To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE S TATE OF NEW YORK
COUNTY OF WESTCHESTER

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SAMUEL RIVERS,

Plaintiff,

-against-

CITY OF MOUNT VERNON, MOUNT VERNON POLICE DEPARTMENT, POLICE OFFICER GREEN,

Defendants.

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Index No: 69130/2015

DECISION and ORDER
Sequence No. 1

RUDERMAN, J.

The following papers were considered in connection with the defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212:

Papers	Numbered
Notice of Motion Affirmation, Exhibits A - L, and Memorandum of Law	1
Affirmation in Opposition, Exhibit A	2

Plaintiff commenced this action for false arrest, false imprisonmnet, infliction of emotional distress, and other claims arising out of his arrest by defendant Officer Demoy Green on November 11, 2014. His complaint alleges that "[a]s the Plaintiff attempted to walk down the public street, Officer Greene yelled at the Plaintiff, pushed him to the ground and placed handcuffs on him," and that he was then brought to central booking and placed in a cell, until a senior officer released him. He further asserts that "[a]t no time did plaintiff commit any offense against the laws of the City of Mount Vernon and or New York State for which an arrest may be lawfully made."

Defendants now move for summary judgment, contending that the evidence establishes as a matter of law that there was probable cause for plaintiff's arrest. They submit plaintiff's deposition testimony in which he explained that he had been sitting in a restaurant called Ripe, facing the window, when he noticed a police car pulling over a vehicle, and then saw a second police car arrive. Plaintiff testified that when the stop continued in excess of fifteen minutes, he exited the restaurant, and walked to the location of the vehicles. He observed the officers shining lights into the stopped car, as if they were asking the occupants for documents. He began to make a video recording with his cell phone, and he testified that his recording includes his remark, "I'm just making sure no one's rights are being violated." Plaintiff acknowledged that he had not observed any violation of civil rights at the time. He also acknowledged that he has videotaped interactions between police officers and citizens "a lot of times," which videos he posts on his YouTube page.

Plaintiff testified that he was at the scene, videotaping, for approximately three or four minutes. During his deposition, a videotape was played, and plaintiff acknowledged his recorded voice on the video recording, first whistling, then making several statements while the officers were proceeding with the traffic stop, including "Can we get a sergeant here or boss on the scene here?" and "I see an illegal stop by the police," as well as "Aren't you cops supposed to have your hats on your head when you step out of your car?" and other related taunts about their lack of hats. The video recording submitted with defendants' motion reflects that at this point, Officer Green took out his handcuffs and approached plaintiff, first instructing him to turn around and put his hands behind his back, and then directed him repeatedly to "Get on the ground." The recording confirms that plaintiff protested "What are you arresting me for?" to

which Officer Green replied, "you're under arrest for harassing a police officer."

Also submitted with defendants' motion is the first 26 pages of the deposition testimony of Officer Green. The officer explained that he conducted the traffic stop because the stopped vehicle did not have license plates. He stated that he noticed plaintiff emerging from the restaurant across the street, as he spoke with the occupants of the stopped car, and that he heard plaintiff remarking that he was violating the civil rights of the car's occupants, and that he was performing an illegal stop. Officer Green testified that while he was conducting the stop alone, he told plaintiff he was standing too close and needed to step back because he was obstructing the investigation. After a second police car arrived, with two additional officers, Officer Green again told plaintiff to back up, and plaintiff backed up approximately two feet. However, after the officer turned to the other officers, plaintiff moved closer. The officer then attempted to handcuff plaintiff, succeeding after a struggle, and placed plaintiff in the back seat of one of the police cars.

Analysis

False Arrest or False Imprisonment

To establish false arrest or false imprisonment, "the plaintiff must show 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" (*Broughton v State*, 37 NY2d 451, 456 [1975]). A prima facie case for false arrest and false imprisonment is made out "by showing that defendant's police officer intentionally arrested and confined him against his consent, and without the lawful privilege of a warrant" (*Smith v County of Nassau*, 34 NY2d 18, 22 [1974]). "Because the arrest and imprisonment were

effected without a warrant, a presumption arises that both are unlawful, and the burden of proving justification, including 'reasonable cause,' is cast upon the defendant" (*id.* at 23).

Defendants rely on the rule that "[a] police officer who can articulate credible facts establishing reasonable cause to believe that someone has violated a law has established a reasonable basis to effectuate a stop" (*People v Robinson*, 97 NY2d 341, 353-354 [ ]), and contend that plaintiff's arrest was, as a matter of law, supported by probable cause. "Probable cause to believe that a person committed a crime is a complete defense to an action alleging false arrest or false imprisonment, whether brought under state law or 42 USC § 1983" (*Rodgers v City of New York*, 106 AD3d 1068, 1069 [2d Dept 2013]).

Defendants argue that when a defendant is uncooperative and refuses several direct requests to "step back" or to keep away from officers conducting a traffic stop, the crimes of obstructing governmental administration in the second degree and disorderly conduct are established.

Penal Law § 195.05 defines the class A misdemeanor of obstructing governmental administration in the second degree. It provides in part that "A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference." "Physical force or (physical) interference (Penal Law § 195.05) can consist of inappropriate and disruptive conduct at the scene of the performance of an official function" (*People v Tarver*, 188 AD2d 938 [3d Dept 1992], citing *People v Dolan*, 172 AD2d 68, 75 3d Dept 1991], lv denied 79 NY2d 946). In *People v Tarver*, evidence that the defendant

approached toward the back of a police officer struggling to arrest a suspect, which necessitated another officer diverting his assistance in the arrest and intervening to protect his partner from the defendant's apparent attack, "constituted a knowing, physical interference with and disruption of the official function (arrest) being performed by" the first officer (188 AD2d at 938). In *People v Romeo* (9 AD3d 744 [3d Dept 2004]), evidence that the defendant had been a passenger in his girlfriend's vehicle when she was pulled over for running a red light and was arrested for driving while intoxicated, and that defendant refused several direct requests that he keep away from the officers as they attempted to subdue his girlfriend, was sufficient to establish the crime of obstructing governmental administration in the second degree (*id.* at 745).

Disorderly conduct, a violation, is defined in Penal Law § 240.20 as follows:

> "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or 5. He obstructs vehicular or pedestrian traffic; or 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose."

The evidence submitted by defendants satisfies their burden of establishing a prima facie showing that at the time of plaintiff's arrest Officer Green had probable cause to believe that plaintiff had committed the crime of obstructing governmental administration in the second degree by intentionally obstructing or used interference to attempt to prevent the officers from conducting their traffic stop. However, in opposition to defendants' motion, plaintiff submits a Supervisor's Report (MV-93) prepared by Sgt. R.M. Wuttke of the Mount Vernon Police

Department. In that document, Sgt. Wuttke described the information he obtained from Officer Green and the other officers on the scene, as well as the assessment of the duty ADA to whom he reported that information, who concluded that plaintiff "had not violated any laws and there was no probable cause to make an arrest."

The determination of whether Officer Green had probable cause to conclude that plaintiff had committed a crime turns on subtleties as whether plaintiff was standing too close to the officers and, if so, whether he ignored reasonable instructions to stand back from the officers. Because these particulars are not established as a matter of law, the issue of probable cause cannot be resolved as a matter of law on the present motion. Therefore summary judgment must be denied on both the first and second causes of action.

Intentional Infliction of Emotional Distress

"The tort [of 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" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). To prevail on this cause of action the plaintiff must establish that the defendant "by extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional distress" to the plaintiff. In opposition to summary judgment on this cause of action, plaintiff asserts that being arrested without probable cause and having your liberty taken from you qualifies as extreme and outrageous conduct. However, he offers no comparable case as authority for this claim. Rather, the facts, even adopting plaintiff's evidence and claims regarding the manner of his arrest, "fall far short of this strict standard" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303

[1983]), and therefore summary judgment is warranted.

Negligent Hiring and Retention

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*Gipe v DBT Xpress, LLC*, 150 AD3d 1208, 1209 [2d Dept 2017] [internal quotation marks and citations omitted]). Moreover, plaintiff has not specifically addressed this cause of action in his argument, and has offered no evidentiary showing in support of his negligent hiring and retention claim in opposition to this summary judgment motion. In the absence of supporting evidence or case law, summary judgment dismissing this fourth cause of action is appropriate.

Negligence

Defendants argue that plaintiff's fifth cause of action, for negligence, must be dismissed because intentional offensive conduct renders an actor liable for assault rather than negligence. They rely on the rule that "once intentional offensive contact has been established, the actor is liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently" (*Mazzaferro v Albany Motel Enterprises, Inc.*, 127 AD2d 374, 376 [3d Dept 1987]). However, in the context of this summary judgment motion in which some of the events are disputed, it would be inappropriate to dismiss the negligence claim before it has been determined that all of the complained-of behavior was intentional rather than merely negligent.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing plaintiff's third and fourth causes of action, and is otherwise denied; and it is further

ORDERED that all parties are directed to appear in the Settlement Conference Part on Tuesday, June 19, 2018 at 9:15 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601 to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 7, 2018

HON. TERRY JANE RUDERMAN, J.S.C.