Fielden v City of New York
2017 NY Slip Op 32301(U)
October 13, 2017
Supreme Court, New York County
Docket Number: 161692/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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LOUISE FIELDEN, individually and as mother and natural guardian of S.F., a minor child

Plaintiff

v

CITY OF NEW YORK, POLICE OFFICER KOSAREK, shield number 26057, POLICE OFFICER KENNEDY, shield number 9178, POLICE OFFICER GONZALEZ, shield number 2627, NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, and NEW YORK FOUNDLING CHARITABLE CORPORATION, a/k/a THE NEW YORK FOUNDLING

Defendant.

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Index No. 161692/2015

DECISION AND ORDER

MOT SEQ 001

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages, inter alia, for false arrest, the defendants City of New York, Police Officers Kosarek, Kennedy, and Gonzalez, and New York City Administration for Children's Services (ACS) (collectively the City defendants) move pursuant to CPLR 3211(a) to dismiss the amended complaint as against them based on a defense founded on documentary evidence (CPLR 3211[a][1]) and for failure to state a cause of action. See CPLR 3211(a)(7). The plaintiff opposes the motion. The motion is granted in part and denied in part in accordance herewith.

II. BACKGROUND

A. The Underlying Incident

The plaintiff Louise Fielden is a citizen of the United Kingdom. On April 9, 2015, while visiting New York and staying at a hotel in Manhattan with her five-month-old son, the plaintiff S.F., Fielden left her son unattended in her hotel room for more than one hour. She also left him on a table in the hotel lobby, during which time, according to witnesses, she was not paying any attention to him. In response to a complaint, two ACS social workers visited the plaintiff in her hotel room later that day.

On April 10, 2015, the social workers returned to Fielden's hotel room and, in response to her own call to the New York City Police Department (NYPD) after the social workers' arrival, three police officers responded to her room. Fielden was placed under arrest and charged with one count of endangering the welfare of a child pursuant to Penal Law § 260.10(1), one count of endangering the welfare of a child pursuant to Penal Law § 260.10(1), one count of resisting arrest (Penal Law § 205.30), and one count of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) in connection with a bottle of codeine pills found in her pocketbook. Fielden was booked at the police station of the NYPD's 10th Precinct, where she claims that she was handcuffed to a pipe embedded in a wall in a hallway, and

was sexually assaulted by a male prisoner who was permitted to leave his cell without confinement or supervision.

B. Prior Judicial Proceedings

On April 11, 2015, Fielden was arraigned on the aforementioned charges in the Criminal Court, New York County. On April 13, 2015, the ACS commenced a neglect proceeding against Fielden in the Family Court, New York County, and that court exercised emergency jurisdiction over her son pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Domestic Relations Law art 5-A).

By decision and order dated July 22, 2015, the Criminal Court denied Fielden's motion to dismiss the accusatory instrument against her for facial insufficiency. See People v Fielden, 48 Misc 3d 1212(A), 2015 NY Slip Op 51097(U) (Crim Ct, N.Y. County, Jul. 22, 2015). On January 4, 2016, all charges were dismissed against Fielden on the ground that the prosecutor was not ready for trial within six months after the commencement of the criminal action against her. See CPL 30.30.

In an order of fact-finding dated November 25, 2015, the Family Court found that Fielden neglected her son by leaving him unattended in her room for 75 minutes, and ignoring him after leaving him on a table in the hotel lobby, despite admonitions and suggestions from other hotel guests. The child was

temporarily placed in the joint custody of the ACS and the defendant New York Foundling Charitable Corporation (NY Foundling), which then placed him in two separate foster homes while the Criminal and Family Court proceedings were pending.

On February 5, 2006, Fielden commenced a proceeding in the United Kingdom High Court of Justice Family Division (the High Court), seeking to make her son a temporary ward of that court. By order dated February 16, 2016, that court found that Fielden's son was a British national and a "habitual resident" of England and Wales. It thus exercised jurisdiction over Fielden's son, placed him in the interim custody of the Greater London Borough of Wandsworth, appointed a British social worker for that purpose, and directed that Fielden's son be returned to the United Kingdom accompanied by that social worker.

Pursuant to the UCCJEA,

> "a court in this state which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds, as is relevant here, that it should relinquish jurisdiction because the child does not have a 'significant connection' with New York, and 'substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.'"

