Copeland v City of New York
2015 NY Slip Op 32388(U)
November 13, 2015
Supreme Court, Bronx County
Docket Number: 304441/12
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART

----------X Index No.: 304441/12

DERRICK COPELAND,

Plaintiff

DECISION/ORDER

-against-

THE CITY OF NEW YORK, P.O. JOSEPH TIMARCHI OF THE 47TH PCT., SHIELD # 27993 & P.O. DENNIS O' SULLIVAN OF EMERGENCY SERVICE UNIT SHIELD #22219, P.O. JOSEPH TASS OF THE 47TH PCT., SHIELD # 28671 AND SGT. TODD RAGNI OF THE CRIMINAL INTEL SECTION, TAX REG #898340

Defendants.

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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**
Notice of Cross-Motion & Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation	**6**

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

This is an action alleging, *inter alia*, false arrest, false imprisonment, malicious prosecution, use of excessive force, Monell claims, negligent training, supervision, and hiring. The defendants move to dismiss for failure to state a cause of action pursuant to Civil Practice Law and Rules (CPLR) § 3211 (a) (7), and for summary judgment pursuant to CPLR § 3212. The plaintiff withdrew his Monell claims, as well as his negligent hiring, training and supervision causes of action, and cross-moves for summary judgment on the false arrest, false imprisonment, assault, battery and excessive force claims.

The elements of a false arrest and false imprisonment claim under 42 USC § 1983, are

substantially the same as the elements under New York law, therefore, the analysis of the state and federal claims are identical (see Boyd v. City of New York, 336 F3d 72 [2d Cir 2003]). 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; Rivera v. City of New York, 40 AD3d 334, 836 NYS2d 108 [App Div 1st Dept 2007]).

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).

Police Officer Tass testified at his examination before trial (EBT) that prior to the execution of the search warrant, he had obtained confidential information that a woman was living at the subject apartment; that her boyfriend was selling drugs out of the apartment; and, that there were guns in the apartment. The defendant officers used this information to apply for a search warrant.

The plaintiff was detained by the officers during the execution of a facially valid search warrant. The defendants submit a copy of the search warrant signed by a Justice of the Supreme Court, thereby establishing probable cause for the arrest. 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 plaintiff made no attempt to rebut the search warrant's presumption of reasonableness.

It has been held that "An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense." (Ricciuti v. N.Y.C. Transit Auth., 124 F3d 123, 128 [2d cir 1997]; see also, People v. Oden, 36 NY2d 382, 329 NE2d 188, 368 NYS2d 508 [Ct App 1975]). When the facts resulting in 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 [Ct App 1991]; Burns v. Eben, 40 NY 463 [Ct App 1869]; Brown v. City of New York, 92 AD2d 15, 459 NYS2d 589 [App Div 1st Dept 1983]; Veras v. Truth Verification Corp., 87 AD2d 381, 451 NYS2d 761 [App Div 1st Dept 1982]).

Here, the defendants argue that the confinement was privileged because the search and detention were made pursuant to a facially valid search warrant. They also claim that they had probable cause to arrest the plaintiff because an ordinarily prudent and cautious person would, in good faith, believe that the plaintiff was the boyfriend referred to in the information received from the informant. The officers believed that the plaintiff had dominion and control over the

one-bedroom apartment because he gave them the apartment address as his own address. Constructive possession requires a showing that the plaintiff 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]). Officer O' Sullivan testified at the EBT that he found the guns in a duffle bag in the bedroom. He remembered finding drugs in the apartment but did not recall the exact location; and, that he saw male and female clothes in the bedroom closet. He also testified that the plaintiff at some point told him that he lived in the apartment. Sergeant Ragni also testified at his EBT that the plaintiff gave the subject apartment address as his address. The court finds that the defendants have met their prima facie burden entitling them to a judgment as a matter of law on the false arrest and false imprisonment claims, if the plaintiff is unable to raise a triable issue of fact.

In opposition, the plaintiff argues that there are disputed facts regarding the arrest and that there is a triable issue of fact on whether there existed probable cause to arrest. In People v. Sanchez, 276 AD2d 723, 724, 714 NYS2d 521 [App Div 2nd Dept 2000] , the court stated that "...neither the mere presence of an individual at the scene of criminal activity nor an individual's flight, without any other indicia of criminal activity, establishes probable cause." And in People v. Edwards, 206 AD2d 597, 614 NYS2d 469 [App Div 3rd Dept 1994], the Court declared that the mere presence in an apartment or house where contraband is found does not constitute a sufficient basis for a finding of constructive possession. The plaintiff testified at the EBT that he told the officers that he did not live in the apartment. There was another male present in the apartment, in addition to the plaintiff, when the officers executed the search warrant and no

evidence was presented to show that the clothes found in the bedroom belonged to the plaintiff. Furthermore, the officer that recovered the guns could not remember if the bag in which they were found, was open or closed. He also could not recall where in the apartment the drugs were found. There was no evidence tending to show indicia of a connection by the plaintiff to the apartment, such as mail addressed to him, or the recovery of other papers or personal effects belonging to him, nor was there a showing that the contraband recovered belonged to the plaintiff or that he exercised constructive possession over it.

The court finds that there exists an issue of fact as to whether the officers had probable cause to arrest the plaintiff. Accordingly, the defendant's motion for summary judgment to dismiss the false arrest and false imprisonment claims, is denied. The plaintiff's cross-motion for summary judgment on it's causes of action for false arrest and false imprisonment is also denied for the same reason.

