Scher v County of Suffolk
2018 NY Slip Op 32084(U)
August 16, 2018
Supreme Court, Suffolk County
Docket Number: 12-14338
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 12-14338
CAL. No. 17-01713OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 2-15-18
ADJ. DATE 3-8-18
Mot. Seq. # 001 - MG; CASEDISP

---X

CAMERON SCHER,

Plaintiff,

- against -

THE COUNTY OF SUFFOLK AND THE SUFFOLK COUNTY POLICE DEPARTMENT,

Defendants.

---X

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 15 ; Answering Affidavits and supporting papers 16 - 28 ; Reply Affidavits and supporting papers 29 - 31 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them is granted.

This action was commenced by plaintiff Cameron Scher to recover damages for injuries he allegedly sustained on June 23, 2011, when he was falsely arrested, falsely imprisoned, maliciously prosecuted, and subjected to libel and slander by defendants County of Suffolk and the Suffolk County Police Department. Plaintiff also asserts claims sounding in negligence, recklessness, intentional infliction of emotional distress (IIED), negligent infliction of emotional distress (NIED), as well as a claim for civil rights violations pursuant to 42 USC § 1983.

Defendants now move for summary judgment in their favor, arguing that probable cause existed for defendant's arrest, barring his claims for malicious prosecution, false arrest, false imprisonment, negligence, recklessness, and constitutional torts. Defendants further argue that a municipality cannot be held liable for IIED or NIED, and that the involved police officers have a qualified privilege, shielding

them from defamation claims. In support of their motion, defendants submit copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, transcripts of the parties' deposition testimony, copies of arrest paperwork, copies of the accusatory instruments, and copies of statements prepared by the arresting officers.

It is undisputed that on June 23, 2011, plaintiff was arrested and charged with operating a vehicle while impaired by the use of a drug, driving without a seatbelt, failing to signal a turn, and failing to maintain his lane of travel. A test of plaintiff's blood later revealed that no drugs or alcohol were present in his system at the time he was arrested, and the charges against him were dropped by the Suffolk County District Attorney's Office.

Specifically, plaintiff testified that at 10:00 a.m. on the date in question he was operating a motor vehicle on New York Avenue in Huntington, New York. He stated that he was traveling from his home to Driftwood Day Camp for the purpose of seeking employment. He indicated that as he passed New York Avenue's intersection with 18th Street, he heard sirens behind him. He testified that he "realized that [the sirens were] for [him]" because he "didn't have [his] seat belt on." He stated he then looked for a suitable place to pull his vehicle over, eventually decided to make a right turn onto West 22nd Street, and stopped. Plaintiff indicated he believed he "was going to get a warning from the cop for like maybe like a seat belt ticket, and then . . . be on [his] way to the Driftwood Camp." He stated that one uniformed police officer approached his driver's side window, and another approached his passenger-side window. He testified that he produced his license, registration, and insurance card upon their request. Then, one of the police officers shined a flashlight into his eyes and "asked [him] what he did the night before." Plaintiff indicated that he replied "Why are you asking?" to which the police officer responded "I know you are high on something." Plaintiff averred that he told the officer he "does not do drugs," but that the officer told him his "pupils are not normal size."

Plaintiff further testified that the police officers repeatedly insisted that he was under the influence of heroin and that he "better admit to doing it." Plaintiff indicated that he denied, 50 times, using heroin, but that the officers eventually told him to get out of his vehicle and perform sobriety tests. Plaintiff stated that he performed the three sobriety tests, which included counting to 30, walking one foot in front of the other, and standing on one leg, "perfect[ly]." However, plaintiff indicated that the officers informed him that he "failed all the tests because [he] was talking back to them." Plaintiff testified that immediately prior to performing the sobriety tests, one of the police officers told him that "if [he] admit[ted] to doing heroin, [his] dad could come to the scene and drive [him] home." He stated that despite his denials, the officers became more insistent that he admit to heroin use and, approximately five minutes later, plaintiff "admitted to doing heroin." Thereafter, he was handcuffed, placed in a police vehicle, and transported to the Second Precinct in Dix Hills, New York, for processing. There, plaintiff consented to the drawing and testing of his blood. Plaintiff indicated that he was arraigned the next day and released on his own recognizance.

