Gordon v City of New York
2016 NY Slip Op 30443(U)
February 19, 2016
Supreme Court, Bronx County
Docket Number: 301557/2012
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

EVERTON GORDON,

Plaintiff,

Index No.: 301557/2012

-against-

MEMORANDUM DECISION/ORDER

THE CITY OF NEW YORK, P.O. HILTON DOMINGUEZ, P.O. ROHAN LUMSDEN, P.O. JOSEPH REEVES, P.O. JOSHUA VALDEZ and SGT. MICHAEL NEZIRI,

Defendants.

HON. RUBEN FRANCO

This is an action alleging, *inter alia,* false arrest, false imprisonment, assault, battery, malicious prosecution, state and federal constitutional violations, and Monell claims. Defendants move for partial summary judgment pursuant to CPLR§3212, seeking dismissal of all claims, except the state and federal excessive force claims.

According to the deposition testimony of the defendant police officers, on August 8, 2011, they responded to a 911 report received from a Hopeton Steele ("Steele"), who claimed that a male was hitting him and evicting him from his residence, located at 955 East 226th Street, in Bronx County. Upon arriving at the location, the police officers saw plaintiff throwing electronic devices onto the front lawn of plaintiff's home and onto the street, and they came upon Steele, who informed the officers that the property being destroyed was his. The police officers also observed swelling on Steele's face. Steele, in a sworn statement given to the Civilian Complaint Review Board, stated that when the police officers arrived, they asked him what was wrong, and he responded that plaintiff had punched him.

To make out a cause of action for malicious prosecution, the following elements must be

set forth: (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 v. State of New York, 37 N.Y.2d 451, 457 [1975]).

The elements of a cause of action for false arrest and/or imprisonment are: (1) the defendant intended to confine him/her; (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 (Broughton v. State of New York, supra, at 456).

A warrantless arrest raises a presumption that it was effectuated without probable cause (Lawson v. City of New York, 83 A.D.3d 609 [1st Dept. 2011]). However, a claim for false arrest and imprisonment may be defeated by proving legal justification for the arrest, which "may be established by showing that the arrest was based on probable cause" (Broughton, at 458; Martinez v. City of Schenectady, 97 N.Y.2d 78, 95 [2001]); Rivera v. County of Nassau, 83 A.D.3d 1032 [2nd Dept. 2011]), and probable cause is a complete defense to claims of false arrest and imprisonment and malicious prosecution, under both state and federal standards (Lawson v. City of New York, 83 A.D.3d 609 [1st Dept. 2011]); Narvaez v. City of New York, 83 A.D.3d 516 [1st Dept. 2011]); Leftenant v. City of New York, 70 A.D.3d 596 [1st Dept. 2011]).

The first three elements of plaintiff's false arrest claim are not in dispute, thus, his false arrest claim hinges on whether it was based on a legal justification (probable cause).

It has been held that probable cause is established, absent materially impeaching circumstances, where the victim of an offense communicates to the arresting officer information providing a credible ground for believing that the offense was committed and identifies the

accused as the perpetrator (see Medina v. City of New York, 102 A.D.3d 101 ([st Dept. 2012]); People v. Gonzalez, 138 AD2d 622 [2nd Dept 1988] *lv. denied*, 71 NY2d 1027 [1988]). Here, Steele identified plaintiff as the person who had allegedly assaulted him and destroyed his personal belongings. Plaintiff proffers nothing to suggest that the police officers should have questioned Steele's credibility (Grimes v. City of New York, 106 A.D.3d 441 [1st Dept. 2013]); Medina v. City of New York, *supra*). And plaintiff's denial of Steele's allegations does not give rise to a triable issue of fact, either as to probable cause, or regarding whether the accusations were made at all (Grimes v. City of New York, *supra)*; Medina v. City of New York, *supra)*.

A plaintiff seeking to recover damages for assault must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact (Gould v. Rempel, 99 A.D3d 759 [2nd Dept. 2012]). To recover damages for battery founded on bodily contact, a plaintiff must prove there was bodily contact, that the conduct was offensive, and that the defendant intended to make the contact without the plaintiff's consent (Johnson v. Suffolk County Police Dept., 245 A.D.2d 340 [2nd Dept. 1997]).