The elements required to make out a claim 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 (see Broughton v. State, 37 NY2d 451, 457 Ct App 1975). The plaintiff's failure to establish even one element, defeats the entire claim (Brown v. Sears Roebuck and Co., 746 NYS2d 141, AD2d 205 [App Div 1st Dept 2002]; Hoyt v. City of New York, 727 NYS2d 317, AD2d 501 [App Div 2nd Dept 2001] citing Covert v. County of Westchester, 202 AD2d 384, 385 [App Div 2nd Dept 1994]). The issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts (see Lundgren v. Margini, 30 AD3d 476, 817

NYS2d 349 [App Div 2nd Dept 2006]). Inasmuch as the court finds that under the facts and circumstances of the arrest of the plaintiff, there exists a material issue of fact regarding the existence of probable cause for the arrest, the motion for summary judgment to dismiss the malicious prosecution claim is denied. If it is determined that the officers had no probable cause to arrest the plaintiff, then " a jury may infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding" (Maskantz v. Hayes, 39 AD3d 211, 215, 832 NYS2d 566 [App Div 1st Dept 2007]). Here, it is possible that a jury could find that the contraband was not in plain view in the bedroom when it was recovered, and that the plaintiff did not reside in the apartment, which may create an inference of malice.

It has been stated that, "A government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (Delgado v. City of New York, 86 AD3d 502, 510 [App Div 1st Dept 2011]). The doctrine of qualified immunity shields police officers from personal liability when, engaged in official conduct, they do not violate clearly established rights of which a reasonable person would have known (see Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed 2d 396 [1982]). It must be objectively reasonable, even if mistakenly, that their conduct did not violate such rights (see Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed. 523 [1987]). To qualify for immunity the defendants must show "arguable probable cause" (see Caraballo v. City of New York, 526 FedAppx 129, 131 [2d Cir 2013]). Although the court finds the existence of a material question of fact regarding whether the officers had probable cause to arrest the plaintiff, the court nonetheless concludes that, in the context of qualified immunity, the defendants have

shown arguable probable cause inasmuch as the officers were executing a duly issued search warrant in an apartment where drug activity may have been taking place, and upon gaining entry, they came upon contraband in the bedroom of a one-bedroom apartment where the plaintiff was present and may have resided. Indeed, it has been held that dismissal is appropriate as long as "officers of reasonable competence could disagree on the legality of the action at issue in its particular factual context." (Walcyzk v. Rio, 496 F 3d 139, 154 [2d Cir 2007], quoting Malley v. Briggs, 475 US 335, 341, 106 S Ct 1092, 89 L.Ed2d 271 [1986]). Moreover, as was stated in Anderson (at 635-636), the officers are permitted to be mistaken, so long as their belief that they were acting properly was "objectively reasonable." Thus, the defendant's motion for summary judgment seeking to dismiss the sixth cause of action for 42 USC § 1983 claims is granted.

Where a claim is made, as it is here, that police officers used excessive force in the course of making an arrest, such claim is analyzed under the Fourth Amendment's "objective reasonableness" standard (see Graham v. Connor, 490 US 386, 109 SCt 1865, 104 LEd 443 [1989]; Rivera v. City of New York, 40 AD3d 334, 836 NYS2d 108 [1st Dept 2007]). 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" (Graham, at 396; Rivera, at 341; Koeiman v. City of New York, 36 AD3d 451, 829 NYS2d 24 [App Div 1st Dept 2007]). To decide whether excessive force has been employed 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 examination before trial of the officers and the plaintiff provided the following

scenario: The officer assigned to do reconnaissance of the subject apartment immediately prior to the execution of the warrant, officer O'Sullivan, found that the door to the apartment was partly opened. Rather than entering, announcing his authority and presenting the warrant, or waiting for the arrival of the other members of the warrant execution team who were advancing up the stairs, he placed his foot at the door's threshold, and informed the female occupant that he was there to paint the apartment door. Not expecting or desiring the inside of her door to be painted, the female attempted to close the door to prevent his entry, and the other two male occupants of the apartment joined in the effort. Whereupon, the other members of the police team arrived and joined in the struggle to force the door open. There was a standoff while both sides struggled to gain the advantage until the officers prevailed and rushed the apartment. Once entry is gained, the stories of the parties differ. The officers state that a struggle ensued with one of the male occupants of the apartment; that there was some wrestling, and that punches were thrown by both sides until the person was subdued. None of the officers could identify which of the two males in the apartment was involved in this struggle. The plaintiff alleges that the officers did not immediately identify themselves, but that when they gained entry, they ordered him to the floor, and he complied. While on the floor and handcuffed, one of the officers kicked him under the right eye and in the ribs, and when he was subsequently placed on a sofa, and while still handcuffed, another officer, presumably officer O'Sullivan, punched him in the forehead, the jaw and the back of the head.

The court finds, after a consideration of all of the facts and circumstances surrounding the arrest, that the plaintiff has presented sufficient evidence to raise an issue of fact regarding whether the officers acted reasonably in effectuating the arrest, or whether they employed

excessive force.

The plaintiff argues that he is entitled to summary judgment on his assault and battery claim because any use of force against him constitutes a battery inasmuch as his arrest was unlawful. This position fails because the plaintiff has not demonstrated that the arrest was unlawful.

The defendant's motion for summary judgment is granted to the extent that the sixth cause of action is dismissed.

The defendant's motion to dismiss on the ground that the plaintiff's complaint fails to state a claim upon which relief can be granted, is denied, except that the branch of this motion seeking dismissal of the plaintiff's sixth cause of action is denied as moot.

The plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

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

Dated: November 13, 2015

Hon. Ruben Franco, JCC

HON. R. FRANCO