Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Dominick Derosa,

Plaintiff,

- against -

The City of New York, New York City Police Department, New York City Department of Corrections and "John Doe", et.al.,

Defendants.

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Index Number: 33944/09

Motion Date: 5/1/12

Motion Cal. Number: 4

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this application by defendant, The City of New York, for summary judgment.

	Papers Numbered
Order to Show Cause-Affirmations-Exhibits.....	1-5
Affirmation in Opposition.....	6
Reply-Exhibits.....	7-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is granted.

As a preliminary matter, since the New York City Police Department and Department of Corrections are not separate legal entities but agencies or departments of the City, they are not cognizable parties that may be sued (see New York City Charter, Chap 17, §396).

Plaintiff, who was operating a motor vehicle, was pulled over by NYPD officers on Seneca Avenue and Bleeker Street in Queens County on June 1, 2007 and arrested for robbery. The record on this motion establishes the following undisputed facts:

On June 1, 2007, at approximately 4:00 pm, Officer Timothy

Cinque and Sgt Robert Krohley received a radio communication of an armed robbery in progress at 60-11 Metropolitan Avenue in Queens County, a plumbing business by the name of Richard Thompson Drain Cleaning. A description of a get-away vehicle was also broadcast over the radio as being a silver/gray 2004 Chrysler Sebring with a black top bearing license plate number DYP 6514. They responded to this address and were informed by a victim, one Martin Viviano, that the perpetrator, wearing a gray shirt and a mask, had fled in the aforementioned vehicle. Viviano did not see plaintiff's face head-on, as he was wearing a mask, but indicated that he saw his face from the side. He gave chase after the perpetrator left the building and saw him get into the passenger side of a gray or silver Chrysler Sebring with a black top and speed off. He did not see the license plate number, but was given the number by other witnesses. Cinque and Krohley ran the license plate and ascertained that the vehicle was owned by one Patricia DeRosa. Viviano testified before the Grand Jury that he knew plaintiff by sight because plaintiff, who was an acquaintance of Richard Thompson, Viviano's boss, would on occasion come into the business and ask Thompson for a loan. One Doreen Healy, another victim who was robbed, also described the perpetrator as wearing a gray sweater.

After searching the area, Cinque and Krohley spotted a silver/gray Chrysler Sebring with a black top bearing the aforementioned license number 10-15 blocks away from the scene of the crime, pulled it over and asked the operator thereof, who was plaintiff, to step out of the vehicle. They frisked and handcuffed him and thereupon received over the radio a positive identification of the perpetrator from one Officer Salomonson, who was with Viviano at the scene of the crime. Approximately 5-10 minutes later, Salomonson arrived with Viviano . A show-up was conducted in which Viviano positively identified plaintiff as the individual who robbed them at gunpoint. Indeed, Cinque testified in his deposition that Viviano was adamant that plaintiff was the perpetrator. Viviano also identified the vehicle plaintiff was operating as the very vehicle into which he saw the perpetrator enter and flee.

Plaintiff was given his Miranda warnings and thereafter signed a statement admitting that he had been operating the aforementioned vehicle since 3:30 pm, and had driven to the location of the robbery as well as to 422 Grandview Avenue in Queens County. In this latter regard, Healy, who resided at that address on the first floor and basement, went home two hours after the crime and was met there by detectives who wished to question her further. As they entered her apartment, Healy noticed a gray sweater on the garbage can and informed the detectives that she recognized it as the sweater that the perpetrator had worn during the robbery. She also

informed them that one Joe Rosa also lives in a studio apartment on the first floor, and that Thompson and Viviano also lived at that address. Based upon the foregoing information, plaintiff was arrested on June 1, 2007 and charged with robbery. On June 28, 2007, the Grand Jury indicted him on six counts of Robbery in the First Degree and three counts of Robbery in the Second Degree. Plaintiff was released on his own recognizance on December 12, 2008. Plaintiff thereafter moved on May 18, 2009 for dismissal pursuant to CPL 30.30 upon the ground that the People had violated his right to a speedy trial. The motion was granted and the case was dismissed on June 22, 2009.

