Thomas v City of New York
2018 NY Slip Op 32838(U)
September 25, 2018
Supreme Court, Bronx County
Docket Number: 305213/2015
Judge: Ruben Franco

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX – IAS PART26

GENIOUS THOMAS,

Plaintiff,

-against-

Index No. 305213/2015

THE CITY OF NEW YORK, NEW YORK CITY POLICE OFFICER WAYNE DARDEN OF THE 41 PCT, SHIELD #3306,, TAX REG. #953799, UNDER DOCKETS #2015BX015571, N/H/A JOHN/JANE DOE I, OTHER NEW YORK CITY POLICE OFFICERS INVOLVED IN SAID ARREST WHOSE NAMES ARE NOT KNOWN AT THIS TIME N/H/A JOHN/JANE DOE II-XIV, AS IT PERTAINS TO THE INCIDENT THAT AROSE ON APRIL2, 2015 AND NO OTHER,

MEMORANDUM DECISION/ORDER

Defendants.

HON. RUBEN FRANCO

This is an action alleging, *inter alia*, false arrest, false imprisonment, assault, battery, malicious prosecution, and unlawful strip search. Defendants City of New York and Police Officer Wayne Darden (collectively, "The City"), move for summary judgment pursuant to CPLR § 3212. Plaintiff has withdrawn Monell claims against the City of New York, as well as claims for negligent hiring, training, supervision and retention.

The facts, as culled from the pleadings, deposition testimony, and exhibits, are as follows: On April 2, 2015, plaintiff was arrested by officers of the New York City Police Department inside 1011 Elder Avenue, Bronx County (the "Building"). The Building has three floors, including apartments on the first and second floors. Access to the first and second floor apartments is obtained by use of an exterior staircase.

Plaintiff testified that several times a week, he had been staying in the second floor

apartment in the Building with his then girlfriend, Charisse Maxwell and Maxwell's mother. Approximately one or two months prior to his arrest, Maxwell's mother moved out of the Building, however, Maxwell and plaintiff continued to live in her apartment. Plaintiff and Maxwell had an ongoing dispute with the owner of the Building regarding the right of plaintiff and Maxwell to occupy the apartment. Apparently, without obtaining a court order, nor providing notice to plaintiff and Maxwell, the landlord changed the locks to their apartment.

On April 2, 2015, at approximately 10:55 P.M., a 911 operator received a telephone call from Marisol Rodriguez ("the Complainant"), who stated that she observed two black teenagers, one male and one female, enter the Building through a window, that no one lived there, and that they were still in the apartment. The 911 operator dispatched a message to police officers, including Officer Darden, informing that there was a burglary in progress at the Building. When Officer Darden arrived at the location, he observed that the lights of the upstairs apartment were on, the door was ajar, and "the window blinds were messed up" on the second floor. Officer Darden and his partner walked up the exterior stairs onto the second floor landing and observed that the door knob to the second floor apartment was removed. The door was open and Officer Darden entered the second floor apartment, announced his presence as a police officer, and saw plaintiff with a styrofoam carton of food in his hands. Officer Darden asked plaintiff why he was there and plaintiff responded that he went through the window and opened the door for his girlfriend, Maxwell, who lived there with her mother who had moved out, and that Maxwell was at the store, whereupon, plaintiff was arrested. While plaintiff was being removed from the apartment, the Complainant positively identified him. Plaintiff was transported to the 43rd Precinct, where he was processed, fingerprinted and photographed, then he was taken to Central

Booking, and was arraigned on April 3, 2015, and bail was set. He remained incarcerated until April 6, 2015, when the criminal charges against him were dismissed and sealed.

The elements of a cause of action for 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 (see Broughton v. State of New York, 37 N.Y.2d 451, 457 [1975]).

The elements of a cause of action for false arrest and/or imprisonment are: (1) the defendant intended to confine the plaintiff; (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 (see Broughton v. State of New York, *supra*, at 456).

A warrantless arrest is presumptively invalid and raises a presumption of lack of probable cause (see Lawson v. City of New York, 83 A.D.3d 609 [1st Dept. 2011]). However, a claim for false arrest and imprisonment may be defeated by proving legal justification for the arrest, which "may be established by showing that the arrest was based on probable cause" (Broughton at 458; Martinez v. City of Schenectady, 97 N.Y.2d 78, 95 (2001); Rivera v. County of Nassau, 83 A.D.3d 1032 (2011). And a showing of probable cause is a complete defense to claims of false arrest and imprisonment and malicious prosecution, under state and federal standards (see Lawson v. City of New York, *supra*; Narvaez v. City of New York, 83 A.D.3d 516 [1st Dept. 2011]; Leftenant v. City of New York, 70 A.D.3d 596 [1st Dept. 2011]).

The first three elements of the false arrest claims of plaintiff, noted above, are not in dispute, as plaintiff was arrested without a warrant. Accordingly, his claim for false arrest hinges

on whether there was legal justification, that is, probable cause, for his arrest.

Probable cause is established by a showing that the officer had sufficient information to support a reasonable belief that an offense had been committed; it does not require proof beyond a reasonable doubt (see Marrerro v. City of New York, 33 A.D.3d 556, 557 [1st Dept. 2006]). Generally, an accusation against a specific individual of a specific crime from an identified citizen is presumed to be reliable, and is sufficient to establish probable cause, absent the police being aware of "materially impeaching circumstances" or grounds for questioning the complainant's credibility (see Medina v. City of New York, 102 A.D.3d 101, 103-104 [1st Dept. 2012]). Mere denial by the accused of the complainant's claims will not constitute "materially impeaching circumstances" or grounds for questioning the complainant's credibility, so as to raise a question of fact as to probable cause (*Id.* at 105). Moreover, a police officer need not conduct an exhaustive investigation prior to effecting an arrest for which he has probable cause (see Gonzalez v. City of New York, 56 Misc.3d 1215 [A][Sup. Ct., Bx. Cty. 2017]; Thompson v. City of New York, 50 Misc.3d 1037 [A][Sup. Ct., Bx. Cty. 2015], both citing Sweet v. Smith, 42 A.D. 502, 509 [4th Dept. 1899]). Further, plaintiff proffers no evidence to suggest that Officer Darden should have questioned the Complainant's credibility (see Grimes v. City of New York, 106 A.D.3d 441 [1st Dept. 2013]; Medina v. City of New York, *supra*).

Accordingly, plaintiff's claims for false arrest, false imprisonment, and malicious prosecution are dismissed.

A plaintiff seeking to recover damages for assault must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact (see Gould v. Rempel,

99 A.D3d 759 [2nd Dept. 2012]). To recover damages for battery founded on bodily contact, a plaintiff must prove that there was bodily contact, that the conduct was offensive, and that the defendant intended to make the contact without the plaintiff's consent (see Johnson v. Suffolk County Police Dept., 245 A.D.2d 340 [2nd Dept. 1997]).

The right to make a lawful arrest accompanies with it the right to use some degree of physical coercion (see Esmont v. City of New York, 371 F. Supp.2d 202 [E.D.N.Y. 2005]); Graham v. Connor, 490 U.S. 396 [1989]; Johnson v. Suffolk County Police Dept., *supra.* Inasmuch as the court has found that there was probable cause for plaintiff's arrest, his claims for assault and battery are without merit and are dismissed.

It is beyond cavil that not every push or shove used in effecting an arrest constitutes excessive force (see Graham v. Connor, *supra*). Whether excessive force under the Fourth Amendment was used by a police officer in carrying out an arrest is determined by the standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene, not from hindsight (see Rivera v. City of New York, 40 A.D.3d 334, 341 [1st Dept. 2007]). The facts underlying the arrest, including the severity of the crime at issue, whether the suspect was actively resisting arrest, and whether the suspect posed an immediate threat to the safety of the officers, must be considered (*Id.* at 342).

Plaintiff alleges that excessive force was used in effecting his arrest. More specifically, plaintiff's Notice of Claim asserts that he had "... multiple assault and batteries committed to his person including but not limited to being placed in handcuffs to tight." Further, paragraph "7" of plaintiff's Complaint alleges that "... Defendants jointly and severally in their capacity as police

officers, wrongfully touched, grabbed, handcuffed and seized Plaintiff GENIOUS THOMAS, in an excessive manner about his person, causing him physical pain and mental suffering..."

However, at his deposition plaintiff testified that the police officers did not punch, kick and/or strike him and that the only excessive force used pertained to the handcuffs. Plaintiff provides no specificity of conduct by The City that allegedly caused any injuries as a result of excessive force, and he has furnished no medical documentation. The lack of a significant injury beyond temporary discomfort, is fatal to an excessive force claim (see Lynch v. City of Mount Vernon, 567 F. Supp.2d 459, 468 [2nd Cir. 2008]; Usavage v. Port Authority of New York and New Jersey, 932 F. Supp.2d 575, 592 [S.D.N.Y. 2013]).

With respect to the allegations involving tight handcuffs, the viability of such a claim rests on whether (1) the handcuffs were unreasonably tight; (2) the defendants ignored the plaintiff's pleas that the handcuffs were too tight; and, (3) the degree of injury to the wrists, if any (see Lynch v. City of Mount Vernon, 567 F.Supp.2d 459, 468 [2nd Cir. 2008]). The lack of significant injury beyond temporary discomfort, is fatal to an excessive force claim. *Id.* at 468. (See, also, Usavage v. Port Authority of New York and New Jersey, 932 F.Supp.2d 575, 592 [S.D.N.Y. 2013]).

Accordingly, plaintiff's claim for excessive force is dismissed.

In order for the police to conduct a visual cavity inspection, they must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity (see People v. Hall, 10 N.Y.3d 303, 311 [2008]; People v. Colon, 80 A.D.3d 440 ([st Dept. 2011]). Visual cavity inspections cannot be routinely undertaken as

incident to all drug arrests or permitted under a blanket police department policy that subjects persons suspected of certain crimes to these procedures (see People v. Hall, *supra*; People v. Colon, *supra).* Here, the City has not articulated a specific factual basis supporting a reasonable suspicion to believe that plaintiff secreted evidence inside a body cavity.

The City argues that the court should adopt plaintiff's first statement concerning whether a strip search of plaintiff was conducted. The City contends that the inconsistency between plaintiff's 50-h hearing testimony, taken on September 17, 2015, wherein he denied that a strip search occurred at any time while he was in custody, and that of his deposition testimony taken on July 14, 2016, claiming that a strip search had taken place, constitutes a feigned issue of fact. However, the court notes that plaintiff's Notice of Claim, duly verified, served on the City of New York on June 30, 2015, recites, *inter alia*, that "While in police custody claimant [plaintiff] was illegally strip searched with cavity inspection." Further, plaintiff's deposition testimony was given over one year prior to the instant motion for summary judgment. Any inconsistencies in the Notice of Claim, 50-h hearing testimony and the deposition raise issues of credibility that should be properly left for the trier of fact (see Muhammad v. New York City Housing Authority, 111 A.D.3d 513 [1st Dept. 2013], citing Francis v. New York City Transit Authority, 295 A.D.2d 164 [1st Dept. 2002]).

Accordingly, the branch of the City's motion seeking dismissal of plaintiff's claim for an illegal strip search, is denied.

This constitutes the Decision and Order of the court.

Dated: September 25, 2018

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO