

Scott v City of New York
2019 NY Slip Op 30443(U)
February 19, 2019
Supreme Court, New York County
Docket Number: 155710/2016
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52

Justice

INDEX NO. 155710/2016
MOTION DATE 01/23/2019
MOTION SEQ. NO. 001

KEVIN SCOTT,
Plaintiff,
- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, SERGEANT JAMES GATTO and SERGEANT
HAN CHOI (Shield No. 00713), P.O. JOHN DOE 1, P.O. JOHN
DOE 2
Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28,
29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

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

Preliminarily, it should be noted that all of Plaintiff's state law claims are hereby
dismissed.1 Therefore, the only claims that are before the Court, are the claims made pursuant to
42 U.S.C. §1983 as against the individually named defendants, Sergeant James Gatto and
Sergeant Han Choi. For the reasons set forth below the City's motion is granted and the
complaint is dismissed in its entirety.

Undisputed Facts

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff
on April 28, 2015, at approximately 5:30 p.m., in the vicinity of 8 Avenue between 35th and 36"
Street, New York, New York, when he was arrested. Plaintiff was stopped by Sergeant Gatto and
Sergeant Choi while Plaintiff was in possession of a knife that was clipped to his front pants
pocket.

Plaintiff was charged with Criminal Possession of a Weapon in the fourth degree in
violation of New York Penal Law § 265.01 and Possession of Knives or Instruments in violation
of Administrative Code § 10-133(c). On July 9, 2015, Plaintiff took an ACD pursuant to
Criminal Procedure Law § 170.55 with his charges being dismissed on January 8, 2016.

1 Plaintiff did not oppose Defendant's, City, motion seeking dismissal of all claims against The City of New York.

Summary Judgment Standard

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dep't 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]).

Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Discussion

The City's motion for summary judgment is granted. The Court rejects plaintiff's claims arising under 42 U.S.C. § 1983 as the complaint fails to plead facts sufficient to establish a cognizable constitutional claim. "A cause of action under 42 USC § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom and must be pleaded with specific allegations of fact." (*Leung v City of New York*, 216 AD2d 10 [1st Dept 1995].) Here, plaintiff's pleading is devoid of facts and fails to meet the *Monell* standard. (*Monell v Dept. of Social Servs. of City of New York*, 436 US 658; *Leung v City of New York*, 216 AD2d 10 [1st Dept, 1995]; *Carattini v Grinker*, 178 AD2d 307 [1st Dept, 1991].) Further, the Court rejects plaintiff's attempts to categorize this incident as a "stop and frisk", as there is nothing in the record that supports this contention when viewing the evidence in the light most favorable to the plaintiff. As such, plaintiff's federal causes of action under 42 USC § 1983 are hereby dismissed.

Assuming *arguendo* that the pleaded facts establish a cognizable constitutional claim, the Court finds for defendants Gatto and Choi on the issue of qualified immunity. An official sued under 42 U.S.C. § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "clearly established" at the time of the challenged conduct. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *see Taravella v. Town of Walcott*, 599 F.3d 129, 133 (2d Cir. 2010) ("Qualified immunity protects officials from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Only arguable probable cause, not actual probable cause, need exist to establish an entitlement to qualified immunity. *See, Caraballo v. City of New York*, 526 F. App'x 129, 131 (2d Cir. 2013); *see Lawrence v. City of Cadillac*, 2010 U.S. Dist. LEXIS 132761, 25- 27 (S.D.N.Y. Dec. 8, 2010). The analysis of qualified immunity is, therefore, an analysis distinct from probable cause. *Warren v. Dwyer*, 906 F.2d 70 (2d Cir. 1990).

The City correctly argues that in determining whether the Police Officers actions were reasonable, one must use the reasonably objective standard. In that instance, it is readily apparent that the police officers' actions meet that standard. Sergeant Gatto observed the plaintiff with a knife in his pocket with part of the blade of the knife exposed. Sergeant Gatto's testimony is buttressed by the knife, which indicates that the blade of the knife folds into the rest of the knife and would therefore be visible if the clip was visible. At that point, as the City's counsel correctly points out, Officer Gatto's actions to charge the plaintiff with violation of Administrative Code Section 10-133(c) and to confiscate the instrumentality of that violation was reasonable under the circumstances.

Plaintiff's counsel argues that there is a question of fact with regard to just what was visible. However, that is not the standard to be used in a qualified immunity defense. However, even assuming that it is, probable cause was obtained regardless of which testimony is to be believed. Administrative Code Section 10-133(c) provides that "[i]t shall be unlawful for any person in a public place, street or park, to wear outside of his or her clothing or carry in open view any knife with an exposed or **unexposed blade** unless such person is actually using such knife for a lawful purpose as set forth in subdivision d of this section." Emphasis added. Therefore, even if only the clip of the knife was exposed and the officer recognized it to be the clip of a knife, probable cause to arrest the plaintiff and confiscate the knife was present.

Accordingly, the motion is granted in full, and the complaint is hereby dismissed in its entirety. Defendants are directed to serve a copy of this order with notice of entry upon plaintiff within 30 days of the entry date.

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

2/19/2019
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED NON-FINAL DISPOSITION

CHECK IF APPROPRIATE: SETTLE ORDER GRANTED IN PART OTHER

INCLUDES TRANSFER/REASSIGN SUBMIT ORDER REFERENCE

FIDUCIARY APPOINTMENT

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK J.S.C.