

Jackson v Metropolitan Transp. Auth.

2016 NY Slip Op 31948(U)

July 7, 2016

Supreme Court, Suffolk County

Docket Number: 28626/2012

Judge: William B. Rebolini

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Short Form Order

COPY**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI****Justice**

Drew Jackson and Katie Jackson,

Plaintiffs,

-against-

The Metropolitan Transportation Authority and
The Metropolitan Transportation Police Department,

Defendants.

Motion Sequence No.: 001; MDMotion Date: 8/3/15Submitted: 10/28/15Index No.: 28626/2012Attorney for Plaintiff:Tinari, O'Connell & Osborn, LLP
320 Carleton Avenue
Central Islip, NY 11729Attorney for Defendants:Bee Ready Fishbein
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170 Old Country Road, Suite 200
Mineola, NY 11501Clerk of the Court

Upon the following papers numbered 1 to 17 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 15; Replying Affidavits and supporting papers, 16 - 17; it is

ORDERED that the motion by defendants Metropolitan Transportation Authority and Metropolitan Transportation Police Department for summary judgment dismissing the complaint is granted only to the extent that the fourth cause of action which alleges intentional infliction of emotional distress, and the fifth cause of action which alleges a violation of plaintiff rights pursuant to 42 U.S.C.A. § 1983, are dismissed, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly suffered by plaintiff Drew Jackson due to the negligence and intentional acts of members of the Metropolitan Transportation

Authority Police Department. The complaint alleges causes of action for assault, unlawful detention, false imprisonment, violation of plaintiff's civil rights and intentional infliction of emotional harm. Plaintiff Katie Jackson seeks damages for loss of consortium.

Defendants Metropolitan Transportation Authority ("MTA") and Metropolitan Transportation Police Department ("MTPD") now move for summary judgement dismissing the complaint. In support of the motion they submit their attorney's affirmation, the pleadings, the transcripts of 50-h hearing and deposition of the plaintiff Drew Jackson, and the deposition transcripts of Philip Siconolfi, Kim Riley and Detective Richard Mattera as witnesses for the defendants. Plaintiffs submit their attorney's affirmation in opposition to the motion.

Plaintiff testified that on October 5, 2011, he was working for United Fence and Guardrail as an operating engineer. At the end of the workday, he was laid off and went home. Between 9:00 and 10:00 p.m., he left his home and went to Napper Tandy's, a pub, for the wing special. He ordered wings and had a drink or two while he waited for his order. He was waiting for approximately fifteen minutes when MTA police officers approached him. He did not see them enter the pub. He saw three plain clothes officers and one or two uniformed officers surround him. Plaintiff testified that he recognized the plain clothes officers as police based on the badges they showed him. The police officer asked if they could speak to him and plaintiff demanded to know why and whether they had a warrant. Plaintiff testified that the officers asked him to go to the back of the pub and he replied that there was no problem.

According to plaintiff, the officers asked him for his identification, and he complied. The officers also asked to see plaintiff's neck. Mr. Jackson testified that he had read a story in the newspaper about a twelve year old boy who was raped and robbed in a train station and the assailant had a tattoo on his neck. Plaintiff testified that he demonstrated to the police that he did not have a tattoo on his neck. He then told the officers that they thought he was the person who attacked the boy at the train station. The officers asked how he knew that and plaintiff replied that it was because he lived in Northport and reads the papers.

Plaintiff testified that as he put his identification back in his coat pocket, one of the plain clothes officers jabbed him in the ribs on his left side and told him to "shut the fuck up." Plaintiff testified that he said he would not shut up, he did nothing wrong, and that "you got the wrong person." The officer grabbed plaintiff and told him he was going to jail. Plaintiff testified that the officers grabbed him and pushed and shoved him out the back door. Once outside, they slammed plaintiff to the ground, putting a knee on the back of his neck. He testified that the officers were leaning on him, trying to put his arms behind his back, although the officer did not ask him to put his arms behind his back. Plaintiff was screaming, trying to find out why they were doing this. The officers handcuffed plaintiff and left him lying on the ground. Plaintiff testified that all the while he protested his innocence, and demanded to know why they were arresting him. Plaintiff testified that the officers ran his name for warrants, and that this took five to ten minutes. The officers then picked plaintiff up and eventually removed the handcuffs. The officers told him to finish his drink and go back to doing what he was doing.