Detective Sean Rail testified he is an eighteen-year veteran of the Suffolk County Police Department, and that on the date in question he was working a 7:00 a.m. to 3:00 p.m. tour, operating an unmarked police vehicle northbound on New York Avenue in Huntington Station, New York. His

partner, James Bebry, was traveling with him, sitting in the passenger seat. Detective (then Police Officer) Rail indicated that at approximately 10:35 a.m. he observed plaintiff's motor vehicle stopped at a stop sign, waiting to make a turn onto New York Avenue from East 16th Street, with no directional signal illuminated. He stated that plaintiff was not wearing a seatbelt, and that he continued to observe plaintiff's vehicle in his rear- and sideview mirrors as he and his partner drove forward. Detective Rail indicated that he observed plaintiff's vehicle execute a left turn onto New York Avenue, without activating its turn signal, and begin driving southbound. Detective Rail testified that after traveling approximately 20 feet past the intersection where plaintiff's vehicle had been stopped, the officers executed a U-turn in their police vehicle and began following it. Detective Rail stated that, while traveling approximately 1 ½ car lengths behind plaintiff's vehicle, he observed that vehicle drive over the white line denoting the shoulder lane on three occasions, at which time he activated his vehicle's lights and sirens, intending to pull plaintiff's vehicle over. He indicated that plaintiff made a right turn onto West 22nd Street and brought his vehicle to a stop approximately 50 feet west of New York Avenue.

Detective Rail further testified that both he and his partner exited their unmarked police vehicle and approached plaintiff's driver's side and passenger-side windows, respectively. Asked to describe plaintiff's demeanor, Detective Rail stated that he "was very slow in talking, his pupils were constricted, he seemed disoriented, and he [was not] answering the questions that were asked of him." Detective Rail indicated plaintiff "appeared to be intoxicated by something," and Detective (then Police Officer) Bebry asked him to step out of his vehicle. Detective Rail testified that Detective Bebry conducted "A.R.I.D.E." field sobriety tests on plaintiff, then directed him to return to his seat in his vehicle. Detective Rail indicated that plaintiff then, spontaneously, stated "I did heroin last night at a party at my friend's house." The two police officers then consulted amongst themselves and decided to arrest plaintiff. Upon questioning, Detective Rail denied that plaintiff, or plaintiff's parents who arrived at the police station later, ever stated plaintiff was on the autism spectrum.

Detective Bebry testified that he has been employed by the Suffolk County Police Department for more than 10 years, and that he was partnered with Detective Rail on the date of the incident in question. He indicated that he has very little independent memory of plaintiff's arrest but, as part of his deposition, he reviewed a report he drafted previously. His testimony regarding the events leading to plaintiff's traffic stop are substantially similar to the account given by Detective Rail, except that Detective Bebry stated that the police vehicle was brought to a stop on the west side of New York Avenue, facing southbound, after they made their U-turn. Detective Bebry further testified that he asked plaintiff if he was ill, had any medical conditions, or had any handicaps, and plaintiff denied any such concerns. He stated that he then conducted A.R.I.D.E. standardized field sobriety tests on plaintiff, and that throughout such tests plaintiff exhibited constricted pupils, depressed reflexes, droopy eyelids, fluttering eyelids, and delayed reactions. Detective Bebry indicated that plaintiff failed the standardized field sobriety tests, then admitted to using heroin, which led him to conclude that plaintiff was under the influence of "narcotic analgesics, of which heroin was a drug." He testified that based upon "the totality of the circumstances," he and Detective Rail placed plaintiff under arrest.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material

issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Criminal Procedure Law § 140.10 (1) provides "a police officer may arrest a person for . . . [a]ny offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence." To prevail on a cause of action alleging false arrest or false imprisonment, "a plaintiff must prove (1) intentional confinement by the defendant, (2) of which the plaintiff was aware, (3) to which the plaintiff did not consent, and (4) which was not otherwise privileged" (***Nolasco v City of New York***, 131 AD3d 683, 684, 15 NYS3d 449 [2d Dept 2015]). "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 NY3d 742, 759, 27 NYS3d 468 [2016]). 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" (*id.* at 760, quoting ***Broughton v State***, 37 NY2d 451, 457, 373 NYS2d 87 [1975]).

The existence of probable cause constitutes a complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution (*see* ***Sinclair v City of New York***, 153 AD3d 877, 878, 60 NYS3d 348 [2d Dept 2017]). Probable cause "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, 31 NYS3d 155 [2d Dept 2016][internal quotations and citations omitted]). The existence or absence of probable cause "becomes 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 surrounding the arrest" (***Liotta v County of Suffolk***, 157 AD3d 781, 781, 66 NYS3d 899 [2d Dept 2018]).

