SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 33

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SHAQUILLE ABRAHAM,

Plaintiff(s),

-against-

THE CITY OF NEW YORK, P.O. "JOHN DOE I" and P.O. "JOHN DOE II",

Defendant(s),

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Index No: 304182/2013

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment	Papers Numbered
Notice of Motion with Affirmation of Support and in Support with Exhibits....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing citied papers, the Decision/Order of this Court is as follows:

Defendants move for summary judgment pursuant to C.P.L.R. §3212 (1) dismissing plaintiff's cause of action for malicious prosecution as there was probable cause to prosecute plaintiff; (2) dismissing plaintiff's cause of action for false arrest and false imprisonment under 42 U.S.C. §1983 as there was probable cause to arrest and detain plaintiff; and (3) dismissing plaintiff's cause of action for excessive force under 42 U.S.C. §1983 as plaintiff was merely handcuffed during the course of his lawful arrest. Defendants further move for dismissal of plaintiff's cause of action for violation of civil rights pursuant to 42 U.S.C. §1983 as plaintiff fails to establish a claim against defendants pursuant to C.P.L.R. §3211. For reasons more fully set forth below, defendants' motion is denied in part and granted in part.

The instant action stems from an arrest of plaintiff on or about November 9, 2011 at approximately 2:35pm at or near 171st Street and Teller Avenue, in the Bronx, and subsequent prosecution. Plaintiff testified that prior to the arrest, he was the back seat passenger, with two friends as the front passengers, in a vehicle that was parked. Detective Erik Sherar did not appear

at a deposition, but instead submits an affidavit indicating that he was assigned to the "44th Precinct Module" as a detective in Bronx Borough Narcotics on the date of plaintiff's arrest. While on patrol, Detective Sherar states that the officers approached the vehicle and saw marijuana on the center console. The officers told plaintiff and the other occupants to exit the vehicle and subsequently searched the vehicle. Plaintiff was placed under arrest. Plaintiff testified that at the time of his arrest, he told the officers that the marijuana was not his. Detective Ivelisse Rodriguez, the assigned arresting officer for the day, was called to the scene. Detective Rodriguez testified at a deposition that when she arrived at the scene, plaintiff was already in handcuffs. The Court notes that Detective Rodriguez has no personal knowledge of the events leading up to plaintiff's arrest, or of Detective Sherar's initial interaction with plaintiff. Plaintiff was then brought to the precinct, and was held in Central Booking for two days before he was arraigned and released on his own recognizance.

Initially, plaintiff's state law claims for false arrest, false imprisonment, assault and battery, negligent training and negligent supervision were dismissed pursuant to a prior order dated March 12, 2014.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v. DiStefano*, 16 A.D.3d 637, 638 [2d Dep't 2005]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). To

defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact. All evidence must be presented in admissible form. Moreover, when deciding a summary judgment motion, the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Knepka v. Talman*, 278 A.D.2d 811, 811 [4th Dep't 2000]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960].

A plaintiff seeking to establish a cause of action for false arrest and false imprisonment must establish that (1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and, (4) the confinement was not otherwise privileged (*Hernandez v. City of New York*, 100 A.D.3d 433, 433 [1st Dep't 2012]). However, a defendant can prevail if he proves legal justification for the arrest and imprisonment, which may be established by showing that the arrest was based on probable cause (*Broughton v. State*, 37 N.Y.2d 451, 457 [1975]). "Probable cause" for arrest requires, not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction, but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed (*Jenkins v. City of New York*, 2 A.D.3d 291, 292 [1st Dep't 2003]). Police may stop a vehicle based upon a, "reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v. Taylor*, 31 A.D.3d 1141, 1142 [4d Dep't 2006]). On the contrary, where police officers approach a vehicle that is already parked and stationary, the level of suspicion necessary to justify that approach is 'an articulable basis,' that is supplied by a 'credible reason' for doing

so, not necessarily indicative of criminality (*People v. Ocasio*, 85 N.Y.2d 982, 985 [1995]; *see also People v. Harrison*, 57 N.Y.2d 470 [1982]; *People v. Witt*, 129 A.D.3d 1449 [4th Dep't 2015]).

Here, the Court finds that defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law. Detective Sherar, in his affidavit states:

> "On November 9, 2011, I was assigned to the 44th Precinct Module as a detective in Bronx Borough Narcotics. While on patrol in the vicinity of 171st Street and Teller Avenue, I observed a Red Dodge Caravan bearing Connecticut license plate 152-NCK parked on the public roadway. Upon approaching, plaintiff Abraham was observed sitting in the center of the van's second passenger row. Two additional individuals, located in the front driver's and passenger's seats, were also in the van."

Detective Sherar does not explain what actions his "patrol" consisted of, or how he came to approach the vehicle in which plaintiff was a passenger. Detective Rodriguez, in her EBT, generally discusses the function of the 44th Precinct Module, as mainly, "just doing day-to-day buy and bust operations and observations." However, Detective Rodriguez was not present at the scene when plaintiff was approached and arrested. Moreover, Detective Sherar does not specify the nature of the approach or whether this was a 'buy and bust operation or observation.' In light of the foregoing, defendants fail to make a prima facie showing of the legality of their initial approach and interaction with plaintiff in a parked car. Therefore, defendants' motion for summary judgment with respect to plaintiff's federal causes of action for false arrest and false imprisonment, malicious prosecution, and assault and battery are denied, based upon defendants insufficient initial showing.

Further, claims of excessive force are analyzed under the Fourth Amendment's objective reasonableness standard. Under this standard, the reasonableness of the officer's use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight (*Graham v. Connor*, 490 U.S. 386, 396 [1989]). In determining whether the

officer used excessive force in the use of handcuffs, the court must consider evidence that: (1) the handcuffs were unreasonably tight; (2) the defendants ignored the pleas that the handcuffs were too tight; and, (3) the degree of injury to the wrists (*Lynch ex rel. Lynch v. City of Mt. Vernon*, 567 F. Supp. 2d 459, 468 [S.D.N.Y. 2008]; *see also Wilson v. the City of New York*, No. 3044842013, 2015 WL 7300919 at *4 [Sup. Ct. N.Y. October 9, 2015]). When the use of handcuffs does not result in any significant injury, there can be no claim of excessive force (*Lynch ex rel. Lynch v. City of Mt. Vernon*, 567 F. Supp. 2d 459, 468 [S.D.N.Y. 2008]). Plaintiff testified during examination before trial, taken June 17, 2015, that he did not suffer significant injuries from his arrest and only received a cut on the top of his left wrist from the handcuffs. Additionally, plaintiff testified that he did not receive medical treatment for any injuries nor did he seek any medical attention following the arrest. Plaintiff fails to submit evidence to support his claim for excessive force. Therefore, defendants' motion for summary judgment with respect to plaintiff's cause of action for excessive force is granted.

42 U.S.C. §1983 creates a remedy for violations of federal rights committed by persons acting under color of state law (*Howlett v. Rose*, 496 U.S. 356 [1990]). Therefore, to survive a motion to dismiss, the plaintiff must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 [2007]). A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 [2009]). The Court must accept as true the factual allegations in the complaint, not legal conclusory statements, and draw all inferences in the plaintiff's favor (*Allaire Corp. v. Okumus*, 433 F.3d 248, 249 [2006]; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 [2009]).

A plaintiff who seeks to hold a municipality liable for damages under 42 U.S.C. §1983 must prove that the, "person who... subjected, or caused him to be subjected," to the deprivation

of his constitutional rights did so because of an official policy or custom (*Monell v. Dep't of Social Services*, 436 U.S. 658, 694 [1978]; *Vippolis v. Vill. of Haverstraw*, 768 F.2d 40, 44 [1985]). It is not enough to show that the police officer is a representative of the municipality through *respondeat superior*, but rather plaintiff must show the police officer was following a municipal policy (*Monell v. Dep't of Social Services*, 436 U.S. 658, 686 [1978]).

Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under §1983 (*McKinnon v. Patterson*, 568 F.2d 930, 934 [2d Cir. 1977]). Plaintiff has failed to name the individual officers in this case, and therefore have not technically made a showing of Detective Sherar or Detective Rodriguez' personal involvement in the case. Additionally, plaintiff has failed to amend the caption to name the individual officers and the statute of limitations to do so has expired. Therefore, defendants' motion to dismiss with respect to plaintiff's fourth cause of action for violation of civil rights pursuant to 42 U.S.C. §1983 is also granted.

Accordingly, based upon the foregoing, all of plaintiff's causes of action are dismissed except for the following: federal false arrest and federal false imprisonment; federal assault and battery; and plaintiff's state and federal claims for malicious prosecution.

This constitutes the decision and order of the Court.

Dated: 7/12/18
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.