Chacko v City of White Plains
2017 NY Slip Op 32956(U)
September 6, 2017
Supreme Court, Westchester County
Docket Number: 51405/2015
Judge: Alan D. Scheinkman
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1To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMPLIANCE PART

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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MATTHEW CHACKO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 51405/2015
Motion Seq. Nos. 1, 2

CITY OF WHITE PLAINS, JOHN FITZSIMMONS, NATHAN SWIFT, PO ABBUZZESE, FRANK MADERA and JOHN DOE NO.1 - JOHN DOE NO.5,

Defendants.

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SCHEINKMAN, J.,

The following motions are consolidated for decision: defendants, City of White Plains, John Fitzsimmons, Nathan Swift, PO Abbuzzese, Frank Madera (collectively, "City defendants") move (sequence #1) for judgment dismissing the complaint pursuant to CPLR 3211(a)(7) and 3212; plaintiff moves (sequence #2) for summary judgment against defendants.

Procedural History and Summary of Claims

Plaintiff commenced this action by filing a summons and verified complaint on February 2, 2015. Issued was joined by service of the defendants' answer on February 24, 2015. An amended verified complaint was filed on March 6, 2015 and defendants filed a verified answer to the amended complaint on March 26, 2015.

Plaintiff alleges that on February 28, 2014, he was detained, arrested and taken into custody by the individually named defendants, John Fitzsimmons ("Fitzsimmons"), Nathan Swift ("Swift"), PO Abbuzzese ("Abbuzzese"), and Frank Madera ("Madera")(collectively, "police officers") , who are employed as police officers by the City of White Plains (the "City"). Plaintiff further alleges that the police officers "repeatedly and unnecessarily subjected plaintiff to the use of excessive force and abused, assaulted, battered, and harassed him all without provocation or justification" (amended complaint ¶15). The amended complaint sets forth causes of action against defendants for (1) assault and battery against the police officers and the

City of White Plains ("the City") on a respondeat superior basis ("Count I" of the amended complaint); (2) negligence against the City for negligent training supervision and control ("Count II" of the amended complaint); (3) "excessive force under 42 USC §1983" as against the individual officers ("Count III" of the amended complaint); and (4) a claim for attorneys' fees and costs pursuant to 42 USC §1988 ("Count IV" of the amended complaint").

Following the completion of discovery, the parties executed a trial readiness stipulation which was so-ordered on January 13, 2017. Pursuant to the trial readiness stipulation and order, "any motion for summary judgment by any party must be served via NYSCEF within 45 days following the filing of the Note of Issue; opposition papers must be served via NYSCEF within 30 days of service of motion papers; and reply papers, if any, must be served via NYSCEF within 10 days following service of any opposition papers." [1] On January 27, 2017, plaintiff filed a note of issue.

On March 13, 2017, defendants moved for summary judgment granting judgment in their favor. The original return date of this motion was April 3, 2017. In their notice of motion, the defendants demanded that answering papers were to be served at least seven days prior to the return date pursuant to CPLR 2214(b).

Thereafter, by email sent to the Compliance Part on March 24, 2017, plaintiff's counsel requested an adjournment of the return date of the motion to May 23, 2017 with the consent of defendants (NYSCEF Doc#87). While it appears that defendants' the motion was adjourned in the Court's case management system in response to this request, no proposed order or stipulation was submitted to the Court and no approval is on record in the New York State Courts Electronic Filing System ("NYSCEF"). [2]

On May 12, 2017, plaintiff filed a notice of cross-motion and specified the relief sought as an order (1) pursuant to CPLR §3212(e) granting partial summary judgment in his favor on Counts I and III of the amended complaint. This cross-motion was made returnable on May 23, 2017.

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[1] Effective January 3, 2017, the rules applicable to cases pending in Westchester County Supreme Court were revised to provide, inter alia, that any motion for summary judgment be made within 45 days following the filing of the Note of Issue (*see* Westchester Supreme Court Differentiated Case Management Protocol Part Rules Revised Effective January 3, 2017 at http://www.nycourts.gov/courts/9jd/diffCaseMgmt/newDCM_protocoljan3_2017.pdf [accessed August 15, 2017]).

[2] The Differentiated Case Management (DCM) Protocol provides that any request for an adjournment may be made in writing to the CP, to the attention of the Motion Clerk, by e-mail to ComplianceWestchester@nycourts.gov at least two (2) business days prior to the return date. It further provides that a proposed stipulation of the parties or order shall be filed via NYSCEF when any request for an adjournment is made.

Analysis

Timeliness and Proper Motion Practice

Prior to addressing the merits of the parties' arguments, the Court must address the issue of timeliness and proper motion practice.

In 2009, a new Differentiated Case Management (DCM) Protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM Protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester Supreme Court civil cases pursuant to the DCM protocol.

In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the "Excellence Initiative" for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "Standards and Goals" as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge's Excellence Initiative and delivering justice to all that enter our courts in a timely and efficient manner.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

> "As we made clear in *Brill*, and underscore here, statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004]; internal citations omitted).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

> "As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely

> responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]; internal citations omitted).

CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. "In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious nonprejudicial motion for summary judgment" (*Greenpoint Props, Inc. v Carter,* 82 AD3d 1157, 1158 [2011], quoting *John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2008]; *see Brill v City of New York,* 2 NY3d 648, 652 [2004]).

Here, defendants' motion for summary judgment, filed on March 13, 2017, was timely. However, plaintiff's cross-motion was untimely, having been made on the 105th day, sixty days after the expiration of the forty-five day period. [3] This cross-motion is a clear example of dilatory tactics which adversely impact the timely disposition of cases. Rather than filing his motion within the applicable period, plaintiff waited until after his adversaries filed a motion before filing his own motion. Plaintiff did not file his motion by the deadline set forth in the trial readiness order which provided that "***any*** motion for summary judgment by **any** party must be served within forty-five (45) days following the filing of the Note of Issue" (emphasis added).[4] Having missed the deadline, he also failed to provide *any* explanation (let alone good cause) for the delay (*see generally Brill v City of New York*, 2 NY3d 648 [2004]; *see Gonzalez v Zam Apt. Corp.*, 11 AD3d 657, 658 [2d Dept 2004]). Plaintiff cannot seek summary judgment at such a late date by simply denominating his motion as a cross-motion (*see Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 785 [2d Dept 2016]; *Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

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[3] Further, since no proposed order or stipulation to adjourn the return date of defendants' motion was uploaded to NYSCEF by plaintiff in accordance with the rules, and therefore, the adjournment never approved, the cross-motion was filed weeks after the April 3, 2017 return date of defendants' motion.

[4] The DCM protocol provides in bold type as follows:

> **"Counsel are cautioned that untimely motions cannot be made timely by denominating such as cross-motions. The failure of a party to serve and file a motion or cross-motion within the 45-day time period pursuant to this protocol and the Trial Readiness Order shall result in the denial of the untimely motion or cross-motion."**

Standards and goals for civil cases in which a note of issue is filed is one year from the filing of the note of issue. If the making of summary judgment motions is delayed for months, this will inevitably mean that either counsel will be rushed to trial or else the case will go over standards and goals. The situation is compounded by adjournments of such motions, particularly where the adjournments are repeated and the motions were already made late. While standards and goals are not immutable, compliance should be the norm, not the exception. If counsel are serious about their motions, they should make them on time or, if they believe that they cannot, they should apply for relief, setting forth the good cause for granting it. What they cannot do is avoid the necessity for showing good cause by simply waiting until the other party moves within the time allowed and then take advantage of that party by denominating their untimely motion as a "cross-motion". Not only does such practice allow the offending and untimely party to take unfair advantage of the timely party's timeliness, it prejudices the timely party by providing only a short time to respond to the "cross-motion." Rather than having the Court extend the time to respond, and thus allow counsel to succeed in both detouring around the rules and in delaying the progress of the case unjustifiably, the consequences should be bourne squarely by the offending party by denying the cross-motion as untimely.

It has been held that untimely cross-motions may be considered by the Court, in the exercise of its discretion, where a timely motion for summary judgment has been made on nearly identical grounds (*see Williams v Wright*, 119 AD3d 670 [2d Dept 2014]). However, the case law does not mandate that the Court must entertain such untimely cross-motions, especially where, as here, to do so would result in the circumvention of the part rules established by the Court and reward non-compliance with court deadlines. Moreover, the late filing of such cross-motions places defendants in an inequitable and prejudicial position where there is little time to oppose a cross-motion that should have been made as an initiatory motion. Therefore, such cross-motion must be denied as untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]). In any event, assuming arguendo that this Court considered plaintiff's untimely cross-motion, it would be denied on substantive grounds as discussed infra.

Substantive Arguments

Summary Judgment Generally

Turning to the substantive merits of the motions, plaintiff's counsel advises in the affirmation in opposition to defendants' motion that plaintiff has withdrawn "Count "II" of the Amended Complaint alleging that the City was negligent in its supervision, control and training of the police officers. Moreover, plaintiff's counsel concedes that plaintiff has no §1983 excessive force claim against the City (Reply Affirmation ¶10). Therefore, since the City bears no liability for the police officers' conduct (*see Monell v. Department of Social Services of City of New York*, 436 US 658 [1977], the City is entitled to judgment dismissing the claims asserted against it. The remaining claims are plaintiff's §1983 excessive force claim against the police officers individually and a claim for assault and battery.

It is well settled that the proponent of a motion for summary judgment "bears the initial burden of demonstrating its *prima facie* entitlement to the requested relief" (*Reyes v Arco*

Wentworth, 83 AD3d 47 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact; failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes*, *supra*, 83 AD3d at 47; *Jacobsen v New York City Health & Hosps. Corp.*, 18 NY3d 499 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD 2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega*, *supra,* 18 NY3d at 499).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015], *quoting Andre v Pomeroy*, 35 NY2d 361 [1974]; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Collado*, *supra*, *quoting Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010]). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp.*, 301 AD 2d 500 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

42 USC § 1983 provides that

> "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. "

A complaint alleging gratuitous or excessive use of force states a cause of action under 42 USC § 1983 against a police officer who, acting under color of law violates federal constitutional or statutory rights (*Delgado v City of New York*, 86 AD3d 502 [1st Dept.2011]. "Where a claim is made 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 [1989]; *Moore v City of New York*, 68 AD3d 946

[2d Dept 2009]). 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 (*see Koeiman v City of New York*, 36 AD3d 451 [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 one with the 20/20 vision of hindsight (*see Eckardt v City of White Plains*, 87 AD3d 1049 [2d Dept 2011]). If the conduct at issue is objectively reasonable, police officers are entitled to a qualified immunity (*Lepore v Town of Greenburgh*, 120 AD3d 1202 [2d Dept 2014]).

"To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent" (*Higgins v Hamilton*, 18 AD3d 436 [2nd Dept 2005]).

Here, defendants argue that the police officers' conduct was objectively reasonable. They explain that they were responding to a call by a concierge at an apartment building that plaintiff was creating a disturbance. Defendants point out that plaintiff is a large man at 6 feet tall and weighing 200 pounds. They assert that the evidence demonstrates that plaintiff failed to comply with the police officers' initial verbal instructions, gave the police officers two birth dates but refused to give any further identification, walked away from the police officers, refused to remove his hands from his pockets and resisted arrest. At the time, plaintiff had an outstanding warrant for his arrest in Nassau County and possessed cocaine. Finally, defendants argue that plaintiff was intoxicated and that his 50-h testimony is inconsistent with his deposition testimony because he has no memory of the incident. Defendants proffer the affidavit of their expert, Mr. Monaghan, in support of their motion. Defendants argue that the appropriate amount of force was used by the officers to arrest plaintiff in accordance with the City's excessive force policy. Defendants submit the deposition transcripts and a copy of a surveillance video in support of their motion.

However, defendants have not demonstrated as a matter of law the absence of a material issue of fact. Rather, the conflicting deposition testimony demonstrates that there are issues of fact as to whether, inter alia, plaintiff was actively resisting arrest and an appropriate amount of force was used, particularly with respect to the allegation that plaintiff was "stomped" on while he was on the ground. These factual issues and the determination of whether the actions of the police officers were reasonable at the time of the arrest and whether they used the appropriate amount of force in effectuating said arrest should be submitted to a jury (*see Woods v City of New York*, 29 AD2d 550 [2d Dept 1967]). Moreover, the surveillance video which has been submitted does not eliminate the issues of fact. The video is dark, of low quality and does not capture all participants involved at all times or the entire incident. While defendants aver that plaintiff's testimony is not credible because he was intoxicated, it is not for this Court to make a credibility determination on this motion (*see Vega, supra*). Accordingly, on the record presently before this Court, defendants have failed to establish their prima facie entitlement to judgment as to plaintiff's cause of action for excessive force. In light of the defendants' failure to establish their prima facie entitlement to judgment as to plaintiffs' cause of action for excessive use of

force, the branch of defendants' motion seeking dismissal of plaintiff's cause of action for assault and battery must be denied as well.

Similarly, even if plaintiff's motion had been timely, because of its intensely factual nature, the question of whether the use of force was reasonable under the particular circumstances of this case is best left for a jury to decide (*see Holland v. City of Poughkeepsie*, 90 AD3d 841 [2nd Dept 2011]).

Conclusion

The Court has considered the following papers in connection with this application:

Defendants' Notice of Motion - Affirmation in Support - Exhibits A-T
Plaintiff's Notice of Cross-Motion - Affirmation in Opposition to Motion and in Support of Cross-Motion - Exhibits A-V
Plaintiff's Notice of Motion for Summary Judgment - Affirmation in Support – Exhibits1-22
Defendants' Affirmation in Reply
Plaintiff's Affirmation in Reply

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that defendants' motion for summary judgment (sequence #1) is granted to the limited extent that plaintiff's amended complaint is dismissed as against defendant City of White Plains, and is otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment (sequence#2) is denied in its entirety; and it is

ORDERED the parties appear in the Settlement Conference Part, Courtroom 1600 on September 20, 2017 at 9:15 a.m. for a settlement conference

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 6, 2017

HON. ALAN D. SCHEINKMAN, JSC

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