SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

MARK H. MILLER,

Plaintiff,

- against -

THE COUNTY OF NASSAU and THE NASSAU COUNTY POLICE DEPARTMENT,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 2444/09

Motion Sequence No. 001, 002, 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2, 3
Answering Affidavits 4, 5
Replying Affidavits 6
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendants County of Nassau and the Nassau County Police Department move, in motion sequence one, pursuant to CPLR 3124 and 3126 to dismiss the complaint for the plaintiff's failure to provide discovery for over two years, or in the alternative to preclude the plaintiff from offering at trial any evidence concerning information requested by the defendants, and not provided by the plaintiff, or in the alternative pursuant to CPLR 3124 to compel the plaintiff to provide full and complete responses to the defendants' discovery demands within 15 days and for the plaintiff to appear within 10 days for a deposition. The *pro se* plaintiff attorney opposes the motion.

The Second Department holds:

"While the nature and degree of the penalty to be imposed on a motion pursuant to

> CPLR 3126 is a matter of the Supreme Court's discretion (***see, Espinal v City of New York***, 264 AD2d 806; Soto v City of Long Beach, 197 AD2d 615, 616), striking a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (***Birch Hill Farm v Reed***, 272 AD2d 282)

Penafiel v. Puretz, 298 A.D.2d 446, 748 N.Y.S.2d 767 [2d Dept, 2002].

This Court determines the defense meets its burden under CPLR 3124 and 3126 by showing the plaintiff failed to comply with the October 12, 2010 preliminary conference order and stipulation, discovery demands and compliance orders and that noncompliance by the plaintiff was willful, contumacious and in bad faith. The plaintiff fails to present a reasonable excuse for the noncompliance. The Court finds the plaintiff has not complied with discovery demands and orders. Moreover, the Court determines the plaintiff has not supplied a verified supplemental bill of particulars required by the October 12, 2010 preliminary conference order and stipulation, and he has not shown a reasonable excuse for that noncompliance. The Court can consider and determine the parties' summary judgment motions without the discovery and the verified supplemental bill of particulars.

The plaintiff moves, in motion sequence two, pursuant to CPLR 3112 (e) for partial summary judgment on liability regarding the first cause of action claiming false imprisonment and false arrest, and to set the matter down for an inquest. The plaintiff contends there are no triable issues of material facts. The defense opposes this plaintiff motion.

The defendants cross move, in motion sequence three, pursuant to CPLR 3112 (e) for summary judgment on the ground there is no triable issue of fact. The plaintiff opposes this defense cross motion.

The underlying action seeks to recover damages for false arrest and false imprisonment arising from a February 11, 2008 incident. The parties proffer a February 8, 2008 temporary order

of protection issued under Nassau County Family Court docket number O-01364-08 in a family offense proceeding entitled Teresa Miller against Mark H. Miller, the plaintiff in this instant action. A Family Court Judge entered that temporary order of protection on a Family Court Act Article 8 petition filed that same day. The order temporary order of protection, which was effective until February 13, 2008, ordered Mark H. Miller to stay away from Teresa Miller wherever she may be except for visitation, curbside pickup and drop off with police assistance, Mark H. Miller to stay away from Teresa Miller wherever she may be except for visitation, until 5 P.M. on Friday, February 8, 2008 until Sunday, February 10, 2008, curbside pickup and drop off with police assistance and refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against Teresa Miller. The Family Court Judge advised Mark H. Miller in Court of the issuance and contents of the order, and personally served Mark H. Miller with that February 8, 2008 temporary order of protection in Court. The temporary order of protection states, "The Family Court Act provides that presentation of a copy of this order of protection to any police officer or peace officer acting pursuant to his or her special duties shall authorize, and sometimes require, such officer to arrest a person who is alleged to have violated its terms and to bring him or her before the court to face penalties authorized by law."

The plaintiff proffers an October 11, 2010 verified bill of particulars. It states the plaintiff was arrested on February 11, 2008, at approximately 8:30 A.M., at the southwest corner of Camp Avenue and Merrick Avenue, Merrick New York. The plaintiff states, in an August 15, 2011 affidavit, he went there, as a routine matter, to pick up his children's school assignments from the main office of the Camp Avenue School. The defendants proffer the police domestic incident report of Police Officer Vincent E. Polera, who responded to the scene, and Police Sergeant

reviewed Officer Polera's report that same day. Officer Polera reported he spoke to Teresa Miller, a teacher who gave him the February 8, 2008 temporary order of protection, and Mark H. Miller at the scene, and obtained statements from both parties. Officer Polera checked the registry, and found the February 8, 2008 temporary order of protection issued under Nassau County Family Court docket number O-01364-08 for Mark H. Miller to stay away from Teresa Miller. Officer Polera concluded he had probable cause to arrest Mark H. Miller for a violation of Penal Law § 215.50 (3), Criminal Contempt, and placed Mark H. Miller into custody for a violation of the February 8, 2008 temporary order of protection. The defendants also proffer a September 2011 affidavit by Officer Polera, who details the incident he observed following a radio call from police communication, to wit 911 to respond to a domestic incident at Camp Avenue School which is located in the First Precinct in Nassau County. He also states a second patrol car operated by Officer Costello also responded to the scene, and both officers made several phone calls to the Records Bureau to verify the validity of the February 8, 2008 temporary order of protection. The defendants also proffer a February 11, 2008 supporting deposition regarding the incident signed by Teresa Miller, the February 11, 2008, 11:58 A.M. computerized police case report generated from Officer Polera and the plaintiff's May 6, 2008 notice of claim to the defendants.