A statement may be defamatory "if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community" (***Golub v Enquirer/Star Group***, 89 NY2d 1074, 1076, 659 NYS2d 836 [1997], quoting ***Mencher v Chesley***, 297 NY 94, 100, 75 NE2d 257 [1947]). Damages will be presumed for statements "that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business" (***Geraci v Probst***, 15 NY3d 336, 344, 912 NYS2d 484 [2010]). Whether particular statements are considered defamatory per se is a question of law (*id.*). To state a cause of action to recover damages for defamation, a plaintiff "must allege that the defendant published a false statement, without privilege

or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (***Rodriguez v Daily News, L.P.***, 142 AD3d 1062, 1063 [2d Dept 2016]). In an action for libel or slander, "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally" (CPLR 3016 [a]).

As to constitutional claims, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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" (42 USC § 1983). However, a municipality "may not be held liable pursuant to 42 USC § 1983 solely on a theory of respondent superior" (***Blake v City of New York***, 148 AD3d 1101, 1104, 51 NYS3d 540 [2d Dept 2017]). Thus, a plaintiff "can proceed to trial against the governmental defendants on [his or] her claims under 42 USC § 1983 only if the record discloses a triable issue of fact as to whether an official policy or custom of the . . . government itself caused the [law enforcement officers] to violate [his or] her constitutional rights" (***De Lourdes Torres v Jones***, *supra* at 768). Finally, to establish a cause of action sounding in negligence, "a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 576, 934 NYS2d 43 [2011]).

Initially, the Court notes that defendants' instant motion was served approximately six days late, when the 120 day computation uses September 12, 2017, the date stamped on plaintiff's copy of the note of issue (*see* CPLR 3212 [a]). However, defendants have shown good cause why the Court should consider their untimely motion, namely that the Suffolk County Clerk's Office computerized database shows a date of September 18, 2017 for the note of issue in this matter (*see generally* ***Fahrenholz v Sec. Mut. Ins. Co.***, 32 AD3d 1326, 822 NYS2d 346 [4th Dept 2006]; ***Saverino v Reiter***, 1 AD3d 427, 767 NYS2d 445 [2d Dept 2003]; *cf.* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Given the Suffolk County Clerk's role in aggregating the documents filed in Supreme Court actions, it was reasonable for defendants to have relied upon its date for the note of issue. Further, as plaintiff's counsel has not shown that defendants were served with a date-stamped copy of that note of issue, the Court will excuse defendants' de minimus lateness and consider their motion (*see* ***Saverino v Reiter***, *supra*).

Here, defendants have established a prima facie case of entitlement to summary judgment in the instant action (*see* ***Whyte v City of Yonkers***, 36 AD3d 799, 828 NYS2d 218 [2d Dept 2007]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through plaintiff's admissions in his General Municipal Law § 50-h hearing transcript, defendants demonstrated plaintiff was not wearing a seatbelt at the time police officers pulled him over. The police officers' observation of plaintiff not wearing a seatbelt, the police officers' alleged observation of physical indicia of plaintiff's intoxication, coupled with plaintiff's alleged poor performance on roadside standardized field sobriety tests, gave those police officers, prima facie, the probable cause necessary to effectuate plaintiff's arrest (*see* ***Owen v State of New York***, 160 AD3d 1410, 76 NYS3d 330 [4th Dept 2018]; ***Kraut v City of New York***, 85 AD3d 979, 925 NYS2d 624 [2d Dept 2011]). Defendants also met their prima facie burden as to plaintiff's claims sounding in libel,

slander, negligence, recklessness, intentional infliction of emotional distress, negligent infliction of emotional distress, and violations of 42 U.S.C. § 1983.

Regarding plaintiff's claim that defendants were grossly negligent and reckless in their arrest of plaintiff, it is well settled that New York courts do not recognize claims for negligent or malicious investigation (***Johnson v Kings County Dist. Attorney's Off.***, 308 AD2d 278, 284, 763 NYS2d 635 [2d Dept 2003]). "A plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover under broad general principles of negligence but must proceed by way of the traditional remedies of false arrest and imprisonment" (*id.* at 284-285 [internal quotations and citations omitted]). Nor, can a member of the public recover damages against a municipality for its employee's negligence in performing discretionary acts, which also precludes plaintiff's NIED claim (*see* ***Lauer v City of New York***, 95 NY2d 95, 711 NYS2d 112 [2000]). Further, the doctrine of governmental function immunity "reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts" (***Connolly v Long Is. Power Auth.***, 30 NY3d 719, 727, 70 NYS3d 909 [2018], quoting ***Valdez v City of New York***, 18 NY3d 69, 76, 936 NYS2d 587 [2011]).