The right to make a lawful arrest accompanies with it the right to use some degree of physical coercion (Esmont v. City of New York, 371 F. Supp.2d 202 [EDNY 2005]; Graham v. Connor, 490 U.S. 396 [1989]; Johnson v. Suffolk County Police Dept. *supra)*. The court's finding that probable cause existed for plaintiff's arrest, dooms his claims of assault and battery. However, defendants concede that issues of fact exist regarding the cause and extent of plaintiff's alleged injuries, and have not moved for summary judgment on plaintiff's state and federal claims of excessive force.

In cases alleging police misconduct, the Courts of this State do not recognize a cause of action for general negligence or negligent investigation (Medina v. City of New York, 102 A.D.3d 101, 108 [1st Dept. 2012]); Johnson v. Kings County Dist. Attorney's Off., 308 A.D.2d 278, 284-285 [2nd Dept. 2003]). Plaintiffs seeking damages for unlawful arrest and imprisonment may not recover under broad principles of negligence, but must proceed by way of the traditional remedies of false arrest and imprisonment (Antonious v. Muhammad, 250 A.D.2d 559, 559-560 [2nd Dept. 1998]). Further, a claim, as we have here, for negligent hiring, training, retention and supervision, is not viable when a municipality's police officers were acting within the scope of their employment (see Karoon v. New York City Transit Auth., 241 A.D.2d 323 [1st Dept. 1997]); Leftenant v. City of New York, 70 A.D.3d 596 [1st Dept. 2010]); Griffin v. City of New York, 67 A.D.3d 550 [1st Dept. 2009]). Similarly, the Monell claim asserted against the City of New York under 42 USC §1983, will not survive the failure to demonstrate that the actions taken by its police officers, resulted from official municipal policy or custom (Delgado v. City of New York, 86 A.D.3d 502 [1st Dept. 2011]); Leftenant v. City of New York, *supra,* at 597, citing Monell v. Dept. of Social Serv. of City of N.Y., 436 U.S. 658, 690-691[1978]). A single incident of objectionable conduct committed by the police department is insufficient to establish the existence of policy or custom for Section 1983 purposes (Bouet v. The City of New York, 125 A.D.3d 539 [1st Dept. 2015]); Dillon v. Perales, 181 A.D.2d 619 [1st Dept. 1992]). In any event, it appears that plaintiff's Monell claims were dismissed by order of Justice Larry S. Schachner, dated May 31, 2013.

Claims of intentional infliction of emotional distress, as a matter of public policy, are barred against governmental bodies (Dillon v. City of New York, 261 A.D.2d 34, 41 [1st Dept.

1999]; Lauer v. City of New York, 240 A.D.2d 543 [2nd Dept. 1997]). Moreover, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (Sheila C. v. Povich, 11 A.D.3d 120, 130-131 [1st Dept. 2004]). Such extreme and outrageous conduct must be clearly alleged in the complaint to survive a motion to dismiss (Dillon v. City of New York, *supra)*. Plaintiff's amended complaint fails to allege any facts to support a cause of action for either intentional or negligent infliction of emotional distress.

Punitive damages cannot be awarded against the State or its political subdivisions in the absence of express legislative authority (Krohn v. New York City Police Dept., 2 N.Y.3d 329 [2004]); Sharapata v. Town of Islip, 56 N.Y.2d 332 [1982]). However, such immunity from punitive damages does not extend to individual police officers (Staudacher v. Buffalo, 155 A.D.2d 956 [4th Dept. 1989]).

By order of Justice Larry S. Schachner, dated June 21, 2013, plaintiff was granted leave to serve a supplemental summons and amended complaint substituting six police officers, but only with respect to federal claims. Justice Schachner's order states, that since the police officers were not named in the Notice of Claim, under GML§50-e and Tannenbaum v. City of New York, 30 A.D.3d 357 (1st Dept. 2006), all state law claims as to the individual police officers are time barred and no longer valid.

In summary, defendants' motion for partial summary judgment is granted to the following

extent: All state law claims against the individual police officers only, are dismissed; all federal claims against the individual police officers, except those for excessive force and punitive damages, are dismissed; and, all state law and federal claims against the City of New York, except those for excessive force, are dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 19, 2016

Ruben Franco, J.S.C.

HON. R. FRANCO