Duque v City of New York
2019 NY Slip Op 31837(U)
June 21, 2019
Supreme Court, New York County
Docket Number: 153173/2012
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JOSE DUQUE,

Plaintiff,

- v -

CITY OF NEW YORK, JOHN DOE #1, M.B.R.P. REST., INC.,DOING BUSINESS AS THE STUMBLE INN, ROBERT CONNOR, PABLO RODRIGUEZ, EMMANUEL RODRIGUEZ

Defendant.

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INDEX NO. 153173/2012

MOTION DATE 06/12/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 were read on this motion to/for DISMISSAL.

Defendants, Police Officer Robert Connor, Shield No. 24500 ("Officer Connor"), Police Officer Pablo Rodriguez, Shield No. 11312 ("Officer P. Rodriguez"), and Police Officer Emmanuel Rodriguez, Shield No. 23119 ("Officer E. Rodriguez) seek an Order pursuant to CPLR § 3211(a)(7) dismissing the Complaint and an Order pursuant to C.P.L.R. § 3212 granting summary judgment to all individually named Police Officer Defendants and dismissing the Complaint as against Officer Connor, Officer P. Rodriguez, and Officer E. Rodriguez.

Preliminarily, it should be noted that on August 11, 2015 the City's motion to dismiss was resolved via a so-ordered stipulation between the Plaintiff and the City.[1] In accordance with the so-ordered stipulation, all state law claims against the City were dismissed, as well as all federal 'Monell' claims against the City. The only remaining claims are plaintiff's alleged causes of action for deprivation of rights, excessive force, false arrest, malicious prosecution, and deliberate indifference to medical needs pursuant to 42 USC § 1983, as against the individually

[1]Defendants, M.B.R.P. Rest., Inc., DBA The Stumble Inn, are no longer in this action pursuant to a stipulation of discontinuance.

named officers only. Specifically, Officer Connor, Officer P. Rodriguez, and Officer E. Rodriguez.

This action arises from personal injuries allegedly sustained by the plaintiff on May 30, 2011 at approximately 12:30 a.m. when he was arrested and detained at 1454 Second Avenue, New York, New York by police officers employed with the New York City Police Department ("NYPD").

Defendants now move for summary judgment on the basis that plaintiff has failed to sufficiently plead his federal causes of action as against the named defendants, plaintiffs arrest and subsequent prosecution was supported by probable cause, plaintiff was not subjected to excessive force and plaintiff was not denied medical attention. In opposition, plaintiff alleges that the police lacked probable cause for the arrest, imprisonment and subsequent prosecution, and that excessive force was used to effectuate the arrests. [2]

For the reasons set forth below defendants' motion for summary judgment is granted.

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 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 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*

[2] Plaintiff's cause of action alleging deliberate indifference of medical needs is dismissed, as the defendants' motion in this regard is granted without opposition. Additionally, in plaintiff's opposition he states that claim was previously dismissed, notwithstanding the record is devoid of any evidence to support such a claim.

v. Ropog Cab Corp., 153 AD2d 520 [1st Dept 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 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 NY2d 557 [1980]). A mere shadowy semblance of an issue of fact or bald, conclusory allegations will not suffice to defeat a motion for summary. judgment. *Mallad Construction Corp. v County Federal Savings & Loan Assoc.*, 32 NY2d 285, 290 [1973]; *Morowitz v Naughton*, 150 A.2d 536 [2d Dept 1989]. It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v Da Ecib USA*, 259 AD 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 NY2d 8, 12 [1960]).

False Arrest/Imprisonment and Malicious Prosecution

With respect to the allegations of false arrest, false imprisonment and malicious prosecution, the Court finds that the arrest and subsequent prosecution of the plaintiff was supported by probable cause as a matter of law. There is no genuine issue of material fact as to the existence of probable cause.

Proof of probable cause to arrest as a matter of law constitutes a complete defense to the claims of false arrest and unlawful imprisonment, *Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006], as well as to claims of malicious prosecution, assuming the initial probable cause is still present at the commencement of the prosecution. *Brown v Sears Roebuck & Co.*, 297 AD2d 205, 211 [1st Dept 2002]. Proof of probable cause is not the equivalent of proof of

guilt beyond a reasonable doubt but merely that it was reasonable to believe that a crime had been committed. *Agront v City of New York*, 294 AD2d 189, 190 [1st Dept 2002].

To succeed on a claim for false arrest and false imprisonment, a 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 of New York*, 37 NY2d 451, 456 [1975]). The defendants can prevail if they prove that the arrest and imprisonment were effectuated with probable cause (*Id.*; *Rivera v City of New York*, 40 AD3d 334, 337 [1st Dept 2007]).

