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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:
HON. ANTHONY L. PARGA
JUSTICE

----------X PART 8

JOHN GANNON,

Plaintiff,

INDEX NO. 9526/06
XXX
MOTION DATE: 7/19/11
SEQUENCE NO. 003

-against-

THE COUNTY OF NASSAU and THE NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.

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Notice of Motion, Affs. & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, it is ordered that the motion by defendants for summary judgment, pursuant to CPLR §3212, dismissing plaintiff's complaint in its entirety, is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action sounding in false arrest, false imprisonment, malicious prosecution, assault and battery, negligence, slander, and intentional and negligent infliction of emotional distress. On March 25, 2005, plaintiff walked across the front of a Long Island Rail Road train which was stopped at the Island Park station. Plaintiff walked around the station's lowered gates and was met on the other side of the tracks by a Transit Officer who issued plaintiff a summons for this violation in the form of a bench appearance ticket. Plaintiff appeared at Nassau County District Court in Hempstead on June 13, 2005, at which time he entered a plea of not guilty through his court-appointed counsel. Initially, the judge was going to release the plaintiff on his own recognizance, but Nassau County Assistant District Attorney Theresa Aiello (hereinafter referred to as "ADA Aiello") advised the judge, Honorable Bonnie Chaikin, that there was a warrant outstanding for his arrest for the identical offense in 2002. Accordingly, ADA Aiello requested that bail be set at two-hundred and fifty dollars. The plaintiff denied these allegations, but Judge Chaikin set bail at fifty dollars ($50.00).

ADA Aiello based her representation to the court that the plaintiff had an outstanding warrant from a failure to appear for a court appearance in 2002 for the identical offense upon a name check in the Nassau County District Attorney's computer database on May 4, 2005. The database is called "SSDA." The information that ADA Aiello reviewed from this database, however, pertained to a John T. Gannon, born on April 26, 1968, and not to the plaintiff, John M. Gannon, born on December 25, 1958. ADA Aiello testified at her deposition that she did not recall comparing the information on the plaintiff's summons to the information in the SSDA database. Accordingly, she did not tell the judge that the person on the SSDA database had a different date of birth and different middle initial than the plaintiff herein. While the plaintiff testified at his deposition that ADA Aiello claimed that the person whose local record she obtained had the same name and date of birth as the plaintiff, there is no evidence in the court record to support same.

Plaintiff was unable to post the fifty dollar sum for bail, so he was handcuffed by the court officers and removed from the courtroom. Plaintiff was then brought downstairs to the holding cell in the court where he was searched, pursuant to the Nassau County Sheriff's Department guidelines. Plaitniff alleges that during the fifteen second routine search, his genitals were touched. He also alleges that he and other inmates were repeatedly verbally threatened. Plaintiff was then transported to the Nassau County Correctional Center, where he was retained until his release a few hours later, sometime around 4:00-5:00 on the same day, when his wife posted the $50 bail.

On June 15, 2005, plaintiff pleaded guilty to the charge he was prosecuted for, walking around the lowered gates at a rail road crossing while the gates were flashing and the bells were ringing.

ADA Aiello testified at her deposition that at the time of plaintiff's arraignment, she had been working for the Nassau County District Attorney for two months. She received some training in arraignments, which primarily involved observing them. Her supervisor, Khristie Hauck, testified at her deposition that she encouraged the practice of using information from their office database in bail applications. ADA Hauck testified that the SSDA database reviews are normally done only with the person's last and first names, and that dates of birth are not used to corroborate that the database refers to the same person. There are no safeguards in place to ensure that the information gleaned from these SSDA database reviews pertains to the correct individual.

Defendants move for summary judgment on the grounds that they are immune from liability for plaintiff's causes of action, as absolute immunity extends to the acts of ADA Aiello.

A district attorney is immune from civil liability for official acts performed in the pursuit of a criminal prosecution, and judicial immunity extends to all judges and encompasses all judicial acts, even if the acts are alleged to have been done maliciously. *(Matter of Covillion v. Town of New Windsor, 123 A.D.2d 763 (2d Dept. 1986); Whitmore* v. City of New York, 80 A.D.2d 638, 436 N.Y.S.2d 323 (2d Dept. 1981), *lv dismissed*, 54 N.Y.2d 753 (1981)). Prosecutors in New York are immune from liability for both investigation and actual prosecution. (*Rodrigues v. City of New York*, 193 A.D.2d 79 (1st Dept. 1993), *citing Schanbarger v. Kellogg*, 35 A.D.2d 902, 315 N.Y.S.2d 1013 (3d Dept. 1970), *motion to dismiss appeal granted,* 29 N.Y.2d 649, *cert denied,* 405 U.S. 919 (1972). A prosecutor's activities which are intimately associated with the judicial phase of the criminal process, including initiating a prosecution and presenting the People's case, are functions in which absolute immunity apply with full force. (*Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S.Ct. 984, 994 - 996 (1976)). Prosecutors also enjoy a qualified immunity when acting in an investigative or administrative capacity. (*Rodrigues v. City of New York*, 193 A.D.2d 79 (1st Dept. 1993); *Matter of Covillion v. Town of New Windsor, 123 A.D.2d 763 (2d Dept. 1986)*).

As ADA Aiello was acting in her official capacity during the judicial phase of the criminal process, she is immune from liability for all claims in this action. In addition, as the judge's order remanding the plaintiff to confinement pending the posting of fifty dollars bail was issued by a court with proper jurisdiction. As such, everyone connected with the matter, including the County of Nassau and the Nassau County District Attorney's Office, is protected from liability for all claims herein. *(Minicozzi v. City of Glen Cove*, 97 A.D.2d 815, 468 N.Y.S. 2d 689 (2d Dept. 1983)(holding that the prosecutor and his employer, the county, were fully protected from civil liability under the doctrine of absolute immunity where the plaintiff alleged that the prosecutor failed to thoroughly investigate the matter, resulting in an unnecessary delay of the ultimate dismissal of the criminal charges against the plaintiff, as the prosecutor's activities were intimately associated with the judicial phase of the criminal process and were performed by the prosecutor in his quasi-judicial capacity,); *see also, Johnson v. Kings County District Attorney's Office*, 308 A.D.2d 278 763 N.Y.S.2d 635 (2d Dept. 2003)).

It is also well settled that "where a facially valid order issued by a court with proper jurisdiction directs confinement, that confinement is privileged and everyone connected with the matter is protected from liability for false imprisonment." (*Holmberg v County of Albany*, 291 AD2d 610, 612 (3d Dept. 2002), *lv denied* 98 NY2d 604 (2002) [citation omitted]; *see also Nuernberger v State of New York,* 41 N.Y.2d 111, 390 N.Y.S. 2d 904 (1976); *Nastasi v State of New York*, 275 App Div 524 (1949), *affd* 300 NY 473 (1949)). Likewise, an arrest and

imprisonment are privileged where the arrest is "made pursuant to a warrant valid on its face and issued by a court having jurisdiction of the crime and person . . . and this is so even though the process may have been erroneously or improvidently issued." (*Boose v City of Rochester*, 71 AD2d 59, 66 (4th Dept.1979); *Middleton v State of New York*, 54 AD2d 450 (3d Dept. 1976, *affd* 43 NY2d 678 (1977); *Broughton v State of New York*, 37 NY2d 451, 457-458); *Nazario v. State of New York,* 24 Misc.3d 443, 449 (N.Y. Ct. of Claims 2009).

The Court notes that the plaintiff was not arrested herein, he was remanded into custody for a charge to which he eventually pled guilty after being unable to post the fifty dollar ($50.00) bail set by Judge Chaikin. The order by which Judge Chaikin remanded the plaintiff and set a nominal bail amount was issued with proper jurisdiction over the plaintiff. As such, his imprisonment is privileged and the plaintiff therefore cannot maintain his causes of action for false arrest and false imprisonment herein.

Further, with respect to plaintiff's claims against the defendants sounding in negligence and gross negligence, a plaintiff seeking damages for an injury resulting from a wrongful arrest may not recover under broad principles of negligence, but must proceed by way of the traditional remedies of false arrest and imprisonment. (*Johnson v. Kings County District Attorney's Office*, 308 A.D.2d 278, 763 N.Y.S.2d 635 (2d Dept. 2003)).

Additionally, claims of false imprisonment, false arrest, and malicious prosecution do not lie where the defendants had probable cause for the plaintiff's arrest. (*See, Grant v. Barnes & Noble, Inc.*, 284 A.D.2d 238, 726 N.Y.S.2d 543 (1st Dept. 2001). Probable cause can exist even where an arrest is based on mistaken information, so long as the arresting officer acted reasonably and in good faith and relied on that information. (*Bernard v. United States*, 25 F.3d 98, 102 (2d Cir. 1995); *Colon v. City of New York*, 60 N.Y.2d 78 (1983)). Probable cause consists of such facts and circumstances as would lead a reasonable and prudent person in like circumstances to believe that an offense has been or is being committed, and that the defendant committed it or is committing that offense. *(People v. Bigelow*, 66 N.Y.2d 417 (1985); *Colon v. City of New York*, 60 N.Y.2d 78 (1983)). Based upon the evidence presented herein, ADA Aiello had probable cause to believe that the plaintiff had an outstanding warrant for the same offense dating back to 2002, even though the SSDA search was later discovered to pertain to a different individual by the same name. Accordingly, even if there was no immunity afforded to the defendants, the defendants could not be held liable for the false arrest, false imprisonment or malicious prosecution causes of action asserted herein.

