SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JASON ROSE,

Plaintiff(s),

- against -

CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICER TERRY BURNS (SHIELD NO. 001168) OF BX TC AND POLICE OFFICER CAROLYN ROMERO (SHIELD NO. 024619) OF THE 43RD PRECINCT,

Defendant(s).

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DECISION AND ORDER

Index No: 307162/12

In this action for, *inter alia*, alleged false arrest, false imprisonment, and excessive force, defendants move seeking an order granting them summary judgment pursuant to CPLR § 3212, thereby dismissing the complaint. Specifically, defendants aver that they are entitled to summary judgment with respect to (1) plaintiff's causes of action for false arrest, false imprisonment, and malicious prosecution insofar as, saliently, plaintiff's arrest, imprisonment, and subsequent prosecution were supported by probable cause; (2) plaintiff's cause of action for assault and battery inasmuch as the evidence demonstrates that plaintiff was touched in furtherance of a lawful arrest and was never hit during his arrest, such that the force used was not excessive; (3) plaintiff's cause of action for abuse of process inasmuch as the arrest alleged was

based on probable cause and, thus, was not in furtherance of a collateral objective nor improper purpose; and (4) plaintiff's cause of action for the negligent hiring and supervision of the individually named officers by defendant THE CITY OF NEW YORK (the City) insofar as such cause of action is barred because the City, interposed an answer for POLICE OFFICER CAROLYN Y. SULLY (SHIELD # 24169) (Sully) s/h/a POLICE OFFICER CAROLYN ROMERO (SHIELD NO. 024619) and also admitted that at all relevant times the individually named defendants were acting within the scope of their employment with the City. Defendants also seek an order pursuant to CPLR §3215(c), dismissing this action against defendant POLICE OFFICER TERRY BURNS (SHIELD NO. 001168) (Burns) because more than a year has elapsed from the time within which plaintiff could have taken a default judgment against Burns for his failure to interpose an answer, and plaintiff has failed to do so.

With the exception of plaintiff's cause of action for abuse of process - which he affirmatively withdraws - plaintiff opposes defendants' motion seeking summary judgment. Saliently, plaintiff argues that the uncontroverted facts establish the absence of probable cause as a matter of law, such that the instant motion, with respect to his claims for false arrest, false imprisonment, and malicious prosecution must be denied. With respect to defendants' motion seeking summary judgment on plaintiff's claims for excessive force, plaintiff opposes the same arguing that

questions of fact preclude summary judgment. Plaintiff also opposes the portion of defendants' motion seeking summary judgment with regard to his negligent hiring and supervision claim asserting that the City's admission that Sully was, at all relevant times, acting within the scope of her employment with the City gives rise to liability. Plaintiff does not oppose the City's application for dismissal of this action against Burns and instead withdraws his claims against him. Based on his contention that with regard to his arrest, imprisonment, and prosecution, probable cause was lacking as a matter of law, plaintiff also cross-moves for summary judgment on the issue of liability with respect to those claims. Defendants oppose plaintiff's cross-motion averring that on this record, the existence of probable cause is controverted thereby warranting denial of plaintiff's cross-motion.

For the reasons that follow hereinafter, defendants motion is granted, in part, and plaintiff's cross-motion is denied.

The instant action is for false arrest, false imprisonment, excessive force, negligent hiring and the retention of police officers, and abuse of process. Within his complaint, plaintiff alleges that on June 3, 2011, he was assaulted, battered, detained and arrested inside premises located at 1240 Morrison Avenue, Bronx, NY (1240) by Sully and Burns, police officers acting within the scope of their employment with the New York City Police Department (NYPD) and the City. Plaintiff also alleges that he was

subsequently charged with, *inter alia*, Criminal Trespass in the Second Degree, imprisoned and prosecuted. Based on the foregoing, plaintiff interposes eight causes of action. The first and second allege that insofar as there existed no probable cause for his arrest, he was falsely arrested and imprisoned by defendants. The third alleges that defendants, motivated solely to do plaintiff harm, abused lawful process[1]. The fourth alleges that insofar as probable cause for the criminal proceeding against him was lacking, he was maliciously prosecuted by defendants. The fifth alleges that defendants were generally negligent. The sixth alleges that insofar as defendants grabbed and handcuffed him, absent probable or reasonable cause, plaintiff was assaulted and battered by defendants and that even if probable cause was extant, the force employed was nevertheless excessive nonetheless. The seventh and eighth allege that insofar as the City failed to exercise due care in hiring and supervising Sully and Burns, it was negligent. As a result of the foregoing, plaintiff alleges that he sustained injury.

Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment with respect to plaintiff's remaining causes of action, namely, false arrest, false imprisonment, malicious prosecution, excessive force, and

[1] This cause of action has been withdrawn and merits no further discussion.

negligence by the City in hiring and supervising Sully and Burns is granted to the limited extent of dismissing plaintiff's causes of action for general negligence, excessive force, and negligence in the training and supervision of the individually named defendants. With respect to the claims for false arrest, false imprisonment, and malicious prosecution, the record establishes a sharp question of fact with respect to whether defendants had probable cause to arrest plaintiff for trespassing, such that summary judgment must be denied. With respect to plaintiff's claim that he was the victim of excessive force, the evidence establishes that the force used upon plaintiff - minimal at best - was reasonable and thus summary judgment in defendants' favor must be granted. Lastly, because general negligence is inactionable, where as here, such claims fall within the ambit of other cases of action and because the City admitted that at all relevant times, Sully and Burns were acting within the scope of their employment with the City, defendants' motion for summary judgment with respect to plaintiff's causes of action for negligence and the negligent hiring and supervision of the foregoing defendants, is granted.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a

defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary

> proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for

summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

False Arrest and False Imprisonment

Whenever an arrest and imprisonment arise without a warrant, the presumption is that such arrest and imprisonment were unlawful (*Smith v County of Nassau*, 34 NY2d 18, 23 [1974]). A plaintiff seeking to establish a cause of action for false arrest and/or imprisonment must establish that (1) the defendant intended to confine him; (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 (*id.* at 22; *Hernandez v City of New York*, 100 AD3d 433, 433 [1st Dept 2012]; *Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *Broughton v State*, 37 NY2d 451, 457 [1975]; *Rivera v County of Nassau*, 83 AD3d 1032, 1033 [2d Dept 2011]). When confronted with such a claim and concomitant proof, the defendant can nevertheless prevail if he proves legal justification for the arrest and imprisonment, which "may be established by showing that the arrest was based on probable cause"

(*Broughton* at 458; *Martinez* at 85; *Rivera* at 1033). While post-arrest judicial participation will not validate an unlawful arrest, evidence of a subsequent arraignment or indictment is, in fact, proof of the presence of probable cause at the time of the arrest (*Broughton* at 457; *Hernandez* at 433-434). Moreover, a conviction which survives appeal is also conclusive evidence that probable cause existed at the time of the arrest (*id.*). Conversely, a subsequent dismissal, acquittal or reversal on appeal is proof tending to establish the absence of probable cause at the time of the arrest (*id.*).

Probable cause, also defined as reasonable cause, exists

> [w]here an officer, in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise

(*Smith* at 24 [internal quotation marks omitted]). A review of CPL §70.10(2), which defines reasonable cause, evinces that provides that reasonable cause is established not only when there is belief that the arrestee has committed a felony, but when he has committed any offense under our Penal Law. Specifically, CPL § 70.10(2) states that

> [r]easonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary

> intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

Accordingly, what is required for an arrest is not "proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been . . . committed" (*Jenkins v City of New York*, 2 AD3d 291, 292 [1st Dept 2003]; *People v McRay*, 51 NY2d 594, 602 [1980] ["Probable cause requires, not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction, but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed." (Internal citations omitted)]).

Even when there exists sufficient facts giving rise to probable cause "the failure to make further inquiry when a reasonable person would have done so may" negate the same and makes probable cause an issue of fact rather than one to be decided as a matter of law (*Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Carlton v Nassau County Police Dept.*, 306 AD2d 365, 366 [2d Dept 2003]). In *Carlton*, for example, the court held that the issue of probable cause could not be decided as a matter of law insofar as the allegations made against the plaintiff - that he left a restaurant without paying his bill - were disputed by the plaintiff such that further inquiry was required before his arrest (*id.* at

366). Significantly, however, a police officer need not conduct an exhaustive investigation prior to effectuating an arrest for which he has probable cause. Instead, faced with questionable facts on the issue of probable cause, an arresting officer need only

> obtain such facts and information as he could obtain by reasonable diligence, which would enable him to determine whether or not the plaintiff was probably guilty of the offense charged.

