Shields v City of New York
2015 NY Slip Op 31756(U)
August 19, 2015
Supreme Court, Bronx County
Docket Number: 22414/13
Judge: Ruben Franco
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IAS 3

----------X

TYRONE SHIELDS AND TRAVIS THORNTON

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, DETECTIVE PETER VALENTIN, POLICE OFFICER JOHN DOE and POLICE OFFICER JOHN ROE,

Defendants.

----------X

Index No.: 22414/13

DECISION/ORDER

Recitation, as required by Rule 2219(a) of the CPLR, of the papers considered in the review of this motion as indicated below:

Papers	**Numbered**
Notice of Motion, Affirmation in Support & Exhibits	**1, 2, 3**
Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation & Exhibits	**6, 7**

Upon the foregoing cited papers the Decision/Order on this motion are decided as follows:

This is an action for, *inter alia*, false arrest, false imprisonment, malicious prosecution, and use of excessive force. The defendants move for summary judgment seeking dismissal as follows: the claims against the New York City Police Department, as it is an entity which cannot be sued; the first, second, seventh, eighth, ninth, and fourteenth causes of action alleging false arrest, false imprisonment and malicious prosecution; the fourth and eleventh causes of action which allege negligent training and negligent supervision; the fifth and twelfth causes of action for abuse of process; the third and tenth causes of action which allege excessive force; and, the sixth and thirteenth causes of action claiming a violation of 42 USC § 1983.

The New York City Charter, Chapter 17, Section 396, states that "All actions and

proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York, and not in that of any agency, except where otherwise provided by law." Thus, the action against the New York City Police Department is dismissed as it is not an entity that can be sued (see Siino v. Department of Educ. of the City of New York, 44 AD3d 568, 843 NYS2d 828 [App Div 1st Dept 2007]).

To succeed on claims for false arrest or false imprisonment, a plaintiff must show 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 (see Broughton v. State of New York, 37 NY2d 451, 335 NE2d 310, 373 NYS2d 87 [Ct App 1975]). The defendants can prevail if they prove that the arrest and imprisonment were effectuated with probable cause (Broughton at 458).

A detention during the execution of a facially valid search warrant is constitutionally permissible (see Michigan v. Summers, 452 U.S. 692, 101 S Ct 2587, 69 LEd2d 340 [S Ct 1981]; Lee v. City of New York, 272 AD2d 586, 709 NYS2d 102 [App Div 2nd Dept 2000]). An arrest or search conducted pursuant to a warrant, is presumed reasonable because such warrants may issue only upon a showing of probable cause (see Walczyk v. Rio, 496 F3d 139 [2d Cir 2007]. A detention occurring in connection with a search warrant gives rise to a presumption of probable cause for the detention, which the plaintiffs must rebut (see Broughton, at 458; Lee, at 587).

Here, the plaintiffs were detained by the police on September 12, 2012, during the execution of a facially valid search warrant. The defendants submit a copy of the search warrant signed on September 6, 2012, by a Justice of the Supreme Court in the Bronx County, thereby

establishing probable cause for the detentions. A plaintiff may overcome a search warrant's presumption of reasonableness by: (1) establishing that the warrant application, on its face, fails to establish probable cause (facial challenge), or (2) by showing that the warrant applicant made false statements or material omissions, either knowingly and intentionally, or with reckless disregard for the truth (see Walczyk v. Rio, supra, at 156).

The plaintiffs have failed to rebut the search warrant's presumption of reasonableness. They cite Delgado v. City of New York, 86 AD3d 502, 928 NYS2d 487 [App Div 1st Dept 2011], and urge the court to utilize the Aguilar-Spinelli test (see Aguilar v. Texas, 378 US 108 [1964]; Spinelli v. United States, 393 US 410 [1969]), which requires a determination of whether the application for a search warrant demonstrated [1] the veracity or reliability of the informant, and [2] the basis of the informant's knowledge in order to determine whether the search warrant was supported by probable cause. However, as is clear from Delgado, the Aguilar-Spinelli test is applicable only when evaluating hearsay information provided by a confidential informant in applying for a warrant. In that case, the warrant was obtained upon the presentation of only an officer's affidavit based on information provided by a confidential informant (see Delgado v. City of New York, supra). When, like here, the confidential informant appears before the issuing magistrate, is sworn, and provides information supporting probable cause, the Aguilar-Spinelli test is inapplicable (see People v. Tordella, 37 AD3d 500, 829 NYS2d 602 [App Div 2nd Dept 2007]).

The plaintiffs attempt to attack the reasonableness of the warrant by positing, inter alia, that the defendants failed to submit certain documents and information to support its reasonableness is misplaced. It is the plaintiffs' burden, not the defendants', to produce evidence

to overcome the search warrant's presumption of reasonableness. The plaintiffs did not demonstrate that the warrant application, on its face, lacked probable cause, or that the warrant applicant made false statements or material omissions, either knowingly and intentionally, or with reckless disregard for the truth. (Broughton v. State of New York, supra; Lee v. City of New York, supra).

The defendants argue that the plaintiffs had constructive possession of the marijuana recovered from the plaintiffs' bedrooms, thus providing the probable cause necessary for the arrests. Constructive possession requires a showing that the plaintiffs exercised a knowing "dominion and control" over the property, by a sufficient level of control over the area in which the contraband was found (see People v. Manini, 79 NY2d 561, 584 NYS2d 282 [Ct App 1992]); People v. Diaz, 68 AD3d 642, 894 NYS2d 1, [App Div 1st Dept 2009]). Detective Valentin testified that the officers recovered 31 bags of marijuana from the top shelf of the closet in the bedroom occupied by Thornton, and six bags of marijuana from the top of the television stand in the bedroom occupied by Shields (see Valentin Tr. at p. 136, lines 2-22). This is substantiated by the property voucher, and the laboratory test reports submitted by the defendants. Plaintiff Shields testified that he was sleeping in his bedroom when the officers entered (see Shields Tr. p. 66 lines 15-22). Plaintiff Thornton testified that he was also sleeping in his bedroom when the officers entered (see Thornton Tr. p. 50 lines 2-8). The plaintiffs do not contend that the bedrooms where the marijuana was recovered were not their own bedrooms, nor that they shared the bedrooms with someone else. The defendants have demonstrated that the plaintiffs exercised constructive possession of the marijuana, establishing probable cause for the arrests.

The plaintiffs' claim that the defendants lacked probable cause for the arrests because the

plaintiffs were "merely sleeping at the time of their arrest and no marijuana was in the apartment (attorney's affirmation, p. 20, paragraph 50), is belied by the fact that marijuana was recovered from each plaintiff's bedroom, which was vouchered and used by the District Attorney as the basis for filing criminal charges. The defendants have proven that they had probable cause to arrest the plaintiffs, and the plaintiff's have failed to show that an issue of fact exists regarding the claims for false arrest and false imprisonment.

The elements required to make out a cause of action for malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and, (4) actual malice (Broughton, at 457). In proving malice, the plaintiff does not have to show that the defendants' intent was to do personal harm, but rather that the defendants acted with a reckless or grossly negligent disregard for the plaintiffs' rights (see Ramos v. City of New York, 285 AD2d 284, 729 NYS2d 678 [App Div 1st Dept 2001]). The burden of proving the lack of probable cause in a malicious prosecution action falls on the plaintiff (see Broughton at 457]). Even where, as here, criminal charges are terminated in favor of the plaintiffs, they may not be able to establish the absence of probable cause because the "Prima Facie Rule", or presumption of probable cause, applies to malicious prosecution claims (see Broughton v. State of New York, supra; Diederich v. Nyack Hosp., 49 AD3d 491, 854 NYS2d 411 [App Div 2d Dept 2008]). The existence of probable cause for the arrests and prosecution provides a complete defense to claims of false arrest, false imprisonment and malicious prosecution under state law, as well as for a 42 USC § 1983 claim (see Garcia v. City of New York, 115 AD3d 447, 981 NYS2d 528 [App Div 1st Dept 2014]; Grant v. Barnes and

Noble, 284 AD2d 238, 726 NYS2d 543 [App Div 1st Dept 2001]).

The defendants have demonstrated that they are entitled to judgment as a matter of law on the claim for malicious prosecution, and the plaintiffs have failed to show the existence of triable issues of fact regarding this claim.

To prevail on a claim of abuse of process, the plaintiffs must establish the existence of the following elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (Curiano v. Suozzi, 63 NY2d 113, 480 NYS2d 466 [Ct App 1984]). The gravamen of an abuse of process claim is the perversion of process, lawfully issued, to accomplish a purpose not consonant with the nature of the process employed (Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Association, Inc., 38 NY2d 397, 343 NE2d 278 [Ct App 1975]). The defendants have met their burden in establishing that the search warrant and the arrest of the plaintiffs, were based on probable cause and were carried out in furtherance of a legitimate law enforcement objective, and not with the intent to obtain a collateral advantage. The plaintiffs have failed to raise a triable issue of fact demonstrating otherwise, accordingly, the motion for summary judgment on the plaintiffs' claim of abuse of process, is granted.

Addressing the plaintiffs's cause of action for negligent hiring, training, and retention, it has been held that 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, retention, or the adequacy of training (Karoon v. New York City Transit Authority, 241

AD2d 323, 324, 659 NYS2d 27 [App Div 1st Dept 1997]). The General Municipal Law § 50-k(2), allows the City of New York to provide for the defense of an employee of any agency in any civil action or proceeding arising out of any alleged act or omission which the Corporation Counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties. Therefore, by answering the Summons and Complaint on behalf of defendant Valentin in the Amended Answer, the City has acknowledged that Detective Valentin was acting within the scope of his employment.

The plaintiffs' demand for punitive damages must be dismissed. The Court of Appeals has held that the State and its political subdivisions are not subject to punitive damages (see Sharapata v. Town of Islip, 56 NY2d 332, 452 NYS2d 347 [Ct App 1982]; Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co. 70 NY2d 382, 521 NYS2d 653 [Ct App 1987]; see also Karoon v. New York City Tr. Auth., supra, at 324; Johnson v. Kings County District Attorney's Office, 308 AD2d 278, 763 NYS2d 635 [App Div 2nd Dept 2003]). The defendants' motion for summary judgment seeking dismissal of the plaintiffs' claims for negligent hiring, retention and training, is granted, as is the plaintiffs' demand for punitive damages.

The third and tenth causes of action are based on claims of excessive force and assault and battery. The plaintiffs make two arguments here: first, that since the arrest of the plaintiffs was without probable cause, any physical contact that the officers inflicted upon the plaintiffs constituted a battery; secondly, that the officers used excessive force in effectuating the arrest of the plaintiffs. Regarding the latter allegation, it has been stated that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the reasonableness standard (Graham v. Connor, 490 US 386, 396 [1989], quoting Johnson v. Glick, 481 F2d 1028, 1033 [2d Cir 1973]). 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, 735 NYS2d 163 [App Div 2d Dept 2001]), and the reasonableness of an officer's use of force must 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, 829 NYS2d 24 [App Div 1st Dept 2007]). The 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). The court finds that, in light of the circumstances of this case, including the absence of proof of injury, the defendants established that the police officers did not use excessive force in executing the search warrant and effecting the arrests, and the plaintiffs failed to present evidence showing otherwise (see Diedrich v. Nyack Hosp. 49 AD3d 491, 854 NYS2d 411 [App Div 2nd Dept 2008]). Furthermore, New York State Penal Law § 35.30, allows for the use of physical force in the course of effecting or attempting to effect an arrest, or to prevent the escape of a person, whom a police officer reasonably believes to have committed an offense. The recovery of contraband upon the execution of a presumptively valid search warrant, would cause the officers to reasonably conclude that the plaintiffs had committed an offense, and the court concludes that the officers' contact with the plaintiffs in effecting the arrests, was not excessive, nor was it a battery.

The plaintiffs' other argument regarding their claims for assault and battery is predicated upon their insistence that the arrests lacked probable cause, thus rendering any physical contact

meted out by the officers, a battery. They support this proposition by citing cases where the court had either determined that the arrest lacked probable cause, or that there existed questions of fact regarding whether the arrest was supported by probable cause (e.g., Budgar v. State, 98 Misc2d 588, 414 NYS2d 463 [Ct Claims 1979]); Johnson v. Suffolk County Police Dept., 245 AD2d 340, 665 NYS2d 440 [App Div 2d Dept 1997]). Here, the court has determined that there existed probable cause for the arrest of the plaintiffs, therefore, this argument also fails.

One of the allegations made by the plaintiffs to support their claim of assault and battery is that the plaintiffs were unnecessarily strip searched. The contraband recovered from the plaintiffs' apartment resulted in the filing of misdemeanor charges against the plaintiffs, which were ultimately dismissed. Strip searches of arrestees charged with misdemeanors or other minor offenses violate the Fourth Amendment to the United States Constitution unless, based on the crime charged and the circumstances of the arrest, there is a reasonable suspicion to believe that the arrestee is concealing weapons or contraband (Huck v. City of Newburgh, 275 AD2d 343, 712 NYS2d 149 [App Div 2nd Dept 2000]). The mere fact that someone has been arrested and taken into custody "does not justify police intrusion into a person's body" (People v. Hall, 10 NY3d 303, 856 NYS2d 540 [Ct App 2008]). To conduct a strip search "...the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity and the visual inspection must be conducted reasonably" (Hall, at 310-311), and may be justified by a consideration of "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" (Hall, at 308, quoting Weber v. Dell, 804 F2d 796, 802 [2d Cir 1986], *cert denied sub nom.* County of Monroe v. Weber, 483 US 1020 [1987]). The strip searches here consisted of the defendants ordering the plaintiffs to remove their clothing, and to bend over and cough. The circumstances of the arrests

make it difficult for the defendants to provide the factual basis necessary to justify this type of intrusion. The plaintiffs' freedom of movement was significantly restricted by the police from the moment they were awakened, until the time of the strip search. Thus, for the court to accept that it was reasonable to conduct a strip search in the police precinct, which incidently, produced no contraband, the court would have to accept that it was reasonable for the police to suspect that the plaintiffs, in the isolation of their bedrooms, while they slept, had weapons or marijuana secreted in their anal cavities.

The defendants have failed to carry their burden to establish entitlement to judgment as a matter of law on the plaintiffs' claims for assault and battery under their third and tenth causes of action, in that there exists a triable issue of fact regarding whether the strip searches conducted by the defendants constituted an assault and battery.

42 USC § 1983 provides that "[every person who, under color of any statute, ordinance, regulation, custom, or usage... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...." To prevail under § 1983, the plaintiffs must show that a custom or policy of the City of New York caused a violation of the plaintiffs' constitutional rights (see Delgado v. City of New York, 86 AD3d 502, 511 [App Div 1st Dept 2011]). To make out their § 1983 claim, the plaintiffs here allege that the custom and policy carried out by the defendant City of New York under its Stop and Frisk program, somehow carried over to the defendant police officers' encounter with the plaintiffs, thus violating their constitutional rights. Specifically, the plaintiffs allege in the sixth and thirteenth causes of action, that they "were lawfully in [their homes at 6:00am on September 12, 2012], when [they were] stopped, questioned, searched and seized solely on the basis of [their] age and/or race and

for no legal or legitimate reason". They claim to be similarly situated to the more than twenty examples that they provide in their Complaint, of individuals who are members of the plaintiff class in the David Floyd v. City of New York, (2008 U.S. Dist WL 4179210 1034 [SDNY 2008]), federal court challenge to the defendant City's Stop and Frisk program. However, in every one of those examples, individuals were detained as a result of street encounters, and while, ostensibly, engaged in innocent conduct. Here, the plaintiffs were actually in bed, asleep, when their encounter with the police occurred. They were arrested as a consequence of information provided by a confidential informant to the police and to a judge regarding the sale of marijuana, which resulted in the issuance of a warrant to search their home, and the recovery of marijuana from each plaintiff's bedroom. The plaintiffs were not arrested pursuant to the Stop and Frisk program.

The plaintiffs have failed to show that questions of fact exist regarding their claims under 42 USC § 1983, therefore, the defendants are entitled to judgment as a matter of law on these claims.

The defendants' motion for summary judgment is granted on all of the plaintiffs' claims, except those under the sixth and thirteenth causes of action alleging assault and battery, in that the plaintiffs have shown that there exist triable issues of fact regarding whether an assault and battery was committed by the defendants when they conducted a strip search of the plaintiffs.

The defendant shall serve a copy of this decision with Notice of Entry, upon the defendant within twenty (20) days of its entry, and file proof of such service with the court within 20 days thereafter.

This constitutes the Decision/Order of the court.

Dated: August 19, 2015

Hon. Ruben Franco, JCC

HON. R. FRANCO