Griffin v City of New York
2018 NY Slip Op 30503(U)
February 7, 2018
Supreme Court, Bronx County
Docket Number: 309790/2012
Judge: Howard M. Sherman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Derik Griffin, Jr.,

Plaintiff,

-against-

The City of New York, New York City Police Department, P.O. F. Garcia, P.O. John McGee (Shield # 013373), and "John Doe,"

Defendants.

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DECISION AND ORDER
Howard M. Sherman, J.S.C.
Index No. 309790/2012

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Memo of Law	**2**
Opposition	**3**

Defendants move to dismiss the complaint pursuant to CPLR 3211 and/or CPLR 3212. Plaintiff opposes the motion.

This action arises out of the arrest of the defendant at approximately 3:30 PM on January 13, 2012, near 170th Street and Clay Avenue, for the sale of a controlled substance (Cialis). The operative facts are derived from the plaintiff's deposition testimony, as well as the deposition testimony of Police Officer John McGee, the arresting officer. Plaintiff testified that at that time and place, he was wearing a Jets jacket. He was standing at a bus stop for approximately 20 minutes, and that during that time, he greeted two individuals (Gregory Clarke and Michael Monroe), exchanging "normal salutations" and "handshakes" with each of these individuals. Both of these individuals left, and plaintiff remained at the bus stop. Police Officers then arrived, asked him, "Where's the marijuana?" and took him into custody. No controlled substances were found on plaintiff's person, either at the scene or at the precinct.

At the time of the arrest, Police Officer McGee, working with the Street Narcotics Enforcement Unit (SNEU), was assigned to the "catch car." McGee did not observe the actual alleged sale. An undercover officer, Police Officer Bonhomme, allegedly reported that he had observed plaintiff give an object to Clark, in exchange for currency. Clark was arrested prior to the plaintiff, and found to be in possession of a pill, or ½ pill, of Cialis. Plaintiff was then arrested by McGee, and later identified as the alleged seller by Bonhomme.[1]

Plaintiff brought this action asserting numerous causes of action under state and federal law. By stipulation January 23, 2013, plaintiff discontinued all causes of action under federal law. In addition, in opposition to the present motion, plaintiff states that he does not oppose that portion of the motion seeking dismissal of the claims of negligent hiring as to defendant McGee only, nor does he oppose dismissal of all claims against P.O. Garcia, the New York City Police Department, and "John Doe."

Defendants argue that plaintiff's claims of false arrest and false imprisonment as asserted in the second, third and fifth causes of action must be dismissed.[2] They argue that P.O. McGee had probable cause to effectuate an arrest under the "fellow officer" rule, which permits a police officer to rely on the observations of a "fellow officer."[3]

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[1] Officer Bonhomme has not testified in this action, or submitted an affidavit.

[2] In reply, the City defendants admit that they did not address the purported claim for malicious prosecution in the fifth cause of action, stating that the fifth cause of action is not denominated as a claim for malicious prosecution. They argue that they are entitled in reply to address the claim and seek dismissal of that cause of action.

[3] "Under the fellow officer rule, a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting " 'upon the direction of or as a result of communication with' " a fellow officer or another police agency in possession of information sufficient to constitute probable cause for the arrest." (*People v. Ketcham*, 93 N.Y.2d 416, 419, 712 N.E.2d 1238, 1241, 690 N.Y.S.2d 874, 877 [1999] [citations omitted].) In a criminal case, in the context of SNEU and

To state a claim for malicious prosecution, the plaintiff must establish the following elements: "(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*, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 373 N.Y.S.2d 87 [1975]; *see also Ramos v. City of New York*, 285 A.D.2d 284, 298, 729 N.Y.S.2d 678 [1st Dept. 2001]). "The existence of probable cause constitutes a complete defense to a claim of malicious prosecution." (*Morant v. City of New York*, 95 A.D.3d 612, 613, 944 N.Y.S.2d 115 [1st Dept. 2012]; *see also Rivera v. City of New York*, 40 A.D.3d 334, 337, 836 N.Y.S.2d 108 [1st Dept. 2007]; *Broughton*, 37 N.Y.2d at 457.)

To prevail on a cause of action for false arrest and imprisonment, the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged. (*Donald v State of New York*, 17 N.Y.3d 389, 394-395, 953 N.E.2d 790, 929 N.Y.S.2d 552 [2011].) For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause. (*De Lourdes Torres v Jones*, 26 N.Y.3d 742, 759, 47 N.E.3d 747, 759-760, 27 N.Y.S.3d 468, 480-481 [2016].)

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undercover observations of drug sales, the People may establish probable cause by relying on hearsay information communicated among the members of a field team. (*People v. Ketcham*, *supra*.)

As the City argues, probable cause is a complete defense to claims of false arrest, false imprisonment, and malicious prosecution. The City is correct in contending that in the context of a criminal action, the police may rely on the hearsay statement of a fellow officer to establish probable cause. In a civil action emanating from an allegedly unlawful arrest, however, the governing law does not ignore disputed issues of fact in determining whether probable cause existed. "[P]robable 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 therefrom (*see Parkin v Cornell Univ.*, 78 NY2d 523, 529, 583 NE2d 939, 577 NYS2d 227 [1991]; *Fausto v City of New York,* 17 AD3d 520, 793 NYS2d 165 [2005])." (*Diederich v. Nyack Hosp.*, 49 A.D.3d 491, 493, 854 N.Y.S.2d 411, 414 [2d Dept. 2008] [defendants did not establish their prima facie entitlement to judgment as a matter of law, as the plaintiff's deposition testimony gave an account of the occurrences preceding his arrest which was different from the account given by the defendants, which was sufficient to raise a triable issue of fact as to whether the defendants acted with probable cause]; *see also Wyllie v District Attorney of County of Kings,* 2 AD3d 714, 718, 770 NYS2d 110 [2003]).

In *Mendez v City of New York* (137 A.D.3d 468, 470, 27 N.Y.S.3d 8, 12 [1st Dept. 2016]), the Court applied these principles in holding that, "The parties' differing versions of the events leading to plaintiff's arrest raise a triable issue of fact whether the officers had probable cause to believe that plaintiff was in possession of a gun, precluding summary dismissal of the false arrest and false imprisonment claims."

In *Mendez* (*supra*), the plaintiff was arrested for possession of a handgun. Police Officer Moreno allegedly saw the plaintiff drop an object onto a pile garbage bags, and

recovered a gun from that area. Officer Moreno then alerted Officer Shea, who made the arrest. Officer Shea never personally observed the plaintiff holding or dropping the gun. The dissenting justice would have held that probable cause existed based on the "fellow officer" rule. The majority held, to the contrary, that crucial facts preceding plaintiff's arrest were in dispute, including whether he dropped an object onto the pile of garbage bags.

Thus, the existence of probable cause to arrest in the context of a criminal case will not be controlling in the context of a civil case, where crucial facts are in dispute. (*See Murray v City of New York*, 154 A.D.3d 591, 591, 63 N.Y.S.3d 340, 342 [1st Dept. 2017] [parties' differing versions of the events leading up to plaintiff's arrest, including whether plaintiff produced a driver's license and registration, present a triable issue of fact whether the individual defendants had probable cause to arrest him].)

In the present case, we have no direct testimony of the crucial fact underlying the existence of probable cause, i.e., that the plaintiff handed an object to Clark, and that the plaintiff received currency in return. Assuming that we can infer that Bonhomme observed an exchange of an object in return for currency, and that this information was relayed to McGee., the plaintiff denies the exchange, stating that he merely shook hands with an acquaintance. These differing versions of the events preclude dismissal of the claims for false arrest, false imprisonment and malicious prosecution.[4]

Plaintiff also alleges assault and battery. An assault and battery cause of action may be based on contact during an unlawful arrest. (*See Johnson v Suffolk County Police*

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[4] The only argument raised by the City for dismissal of the claim of malicious prosecution is that the arrest was supported by probable cause.

Dept., 245 A.D.2d 340, 341, 665 N.Y.S.2d 440 [1997]; *Gantt v County of Nassau*, 234 A.D.2d 338, 339, 651 N.Y.S.2d 541 [1996]. The questions of fact regarding whether the plaintiff's arrest was supported by probable cause also preclude summary judgment on the cause of action for assault and battery as against the defendants. (*Wyllie v. DA*, 2 A.D.3d 714, 718-719, 770 N.Y.S.2d 110, 114 [2d Dept. 2003]; *Mendez v. City of New York, supra.*)

As defendants argue, an action for negligent supervision may not be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of *respondeat superior* and, therefore, a cause of action for negligent supervision would be entirely redundant. (*See Ashley v. City of New York*, 7 A.D.3d 742, 779 N.Y.S.2d 502 [2d Dept. 2004]; *Karoon v. NYC Transit Authority*, 241 A.D.2d 323, 659 N.Y.S.2d 27 [1st Dept. 1997]). The City's argument is that all of the officers were acting within the scope of their duties, and thus this claim must be dismissed in its entirety (not just as to Officer McGee as conceded by plaintiff).

Lastly, plaintiff seeks damages for intentional infliction of emotion distress. That cause of action has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and, (4) severe emotional distress. (*Taggart v Costabile*, 131 A.D.3d 243, 245, 14 N.Y.S.3d 388, 390 [2d Dept. 2015].) "Public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity." (*Matter of Gottlieb v City of New York*, 129 A.D.3d 724, 727, 10 N.Y.S.3d 542 [2d Dept. 2015] [internal quotation marks omitted]; *see Shahid v City of New York*, 144 A.D.3d 1127, 1129, 43 N.Y.S.3d 88, 90 [2d Dept. 2016].) Moreover, plaintiff has failed to

sufficiently allege extreme and outrageous conduct. Plaintiff argues that he was searched in public, and denied water and the use of a restroom at the precinct. The complaint does not establish that the officers' conduct was "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [was] utterly intolerable in a civilized community'" (*Murphy v American Home Prods. Corp.*, 58 N.Y.2d 293, 303, 448 N.E.2d 86, 461 N.Y.S.2d 232 [1983].)

Accordingly, it is

ORDERED that the claims of negligent hiring, retention and supervision as to all defendants are dismissed, and it is further

ORDERED that all claims against P.O. Garcia, the New York City Police Department, and "John Doe," are herby dismissed, and it is further

ORDERED that the claim of intentional infliction of emotional distress is dismissed.

This constitutes the Decision and Order of the Court.

Dated: 2/7/18, 2018

Hon. Howard M. Sherman, J.S.C.