Plaintiff also cannot sustain a cause of action against the defendants for intentional infliction of emotional distress. A cause of action for intentional infliction of emotional distress

cannot be brought against a governmental entity, but is triable only when there are named defendants. (*Lauer v. City of New York*, 240 A.D.2d 543, 659 N.Y.S.2d 57 (2d Dept. 1977); *Wheeler v. State of New York*, 104 A.D.2d 496, 479 N.Y.S.2d 244 (2d Dept. 1984)).

Further, both causes of action for intentional and negligent infliction of emotional distress must be supported by allegations that "a defendant's conduct 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 society." (*Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 799 N.Y.S.2d 452 (1st Dept. 2005); *Dillon v. City of New York*, 26 A.D.2d 34, 704 N.Y.S.2d 1 (1st Dept. 1999); *Lauer v. City of New York*, 240 A.D.2d 543, 659 N.Y.S.2d 57 (2d Dept. 1977)). In order to sustain a cause of action for negligent infliction of emotional distress against the municipal defendants herein, the plaintiff must be able to demonstrate that the defendants breached a special duty owed to the plaintiff which unreasonably endangered the plaintiff's physical safety. (*Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843 (1984); *Lauer v. City of New York*, 240 A.D.2d 543, 659 N.Y.S.2d 57 (2d Dept. 1977); *Slyvester v. City of New York*, 23 Misc.3d 1139(A), 889 N.Y.S.2d 508 (N.Y.Cty. Sup. Ct. 2009)). To sustain liability against a municipality, the duty breached must be more than that owed to the public generally. (*Lauer v. City of New York*, 240 A.D.2d 543, 659 N.Y.S.2d 57 (2d Dept. 1977)). As there is no evidence of same herein, the plaintiff cannot sustain a cause of action sounding in negligent infliction of emotional distress.

Plaintiff's causes of action sounding in slander and defamation against the defendants herein also cannot be sustained. Statements made by parties, attorneys, and witnesses in the course of judicial or quasi-judicial proceedings are absolutely privileged, notwithstanding motive, so long as they are material and pertinent to the issues to be resolved in the proceeding. (*55th Management Corp. V. Goldman*, 1 Misc.3d 239, 768 N.Y.S.2d 747 (N.Y. Cty. Sup. Ct. 2003); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.2d 136, 615 N.Y.S.2d 410 (2d Dept. 1994); *Mosesson v. Jacob D. Fuchsberg Law Firm*, 257 A.D.2d 384, 683 N.Y.S.2d 88 (1st Dept. 1999)). As the statements made by ADA Aiello were made in the course of judicial proceedings, they are privileged, and the defendants herein cannot be subject to liability for same.

With respect to plaintiff's allegations sounding in assault and battery, plaintiff bases these claims on the bodily search and unwanted physical touching by County of Nassau employees before plaintiff was transported to the Nassau County Correctional Center. One who seeks to conduct a lawful search in a jail has the right to perform a level of intrusion that is sufficient to maintain security and order in a prison and prevent the introduction of contraband into the prison population. (*People v. Sanders*, 140 Misc.2d 544, 531 N.Y.S.2d (Bronx Cty. Sup. Ct. 1988);

People v. McKanney, 56 A.D.3d 1049, 867 N.Y.S.2d 578 (3d Dept. 2008). The search of persons entering a jail facility is similar to a border search; that is, in both instances, the aim is to prevent contraband and other prohibited material from entering. (*Black v. Amico*, 387 F.Supp. 88 (DCNY 1974)). The plaintiff herein was subjected to a fifteen second search, by a same sex court officer wearing gloves, prior to his transport to the Nassau County Correctional Center. This type of search was a standard procedure of the County of Nassau. There are no further allegations of "unwanted physical contact and touching" made by the plaintiff. Accordingly, plaintiff is unable to maintain an action for assault and battery against the defendants herein.

Lastly, a claim of inadequate training or supervision will indicate municipal liability only when the failure to train amounts to deliberate indifference to the rights of persons with whom municipal employees come into contact. (*Johnson v. Kings County District Attorney's Office*, 308 A.D.2d 278, 763 N.Y.S.2d 635 (2d Dept. 2003)). There is no such evidence here. ADA Aiello was trained to do arraignments and performed the name-based search of the Nassau County District Attorney's SSDA database according to the procedures of the department. Both ADA Aiello and her supervisor testified to same at their depositions. Additionally, deliberate indifference requires city policymakers to make a deliberate choice from among various alternatives not to train its employees, and there was no such evidence of same herein. (*Id.*). Accordingly, there is no cause of action for inadequate training or supervision.

In opposition, plaintiff has failed to raise any triable issues of fact sufficient to defeat the defendants' prima facie showing of entitlement to summary judgment. (*See, Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). Accordingly, defendants' motion for summary judgment is granted, and plaintiff's complaint is hereby dismissed.

Dated: September 14, 2011

Anthony L. Parga, J.S.C.

ENTERED
SEP 16 2011
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COUNTY CLERK'S OFFICE

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