An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense (*Ricciuti v. N.Y.C. Transit Auth.*, 124 F 3d 123, 128 [2d Cir. 1997]; *see also People v Oden*, 36 NY2d 382, 384 [1975]). When the facts resulting in an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide (*Parkin v Cornell University, Inc.*, 78 NY2d 523, 528 [1991]).

To prevail on a claim of malicious prosecution, a plaintiff has the burden to plead and prove the following four elements: (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. *Broughton* 37 NY2d 451, 457 (1975).

Here, it is undisputed that police officers, specifically Officer Connor and Officer P. Rodriguez, observed plaintiff initiate a confrontation with an individual at the Stumble Inn entrance. Defendants' version of events is corroborated by video surveillance taken at the subject location. These facts alone establish probable cause as a matter of law.

Moreover, plaintiff does not dispute that he may have struck Officer Connor. In fact, in his deposition testimony he specifically states that Officer Connor did have blood on him, but it was not done on purpose, contrary to his opposition that denies contact ever occurred. *See* Plaintiff's EBT testimony 17:11-23.

In opposition plaintiff asserts that his recollection of the night and the events that led to arrest is unclear, yet he still denies his initiating contact. Plaintiff's denials are simply not enough to defeat the instant motion, especially here where there is a video recording of the incident. As such, plaintiff's causes of action for false arrest, false imprisonment and malicious prosecution are dismissed.

Excessive Force

Preliminarily, with respect to plaintiff's argument that the City is barred from arguing the sufficiency of the pleadings for federal causes of action, based on the theory of res judicata, the Court does not reach this argument. The Court deems plaintiff's original complaint sufficient to state a cause of action pursuant to 42 USC §1983 as against the individually named officers.

A person has a private right of action under 42 USC § 1983 against an individual who, acting under color of law, violates federal constitutional or statutory rights (*Delgado v City of New York*, 86 AD3d 502, 511 [1st Dept 2011] "A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute (42 USC § 1983) against that officer.") See also *Abreu v NY City Police Dept.*, 150 AD3d 405, 406 [1st Dept 2017].

Defendants contend that any force used was reasonable and privileged, that Officer E. Rodriguez was not there at the time the alleged excessive use of force was used, and that tight handcuffs are insufficient to establish excessive force as a matter of law.

In opposition, plaintiff asserts that allegations of tight handcuffs qualify to establish a claim of assault and battery because the arrest was not supported by probable cause, for the reasons discussed above that argument is without merit[3]. Plaintiff alleges that Officer P. Rodriguez placed the handcuffs on him too tight causing his wrists to be "bruised and/or cut". See Pltf.'s Aff in Opp. ¶ 53. Plaintiff also alleges that he was "brutalized on the hood of the police car on [his] head many times" See plaintiff's deposition testimony 18:11-22. Plaintiff also states he does not know slammed his head against the hood. See *id.* at 18:23-25 and19:1-3.

Plaintiff's conclusory allegations of being brutalized and not knowing the identities of the individuals who allegedly participated in the excessive use of force, are insufficient to oppose defendants' motion for summary judgment. Especially, since there can be no vicarious liability to any entity as the City is not in the action and plaintiff has not specified any conduct that any of the named defendants engaged in that raised a question of fact as to whether the force used by them was excessive.

In neither his deposition testimony or in opposition did plaintiff assert any specific allegations of excessive force against any of the individually named officers, except tight handcuffs by Officer P. Rodriguez. Moreover, plaintiff does not oppose defendants' motion that all excessive force claims be dismissed as to Officer Emmanuel Rodriguez, therefore that portion of the motion is granted without opposition,

With respect to Officer Connor, plaintiff does not allege any specific conduct by this officer in either his deposition testimony or in opposition, therefore the excessive force claims are dismissed as against Officer Connor.

[3] Further, there are no state law claims assault and battery.

With respect to the allegations of tight handcuffs made against Officer P. Rodriguez, although plaintiff made a complaint that the handcuffs were too tight, allegedly to Officer P. Rodriguez only, plaintiff testified that he did not complain to anyone else regarding these injuries and never sought medical attention for these injuries. *see* plaintiff's EBT testimony 19:23-25 and 20:1-4. As such, plaintiff fails to raise an issue of fact regarding the amount of force used to handcuff him. *see Davidson v City of NY*, 155 AD3d 544, 544, [1st Dept 2017] (finding excessive force claim dismissed where there was no showing of injury from the allegation that handcuffs were too tight).

In viewing the evidence in the light most favorable to plaintiff, defendants have established a *prima facie* entitlement to judgment as a matter of law, and plaintiff has not sufficiently rebutted this showing. Accordingly, it is hereby

ORDERED that defendants 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.

6/21/2019
DATE

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

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE