Broome v City of New York
2018 NY Slip Op 31237(U)
June 19, 2018
Supreme Court, New York County
Docket Number: 152353/2012
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52
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BERNARD H. BROOME,

Plaintiff, Index No.: 152353/2012

-against-

THE CITY OF NEW YORK, POLICE OFFICER RAJINDER SINGH and POLICE OFFICER JOHN PIRANDO,

Defendants.
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ALEXANDER M. TISCH, J.:

This action arises out of damages allegedly sustained by plaintiff Bernard H. Broome when he was arrested by Police Officer Rajinder Singh (Singh) and Police Officer John Pirando (Pirando) and detained by defendant the City of New York until the following day. Plaintiff alleges causes of action for false arrest and imprisonment, malicious prosecution and civil rights violations, including the use of excessive force during the arrest. Plaintiff moves for an order compelling Pirando to submit for further examination before trial in regard to discovery exchanged on April 26, 2017 and May 12, 2017. Plaintiff further seeks to compel defendants to provide a supplemental response to his notices for discovery and inspection and requests an in camera inspection of Singh and Pirando's personnel files.

The City of New York, Singh and Pirando (collectively, defendants), cross-move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint. In the alternative, defendants move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint. In their cross motion, defendants argue that, as they have met their prima facie burden for summary judgment dismissing plaintiff's complaint, no additional discovery is necessary and plaintiff's motion to compel should be denied.

BACKGROUND AND FACTUAL ALLEGATIONS

The relevant facts are as follows: Plaintiff, an attorney who is representing himself, testified that, after leaving work on May 12, 2011, he arrived at his home located in New York, New York, at approximately 7:30 p.m. As he entered the lobby of the building, non party Donna Mirman (Mirman), who is plaintiff's ex-wife, informed plaintiff that he was not allowed to enter the marital residence and that she had called the police. Plaintiff testified that, at the time, he was unsure why he was not allowed upstairs, but that he had found out later that Mirman had taken out an order of protection against him and commenced a divorce proceeding that same day. Although plaintiff was served at work with the notice of protection that day, he did not look at the papers.

In any event, plaintiff testified that he then went outside of the building to wait for the police to arrive. Plaintiff testified that Pirando and Singh arrived shortly thereafter and escorted plaintiff into the lobby of the building. Singh was looking over the order of protection and Mirman was also waiting in the lobby. Plaintiff testified that, while they were in the lobby, Singh told plaintiff to sit down. "After a long period of time went by," plaintiff stood up to speak to Pirando. Plaintiff's tr at 17. When plaintiff stood up for the third time in the lobby, Singh walked over and took plaintiff outside to the squad car, placed handcuffs on him and arrested him.

The police officers did not tell plaintiff why he was being arrested. After staying in a cell at the 20th precinct for a couple of hours, plaintiff was taken to 100 Centre Street. He testified that he was placed in a "chain gang" to 100 Centre Street, where he was lined up with other people, had chains on his wrist and had handcuffs on. Plaintiff states that he asked Pirando to loosen his handcuffs while he was at 100 Centre Street, but that Pirando ignored him. According to plaintiff, he did not find out until the next day that he was being charged for violating an order of protection and "some sort of contempt, but to my knowledge I just didn't do anything wrong other than standing up when the police officer asked me to sit down." Plaintiff's tr at 23.

Around 8:00 p.m. the following day, plaintiff was released and told to come back to Criminal Court at a later date. On December 6, 2011, Hon. Tandra Dawson, of the Supreme Court of New York, New York County, dismissed the charges and the criminal proceedings. On April 12, 2012, a certification of dismissal was issued, indicating that the criminal charges were dismissed and that the dismissal is "a termination of the criminal action in favor of the accused and pursuant to Section 160.60 of the criminal procedure law the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status occupied before the arrest and prosecution." Plaintiff's exhibit F at 1 (internal quotation marks omitted).

As a result of the incident on May 12, 2011, plaintiff filed a notice of claim with the City of New York, claiming damages for "false arrest, wrongful detention, malicious prosecution and violation of his civil rights." Notice of claim at 2. Plaintiff further alleged that he was assaulted and brutally handcuffed, and that the City of New York was negligent in their hiring, training, supervision and retention of employees.

Plaintiff subsequently commenced this action, alleging seven causes of action.[1] In the first cause of action, for false arrest and imprisonment, plaintiff alleges that he was falsely arrested and imprisoned, assaulted with excessive force by Pirando and Singh, and maliciously prosecuted. Further, under this cause of action, plaintiff alleges that he was unlawfully charged with violation of "Penal Law § 205.30, Resisting Arrest and Penal Law § 215.30 (3), Criminal Contempt in the Second Degree," and that prior to the commencement of this action, Hon. Dawson "dismissed all criminal charges including Penal Law § 205.30 and Penal Law § 215.50 (3) in favor of plaintiff." Complaint, ¶ ¶5, 6.

The second cause of action, alleging excessive use of force, states that defendants wrongfully and maliciously arrested and assaulted plaintiff and deprived him of his liberty. Plaintiff alleges that Pirando and Singh assaulted him with excessive force when they "brutally handcuff[ed] plaintiff and refus[ed]

[1] As many of the causes of action contain the same allegations, the court attempts to decipher the claims as indicated.

his entreaties to adjust and loosed the handcuffs from the direct compression of the nerve against the bone." Defendants' exhibit D, bill of particulars, ¶ 18. Plaintiff states that the handcuffs were placed tightly on his wrists and that, although he asked them, the police officers would not loosen them. Plaintiff alleges that he suffered from neuropathy in his left hand as a result of the handcuffs being placed too tightly on his wrist. He further alleges that he still suffers from pain, tingling and numbness in his hands and wrists. Plaintiff explained that he was treated by a neurologist and EMG studies confirmed nerve damage as a result of the compression of the nerve against the bone.

In the third cause of action, for malicious prosecution, plaintiff alleges that he was maliciously prosecuted by defendants and indicates that all of the charges against him were dismissed and the arrest and prosecution were deemed a nullity. Plaintiff states that defendants maliciously and without reasonable probable cause arraigned him and charged him with Resisting Arrest and Criminal Contempt in the Second Degree and prosecuted him.

The fourth cause of action states that the defendants, while acting under the color of law, violated 42 USC § 1983 and deprived plaintiff of his civil rights.

In the fifth cause of action, for conspiracy, plaintiff alleges that Singh and Pirando conspired to arrest, charge and prosecute plaintiff without probable cause.

The sixth cause of action alleges that Singh and Pirando made fraudulent statements that caused plaintiff to sustain damages as a result of the false arrest, imprisonment and malicious prosecution. Further, the fraudulent representations made by Singh and Pirando, "were known by [them] to be false and were made to them with the intent to deceive, defraud and punish the plaintiff." *Id.*, ¶ 38.

The seventh cause of action alleges that defendants acted in a "careless manner as to show complete disregard" for plaintiff's safety and rights. *Id.*, ¶ 42. Plaintiff is also seeking punitive and exemplary damages to "punish" defendants for their conduct and to discourage others from "repeating like or similar acts of intentional . . . conduct." *Id.*, ¶ 47.

Cross Motion

Defendants cross move, pursuant to CPLR 3212 and CPLR 3211 (a) (7), for either summary judgment or dismissal of the causes of action alleged in the complaint.

The record indicates that plaintiff was charged with a violation of Penal Law § 205.30, Resisting Arrest, and Penal Law § 215.50 (3), Criminal Contempt in the Second Degree. *See* defendants' exhibit H at 1. Pirando was the arresting officer. In the section of the arrest report stating "Force Used," the word yes is noted and the type is listed as physical force. The reason listed is "rstrain/conrl/remv." *Id.* at 2. The prisoner pedigree card filled out by Pirando, states that plaintiff had been arrested and charged with Criminal Contempt of Court and Resisting Arrest. A supervisor verifying the arrest signed off on the charges.

The record indicates that Mirman was granted a temporary order of protection, ex-parte, on May 12, 2011. Defendants' exhibit I. Plaintiff testified that he was not in violation of the order of protection on the date it was issued and that he has never been in violation of the order of protection. He states that he spoke to his son on the phone and that he never spoke to Mirman.

In the criminal complaint report, Pirando stated that Mirman informed him that plaintiff called his son and asked to speak to his mother. Plaintiff further told his son that he was on his way home. In the report, Pirando stated there was a valid order of protection. He continued that, when he arrived at the residence, he saw plaintiff standing outside the entrance to the building. Plaintiff told Pirando that he was at work and a process server handed him something but that he did not look at it and put it in his bag. Plaintiff further advised Pirando that, upon arriving home, Mirman told plaintiff that he was not allowed to go inside. Pirando further documented plaintiff's allegations that after two officers arrived, one told him to sit down and then they told him to stand up and arrested him. Pirando did not document the charge for Resisting Arrest in this report. Defendants' exhibit H at 3-4.

