Veras v City of New York
2018 NY Slip Op 33486(U)
December 13, 2018
Supreme Court, Bronx County
Docket Number: 308365/2011
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX – IAS PART26

LUIS A. VERAS,

Plaintiff,

-against-

Index No. 308365/2011

THE CITY OF NEW YORK, GAETNO FUNDARO, in his official and individual capacity, MICHAEL ERNST, in his official capacity, JOHN DOE #1 – JOHN DOE #12, in their official and individual capacities , the named "John Doe" being fictitious and intended to designate the additional Police Officers present during the unlawful arrest and detention of plaintiff,

MEMORANDUM DECISION/ORDER

Defendants.

HON. RUBEN FRANCO

This is an action alleging false imprisonment, assault, excessive force, negligent hiring, intentional infliction of emotional distress, negligent use of force, violation of New York State civil rights, violation of the New York State Constitution, and Monell claims (Monell v. Dept. of Social Serv. of City of New York, 436 U.S.658, 690-695 [1978]).

The Complaint alleges, *inter alia*, that on August 1, 2010, at approximately 10:45 P.M., New York City police officers in a patrol car, for no apparent reason, activated their lights and siren and stopped plaintiff's motor vehicle. Immediately after this stop, one of the officers stated to plaintiff that he was going to jail "for being a smart ass." When plaintiff requested that a sergeant be called to the scene, the officers began striking the driver's side window of plaintiff's vehicle with flashlights, a hammer, and their fists. They called for backup and approximately fourteen other police officers arrived on the scene, surrounded plaintiff's vehicle, screamed profanities at him, brandished weapons, and threatened to break his car window if he did not

open the door and exit his vehicle. Plaintiff informed the officers that he was going to use his cellular telephone to report this incident to a 911 operator. One of the police officers then discharged a toxic spray (plaintiff presumed it was pepper spray) into plaintiff's vehicle and face. Then the police officers intentionally shattered the driver's side window of plaintiff's vehicle. After the window was broken, plaintiff exited his vehicle in a peaceful and non-threatening manner, whereupon, the police officers grabbed plaintiff's arm, shoved him to the ground and handcuffed him. The officers kept plaintiff on the ground on his stomach by digging their knees very hard into his back, and standing on him. While on the ground, police officers kicked and struck plaintiff about his back, neck and head. Plaintiff was placed under arrest and forcibly removed to the 41st precinct. He requested, but was denied medical treatment. After spending several hours at the 41st precinct, he was taken to the Bronx Criminal Courthouse and arraigned.

The City of New York, Gaetno Fundaro ["Fundaro"] and Michael Ernst ["Ernst"] ("the defendants") move pursuant to CPLR § 3211(a)(7), to dismiss the Fourth, Fifth, Sixth, Seventh, Eight and Ninth causes of action. Defendants also move, pursuant to CPLR §§ 3215(c), 1024 and 306-b, to dismiss the Complaint against "JOHN DOES #1 – JOHN DOES #12.

The court first addresses plaintiff's assertion that the motion is one for summary judgment and is untimely as not having been made within 120 days of the filing of the Note of Issue. This contention lacks merit. First, the defendants moved under CPLR §§ 3211(a)(7), 3215(c), 1024 and 306-b, none of which require that a motion be made within 120 days of the filing of the Note of Issue. Parenthetically, if this was a motion for summary judgment, it would still be timely. Pursuant to CPLR§3212(a), a summary judgment motion must be made within120 days of the filing of the Note of Issue. Plaintiff filed his Note of Issue on March 17,

2017, therefore, defendants' motion was required to be made on or before July 14, 2017. CPLR§2211 provides that a motion is made when served. The defendants' motion was served on July 14, 2017, and thus, was timely.

On a motion to dismiss a Complaint pursuant to CPLR§3211(a)(7), a court must liberally construe the Complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (see Nonnon v. City of New York, 9 N.Y.3d 825, 827 [2009], citing Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]; Siegmund Strauss, Inc. v. East 149th St. Realty Corp., 104 A.D.3d 401 [1st Dept. 2013]).

Plaintiff's Fourth Cause of Action alleges that defendants maintain a policy, practice and custom of unreasonably seizing and unlawfully arresting New York City residents, in violation of 42 USC §1983, and the Fourth and Fourteenth Amendments to the United States Constitution. These Monell claims asserted against The City of New York under 42 USC §1983, must be dismissed. The court finds that plaintiff has not pled with sufficient specificity to establish a plausible claim under 42 USC § 1983 (see for example, Ashcroft v. Iqbal, 556 U.S. 662 [2009]; Walker v. City of New York, 974 F 2d 293 [2nd Cir 1992]). Plaintiff has failed to demonstrate that the actions taken by the City's police officers resulted from official municipal policy or custom (see Delgado v. City of New York, 86 A.D.3d 502 [1st Dept. 2011]; Leftenant v. City of New York, *supra,* at 597, citing Monell v. Dept. of Social Serv. of City of N.Y., 436 U.S. 658, 690-691[1978]. And a single incident of objectionable conduct committed by the police department is insufficient to establish the existence of a policy or custom for Section 1983 purposes (see Bouet v. The City of New York, 125 A.D.3d 539 [1st Dept. 2015]; Dillon v.

Perales, 181 A.D.2d 619 [1st Dept. 1992]), particularly when it involved only actors below the policy-making level (Ricciuti v. N.Y.C. Transit Authority, et al. , 941 F2d 119 [2nd Cir 1991]). Plaintiff has failed to create a triable issue of fact which would preclude dismissal of his Monell claims. For the same reasons, plaintiff also fails to state a cause of action pursuant to 42 USC § 1983, against the individual defendants (see Vargas v. City of New York, 105 A.D.3d 834, 837 [2nd Dept.]).

Plaintiff's Fifth Cause of Action alleges that the defendants conduct constitutes "a negligent use of force." A review of the allegations in the Complaint reveal claims of intentional and reckless acts, not negligence. In essence, plaintiff's claim is akin to one for negligent assault, and no such cause of action exists (see Cagliostro v. Madison Square Garden, 73 A.D.3d 534 [1st Dept. 2010]).

Plaintiff's Sixth Cause of Action alleges that the City of New York was negligent in its hiring, training, retention and supervision of police officers Fundaro and Ernst. A claim for negligent hiring, training, retention and supervision is not viable when a municipality's police officers were acting within the scope of their employment (see, Karoon v. New York City Transit Auth., 241 A.D.2d 323 [1st Dept. 1997]; Leftenant v. City of New York, 70 A.D.3d 596 [1st Dept. 2011]; Griffin v. City of New York, 67 A.D.3d 550 [1st Dept. 2009]). Here, the City of New York, in its Amended Answer acknowledges that Fundaro and Ernst were acting within the scope of their employment. Accordingly, plaintiff's claims of negligent training, negligent supervision and negligent retention and hiring, cannot stand.

Plaintiff's Seventh Cause of Action alleges that defendants violated the Civil Rights Law of the State of New York. The bare legal conclusions that defendants violated unspecified

sections of the New York State Civil rights Law is insufficient to sustain a cause of action (see Asgahar v. Tringali Realty, Inc., 18 A.D.3d 408 [2nd Dept. 2005]).

Plaintiff's Eighth Cause of action alleges that defendants violated Article 1, Section 12, of the New York State Constitution. In Brown v. State of New York, 89 N.Y.2d 172, 192 [1996]), the Court of Appeals recognized the availability of causes of action against the state for equal protection and search and seizure violations under Article 1, Sections 11 and 12 of the New York State Constitution. However, the applicability of Brown has been limited by both state and district courts to situations where plaintiffs have no alternative remedies that would protect their interests (see Vilkhu v. City of New York, 2008 WL 1991099 [EDNY], citing Coakley v. Jaffe, 49 F. Supp.2d 515, 628-29 [SDNY 1999]). Here, plaintiff has asserted tort claims under state law, however, his claim of a constitutional tort under Article 1, Section 12, of the New York State Constitution is not viable.

Plaintiff's Ninth Cause of Action against the City of New York alleges the tort of intentional infliction of emotional distress. Such claims are barred against governmental bodies, as a matter of public policy (see Dillon v. City of New York, 261 A.D.2d 34, 41 [1st Dept. 1999]; Lauer v. City of New York, 240 A.D.2d 543 [2nd Dept. 1997]), and it is undisputed that the police officers here were acting within the scope of their employment. Moreover, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (see Sheila C. v. Povich, 11 A.D.3d 120, 130-131 [1st Dept. 2004]). To survive a motion to dismiss, such extreme and outrageous conduct must be clearly alleged in the

Complaint (see Dillon v. City of New York, *supra)*. The Complaint here fails to allege any facts to support a cause of action for either intentional, or negligent, infliction of emotional distress.

The branch of defendants' motion pursuant to CPLR §§ 3215(c), 1024 and 306-b, to dismiss the Complaint against "JOHN DOES #1 – JOHN DOES #12, is granted. Plaintiff has abandoned his claims against the John Doe defendants by failing to oppose the parts of defendants' motion seeking dismissal of those claims (see Josephson v. Column Financial, Inc., 94 A.D.3d 479 [1st Dept. 2012]).

In summary, defendants' motion to dismiss the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth causes of action of the Complaint is granted, and these causes of action are dismissed. The branch of defendants' motion to dismiss the Complaint against the John Doe defendants is granted, and all claims against them are dismissed.

This constitutes the Decision and Order of the Court.

Dated: December 13, 2018

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO