Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

Index No. 705076/2017

OSAMA E. METWALLY,

Plaintiff,

-against-

Motion
Date: December 9, 2019

Respectfully
Referred on: December 12, 2019

Motion Cal. No.: 16

Motion Sequence No.: 2

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PORT AUTHORITY POLICE DEPARTMENT, DETECTIVE WILLIAM PRENTICE and CITY OF NEW YORK,

Defendants.

The following papers numbered 55-70, 91-96, 98, 101-102 submitted and considered on this motion by defendants THE PORT AUTHORITY POLICE DEPARTMENT and THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY(individually referred to as "PA"), (collectively referred to as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3211 and 3212 dismissing the plaintiff OSAMA E. METWALLY'S (hereinafter referred to as "Plaintiff") Complaint as against the Defendants with prejudice and for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 55-70
Affirmation in Opposition-Affidavits-Exhibits.	EF 91-96, 98
Reply Affirmation-Memorandum of Law.....	EF 101-102

This is an action for damages, the facts are alleged as follows. On June 12, 2014, Plaintiff, a cab driver for Cario Limousine Service, picked up a pre-arranged round-trip passenger from New Jersey at 5:45 p.m with the intention of taking her to John F. Kennedy International Airport to pick

up a friend and then drive both back to New Jersey. Plaintiff claims he arrived at Terminal 4 between 7:30 and 8:00 p.m and immediately saw the named defendant William Prentice ("Prentice") waving his hand seemingly to hail a ride. Plaintiff alleges he thought Prentice was blind because he was wearing big dark glasses despite the fact that it was getting dark. After his passenger disembarked he drove to the end of Terminal 4, ignoring Prentice's gesture and intending to break his fast with a meal. Plaintiff claims he exited the vehicle intending to dispose of the garbage that remained from his meal and upon returning to his vehicle he observed that Prentice was now standing by his car at the passenger side window. Plaintiff claims Prentice requested that Plaintiff take him to Manhattan for seventy-five dollars. Plaintiff claims he refused and told Prentice he already had a client. Instead, Plaintiff claims he gave Prentice a card with a number to contact his employer and arrange a pick-up. Plaintiff testified he intended either to call for Prentice because he believed he was blind or allow Prentice to call. Plaintiff claims he was arrested by Prentice after handing Prentice the card.

Prentice's Account

Prentice claims on June 12, 2014 he was stationed at Terminal 4 in John F. Kennedy Airport in his capacity as a detective for Port Authority Police Department. That Plaintiff rolled down his passenger side window and inquired as to whether Prentice needed a cab. Prentice alleges he told Plaintiff he needed a cab to Manhattan or the Sheraton Hotel and Plaintiff responded that it would cost $70 and told Prentice to meet him further down the road. Prentice alleges the conversation occurred again and he ultimately perched himself behind Plaintiff's trunk. Then, Prentice alleges Plaintiff took Prentice's suitcase and placed it in the trunk of his car. This allegedly led Prentice to arrest Plaintiff for solicitation. Prentice claims he was not wearing glasses that day and that there was no passenger in Plaintiff's car at the time but that Plaintiff did exclaim "I thought you were blind" while he was under arrest.

Testimony of Senada Berberistanin

Senada claims on June 12, 2014 she arranged with Plaintiff to take her from her home in New Jersey to John F. Kennedy Airport to pick up a friend, then back to her home in New Jersey for $250. Senada claims that she used Plaintiff several times in the past for cab services along with her family and friends. That on June 12, 2014 Plaintiff picked her up a little after 6:00 p.m. from her home and took her to Terminal 4 where she went to go get her friend. Upon returning with her friend to meet Plaintiff he was not there. She found this unlike his behavior in the past.

Motion To Dismiss

Now, Defendants seek an Order pursuant to CPLR 3211(a)(2) dismissing all of Plaintiff's Causes of Action as alleged against named defendant Port Authority Police Department.

CPLR 3211 (a)(2) states as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing

one or more causes of action asserted against him on the ground that:
2. the court has not jurisdiction of the subject matter of the cause of action

Defendants allege as an agency of the City of New York the Port Authority Police Department is not an entity in its own right but merely an administrative arm of the municipality, therefore, it can neither sue nor be sued. Defendants cite *Charles Edward Davis v Lynbrook Police Department* (224 F. Supp.2d 463 [EDNY 2002]) where plaintiff alleged he was harassed by a police officer and brought a civil rights action. Lynbrook Police Department moved to dismiss. The court held "Under New York law, departments that are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and, therefore, cannot sue or be sued" (*id* at 477).

Plaintiff has not pled facts sufficient to prove that the Port Authority Police Department is more that a mere "administrative arm" of the City of New York (*id*).

Court Lacks Personal Jurisdiction over Port Authority

> The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act **shall be commenced within one year after the cause of action therefor shall have accrued**, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a **notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit**, action or proceeding **is commenced**. The provisions of this section shall not apply to claims arising out of provisions of any workmen's compensation law of either state. (Mckinney's Cons Laws of NY § 7107 [emphasis added])

PA seeks to dismiss Plaintiff's First, Third, Fourth, Fifth, Seventeenth and Eighteenth Causes of Action pursuant to CPLR 3211and/or because they are untimely.

CPLR 3211 (a)(7)

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference" (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]; *see also Leon v Martinez*, 84 NY2d 83 [1994]).

First Cause of Action- New York State Tort Law False Arrest and False Imprisonment

A cause of action for false arrest and imprisonment under New York law arises "at the time of plaintiff's actual physical release from confinement" (*Thomas D. Allee v City of New York*, 43 AD2d 899 [1st Dept 1973]). Here, Plaintiff was released from confinement on June 15, 2014

therefore, Plaintiff's first cause of action began to accrue on the same date. Plaintiff commenced this action on May 17, 2016 by filing the Summons and Complaint.

Third Cause of Action- Intentional Infliction of Emotional Distress

Plaintiff cannot maintain this cause of action against a government entity (See *Edward G. Lauer v City of New York et al.*, 240 AD2d 543, 544 [2d Dept 1997]).

Fourth Cause of Action- Negligent Infliction of Emotional Distress

Plaintiff claims he was acquitted in this matter on June 19, 2015 and that his negligent infliction of emotional distress claim overlaps with his malicious prosecution claim, thereby making this claim timely.

Plaintiff was charged with violating Vehicle and Traffic Law § 1220-b.

Vehicle and Traffic Law § 1220-b states:

> 1. No person shall unlawfully solicit ground transportation services at an airport. A person unlawfully solicits ground transportation services at an airport, when, at an airport, such person, without being authorized to do so by the airport operator, or without having made a prior agreement to provide ground transportation services to a specific patron, engages or offers to engage in any business, trade or commercial transaction involving the rendering to another person of any ground transportation services from such airport.
>
> 1. 2. As used in this section, the term "ground transportation service" shall mean a service offering transportation by any vehicle, including taxi cab, limousine, van or bus.
>
> 3. As used in this section, the term "airport" shall mean all of the real property forming part of any facility used for the landing and taking off of airplanes engaged in the transportation of passengers, including without limitation, all roadways, parking areas, pedestrian walkways and terminal buildings forming part of such facility.
>
> 4. Any person who engages in the unlawful solicitation of ground transportation services at an airport shall be guilty of a class B misdemeanor punishable by a fine of not less than seven hundred fifty dollars nor more than one thousand five hundred dollars, or by imprisonment of not more than ninety days or by both such fine and imprisonment. Notwithstanding any contrary provision of law, any charge alleging a violation of this section shall be returnable before a court having jurisdiction over misdemeanors.

Fifth Cause of Action- New York State Law Negligence

Plaintiff claims PA was generally negligent and negligent in its hiring, training and retention of Prentice. PA asserts Plaintiff is seeking to recover under principles of negligence for injuries allegedly resulting from his false arrest and false imprisonment thereby requiring dismissal of those claims.