Singh Testimony

Singh testified that he spoke to Mirman who told him that "an order of protection was in place and it had been violated." Singh tr at 16. Singh did not recall if he looked at the order of protection that night. *Id.* at 49. He could not recall if the order of protection indicated that plaintiff was not allowed to be in the lobby of the building. Singh testified that "the statements at the scene" between plaintiff and Mirman led to the decision to charge plaintiff for disobeying a court order and that he did not have any other basis to arrest plaintiff. *Id.* at 94.

Singh testified that it would not be grounds for an arrest if he asked plaintiff to sit down but plaintiff stood up. Singh testified that he did not recall if plaintiff resisted him or Pirando during the arrest.

Pirando testimony

Pirando testified that he was the officer who arrested plaintiff and also the one who placed the handcuffs on him. He continued that he was responding to a 911 call about a violation of an order of protection. Mirman informed Singh that plaintiff had violated an order of protection and then Singh told this to Pirando. Pirando had been informed that plaintiff called and spoke to his son and then when plaintiff went to the residence Mirman did not want to speak to him. Pirando testified that he was in the lobby with plaintiff and Singh went to speak to Mirman. He did not recall seeing the order of protection nor did he speak to Mirman at that time. Pirando continued that, later on, either before or after the arrest, he called Mirman on the phone to confirm what she told Singh.

Pirando testified that he was the one who wrote down that plaintiff should be charged with Resisting Arrest because plaintiff resisted his arrest. When asked how plaintiff resisted the arrest, Pirando testified "[b]y tensing your arm." Pirando tr at 142. Pirando testified that plaintiff did not scream at him, talk loudly to him, curse at him, flail his arms at him, or touch him in any way, but that he offered resistance by tensing his arms while his arms were being handcuffed behind his back. Pirando

could not define the term tensing but explained that it meant plaintiff did not offer complete compliance. He continued, "you were tensing your arms, you were nervous, anxious and emotional." *Id.* at 151.

When questioned about the term physical force as used on the arrest report, Pirando stated that this refers to being placed in handcuffs. However, he clarified that handcuffs are placed on everyone according to police procedure when they are arrested.

Pirando testified that he did not know if it was an involuntary or deliberate action when plaintiff tensed his arms. He testified that the only basis for charging plaintiff for Resisting Arrest was his tensing of the arms while they were behind his back being handcuffed. He stated that he wrote this up on the online booking sheet in the 20th precinct. Pirando could not recall if he conferred with his supervisor prior to writing down this charge for Resisting Arrest. He said that he did not confer with the Assistant District Attorney (ADA) prior to charging Broome with Resisting Arrest and that he did not know if Resisting Arrest required intentionality or not.

Pirando testified that when he and Singh arrived, plaintiff was in the lobby. Pirando acknowledged that he was under oath when he signed the document indicating that, contrary to his testimony, when he arrived at the residence, he saw plaintiff outside of the building.

In support of their motion, defendants argue that the claims for false arrest and imprisonment and malicious prosecution must be dismissed on the basis that probable cause existed for the arrest. They state that, on the date of the arrest, Mirman called the police complaining that plaintiff had violated a valid order of protection when he called the residence on the phone and informed his family that he was on his way home. When the police arrived at the residence they arrested plaintiff after they reviewed the order of protection and concluded that it had been violated. Defendants do not mention any resistance offered by plaintiff during the arrest nor do not address any of plaintiff's arguments regarding the charge for Resisting Arrest. Defendants add that, to the extent plaintiff challenges any prosecutorial decisions, these claims cannot be made against the City of New York.

With respect to any civil rights claims, defendants provide various boilerplate arguments regarding plaintiff's alleged failure to plead a civil rights claim against the City of New York. They assert that plaintiff fails to plead the existence of a specific custom or policy that deprived him of a constitutional right. Defendants continue that the individual defendants are entitled to qualified immunity from liability. Defendants argue the excessive force claim should be dismissed because plaintiff failed to meet his burden of showing that any force used by defendants to effectuate the arrest was unreasonable. Although the complaint does not have a cause of action alleging negligent hiring, retention, training or supervision, defendants contend that this claim should be dismissed because the police officers were acting within the scope of their employment during the incident.

In opposition, plaintiff argues that there was no probable cause for the charge of Criminal Contempt because he did not violate the order of protection. He states that this "was false because the officers took me into the lobby to talk to my ex-wife. I never sought to enter the marital apartment. Any communication between my ex-wife and myself was initiated by my ex-wife. I left the lobby as soon as my ex-wife informed me that she has procured an Order of Protection that afternoon." Affirmation in opposition, ¶ 8. He continues that the police officers did not read the order of protection prior to the arrest and did not have information to support a reasonable belief that the order of protection had been violated.

