NW2d 824 (2000). Accordingly, Sgt. Porter was acting within the scope of his authority, discharging a governmental function, and was not acting in a grossly negligent manner when he arrested plaintiff.

Although plaintiff has not filed a brief in this Court, her response in the trial court to defendants’ motion suggests two arguments against defendants’ position: (1) that there was no valid warrant against her at the time of her arrest and (2) that there was no reasonable cause to

arrest her for possession of marijuana, an alternate charge for which Sgt. Porter stated in his report that he arrested plaintiff.

With respect to the first point, although plaintiff argued in her brief in the trial court that defendant has yet to produce a valid warrant, plaintiff misses the point. The burden is on plaintiff to plead in avoidance of immunity. Plaintiff has not pled, nor produced any evidence, that Sgt. Porter did not, in fact, receive information from LEIN indicating that there was an outstanding warrant for plaintiff's arrest. The mere fact that Detroit PD could not, or would not, confirm that evening that there was a warrant does not mean that no such warrant existed or that the warrant was fatally flawed if it did exist. The only conclusion that can be drawn is that Detroit PD was either unable or unwilling to confirm the warrant, not that there was no valid warrant.

As to the second point, whether there was a valid basis to arrest plaintiff on the marijuana possession charge is irrelevant if a warrant for her arrest existed. As the United States Supreme Court explained in *Devenpeck v Alford*, 543 US 146, 153-154; 125 S Ct 588; 160 L Ed 2d 537 (2004), the subjective intent of the officer making the arrest is not relevant to whether there was a valid arrest. Rather, the question is whether the objective facts known to the officer at the time of arrest would justify an arrest. In other words, an arrest is valid if it was objectively reasonable even if the officer's subjective belief as to why he was making an arrest is incorrect.

Thus, in the case at bar, even if Sgt. Porter incorrectly concluded that he had probable cause to arrest for possession of marijuana, the arrest would be valid if there was another objectively reasonable basis for the arrest. As discussed above, such a reason existed if LEIN reflected an outstanding warrant for plaintiff's arrest. And, as we have concluded, plaintiff has not pled in avoidance of immunity on that issue.

For the above reasons, we conclude that plaintiff failed to adequately plead in avoidance of immunity on the false arrest and false imprisonment claims against Sgt. Porter. Accordingly, the trial court erred in failing to dismiss them.

Next, defendants argue that the trial court erred in failing to dismiss the ethnic intimidation claim against Officer Losh. To establish ethnic intimidation, plaintiff would have to show not just that Officer Losh used racial slurs, but also that those slurs accompanied actual or threatened harm to plaintiff or her property. *Badiee v Brighton Area Schools*, 265 Mich App 343, 360; 695 NW2d 521 (2005). The extent of plaintiff's allegations of ethnic intimidation is that, in her general allegations, she alleged "that racial slurs were used by Officer Losh during the arrest." Further, in the ethnic intimidation count itself, she alleges the following:

24. That during this physical onslaught with the Plaintiff, Defendant-Officer LOSH repeatedly referred to Plaintiff's ethnicity in a derogatory manner.

25. That Defendant-Officer, LOSH constantly referred to Plaintiff, who is African American, as "nigger".

26. That Defendant-Officer, LOSH, is white and he perpetrated the above assault through ethnic intimidation and, as such, is liable, pursuant to

Michigan's Ethnic Intimidation Statute for collateral damages, attorney fees, costs and treble damages.

While, as defendants point out in their brief, plaintiff's own deposition raises serious question to whether Officer Losh even used racial slurs, much less directed them at plaintiff, we need not reach that issue. Other than the general conclusions stated by plaintiff in paragraph 26 of her complaint, there is no indication that Officer Losh actually engaged in any assault or threatened assault of plaintiff. Indeed, the only actual harm alleged by plaintiff is the false arrest itself.¹ Because, as discussed above, plaintiff has failed to establish the viability of the false arrest claim, of necessity she has also failed to establish the viability of the ethnic intimidation claim because she cannot establish the actual or threatened harm to herself as required by the ethnic intimidation statute. *Badiee, supra*.²

For the above reasons, we conclude that the trial court erred in denying summary disposition to defendants based upon governmental immunity.

Reversed and remanded to the trial court with instructions to enter summary disposition in favor of defendants on all counts. We do not retain jurisdiction. Defendants may tax costs.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

¹ The assault claim, which was dismissed as to all defendants, only involved claims regarding the use of force incident to the making of an arrest—i.e., handcuffing and searching plaintiff. There was no claim of excessive force in making the arrest. Therefore, if the arrest is valid, there would be no viable assault claim.

² Indeed, once the trial court dismissed the false arrest, false imprisonment and assault and battery claims against Officer Losh, the ethnic intimidation claim against him should have been dismissed as well. Even if the false arrest and false imprisonment claims against Sgt. Porter were viable, they would not support an ethnic intimidation claim against Officer Losh because it would not establish that Officer Losh harmed or threatened to harm plaintiff.