The Second Department holds:

> It is well-settled that in the absence of any concrete indication of criminality, a police officer may approach a private citizen on the street for the purpose of investigation if he can point to specific and articulable facts which warrant the intrusion (***People v. DeBour***, 40 N.Y.2d 210, 223, 386 N.Y.S.2d 375, 352 N.E.2d 562; ***see also, People v. Carrasquillo***, 54 N.Y.2d 248, 252–253, 445 N.Y.S.2d 97, 429 N.E.2d 775; ***People v. Howard***, 50 N.Y.2d 583, 430 N.Y.S.2d 578, 408 N.E.2d 908, ***cert. denied*** 449 U.S. 1023, 101 S.Ct. 590, 66 L.Ed.2d 484)

People v. Tolliver, 145 A.D.2d 660, 662, 536 N.Y.S.2d 483 [2d Dept, 1988].

The Court of Appeals stated:

> In passing on whether there was probable cause for an arrest, we consistently have made it plain that the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice (***People v. De Bour***, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 352 N.E.2d 562, ***supra; People v. Corrado***, 22 N.Y.2d 308, 292 N.Y.S.2d 648, 239 N.E.2d 526; La Fave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich.L.Rev. 40, 73–75). In making such a judgment, we must also bear in mind that "[i]n dealing with probable cause * * * we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (***Brinegar v. United States***, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879).

People v. Carrasquillo, 54 N.Y.2d 248, 254, 429 N.E.2d 775 [1981].

The Second Department also holds: "A statement of a complainant, an identified citizen, is assumed to have veracity and is sufficient to establish probable cause for arrest (***see People v. Sanders***, 239 A.D.2d 528, 658 N.Y.S.2d 958; ***People v. Boykin***, 187 A.D.2d 661, 590 N.Y.S.2d 261; ***People v. Cotton***, 143 A.D.2d 680, 532 N.Y.S.2d 911" (***People v. Read***, 74 A.D.3d 1245, 1245-1246, 904 N.Y.S.2d 147 [2d Dept, 2010]). The Court of Appeals stated:

> In enacting Family Court Act § 168, the Legislature intended to encourage police involvement in domestic matters, an area in which the police traditionally have exhibited a reluctance to intervene (***see, e.g., Bruno v Codd***, 47 NY2d 582, 590; Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 168, pp 131-132)...By its terms, section 168 provides that a certificate of protection "shall constitute authority" for a peace officer to take into custody one who reasonably appears to have violated the order. As such, it "broadens the circumstances under which a peace officer may take a person into custody beyond those enumerated in Article 140 of the Criminal Procedure Law" (Besharov, Practice Commentary, ***supra***.;, at p 131)...The order evinces a preincident legislative and judicial determination that its holder should be accorded a reasonable degree of protection from a particular individual. It is presumptive evidence that the individual whose conduct is proscribed has already been found by a court to be a dangerous or violent person and that violations of the order's terms should be treated seriously.

Sorichetti v City of New York, 65 N.Y.2d 461, 469-470, 492 N.Y.S.2d 591 [1985].

The defendants establish a *prima facie* showing they are entitled to summary judgment as a matter of law regarding false arrest and false imprisonment. There is no requirement the violation of the

February 8, 2008 temporary order of protection be willful or intentional for an arrest and detention under Family Court Act § 168. In opposition, the plaintiff fails to show there are any triable issues of fact regarding false arrest or unlawful imprisonment. Moreover, the plaintiff does not allege any facts sufficient to rise to the level of false arrest or unlawful imprisonment (***see Baker v. City of New York***, 44 A.D.3d 977, 845 N.Y.S.2d 799 [2d Dept, 2007]).

The defense shows evidence Officer Polera conducted an inquiry in response to the 911 call. Both parties voluntarily spoke with the officer. The defendants show reasonable cause for Mark H. Miller's arrest existed, under the circumstances known to Officer Polera and the information Officer Polera had before making that arrest. Those things were such as to lead a reasonably prudent person to believe a crime had been committed, and Mark H. Miller was the person who committed it. The defendants show Officer Polera executed a lawful arrest based on the totality of the circumstances, to wit the information given to him by the complainant, an identified citizen, and the valid February 8, 2008 temporary order of protection with Mark H. Miller present there in violation of it (***see*** CPL § 140.10; ***see also generally Dunaway v. New York***, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 [1979]). Since the arrest was made with probable cause it was lawful even though Mark H. Miller was not convicted for a violation of Penal Law § 215.50 (3), Criminal Contempt for which he was arrested (***see Moscatelli v City of Middletown***, 252 A.D.2d 547, 675 N.Y.S.2d 639 [2d Dept, 1998]). The Court finds the motion and cross motion can be determined notwithstanding the plaintiff's contention probable cause must be plead as an affirmative defense. The defense answer alleged it was a lawful arrest which pleads probable cause for consideration by the Court (***see Rizzi v Sussman***, 9 A.D.2d 961, 195 N.Y.S.2d 672 [2d Dept, 1959]).

The defense shows evidence the defendants did not falsely imprisoned Mark H. Miller.

The defense shows Officer Polera did not intentionally and without the right to do so confine Mark H. Miller. The defense shows Mark H. Miller was detained in a reasonable manner and for no more than a reasonable period of time to permit investigation.

There is no allegation by the plaintiff of any physical force nor excessive or unreasonable force other than a vague claim of "unwanted physical contact." Penal Law § 35.30 (1) provides:

> A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest.

Moreover, the defendants make a *prima facie* showing they are entitled to summary judgment as a matter of law regarding the second cause of action for assault. Because the plaintiff fails to produce evidence in admissible form to demonstrate the existence of an issue of fact as to assault, and he offers no explanation for his failure to come forward with such evidence, the defense motion for summary judgment should have been granted. In opposition, the plaintiff fails to show there are any triable issues of fact regarding assault. Moreover, the plaintiff does not allege any facts sufficient to rise to the level of assault ***(see Baker v. City of New York***, 44 A.D.3d 977, 845 N.Y.S.2d 799 [2d Dept, 2007]).

The defendants make a *prima facie* showing they are entitled to summary judgment as a matter of law regarding the third cause of action for negligence. The Appellate Division held in an analogous claim:

> Contrary to the plaintiff's contention, we further find that the complaint fails to state a legally cognizable cause of action for recovery sounding in negligence. At bar, the plaintiff seeks damages for the injury occasioned to him because of the defendants' negligence in filing a second paternity petition against him, which allegedly resulted in his wrongful arrest and detention. However, 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'" (***Stalteri v County of Monroe***, 107 AD2d 1071, ***citing Boose v City of Rochester***, 71 AD2d 59; ***see also, Russo v Village of Port Chester***, 198 AD2d 408). Moreover, as a matter of public policy, there is no cause of action in the State of New York sounding in negligent prosecution (***see, Pandolfo v U.A. Cable Sys.***, 171 AD2d 1013; ***Coyne v State of New York***, 120 AD2d 769, 770)

Secard v Department of Social Servs. of County of Nassau, 204 A.D.2d 425, 426-427, 612 N.Y.S.2d 167 [2d Dept, 1994].

New York State does not recognize negligence claims predicated on a criminal prosecution (***see Santoro v. Town of Smithtown***, 40 A.D.3d 736, 835 N.Y.S.2d 658 [2d Dept, 2007.]). In opposition, the plaintiff fails to show a triable issue of fact. Moreover, the plaintiff does not allege any facts sufficient to rise to the level of negligence ***(see Baker v. City of New York***, 44 A.D.3d 977, 845 N.Y.S.2d 799 [2d Dept, 2007]).

The defendants make a *prima facie* showing they are entitled to summary judgment as a matter of law regarding the fourth cause of action for denial of due process. The Appellate Division holds:

> A cause of action under 42 USC § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom (***Carattini v Grinker***, 178 AD2d 307, ***lv denied*** 80 NY2d 752), and must be pleaded with specific allegations of fact (***Alfaro Motors v Ward***, 814 F2d 883, 887). Plaintiff's broad and conclusory statements, coupled with his failure to allege facts of the alleged offending conduct, are insufficient to state a claim under section 1983. Moreover, the amended complaint does not plead facts showing that a specific custom or policy instituted by defendants caused civil rights violations, and thus his cause of action fails for that reason alone. (***Carattini v Grinker, supra.***)

Pang Hung Leung v City of New York, 216 A.D.2d 10, 11, 627 N.Y.S.2d 369[1st Dept, 1995].

In opposition, the plaintiff fails to show a triable issue of fact. Moreover, the plaintiff does not allege any facts sufficient to rise to the level of a denial of due process ***(see Baker v. City of New York***, 44 A.D.3d 977, 845 N.Y.S.2d 799 [2d Dept, 2007]). In addition, this cause of action is ambiguous because the plaintiff alleges the arrest, imprisonment and prosecution were based on an order of protection which had never been served upon him, however the plaintiff's prosecution and

imprisonment was based upon a Nassau County District Court information not a Family Court order of protection.

Accordingly, the defense motion , in motion sequence one, seeking discovery is now moot and is denied. The plaintiff motion, in motion sequence two, for partial summary judgment is denied. The defendants' cross motion, in motion sequence three is granted, in motion sequence three, for summary judgment is granted and the complaint is dismissed.

So ordered.

Dated: **March 18, 2012**

ENTER:

J. S.C.

FINAL DISPOSITION