Plaintiff argues that the conflicting factual versions between plaintiff and defendants of the events leading up the arrest and the conflicting testimony of the police officers precludes summary judgment. For example, Singh testified that he arrested plaintiff and placed the handcuffs on him, but Pirando was actually the documented arresting officer. Plaintiff notes that the police officers have no recollection of the arrest and compares Pirando's testimony that plaintiff was already in the lobby when the police officers arrived with Pirando's signed statement that, when he arrived at the residence, he observed plaintiff standing outside.

Plaintiff alleges that there was no probable cause for the charge of Resisting Arrest and that it is completely false because plaintiff never resisted the arrest. He emphasizes that he complied with the directives of the police officers and states , "[a]t no time did I offer my resistance." *Id.*, ¶ 12. Plaintiff notes Pirando's testimony that plaintiff did not curse, flail his arms, touch him in any way, but only "tensed" his arms as the handcuffs were being placed on him. Plaintiff testified that Singh initially placed the handcuffs on him and that Singh also testified that he placed the handcuffs on plaintiff and that he could not recall any resistance. "The notion that I tensed my arm muscle and that this is sufficient to constitute the charge of Resisting Arrest is absurd on its face." *Id.*, ¶17.

Malicious Prosecution

In support of the malicious prosecution claims, plaintiff argues that probable cause was lacking, defendants acted with actual malice and the criminal action was terminated in his favor. In addition to the lack of probable cause for the charge of Resisting Arrest, plaintiff believes that the arrest was the result of an improper motive, as Singh was punishing plaintiff for standing up after being told to sit down. "The conflicting versions and the wrongful charge of Resisting Arrest indicate bad faith motivated by malice by the defendant police officers. The charge of Resisting Arrest was fabricated to support their unlawful conduct." *Id.* Further, plaintiff claims that the officers sought to punish him by deliberately placing the handcuffs tightly on his wrist.

Remaining Claims

Plaintiff argues that defendants are not entitled to qualified immunity because their actions were objectively unreasonable under the circumstances.

Motion to Compel

Plaintiff's motion to compel requests that the court order Pirando to submit to further examination before trial with respect to the most recent discovery exchange. Plaintiff explains that he has not yet had an opportunity to depose Pirando regarding the prisoner pedigree card, Pirando's memo

book entries, the domestic incident report signed by Pirando, Pirando's statement of allegations and the 911 Sprint Report. Plaintiff states that he reserved his right to additional examination before trial with respect to the outstanding discovery. He notes that the requested online booking sheet is still outstanding. In addition, plaintiff is requesting an in-camera inspection of Singh and Pirando's personnel files, including any Civilian Complaint Review Board (CCRB) complaints made against them or any disciplinary actions taken against them.

Defendants argue that plaintiff's motion to compel should be denied on the basis that no further discovery is material or necessary in this action. They note that the police officers have already been deposed. In addition, defendants object to the demand for an in camera inspection of the personnel files, arguing that these records are privileged. Furthermore, defendants allege that plaintiff is unable to demonstrate a reasonable likelihood that these personnel records contain relevant and material information.

In reply, plaintiff maintains that he is still requesting an in camera inspection of the personnel files and that he is still seeking to depose Pirando after the most recent discovery exchange.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v*

Grasso, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In assessing a motion under CPLR 3211 (a) (7), . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v Martinez*, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted).

False Arrest and False Imprisonment-New York common law

To establish a cause of action for false arrest and imprisonment, plaintiff must prove that defendants "intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged." *Hernandez v City of New York*, 100 AD3d 433, 433 (1st Dept 2012). Where, like here, there was no initial warrant, defendants have the burden of proving "legal justification as an affirmative defense . . . . showing that the arrest was based on probable cause." *Broughton v State of New York*, 37 NY2d 451, 458 (1975), *cert denied sub nom*, *Schanberger v Kellogg*, 423 US 929 [1975]. Probable cause for an arrest "constitutes a complete defense to causes of action alleging false arrest [and] false imprisonment . . . . [It] does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support

a reasonable belief that an offense has been committed or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances." *Shaw v City of New York*, 139 AD3d 698, 699 (2d Dept 2016) (internal quotation marks and citations omitted).

Here, defendants have met their burden to establish the existence of probable cause at the time of the arrest for Criminal Contempt in the Second Degree.[2] The testimony and documentary evidence indicates that a valid order of protection was issued to Mirman on May 12, 2011 whereby plaintiff was ordered to refrain from communicating with Mirman. The order of protection further excludes him from the residence. Plaintiff was served at his work with this order of protection. Evidently, after plaintiff called the residence and spoke to his son, Mirman called the police. Mirman knew that plaintiff would be arriving at their residence and informed the police that he would be violating a valid order of protection by doing so.

When defendants arrived at the residence, they saw plaintiff, reviewed the order of protection and spoke to both parties. "Generally, information provided by an identified citizen accusing another individual of a specific crime is legally sufficient to provide the police with probable cause to arrest." *Williams v City of New York*, 114 AD3d 852, 853 (2d Dept 2014) (internal quotation marks and citations omitted).

Therefore, defendants have established that, based on the facts known at the time of the underlying incident, it was reasonable for them to believe that plaintiff was guilty of Criminal Contempt in the Second Degree by violating a valid order of protection. *See e.g. Jenkins v City of New York*, 2 AD3d 291, 292 (1st Dept 2003) (Probable cause "requires a showing of such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe that [the subject] had committed the [crime]") (internal quotation marks and citation omitted).

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[2] In pertinent part, "[a] person is guilty of criminal contempt in the second degree when he engages in . . . [i]ntentional disobedience or resistance to the lawful process or other mandate of a court." Penal Law § 215.50 (3).

In opposition, as set forth below, none of plaintiff's arguments raise a triable issue of fact to preclude summary judgment on the false arrest and imprisonment causes of action. Plaintiff argues that defendants' conflicting testimony regarding the events leading up to the arrest precludes summary judgment. However, for purposes of probable cause, it is irrelevant that Pirando documented that plaintiff had been waiting outside and subsequently testified that plaintiff was inside the lobby. "Probable cause is determined on the basis of facts known to the arresting officer at the time of the arrest." *Keith v City of New York*, 641 Fed Appx 63, 67 (2d Cir 2016) (internal quotation marks and citation omitted). At the time the arrest was made, plaintiff was undisputedly still at the residence, even if he was outside at the time when defendants arrived.

Plaintiff also argues that defendants did not have information to support a reasonable belief that he committed an offense. Plaintiff explains that he did not attempt to enter the marital residence because he only entered the lobby and not the apartment. As soon as Mirman informed plaintiff that she had taken out an order of protection, plaintiff states that he waited on the sidewalk. Plaintiff continues that he did not make any attempt to communicate with Mirman.

However, defendants received a 911 phone call from Mirman that plaintiff had violated an order of protection. They had no reason to doubt her testimony, considering she had been issued a valid order of protection and plaintiff was at the residence. "A citizen's reliability, as differentiated from that of a paid or anonymous informant, is assumed, since he [or she] could be prosecuted if his [or her] report were a fabrication." *People v Bero*, 139 AD2d 581, 584 (2d Dept 1988) (internal quotation marks and citation omitted).

Defendants were not required to conduct a lengthy investigation regarding the circumstances behind Mirman's phone call to police or the underlying domestic dispute prior to effectuating the arrest. To the extent that plaintiff is alleging that defendants negligently investigated the matter between he and Mirman, "the police are not obligated to pursue every lead that may yield evidence beneficial to the

accused, even though they had knowledge of the lead and the capacity to investigate it." *Gisondi v Town of Harrison*, 72 NY2d 280, 285 (1988).

Further, plaintiff states that, although he was served with papers, as he did not look at the papers, he was unaware that Mirman had taken out an order of protection. However, probable cause is not negated by plaintiff's exculpatory reasons for his conduct. *See e.g. Agront v City of New York*, 294 AD2d 189, 190 (1st Dept 2002) ("The alleged conflicting evidence uncovered in the course of the police investigation is relevant to the issue of whether guilt beyond a reasonable doubt could have been proven at a criminal trial, not to the initial determination of the existence of probable cause").

Moreover, plaintiff argues that defendants' conflicting testimony and their conduct indicates that they acted in bad faith and had an improper motive for arresting plaintiff. However, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause and his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *People v McCorkle*, 111 AD3d 557, 558 (1st Dept 2013) (internal quotation marks and citations omitted).

In addition, for probable cause purposes, it is irrelevant which officer actually made the arrest, as long as Pirando consulted with an officer who made the determination after speaking with Mirman. "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 NY2d 416, 419 (1999) (internal quotation marks and citations omitted).

Defendants do not address plaintiff's argument regarding lack of probable cause for the charge of Resisting Arrest. Nevertheless, "[t]he probable cause defense to a false arrest claim requires only that there was probable cause for an arrest; it does not require that the officer had probable cause to arrest for

each specific offense charged . . . the defense prevails if there was probable cause to arrest for any single offense." *Anderson v City of New York*, 2017 WL 2729092, *3, 2017 US Dist LEXIS 97502, *7 (SD NY, June 23, 2017, No. 16-CV-6629 [DLC]) (internal citations omitted). Inasmuch as there was probable cause to support plaintiff's arrest under Penal Law § 215.30 (3), because probable cause is a complete defense to false arrest and imprisonment causes of action, defendants are granted summary judgment dismissing the first cause of action for false arrest and imprisonment.