Plaintiff served a notice of claim upon the City on September 11, 2009 asserting the following claims: "tort", false arrest and false imprisonment. Thereafter, plaintiff filed a summons and complaint on December 18, 2009 alleging causes of action for violation of 42 USC §1983, malicious prosecution, malicious abuse of process, false arrest and false imprisonment, intentional infliction of emotional distress, assault, battery and conspiracy.

The City moves for dismissal of the complaint in its entirety, inter alia, upon the grounds that all of plaintiff's state law claims other than false arrest and false imprisonment were not asserted in the notice of claim and are therefore precluded, that plaintiff's notice of claim asserting false arrest and false imprisonment was untimely, that all of his state law claims are unmeritorious as a matter of law and that plaintiff's civil rights claims under §1983 fail to state a cause of action and also fail on the merits.

Plaintiff's causes of action for malicious prosecution, malicious abuse of process, intentional infliction of emotional distress, assault, battery and conspiracy asserted in his complaint must be dismissed since plaintiff failed to assert said claims in his notice of claim (see Bonilla v City of New York, 232 AD 2d 597 [2nd Dept 1996]). The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" (General Municipal Law §50-e [2]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785 [2nd Dept 2008] internal quotations and citations omitted]). Plaintiff's mere description of the nature of his claim as "tort" does not satisfy the requirement of the statute in that it does not apprise the City of the nature of the claims being asserted against it.

Plaintiff's causes of action for false arrest and false

imprisonment must also be dismissed since the notice of claim asserting them was untimely.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Plaintiff's causes of action for false arrest and unlawful imprisonment accrued on the date he was released from physical custody on December 12, 2008 (see Ragland v New York City Housing Authority, 201 AD 2d 7 [2nd Dept 1994]). Therefore, he had until March 12, 2009 to serve a notice of claim on those grounds. His notice of claim asserting these claims, served on September 11, 2009, six months past the 90-day deadline, without leave of court, was a nullity (see Chicara v, City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004])and, thus, his causes of action for false arrest and unlawful imprisonment must be dismissed as a matter of law.

Moreover, since the late notice of claim with regard to the false arrest and unlawful imprisonment claims, served without leave of the Court, was a nullity, and since the causes of action asserted in the complaint for malicious prosecution, malicious abuse of process, intentional infliction of emotional distress, assault, battery and conspiracy were not included in the notice of claim, the present action was never properly commenced and is now time-barred (see Davis v. City of New York, 250 AD 2d 368 [1st Dept 1998]). The Court also notes that it has no authority to allow a late notice of claim at this late juncture, since the one year and 90-day statute of limitations has expired (see Hochberg v. City of New York, 63 NY 2d 665 [1984]). Indeed, plaintiff does not even seek leave to serve a late notice of claim.

Even if, arguendo, plaintiff's state law claims were asserted in a timely notice of claim, they are unmeritorious as a matter of law.

A finding of probable cause operates as a complete defense to an action alleging false arrest and false imprisonment (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2nd Dept 2003]). Information provided by an identified citizen accusing another individual of a crime constitutes sufficient probable cause for the police to arrest, unless under the circumstances a reasonable person would have made further inquiry and the arresting officer failed to do so (see id). Plaintiff was arrested based upon his identification by an eyewitness to the robbery, who identified him as the perpetrator and positively identified the vehicle he was driving as the get-away vehicle. The vehicle and its license plate

number matched the description given by eyewitnesses, and plaintiff admitted having driven said vehicle around the time the crime was committed to the location of the crime. He also admitted driving to 422 Grandview Avenue, where a gray sweater was later found on a garbage can which was identified by a witness and victim as being the self-same sweater worn by the masked perpetrator. Under the circumstances, the Court finds that the City had ample probable cause to arrest plaintiff, that the arresting officers acted reasonably based upon such positive identification and that no further inquiry was indicated based upon the facts presented at the time.

Therefore, plaintiff's causes of action for false arrest and unlawful imprisonment must be dismissed, as a matter of law.

With respect to plaintiff's claims of intentional infliction of emotional distress, such a cause of action requires allegations of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society" (Berrios v Our Lady of Mercy Medical Center, 20 AD 3d 361, 362 [1st Dept 2005] [citations and internal quotations omitted]). The allegations of the complaint, and the record on this motion, do not support a claim for intentional infliction of emotional distress. In any event, such a claim may not be brought against a municipality (see Clark-Fitzpatrick, Inc. V. Long Island Railroad, 70 NY 2d 382 [1987]).

