SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C. PART 5

INDEX NO. 158129/2015

ISSA YATTASSAYE aka ISSA COULIBALY
Plaintiff,

- v -

THE CITY OF NEW YORK,
JOHN AND JANE DOES - Police Officers
as yet unidentified
Defendant(s).

MOT. DATE May 23, 2017
MOT. SEQ. NO. 001

The following papers were read on this motion for Summary Judgment

Notice of Motion/Petition-- Affidavits — Exhibits	ECFS DOC No(s). 1-8
Notice of Cross-Motion/Answering Affidavits — Exhibits A through G	ECFS DOC No(s). 1-10
Reply Memorandum of Law -- Exhibits A through C	ECFS DOC No(s). 1-5

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff Issa Yattassaye aka Issa Coulibaly, resulting from his arrest on May 8, 2014 for criminal mischief and subsequent custody at Harlem Hospital, prior to his bedside arraignment held on May 23, 2014. Plaintiff moves for an order pursuant to CPLR §3212 seeking summary judgment on his False Arrest and False Imprisonment claims and on his Fourth Amendment violations claims. The City of New York (hereinafter, defendant/City) cross moves for an order pursuant to CPLR §3212 granting summary judgment in its favor, dismissing plaintiff's complaint and in opposition to plaintiff's motion seeking summary judgment. The motion and cross motion, Motion Sequence Number 001, are consolidated for disposition.

PROCEDURAL/FACTUAL BACKGROUND

Plaintiff served a Notice of Claim upon the City on or about July 29, 2014. Plaintiff commenced this action by purchase of an Index Number and filing a Notice of Summons on or about August 6, 2015 and subsequently filed and served his complaint upon the City on or about August 27, 2015. The City served an Answer on or about September 17, 2015. On August 26, 2015 plaintiff appeared for a deposition pursuant to GML §50-h.

In support of his motion, plaintiff submits an attorney's affirmation. Plaintiff argues that he was arrested and held without an arraignment from May 8, 2014 to May 23, 2014. As such, plaintiff contends that the City's delay after the arrest was not legally justifiable, thus rendering the arrest unlawful, *ab initio.* Plaintiff argues that since his arrest was "rendered unlawful *ab initio* by the failure to obtain any judicial determination of probable cause for nearly two weeks, plaintiff is entitled to judgment as a matter of law". (Sanderson Aff. ¶ 31).

In opposition to plaintiff's motion and in support of its cross motion for summary judgment, the City relies on the pleadings, plaintiff's deposition testimony, the Harlem Hospital records and the affida-

vit of Police Officer David Fernandez (hereinafter PO Fernandez). The City argues that it has met its burden and is entitled to summary judgment because probable cause is a complete defense to plaintiff's claims. The City contends that PO Fernandez' s affidavit, which includes a copy of the criminal affidavit, establishes probable cause for the arrest based on the identification by the complaining victim and PO Fernandez's observation of the damaged property. As such, the City claims that plaintiff's allegation of false arrest is without merit. In addition, the City contends that plaintiff's claim for false imprisonment and his constitutional claims must also be dismissed as there was no unreasonable delay in plaintiff's arraignment.

On May 8, 2014 at approximately 4:00 a.m., plaintiff and his girlfriend were arguing and after stepping into the hallway, he was unable to gain access back into his apartment. (Papandrew Aff., Ex. E, p. 19). Attempting to get back into his apartment, plaintiff climbed onto his roof and climbed on a fire escape to re-enter through a window; plaintiff lost his footing and slipped, falling five stories to the ground below. Plaintiff was taken to Harlem Hospital via ambulance.

Per the Affidavit of PO Fernandez, on May 8, 2014 he and his partner responded to a 911 call regarding a dispute; when they arrived at the scene, PO Fernandez and his partner encountered the complaining victim ("CV") and proceeded to question her regarding her complaint. (Papandrew Aff., Ex. F, ¶ 2-4). The CV told PO Fernandez that plaintiff had smashed her cell phone to the ground after he refused to allow her to enter the apartment that she shared with plaintiff. (Id. at ¶ 4). "My partner and I proceeded to the fifth floor where the CV and suspects' apartment was located. However, we did not enter the apartment as the suspect had locked the CV out of the apartment. While canvassing to find suspect, I heard screaming from the ground outside the rear of the building where someone was screaming 'help!'" (Id. at ¶ 5). The responding officers then radioed for an ambulance that transported the plaintiff to Harlem Hospital where he was treated for his injuries. (Id.).

At approximately 6:30 a.m., the CV arrived at Harlem Hospital and based on the identification of the CV and PO Fernandez's observation of the damaged cell phone, he arrested and handcuffed plaintiff charging him with criminal mischief, Class E felony, for intentionally damaging the property of another. (Id. at ¶ 9). PO Fernandez was relieved by Police Officer Riggins; he then returned to the 32nd Precinct and completed the Arrest Report, Complaint Report and Domestic Incident Report. At approximately 4:55 p.m., PO Fernandez met with Assistant District Attorney Megan McDermott and signed the criminal affidavit. (Id. at ¶ 10-11).

Plaintiff argues that he was held in police custody for nearly two weeks, subject to 24-hour police guard, with his wrist and ankle handcuffed to the hospital bed and that he was deprived of his rights to liberty and association. (Sanderson Aff. ¶ 16 and 17). Plaintiff contends that he retained counsel on May 14, 2014 who attempted to secure plaintiff's release from custody. Thereafter, on May 22, 2014 counsel filed a petition for writ of habeas corpus and on May 23, 2104, plaintiff was arraigned at Harlem Hospital and charged with one misdemeanor count of criminal mischief in the fourth degree in violation of PL §145.00(1). The court never ruled on the writ of habeas corpus. (Sanderson Aff. ¶ 15).

