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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA J.S.C. Justice

PART 19

Index Number : 108554/2009
DISHMAN, LAURA
vs.
THE ROOSEVELT ISLAND OPERATING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated July 12, 2012 which disposes of motion sequence(s) no. 2

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 18 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/12/12

SALIANN SCARPULLA J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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LAURA DISHMAN, EDWARD FRANCIS DISHMAN, and RICHARD MICHAEL DISHMAN,

Plaintiffs,

- against-

Index No.: 108554/2009
Submission Date: 04/04/2012

THE CITY OF NEW YORK, THE ROOSEVELT ISLAND OPERATING CORPORATION, THE ROOSEVELT ISLAND PUBLIC SAFETY DEPARTMENT, PUBLIC SAFETY OFFICER VIEL, individually and as a peace officer, PUBLIC SAFETY OFFICER CHAVIS, individually and as a peace officer, PUBLIC SAFETY OFFICER DONET, individually and as a peace officer, PUBLIC SAFETY OFFICERS "JOHN DOES and JANE DOES #1-#10", these name being fictitious, the true names of said defendants being unknown to the Plaintiff, individually and as peace officers,

Defendants.

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For Plaintiffs:
Baker, Sanders, Barshay, Grossman
Fass, Muhlstock & Neuwirth, LLC
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Garden City, NJ 11530

For Defendants:
Ahmuty, Demers & McManus, Esqs.
200 I.U. Willets Road
Albertson, NY 11507

Papers considered in review of this motion for summary judgment:
Notice of Motion 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action for false arrest and imprisonment, defendant The City of New York (the "City") moves for summary judgment dismissing the complaint against it.

On the evening of June 17, 2008, plaintiffs Laura Dishman ("Laura"), Edward Dishman ("Edward") and Richard Dishman ("Richard") (collectively "plaintiffs") were returning home by taxi to Roosevelt Island when several public safety officers (the "public safety officers") approached them. According to Edward, the public safety officers requested that he pick up a pizza box that had fallen out of plaintiffs' taxi. Plaintiffs allege that after Edward did not comply with their instructions, the public safety officers, including defendant Public Safety Officers Viel ("Viel") and Chavis ("Chavis"), surrounded Edward and Richard and began hitting and eventually handcuffing them. Laura testified at her deposition that Viel threw her down and handcuffed her after she tried to intervene.

Christopher Dickerson ("Dickerson"), a Senior Insurance Claims Specialist with the City, attests that the public safety officers named in this action were employees of defendant Roosevelt Island Operating Corporation ("RIOC"), not the City. Viel testified at her deposition that defendant RIOC was her employer on the date of plaintiffs' arrest.

After the arrest, plaintiffs were taken to the Public Safety Office on Roosevelt Island, where they remained for approximately two to three hours. There, the public safety officers read plaintiffs their Miranda rights and allowed plaintiffs to speak with their parents. The public safety officers then transferred plaintiffs to the New York Police Department's (NYPD) 114th precinct in Astoria, Queens. Edward testified at his

deposition that plaintiffs remained handcuffed there from 3:00 a.m. until 1:30 p.m on June 18, 2008.

According to Edward, plaintiffs were then taken to Central Booking at 100 Centre Street in Manhattan. Edward and Richard remained at Central Booking until the evening of June 19, 2008, during which time they met with an attorney. Laura was transferred to the 7th precinct and later Bellevue Hospital for a psychiatric evaluation. Laura testified that she returned to the 7th precinct at approximately 7:00 P.M., where she remained until the evening of June 19, 2008. All three plaintiffs testified that they were arraigned after 5:00 p.m. on June 19, 2008, approximately forty hours after the arrest.