(*Sweet v Smith*, 42 AD 502, 509 [4th Dept 1899]). Thus in *Sweet*, the obligation to make further inquiry arose because

> defendant acted upon hearsay evidence in causing the plaintiff's arrest, [and] if such evidence could easily be tested and the truth ascertained, is one element, though not a conclusive one, in determining the question of probable cause.

(*id.*).

Where the facts leading up to an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide (*Parkin v Cornell University, Inc.*, 78 NY2d 523, 529 [1991]; *Burns v Eben*, 40 NY 463, 466 [1869]; *Wyllie v District Atty. of County of Kings*, 2 AD3d 714, 718 [2d Dept 2003]; *Brown v City of New York*, 92 AD2d 15, 17 [1st Dept 1983]; *Veras v Truth Verification*, 83 AD2d 381, 384 [1st Dept 1982], *affd* 57 NY2d 947 [1982]).

Here, in support of the instant motion defendants submit the transcripts of plaintiff's 50-h hearing and deposition, wherein he

testified, in pertinent part, as follows. On June 3, 2011, at approximately 5PM, plaintiff was arrested while within the courtyard of 1240. Shortly before his arrest, plaintiff, accompanied by his friend Suni, arrived at 1240 and dropped-off his daughter at his cousin Caleb's apartment on the eighth floor. On his way out, he and Suni, while within the elevator, bumped into Damian, a resident of 1240. Plaintiff, Suni and Damien proceeded to the courtyard, where they conversed for the next 45 minutes. At some point, two officers, one male and another female, came out to the courtyard and proceeded to ask everyone for identification. After Damien produced identification, he was told to leave. After Damien left, plaintiff and Suni were told they were trespassing and would be arrested. When plaintiff indicated that he was with Damien, a resident of 1240, he was told that Damien was no longer there to corroborate his story or vouch for him. Plaintiff, in an attempt to establish his connection with 1240 - that he had once resided therein and/or that his cousin currently resided therein - showed the officers a tattoo on his forearm which bore 1240's address. Plaintiff was handcuffed and arrested nonetheless. He was transported to the precinct, processed and then taken to central booking. He was told that unlike Suni, who was given a desk appearance ticket, he could not be accorded the same relief because of his criminal record - about which plaintiff also testified. Plaintiff was released the next day. Ultimately the

charges against the plaintiff were dismissed. Plaintiff denied receiving any physical injuries during the course of his arrest. He did, however, indicate that as a result of being handcuffed, he sustained bruising to his wrists, which persisted for a few days.

Defendants also submit Sully's deposition transcript, wherein she testified, in pertinent part, as follows. On June 3, 2011, she was employed by the NYPD as a police officer and was assigned to the 43rd Precinct. On that day, she and her partner Manuel Cruz (Cruz) were assigned a robbery reduction detail, whereby they would patrol the confines of the 43rd Precinct to deter crime. At about 5:30PM, she came across plaintiff within the courtyard of 1240. Plaintiff was there with Suni. Sully observed plaintiff and Suni smoking what appeared to be marihuana and she also smelled what she believed to be the same. As she approached, plaintiff handed the marihuana to Suni, who swallowed it. Sully asked plaintiff and Suni for identification and the names of those they were visiting at 1240. When neither plaintiff nor Suni could produce identification indicating that they lived at 1240 or any information about who they were to there to see, an arrest ensued. Plaintiff was searched, handcuffed and transported to the 43rd Precinct. At some point, Sully discovered that plaintiff had a warrant and, thus, he was transported to Central Booking. Suni was issued a Desk Appearance Ticket.

Defendants submit a copy of plaintiff's arrest report, which

indicates that he was arrested because he was found within 1240 and couldn't provide the name of a tenant whom he was there to see. The report evinces that plaintiff was, thus, charged with Criminal Trespass in the Third Degree (PL § 140.10[a])[2]. Defendants also submit a copy of document evincing that a warrant for plaintiff's arrest was issued on March 21, 2011, and that he was returned pursuant thereto on June 5, 2011.