Plaintiff argues that there was no lawful reason for the City to delay plaintiff's arraignment for two weeks and the fact that the arraignment took place within 24 hours of plaintiff filing an Order to Show Cause seeking habeas corpus, demonstrates that the City could have easily ensured plaintiff received a hospital arraignment with 24 hours of his arrest. Conversely, the City argues that the circumstances causing the delay in plaintiff's arraignment were necessitated by his physical incapacitation. Relying on the medical records, the City argues that plaintiff underwent several orthopedic surgeries for fractures to his leg and was administered several medications impairing his cognitive functioning. (Papandrew Aff., Ex. G). Thus, the City contends that due to plaintiff's physical incapacitation, his appearance at a traditional in-court arraignment was not possible and that arrangements for a bedside arraignment which

must be coordinated with the court and the District Attorney's Office, usually takes three to four weeks to arrange.

The issue before the court is whether there was a justifiable reason for the City to delay plaintiff's arraignment for thirteen days after the arrest, to May 23, 2014. For the reasons that follow, the motion and cross motion for summary judgement are denied as there are issues of fact presented concerning both the gravity of plaintiff's condition and whether the delay of thirteen days, from the time of the arrest to the time of plaintiff's bedside arraignment, was unnecessary.

STANDARD OF REVIEW/ANALYSIS

On a motion for summary judgment, the moving party "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" *(Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers (Id.). When deciding a summary judgment motion, the court must view the alleged facts in a light most favorable to the non-moving party *(Sosa v 46th St. Dev. LLC,* 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept. 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact *(Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's role in deciding a summary judgment motion is to determine whether there are any issues of fact and not to delve into or resolve issues of credibility *(Vega v Restani Constr. Corp.,* 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied *(Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [lst Dept. 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]). The court's function on these motions is limited to "issue finding," not "issue determination." *(Sillman v. Twentieth Century Fox Film,* 3 NY2d 395 [1957]).

Plaintiff has simply failed to meet his burden to demonstrate entitlement to judgment as a matter of law. He relies solely on an affirmation of counsel annexing citations to case law and the writ of habeas corpus, affirmed by counsel, who had no personal knowledge of the facts. See, *Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 (1980); *Murray v. City of New York,* 74 AD3d 550 (1st Dept. 2010). Plaintiff summarily concludes that there was no lawful reason for the City to delay his arraignment to May 23, 2014, but fails to support this statement with sufficient proof establishing his *prima facie* entitlement to summary judgment.

Plaintiff failed to submit an affidavit of a person with knowledge demonstrating that the City's delay in arranging a bedside arraignment to May 23, 2014 was not legally justifiable. Instead, plaintiff asks this court to assume that the fact that the arraignment took place within hours of the filing of the Order to Show Cause, demonstrates that the City could have arranged a hospital arraignment within 24 hours of plaintiff's arrest. There is no reliable proof in this record to support plaintiff's conclusory averment that the City's delay of thirteen days was not legally justifiable and therefore, plaintiff is not entitled to summary judgment. *Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 (1986).

Likewise, the City has not met its burden to establish judgment as a matter of law. Although the City has submitted the Affidavit of PO Fernandez in support of its motion, along with the Harlem Hospital records, to support its claim that the delay in plaintiff's arraignment was necessitated by plaintiff's physical condition and impaired cognitive functioning, the hospital records raise an issue of fact as to whether plaintiff could have been arraigned sooner. Indeed, the Social Worker's Progress Notes dated

May 10, 2014 indicate that "worker visited patient whom worker observed patient to be alert and oriented." (Papandrew Aff., Ex. G, p. 6). Although the City annexed plaintiff's hospital records to its motion, the City did not provide a medical affidavit to support its conclusory statement that plaintiff's physical incapacitation prevented a traditional in court arraignment and thus, necessitated a hospital bedside arraignment.

Moreover, the City's claim that the delay in arranging the bedside arraignment was justified, is not supported by any independent evidence. The City argues that "the scheduling of a bedside arraignment in New York County averages three to four weeks." (Papandrew Aff., ¶ 12). The City argues that its delay was justified "[b]ased upon information and belief, the scheduling of bedside arraignments is complex". (Papandrew Aff., ¶ 12). A motion for summary judgment cannot rest upon "information and belief" but rather must be rooted in a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" *(Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such *prima facie* showing requires denial of the motion. (id.).

The City concedes that an arrest, lawful in its inception, may nevertheless be rendered void *ab initio* for purposes of a false imprisonment action if there is an unnecessary delay in arraignment. *Lewis v. Counts,* 81 AD2d 857 (2d Dept. 1981). The City argues however, that its delay of thirteen days was justifiable due to plaintiff's physical incapacitation and the practical delays inherent in arranging a bedside arraignment. However, on this record, as noted above, the City's explanation for the delay in arraignment presents an issue of fact, that precludes summary judgment. The court's role in deciding a summary judgment motion is to determine whether there are any issues of fact and not to delve into or resolve issues of credibility *(Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied *(Tron/one v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [lst Dept. 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

ORDERED, that Plaintiff's motion for summary judgment, Sequence No. 001, seeking summary judgment, as a matter of law on his cause of action for false arrest and false imprisonment and Fourth Amendment violations it, is denied; and it is further

ORDERED, that Defendant the City's cross motion for summary judgment, Sequence No. 001, seeking dismissal of all claims asserted against it, is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

SO ORDERED:

Dated: June 5, 2017

HON.W. FRANC PERRY, J.S.C.

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**