Plaintiffs commenced this action in May 2009, asserting causes of action for false arrest and imprisonment, malicious prosecution, and intentional infliction of emotional distress ("IIED") against Viel, Chavis and Public Safety Officer Donet ("Donet"), both individually and as peace officers, RIOC, the City, and unnamed City employees (collectively "defendants"). Plaintiffs also assert negligent hiring, training, supervision and retaining claims against defendants, and federal civil rights claims, including violations of 42 USC § 1983. Lastly, plaintiffs assert assault and battery causes of action against Viel, Chavis, Donet and RIOC.

On September 29, 2011, plaintiffs filed the note of issue certifying that all necessary discovery in this action was complete.

The City now moves for summary judgment dismissing the complaint against it. The City argues that the Court should dismiss the false arrest and imprisonment, malicious prosecution, and IIED claims against the City because the public safety officers were RIOC, not City, employees and thus the City is not vicariously liable for their actions.[1] Insofar as plaintiffs seek to hold the City liable for actions of NYPD and court personnel, the City argues that there is no evidence of wrongdoing on the City's part after plaintiffs were transferred to NYPD custody.

The City maintains that the negligent hiring claim should also be dismissed because the City was not responsible for the hiring, training or supervision of the public safety officers. The City contends that it is entitled to dismissal of the negligent hiring claim as to City employees because plaintiffs have not identified the individual officers that allegedly mistreated plaintiffs. Lastly, the City argues that it is entitled to summary judgment on the § 1983 claims because plaintiffs have not specified which constitutional provisions the City allegedly violated or proven that a City custom or policy deprived them of their constitutional rights.

In opposition, plaintiffs argue that they are attempting to hold the City vicariously liable for the tortious conduct of NYPD officers and Department of Correction employees after plaintiffs were transferred to NYPD custody, not for the tortious conduct of the

[1] The City makes the same argument to support dismissal of the Assault and Battery claim. However, as the plaintiffs do not assert an Assault and Battery claim against the City, the Court will only address this argument as to the false arrest and imprisonment, malicious prosecution and IIED claims.

public safety officers. Plaintiffs further contend that they have adequately pled a § 1983 claim because they cite the specific constitutional amendments that they allege the City violated.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, the City has made a *prima facie* showing of entitlement to summary judgment on the false arrest claims against it. Plaintiffs testified that the public safety officers arrested them, and Dickerson attests that the public safety officers were not City employees. Further, Viel testified that she worked for RIOC, not the City. Accordingly, the City is not vicariously liable for any claims arising from plaintiffs' arrest. *See Araneo v. Town Bd. for Town of Clarkson*, 55 A.D.3d 516, 519 (2d Dept. 2008).

However, the City has failed to make an adequate showing entitling it to summary judgment on the false imprisonment cause of action. A false imprisonment claim may arise where "there was an unnecessary delay in arraigning the plaintiff" after arrest. *Murray v. City of New York*, 74 A.D.3d 550, 551 (1st Dep't 2010) (internal quotations

omitted). In New York, "delay of arraignment of more than 24 hours is presumptively unnecessary and, unless explained, constitutes a violation of [Criminal Procedure Law] 140.20(1) ... ." *People ex rel. Maxian v. Brown*, 164 A.D.2d 56, 67-68 (1st Dept. 1990), *affd* 77 N.Y.2d 422.

The City argues that there is no evidence of any wrongdoing on its part after plaintiffs arrived at the 114th precinct. However, plaintiffs testified that they were detained for approximately forty hours in total, and approximately thirty-seven hours after arriving at the 114th precinct, before arraignment. Such a delay is presumptively unreasonable, *see Sorensen v. City of New York*, 2000 U.S. Dist. LEXIS 15090, at *38-39 (S.D.N.Y. Oct. 13, 2000), and the City has not presented any evidence to rebut plaintiffs' testimony, nor any explanation for the delay. The Court thus denies summary judgment on the false imprisonment cause of action. *See Sorensen*, 2000 U.S. Dist. LEXIS 15090, at *40-41 (holding that plaintiff was entitled to summary judgment on false imprisonment claim where the plaintiff was detained for forty-two hours before arraignment).