With respect to plaintiff's claim of malicious prosecution, his indictment by a grand jury also created the presumption of probable cause which plaintiff has failed to rebut, and therefore, plaintiff is entitled to summary judgment dismissing plaintiff's malicious prosecution cause of action (see Williams v City of New York, 40 AD 3d 847 [2nd Dept 2007]). Moreover, the record on this motion fails to establish that plaintiff's arrest and prosecution was motivated by actual malice, a requirement for a cause of action alleging malicious prosecution (see Rush v County of Nassau, 51 AD 3d 762 [2nd Dept 2008]). Under the same analysis, plaintiff's related cause of action for "malicious abuse of process" is also without merit.

Also, since there was ample probable cause to arrest, detain and prosecute plaintiff, his claims of assault and battery stemming from his being handcuffed and strip-searched are without merit as a matter of law.

Since the record on this motion establishes that there was clear probable cause to arrest plaintiff, his cause of action

alleging conspiracy based upon his allegation that Cinque and Krohley should have made a more thorough investigation before arresting plaintiff and that defendants agreed to arrest, detain and prosecute plaintiff without probable cause is without merit as a matter of law.

As to plaintiff's remaining causes of action for civil rights violations pursuant to 42 U.S.C. §1983, the City contends that said cause of action must also be dismissed. The Court concurs.

The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]).

A municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original). There is no showing that plaintiff's arrest, detention and prosecution was as a result of the implementation of an official policy or custom of the City. Indeed, plaintiff fails to address this issue in his opposition papers. Therefore, plaintiff's §1983 causes of action must be dismissed, as a matter of law.

In any event, the existence of probable cause for the arrest and detention of plaintiff immunizes the City against a claim brought pursuant to §1983 (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]), even had plaintiff alleged an official policy or custom on the part of the City. The undisputed facts, on this record, as heretofore summarized, establish that there was clear probable cause to arrest, detain and prosecute plaintiff.

Finally, with respect to the "John Doe" defendants, the Court notes that the complaint alleges that all acts constituting plaintiff's causes of action, including his §1983 claims, were perpetrated by Officer Cinque and Sgt. Krohley. However, they were

not named in the caption of the summons and complaint and plaintiff's counsel does not dispute that no individual defendants were served with the summons and complaint and no service was effected upon any "John Doe" defendants. Notwithstanding that the Corporation Counsel is representing only the City in this matter, they are also moving for dismissal, pursuant to CPLR 3211(a)(7), on behalf of the "John Doe" defendants (who can only be Cinque and Krohley since no allegation is made in the complaint concerning any other named or un-named individuals).

As to Cinque and Krohley, police officers are entitled to qualified immunity which may be invoked to protect them from suit under §1983 if it is established that there was probable cause for the arrest and detention (see Scheuer v. Rhodes, 416 U.S. 232 [1974]). No sharp factual dispute regarding the question of whether there was probable cause to arrest plaintiff has been presented, on this record, so as to preclude resolution of the issue by way of summary judgment (see Murphy v Lynn, 118 F. 3d 938 [2nd Cir. 1997]; Stipo v. Town of North Castle, 205 AD 2d 608 [2nd Dept 1994]). As heretofore noted, there was a clear showing of probable cause to arrest plaintiff and, therefore, that it was objectively reasonable for Cinque and Krohley to believe that they were acting in a manner that did not violate plaintiffs' Constitutional rights. Since probable cause was clearly established, it was the burden of plaintiff to disprove the officers' entitlement to qualified immunity (see Kravits v. Police Dept. Of the City of Hudson, 285 AD 2d 716 [3rd Dept 2001]). Plaintiff does not even address this issue in his affirmation in opposition. Therefore, plaintiff's causes of action against them based upon 42 U.S.C. §1983 must fail (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]; Zientek v. State of New York, 222 AD 2d 1041 (4th Dept 1995]).

Finally, for the reasons heretofore stated with respect to the City, plaintiff's state law claims as against the individual police officers are without merit as a matter of law.

Accordingly, the motion is granted and the complaint is dismissed.

The Court has not considered plaintiff's improper sur-reply.

Dated: May 18, 2012

KEVIN J. KERRIGAN, J.S.C.