Based on the foregoing, it is clear that there exists a sharp question of fact with respect to the existence of probable cause precluding summary judgment in defendants' favor on plaintiff's causes of action for false arrest and false imprisonment. Accordingly, defendants' fail to establish prima facie entitlement to summary judgment with respect to those causes of action.

As discussed, above, whenever an arrest and imprisonment arise without a warrant, the presumption is that such arrest and imprisonment were unlawful (*Smith* at 23). Accordingly, when confronted with such a claim and concomitant proof, a defendant can nevertheless prevail if he proves legal justification for the arrest and imprisonment, which "may be established by showing that the arrest was based on probable cause" (*Broughton* at 458; *Martinez* at 85; *Rivera* at 1033). Probable cause exists when "an officer, in good faith, believes that a person is guilty of a felony, and his

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[2] To the extent that plaintiff, within his complaint, alleges that he was charged with Criminal Trespassing in the Second Degree, that was obviously an error.

belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise (*Smith* at 24 [internal quotation marks omitted]). Staed differently, probable cause exist when there is reasonable cause to believe that a person committed an offense under the penal law, meaning

> when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it

(CPL § 70.10[2]).

Here, while defendants' version of the events - meaning Sully's version of the events underlying plaintiff's arrest - establish probable cause for his arrest on grounds that plaintiff violated PL § 140.10(a), plaintiff's version of same the events establish the absence of probable cause. Specifically, Sully testified that when she approached plaintiff, he was within 1240 with Suni - who was not a tenant - and no one else, and failed to establish that he either lived there or was visiting a tenant. Thus, insofar as one is guilty of Criminal Trespass in the Third Degree when he "knowingly enters or remains unlawfully in a building or upon real property . . . which is fenced or otherwise enclosed in a manner designed to exclude intruders" (PL §

140.10[a]), here because plaintiff could not establish - as testified to by Sully - that he either lived at 1240 or was there lawfully, visiting a tenant, there existed ample probable cause to arrest and imprison him (*People v Barksdale*, 110 AD3d 498, 499 [1st Dept 2013] ["Defendant admitted that he did not live in the building. When, in response to follow-up questions, he claimed to be visiting a friend but did not supply the friend's name or apartment number, the officer had probable cause to arrest defendant for criminal trespass."]).

However, plaintiff's version of the events, namely that he was lawfully in the building visiting his cousin and more particularly , with Damien - a tenant of 1240 - raises a question of fact with respect to whether plaintiff was in fact trespassing in violation of PL § 140.10(a)(*Diederich v Nyack Hosp.*, 49 AD3d 491, 493 [2d Dept 2008] ["Here, the Orangetown defendants did not establish their prima facie entitlement to judgment as a matter of law, as the plaintiff's deposition testimony gave an account of the occurrences preceding his arrest which was different from the account given by the Orangetown defendants, and was sufficient to raise a triable issue of fact as to whether the Orangetown defendants acted with probable cause."]; *Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 718 [2d Dept 2003] ["Here, the plaintiff's grand jury testimony gave a different account of the occurrences preceding her arrest, and was sufficient to raise

triable issues of fact whether the State defendants acted with probable cause."]; *cf. Hernandez v City of Rochester*, 260 FSupp2d 599, 611 [WDNY 2003] [Defendant granted summary judgment because while plaintiff attributed an innocent, noncriminal purpose for otherwise unchallenged behavior, "[e]ven assuming the truth of plaintiff's account of what happened, he was walking and talking with Ocasio in the same manner as the other individuals whom Bernabei had seen during the preceding twenty minutes, in what reasonably appeared to him to be likely drug deals. That provided a basis at least to detain plaintiff for questioning."]). Significantly, plaintiff testified that when Sully approached him, he was with both Suni and Damien and that Damien produced identification and was then told to leave. The foregoing, establishes that Damien must have satisfactorily established that he was a tenant within 1240, not only because he was told to leave, but because he was never arrested for trespassing. Under this version of the events, then, plaintiff was lawfully in the building inasmuch as he was within 1240 with Damien, a tenant, and should not have been arrested.

Defendants having failed to establish prima facie entitlement to summary judgment on plaintiff's claim for false arrest and false imprisonment, the Court need not address the sufficiency of plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] ["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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (internal citation and quotation marks omitted)]; *6014 Eleventh Ave. Realty, LLC v 6014 AH, LLC*, 114 AD3d 661, 661 [2d Dept 2014]), and this portion of defendants' motion is denied.

Malicious Prosecution

The tort of malicious prosecution provides protection from and provides redress for the initiation of unjustifiable litigation (*Broughton* at 457). However, since public policy favors bringing criminals to justice, the system must afford accusers room for benign misjudgments (*Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). This, of course, fosters the long standing belief that the court system is open to all without fear of reprisal through the use of retaliatory lawsuits (*Curiano v Suozzi*, 63 NY2d 113, 119 [1984]). Thus, a plaintiff asserting a cause of action for malicious prosecution must satisfy a heavy burden (*Smith-Hunter* at 195).

The essence of a cause of action for malicious prosecution is the perversion of proper legal procedures (*Broughton* at 457; *Boose v City of Rochester*, 71 AD2d 59, 65 [4th Dept 1979]). As such, a prior judicial proceeding is the *sine qua non*, of such cause of

action (*id.* at 65). Simply stated, then, a cause of action for malicious prosecution is one where it is alleged that a legal proceeding was maliciously initiated "without probable cause for doing so which finally ends in failure" (*Curiano* at 118). The elements of the cause of action for malicious prosecution stemming from a prior criminal proceeding, all of which are required for recovery, are (1) the commencement or continuation of a prior criminal proceeding by the defendant; (2) the termination of the prior proceeding in favor of the plaintiff; (3) the absence of probable cause for the initiation of the prior criminal proceeding; and (4) actual malice (*Cantalino v Danner*, 96 NY2d 391, 394 [2001]; *Smith-Hunter* at 195; *Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Martin v City of Albany*, 42 NY2d 13, 16 [1977]; *Broughton* at 457; *Heany v Purdy*, 29 NY2d 157, 159-160 [1971]). The elements for a malicious prosecution cause of action based upon a prior civil action are identical except, that in addition to the foregoing, it must be proven that plaintiff sustained special damage or injury (*The Purdue Frederick Company v Steadfast Insurance Company*, 40 AD3d 285, 286 [1st Dept 2007]; *Wilhelmina Models, Inc. v Fleischer*, 19 AD3d 267, 269 [1st Dept 2005]; *Honzawa v Honzawa*, 268 AD2d 327, 329 [1st Dept 2000]. Generally, special damages mean that the prior action interfered with a plaintiff's person or property (*Williams v Williams*, 23 NY2d 592, 604 [1969]; *The Purdue Frederick Company* at 286; *Wilhelmina Models, Inc.* at

269; Honzawa at 329) or proof of "concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel v CBS, Inc.*, 93 NY2d 195, 205 [1999]).

Whether an action is terminated favorably so as to give rise to a cause of action for malicious prosecution depends on how the action was terminated. In *Levy's Store, Inc. v Endicott-Johnson Corporation* (272 NY 155 [1936]), the court confronted with this very issue stated

> [i]t is true that where a proceeding has been determined in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant, as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution. Where, however, the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties or solely by the procurement of the accused as a matter of favor or as the result of some act, trick or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case, the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for the prosecution. In the other case, no such implication reasonably follows

(*id.* at 162; *see also, Loeb v Teitelbaum*, 77 AD2d 92, 100 [2d Dept.

1980]). Thus, a favorable termination on the merits and in favor of the accused or defendant in the prior action - since it implies lack of probable cause - satisfies the element of favorable termination in a cause of action for malicious prosecution, while a termination chargeable to the plaintiff or complainant in the prior action, such as settlement, withdrawal or discontinuance, does not (*Levy's Store, Inc.* at 162; *Loeb* at 100). In *Pagliarulo v Pagliarulo* (30 AD2d 840, 840 [2d Dept 1968]), the court held defendant's agreement to discontinue a prior action served to bar plaintiff's action for malicious prosecution insofar as discontinuance of the prior action against the plaintiff was not a favorable termination.

For purposes of malicious prosecution, probable cause means facts and circumstances which would lead a reasonably prudent person, in similar circumstances, to conclude that plaintiff was guilty of the acts alleged (*Colon* v. City of New York, 60 NY2d 78, 82 [1983]; *Munoz v City of New York*, 18 NY2d 6, 10 [1966]; *Fink v Shawangunk Conservatory, Inc.*, 15 AD3d 754, 755 [3d Dept 2005]; Boose at 67). Whether there is probable cause to initiate a prosecution hinges on whether defendant's conduct at the time he/she commenced the prior proceeding would have led a reasonably prudent person to initiate the prior proceeding (*Levy's Store, Inc.* at 161; *Loeb* at 102; *Kezer v Dwelle-Kaiser Company*, 222 AD 350, 354 [4th Dept 1927]). When the facts regarding the existence of

probable cause and the inferences to be drawn therefrom are undisputed, the existence of probable cause can be decided as a matter of law (*Parkin v Cornell University, Inc.*, 78 NY2d 523, 528-529 [1991]; *Lundgren v Margini*, 30 AD3d 476, 477 [2d Dept 2006]).

Here, for the very same reasons warranting denial of defendants' motion with respect to plaintiff's claims for false arrest and false imprisonment - namely, extant and sharp questions of fact on the issue of probable cause - defendants' motion seeking summary judgment on plaintiff's claim for malicious prosecution must also be denied. Since, absence probable cause is essential for a claim of malicious prosecution (*Cantalino* at 394; *Smith-Hunter* at 195; *Colon* at 82; *Martin* at 16; *Broughton* at 457; *Heany* at 159-160), its existence is, thus, essential to successfully defend such claim. Here, where defendants' own evidence fail to conclusively establish the existence of probable cause, the motion for summary judgment on that issue must be denied.

Excessive Force

It is well settled that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment" (*Graham v Connor*, 490 US 386, 396 [1989]). Thus, whether the force used in effectuating an arrest is excessive, must be analyzed under the Fourth Amendment and its standard of objective reasonableness (*Rivera v City of New York*, 40

AD3d 334, 341 [1st Dept 2007]; *Ostrander v State of New York*, 289 AD2d 463, 464 [2d Dept 2001]), and the reasonableness of an officer's use of force must be, therefore, be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (Rivera at 341; *Graham* at 396; *Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007]). Thus, determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest (*Koeiman* at 453; *Vizzari v Hernandez*, 1 AD3d 431, 432 [2d Dept 2003]). Accordingly, while generally, "[b]ecause of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844 [2d Dept 2011]; *Harvey v Brandt*, 254 AD2d 718, 718 [4th Dept 1998]), where the undisputed evidence demonstrates that the force used by police officers was objectively reasonable under the attendant circumstances, defendant should nevertheless be granted summary judgment (*Koeiman* at 453 ["The evidence adduced at trial regarding the incident—principally the testimony of officers Mondello and Carson—demonstrated that the decedent, without provocation or justification, assaulted Officer Mondello, that decedent resisted Officer Mondello's efforts to

restrain him, and that the officers used the amount of force they reasonably believed was necessary to subdue and handcuff the decedent. Moreover, the incident rapidly unfolded and required the officers to make a split-second decision regarding the amount of force to employ. Plaintiff submitted no evidence—expert or otherwise—demonstrating that the force used by the officers, judged from the perspective of a reasonable officer on the scene, was excessive." (internal citations omitted)]; *Diederich v Nyack Hosp.*, 49 AD3d 491, 494 [2d Dept 2008] ["The Supreme Court should have granted that branch of the Orangetown defendants' motion which was for summary judgment dismissing the use of excessive force cause of action. In light of the circumstances of this case, including the absence of proof of injury, the defendants established that the police officer did not use excessive force in restraining the plaintiff, and the plaintiff failed to present any evidence otherwise."]).

With respect to allegations involving tight handcuffs, whether the use of handcuffs is reasonable and, thus, not actionable or excessive, hinges on whether 1) the handcuffs were unreasonably tight; 2) the defendants ignored the plaintiff's pleas that the handcuffs were too tight; and 3) the degree of injury to the wrists, if any (*Lynch v. City of Mount Vernon*, 567 FSupp2d 459, 468 [2d Cir 2008] [Even though handcuffs were tight, and made tighter after plaintiff complained, the fact that there was no

injury to plaintiff's wrists was "fatal to the excessive force claim."]). The injury requirement is particularly important and often times dispositive (*id.* at 468 ["There is a consensus among courts in this circuit that tight handcuffing does not constitute excessive force unless it causes some injury beyond temporary discomfort."]; *Usavage v Port Authority of New York and New Jersey*, 932 FSupp2d 575, 592 [SDNY 2013]).

Here, to the extent that plaintiff premises a portion of his excessive force claim on the tightness of the handcuffs placed on him, he testified that he suffered no significant injury as a result of the same. Since, when the use of handcuffs does not result in any significant injury, there can be no claim of excessive force (*Lynch* at 468; *Usavage* at 592), here, defendants establish prima facie entitlement to summary judgment to the extent such claim is premised on the use of handcuffs. Indeed, plaintiff testified that the bruising he sustained as a result of the handcuffs dissipated soon thereafter. Nothing else testified to by plaintiff gives rise to a cognizable claim that the force used upon him was excessive since he also testified that he was never hit or struck in anyway by defendants. Nothing submitted by plaintiff in opposition raises a triable issue of fact on this claim sufficient to preclude summary judgment. Thus, defendants' motion on this issue is granted.

General Negligence

It is well settled that in this State, in cases alleging police misconduct, the law does not recognize a cause of action for general negligence, negligent investigation (*Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 284-285 [2d Dept 2003]). Accordingly,

> a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover under broad general principles of negligence ... but must proceed by way of the traditional remedies of false arrest and imprisonment

(*Antonious v Muhammad*, 250 AD2d 559, 559-560 [2d Dept 1998] [internal quotation marks omitted]; *Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007]). Accordingly, a cause of action sounding in false arrest, imprisonment or malicious prosecution must be pled as such and the failure to do so warrants dismissal (*Medina* at 108 ["The cause of action alleging negligence, including negligent hiring, retention, and training, must be dismissed because no cause of action for negligent investigation lies in New York."]; *Johnson* at 285 [Court dismissed plaintiff's claim for negligent investigation on grounds that no such claim was cognizable under New York State law.]).

Here, while defendants denominate the portion of their motion seeking dismissal of this claim as one for summary judgment, it is actually a motion directed at the pleadings pursuant to CPLR §

3211(a)(7).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]).

CPLR § 3013, states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or

> occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 (2nd Dept. 2006); *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

Here, a review of plaintiff's complaint evinces that in addition to his claims for false arrest, false imprisonment, and malicious prosecution, he also asserts, within his fifth cause of action, a claim for negligence. Insofar as a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover under broad general principles, but must proceed by way of the traditional remedies of false arrest and imprisonment (*Antonious* at 559-560; *Santoro* at 738), his cause of action for negligence must dismissed as it fails to state a cause of action.

Negligent Hiring and Supervision

It is well settled that a claim for negligent hiring, retention, and training will be dismissed when an employer concedes that the acts alleged to have been perpetrated by the employee were within the scope of that employee's employment (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; *Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]; *Ashley v City of New York*, 7 AD3d 742, 743 [2d Dept 2004]). Thus, "[g]enerally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention" (*Karoon* at 324).

Here, again, this portion of the instant motion is directed at the pleadings and is not, as posited, one for summary judgment. Significantly, within their amended answer dated March 7, 2013, the City and Sully, admitted, albeit by failing to deny (CPLR §3018[a[), that with respect to plaintiff's claims within paragraph 8, 40, and 41, Sully, at all relevant times, was acting within the scope of her employment with the City. Thus, plaintiff's cause of action for negligent hiring and supervision, his seventh and eighth cannot stand (*Karoon* at 324). Plaintiff's assertion that this cause of action remains viable despite the foregoing is misplaced. Having admitted that its employees were acting within the scope of

their employment with the City, liability is now vicarious and not for the City's own negligence.

Plaintiff's Cross-Motion

Plaintiff's cross-motion seeking summary judgment on liability with respect to his causes of action for false arrest, false imprisonment, and malicious prosecution is denied. As noted above, probable cause is an essential element to all those causes of action and, here, that issue remains unresolved and a question of fact to be resolved at trial.

City's Motion for Dismissal as Against Burns

Inasmuch as plaintiff has withdrawn his claim against Burns, the City's motion seeking dismissal of this action against him is denied as moot. It is hereby

ORDERED that plaintiff's cause of actions for abuse of process (third); negligence (fifth); excessive force (sixth); negligent supervision (seventh); and negligent hiring (eighth), be hereby dismissed with prejudice. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : August 12, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.