Matter of LaCour v Puglisi, 147 AD3d 842, 842 (2nd Dept. 2017), quoting Domestic Relations Law § 76-a(1)(a); see Matter of Nelson v McGriff, 130 AD3d 736, 737 (2nd Dept. 2015). "While foreign countries are not included in the definition of a 'state,'" the

"general policies of [the Act] extend to the international area." Matter of Kratz v Olsen, 290 AD2d 689, 690 n 1 (3rd Dept. 2002); see Domestic Relations Law § 75-c(10); Domestic Relations Law former § 75-w; Matter of Nesa v Baten, 290 AD2d 663 (3rd Dept. 2002); Kosmicki v Salzer, 252 AD2d 972, 973 (4th Dept. 1998).

By order dated February 23, 2016, the Family Court, upon receiving the order of the High Court, dismissed the neglect proceeding for lack of continuing jurisdiction in accordance with these principles, discharged Fielden's son to the care of the Greater London Borough of Wandsworth, and directed that the docket entries in the neglect proceeding be provided to both the High Court and appropriate authorities in England and Wales. Fielden's son was thereafter returned to the United Kingdom, escorted by the court-appointed social worker.

C. The Instant Action

Fielden thereafter commenced this action against the City, the police officers who arrested her, the ACS, and NY Foundling, asserting nine causes of action in her amended complaint. The first cause of action seeks to recover against the City and the police officers for false arrest, and the second seeks to recover against the same defendants for false imprisonment. The third cause of action seeks to recover against those defendants for their alleged negligence in the manner in which they manacled

Fielden, in failing to prevent a male prisoner from sexually assaulting her at the police station, in neglecting to advise her of her rights, and in lacking probable cause to arrest her. The fourth cause of action seeks to recover from the officers for intentional infliction of emotional distress, while the fifth cause of action seeks to recover from both the City and the officers for negligent infliction of emotional distress.

The sixth cause of action seeks to recover under 42 USC § 1983 for the violation or deprivation of rights secured to Fielden under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The seventh cause of action seeks to recover from the City, the ACS, and NY Foundling, on behalf of the infant plaintiff, for negligence in supervising the conduct of the New York foster parents with whom he was placed pending the outcome of the Criminal and Family Court proceedings against Fielden. The eighth cause of action seeks to recover for Fielden's loss of her son's consortium. The ninth cause of action seeks to recover for malicious prosecution.

The City defendants now move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as against them. Fielden opposes the motion.

III. DISCUSSION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is

"to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977).

Where, however, the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer v Ginzburg, supra, at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no

significant dispute exists regarding it." Id. "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion." Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372, 372 (2nd Dept. 2002); see Guggenheimer v Ginszburg, supra; Rivietz v Wolohojian, 38 AD3d 301 (1st Dept. 2007); Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997). "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." Peter F. Gaito Architecture, LLC v Simone Development Corp., 46 AD3d 530, 530 (2nd Dept. 2007).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, supra, at 87-88; see Ellington v EMI Music, Inc., 24 NY3d 239 (2014).

A. FALSE ARREST and FALSE IMPRISONMENT

"Under the common law, a plaintiff may bring suit for false arrest and imprisonment against one who has unlawfully robbed the plaintiff of his or her 'freedom from restraint of movement.'" De Lourdes Torres v Jones, 26 NY3d 742, 759 (2016), quoting Broughton v State of New York, 37 NY2d 451, 456 (1975). To

prevail on such a cause of action, the plaintiff must demonstrate 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" De Lourdes Torres v Jones, supra, at 759; see Donald v State of New York, 17 NY3d 389 (2011); Martinez v City of Schenectady, 97 NY2d 78 (2001); Parvi v City of Kingston, 41 NY2d 553 (1977).

In the context of a false arrest and imprisonment claim asserted against a law enforcement officer, an act of confinement is privileged if it "stems from a lawful arrest supported by probable cause" De Lourdes Torres v Jones, supra, at 759; see Gisondi v Town of Harrison, 72 NY2d 280 (1988); Broughton v State of New York, supra; see also Fortunato v City of New York, 63 AD3d 880 (2nd Dept. 2009). "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty." Colon v City of New York, 60 NY2d 78, 82 (1983); see De Lourdes Torres v Jones, supra. "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 the question of whether probable cause existed must be judged under the totality of the circumstances. People v

Bigelow, 66 NY2d 417, 423 (1985); see De Lourdes Torres v Jones, supra.

A cause of action alleging false arrest is indistinguishable from one asserting false imprisonment. See 59 NY Jur 2d, False Imprisonment, § 1, at 262-263; 22 Am Jur, False Imprisonment, p. 354, § 3; Poje v Hopkins, 298 AD2d 780 (3rd Dept. 2002); Brown v Roland, 215 AD2d 1000 (3rd Dept. 1995).

Here, based on Fielden's admissions and statements by eyewitnesses as to Fielden's alleged failure to supervise her infant child, the individual police officers effectuating Fielden's arrest had probable cause to believe that she committed the offenses of endangering the welfare of a child that were asserted against her. Those offenses require proof that the accused "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old" (Penal Law § 260.10[1]) and that "[b]eing a parent . . . of a child less than eighteen years old, he or she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming a 'neglected child,'" within the meaning of article 10 of the Family Court Act. Penal Law § 269.10(2). Moreover, the Family Court ultimately made a finding of fact that Fielden did indeed neglect her child within the meaning of Family Court Act §§ 1012(f)(i)(A) and (B), which are codified in article 10 of the Family Court Act.

Thus, the parties' submissions reveal that "only one reasonable inference could be drawn from the facts regarding probable cause." Lewis v Caputo, 20 NY3d 906, 907 (2012). Hence, not only was there probable cause to arrest Fielden, but the submissions strongly suggest that the allegations of criminal neglect against her were largely true. See generally People v Williams, 7 NY3d 15 (2006).

In addition, the officers had probable cause to charge Fielden with resisting arrest, since they personally witnessed her behavior when they sought to detain and confine her. Upon the officers' search of Fielden's person and pocketbook, which was lawfully effected as an incident to her arrest (see People v Reid, 24 NY3d 615 [2014]), they had probable cause to charge her with criminal possession of a controlled substance in the seventh degree, even though it was later established that Fielden had a prescription for the subject codeine tablets. See People v Terry, 124 AD3d 309 (1st Dept. 2015).

Since the facts asserted by Fielden in the complaint defeat her contention that there was no probable cause for her arrest, and the documentary evidence submitted by the defendants conclusively shows that there was probable cause to arrest her for at least two of the offenses, the first and second causes of action, which respectively seek to recover for false arrest and false imprisonment, must be dismissed for failure to state a

cause of action.

B. NEGLIGENCE

To establish negligence, Fielden must prove that the defendants owed her a duty of care and breached that duty, and that the breach proximately caused her injuries. See Solomon v City of New York, 66 NY2d 1026 (1985); Wayburn v Madison Land Ltd. Partnership, 282 AD2d 301 (1st Dept. 2001). The amended complaint alleges that the defendant officers owed Fielden a duty to properly handcuff her. It also asserts that the officers were negligent in arresting Fielden without probable cause and imprisoning her without basis for 18 hours, and assaulting and battering her. Fielden further asserts that the officers had a duty to protect her in the police station from unwanted assaults by other prisoners, and that their failure to do so allowed a male prisoner to sexually assault her.

The allegation that the officers made Fielden's handcuffs too tight during her arrest is not properly asserted as a negligence claim, but must be analyzed under the Fourth Amendment standard of whether excessive force was used in arresting her. See Ostrander v State of New York, 289 AD2d 463 (2nd Dept. 2001); see also Burgos-Lugo v City of New York, 146 AD3d 660 (1st Dept. 2017).

The allegation that the defendant officers arrested and

confined Fielden without probable cause does not implicate common-law negligence, but is relevant only to the false arrest, false imprisonment, and Fourth Amendment causes of action.

The allegation that the defendant officers assaulted and battered Fielden are irrelevant to her claim that they were negligent, since New York does not recognize a cause of action to recover for "negligent assault." See Johnson v City of New York, 148 AD3d 1126 (2nd Dept. 2017); Smiley v North Gen. Hosp., 59 AD3d 179 (1st Dept. 2009). The court notes that Fielden does not assert a separate cause of action to recover for assault and battery, which are intentional torts inconsistent with an allegation of negligence. See Allstate Ins. Co. v Mugavero, 79 NY2d 153 (1992); Sphere Drake Ins. Co. v 72 Centre Ave. Corp., 238 AD2d 574 (2nd Dept. 1997).

However, Fielden does state a cause of action to recover for the negligence of the City and the defendant officers for failing to protect her from a sexual assault by another prisoner while she was being held in a police station. In her amended complaint, Fielden asserts that, while in custody inside the police station of the NYPD's 10th Precinct, she was handcuffed to a metal railing that was attached to a wall, and sitting on a bench, when a male prisoner named Thomas Ferguson sexually assaulted her. She asserts that, although Ferguson had been confined in a holding cell, police officers let him out of the

cell and failed to handcuff or restrain him, thus giving him the opportunity to approach and attack her.

A governmental agency operating any facility where prisoners or inmates are held, including local police stations, court houses, county or municipal jails, or state penitentiaries, owes a duty of care to a person in custody to protect him or her from reasonably foreseeable harm, including the harm from attack by a fellow arrestee or prisoner. "Having assumed physical custody" of prisoners and inmates, "who cannot protect and defend themselves in the same way as those at liberty can," the municipality or the State, as the case may be, owes a duty of care to safeguard prisoners and inmates, "even from attacks by fellow" prisoners or inmates. Sanchez v State of New York, 99 NY2d 247, 252 (2002). That duty does not, however, render the municipality or State an insurer of prisoner or inmate safety. "Like other duties in tort, the scope of the . . . duty to protect" prisoners and inmates "is limited to risks of harm that are reasonably foreseeable." Id. at 252-253.

The issue of whether it was foreseeable that another person in police custody would attack Fielden must await the completion of discovery. At the pleading stage, at least, Fielden's allegation that the City and the defendant police officers were negligent in failing to protect her from her fellow prisoner states a cause of action to recover for negligence.

Consequently, the court grants that branch of the City defendants' motion which is to dismiss Fielden's third negligence cause of action as against them, which alleges negligence, except insofar as that cause of action seeks to recover for the negligence of the City and the defendant police officers in failing to protect Fielden from the assault of a fellow prisoner.

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." Howell v New York Post Co., 81 NY2d 115, 121 (1993)

The cause of action to recover for intentional infliction of emotional distress must be dismissed as duplicative of other causes of action. This claim "fall[s] within the ambit of other traditional tort liability," specifically, the false arrest and false imprisonment causes of action. Fleischer v NYP Holdings, Inc., 104 AD3d 536, 538 (1st Dept. 2013); see Fischer v Maloney, 43 NY2d 553 (1978); Rodgers v City of New York, 106 AD3d 1068 (2nd Dept. 2013); Stuart v Porcello, 193 AD2d 311 (3rd Dept. 1993). Additionally, this claim does not allege any facts independent of those alleged in connection with the false arrest and false imprisonment causes of action, or allege distinct

damages. See Matthaus v Hadjedj, 148 AD3d 425 (1st Dept. 2017); Perez v Violence Intervention Program, 116 AD3d 601 (1st Dept. 2014); Fleischer v NYP Holdings, supra. The dismissal of the false arrest and false imprisonment causes of action for failure to state a claim requires dismissal of the cause of action to recover for intentional infliction of emotional distress. See generally Bacon v Nygard, 140 AD3d 577 (1st Dept. 2016).

The cause of action alleging intentional infliction of emotional distress must be dismissed for the additional reason that the plaintiff fails to "allege conduct that approaches the level of outrageousness or extremity necessary to support a claim of intentional infliction of emotional distress." Cecora v De La Hoya, 106 AD3d 565, 566 (1st Dept. 2013); see Howell v New York Post Co., supra; Brown v Sears Roebuck and Co., 297 AD2d 205 (1st Dept. 2002). Although the plaintiff alleges that the defendants falsely arrested her based on spurious charges, and knocked her to the floor when arresting her, such conduct, even if it occurred, is not so extreme, reckless, or outrageous to support a claim of intentional infliction of emotional distress. See Brown v Sears Roebuck and Co., supra.

Hence, the fourth cause of action, which seeks to recover for intentional infliction of emotional distress, must be dismissed.

D. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

As explained by the Court of Appeals,

> "It is well-settled that a person 'to whom a duty of care is owed . . . may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations' (Johnson v State of New York, 37 NY2d 378, 381, 334 NE2d 590, 372 NYS2d 638 [1975] [citations omitted]). A breach of the duty of care 'resulting directly in emotional harm is compensable even though no physical injury occurred' (Kennedy v McKesson Co., 58 NY2d 500, 504, 448 NE2d 1332, 462 NYS2d 421 [1983]) when the mental injury is 'a direct, rather than a consequential, result of the breach' (id. at 506) and when the claim possesses 'some guarantee of genuineness' (Ferrara v Galluchio, 5 NY2d 16, 21, 152 NE2d 249, 176 NYS2d 996 [1958])."

