Perko v Town of Greenburgh
2020 NY Slip Op 34875(U)
June 2, 2020
Supreme Court, Westchester County
Docket Number: Index No. 56777/2011
Judge: Terry Jane Ruderman

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 STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KENNETH A. PERKO, JR. and SUSAN JANE PERKO,

Plaintiffs,

-against-

THE TOWN OF GREENBURGH, ED DEVITO, JOSEPH DECARLO and JOHN DOES #1 - #5,

Defendants.

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DECISION and ORDER

Motion Sequence Nos. 1 & 2
Index No. 56777/2011

RUDERMAN, J.

The following papers were considered on the motion by defendants Police Officer Edward DeVito, sued herein as Ed DeVito, and Police Chief Joseph DeCarlo, sued herein as Joseph DeCarlo, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against them (sequence 1); and the motion by defendant Town of Greenburgh for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against it (sequence 2):

Papers	Numbered
Notice of Motion (seq 1), Affirmation, Exhibits A - Y, and Memorandum of Law	1
Notice of Motion (seq 2), Affirmation, Exhibits A - B	2
Affirmation in Opposition, Exhibits 1 - 8, Memorandum of Law, Affidavit in Opposition, Exhibit a	3
Reply Affirmation (seq 1), Exhibit U	4
Reply Affirmation (seq 2)	5

Background

This action for false arrest and related claims arises out of the October 11, 2010 arrest of plaintiff Kenneth Perko, Jr. ("Perko")[1] for the crime of public lewdness (Penal Law § 245.00). The arrest followed a radio dispatch reporting a man doing yardwork naked from the waist down at 325 Old Army Road in Scarsdale, New York, which is the residence of plaintiffs Kenneth and Susan Perko. Officer DeVito, of the Town of Greenburgh Police Department, testified that when he arrived at plaintiffs' property in response to the radio dispatch, he observed Kenneth Perko using an electrical leaf blower near the roadway, and that after he exited his patrol car he observed Kenneth Perko's scrotum and penis. Officer DeVito initially instructed Perko to "put on some pants," but when Perko declined to do so, asserting that he could do as he pleased on his own property and that the officer did not have the right to enter his property, Officer DeVito placed Perko under arrest, charging him with public lewdness.

The Information prepared and signed by Officer DeVito that day states the language of Penal Law § 245.00 as it then existed, and then described the facts of the charge:

> "Count 1: A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed."
>
> "To wit: On the above listed time, date and location said defendant did intentionally operate a leaf blower nude below the waist in public view of this officer."

Additional factual allegations were included in the Incident Report prepared that day by Officer DeVito:

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[1]References to "Perko" in the singular will refer to plaintiff Kenneth A. Perko, Jr.

> "... [the] undersigned responded to call at the intersection of Old Army Rd and Whiteoak Ln on a report of a male naked from the waist down doing lawn work. On arrival undersigned observed listed offender using an electric leaf blower at the edge of his driveway naked from the waist down with his private/intimate groin area was in public view. Undersigned exited vehicle to advise offender that there was a call on his actions he quickly advised undersigned that he was on his own property and was free to do as he wanted. Offender placed under arrest by undersigned and transported to GPD Headquarters for processing."

After processing, Perko was issued an appearance ticket and released without having to post bail.

On October 12, 2010, according to Perko, an article reporting his arrest, along with another unrelated incident, appeared in the Scarsdale Inquirer; he submits a copy of a page from a local news website, www.scarsdale10583.com, apparently reproducing that article (see Defendants' Exhibit O, NYSCEF Doc. No. 43).

A Superceding Information was filed on November 17, 2010 in Greenburgh Town Court, adding a count of Disorderly Conduct in violation of Penal Law § 240.20, and replacing the charge of Public Lewdness, a B misdemeanor, to a charge under Penal Law § 245.01, the offense of Exposure of a Person, a violation. Officer DeVito described the events in the Superceding Information as follows:

