Davidson v City of New York
2016 NY Slip Op 31358(U)
June 6, 2016
Supreme Court, Bronx County
Docket Number: 301524/2012
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

ALVIN DAVIDSON,

DECISION/ORDER

Plaintiff,

-against-

Index No.: 301524/2012

THE CITY OF NEW YORK, NEW YORK CITY POLICE OFFICER MICHAEL O'CONNOR OF THE 48TH PCT., Shield #3085 AND LIEUTENANT KEVIN MALONEY, TAX REG #904435,

Defendants.

The following papers numbered 1 to 7 read on this motion and cross-motion for summary judgment noticed on November 7, 2014 and May 15, 2015 respectively, and fully submitted on May 23, 2016.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Notice of Cross-Motion & Affirmation	**4, 5**
Affirmation in Reply to Opposition and in Opposition to Cross-motion	**6**
Reply Affirmation	**7**

Upon the foregoing cited papers and after reassignment of this matter from Justice Mitchell J. Danziger, Defendants, The City of New York, New York City Police Officer Michael O'Connor of the 48th Pct., Shield #3085 and Lieutenant Kevin Maloney, Tax Reg #904435, seek an Order pursuant to CPLR 3211(a)(7) dismissing and/or pursuant to CPLR 3212 granting summary judgment dismissing all of Plaintiff's causes of action against the Defendants. By cross-motion, Plaintiff Alvin Davidson seeks an Order pursuant to CPLR 3212 granting partial summary judgment with respect to Plaintiff's federal claims under 42 USC §1983 sounding in false arrest, false imprisonment, assault, battery and illegal search and seizure.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, Alvin Davidson, when he was arrested on July 2, 2009 by members of the New York

City Police Department, in the vicinity of the corner of East 184th Street and Park Avenue, County of Bronx, City and State of New York. Plaintiff Davidson was held in custody for approximately six (6) days following his arrest.

As a preliminary matter, The Court notes that, in his Cross-motion papers, Plaintiff withdrew his state law claims sounding in false arrest, false imprisonment, assault and battery. Accordingly, Defendants' motion for an Order dismissing these claims is denied as moot. Plaintiff further withdrew his 42 USC 1983 claims against Defendant The City of New York as well as his negligent hiring and retention cause of action. Thus, Defendants' motion for an Order dismissing these claims is also denied as moot. Plaintiff then argues that the merits of his remaining causes of action, state and federal malicious prosecution, federal claims against the individual Defendants sounding in false arrest, false imprisonment, assault, battery, excessive force and illegal search and seizure, should be decided by a Jury.

The tort of malicious prosecution provides protection from and provides redress for the initiation of unjustifiable litigation (*Broughton v. State,* 37 N.Y.2d 451, 457 [1975]). However, since public policy favors bringing criminals to justice, the system must afford accusers room for benign misjudgments (*Smith-Hunter v. Harvey*, 95 N.Y.2d 191, 195 [2000]). This, of course, fosters the long standing belief that the court system is open to all without fear of reprisal through the use of retaliatory lawsuits (*Curiano v. Suozzi*, 63 N.Y.2d 113, 119 [1984]). Thus, a plaintiff asserting a cause of action for malicious prosecution must satisfy a heavy burden (*Smith-Hunter* at 195).

The essence of a cause of action for malicious prosecution is the perversion of proper legal procedures (*Broughton* at 457; *Boose v. City of Rochester*, 71 A.D.2d 59, 65 [4th Dept. 1979]). As such, a prior judicial proceeding is the *sine qua non*, of such cause of action (*id.* at

65). Simply stated, then, a cause of action for malicious prosecution is one where it is alleged that a legal proceeding was maliciously initiated "without probable cause for doing so which finally ends in failure" (*Curiano* at 118). The elements of the cause of action for malicious prosecution stemming from a prior criminal proceeding, all of which are required for recovery, are (1) the commencement or continuation of a prior criminal proceeding by the defendant; (2) the termination of the prior proceeding in favor of the plaintiff; (3) the absence of probable cause for the initiation of the prior criminal proceeding; and (4) actual malice (*Cantalino v. Danner*, 96 N.Y.2d 391, 394 [2001]; *Smith-Hunter* at 195; *Colon v. City of New York*, 60 N.Y.2d 78, 82 [1983]; *Martin v City of Albany*, 42 N.Y.2d 13, 16 [1977]; *Broughton* at 457; *Heany v. Purdy*, 29 N.Y.2d 157, 159-160 [1971]). The elements for a malicious prosecution cause of action based upon a prior civil action are identical except, that in addition to the foregoing, it must be proven that plaintiff sustained special damage or injury (*The Purdue Frederick Company v. Steadfast Ins. Co.*, 40 A.D.3d 285, 286 [1st Dept. 2007]; *Wilhelmina Models, Inc. v. Fleischer*, 19 A.D.3d 267, 269 [1st Dept. 2005]; *Honzawa v Honzawa*, 268 A.D.2d 327, 329 [1st Dept. 2000]. Generally, special damages mean that the prior action interfered with a plaintiff's person or property (*Williams v. Williams*, 23 N.Y.2d 592, 604 [1969]; *The Purdue Frederick Company* at 286; *Wilhelmina Models, Inc.* at 269; Honzawa at 329) or proof of "concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel v. CBS, Inc.*, 93 N.Y.2d 195, 205 [1999]).

Whether an action is terminated favorably so as to give rise to a cause of action for malicious prosecution depends on how the action was terminated. In *Levy's Store, Inc. v. Endicott-Johnson Corporation* (272 N.Y. 155 [1936]), the court confronted with this very issue stated

> [i]t is true that where a proceeding has been determined in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant, as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution. Where, however, the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties or solely by the procurement of the accused as a matter of favor or as the result of some act, trick or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case, the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for the prosecution. In the other case, no such implication reasonably follows

(*id.* at 162; *see also*, *Loeb v. Teitelbaum*, 77 A.D.2d 92, 100 [2d Dept. 1980]). Thus, a favorable termination on the merits and in favor of the accused or defendant in the prior action - since it implies lack of probable cause - satisfies the element of favorable termination in a cause of action for malicious prosecution, while a termination chargeable to the plaintiff or complainant in the prior action, such as settlement, withdrawal or discontinuance, does not (*Levy's Store, Inc.* at 162; *Loeb* at 100). In *Pagliarulo v. Pagliarulo* (30 A.D.2d 840 [2nd Dept. 1968]), the court held defendant's agreement to discontinue a prior action served to bar plaintiff's action for malicious prosecution insofar as discontinuance of the prior action against the plaintiff was not a favorable termination.

For purposes of malicious prosecution, probable cause means facts and circumstances which would lead a reasonably prudent person, in similar circumstances, to conclude that plaintiff was guilty of the acts alleged (*Colon v. City of New York*, 60 N.Y.2d 78, 82 [1983];

Munoz v. City of New York, 18 N.Y.2d 6, 10 [1966]; *Fink v. Shawangunk Conservatory, Inc.*, 15 A.D.3d 754, 755 [3rd Dept. 2005]; *Boose* at 67). Whether there is probable cause to initiate a prosecution hinges on whether defendant's conduct at the time he/she commenced the prior proceeding would have led a reasonably prudent person to initiate the prior proceeding (*Levy's Store, Inc.* at 161; *Loeb* at 102; *Kezer v. Dwelle-Kaiser Company*, 222 A.D. 350, 354 [4th Dept. 1927]). When the facts regarding the existence of probable cause and the inferences to be drawn therefrom are undisputed, the existence of probable cause can be decided as a matter of law (*Parkin v. Cornell University, Inc.*, 78 N.Y.2d 523, 528-529 [1991]; *Lundgren v. Margini*, 30 A.D.3d 476, 477 [2nd Dept. 2006]). With regard to the Section 1983 action predicated on the tort of malicious prosecution, a Plaintiff must show sufficient restraint on liberty to implicate his Fourth Amendment rights, that the Defendant initiated or maintained the prosecution against the Plaintiff without probable cause, that the Defendant acted maliciously, and that the proceeding was terminated in the Plaintiff's favor. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 4.

In this matter, Police Officer Michael O'Connor and Lieutenant Kevin Maloney based the arrest on their belief that Plaintiff committed Criminal Possession of a Weapon, under P.L. §265.03(3) and P.L. §265.01(1), after Lieutenant Kevin Maloney heard loud bangs which he believed to be either fireworks or gunshots, walked on the sidewalk toward the direction of the sound, observed Plaintiff emerge onto the sidewalk carrying a small plastic bag, approached Plaintiff, initiated contact, searched the bag Plaintiff was carrying and recovered a firearm in it. The involvement of the Defendants and all claims raised by the parties are determinative upon whether sufficient probable cause existed for the Defendants to conduct a warrantless arrest of Plaintiff. On August 31, 2009, the Grand Jury indicted Plaintiff on three counts: Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Fourth

Degree and Possession of Ammunition. On August 31, 2011, the criminal charges from Plaintiff Davidson's arrest were dismissed at the request of the District Attorney's Office as the result of a suppression hearing wherein evidence was suppressed.

First, it should be noted that a warrantless arrest is presumed unlawful. *Veras v. Truth Verification Corp.*, 87 A.D.2d 381 (1st Dept. 1982). However, the existence of probable cause to arrest provides a complete defense to claims of false arrest, unlawful imprisonment and malicious prosecution. *Lawson v. City of New York*, 83 A.D.3d 609 (1st Dept. 2011); *Marrero v. City of New York*, 33 A.D.3d 556 (1st Dept. 2006). Therefore, sufficient probable cause must have existed that Plaintiff committed Criminal Possession of a Weapon, under P.L. §265.03(3) and P.L. §265.01(1), at the time of the arrest, as this crime was the basis of Police Officer Michael O'Connor and Lieutenant Kevin Maloney's probable cause to arrest Plaintiff.

The Court notes that "[t]he existence of [probable] cause does not require certitude that a crime was, or was being, committed by the person arrested," *People v. Cunningham*, 71 A.D.2d 559 (1st Dept. 1979), *aff'd*, 52 N.Y.2d 927 (1981), nor does its existence need to be strong enough to warrant a conviction, *People v. Miner*, 42 N.Y.2d 937 (1977), "the issue of probable cause is a question of law to be decided by the court [only when] 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 difference inferences, the question is for the jury" *Parkin v. Cornell Univ.*, 78 N.Y.2d 523 (1991). Additionally, "[i]n determining whether a police officer had probable cause to effect an arrest, the emphasis should not be narrowly focused, but rather should consider all of the facts and circumstances together." *Marrero*, 33 A.D.3d at 556.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor.

GTF Mktg., Inc. v. Colonial Aluminum Sales, Inc., 66 N.Y.2d 965 (1985). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574 (2nd Dept. 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 305 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1st Dept. 1998).

The role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos,* 46 N.Y.2d 223 (1978). In this instance, the Court finds that Defendants have sufficiently established that no triable issues of fact exist to be decided by a jury as Defendants had probable cause to stop, search, arrest and prosecute Plaintiff Davidson. Based upon the exhibits and extensive deposition testimony submitted, the Court finds that Defendants are entitled to summary judgment with respect to Plaintiff's claims for false arrest, false imprisonment and malicious prosecution insofar as Plaintiff's arrest and subsequent prosecution were supported by probable cause. Plaintiff's claims sounding in malicious prosecution are also dismissed as there was no favorable termination of the underlying criminal proceeding.

With respect to Plaintiff's allegations of assault, battery and excessive force, these claims are likewise dismissed as the evidence demonstrates that any force used was reasonable under the circumstances and Plaintiff's Bill of Particulars did not claim any specific physical injury. It is well settled that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment" (*Graham v. Connor*, 490 U.S. 386, 396

[1989]). Thus, whether the force used in effectuating an arrest is excessive, must be analyzed under the Fourth Amendment and its standard of objective reasonableness (*Rivera v. City of New York*, 40 A.D.3d 334, 341 [1st Dept. 2007]; *Ostrander v. State of New York*, 289 A.D.2d 463, 464 [2nd Dept. 2001]), and the reasonableness of an officer's use of force must be, therefore, be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Rivera* at 341; *Graham* at 396; *Koeiman v. City of New York*, 36 A.D.3d 451, 453 [1st Dept. 2007]). Thus, determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest (*Koeiman* at 453; *Vizzari v. Hernandez*, 1 A.D.3d 431, 432 [2nd Dept. 2003]). Accordingly, while generally, "[b]ecause of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Holland v. City of Poughkeepsie*, 90 A.D.3d 841, 844 [2nd Dept. 2011]; *Harvey v. Brandt*, 254 A.D.2d 718, 718 [4th Dept. 1998]), where the undisputed evidence demonstrates that the force used by police officers was objectively reasonable under the attendant circumstances, defendant should nevertheless be granted summary judgment (*Koeiman* at 453).

With respect to allegations involving tight handcuffs, whether the use of handcuffs is reasonable and, thus, not actionable or excessive, hinges on whether 1) the handcuffs were unreasonably tight; 2) the defendants ignored the plaintiff's pleas that the handcuffs were too tight; and 3) the degree of injury to the wrists, if any (*Lynch v. City of Mount Vernon*, 567 FSupp2d 459, 468 [2nd Cir 2008] [Even though handcuffs were tight, and made tighter after plaintiff complained, the fact that there was no injury to plaintiff's wrists was "fatal to the excessive force claim."]). The injury requirement is particularly important and often times

dispositive (*id.* at 468 ["There is a consensus among courts in this circuit that tight handcuffing does not constitute excessive force unless it causes some injury beyond temporary discomfort."]; *Usavage v. Port Authority of New York and New Jersey*, 932 FSupp2d 575, 592 [SDNY 2013]). In light of the circumstances of the case at bar, including the absence of proof of injury, the Defendants established that the police officers did not use excessive force in restraining the Plaintiff, and the Plaintiff failed to present any evidence otherwise. Nothing submitted by Plaintiff in opposition raises a triable issue of fact sufficient to preclude summary judgment.

Therefore it is

ORDERED, that Defendants, The City of New York, New York City Police Officer Michael O'Connor of the 48th Pct., Shield #3085 and Lieutenant Kevin Maloney, Tax Reg #904435's motion for an Order pursuant to CPLR 3211(a)(7) dismissing and/or pursuant to CPLR 3212 granting summary judgment dismissing all of Plaintiff's causes of action against the Defendants is **granted**; and it is further

ORDERED, that Plaintiff Alvin Davidson's cross-motion for an Order pursuant to CPLR 3212 granting partial summary judgment with respect to Plaintiff's federal claims under 42 USC §1983 sounding in false arrest, false imprisonment, assault, battery and illegal search and seizure is **denied**.

This constitutes the Decision and Order of the Court.

Dated: June 6, 2016

Hon. Ben R. Barbato, A.J.S.C.