The Court also denies summary judgment on the malicious prosecution cause of action. The elements of a malicious prosecution claim are: "(1) [t]he commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice." *Peresluha v. New York*, 60 A.D.2d 226, 230 (1st Dept. 1977), *quoting Broughton v. State of New York*, 37 N.Y.2d 451, 457

(1975). In its motion papers, the City does not address the lack of any of these required elements. Instead, the City's only argument to support dismissal of plaintiffs' malicious prosecution claim is that the City is not vicariously liable for the public safety officers' actions.

Plaintiffs' malicious prosecution allegations relate to the City's criminal prosecution of plaintiffs, not the public safety officers' actions. Because the City has failed to submit any evidence to make out its burden of proof that its prosecution of plaintiffs was not malicious, the City is not entitled to dismissal of the malicious prosecution claim regardless of the claim's ultimate merits.[2]

The City has made a *prima facie* showing of entitlement to summary judgment dismissing the negligent hiring, training, supervision and retaining cause of action against it. To prevail on a negligent hiring and supervision claim, a plaintiff must show that an employer knew or should have known of the employee's propensity for the particular behavior that caused the plaintiff's injuries. *See Taylor v. United Parcel Serv., Inc.*, 72 A.D.3d 573, 574 (1st Dept. 2010).

As stated above, the public safety officers were not City employees, thus plaintiffs may not assert a negligent hiring claim against the City arising from their actions.

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[2]It appears from Laura's deposition testimony that the final disposition of plaintiffs' criminal action was adjournment in contemplation of dismissal ("ACD"), which "is not a favorable termination for purposes of a malicious prosecution action," *Lewis v. Counts*, 81 A.D.2d 857, 864 (2d Dep't 1981). The City, however, has failed to present the Certificate of Disposition or any other any other admissible evidence proving that plaintiffs' case in fact terminated in ACD.

Further, plaintiffs certified that discovery is complete but have still not identified the City employees that allegedly mistreated them after plaintiffs were transferred to NYPD custody. Thus, plaintiffs cannot establish that the City was on notice of those unnamed employees' propensity for the conduct that allegedly caused them damages. *See Taylor*, 72 A.D.3d at 574. Accordingly, the City is entitled to summary judgment on the negligent hiring cause of action.

The Court also dismisses the IIED cause of action against the City as plaintiffs have not alleged conduct by the City sufficiently extreme or outrageous to sustain an IIED cause of action. *See Lau v. S&M Enters.*, 72 A.D.3d 497, 498 (1st Dept. 2010).[3]

The City is also entitled to summary judgment of the § 1983 civil rights claims. Under 42 USC § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." A § 1983 action may lie against a municipality only where the plaintiff shows that the municipality's allegedly unconstitutional action is "a practice so permanent and well settled as to constitute a custom or usage with the force of law." *Maio v. Kralik*, 70 A.D.3d 1, 10-11 (2d Dept. 2009) (internal quotations omitted).

[3]Plaintiffs allege in their complaint that they were denied food and water while they were detained. However, nowhere in their depositions do they testify that either the peace officers or City employees denied them food or water. Indeed, Richard testified that he chose not to eat because there was only one toilet in the Central Booking cell.

Because there is no evidence in the record that plaintiffs' lengthy pre-arraignment detention or allegedly malicious prosecution was part of a City policy or practice, the City is entitled to summary judgment on plaintiffs' § 1983 claims. *See Lewis v. City of New York*, 2010 U.S. Dist. LEXIS 68700, at *13-14 (S.D.N.Y. June 29, 2010).

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendant The City of New York is granted to the extent that the causes of action for false arrest; negligent hiring, training, supervision and retaining; intentional infliction of emotional distress; and violations of 42 USC § 1983 are dismissed as to The City of New York, and the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
July 12, 2012

ENTER:

Saliann Scarpulla, J.S.C.