> "The Defendant(s) at the above date, time and place did with intent to cause public inconvenience, and annoyance and alarm, and recklessly creating a risk thereof, create a hazardous or physically offensive condition by any act which serves no legitimate purpose. The Defendant(s) appeared in a public place while the private-or intimate parts were unclothed or exposed.
>
> "To wit: Your deponent, at the above date, time and place, did while seated in a marked Town of Greenburgh Police Car on Old Army Rd, observed the defendant Kenneth Perko standing at the end of the driveway at 325 Old Army Rd using an electric leaf blower approximately five feet from the roadway of Old Army Rd, a public highway. He was wearing a t-shirt and was nude from the waist down, with his penis exposed. Your deponent got out of the patrol car, and approached the defendant, who remained standing, still nude from the waist down. After advising the defendant that he was naked from the waist down, the defendant told your

deponent that he was on his own property, and that he could do as he pleased. He continued to engage your deponent in conversation while his genitalia were still being exposed. At the time the defendant was engaging in the above conduct he was not breasfeeding or entertaining in a play, exhibition or show. Old Army Road is a heavily trafficked thoroughfare, located approximately twenty yards from the entrance to Edgemont High School. On a daily basis, there are numerous school buses and hundreds of cars as well as foot traffic which pass by 325 Old Army Road."

On November 18th, 2010 the police obtained a statement from witness Diana Asher, the individual who had originally contacted the police about her observations of Perko on the date of his arrest:

"On October 11th, 2010 I was traveling on Old Army Rd, on my way home from the store. I observed a white male approximately 60 years clearing a yard on Old Army Rd. He was about six feet tall with a medium build. He was at the end of a driveway on Old Army Road, close to White Oak Lane, which is the entrance to Edgemont High School. There was a woman outside with him who appeared to be helping him. I was surprised when I realized that he was not wearing pants or underwear. He was naked from the waist down. I continued on my way home and was somewhat in a state of disbelief. I became concerned about the situation and for the man and his well being. I did not know if he needed help and I was concerned that children or people traveling with children could travel by and see him. I turned around and drove by again to make sure I was not mistaken in what I saw. When I drove by the second time I saw the same man bending over at the waist and got a clear view of his naked behind. He was only a few feet from the roadway in clear sight. I went home and called the police. I thought the police should be made aware of what he was doing and I also thought he or the woman who was with him may have needed some help. A short while later I received a phone call from the Greenburgh Police informing me that they had located and arrested the man. I was a little surprised. A police officer came to my house a few minutes later and I told him that I did drive by and see the man doing yard work naked from the waist down and that I was the one that called to report it. He asked me at that time if I was willing to provide a statement and I told him I did not really want any further involvement. I was contacted by Sgt. Powell on November 17, 2010 and he spoke with me about the arrest and case. After speaking with him I did agree to provide a statement about what I saw and why I called."

A non-jury trial on the criminal charges was held on January 15, 2013, at which Diana

Asher and Officer DeVito testified. After the prosecution (but apparently not the defense) rested, Perko made a motion pursuant to Criminal Procedure Law section 290.10 for a trial order of dismissal. The trial court (Hon. Walter Rivera, J.), in an order dated August 13, 2013, denied Perko's motion for a trial order of dismissal, and proceeded to make factual findings and concluded that Perko was guilty of the charges. By an amended decision and order dated September 30, 2013, the court vacated the findings of guilt, but adhered to the decision denying defendant's motion for a trial order of dismissal as to both counts, and directed that the trial continue on a future date. In a subsequent order dated June 24, 2014, the Court granted a mistrial and directed that a new trial be held before a different Town Justice. After numerous reschedulings of the retrial based on the unavailability of the People's witnesses, by order dated May 24, 2017 the case was dismissed on speedy trial grounds.

The Present Action

Kenneth Perko and his wife, Susan Perko, commenced this action on October 11, 2011 by service of a summons with notice. The complaint was filed on April 11, 2012. It alleges ten causes of action: 1) trespass, 2) false arrest, 3) battery and the use of excessive force, 4) false imprisonment, 5) defamation, 6) "prima facie tort – stalking," 7) malicious prosecution, 8) intentional infliction of emotional distress, 9) a derivative claim on behalf of plaintiff Susan Perko, and 10) a purported derivative claim on behalf of Kenneth Perko. In addition to the foregoing facts and allegations, plaintiffs allege that at least two unmarked police vehicles from the Town of Greenburgh conducted surveillance of plaintiffs' home beginning with the pre-dawn hours of October 14, 2010, and then followed plaintiff Susan Perko's vehicle on trips to the bank and grocery store, causing plaintiffs mental suffering, fear and insecurity in their home.

In considering defendants' motion for summary judgment, each cause of action will be addressed individually, as follows:

False Arrest and False Imprisonment

Initially, "false arrest and false imprisonment . . . are two names for the same tort" (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844-845 [2d Dept 2011]). "In order to prevail on a cause of action seeking to recover damages for false arrest, ... a plaintiff must prove that: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was aware of the resulting confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged" (*Washington-Herrera v Town of Greenburgh*, 101 AD 3d 986, 987-988 [2d Dept 2012], quoting *Rivera v County of Nassau*, 83 AD 3d 1032, 1033 [2d Dept 2011]; *see Broughton v State of New York*, 37 NY 2d 458 [1975], *cert denied sub nom Schanbarger v Kellogg*, 423 US 929 [1975]).

Importantly, probable cause to believe that the plaintiff committed a Penal Law offense is a complete defense to a claim of false arrest (*see Holland v City of Poughkeepsie*, 90 AD3d at 844-845; *Fortunato v City of New York*, 63 AD3d 880 [2d Dept 2009]). The existence or absence of probable cause "becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn therefrom" (*Fortunato v City of New York*, 63 AD3d at 880 [internal quotation marks omitted]).

> "Probable cause to arrest requires the existence of facts and circumstances which, when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed, and that the defendant committed or is committing that offense. A finding of probable cause does not, however, require the same quantum of proof necessary to sustain a conviction, or to establish a prima facie case. Rather, it need merely appear more probable than not that a crime has taken place and that the

> one arrested is its perpetrator. Moreover, in determining whether a police officer has probable cause for an arrest, the emphasis should not be narrowly focused on . . . any . . . single factor, but on an evaluation of the totality of circumstances, which takes into account 'the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents"

(*People v Wright*, 8 AD3d 304, 306-307 [2d Dept 2004] [internal citations and quotation marks omitted]).

Although the crime of Public Lewdness (Penal Law § 245.00), with which Perko was charged at the time of his arrest, includes the element of a lewd act or a lewd manner, which arguably was not established by the circumstances, it is well settled that a police officer's "subjective reason for making [an] arrest need not be the criminal offense as to which the known facts provide probable cause" (*Devenpeck v Alford*, 543 US 146, 153 [2004]; *see People v Rodriguez*, 84 AD3d 500, 501 [1st Dept 2011]). The facts known to, and the observations made by, Officer DeVito, were sufficient to establish probable cause that Perko was committing the offense of Exposure of a Person (Penal Law § 245.01) in his presence. That offense is committed when, with certain inapplicable exceptions, the perpetrator "appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed."

At the time of Perko's arrest, Officer DeVito had a sufficient basis to conclude that the private or intimate parts of Perko's body were being exposed, at least partially or intermittently, to people who happened to pass by. Importantly, it is undisputed that Perko was not wearing any pants or underwear while he was using a leaf blower in his yard, in proximity to a public road, where motorists or other passersby could see him. Neither plaintiffs' assertions that Perko was wearing a t-shirt that extended "at least twelve (12) inches below his waist" and covered his genitals at all times, nor the submitted photographs of Perko wearing the t-shirt he was wearing

at the time of his arrest, serve to create the existence of a material issue of fact on the question of whether Officer DeVito had probable cause to make the arrest. Both the assertion that the bottom of his t-shirt covered Perko's genitals at all times, and the photograph showing the t-shirt covering his genitals, fail to establish plaintiffs' contention that "his genitals were not visible [to Officer DeVito] below the bottom of his t-shirt." They merely establish, at best, that if Perko stood still, with the t-shirt carefully arranged, his genitals were not visible to an individual whose eyes were at the height of the camera; they do not establish that the t-shirt hung sufficiently far below his genitals to ensure that a passing breeze or a sideways motion would not result in exposure.

Nor do plaintiffs' submissions preclude the possibility that a shorter passerby, such as a child, could be exposed to a view of Perko's genitals. Susan Perko's affidavit stating that she saw Office DeVito bend over in front of Perko, which plaintiffs rely on to establish that the officer was unable to see Perko's genitals unless and until he bent over, serves to establish that possibility. The purported dispute plaintiffs attempt to create as to exactly when and how Officer DeVito was able to see Perko's genitals does not create a material issue of fact as to whether Perko properly made observations that supported his determination that he had probable cause to make an arrest.

The requirement that the accused person's appearance be "in a public place" is also satisfied as a matter of law by Officer DeVito's knowledge and observations here. The subtleties of determining when an individual is situated "in a public place" for purposes of the Penal Law was explored in *People v McNamara* (78 NY2d 626 [1991]), where each of the defendants was charged with public lewdness for engaging in a sexual act in a parked vehicle. The Court

clarified that the element of "public place" was not established merely by the charge that the perpetrator was located in "the interior of a vehicle parked at a stated address," but that the interior of a parked vehicle may become a "public place" if the car's interior is visible to a member of the passing public, and the vehicle is situated where it likely would be observed by such a person (78 NY2d at 634). Here Officer DeVito's testimony established that Perko, although standing on his private property, was positioned so as to be "visible to a member of the passing public, and [was] situated in a place where [he] likely would be observed by such a person" (*id.*). Any dispute as to Perko's exact location in his driveway and yard is immaterial, since regardless of his distance from the street, which varied, under any such circumstance he was visible to a passerby, and "in such a manner that the private or intimate parts of his body [were] unclothed or exposed." It is worth noting that the "dashcam" footage from the police car shows Perko to have been standing near to, and visible from, the street as the officer approached.

Defendants having established a prima facie showing that the arresting officer had probable cause to arrest Perko for Exposure of a Person, and plaintiffs having failed to demonstrate the existence of any issue of fact in that regard, defendants are entitled to the dismissal of the causes of action for false arrest and false imprisonment.

Even if this Court concluded that the police officer lacked probable cause at the time of the arrest, defendants are protected by qualified immunity, as long as the arresting officer reasonably, albeit mistakenly, believed he had probable cause (*see Hunter v Bryant*, 502 US 224, 227 [1991]). "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in those situations courts will not hold that they have violated the Constitution" (*Caldarola v Calabrese*, 298 F3d 156, 162 [2d Cir 2002], quoting

Saucier v Katz, 533 US 194, 206 [2001] [internal quotation marks omitted]). "Therefore, in situations where an officer may have reasonably but mistakenly concluded that probable cause existed, the officer is nonetheless entitled to qualified immunity" (*Caldarola v Calabrese*, 298 F3d at 162).

Plaintiffs argue that qualified immunity does not protect officers who "plainly violate" the constitutional rights of the arrested individual (*Harlow v Fitzgerald*, 457 US 800, 818 [1982]), and claim that the constitutional right that was plainly violated was "the right to be free from arrest or prosecution in the absence of probable cause" (citing *Riccuiti v New York City Tr. Auth.*, 124 F3d 123, 127 [2d Cir 1997]; *Golino v City of New Haven*, 950 F2d 864, 870 [2d Cir 1991]). However, the circumstances presented here do not qualify as a plain violation of a constitutional right; the relied-on right to be free from arrest in the absence of probable cause does not support a finding of civil liability *if* the error in the officer's probable cause assessment was reasonable, albeit mistaken. Here, Officer DeVito, having heard a report of a man naked from the waist down, and having observed Perko, who was visible from the road, to be clothed in only a shirt that did not extend far past his genitals, and having further observed that his genitals were, in fact, exposed, could reasonably have concluded that he had probable cause to make an arrest, even if he was mistaken in his assessment of the circumstances or the applicable provision of the Penal Law.

Malicious Prosecution

"The elements of the tort of 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" (*Broughton v State of New York*, 37 NY2d at 457; *see Washington-Herrera v Town of Greenburgh*, 101 AD 3d at 988). The previously-reached conclusion that the police had probable cause for Perko's arrest, and the absence of any basis to find that the probable cause dissipated thereafter, requires the dismissal of this cause of action as well.

Moreover, defendants have made a prima facie showing that Perko's arrest and prosecution were not motivated by actual malice. Such malice is defined, in the context of malicious prosecution, as "a wrong or improper motive, something other than a desire to see the ends of justice served" (*De Lourdes Torres v Jones*, 26 NY3d 742, 761, quoting *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]). Plaintiffs' contention in response, that Officer DeVito's malice is shown by his misrepresentation or falsification of evidence, cannot succeed. They have not shown the type of falsification of evidence that would establish an improper motive (*see Colon v City of New York*, 60 NY2d 78, 82 [1983]).

Plaintiffs' falsification claim relies substantially on the suggestion that DeVito lied when he asserted that he observed Perko's genitals as he approached Perko. However, they cannot establish that DeVito was lying when he made that statement. The observation cannot be disproved, and indeed, nothing they submitted succeeds in doing so. Moreover, the purported dispute as to exactly when and how Officer DeVito was able to see Perko's genitals does not create a material issue of fact as to whether Perko falsified his observations so as to make an unwarranted arrest. Rather, both sides' assertions establish the legitimacy of the arrest based on Perko's refusal to put on additional clothing.

Part of plaintiffs' argument is that Officer DeVito's malice is apparent when the arrest is

understood to have been prompted not by Perko's lack of clothing, but by his lack of obedience to the officer's directives. However, the evolution of Officer DeVito's response from his initial, more conciliatory approach to his eventual placement of Perko under arrest was ultimately, legitimately prompted by Perko's refusal to "put on some pants" based on his (incorrect) asserted belief that he was entitled to dress exactly as he chose while on his own property, and that the police had no authority in that situation – irrespective of whether intimate parts of his body might be visible to members of the public. The assertion that Officer DeVito "admitted" that he arrested Perko only because Perko questioned his authority does not establish an admission of an improper motive; it is merely a recognition that he had no other options.

To the extent plaintiffs point to disagreements from, or changes in, details provided by Officer DeVito in the course of the prosecution, such as regarding Perko's distance from the street, nothing in any such deviations constitutes the type of doctoring or falsehoods that could justify a finding of malice. Indeed, given the radioed information, which Officer DeVito was merely confirming, and the dashcam footage showing Perko near to, and in view of, the roadway, nothing in DeVito's testimony was suspect. Finally, Officer DeVito's initial choice of a charge does not establish malice on his part; it merely illustrates the usefulness of subsequent legal review.

Because nothing in plaintiffs' submissions is sufficient to create a triable issue of fact on the claim that Officer DeVito acted with malice, and because the officer had probable cause to make the arrest, the malicious prosecution claim must be dismissed.

Trespass

The cause of action for trespass alleges that at the time Officer DeVito entered upon the

Perkos' property despite Perko's instruction that the officer stay off of his private property in the absence of a warrant or probable cause to enter. Defendants argue that the cause of action must be dismissed because Officer DeVito was privileged to enter Perko's property.

Significantly, this case does not involve a warrantless intrusion or arrest inside a home or its "curtilage," in which a person has a "legitimate expectation of privacy" (*see People v Theodore*, 114 AD3d 814, 816 [2d Dept 2014], citing *Florida v Jardines*, 569 US 1, 133 S Ct 1409 [2013]). The area in which Perko was standing when he protested that Officer DeVito was trespassing was viewable by the public, and could properly be entered by the police to make a legitimate inquiry or investigate a complaint, in the absence of a warrant or the use of the emergency doctrine (*id.*). Having arrived at plaintiffs' premises based on a radio dispatch call of a man on the property, "naked to the waist," and having, upon arrival, perceived that Perko was not wearing pants, Officer DeVito was authorized to take reasonable steps to investigate the situation further. He had the obligation to inquire into the state of mind of the subject individual, as well as to ensure that Perko was not subjecting people passing by to inadvertent and unwanted glimpses of his genitalia.

> "The officer did not come to the premises . . . to make an arrest. He had responded to a call from [a neighbor] to investigate an unusual [occurrence]. What. . . action would be required upon ascertaining the cause was not determinable in advance by the police. . . The inquiry might result in no action, in succor for a person or persons in distress with or without criminal causation, in a direction to quiet down, or in a criminal arrest."

(*People v Gallmon*, 19 NY2d 389, 392 [1967]). Once he came to understand that Perko's state of semi-undress was intentional, and that Perko was unconcerned with the possibility that individuals who happened to pass by could be subjected to a view of his genitalia, Officer

DeVito reasonably concluded that he had probable cause to make an arrest.

At every stage in the process, Officer DeVito's presence on plaintiffs' property was supported by proper authority and privilege, and he may not be held liable for trespass.

Battery and Use of Excessive Force

Plaintiffs' cause of action for "Battery and Excessive Force" alleges that despite Perko's having advised Officer Devito that Perko was recovering from hip replacement surgery, the officer improperly and forcefully placed Perko in handcuffs behind his back and pushed Perko toward and into the patrol car. It is also alleged that the handcuffs were tightened excessively, and that they caused bruising, soreness and stiffness in both wrists,. Defendants contend that because Perko did not sustain any injury, the claimed use of such force is established to have been de minimis, such that the cause of action should be dismissed.

The law provides for the justifiable use of force by a police office making an arrest (*see* Penal Law § 35.30). "A police or peace officer, having a reasonable belief that a person has committed an offense, may generally use such physical force, short of deadly physical force, as the officer reasonably believes necessary to effect that person's arrest" (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 35.00). The "right to make an arrest... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it" (*Graham v Connor*, 490 US 386, 396 [1989]).

A claim for battery against a police officer based on the officer's conduct in the course of an arrest requires the plaintiff to prove that the officer's use of force was "excessive or objectively unreasonable under the circumstances" (*Holland v City of Poughkeepsie*, 90 AD3d 841 [2011]). "[T]he test for whether a plaintiff can maintain a . . . cause of action for . . . battery

is the exact same test as the one used to analyze a Fourth Amendment excessive force claim" (*Graham v City of New York*, 928 F Supp 2d 610, 624 [ED NY 2013]). To prove a civil battery claim against a police officer, a plaintiff is required to show that the officer intentionally made bodily contact, that the contact was offensive and that [the officer's] conduct was not reasonable within the meaning of Penal Law section 35.30(1), which governs the use of force by law enforcement in the course of their duties (*see Nimely v City of New York*, 414 F3d 381, 391 [2d Cir 2005]; *Johnson v Suffolk County Police Dept.*, 245 AD 2d 340 [2d Dept 1997]).

"Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness" (*Ostrander v State of New York*, 289 AD2d 463, 464 [2d Dept 2001]). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*see Campagna v Arleo*, 25 AD3d 528, 529 [2d Dept 2006], quoting *Mazzariello v Town of Cheektowaga*, 305 AD2d 1118, 1119 [4th Dept 2003]). "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion ... to effect it," and "[n]ot every push or shove ... violates the Fourth Amendment" (*Graham v Connor*, 490 US 386, 394-395, 396 [1989]; *see Johnson v Glick*, 481 F. 2d 1028, 1033 [2d Cir 1973]).

The evidence provided by defendants in support of this motion establishes that any push or shove given to Perko by Officer DeVito, such as when they were proceeding uphill or into the police car, were not of a nature that would violate the applicable reasonableness standard. Nor does anything submitted by plaintiffs create an issue of fact on this issue. Indeed, Perko acknowledged in his own testimony that as he and Officer DeVito headed up an incline as they

walked toward the police car located about 20 - 25 feet away, he slowed down, at which point Officer DeVito gave him what he termed an "isolated push" with one of his hands to Perko's back or shoulder. No unreasonable force is demonstrated.

"[I]n evaluating the reasonableness of handcuffing, a Court is to consider evidence that: 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" (*Lynch ex rel Lynch v City of Mount Vernon*, 567 F Supp 2d 459, 468 [SD NY 2008]). "There is consensus among courts in the [Second] [C]ircuit that tight handcuffing does not constitute excessive force unless it causes some injury beyond temporary discomfort" (*Lynch v City of Mount Vernon,* 567 F Supp 2d at 468, and cases cited therein). Those injuries most common in handcuffing cases which satisfy the "injury" requirement are "scarring and nerve damage" (*Usavage v Port Auth. of New York & New Jersey*, 932 F Supp 2d 575, 592 [SD NY 2013]).

Plaintiff asserts no injuries other than bruising, soreness and stiffness in both wrists from the allegedly excessively tight handcuffs, and he admitted that there was no permanent injury and that he did not seek medical attention.

The facts as claimed by plaintiffs fail to rise to the level at which they could create an issue of fact requiring trial of plaintiffs' excessive force and battery claims.

Defamation

The complaint alleges that both Officer DeVito and Police Chief DeCarlo "maliciously and/or with reckless disregard ... published false and defamatory words to the public; to wit, that Perko had appeared on his front lawn 'naked from the waist down.'" It adds that these words were published to members of the press, and were thereafter widely reported on the radio, on

television, over the internet and in newspapers.

"The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" (*Stone v Bloomberg L.P.*, 163 AD3d 1028, 1029 [2d Dept 2018]). CPLR 3016 (a) requires that "the particular words complained of shall be set forth in the complaint."

Although the complaint quotes the complained-of language, as CPLR 3016 (a) requires, defendants initially contend that the complaint fails to specify the time, place and manner of the alleged false statement and identify to whom the statement was made, as has been required by case law (*see Arsenault v Forquer*, 197 AD2d 554, 556 [2d Dept 1993]). However, since the complaint can be understood to contemplate defendants' release of the Incident Report to the media, this ground for summary judgment is rejected, and the court turns to defendants' defense of truth, as well as the claims of privilege.

Officer DeVito's statement in his Incident Report was that he had responded to a radio dispatch call of a man "naked from the waist down." That statement is true and accurate; he arrived at plaintiffs' home to investigate such a reported call; nor is there any basis to question the contents of the reported radio dispatch, given Diana Asher's statement asserting that she made such a statement when she called the police. Truth serves as an absolute defense (*see Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 638 [2d Dept 2007]). Moreover, even had DeVito been asserting his own observation rather than repeating the words of the radio dispatcher, the statement that Perko was "naked from the waist down" sufficiently conveyed the

substantial truth (*see Kehm v Murtha*, 286 AD2d 421 [2d Dept 2001]; *Carter v Visconti*, 233 AD2d 473, 474 [2d Dept 1996]; *Love v Morrow & Co.*, 193 AD2d 586, 588 [2d Dept 1993]). Accordingly, defendants have demonstrated that they have an absolute defense to the cause of action.

Moreover, the release of official police incident reports to local media representatives is a privileged governmental function, which privilege can be overcome only by proof in evidentiary form that defendants acted with malice (*Cahill v County of Nassau*, 17 AD3d 497 [2d Dept 2005]; *Grier v Johnson*, 232 A.D.2d 846, 848 [3d Dept 1996]). Nothing in plaintiffs' verified complaint or evidentiary submissions satisfies that burden of establishing the existence of an issue of fact as to whether defendants acted with malice. The simple inclusion of the words "naked from the waist down" in these circumstances does not in itself permit an inference of malice sufficient to overcome the privilege.

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]). New York sets a high threshold for conduct that is "extreme and outrageous" enough to constitute intentional infliction of emotional distress (*Murphy v American Home Products Corp.*, 58 NY2d 293, 303 [1983]).

None of the complaint's factual allegations satisfy the high threshold for the element of "extreme and outrageous conduct." Moreover, nothing in plaintiffs' submission create a showing

of emotional distress of sufficient severity as could create a material issue of fact regarding that element of the tort.

Prima Facie Tort – Stalking

The "cause of action of prima facie tort consist[s] of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful" (*Curiano v. Suozzi*, 63 NY2d 113, 117 [1984]). The cause of action is "disfavored ... under New York law" (*Hall v City of White Plains*, 185 F Supp 2d 293, 304 - 305 [SD NY 2002]). "An element of a prima facie tort cause of action is that the complaining party suffered *specific and measurable loss*, which requires an allegation of special damages" (*Goldman v Citicore I, LLC*, 149 AD3d 1042, 1045 [2d Dept 2017] [emphasis added] [citations omitted]). Neither "[n]onspecific conclusory allegations" nor "round figures or a general allegation of a dollar amount" even meet the pleading requirements (*see Matherson v. Marchello*, 100 AD2d 233, 235 [2d Dept 1984]). Because plaintiffs offer no evidentiary materials establishing specific and measurable loss suffered by them, but merely nonspecific conclusory allegations of extreme mental suffering, the cause of action cannot survive summary judgment.

Derivative Claim

A cause of action to recover damages for loss of consortium is derivative, so that dismissal of the primary causes of action also necessitates dismissal of the related loss of consortium claim (*see Paisley v Coin Device Corp.*, 5 AD3d 748, 750 [2d Dept 2004]; *Holmes v City of New Rochelle*, 190 AD2d 713, 714 [2d Dept 1993]). Finally, there is no authority that would allow Kenneth Perko to bring a derivative cause of action based on his wife's loss of

consortium claim.

Based upon the foregoing, it is hereby

ORDERED that defendants' motions for summary judgment dismissing the complaint pursuant to CPLR 3212 are granted, the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 2, 2020

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

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