Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Teion Corbett,

Plaintiff,

- against -

The City of New York, The City of New York Police Department, Salvatore Lacova, individually and in his capacity as a police officer for the City of New York, The Queens County District Attorney's Office and Schlomit Metz, individually and in her capacity as Assistant District Attorney,

Defendants.

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Index Number: 551/09

Motion Date: 5/29/12

Motion Cal. Number: 4

Motion Seq. No.: 2

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Memorandum of Law-Exh...	1-5
Affirmation in Opposition-Exhibits.....	6-8
Reply.....	9-10

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

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

Three individuals, Daniel Leung, Diego Pingouil and Eddie Pingouil were robbed outside the La Perrada De Chalco restaurant on Northern Boulevard in Queens County on June 24, 2006. All three victims described the robber as a dark-skinned African-American male, approximately 5'8" tall and 165 lbs. On said date, Leung was interviewed at the 115th Police Precinct by defendant Detective Salvatore Lacova and described the perpetrator as a male black approximately 20 years old and 5'8" tall. The perpetrator's description was then entered into the Photo Manager Computer

System. Detective Lacova, in his deposition, explained that when people are arrested and photographed at Central Booking, their photographs and their physical characteristics are entered into a database. Thus, when a perpetrator's description is given by a crime victim, it is entered into the Photo Manager database, which yields photographs of individuals fitting that description who had been previously arrested. The crime victims view the photographs six at a time on a screen. Leung positively identified a photograph of plaintiff as his attacker. Detective Lacova thereafter went to the location of the crime to view possible video footage from a surveillance camera at the restaurant but was unable to retrieve the video.

Based upon Leung's positive identification of plaintiff's photograph from the Photo Manager, Lacova generated a "wanted card", pursuant to which the Queens Warrant Squad went to plaintiff's home at 33-25 90th Street in Queens County on July 11, 2006 and took him into custody. He was brought to the 115th Precinct where he was arrested. Lacova then set up a line-up consisting of plaintiff and four "fillers". Defendant Metz, the Assistant District Attorney assigned to the line-up, viewed the line-up and approved the fillers. The three victims viewed the line-up separately and were kept apart from each other after they viewed the line-up. Lacova also testified in his deposition that only Leung had viewed the photographs from the Photo Manager, not the other two victims. He stated that since Leung positively identified plaintiff's photograph, there was no need to show the photographs to the other victims. He also explained that once one victim identifies the perpetrator from the Photo Manager, he will not allow any of the other victims to view the Photo Manager so that they can view the subsequent line-up without having seen the perpetrator's photograph. Leung and both Daniel and Eddie Pingouil positively identified plaintiff in the line-up as the individual who attacked and robbed them. Plaintiff was thereupon brought to Central Booking, where charges were proffered against him for assault and robbery. He was arraigned and sent to Rikers Island, where he remained until he was released from custody on bail on April 19, 2007.

On July 14, 2006, plaintiff was indicted by a Grand Jury on two counts of robbery in the second degree, two counts of robbery in the second degree causing physical injury to a non-participant, three counts of assault in the second degree and one count of assault in the third degree.

A Wade/Dunaway hearing was conducted by Justice Daniel Lewis on December 13, 2006 pursuant to which plaintiff's motion to suppress the full identification of plaintiff and to suppress the

arrest was denied pursuant to the order of Justice Lewis issued on the record at said hearing. Justice Lewis held, inter alia, that "the detective had probable cause for the arrest made herein and the warrant squad acting as an agent properly acted in his behalf in taking the party into custody and I find there are no constitutional violations of his rights as set forth by Dunaway."

Metz testified in her deposition that prior to the date scheduled for trial in September or October 2007, she was apprised by plaintiff's defense attorney that he had learned that the word on the street was that an individual by the name of "Rain" was the actual perpetrator and not plaintiff. The surveillance video from the restaurant also materialized. Metz stated that she did not know of the existence of a video when she signed the bill of particulars and that the video came into her possession months after the lineup and after the Wade hearing. She did not know how the video got to her. She did state that she believes that Lacova had indicated to her that he had unsuccessfully attempted to retrieve a surveillance video from the restaurant. Defense counsel also gave Metz photographs of plaintiff wearing clothes similar to those worn by the perpetrator taken by an investigator in prison and superimposed upon stills taken from the video. Based upon this information, she had the trial adjourned. Examination of the video and the stills, due to their grainy and poor quality, initially failed to convince Metz that the individual depicted therein was not plaintiff. Some time thereafter, defense counsel apprised Metz that the name of the individual "Rain" who was purported to be the real perpetrator, was James Fogly. Upon retrieving a mug shot of Fogly, Metz noticed a similarity in appearance with plaintiff's photograph identified by Leung.

Metz testified that during the trial of Fogly for an unspecified crime, she had an un-named co-defendant of his transported from "Upstate" to view the video and the photograph. She related that Fogly's co-defendant had indicated to her that the word on the street was that plaintiff did not "do it" but he would not name Fogly. She stated that she believed that he knew that Fogly was the perpetrator and commenced an investigation with the Assistant District Attorney who was going to try plaintiff's case, now that she had Fogly's name. She thereafter went to the courtroom where Fogly was being tried and brought with her a laptop containing the surveillance video that had captured the image of the perpetrator. She played the video as Fogly was entering the courtroom, and she realized that the person in the video had the same build and gait as Fogly and that Fogly was wearing the same watch as one that the perpetrator in the video was depicted as wearing. Metz thereupon began the process of moving to dismiss the charges against plaintiff, pursuant to which all charges were

dismissed on February 11, 2008.

Plaintiff served a notice of claim upon defendants on May 8, 2008 asserting claims for "[p]ersonal injuries; negligence; negligent & intentional infliction of emotional harm due to false arrest, malicious prosecution and unlawful imprisonment". He claims that his items of damages consisted of "psychological and emotional damages; stagnation of education and professional advancement".

Thereafter, plaintiff filed a summons and complaint on January 9, 2009 alleging thirteen causes of action for violation of his civil rights under 42 USC §1983, and causes of action under state law for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, false arrest, false imprisonment, malicious prosecution, malicious abuse of process, assault, battery and conspiracy. Plaintiff's constitutional causes of action under §1983 allege excessive force, violation of the "right to bodily integrity", false arrest, false imprisonment, unlawful search and seizure, malicious prosecution, assault, battery, deprivation of liberty without due process and denial of a fair trial, prosecutorial and police misconduct, negligent hiring, training and supervision of police officers, inadequate and negligent adoption of police procedure and policy, conscious disregard of police procedures by the police officers involved, "malicious and negligent action" by officers, malicious prosecution, civil conspiracy, and "municipal liability" (i.e. vicarious liability).

Plaintiff's causes of action under state law for assault, battery and conspiracy asserted in his complaint must be dismissed since plaintiff failed to set forth 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]). Since plaintiff did not assert claims for assault, battery or conspiracy in his notice of claim, these causes of action asserted in his complaint must be dismissed.

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 April 19, 2007 (see Ragland v New York City Housing Authority, 201 AD 2d 7 [2nd Dept 1994]). Therefore, he had until July 19, 2007 to serve a notice of claim on those grounds. His notice of claim asserting these claims, served on May 5, 2008, nine months and 17 days 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 assault, battery and conspiracy were not included in the notice of claim, the present action was never properly commenced as to those causes of action 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. His counsel's argument in his affirmation in opposition that defendants should be equitably estopped from raising the untimeliness of the notice of claim as a defense is without merit.

Even if, arguendo, plaintiff's state law claims for false arrest and unlawful imprisonment 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 positively identified him from his photograph as the perpetrator. In addition, said victim and the two other victims of the robbery and assault positively identified plaintiff at a line-up.

Plaintiff's entire case is based upon his contention that the restaurant surveillance video was exculpatory evidence and was immediately available, but that Lacova failed to obtain it and allowed plaintiff to be prosecuted, knowing that said video would exonerate him.

When Lacova testified that he went to the restaurant on June 24, 2006 and spoke to the individual who identified herself as the manager, he was asked by plaintiff's counsel, "Do you have a written record in this packet as to meeting these people and what they might have told you?" Lacova responded in the affirmative, indicating a written report, called a complaint follow-up informational, introduced as plaintiff's exhibit 2L at the deposition, and which is annexed to the moving papers as Exhibit "S". Plaintiff's counsel thereupon recited Lacova's narrative set forth in the details section of the complaint follow-up informational. Lacova's narrative is as follows:

> On 06/24/05 at approx. 2300 hours the undersigned along with Detective Nolan responded to 82-12 Northern Blvd. (La Perrada de Chalo Restraunt. The purpose of the visit was to view possible video and interview witnesses. Details are as follows.
>
> Manager stared that she was working at approx. 0500 hours and dose rember a fight outside but did not see who was fighting. Store video was running but dut to construction inside the image was obstructed. Owner was also present but was unable to burn a copy onto a disc. Manager stated that she would save the image to be recovered at a later date. (Sic.)

Thus, the evidence presented is that Lacova was informed by the restaurant manager that the video image was obstructed by construction and that the video could not be copied but would be saved for later recovery. No evidence was presented to rebut Detective Lacova's statement made in his complaint follow-up informational. Moreover, no evidence has been presented to rebut his testimony that he was unable to recover the video upon a subsequent visit because he was informed that it was no longer available. Although the video eventually was obtained under circumstances that have not been developed, on this record, no evidence has been presented so as to raise an issue of fact as to whether Lacova knowingly and deliberately suppressed exculpatory evidence. Indeed, when the surveillance video was obtained and plaintiff's defense counsel provided the name of the alleged true perpetrator, prompt and diligent efforts were made to investigate and, upon ascertaining that plaintiff was not the perpetrator, Metz

took the necessary steps to have all charges against plaintiff dismissed.

Under the circumstances, the Court finds that the City had ample probable cause to arrest plaintiff, that the arresting officers acted reasonably based upon the positive identification of plaintiff's photograph by one of the three crime victims and the positive identification of plaintiff by all three victims at a line-up, 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 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's malicious prosecution cause of action must also be dismissed (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 and his cause of action alleging conspiracy based upon his allegation that defendant officers agreed to arrest, detain and prosecute him without probable cause must also fail as a matter of law.

Plaintiff's cause of action alleging negligence is based upon defendants' failure to timely obtain and act upon the exculpatory surveillance video so as to have prevented plaintiff's prosecution and incarceration. In other words, plaintiff is alleging negligent investigation, which is not a cognizable cause of action (see Coyne v State, 120 AD 2d 769 [3rd Dept 1986]). In any event, since the alleged negligent investigation was a discretionary act, it may not form the basis of liability (see McLean v City of New York, 12 NY 3d 194 [2009]; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.). Therefore, plaintiff's cause of action for negligence must also 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 against the defendant officers. With regard to the City and the office of the District Attorney, 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 cause of action for negligent infliction of emotional distress, such cause of action also requires allegations of outrageous and extreme conduct(see Berrios v Our Lady of Mercy Medical Center, supra). The allegations of the complaint, and the record on this motion, do not support a claim for either intentional or negligent infliction of emotional distress.

As to plaintiff's remaining causes of action for civil rights violations pursuant to 42 U.S.C. §1983, the City contends that said causes 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 against the City and the office of the District Attorney 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 and the office of the District Attorney 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. The undisputed facts, on this record, as heretofore summarized, establish that there was clear probable cause to arrest, detain and prosecute plaintiff.

As to Lacova, 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 Lacova to believe that he was acting in a manner that did not violate plaintiff's constitutional rights. Since probable cause was clearly established, it was the burden of plaintiff to disprove Lacova's entitlement to qualified immunity (see Kravits v. Police Dept. Of the City of Hudson, 285 AD 2d 716 [3rd Dept 2001]). Plaintiff has failed to meet his burden. Therefore, plaintiff's causes of action against Lacova 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]).

With respect to Metz, she is protected by absolute immunity in her decision as Assistant District Attorney to prosecute plaintiff (see Imbler v Pachtman, 424 U.S. 409 [1986]).

Without merit also are plaintiff's causes of action for excessive force and violation of the "right to bodily integrity" as a result of his being handcuffed. No evidence whatsoever is proffered that any force was used against plaintiff or that he sustained any injury as a result of his being handcuffed. Indeed, in his 50-h hearing, plaintiff testified that he was placed in handcuffs but did not state that any force was used against him or that any injuries were sustained by him. He testified that two police officers came to his house but did not put him in handcuffs. Rather, they asked him to go with them and he complied. They drove him directly to the 115th Precinct and they placed the handcuffs on him when he exited the police vehicle. He was led to the interrogation room where they interrogated him for 1½ - 2 hours. However, he was not handcuffed when he was interrogated. He stated

he was released from the handcuffs. Also, when he was subsequently placed in a holding cell for approximately 4 - 5 hours, he was not handcuffed. Afterward, he was brought to another room "where they do the photos for the line-ups" and was handcuffed while he was there for approximately two hours. When asked, "Since you were released in April of 2007, have you sought any medical treatment for injuries sustained since the arrest?" he responded, "No."

No evidence is proffered to support the claim that excessive force was used in his arrest and handcuffing.

Plaintiff's cause of action against the City under §1983 based upon a claim of negligent hiring, training and supervision of Detective Lacova must also be dismissed.

It is a well-established principle that no action for negligent hiring, training or supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent hiring, training and supervision would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324).

This principle applies to the instant matter, even as to plaintiff's claims alleging assault. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 AD 2d 777 [2nd Dept 1990]). An assault by a police officer who is engaged in police business may be found to be within the scope of his employment (see generally Garcia v. City of New York, 104 AD 2d 438 [2nd Dept 1984]).

Where the employer concedes that its employee was acting within the scope of his employment in the commission of the allegedly tortious act, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]).

Here, the City does not dispute, but concedes that Detective Lacova was acting within the scope and course of his employment as

an NYPD Detective when he arrested plaintiff. Therefore, the City is entitled dismissal of plaintiff's cause of action under §1983 as is premised upon claims of negligent hiring, training and supervision (see Ashley v. City of New York, 7 AD 3d 742, supra).

Since there was probable cause for the arrest, detention and prosecution of plaintiff, and his claims for false arrest, unlawful imprisonment and malicious prosecution must therefore be dismissed, his causes of action alleging unlawful search and seizure, assault, battery, deprivation of liberty without due process and denial of a fair trial, prosecutorial and police misconduct, inadequate and negligent adoption of police procedure and policy, conscious disregard of police procedures by the police officers involved and "malicious and negligent action" by officers are also without merit and must be dismissed.

The Court notes that the only basis for plaintiff's voluminous claims of police and prosecutorial misconduct and negligence is that the surveillance video constituted exculpatory evidence which Lacova and Metz either intentionally suppressed or were negligent in failing to obtain and act upon in a timely fashion.

In the first instance, there is no showing that the surveillance video in and of itself constituted exculpatory evidence which would have persuaded Lacova and the District Attorney not to arrest or prosecute plaintiff. No evidence was presented to rebut Metz' testimony that the poor quality of the video prevented her from determining that it did not depict plaintiff and that it was not until plaintiff's defense attorney, thanks to his own investigative efforts, provided her with the name of the purportedly true perpetrator that she was able to pursue an investigation which ultimately led her to compare the surveillance video against Fogly and ascertain that he was indeed the person depicted in the video. In any event, there is no evidence that Lacova intentionally suppressed the video in order to falsely arrest and prosecute plaintiff, and there is no evidence of any negligence on his part in failing to secure a copy of it at the outset of his investigation. With respect to Metz, plaintiff has failed to proffer any evidence to rebut her testimony that she was unaware of a video until it was delivered to her after the Wade/Dunaway hearing. In fact, her undisputed testimony establishes that far from acting in a malicious or negligent manner, she took the initiative to conduct an investigation as soon as sufficient information was presented to her by plaintiff's defense attorney and to cause the charges to be dismissed against plaintiff.

Plaintiff's remaining cause of action against the City based upon the doctrine of respondeat superior must also be dismissed,

since none of the causes of action against Lacova or Metz are viable.

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

Dated: June 25, 2012

KEVIN J. KERRIGAN, J.S.C.