In *Floyd Thompson v The City of New York et al.* (50 Misc.3d 1037, 2015 NY Slip Op 25419 *1039 [Sup Ct, Bronx County 2015]) plaintiff brought suit against the defendant alleging false arrest, false imprisonment, malicious prosecution, negligence, violation of 42 USC § 1983, and negligence in the supervision, hiring and retention of police officers. Plaintiff and defendant dispute the events that led up to the stopping and eventual arrest of plaintiff, plaintiff's account of the events raises an issue of fact as to the constitutionality of the "initial police conduct to which his subsequent arrest was inextricably tied". (*Thompson*, 2015 NY Slip Op 25419, *1042). Among other things, the defendant sought to dismiss plaintiff's claims for general negligence, negligent hiring, supervision and retention. As to plaintiff's general negligence claim the court held "[i]nsofar as a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention [s/he] may not recover under broad general principles, but must proceed by way of traditional remedies of false arrest and imprisonment. This is because [it] is well settled that in this State, in cases alleging police misconduct, the law does not recognize a cause of action for general negligence or negligent investigation" (*Thompson*, 2015 NY Slip Op 25419, *1053). As to plaintiff's negligent hiring, retention and supervision claim the court held such a claim "will be dismissed when an employer concedes that the acts alleged to have been perpetrated by the employee were within the scope of that employee's employment" (*Thompson*, 2015 NY Slip Op 25419. *1053). Defendant in their amended answer admitted that their employee was acting within the scope of his employ. Therefore, plaintiff's claims for negligent hiring, supervision and retention were dismissed (*Thompson*, 2015 NY Slip Op 25419 *1054).

Here, paragraph 78 of Plaintiff's Compliant states: "That Defendants', PORT AUTHORITY and PAPD, employee Defendant Det PRENTICE, were negligent, reckless and careless by allowing and providing the means and opportunity by which Defendant Det PRENTICE was able to manufacture a pretextual fraudulent and deceitful basis to arrest Plaintiff, arrested and detained him and then caused and participated in the malicious prosecution of Plaintiff while working as their, employee, agent and servant."

Plaintiff's general negligence claim is grounded in damages that resulted from his alleged wrongful arrest and detention and therefore, Plaintiff's general negligence claim is dismissed.

As to Plaintiff's negligent hiring, training and retention claims we must first look to PA's Answer. Unlike in *Thompson,* where the defendant admitted that the named officer was under their employ and working within the scope of their employ here, PA did not make such an admission within their Answer. Instead paragraph 9 of the Answer states: "Denies the allegations contained in paragraph "9" of the Complaint, except admits that the Port Authority has a Department of Public Safety that employs police officers and that Detective William Prentice is a detective and/or police officer with the Port Authority's Department of Public Safety, and respectfully refers all questions of law to the Court." The above statement confirms that Prentice was under the employ of PA but is unclear as to whether at the time of the arrest he was acting within the scope of his employment to them. Later PA addresses the same in their reply papers stating "Here, it is undisputed that Detective Prentice was acting within the scope of his employment as a police officer when he made the lawful arrest." Accordingly, because Detective Prentice was acting within the scope of his employment, Plaintiff cannot assert a cause of action for negligent hiring, retention training or supervision.

Plaintiff's Fifth Cause of Action is dismissed.

Seventeenth and Eighteenth Causes of Action- Federal Law False Arrest and False Imprisonment

PA alleges Plaintiff's claim pursuant to 42 USC § 1983 should be dismissed because there was probable cause for the arrest.

To establish a claim for false arrest and false confinement pursuant to both 42 USC § 1983 and NY Law the plaintiff must prove that the defendant intentionally confined the plaintiff without plaintiff's consent and without justification. Probable cause to arrest is a complete defense (*Larry Weyant v George Okst,* 101 F3d 845, 852 [1996]). "[P]robable cause to arrest exists whether the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime" (*id*). Whether or not probable cause existed may be decided as a matter of law where there is no dispute as to the pertinent events and the knowledge of the officers (*id*).

Here, there are issues of fact surrounding the events leading up to Plaintiff's arrest. Plaintiff claims Prentice approached him and he denied Prentice's request for cab service and instead offered a company card. This court lacks enough information to determine whether the mere offering of an employer's company card could formulate the probable cause Prentice needed. On the other hand, Prentice contends it was Plaintiff who initiated their interaction, set the fare price and attempted to place Prentice's luggage in the trunk of his car. Therefore, PA's motion to dismiss Plaintiff's federal false arrest and false confinement claim is denied because there are issues of fact surrounding the events that led up to Plaintiff's arrest.

Second and Nineteenth Causes of Action- Malicious Prosecution

"Under both federal and state law, the elements of a malicious prosecution claim are (1) defendant commenced or continued a criminal proceeding against plaintiff; (2) the proceeding terminated in plaintiff's favor; (3) there was no probable cause for the criminal proceeding; and (4) defendant initiated the criminal proceeding out of malice. (*Robert Collom v Incorporated Village of Freeport, New York et al.*, 691 F Supp 637, 640 [EDNY 1988]). In *Collom*, the court found that since probable cause was established to support the arrest there was no basis for wrongful prosecution unless a jury could find during the time between the arrest and the prosecution the authorities were made aware of evidence that could exonerate the accused (*id*).

As stated above, this Court concludes there are issues of fact surrounding whether probable cause existed for Plaintiff's arrest, issues that speak to questions surrounding the validity of the prosecution rooted in the arrest. "The tort of malicious prosecution provides redress for the initiation of unjustifiable litigation" (*Thompson*, 2015 NY Slip Op 25419 *1049). Therefore, PA's motion to dismiss Plaintiff's federal and state malicious prosecution claim is denied.

Fourth Cause of Action

PA cites *Mary Lancellotti v James C. Howard* (155 AD2d 588, 589 [2d Dept 1989]) where plaintiff sought to recover for psychic harm that resulted from the defendant's misdiagnosis and treatment. The court stated in order to recover for emotional harm the cause of action must "be premised upon a breach of duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety" (*id*). Ultimately, the court dismissed plaintiff's cause of action for negligent infliction of emotional distress (*id* at 589).

PA alleges Plaintiff's claim for negligent infliction of emotional distress fails to allege a specific duty owed and that the duty was breached in either his Notice of Claim or Complaint. Plaintiff alleges PA breached its general duty to protect Plaintiff's civil rights, Therefore, PA's motion to dismiss Plaintiff's negligent infliction of emotional distress claim is granted.

Monell Claim

In *Jane Monell et al. v Department of Social Services for the City of New York et al.* (436 US 658 [1978]) plaintiffs brought suit against the defendants alleging violation of 42 USC § 1983 stating that the defendants policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons in violation of their constitutional rights. Local governing bodies, such as the defendants, can be sued under 42 USC § 1983 when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent the official policy" (*id* at 659). Local governments may be sued under 42 USC § 1983 "for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels" (*id* at 691).

However, suit under 42 USC § 1983 may not be brought through a theory of respondeat superior "it is when execution of a governments policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" (*id* at 694).

42 USC § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Here, PA alleges that Plaintiff's Complaint is devoid of facts to support a claim that the Port Authority has failed to train or supervise its employees and that such a failure amounts to deliberate indifference on its part to the rights of persons with whom its employees come into contact. PA alleges Plaintiff has not pointed to a policy or custom that "inflict[ed] the injury" (*Monell* at 694) . Therefore, PA claims Plaintiff's Sixteenth, Eighteenth and Nineteenth Causes of Action should be dismissed.

In opposition, Plaintiff alleges PA had a custom or policy to use deception to entrap hustlers, a laudable goal, however Plaintiff alleges PA failed to balance the goal with care for and consideration of the rights of innocent persons. By employing a culture of deception as a matter of policy PA risked corroding the ethical restraints of its employees. Plaintiff alleges this is evidenced by Prentice's disguise as a blind man in need of help. Plaintiff alleges the Complaint pleads facts sufficient to prove PA violated 42 USC § 1983 under a "single incident theory".

In *Harry F. Connick v John Thompson* (563 US 51, 54 [2011]) plaintiff was prosecuted for attempted robbery in a related criminal matter and was convicted. A month before his planned execution, stemming from a murder conviction in which plaintiff chose not to testify because of his armed robbery conviction, it was later determined that prosecutors in the armed robbery matter violated *John Brady v State of Maryland,* 373 US 83 (1963) by failing to disclose exculpatory evidence. Both plaintiff's armed robbery and murder convictions were vacated (*Connick* at 53). Plaintiff instituted this action pursuant to 42 USC § 1983 alleging defendants failed to train their prosecutors adequately on the laws governing discovery and that the lack of training caused non-disclosure in his robbery case (*id* at 54). "[A] municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the untrained employees come into contact" (*id* at 61 [internal citation omitted]). To show deliberate indifference proof must establish "that a municipal actor disregarded a known or obvious

consequence of his action" (*id* [internal citation omitted]). Plaintiff relied on "single-incident liability" theory instead of attempting to prove a pattern of similar *Brady* violations in order to prove deliberate indifference. The court points to *City of Canton. Ohio v Geraldine Harris* (489 UD 378 [1989]) where, according to the court, the possibility that in a narrow range of circumstances a pattern need not be shown to prove deliberate indifference was an issue left open (*id* at 63). *Canton* posed the hypothetical of a city that armed its police force with firearms and deployed them into the public to capture fleeing felons, without training those officers on the constitutional limitation of using deadly force. The *Canton* court theorized in that scenario, due to the known frequency with which officers attempt to capture fleeing felons coupled with the predictability that an officer who lacks specific tools to handle such a situation will violate a citizens rights such a decision reflects the city's deliberate indifference to the "highly predictable consequence" (*Board of the County Commissioners of Bryan County. Oklahoma v Jill Brown et al.*, 520 US 397, 409 [1997]). The *Connick* court ruled failure to train prosecutors on *Brady* violations does not fall within the narrow range of single incident liability set forth in *Canton* (*id* at 64). The court reasoned the obvious need for specific legal training present in the *Canton* hypothetical was not present there. "There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal training is what differentiates attorneys from average public employees" (*id* at 64 [internal citations omitted]).

Plaintiff also suggests a pattern of similar incidents proving deliberate indifference may exist pointing to Prentice's testimony:

> Q: Other than that complaint and the present one. Were there any other complaints, civilian complaints against you during the course of your career as a police officer with the Port Authority Police Department?
> A: There was a similar case involving a subject I arrested also for solicitation of ground transportation services. (Page 96 lines 3-13)

Plaintiff has not alleged facts that suggest PA violated 42 USC § 1983 either under a theory of single incident liability or by proving a pattern of similar incidents. Taking Plaintiff's allegations as factual even if PA has a custom or policy of using deception by employing disguises to coax out hustlers the same is not an example of deliberate indifference. The alleged hustler, whether under the impression that he/she is helping a blind man or otherwise, is still required to avoid violating the law and refrain from soliciting services. Therefore, while issues of fact surround whether based on Plaintiff's actions probable cause existed as to his arrest and later prosecution, it cannot be said that the use of a disguise to coax out alleged hustlers has the obvious effect of forcing persons to violate solicitation laws thereby violating their constitutional rights.

42 USC § 1985 and 42 USC § 1988 claims

PA moved to dismiss Plaintiff's 42 USC §§ 1985 and 1988 claims.

42 USC § 1985

According to the court in *Steven Romer v Robert M. Morgenthau* (119 F Supp 2d 346 [2000]) to make a valid conspiracy claim the complainant must allege 1. A conspiracy itself and 2. Actual deprivation of constitutional rights (*id* at 363). "To withstand a motion dismiss, the conspiracy claim must contain more than conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights" (*id*).

PA argues Plaintiff has made vague and conclusory assertions. Upon reviewing Plaintiff's Twenty-Third cause of action this Court agrees with PA. In opposition, Plaintiff does not address the same.

42 USC § 1988

Plaintiff has surviving federal claims therefore, PA's motion to dismiss Plaintiff's 42 USC § 1988 claim is denied. Therefore it is,

ORDERED, that all Plaintiff's Causes of Action as asserted against Port Authority Police Department are dismissed with prejudice; and it is further,

ORDERED, that Plaintiff's Fifth, Third, Fourth and Twenty-Third Causes of Action are dismissed as against Port Authority.

The foregoing constitutes the decision and order of this Court.

Dated: January 10, 2020

Hon. Chereé A. Buggs, JSC

FILED
JAN 16 2020
COUNTY CLERK
QUEENS COUNTY