

**Casco v City of New York**

2017 NY Slip Op 32114(U)

September 26, 2017

Supreme Court, Queens County

Docket Number: 712814/15

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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JOSUE CASCO,  
  
Plaintiff,  
  
-against-  
  
CITY OF NEW YORK and P.O. KYLE  
MULLEN  
  
Defendants.  
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Motion  
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Upon the foregoing papers it is ordered that this motion by plaintiff, Josue Casco, for summary judgment pursuant to CPLR 3212 against defendants, P.O. Kyle Mullen and the City of New York ("the City") on plaintiff's common law claims of false arrest and malicious prosecution (plaintiff's first and second causes of action, respectively); and against defendant, P.O. Kyle Mullen on plaintiff's federal civil rights claims brought pursuant to 42 U.S.C. § 1983 sounding in false arrest, malicious prosecution, and violation of due process rights (plaintiff's fifth, sixth, and seventh causes of action, respectively); and defendants' cross motion for an order pursuant to CPLR 3211 and 3212 granting partial dismissal of plaintiff's Complaint are hereby decided as follows:

At the outset, the Court notes that in the "Reply

Affirmation" plaintiff consents to the dismissal of the second and third causes of action for assault and battery as they have not been timely brought, and plaintiff consents to the dismissal of plaintiff's federal claims (fifth, sixth, and seventh causes of action respectively) as against defendant, the City only.

This is an action to recover damages for alleged false arrest and imprisonment, malicious prosecution, assault and battery, and violation of due process rights arising out of an incident that occurred on November 21, 2014 in the vicinity of 104<sup>th</sup> Street and Roosevelt Avenue in Queens, New York. Plaintiff was arrested and charged with Assault in the Second Degree and related charges.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

In order to maintain an action for malicious prosecution, a party must demonstrate: "(1) the commencement of a judicial proceeding against the [party claiming the malicious prosecution], (2) at the insistence of the [party who prosecuted the judicial proceeding], (3) without probable cause, (4) with malice, (5) which action was terminated in favor of the [party

claiming malicious prosecution,] and (6) to the [injured party's] injury" (*Furgang and Adwar, LLP v. Fiber-Shield Industries, Inc.*, 866 NYS2d 250 [2d Dept 2008]). "To show a termination in its favor, the [party claiming malicious prosecution] must prove that the court passed on the merits of the charge or claim against it under such circumstances as to show its innocence or nonliability, or show that the proceedings were terminated or abandoned at the instance of the [party who prosecuted the action] under circumstances which fairly imply the [party claiming malicious prosecution's] innocence". (*Id.*).

The elements of a false arrest and false imprisonment cause of action are: (1) the defendant intended to confine the plaintiff; (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*, 37 NY2d 451 (1975)).

Further, a governmental entity "cannot be liable for false arrest or malicious prosecution under 42 USC § 1983 unless an official government policy, custom or widespread practice caused the violation of the plaintiff's constitutional rights" (*De Lourdes Torres v. Jones, supra* at 762; see, *Combs v. City of New York*, 130 AD3d 862 [2015]; *Holland v. City of Poughkeepsie*, 90 AD3d 841 [2011]).

The existence of probable cause is a complete defense to a cause of action for false arrest and/or false imprisonment under both state and federal law (see, *Rodgers v. City of New York*, 106 AD3d 1068, 1069 [2d Dept 2013]; *Whyte v. City of Yonkers*, 36 AD3d 799 [2d Dept 2007]).

Whether probable cause existed is ordinarily a question of fact that cannot be decided as a matter of law unless there is no real dispute as to the facts and the appropriate inferences to be drawn therefrom (see, *Petrychenko v. Solovey*, 99 AD3d 777, 780 [2d Dept 2012]; *Holland v. City of Poughkeepsie*, 90 AD3d 841, 845 [2d Dept 2011]).

Where an arrest is made without a warrant, there is a presumption that the arrest was unlawful and defendant bears the burden of demonstrating that there was probable cause for the arrest (see, *Fakoya v. City of New York*, 115 AD3d 790, 791 [2d Dept 2014]; *Tsachalis v. City of Mt. Vernon*, 293 AD2d 525, 525-26 [2d Dept 2002]).

In the instant case, there is no dispute that the plaintiff was arrested without a warrant. Here, Officer Kyle Mullen,

the police officer who arrived on the scene testified inter alia, that he arrested plaintiff because: he observed plaintiff swinging at the complaining witness Jesus Hernandez, he heard glass break, he observed plaintiff's bloody hand at the time of the arrest, he observed Jesus Hernandez fall to the ground and become unconscious, and immediately before the physical altercation he heard the three men involved yelling at each other. The examination before trial transcript testimony of P.O. Mullen and the examination before trial transcript testimony of P.O. Mullen's partner, Officer Matthew Tranquellino establish a prima facie case that there was probable cause for the arrest.

In opposition, plaintiff presents, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testified, inter alia, that: Jesus Hernandez was holding a beer bottle in his hand and was making circles with the beer bottle, Juan Hernandez punched Jesus and Jesus fell to the ground, the beer bottle Jesus Hernandez had been holding fell to the ground and "crashed," plaintiff did not punch or hit anyone, after Juan punched Jesus, the other guys who were with Jesus came towards Juan, then the other guys ran away and plaintiff heard someone say "police," police officers came up from behind plaintiff and threw plaintiff and Juan to the ground, and plaintiff was handcuffed.

Under the circumstances, there remain issues of fact as to inter alia, whether probable cause existed for plaintiff's arrest.

As there remain issues of fact regarding whether there existed probable cause for plaintiff's arrest, defendants are not entitled to summary judgment on plaintiff's causes of action for false arrest and false imprisonment and malicious prosecution (see, e.g., *Sital, supra*, at 466).

Additionally, the Court finds that there are triable issues of fact as to whether plaintiff was deprived of his liberty.

To recover on a § 1983 claim, a plaintiff is required to plead and prove: (1) that defendant's conduct was under color of state law; (2) that this conduct deprived plaintiff of a right protected by the Constitution of the United States or a federal statute; and (3) that defendant's conduct caused the injuries and damages claimed by plaintiff (*Valdez v. City of New York*, 18 NY3d 69, 80 [2011]; see also, NY Pattern Jury Instructions [2016] § 3:60).

In the instant case, triable issues have been raised as to

whether there was a wrongful arrest, which arrest deprived plaintiff of a Constitutionally protected right.

Accordingly, the cause of action for violation of due process cannot be dismissed summarily.

This constitutes the decision and order of the Court.

Dated: September 26, 2017

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**Howard G. Lane, J.S.C.**