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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 5

Zweifach, Santiquel

- v -

City of N.Y.

INDEX NO. 115896/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. 123

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12-1-11

DEC 0 1 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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SANMIGUEL ZWEIFACH,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

----------x

Index No. 115896/08

Motion Subm.: 9/13/11
Motion Seq. No.: 002

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For City:
Lynn M. Leopold, ACC
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By notice of motion dated May 27, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment as to liability and scheduling an immediate trial on damages. City opposes and, by notice of cross motion dated June 24, 2011, moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it.

I. BACKGROUND

On August 16, 2008, plaintiff was arrested and charged with possessing marijuana, which may be disposed by an adjournment in contemplation of dismissal (ACD) pursuant to Criminal Procedure Law § 170.56. (Affirmation of Ronald Saffner, Esq., dated May 27, 2011 [Saffner Aff.]). On April 17, 2008, a New York City Police Department (NYPD) sergeant filled out a Fugitive Affidavit, stating therein that plaintiff had been charged in New Jersey with violating probation and forging an instrument and that a warrant had been issued against him there; the

affidavit sets forth the name and telephone number of a contact person in New Jersey. (Saffner Aff., Exh. B). The warrant is dated December 10, 2003 and provides that a Ruben Zweifach, living at 2110 Arthur Avenue, Bronx, New York, violated probation as ordered by the Superior Court in Bergen County, New Jersey. (Saffner Aff., Exh. A).

When plaintiff was arraigned on April 17, 2008, plaintiff's attorney requested an ACD at which point the Assistant District Attorney (ADA) stated that plaintiff had a fugitive warrant from New Jersey. The court then issued an ACD for plaintiff's marijuana charge but upon plaintiff's execution of an extradition waiver, remanded him to custody until August 30, 2008. (Affirmation of Lynn M. Leopold, ACC, dated June 24, 2011 [Leopold Aff.], Exh. H). On April 29, 2008, plaintiff was released from custody. (Affidavit of Sanmiguel Zweifach, dated May 27, 2011).

On May 29, 2008, plaintiff served City with a notice of claim in which he asserted a claim for false imprisonment on the ground that he had not been released from custody after completion of a pending criminal case and was retained in custody for 13 days without legal basis. (Leopold Aff., Exh. A).

On September 25, 2008, plaintiff testified at a 50-h hearing, as pertinent here, that after his arrest his attorney informed him that he would be offered an ACD but that when he appeared before the criminal court judge, he was told that he was going to be held in custody pursuant to the New Jersey warrant. Plaintiff told his attorney that a mistake had been made, but his attorney advised him to sign an extradition waiver in order to be released from custody earlier. On April 30, 2008, when plaintiff again appeared before the judge, an ADA told the judge that a mistake had been made and the warrant did not apply to plaintiff. (*Id.*, Exh. E).

On or about October 12, 2008, plaintiff served City with his summons and complaint, in which he alleged claims for negligence and violations of his state and federal civil and constitutional rights. (*Id.*, Exh. C). On or about December 26, 2008, City served its answer. (*Id.*, Exh. D).

At an examination before trial held on January 13, 2010, Edward Beurnier, a NYPD detective, testified that on August 16, 2008 he arrested plaintiff for possession of marijuana, a B misdemeanor. He did not check to see if any warrants had been issued for plaintiff as plaintiff's arrest was a standard misdemeanor arrest and it was not standard operating procedure to check for warrants in such a situation. (*Id.*, Exh. G).

II. CONTENTIONS

Plaintiff alleges that City negligently failed to ascertain or investigate whether the warrant had been issued against him, asserting that it is clear from the face of the warrant that it referred to someone else. (Saffner Aff.).

City contends that as the decision to remand plaintiff to custody for the warrant was made by the criminal court judge and/or District Attorney's office and not by any City employee, it cannot be held liable for false imprisonment. It also denies that there is a claim for negligent investigation under New York State law or that plaintiff may maintain such a claim absent asserting same in his notice of claim, and asserts that plaintiff's federal claims are conclusory and insufficient. (Leopold Aff.).

In opposition, plaintiff maintains that the NYPD was required to verify whether a warrant had been issued against him and failed to do so, and observes that the judge's decision to remand him was based upon NYPD's failure. Plaintiff also claims that the allegations in his notice of

claim sufficiently set forth his claim against City. (Affirmation of Ronald Saffner, Esq., dated July 18, 2011).

In reply, City reiterates its prior arguments. (Reply Affirmation, dated Aug. 3, 2011).

III. ANALYSIS

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562).

While there may be no cognizable claim for negligent investigation, the allegations underlying plaintiff's claim are appropriately interposed in his false imprisonment claim. (*Guntlow v Barbera*, 76 AD3d 760 [3d Dept 2010], *lv denied* 15 NY3d 906; *Santiago v City of Rochester*, 19 AD3d 1061 [4th Dept 2005], *lv denied* 5 NY3d 710; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278 [2d Dept 2003]).

The elements of a false imprisonment claim are that: (1) the defendant intended to

confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]).

A confinement is privileged when made pursuant to an arrest under valid process or warrant issued by a court with appropriate jurisdiction. (*Davis v City of Syracuse*, 66 NY2d 840 [1985]). However, when a warrant may be applicable to two or more persons, the arresting officer is "required to exercise reasonable care in assuring that he has arrested the person intended to be apprehended under the warrant." (*Id.* at 842; *see also Cruz v City of New York*, 33 AD3d 394 [1st Dept 2006] [evidence supported jury's finding that City failed to exercise reasonable care in ascertaining that plaintiff was person intended to be apprehended under bench warrant as City Department of Criminal Justice failed to respond to fingerprint inquiry, plaintiff's personal information differed from that of fugitive to whom warrant actually applied, plaintiff provided information that was not checked, and photograph of fugitive not checked]; *Doumbia v City of New York*, 285 AD2d 623 [2d Dept 2001] [evidence that Amtrak police officers did not use reasonable care in arresting plaintiff as his appearance did not match description on warrant]).

Here, as the warrant did not reflect plaintiff's exact name and it was thus not obvious from the face of it that it applied to plaintiff, the NYPD was required to exercise reasonable care in ascertaining that plaintiff was identified as the person intended to be apprehended under the warrant. However, neither party offers any evidence or explanation as to why the NYPD concluded that the warrant applied to plaintiff or what investigation, if any, it conducted. Thus, it cannot yet be determined whether City employees acted or did not act with reasonable care in

determining that plaintiff was the person to whom the warrant applied, and, therefore, neither party has established that no triable issues remain. (*See Dennis v State of New York*, 96 AD2d 1143 [4th Dept 1983] [whether officers exercised due diligence in arresting plaintiff pursuant to warrant presented triable issue of fact]; *Williams v City of Buffalo*, 72 AD2d 952 [4th Dept 1979], *lv denied* 49 NY2d 799 [1980] [determination of due diligence generally jury issue]).

Moreover, while City contends that the decision to remand plaintiff was made by the court and/or the ADA, it does not address the fugitive affidavit filled out by an NYPD employee, which information was apparently conveyed to the court and the ADA. Thus, there is evidence that a City employee provided information linking plaintiff to the warrant, which the court then relied on in deciding to remand plaintiff.

Finally, as plaintiff does not oppose dismissal of his federal claims, they are dismissed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that defendant's motion for summary judgment is granted only to the extent of dismissing plaintiff's federal claims.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 1, 2011
New York, New York

DEC 0 1 2011

FILED

DEC 05 2011

COUNTY CLERK'S OFFICE
NEW YORK