Defendants narrative of the events herein is gleaned from the depositions of the three plain clothes MTA police officers involved in the incident with the plaintiff. On the date of the incident, at approximately 9:40 p.m., MTA Police Detective Richard Mattera was on duty and working at MTA police District 1 Base, located at 10 West Suffolk Avenue, Central Islip. Detective Mattera testified that he had been assigned to investigate, and had been investigating for approximately five months, a sexual assault crime which had occurred at the Northport train station. The victim had given a description of the perpetrator as "approximately six foot to six-three, heavy build, round face, large belly, he was a black male adult, somewhere between his early twenties to early thirties."

Detective Mattera testified that he received a telephone call from one Michelle Thompson, who informed him that someone fitting the description of the suspect was dropped off at Napper Tandy's pub in Northport by a taxi. He testified that he knew that Napper Tandy's is approximately one mile from the Northport train station, and that the dispatcher for the taxi company was located next to the station. Detective Mattera testified that he called the dispatcher for the taxi company and asked if someone fitting the description of the suspect had been dropped off at Napper Tandy's. The dispatcher answered in the affirmative, whereupon Detective Mattera, along with Detective Siconolfi and Detective Sgt. Riley, as well as two uniformed officers, responded to Napper Tandy's. Once at the pub, they spoke to the bouncer, who told them that the person fitting the suspects description was seated at the end of the bar.

Detective Sgt. Riley further testified that plaintiff was seated at the bar. She testified that she knew the suspect had a tattoo on his neck, but was unable to see plaintiff's neck because he was wearing a jacket. Detective Sgt Riley testified that she introduced herself to the plaintiff and told him that she wanted to speak to him, and that plaintiff responded by saying "I know who you are." Detective Sgt. Riley testified that plaintiff stood up and was yelling and swearing at her. Detective Sgt. Riley asked plaintiff to step outside to avoid making a scene in the bar, whereupon plaintiff "took a swing" at Detective Sgt. Riley, at which point Detectives Mattera and Siconolfi physically restrained the plaintiff escorted him out of the bar.

Detective Siconolfi testified that plaintiff was not handcuffed as he was escorted out of the bar, and that, once he was outside plaintiff struggled to free himself from the grip of himself and Detective Mattera. The two uniformed officer helped them handcuff the plaintiff. Detective Siconolfi testified that the officers had trouble putting plaintiff's hands behind his back because he was a strong man, and was fighting their efforts to get his hands behind his back. Once plaintiff was handcuffed, the officers were able to get his identification and run a warrant check.

Detective Sgt. Riley further testified that, while the plaintiff was in handcuffs, Detective Mattera was able to observe that he did not have a tattoo on his neck. Detective Sgt. Riley testified that after a search for warrants for plaintiff came back clear, and officers observed that plaintiff did not have a neck tattoo, the handcuffs were removed in a matter of minutes, and plaintiff was told "you weren't the person we were looking for." Detective Sgt. Riley testified that she made a decision not to arrest plaintiff because he was drinking. She testified that plaintiff was released and the officers went back to MTA District 1 base to prepare incident reports.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, *supra*; *O'Neill v Fishkill*, *supra*).

Defendants have established their *prima facie* right to dismissal of the fourth cause of action which alleges intentional infliction of emotional distress on the plaintiff. Public policy bars claims alleging intentional infliction of emotional distress against governmental entities (*Afifi v City of New York*, 104 AD3d 712, 713, 961 NYS2d 269 [2d Dept 2013]; see *Eckardt v City of White Plains*, 87 AD3d 1049, 930 NYS2d 22 [2d Dept 2011]). Therefore, defendants are entitled to summary judgment dismissing the fourth cause of action.

Defendants have also established their *prima facie* right to dismissal of the fifth cause of action which alleges a violation of plaintiff rights pursuant to 42 U.S.C.A. § 1983. There was no evidence that acts which allegedly deprived plaintiff of his constitutional rights were performed pursuant to an express or implied policy or custom of MTA or MTPD, as required for his § 1983 claims against defendants (see *Bah v City of New York*, 108 AD3d 646, 969 NYS2d 167 [2d Dept 2013]; *Ellison v City of New Rochelle*, 62 AD3d 830, 879 NYS2d 200 [2d Dept 2009]). Therefore, defendants are entitled to summary judgment dismissing the fifth cause of action.

However, as to the plaintiff's remaining causes of action, a municipality may be held vicariously liable for torts committed by an employee while acting within the scope of his or her employment (see *Holland v City of Poughkeepsie*, 90 AD3d 841, 935 NYS2d 583 [2d Dept 2011]; *Eckardt v City of White Plains*, *supra*; *Ashley v City of New York*, 7 AD3d 742, 779 NYS2d 502 [2d Dept 2004]). To prevail on a cause of action alleging false arrest or false imprisonment, a plaintiff must prove (1) intentional confinement by the defendant, (2) of which the plaintiff was aware, (3) to which the plaintiff did not consent, and (4) which was not otherwise privileged (see *Broughton v State of New York*, 37 NY2d 451, 373 NYS2d 87 [1975]; *Nolasco v City of New York*, 131 AD3d 683, 15 NYS3d 449 [2d Dept 2015]; *Ali v City of New York*, 122 AD3d 888, 998 NYS2d 64 [2d Dept 2014]; *Williams v City of New York*, 114 AD3d 852, 981 NYS2d 114 [2d Dept 2014]).

To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. The elements of a cause of action to recover damages for battery are bodily contact made with intent that is offensive in nature (see *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 7 NYS3d 348 [2d Dept 2015];

Jackson v. The MTA
Index No.: 28626/2012
Page 5

Fugazy v Corbetta, 34 AD3d 728, 825 NYS2d 120 [2d Dept 2006]; *Tillman v Nordon*, 4 AD3d 467, 771 NYS2d 670 [2d Dept 2004]).

Defendants have submitted the testimony of three of their police officers to establish that they had probable cause to stop and detain the plaintiff, and that any injuries suffered by plaintiff were due to his own actions. Probable cause to believe that a person committed a crime is a complete defense to an action alleging false arrest or false imprisonment, and may also provide a defense for a cause of action alleging assault, whether brought under state law or 42 U.S.C.A. § 1983 (*Rodgers v City of New York*, 106 AD3d 1068, 966 NYS2d 466 [2d Dept 2013]; see *Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 9 NYS3d 329 [2d Dept 2015]; *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561, 771 NYS2d 170 [2d Dept 2004]) Here, plaintiff's submissions revealed the existence of triable issues of fact as to whether plaintiff's arrest was based on probable cause (see *MacDonald v Town of Greenburgh*, 112 AD3d 586, 976 NYS2d 189 [2d Dept 2013]; *Lundgren v Margini*, 30 AD3d 476, 817 NYS2d 349 [2d Dept.2006]; *Carlton v Nassau County Police Dept.*, 306 AD2d 365, 761 NYS2d 98 [2d Dept 2003]). Plaintiff's testimony contradicts that of defendants' witnesses that their action were based upon probable cause. Significantly, plaintiff testified that he provided the officers with his identification and showed them that he did not have a tattoo on his neck prior to the police actions which form the basis of this action. A motion for summary judgment should not be granted when conflicting inferences may be drawn or where there are issues of credibility regarding material facts (see *Disa Realty, Inc. v Rao*, 137 AD3d 740, 25 NYS3d 677 [2d Dept 2016]; *Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 100, 25 NYS3d 357 [2d Dept 2016]; *Vanderhurst v Nobile*, 130 AD3d 716, 717, 13 NYS3d 231 [2d Dept 2015]). Since there are issues of both fact and credibility remaining before the Court, defendants' motion for summary judgment with regard to plaintiffs' remaining causes of action must be denied.

Accordingly, the motion by defendants Metropolitan Transportation Authority and Metropolitan Transportation Police Department for summary judgment dismissing the complaint is granted only to the extent that the fourth cause of action, which alleges intentional infliction of emotional distress, and the fifth cause of action, which alleges a violation of plaintiff rights pursuant to 42 U.S.C.A. § 1983, are dismissed. The motion is otherwise denied.

Dated:

July 7, 2016

William B. Rebolini
 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION