

**Hinds v City of New York**

2013 NY Slip Op 31877(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 400284/2011

Judge: Kathryn E. Freed

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

HON. KATHRYN FREED  
**PRESENT:** JUSTICE OF SUPREME COURT  
*Justice*

**PART** 5

Index Number : 400284/2011  
HINDS, RUSSELL  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT *CALL # 32*

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**


**FILED**

AUG 13 2013

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 8-8-13  
AUG 08 2013

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

- 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

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

-----X  
RUSSELL HINDS,

Plaintiff,

-against-

DECISION/ORDER

Index No. 400284/2011  
Seq. No. 001

THE CITY OF NEW YORK, and THE NEW YORK  
CITY POLICE DEPARTMENT,

Defendants.

-----X  
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....4.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
OTHER.....(Amended Cross-Motion).....	.....3.....

**FILED**

**AUG 13 2013**

COUNTY CLERK'S OFFICE  
NEW YORK

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR§ 3212, granting summary judgment upon the grounds that there are no triable issues of fact regarding the liability of defendant The City of New York and The New York City Police Department, (“collectively known as “the City”). The City cross-moves for an Order pursuant to CPLR§ 3211, dismissing the Complaint and/or pursuant to CPLR§ 3212 for summary judgment.

After a review of the papers presented, all relevant statutes and case law, the Court denies both the motion and cross-motion.

Factual and procedural background:

According to plaintiff, on May 6, 2009, at or near John Street and Broadway in New York County, he was standing in line at a news stand, awaiting his turn to purchase a lottery ticket when two males approached him from behind and asked him what he had in his pocket. Plaintiff did not respond. When he was asked the same question a second time, he responded that he had nothing in his pocket. Plaintiff then realized that these males were in fact police officers, despite the fact that they had failed to display their respective badges. When plaintiff asked to see a supervisor, the males handcuffed him and proceeded to pat him down, including reaching into his pockets. As a crowd began to form, the officers took plaintiff across the street to continue searching him. Upon searching his pockets, they found and removed a wallet and a pen.

While still handcuffed, the police officers flicked plaintiff in the face with money removed from his wallet, asking him if said money was his. They spoke to him in an “aggressive tone” and were being “physically rough” with him. Some minutes later, a squad car arrived and transported plaintiff to the precinct wherein the arresting officers proceeded to search his backpack. They discovered plaintiff’s work knife, a pair of goggles and a pair of ear plugs inside. Plaintiff alleges that at the time of his arrest, he was employed by KSW Services as a steam fitter, and his duties in that capacity included installing heating systems and heating pipes. He used the knife as a tool to perform said duties. Once plaintiff’s knife was recovered, he was placed in a holding cell for approximately four to five hours before being transported to Central Booking. Plaintiff was charged with one count of Criminal Possession of a Weapon, and one count of Resisting Arrest. He was arraigned and released at 2:45 p.m., the following day. On December 10, 2009, said charges were

ultimately dismissed when plaintiff was offered and accepted an Adjournment in Contemplation of Dismissal (“ACD”). It is important to note that in his Verified Complaint, plaintiff alleges that the charges were dismissed on June 9, 2010, which was when the ACD was dismissed and the matter, presumably, sealed.

According to the City, after the arresting officers, P.O. Emmanuel De Jesus and P.O. David Poggiolo, approached plaintiff to inquire about what appeared to be a gravity knife clip hanging from the outside of the small pocket of his carpenter’s pants. When they asked him what was in his pocket two times, plaintiff responded both times, “It don’t matter what I have in my pocket. You’re not getting to it.” P.O. De Jesus testified that when he attempted to frisk the side of plaintiff’s pants wherein the gravity knife clip appeared to be, plaintiff shoved his hand away, and began calling out to a developing crowd, to help him. Thereafter, plaintiff served an untimely notice of claim on or about February 19, 2010, alleging actions for false arrest, false imprisonment, and violation of due process and constitutional rights emanating from his May 6, 2009 arrest. Plaintiff appeared for a General Municipal Law §50-h hearing on April 13, 2010. He then commenced the instant action on or about October 13, 2010 via service of a Summons and Complaint.

Positions of the parties:

Plaintiff argues that he was arrested without a warrant, and because the “frisk” merely turned up a wallet and pen, no probable cause existed to place him under arrest. He argues that when an arrest is made without a warrant, a presumption arises that it was unlawful, and the burden of proving justification is assumed by defendant. Additionally, plaintiff argues that he has sufficiently established all the elements to establish and sustain a claim for false imprisonment in his complaint.

Therefore, summary judgment is warranted because there are no issues of material fact.

The City responds that plaintiff's claims of false arrest and false imprisonment necessitate dismissal because his notice of claim was untimely, in that it was not filed within the statutorily mandated 90 days pursuant to GML§ 50-e (1)(a). The City argues that plaintiff also failed to attempt to serve a late notice of claim. It also argues that a cause of action for false arrest and/or false imprisonment accrues when a claimant is released from custody. Thus, since plaintiff was released on May 7, 2009, he was required to file a notice of claim by August 5, 2009, which he failed to do. Defendant also argues that since plaintiff served a late notice of claim on February 19, 2010, without leave of court, it is regarded as a nullity.

Defendant also argues that plaintiff's claims for malicious prosecution and negligent hiring, retention and training also necessitate dismissal for non-compliance with GML§ 50-e, in that plaintiff's failure to allege a malicious prosecution theory in his notice of claim, precludes him from alleging same in his complaint. Defendants further argue that a claim for constitutional violations is subject to heightened pleadings standards, and plaintiff's claim is "impermissibly vague." It argue that in his Second Cause of Action, plaintiff fails to adequately plead a claim pursuant to 42 U.S.C. §1983, in that he fails to allege a municipal pattern of practice under which his constitutional rights were allegedly violated.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" ( *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1<sup>st</sup> Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64

N.Y.2d 851, 853 [1985] ). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact ( see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1<sup>st</sup> Dept. 2008] ). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” ( *Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985] ). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied ( *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1<sup>st</sup> Dept. 2002] ).

In the case at bar, plaintiff served a notice of claim upon the City on February 19, 2010, asserting false arrest, false imprisonment, and violations of his due process and constitutional rights emanating from his arrest on May 6, 2009. As a threshold matter, the Court agrees that plaintiff’s causes of action alleging false arrest and false imprisonment warrant dismissal based on the fact that his notice of claim was not filed within the statutorily mandated 90 days. A notice of claim must be served within 90 days after the claim arises ( see GML § 50-e[1][a] ), though a court may grant the claimant leave to serve a late notice of claim if leave is sought within one year and 90 days of accrual ( see GML§ 50-e[5] ). False arrest and unlawful imprisonment claims accrue upon the claimant’s release from custody ( see *Nunez v. City of New York*, 307 A.D.2d 218, 219 [1<sup>st</sup> Dept. 2003]; *Bumbury v. City of New York*, 62 A.D.3d 621 [1<sup>st</sup> Dept. 2009] ). Here, plaintiff was released from custody on May 7, 2009. Therefore, he was required to serve a Notice of Claim by August 5, 2009. However, he filed a late notice of claim on February 10, 2010, beyond the mandated 90 days,

and also without leave of court. Therefore, said notice of claim is deemed a legal nullity.

Plaintiff's Complaint, Second and Third Causes of Action states in pertinent part that:

The defendant, through its agent(s), servant(s) and/or employee(s), acted under color of law, i.e. of the statutes, ordinances, regulations, customs and usages, of the United States of America, the State of New York and the City of New York, in the unlawful arrest, prosecution and imprisonment of the plaintiff. The defendant's actions deprived plaintiff of his rights, privileges, and immunities secured to him by the Constitution of the United States of America and of the laws thereunder, pursuant to Title 42 U.S.C. § § 1981, 1983 and 1985 and to 28 U.S.C. § 1342.....

The defendants, through its [sic] agent(s), servant(s), and/or employees, was negligent in the screening, training and supervision of its agent(s), servant(s) and/or employee(s) and failed to take all steps proper and necessary to prevent the occurrence giving rise to this action.

As a result of the defendant's negligence in the screening, training and supervision of its agent(s), servant(s) and/or employee(s) of the NYPD and others who unlawfully arrested, falsely swore a complaint against, unlawfully imprisoned and violated the civil rights of the plaintiff, the plaintiff suffered said unlawful arrest, unlawful imprisonment and violation of his civil rights.

By reason of the foregoing, the plaintiff has been damaged by the defendant, through no culpable conduct of his own, in a sum exceeding the jurisdictional limits of all lower courts which would otherwise have jurisdiction therein.

While a municipality cannot be held liable under 1983 on the theory or *respondeat superior*, it can be held responsible for a deprivation of constitutional rights caused by its own official policy or custom ( see *Monell v. Dept. of Social Servs. of City of New York*, 436 U.S. 658, 690-694 [1978]); *Ramos v. City of New York*, 285 A.D.2d 284, 302 [2001]; *Leftenant v. City of New York*, 70 A.D.3d 596 [1<sup>st</sup> Dept. 2010]; *Leung v. City of New York*, 216 A.D.2d 10 [1<sup>st</sup> Dept. 1995] ). "Section 1983 is only a grant of a right of action; the substantive right giving rise to the action must come from another source" ( *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 [2d Cir. 1995] ).



As such, the City's dispute centers on the adequacy of plaintiff's Second and Third Causes of Action, as those are the only allegations seemingly sounding in municipal liability pursuant to *Monell*. According to *Bumbery v. City of New York*, 62 A.D.3d 621, 634-5 [1<sup>st</sup> Dept. 2009], "a municipality's failure to train or supervise its employees can be considered tantamount to an official policy or custom where 'in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need' ( *City of Canton, Ohio v. Harris*, 489 U.S. 278, 390 [1989]; see *Johnson v. Kings County Dist. Attorney's Off.*, 308 A.D.2d 278, 294 [2003] ).

To support a failure to train or supervise claim, a plaintiff must demonstrate that: (1) the policymakers know to a moral certainty that their employees will encounter a given situation; (2) the situation either presents the employee with a difficult choice of the sort that training or supervision would make less difficult or there is a history of employees mishandling the situation; and (3) the wrong choice by the employee will frequently result in the deprivation of a person's constitutional rights ( see *Johnson*, 308 A.D.2d at 293-294); *Walker v. City of New York*, 974 F.2d 293 [2d Cir. 1992], *cert denied* 507 U.S. 961 [1993] )."

In the case at bar, the Court finds that there exist issues of material fact with regard to the *Monell* claim, that would be more appropriate for a jury's determination.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City's motion for summary judgment is granted to the extent that only the causes of action of false arrest and false imprisonment are dismissed, and the §1983 claim remains; and it is further

ORDERED that plaintiff's motion for summary judgment is also denied; and it is further  
ORDERED that this constitutes the decision and order of the Court.

DATED: August 8, 2013

AUG 08 2013

ENTER:



Hon. Kathryn E. Freed  
HON. <sup>J.S.C.</sup> KATHRYN FREED  
JUSTICE OF SUPREME COURT

**FILED**

AUG 13 2013

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