Ornstein v New York City Health & Hosps. Corp., 10 NY3d 1, 6 (2008). "[E]xtreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress." Taggart v Costabile, 131 AD3d 243, 253-254 (2nd Dept. 2015).

Inasmuch as the court declines to dismiss so much of the third cause of action as is premised upon the negligent failure to protect Fielden at the police station, and that event allegedly caused Fielden to sustain emotional distress as well as physical injury, there is no basis upon which to dismiss the fifth cause of action, which is to recover for negligent infliction of emotional distress.

E. FEDERAL CIVIL RIGHTS CLAIMS

A plaintiff may assert a cause of action pursuant to 42 USC § 1983 to recover damages arising from a violation of his or her

constitutional or federally guaranteed rights that was effected under color of state law. There is no vicarious liability under that statute against a municipality for the conduct of its officials and employees; rather, a claim under 42 USC § 1983 may only be successfully prosecuted against a municipality if it is alleged and proven that the implementation of an official policy, procedure, practice, pattern of conduct, or custom of the municipal government itself caused its officers to violate the plaintiff's constitutional rights. See Monell v New York City Dept. of Social Servs., 436 US 658 (1978); 423 S. Salina St. v City of Syracuse, 68 NY2d 474 (1986); De Lourdes Torres v Jones, supra; Ramos v City of New York, 285 AD2d 284 (1st Dept. 2001).

Since Fielden does not allege that the conduct of the officers was undertaken pursuant to such a municipal policy, procedure, practice, pattern of conduct, or custom, the sixth cause of action must be dismissed against the City of New York.

With respect to Fielden's claims against the individual officers, the Fourth Amendment to the United States Constitution protects her against the unreasonable search or seizure of her person or property. A viable cause of action pursuant to 42 USC § 1983 may be stated where it is alleged either that the seizure of a person was unreasonable by virtue of being made without probable cause--a so-called "federal false arrest" claim (see Burgos-Lugo v City of New York, 146 AD3d 660 [1st Dept. 2017])--or that the seizure of a person was unreasonable since it was

effected by the use of excessive physical force.

> "A claim that a law enforcement official used excessive force is to be analyzed under the objective reasonableness standard of the Fourth Amendment. '"The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight'" (Williams v City of New York, 129 AD3d 1066, 1066, 12 N.Y.S.3d 256, quoting Washington-Herrera v Town of Greenburgh, 101 AD3d 986, 989, 956 N.Y.S.2d 487; see Lepore v Town of Greenburgh, 120 AD3d 1202, 1203, 992 N.Y.S.2d 329). 'The determination of an excessive force claim requires an analysis of the facts of the particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [he or she] is actively resisting arrest or attempting to evade arrest by flight' (Vizzari v Hernandez, 1 AD3d 431, 432, 766 N.Y.S.2d 883 [internal quotation marks omitted])."

Boyd v City of New York, 149 AD3d 683 684-685 (2nd Dept. 2017) (some citations and internal quotation marks omitted); see Diaz v State of New York, 144 AD3d 1220 (3rd Dept. 2016); Davila v City of New York, 139 AD3d 890 (1st Dept. 2016); Holland v City of Poughkeepsie, 90 AD3d 841, 844 (2nd Dept. 2011).

Since Fielden has not sufficiently stated a cause of action to recover for state common-law false arrest and false imprisonment, she has no cause of action to recover under 42 USC § 1983 based solely on the fact that she was arrested, or based on her assertion that she was arrested without probable cause. However, since she makes independent allegations that the individual officers kicked her to the floor during the course of arresting her, that she was not resisting their attempts to arrest her, and that they affixed handcuffs too tightly to her

wrists after they had subdued her, she has stated a cause of action against those defendants to recover under 42 USC § 1983 based on their use of excessive force under the circumstances.

Fielden, however, has not stated a cause of action to recover for violations of her Fifth and Sixth Amendment rights. She has not alleged that she was caused to sustain any compensable injury by virtue of the officers' alleged failure t provide her with Miranda warnings (see Miranda v Arizona, 384 US 436 [1966]), since she does not allege that she was forced to be a witness against herself or denied the right to counsel. The failure to inform Fielden of her Miranda rights "does not, without more, result in § 1983 liability." Deshawn E. v Safir, 156 F3d 340, 346 (2nd Cir. 1998). While a criminal defendant has a constitutional right not to have a coerced statement used against him or her, or to be coerced to proceed without counsel, that defendant "does not have a constitutional right to receive Miranda warnings." Id.; see New York v Quarles, 467 US 649 (1984) (defendant does not have a constitutional right to receive Miranda warnings because warnings are only a procedural safeguard designed to protect a person's right against self-incrimination).

The remedy for a violation of the right against self-incrimination is "the exclusion from evidence of any ensuing self-incriminating statements" and "not a § 1983 action." Neighbour v Covert, 68 F3d 1508, 1510 (2nd Cir. 1995). The court notes that, in any event, the criminal charges against Fielden

were ultimately dismissed.

Fielden has not stated a cause of action to recover for violation of her Eighth Amendment rights, since the Eighth Amendment prohibition on the infliction of cruel and unusual punishments applies only to those individuals convicted of crimes. See Wilson v Seiter, 501 US 294 (1991); Tuff v Village of Yorkville Police Dept., 2017 US Dist LEXIS 12142 (ND NY, Jan. 30, 2017). Because the facts do not indicate that Fielden was convicted of a crime, the Eighth Amendment claim is inapplicable.

In addition, inasmuch as the Fourth Amendment provides an explicit textual source of constitutional protection for constitutional injuries arising from an arrest, Fielden has no basis to claim that the defendants deprived her of liberty without due process in violation of the Fourteenth Amendment, based upon the allegedly unlawful seizure of her person. See Albright v Oliver, 510 US 266 (1994). To the extent that she alleges that her Fourteenth Amendment rights to the continuing custody of her child were violated, she makes no allegations that the procedures employed in the Criminal Court or the Family Court were tainted or so fundamentally unfair as to deprive her of due process. See Manuel v City of Joliet, _____US_____, 137 S Ct 911 (2017). "[T]here is no constitutional violation (and no available § 1983 action) when there is an adequate postdeprivation procedure to remedy a random, arbitrary deprivation of liberty or property." Hellenic Am. Neighborhood

Action. Comm. v City of New York, 101 F3d 877, 881-882 (2nd Cir. 1996). The Criminal Court and Family Court proceedings provided Fielden with such postdeprivation procedures. Inasmuch as the Criminal Court proceeding terminated with a dismissal of the charges on speedy-trial grounds, and the Family Court proceeding was effectively terminated by the issuance of an adverse order of fact finding and a dismissal based on a lack of continuing emergency jurisdiction, any conclusion that the postdeprivation proceedings were unfair or tainted is unwarranted.

F. NEGLIGENT SUPERVISION BY FOSTER PARENTS

Where, as here, a local social services agency such as the ACS places a child in temporary or foster care based on a home study, that social services agency is judicially immune from claims that it negligently relied on a faulty home study, since the study was an integral part of the judicial decision making process. See Mosher-Simmons v County of Allegany, 99 NY2d 214 (2002). Moreover, municipalities and foster care agencies "cannot be vicariously liable for the negligent acts of foster parents, who are essentially contract service providers." Keizer v SCO Family of Servs., 120 AD3d 475, 476 (2nd Dept. 2014); see Blanca C. v County of Nassau, 103 AD2d 524 (2nd Dept. 1984), affd 65 NY2d 712 (1985).

However, municipal social services agencies and private foster care agencies "may be sued to recover damages for

negligence in the selection of foster parents and in supervision of the foster home." Keizer v SCO Family of Servs., supra, at 476; see Liang v Rosedale Group Home, 19 AD3d 654 (2nd Dept. 2005); Merice v County of Westchester, 305 AD2d 383 (2nd Dept. 2003). A plaintiff asserting such a claim must ultimately show that the social services or foster care agency had sufficiently specific knowledge or notice of the alleged dangerous conduct at the foster home that caused injury to the infant (see Keizer v SCO Family of Servs., supra), and the amended complaint alleges that the City and ACS, as well as NY Foundling, had such knowledge and notice. The resolution of that issue must await the completion of discovery, and does not defeat, at the pleading stage, the claim of negligence based thereon.

Consequently, the court denies that branch of the City defendants' motion which is to dismiss the seventh cause of action as asserted against the City and the ACS, which seeks to recover on behalf of the infant plaintiff for the negligence of those defendants in supervising the foster homes in which he was placed.

G. LOSS OF CONSORTIUM

The eighth cause of action, which seeks to recover for Fielden's loss of her child's consortium, must also be dismissed. Claims for loss of consortium must arise from tortious conduct (see Odell v Dalrymple, 156 AD2d 967 [4th Dept. 1989]), and are

asserted to recover for injury to the relationship between the injured plaintiff and the plaintiff who seeks to recover for the loss of consortium. See Buckley v National Freight, 90 NY2d 210 (1997). Generally, a parent's loss of a minor child's companionship is not compensable. See Valicenti v Valenze, 68 NY2d 826 (1986); Devito v Opatich, 215 AD2d 714 (2nd Dept. 1995); cf. Samela v Post Rd. Entertainment Corp., 100 AD3d 857 (2nd Dept. 2012) (a parent may recover for loss of a child's services upon submitting proof that child contributed to household income or paid a part of household expenses). Even if it were, Fielden's alleged loss of her son's companionship here did not arise from the injuries he allegedly sustained as a consequence of negligence in the supervision of the foster home, but solely because he was placed in foster care in the first place, thus temporarily interfering with Fielden's custody of the child.

As such, the cause of action seeking to recover for Fielden's loss of consortium is not viable.

H. MALICIOUS PROSECUTION

> "The common law also recognizes a cause of action for the separate tort of malicious prosecution, which protects the plaintiff's distinct "interest of freedom from unjustifiable litigation" (Broughton [v State of New York], 37 NY2d at 457). 'The elements of the tort of malicious prosecution 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' (id. at 457; see Smith-Hunter v Harvey, 95 NY2d 191, 195 [2000]; Martinez [v City of

> Schenectady], 97 NY2d at 84; Thaule v Krekeler, 81 NY 428, 433 [1880])."

De Lourdes Torres v Jones, supra, at 760.

> "Thus, while false arrest and malicious prosecution are 'kindred actions' insofar as they often aim to provide recompense for illegal law enforcement activities, each action 'protects a different personal interest and is composed of different elements' (Broughton, 37 NY2d at 456; see Marks v Townsend, 97 NY 590, 597-598 [1885]). And, the unique elements of malicious prosecution typically present a greater obstacle to recovery than the elements of false arrest; as we have said, 'The law . . . places a heavy burden on malicious prosecution plaintiffs' (Smith-Hunter, 95 NY2d at 195; see Munoz v City of New York, 18 NY2d 6, 9 [1966])."

Id.

Although, in the context of a malicious prosecution claim, the dismissal of a criminal action against the accused on speedy-trial grounds may be deemed a termination in his or her favor (see Smith-Hunter v Harvey, 95 NY2d 191 [2000]), this court has already determined that there was probable cause to proceed against Fielden on the two counts of endangering the welfare of a child and the count of resisting arrest. Moreover, Fielden has not alleged facts supporting her contention that the prosecution was commenced with actual malice. Actual malice "means that the defendant must have commenced the . . . criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served." Nardelli v Stamberg, 44 NY2d 500, 503 (1978); see also Du Chateau v Metro-North Commuter R.R. Co., 253 AD2d 128, 132 (1st Dept. 1999).

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of the defendants City of New York, Police Officer Kosarek, Police Officer Kennedy, Police Officer Gonzalez, and New York City Administration for Children's Services to dismiss the complaint insofar as asserted against them is granted to the extent that:

(a) the first, second, fourth, eighth, and ninth causes of action are dismissed as against those defendants;

(b) so much of the third cause of action as seeks to recover for the negligence of those defendants in handcuffing Louise Fielden, arresting her without probable cause, imprisoning her without basis for 18 hours, and in assaulting and battering her is dismissed as against those defendants;

(c) so much of the sixth cause of action as seeks to recover from the City of New York is dismissed;

(d) so much of the sixth cause of action as seeks to recover from the defendants Police Officer Kosarek, Police Officer Kennedy, and Police Officer Gonzalez pursuant to 42 USC § 1983 for violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights of Louise Fielden, and the Fourth Amendment right of Louise Fielden to be free from an arrest not based on probable cause, are dismissed against those defendants;

and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: 10/13/17

ENTER: _____
J.S.C.
HON. NANCY M. BANNON