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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5
Justice

Index Number : 402371/2010
KUSHNIR, ALEX
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
EXTEND TIME Cal # 69

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). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
DEC 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/5/12
DEC 05 2012

_____, J.S.C.
BARBARA JAFFE

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 : PART 5

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ALEX KUSHNIR and VENERA KUSHNIR,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK POLICE DEPARTMENT and POLICE OFFICER FRANCISCO ACOSTA,

Defendants.

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Index No. 402371/10

Argued: 6/12/12
Motion seq. no.: 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiffs:
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New York, NY 10007
212-385-1122

For defendants:
Michael Nacchio, ACC
Michael A. Cardozo
Corporation Counsel
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By notice of motion dated April 2, 2012, plaintiffs move for an order extending their time to file a note of issue. Defendants oppose and, by notice of cross motion dated May 8, 2012, move pursuant to CPLR 3211(a)(7) and/or 3212 for an order summarily dismissing the complaint against them.

I. PERTINENT BACKGROUND

A. Acosta's testimony

After midnight on September 6, 2009, plaintiff were stopped at an NYPD Driving While Intoxicated (DWI) checkpoint. As they passed through the checkpoint, Police Officer Acosta, a 16-year NYPD veteran, asked them to lower the car window. He thereupon noticed a strong odor

of marijuana coming from the vehicle and once he began talking to plaintiff Alex Kushnir, he smelled marijuana on his breath and saw that his eyes were bloodshot and his face was flushed. Alex denied drinking alcohol but admitted to smoking marijuana. Acosta had made many arrests involving marijuana and had smelled marijuana hundreds of times. (Affirmation of Michael Nacchio, ACC, dated May 8, 2012 [Nacchio Aff.], Exhs. K, I, P).

Acosta then ordered plaintiffs to pull over and asked Alex to exit. Alex cursed at Acosta and again admitted to smoking marijuana but denied being drunk. As Acosta attempted to arrest him, Alex resisted and waved his arms in an attempt to avoid being handcuffed, requiring the assistance of another officer. (*Id.*).

B. Plaintiffs' testimony

At a 50-h hearing held on May 3, 2010, Alex testified, as pertinent here, that on the night of his arrest, while at dinner with his wife and friends, he consumed only an iced tea, and that when he and his wife approached the checkpoint, a police officer waved his car over and ordered Alex to exit. After he exited the car, the officer asked him whether he had drunk any alcohol. After responding negatively, Alex offered to take a breathalyzer test. The officer then asked him if he had taken any narcotics, which Alex also denied. The officer told him to put his hands on his car, arrested him, pushed him violently into a police van, twisted his arms, and injured his shoulder. (*Id.*, Exh. F).

The same day, plaintiff Venera Kushnir testified at a 50-h hearing, corroborating all of Alex's testimony. (*Id.*, Exh. E).

C. Other relevant facts

Acosta searched Alex after handcuffing him and fruitlessly searched the vehicle. (*Id.*).

He then drove Alex to the NYPD Intoxicated Driver Testing Unit and recorded his processing on videotape, a copy of which was provided to the court. Alex consented to a breathalyzer test for alcohol, which he passed, but refused to provide a urine sample to test for drugs. Defendant NYPD alleges that he failed coordination testing as well. Alex was charged with violating Penal Law 205.30 for resisting arrest and VTL 1192.4 for driving while impaired by drugs. (*Id.*, Exhs. I, J).

The same day, Alex was arraigned in criminal court and pleaded not guilty to the charges. He was paroled and directed to appear on October 2, 2009, in order to give him time to retain private counsel and to be screened for substance abuse; his driving license was suspended by operation of law. (*Id.*, Exh. K).

On October 2, 2009, Alex appeared in court without an attorney and attempted to represent himself. Based on statements he made to the court, the judge ordered him to undergo an examination to determine his fitness to stand trial. (*Id.*, Exh. M).

On November 4, 2009, Alex appeared again in criminal court, at which time the judge observed that two psychiatrists had deemed Alex unfit to stand trial. The judge ordered a fitness hearing to be held on November 17, 2009. On November 17, Alex's attorney confirmed the finding that Alex was unfit to stand trial; the charges against him were dismissed. (*Id.*, Exhs. O, P).

On December 4, 2009, plaintiffs served a notice of claim on City, alleging claims against City and the NYPD for false arrest and imprisonment, assault and battery, excessive force, negligence, negligent hiring and retention of police officers, and violations of state and federal constitutional rights. They allege therein that Acosta falsely arrested and imprisoned Alex and

assaulted, battered, and injured him. (*Id.*, Exh. A).

II. MOTION TO EXTEND TIME

In light of my findings below (*see infra.*, III)., and as discovery remains outstanding, plaintiffs' motion is granted to the extent of directing the DCM clerk to schedule a new compliance conference so that any discovery issues may be then addressed.

III. MOTION TO DISMISS

A. False arrest and imprisonment claims

1. Contentions

Defendants argue that Alex's arrest was based on probable cause, given Acosta's observations at the scene and Alex's refusal to submit to drug testing and poor performance on the coordination tests. They characterize Alex's version of events as contradictory, incredible, and false, and maintain that his testimony ought be given no evidentiary weight because he was found unfit to stand trial. (Nacchio Aff.).

Plaintiffs contend that given the conflicts between their testimony and Acosta's, factual issues exist as to whether his arrest was supported by probable cause. They also assert that the finding of unfitness has no bearing on his credibility and observe that Alex's testimony was corroborated by his wife. (Affirmation of Robert J. Miraglia, Esq., dated June 5, 2012 [Miraglia Aff.]).

2. Analysis

The elements of a cause of action for false arrest and/or false imprisonment are: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise

privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]). A warrantless arrest gives rise to a presumption that the arrest was unlawful, and thus the plaintiff establishes, *prima facie*, a claim of false arrest upon proof that her arrest was made without a warrant. (59 NY Jur 2d, False Imprisonment § 32 [2010]). In order to avoid liability for the arrest, the defendant must then establish that the arrest was legally justified based on proof that at the time of the arrest, the arresting officer had probable cause to believe that the plaintiff had committed a crime. (*Id.*).

Probable cause exists when the arresting officer has reasonable grounds for believing that the arrestee had committed an offense, or grounds which would induce an ordinary prudent and cautious person, under the circumstances, to believe the arrested person guilty. (*Id.* § 33). "The issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts . . . where there is 'conflicting evidence, from which reasonable persons might draw different inferences * * * the question [is] for the jury.'" (*Parkin v Cornell Univ., Inc.*, 78 NY2d 523 [1991], *quoting Veras v Truth Verification Corp.*, 87 AD2d 381 [1st Dept 1982], *affd* 57 NY2d 947; *see also Petrychenko v Solovey*, 99 AD3d 777 [2d Dept 2012]).

Here, as Alex was arrested upon being handcuffed, defendants must establish the existence of probable cause to arrest him at that point in time. Given the conflicting evidence as to whether or not Alex admitted to having smoked marijuana, and absent any other evidence to support a finding of probable cause, it cannot be determined, as a matter of law, that Acosta had probable cause to believe that Alex had been driving his vehicle while under the influence of drugs and was resisting a lawful arrest. (*See Lopez v City of New York*, 69 AD3d 476 [1st Dept 2010] [issues of fact as to probable cause raised by conflicting versions of events leading to arrest

given by plaintiff and arresting officer]; *Burgio v Ince,* 79 AD3d 1733 [4th Dept 2010] [summary judgment denied as to plaintiff's false arrest claim as deposition testimony of witnesses contradicted defendant's version of its investigation, raising credibility issues that precluded summary dismissal]; *Diederich v Nyack Hosp.*, 49 AD3d 491 [2d Dept 2008], *lv denied* 11 NY3d 862 [plaintiff's deposition testimony gave account of circumstances leading to arrest that differed from defendants' account, thereby raising triable issue as to probable cause]).

B. Assault and battery claim

1. Contentions

Defendants assert that any force used in handcuffing Alex does not constitute an assault and battery and, as he was resisting arrest, was justified and privileged. (Nacchio Aff.).

Plaintiffs contend that Alex's shoulder was injured as a result of Acosta violently twisting his arms, that as a result he sustained a loss of range of motion in his shoulder, and that his injuries are thus not minor and are actionable. (Miraglia Aff.).

To defeat plaintiffs' assault and battery claim, defendants must establish that Acosta "did not intentionally place plaintiff in apprehension of imminent harmful or offensive contact, and did not intentionally engage in offensive bodily contact with plaintiff's consent." (*Guntlow v Barbera*, 76 AD3d 760 [3d Dept 2010]).

Here, as plaintiffs have alleged that Acosta violently twisted Alex's arms after he was handcuffed, causing him injury, triable issues thus exist as to this claim. (*Guntlow*, 76 AD3d at 766; *see also Oteri v Vill. of Pelham*, _ NYS2d _, 2012 WL 5503674 [2d Dept 2012] [plaintiff's testimony that arresting officer manipulated her arm in unnatural way in order to handcuff her, dragged her into holding cell, and kept her tightly handcuffed stated assault claim]).

Whether Acosta was justified under the circumstances in his use of force is generally a jury question. (*Holland v City of Poughkeepsie*, 90 AD3d 841 [2d Dept 2011]; *see also Harvey v Brandt*, 254 AD2d 718 [4th Dept 1998] [plaintiff's testimony that officer handcuffed her by forcibly jerking her hand behind her back and pushed her back forward, causing neck and back injuries requiring medical treatment, raised triable issue was to whether officer's conduct was objectively reasonable]).

C. Claims against Acosta

Defendants argue that plaintiffs' claims against Acosta must be dismissed as they failed to name him personally in their notice of claim. (Nacchio Aff.).

Plaintiffs observe that they named Acosta as the offending officer in the body of the notice of claim, and that the failure to include him in the caption was an inadvertent clerical error that did not prejudice defendants' ability to investigate plaintiffs' allegations. (Miraglia Aff.).

The service of a notice of claim within 90 days after the accrual of a cause of action is a condition precedent to the commencement of a tort action against City. (General Municipal Law [GML] 50-a[1][a]; GML 50-i[1][a]; *Shahid v City of New York*, 50 AD3d 770 [2d Dept 2008]). The notice of claim must identify any City employee against which a plaintiff intends to bring a cause of action, and the failure to do so requires dismissal of the cause of action. (*Tannenbaum v City of New York*, 30 AD3d 357 [1st Dept 2006]).

Here, while Acosta is not named in the caption of the notice of claim, he is identified by name in the body of the notice of claim as the arresting officer and alleged offender, and thus plaintiffs' notice of claim is sufficient.

D. Federal claims against City

Defendants contend that plaintiffs' federal claims against City and the NYPD fail as they neither allege nor prove that City and the NYPD engaged in any pattern or practice that violated plaintiffs' constitutional rights. (Nacchio Aff.).

Plaintiffs claim that as defendants have not provided them with documents relevant to their federal claims against City, including Acosta's personnel file and any Civilian Complaint Review Board and Internal Affairs Bureau records and complaints, they cannot litigate these claims. (Miraglia Aff.).

The documents identified by plaintiff relate solely to possible claims against City and the NYPD for negligent hiring, retention, or supervision based on prior complaints made against Acosta, and thus essentially seek to hold them liable for Acosta's behavior based on respondeat superior. However, a federal civil rights claim against a municipality and/or its police department must be based on an allegation and/or proof that the municipality had an official policy or custom that caused a deprivation of the plaintiff's civil rights. (*Guntlow*, 76 AD3d 760).

Here, as plaintiffs' constitutional claims against City and the NYPD seem to be based on respondeat superior, and absent any allegation or proof that Acosta's actions resulted from an official policy or custom, plaintiffs' federal civil rights claims against City and the NYPD are not viable. (*Leftenant v City of New York*, 70 AD3d 596 [1st Dept 2010]; *Graham v City of New York*, 279 AD2d 435 [1st Dept 2001] [dismissing civil rights claim as plaintiff failed to set forth official policy or custom that caused him to be deprived of constitutional right]; *see also Leung v City of New York*, 216 AD2d 10 [1st Dept 1995]; *Liu v New York City Police Dept.*, 216 AD2d 67 [1st Dept 1995], *lv denied* 87 NY2d 802, *cert denied* 517 US 1167 [1996]).

E. Federal claims against Acosta

Defendants deny that Acosta may be held liable for violating plaintiffs' constitutional rights as he is entitled to qualified immunity given the existence of probable cause to arrest Alex and/or his proper exercise of judgment in arresting him based on his personal observations and Alex's behavior at the scene. (Nacchio Aff.).

Plaintiffs assert that their testimony shows that Acosta did not have probable cause to arrest Alex and is thus not entitled to qualified immunity. (Miraglia Aff.).

"To be entitled to qualified immunity, it must be established that it was objectively reasonable for the police officer involved to believe that his or her conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether his or her conduct was proper." (*Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011]).

As triable issues exist as to whether Acosta had probable cause to arrest plaintiff (*supra*, III.A.2), triable issues also exist as to whether he is entitled to qualified immunity. (*Guntlow*, 76 AD3d at 766; *Diedrich*, 49 AD3d at 493).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an extension of time to file their note of issue is granted to the extent of directing the DCM clerk to schedule a new compliance conference in this matter and notify the parties accordingly; and it is further

ORDERED, that defendants' motion for summary judgment is denied except as to dismissing plaintiffs' federal civil rights claims against defendants City of New York and the

New York Police Department.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 5, 2012
New York, New York

DEC 0 5 2012