Turning to the defamation claims against defendants, they established, prima facie, that they are entitled to a qualified privilege with respect to plaintiff's arrest. "If found to be objectively reasonable, an officer's actions are privileged under the doctrine of qualified immunity . . . [which] 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, 33 NYS3d 306 [2d Dept 2016] [internal quotations and citations omitted]). Plaintiff's failure to wear a seatbelt, his alleged poor performance on standardized field sobriety tests, and his alleged admission to using heroin were sufficient to provide probable cause to arrest and charge plaintiff (*see* ***Shaw v City of New York***, *supra*). Further, defendants also possessed the "common interest privilege, 'which arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding duty or interest'" (***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 719, 770 NYS2d 110, 115 [2d Dept 2003], quoting ***Paskiewicz v National Assn. for Advancement of Colored People***, 216 AD2d 550, 551, 628 NYS2d 405 [1995]).

Under New York law, "a cause of action alleging intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (***Taggart v Costabile***, 131 AD3d 243, 249 [2d Dept 2015], quoting ***Howell v New York Post Co.***, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). The parties' accounts of the subject events are devoid of any such extreme or outrageous conduct (*cf.* ***Matter of Leff v Our Lady of Mercy Academy***, 150 AD3d 1239, 55 NYS3d 392 [2d Dept 2017]). It is also "well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity" (***Lauer v City of New York***, 240 AD2d 543, 544, 659 NYS2d 57 [2d Dept 1997]; *see* ***Sawitsky v State of New York***, 146 AD3d 914, 46 NYS3d 123 [2d Dept 2017]).

Regarding plaintiff's cause of action alleging negligent infliction of emotional distress, "a breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach, and when the claim possesses some guarantee of genuineness" (***Ornstein v NY City Health & Hosps. Corp.***, 10 NY3d 1, 6, 852 NYS2d 1 [2008] [internal quotations and citations omitted]). Unlike intentional infliction of emotional distress, negligent infliction of emotional distress does not require the alleged conduct to be "extreme and outrageous" (*see* ***Taggart v Costabile***, *supra*).

Detectives Rail and Bebry were not named personally in plaintiff's instant action. Therefore, the Court is constrained to analyze plaintiff's 42 USC § 1983 claims pursuant to ***De Lourdes Torres***, *supra*. In doing so, the Court finds defendants have proven, through the testimony of the witnesses, a prima facie case that no official policy or custom led to plaintiff's arrest (*see* ***Harris v City of New York***, 153 AD3d 1333, 62 NYS3d 411 [2d Dept 2017]; ***Shaw v City of New York***, *supra*). While plaintiff's counsel attempted to establish that defendants were not properly trained to interact with an individual alleged to have autism, no dearth of training would diminish the legality of plaintiff's arrest for his admitted failure to wear a seatbelt. The burden, thus, shifted to plaintiff to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to defendants' motion, plaintiff argues probable cause for his arrest did not exist because he "was pressured to admit to a crime he did not commit," that defendants "cite no legal authority supporting their argument that plaintiff's gross recklessness and negligence claims must be dismissed," that the arresting officers "are not entitled to a qualified privilege," and that "defendants' conduct constitutes negligence per se." In support of his arguments, plaintiff submits copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, transcripts of the parties deposition testimony, and a copy of a "compliance conference order." Plaintiff's submissions fail to raise a triable issue (*cf.* ***Williams v City of New York***, 153 AD3d 1301, 62 NYS3d 401 [2d Dept 2017]).

Even assuming all allegations made by the plaintiff are true, plaintiff admitted to committing the traffic infraction of failing to wear a safety belt while operating a motor vehicle. Defendants, possessing the, albeit rarely-exercised, privilege to arrest plaintiff on an admitted seatbelt infraction, also possessed the privilege to hold plaintiff in custody until his arraignment. Thus, despite the later revelation of potentially-exculpatory negative blood test results, there were alternative grounds for plaintiff's arrest, beyond the misdemeanor Vehicle and Traffic Law § 1192.4 charge (*see generally* ***Martinez v City of New York***, 153 AD3d 803, 61 NYS3d 562 [2d Dept 2017]). Therefore, plaintiff's causes of action alleging false arrest, false imprisonment, and malicious prosecution cannot be sustained (*see* ***Bartone v County of Nassau***, *supra*). With regard to the assertion that the police officers were grossly negligent or reckless in arresting him, plaintiff has not set forth, with any specificity, the acts alleged to be so. Plaintiff testified that the police officers questioned him, made observations of his physical appearance, conducted standardized field sobriety tests, then transported him to the police precinct for a voluntary blood test (*cf.* ***Fortunato v City of New York***, 63 AD3d 880, 881, 882 NYS 2d 195 [2d Dept 2009]). Finally, in failing to address the IIED and NIED claims in his opposition, plaintiff abandoned them (*see* ***Shaw v City of New York***, *supra*).

Accordingly, the motion by defendants for summary judgment dismissing the complaint against them is granted.

Dated: August 16, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION