Delcastillo v City of New York
2017 NY Slip Op 30302(U)
January 30, 2017
Supreme Court, Queens County
Docket Number: 700536/14
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

RUBEN DELCASTILLO,
Plaintiff,

-against-

THE CITY OF NEW YORK,
Defendant.

Index Number 700536/14

Motion Date August 2, 2016

Motion Seq. No. 1

Motion Cal. No. 38

The following papers read on this motion by defendant The City of New York (City) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiff Ruben Delcastillo's complaint due to his inability to prove a prima facie case against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	HC A
Answering Affidavits - Exhibits	HC B
Reply Affidavits	HC C

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

In this action by plaintiff seeking to recover damages for false arrest and imprisonment, malicious prosecution, abuse of process, violation of constitutional rights pursuant to 42 USC § 1983, and negligent infliction of emotional distress, defendant City moves for summary judgment.

Plaintiff gave the following testimony at his 50-h hearing and examination before trial: In April of 2012, plaintiff had lent his vehicle to a friend, Hugo Andres Hoyos, and

Hoyos, in turn, had lent the vehicle to an unlicensed driver. That unlicensed driver was pulled over by police while using plaintiff's vehicle in Connecticut, and the vehicle was impounded. On April 20, 2012, at approximately 12:30 P.M., on the way to Connecticut with Hoyos to retrieve the vehicle, plaintiff and Hoyos stopped at a McDonalds in Whitestone, New York for Hoyos to meet with a man who was going to lend Hoyos money. As Hoyos and that older man were speaking, plaintiff was sitting and eating at a table outside the McDonalds when he was approached by two undercover police officers. The officers, Figueroa and France, identified themselves as New York State (NYS) Police Officers. They questioned plaintiff, who admitted he knew and was with Hoyos. Plaintiff was arrested along with Hoyos for alleged money laundering. The officers placed plaintiff in handcuffs into a truck which was then driven to the 109th Precinct in Queens by an Officer Santiago.

At the 109th Precinct, plaintiff was fingerprinted and placed in a cell. Plaintiff shared the cell with both Hoyos and the older man with whom Hoyos had been speaking at the McDonalds. Approximately two (2) to three (3) hours later, plaintiff was taken, once again in handcuffs, by Officer Santiago to Central Booking in Manhattan. Upon arrival, both he and Hoyos were photographed. Plaintiff was taken in handcuffs to a cell in another building, where he was held with approximately 30 other people, for about 20 to 24 hours. Although no one in that cell made any violent threats toward him, he felt his safety was threatened because there was no way for him to reach one of the officers. He asked a nearby security officer to speak with someone, but was told that no one was available. He did not tell that security officer that he felt his safety was being threatened.

At approximately 7:00 P.M., on April 21, 2012, the day after his arrest, plaintiff was released, without being charged with any crime. He did not suffer any physical injuries from the time of his arrest to his release, but emotionally, he still feels sad and depressed. He did not suffer an inability to work because of the arrest. He does not remember meeting New York City (NYC) Police Sergeant Michele Kemp or NYC Police Officer John Stapleton.

NYC Police Officer John Stapleton, who was stationed out of the 109th Precinct, testified on behalf of defendant City as follows: On April 20, 2012, NYC Police Officer Stapleton was at the Precinct processing three arrests which he had made earlier that day. NYC Police Sergeant Michele Kemp was the on-duty Sergeant. Sergeant Kemp would sign off on arrest paperwork when completed by the officers prior to booking. While at the Precinct, NYC Police Officer Stapleton saw NYS Police Officer L. France also processing an arrest. Each NYC Police Officer has his or her own Omni Code. An Omni Code is required for the officer to enter complaint reports and arrest reports into the computer system. NYS Police Officers do not have Omni codes. When a NYS Police

Officer makes an arrest within a City Precinct, the NYS Police Officer must use the Omni Code of a NYC Police Officer from that Precinct in order to enter his or her report. On the subject date, NYC Police Officer Stapleton let NYS Police Officer France use his Omni Code to enter plaintiff's arrest report. Since NYC Police Officer Stapleton's Omni Code was used, plaintiff's arrest report indicates that it was entered by NYC Police Officer Stapleton, even though it was actually entered by NYS Police Officer France. NYC Police Officer Stapleton also identified a "Command Log" entry for plaintiff's arrest on the subject date, which indicated plaintiff's arresting officer as NYS Police Officer Juan Figueroa. According to NYC Police Officer Stapleton, "Command Log" entries are entered by Supervisors at the Precinct.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman* v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), or credibility assessment (*see Ferrante v American Lung Association*, 90 NY2d 623 [1997]). Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

It is well-settled that in order to prevail on a cause of action to recover damages for false arrest or imprisonment, the plaintiff must show that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement, and that the confinement was not privileged (*see De Lourdes Torres v Jones*, 26 NY3d 742 [2016]; *see also Broughton v State of New York*, 37 NY2d 451 [1975]; *Williams v City of New York*, 114 AD3d 852 [2014]). As for a cause of action for malicious prosecution, the elements of such tort are "(1) the 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" (*Broughton v State of New York*, *supra* at 457). The existence of probable cause constitutes a complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution. (*see De Lourdes Torres v Jones*; *supra*; *see also Batten v City of New York*, 133 AD3d 803 [2015]; *Paulos v City of New York*, 122 AD3d 815 [2014]). " 'Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely

information sufficient to support a reasonable belief that an offense has been or is being committed' by the suspected individual, and probable cause must be judged under the totality of the circumstances" (*De Lourdes Torres v Jones*, 26 NY3d at 759, quoting *People v Bigelow*, 66 NY2d 417, 423 [1985]). Further, a governmental entity "cannot be liable for false arrest or malicious prosecution under 42 USC § 1983 unless an official government policy, custom or widespread practice caused the violation of the plaintiff's constitutional rights" (*De Lourdes Torres v Jones*, *supra* at 762; *see Combs v City of New York*, 130 AD3d 862 [2015]; *Holland v City of Poughkeepsie*, 90 AD3d 841 [2011]).

In this case, defendant City demonstrated its prima facie entitlement to judgment as a matter of law with regard to the causes of action to recover damages for false arrest and imprisonment. Defendant City presented competent evidence showing that neither it, nor the NYC Police Department was involved in the decision to arrest plaintiff, or the arrest itself (*see Doumbia v City of New York*, 285 AD2d 623 [2001].) Rather, plaintiff's arrest was conducted by the NYS Police, and the State of New York was not named as a party in this action. The evidence submitted by defendant City also demonstrated that plaintiff's subsequent incarceration, while at Central Booking in Manhattan, was privileged (*see Doumbia v City of New York*, *supra*).

In addition, defendant City demonstrated its prima facie entitlement to judgment dismissing plaintiff's cause of action to recover damages for malicious prosecution. As noted, in order to obtain recovery for malicious prosecution, a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice (*see Broughton v State of New York*, *supra*). Here, defendant City established that plaintiff's cause of action for malicious prosecution must fail because no criminal proceeding was ever commenced against plaintiff. An arraignment of plaintiff was never held, the money laundering charges were dropped and plaintiff was released from custody without any charges pending (*see Best v State of New York*, 92 AD3d 1162 [2012]). Moreover, there is no evidence of actual malice in conjunction with plaintiff's arrest by the NYS Police Department, nor with his time in custody at both the 109th Precinct and Central Booking.

Defendant City also established its prima facie entitlement to judgment dismissing plaintiff's cause of action to recover damages for civil rights violations pursuant to 42 USC § 1983 by demonstrating that there is no evidence, nor has plaintiff alleged, that an official policy or custom of defendant City caused the police officers involved to violate plaintiff's constitutional rights (*see Shaw v City of New York*, 139 AD3d 698 [2016]; *see also Ellison v City of New Rochelle*, 62 AD3d 830 [2009]; *Serpa v County of Nassau*, 280 AD2d 596 [2001]).

Defendant City further established its entitlement to summary judgment as a matter of law dismissing plaintiff's remaining causes of action for abuse of process and negligent infliction of emotional distress.

A cause of action for abuse of process lies not for the commencement of an action, i.e., malicious prosecution, but for the perversion of the process after it is commenced. (*see Board of Education of Farmingdale Union Free school District v Farmingdale Classroom Teachers Association, Inc.*, 38 NY2d 397 [1975]). In order to prevail on a cause of action for abuse of process, it must be demonstrated that the defendant (1) caused the issuance of regularly issued process either criminal or civil; (2) with the intent to do harm without excuse or justification; and (3) that the process was perverted to obtain a collateral advantage (*see Curiano v Suozzi*, 63 NY2d 113 [1984]; *see also Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Association, Inc.*, *supra*; *Panish v Steinberg*, 32 AD3d 383 [2006]).

As noted herein, defendant City has demonstrated that it was not involved in plaintiff's arrest; that plaintiff's incarceration until his release was privileged; that plaintiff was never prosecuted, and that plaintiff was released without being charged. Defendant City further established that it was not involved in the perversion of process so as to obtain a collateral advantage.

Negligent infliction of emotional distress is premised upon a breach of duty which unreasonably endangers the plaintiff's safety or causes the plaintiff to fear for his or her safety (*see Bovsun v Sanperi*, 61 NY2d 219 [1984]; *see also Daluise v Sottile*, 40 AD3d 801 [2007]; *Hecht v Kaplan*, 221 AD2d 100 [1996]).

Defendant City established its entitlement to summary judgment dismissing plaintiff's cause of action for negligent infliction of emotion al distress by demonstrating that it did not owe plaintiff any special duty (*see Lauer v City of New York*, 95 NY2d 95 [2000]). Moreover, neither plaintiff's allegations, nor his testimony demonstrates that his safety was unreasonably endangered to support a cause of action for negligent infliction of emotional distress (*see Daluise v Sottile*, *supra*; *see also E.B. v Liberation Publications, Inc.*, 7 AD3d 566 [2004]).

Since defendant City met its initial burden of establishing its entitlement to summary judgment as a matter of law dismissing all of plaintiff's causes of action against it, the burden shifts to plaintiff to present competent evidence to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Plaintiff has failed to meet this burden. Contrary to plaintiff's arguments in

opposition, NYS Police Officer France's use of NYC Police Officer Stapleton's Omni Code to enter his report of plaintiff's arrest, and NYC Police Sergeant Kemp's signing the arrest paperwork at the 109th Precinct prior to plaintiff's being brought to Central Booking, fail to raise an issue of fact as to whether defendant City played a role in plaintiff's arrest and imprisonment. Plaintiff failed to raise a triable issue regarding any of his causes of action. Plaintiff's assertion that a triable issue of fact exists as to whether defendant City was negligent in its protection of plaintiff while he was in custody concerns a new claim, and the addition of such a cause of action which was not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of plaintiff's claims. Such a new theory of liability, not previously interposed, is time-barred (*see* General Municipal Law § 50-e [5].) In addition, amendments of a substantive nature are not within the purview of General Municipal Law § 50-e (6) (*see Johnson v County of Suffolk*, 238 AD2d 480 [1997]; *see also Demorcy v New York*, 137 AD2d 650 [1988]; *Gordon v City of New York*, 79 AD2d 981[1981]). Moreover, this claim of negligent police protection is unsupported. Plaintiff testified that while in custody, no one made, nor did he perceive any threats being made toward him. He further testified that while in custody, he did not tell anyone that he felt his security was being threatened.

Finally, plaintiff contends that the instant motion is premature. Plaintiff's mere expression of hope that further discovery will reveal something helpful to defeat the motion provides no basis for denying defendant City's summary judgment motion (*see Jorbel v Kopko*, 31 AD3d 612 [2006]; *see also Manney v GE Medical Systems*, 7 AD3d 763 [2004]; *Mazzaferro v Barterama Corp.*, 218 AD2d 643 [1995]).

Accordingly, defendant City's motion for summary judgment is granted and plaintiff's complaint is dismissed in its entirety.

Dated: January 30, 2017

Howard G. Lane, J.S.C.