Claim for Excessive Force

"Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness." *Combs v City of New York*, 130 AD3d 862, 864 (2d Dept 2015) (internal quotation marks and citations omitted); *see also Shamir v City of New York*, 804 F3d 553, 556 (2d Cir 2015) ("the use of excessive force renders a seizure of the person unreasonable and for that reason violates the Fourth Amendment").

Plaintiff alleges that he was subject to excessive force when Singh deliberately placed the handcuffs tightly on his wrists during the arrest and when Pirando refused to loosen them for the 24-hour period prior to his arraignment, despite his requests for him to do so. Plaintiff claims that the constrictive and painful placement of the handcuffs directly caused him to suffer neuropathy and other injuries to his hands. Further, plaintiff alleges that he did not resist arrest.[3]

In support of their motion, defendants argue that, other than being handcuffed, plaintiff does not allege that defendants used force during the arrest. However, courts have "recognized that excessively tight handcuffing that causes injury can constitute excessive force in violation of the Fourth Amendment." *Shamir v City of New York*, 804 F3d at 557. Defendants did not address any of plaintiff's arguments concerning the charge for Resisting Arrest or plaintiff's request for the handcuffs to be

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[3] "To the extent plaintiff asserts claims of assault . . . under 42 USC § 1983, these claims are best understood as a federal claim of excessive force." *Murray v City of New York*, 154 AD3d 591, 592 (1st Dept 2017).

loosened. As noted, Singh could not recall any resistance by plaintiff while he placed the handcuffs on him and Pirando testified that the resistance could be construed as tensing arms while being handcuffed.

Here, accepting plaintiff's statements as true, given the severity of plaintiff's injuries and the lack of aggressive conduct on plaintiff's part, questions of fact remain as to whether defendants employed excessive force in securing the handcuffs. "[D]efendants failed to eliminate triable issues of fact as to whether [Singh and Pirando] used force to effect the plaintiff's arrest and whether any such use of force was objectively reasonable under the circumstances." *Combs v City of New York*, 130 AD3d at 865. Accordingly, defendants' motion for summary judgment dismissing the second cause of action for excessive use of force is denied.

Malicious Prosecution-New York common law

"The elements of the tort of 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." *De Lourdes Torres v Jones*, 26 NY3d 742, 760 (2016) (internal quotation marks and citations omitted). "Probable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution." *Batten v City of New York*, 133 AD3d 803, 805 (2d Dept 2015) (internal quotation marks and citations omitted).

"While probable cause to arrest for any crime will defeat a false arrest claim, the Court must separately analyze the charges claimed to have been maliciously prosecuted." *Maldonado v City of New York*, 2014 WL 787814, *7, 2014 US Dist LEXIS 26239, *23 (SD NY, Feb. 26, 2014, No. 11-CV-3514 [RA]), quoting *Posr v Doherty*, 944 F2d 91, 100 (2d Cir 1991); *see also Davis v City of New York*, 373 F Supp 2d 322, 334 (SD NY 2005) ("there are two distinct charges underlying the prosecution at issue here. . . . [P]robable cause for simple trespass does not preclude a malicious prosecution claim as to either the criminal trespass or the unlawful posting"). Here, as set forth above, defendants had probable

cause to arrest plaintiff for the criminal proceeding, which constitutes a complete defense to the malicious prosecution claim. *Brown v Sears Roebuck and Co.*, 297 AD2d 205, 211 (1st Dept 2002). Accordingly, defendants are entitled to summary judgment on this claim as well. *See Broughton v State*, 37 NY2d 451, 458 (1975).[4]

Civil Rights Claims

"[A] person has a private right of action under 42 USC § 1983 against police officers who, acting under color of law, violate federal constitutional or statutory rights." *Delgado v City of New York*, 86 AD3d 502, 511 (1st Dept 2011). Furthermore, pursuant to 42 USC § 1983, plaintiff may "sue government agents for unlawful arrest . . . in violation of the laws and Constitution of the United States." *De Lourdes Torres v Jones*, 26 NY3d at 762. Under this statute, a municipality may be liable for civil rights violations if plaintiff shows that his civil rights were violated as a result of "an official government policy, custom or widespread practice." *Id.* "[T]he existence of such a policy may be shown by proof that the municipality had a custom or practice that was both widespread and reflected a deliberate indifference to its citizens' constitutional rights." *Id.* at 768.

Claims under 42 USC 1983 against the City of New York

Here, the City of New York is granted summary judgment dismissing plaintiff's causes of action grounded on civil rights violations pursuant to 42 USC § 1983, including the one for excessive use of force. While plaintiff alleges that the City of New York acted under color of law and deprived plaintiff of his civil rights, he fails to raise a triable issue of fact as to whether the unconstitutional actions, including false arrest, malicious prosecution and the use of excessive force, were the result of "an official government policy, custom or widespread practice" of the City of New York, itself. *De Lourdes*

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[4] Plaintiff's sixth cause of action, to the extent that it alleges that defendants made fraudulent statements surrounding the charges, "may be equated with the initiation of a malicious prosecution." *Rivera v City of New York*, 148 AD3d 462, 463 (1st Dept 2017). Neither party specifically addresses this cause of action. Accordingly, as the third cause of action alleges malicious prosecution, the sixth cause of action is dismissed as duplicative.

Torres v Jones, 26 NY3d at 762.

Further, as the City of New York, itself, did not cause the alleged constitutional violation, "[i]t cannot be held liable pursuant to 42 USC § 1983 based solely upon the doctrine of respondeat superior or vicarious liability" for the alleged actions or comments of one police officer. *Liu v New York City Police Dept.*, 216 AD2d 67, 68 (1st Dept 1995). In addition, "a single incident of objectionable conduct" fails to "establish the existence of policy or custom for section 1983 purposes." *Dillon v Perales*, 181 AD2d 619, 620 (1st Dept 1992) (citation omitted).

Claims under 42 USC § 1983 against Singh and Pirando

To the extent plaintiff is claiming that individual defendants unlawfully arrested and maliciously prosecuted him in violation of 42 USC § 1983, these claims are untenable because, as discussed above, probable cause existed for the arrest. *See Medina v City of New York*, 102 AD3d 101, 108 (1st Dept 2012) ("The cause of action for violation of civil rights must be dismissed based on the dismissal of the antecedent tort claims of false arrest/false imprisonment [and] malicious prosecution. . . ."); *see also Singer v Fulton County Sheriff*, 63 F3d 110, 118 (2d Cir 1995), *cert denied* 517 US 1189 (1996) ("There can be no federal civil rights claim for false arrest where the arresting officer had probable cause").

Qualified Immunity

Defendants argue that Singh and Pirando are entitled to qualified immunity for any claims brought pursuant to 42 USC § 1983. "If found to be objectively reasonable, [an] officer's actions are privileged under the doctrine of qualified immunity. The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davila v City of New York*, 139 AD3d 890, 893 (2d Dept 2016) (internal quotation marks and citation omitted). As noted, plaintiff has raised a triable issue of fact with respect to his 42 USC § 1983 claim premised on excessive force. "A complaint

alleging gratuitous or excessive use of force by a police officer states a cause of acting under the statute [42 USC § 1983] against that officer." *Delgado v City of New York*, 86 AD3d 502, 511 (1st Dept 2011).

Given the injuries sustained and the discrepancies regarding any resistance, questions of fact remain as to whether defendants' conduct was objectively reasonable. "[B]ecause a dispute exists as to the extent of the injuries that [plaintiff] sustained, the extent of his resistance, and the amount of force [defendants] used in arresting him, a reasonable jury could find that [defendants'] use of force was objectively unreasonable." *Gersbacher v City of New York*, 2017 WL 4402538, *11, 2017 US Dist LEXIS 162707, *30 (SD NY, Oct. 2, 2017, 1:14-CV-7600 [GHW]). Accordingly, while "qualified immunity may operate as a defense to . . . excessive force claims," at this stage, defendants' request for qualified immunity is denied. *Sanabria v Tezlof*, 2016 WL 4371750, *7, 2016 US Dist LEXIS 107104, *21 (SD NY, Aug. 12, 2016, 11-CV-6578 [NSR]).

Remaining Causes of Action

As set forth below, any additional causes of action brought pursuant to 42 USC § 1983 are not sufficiently pled because they are "wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced." *Martin v City of New York,* 153 AD3d 693, 694 (2d Dept 2017) (internal quotation marks and citation omitted).[5]

Conspiracy

"To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v Culbertson*, 200 F3d 65, 72 (2d Cir 1999). Plaintiff alleges in his complaint that Singh and Pirando entered into a

[5] In any event, as plaintiff did not oppose defendants' motion with respect to the remaining causes of action, he has abandoned them. *See e.g. Hanig v Yorktown Cent. Sch. Dist.*, 384 F Supp 2d 710, 723 (SD NY 2005) ("[B]ecause plaintiff did not address defendant's motion to dismiss with regard to this claim, it is deemed abandoned and is hereby dismissed").

conspiracy to arrest, charge and prosecute him. Plaintiff does not provide any more information about defendants' alleged agreement to conspire nor does he oppose defendants' motion dismissing this claim.

Specifically, in connection with a motion to dismiss a Section 1983 claim, courts have found that "complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." *Ciambriello v County of Nassau*, 292 F3d 307, 325 (2d Cir 2002) (internal quotation marks and citation omitted). Here, plaintiff has only presented conclusory and speculative allegations of a conspiracy, which are inadequate to establish a cause of action for a Section 1983 conspiracy. Accordingly, defendants' motion to dismiss the fifth cause of action is granted.

Negligence

In the seventh cause of action, plaintiff alleges that defendants acted in a careless manner when they handcuffed plaintiff and this resulted in injuries. However, plaintiff's "negligence claim, which is based on personal injuries [he] allegedly suffered when [he was] arrested, is fatally defective because there is no cause of action for false arrest or false imprisonment sounding in negligence." *Swinton v City of New York*, 61 AD3d 557, 558 (1st Dept 2009).

In addition, although the notice of claim alleges municipal liability under 42 USC § 1983 for the City of New York's failure to supervise the individual police officers who wrongly arrested plaintiff, "the negligent hiring, retention, and training claims must be dismissed because it is undisputed that the [officers were acting within the scope of their] employment." *Medina v City of New York*, 102 AD3d at 108.

III. Motion to Compel

Plaintiff has raised a triable issue of fact with respect to the individual officers' liability for violations of 42 USC § 1983 premised on excessive force. As a result, plaintiff has "established a good

faith factual predicate" that the officers' disciplinary history may "contain material related to the subject incident." *McFarlane v County of Suffolk*, 79 AD3d 706, 708 (2d Dept 2010). Accordingly, the part of plaintiff's motion, seeking to compel the production of the officers' records, is granted in part. Because these are federal claims, the CCRB, IAB, and any other disciplinary record found in the officers' personnel files relevant to excessive force (not the entire personnel files themselves), shall be disclosed directly to the plaintiff, subject to any redactions for personal identifying information. *See Unger v Cohen*, 125 FRD 67 [SD NY 1989]; *King v Conde*, 121 FRD 180 [ED NY 1988]). Any issues concerning compliance with this directive may be brought to the Court's attention and discussed at the parties' next compliance conference on August 15, 2018, at which time counsel for Singh and Pirado shall bring a redacted and unredacted copy of the disclosure.

Plaintiff's affirmation states that, in addition to the personnel records, he is also seeking to compel an additional examination before trial of Pirando, with respect to the latest discovery exchange. Plaintiff alleges that he has not yet had an opportunity to question Pirando with respect to the latest discovery request, including Pirando's memo book, domestic incident report, the 911 report, among other items.

"A municipality has the right to determine which of its officers with knowledge of the facts may appear for pretrial examination. Only when the plaintiff establishes that the knowledge of the proffered official is insufficient to produce testimonial and documentary evidence 'material and necessary' to the prosecution of the action, as provided in CPLR 3101 (a), may the court grant a motion for the production of additional witnesses." *Colicchio v City of New York*, 181 AD2d 528, 529 (1st Dept 1992) (citation omitted). Pirando testified that, prior to his deposition, he looked at the memo book, the online complaint report, the online booking sheet, the domestic incident report and the 911 Sprint report. Here, plaintiff has not established how any additional testimony of Pirando is "material and necessary to the prosecution of the action." In addition, "a party seeking to depose additional witnesses must make a

detailed showing of the necessity for taking such depositions." *Id.* at 529 (citations omitted). Here, plaintiff has not done so. Accordingly, the part of plaintiff's motion to compel the further examination before trial of Pirando, is denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion to compel is granted only to the extent that defendants are ordered to disclose the disciplinary history of Police Officer Rajinder Singh and Police Officer John Pirando as set forth above, and the remaining portion of the motion to compel is otherwise denied; and it is further

ORDERED that defendants' cross motion is granted in part to the extent that all of the claims against the City of New York are dismissed; and it is further

ORDERED that all claims against Police Officers Rajinder Singh and John Pirando are dismissed except plaintiff's claim grounded in violations of 42 USC § 1983 alleging the excessive use of force.

This constitutes the decision and order of the Court.

Dated: June 19, 2018

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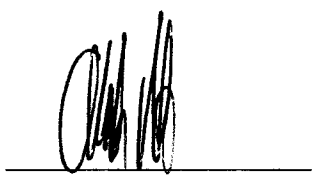

A.J.S.C.

HON. ALEXANDER M. TISCH