

<b>Rogalsky v City of New York</b>
2021 NY Slip Op 31759(U)
May 25, 2021
Supreme Court, New York County
Docket Number: 152818/2018
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 52

Justice

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INDEX NO. 152818/2018

ALENA ROGALSKY, AS ADMINISTRATOR OF THE  
ESTATE OF DR. VITALY ROGALSKY DECEASED,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 003

- v -

CITY OF NEW YORK, POLICE OFFICER #1 (OFFICIAL &  
INDIVIDUAL CAPACITY, IDENTITY UNKNOWN), POLICE  
OFFICER #2 (OFFICIAL & INDIVIDUAL CAPACITY,  
IDENTITY UNKNOWN), POLICE OFFICER #3 (OFFICIAL &  
INDIVIDUAL CAPACITY, IDENTITY UNKNOWN), POLICE  
OFFICER #4 (OFFICIAL & INDIVIDUAL CAPACITY,  
IDENTITY UNKNOWN), POLICE OFFICER #5 (OFFICIAL &  
INDIVIDUAL CAPACITY, IDENTITY UNKNOWN)

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42,  
43, 44, 45, 46, 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

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, defendant’s motion for summary judgment is granted in part and denied in part. This is an action to recover damages allegedly sustained by plaintiff as a result of his arrest and prosecution. Preliminarily, it must be noted that during oral argument plaintiff confirmed withdrawal of excessive force claims pursuant to 42 USC §1983.

**Summary Judgment Standard**

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Weiner v Ga-Ro Die Cutting, Inc.*, 104 AD2d 331[1st Dept 1984] *aff’d* 65 NY2d 732 [1985].

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 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*, 3 NY2d 395 [1957]).

#### **False Imprisonment/False Arrest and Malicious Prosecution**

Probable cause is a complete defense to a false arrest and false imprisonment claim. *Morel v Crimaldi*, 683 NYS2d 22 [1st Dept 1998].

To prevail on a cause of action for false arrest/imprisonment, plaintiff must demonstrate that (1) defendant intended to confine plaintiff, (2) plaintiff was conscious of the confinement, (3) plaintiff did not consent to the confinement and (4) the confinement was not privileged. *De Lourdes Torres v Jones*, 26 NY3d 742 [2016]. An act of confinement is privileged if it stems from a lawful arrest supported by probable cause. USCA Const. Amend. 4; *De Lourdes Torres*, 26 NY3d 742 [2016].

When an arrest is made without a warrant, a presumption arises that it was unlawful, and the government bears the burden of raising and proving the affirmative defense of probable cause for the arrest. USCA Const. Amend. 4; *Medina v City of New York*, 102 AD3d 101 [1st Dept 2012]; *Bruce v Port Auth. New York and New Jersey*, 531 F Supp 2d 474 (EDNY 2008); *Smith v Nassau County*, 34 NY2d 18 [1974].

Probable cause for arrest consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe that an offense has been or is being committed by the suspected individual. USCA Const. Amend. 4; *De Lourdes Torres* 26 NY3d 742 [2016].

Where “information given to an officer by an identified citizen, accusing plaintiffs of a specific crime, [it is] legally sufficient to provide the officer with probable cause to arrest.” *Kramer v City of New York*, 173 AD2d 155 [1st Dept 1991] citing, *People v Nichols* 156 AD2d 129, app. Denied, 76 NY2d 740; *People v Gonzalez*, 138 AD2d 622, app. denied, 71 NY2d 1027; *Jackson v. County of Nassau*, 123 AD2d 834, app. denied, 69 NY2d 608; *People v Phillips*, 120 Ad2d 621.

To establish a claim of malicious prosecution plaintiff must prove (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. *De Lourdes Torres v Jones*, 26 NY3d 742 [2016]. In the context of a malicious prosecution action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. *Ramos v City of New York*, 285 AD2d 284 [1st Dept 2001]. A plaintiff need not demonstrate the defendant’s intent to do him or her personal harm but need only show a reckless or grossly negligent disregard for his or her rights; this may be manifest in an egregious deviation from proper investigative procedures or by initiation of the prosecution notwithstanding the total absence of probable cause. *Ramos*, 285 AD2d at 301.

### **Discussion**

Preliminarily, plaintiff's claim of intentional infliction of emotional distress is dismissed as such claims are barred as a matter of public policy. *See Lauer v City of New York*, 240 AD2d 543, 1v denied 91 NY2d 807[1998]. Moreover, none of the allegations in the complaint rise to the level of outrageous and reprehensible conduct not tolerated in a civilized society. *Id.* Plaintiff did not oppose the City's motion with respect to the claim of negligent infliction of emotional distress, accordingly that is granted without opposition. Plaintiff's negligent hiring, training and retention is also dismissed as the City concedes the officers were acting within the scope of their employment (*see Karoon v N.Y. City Transit Auth.*, 241 AD2d 323 [1st Dept 1997]).

The City also moves for summary judgment on the grounds that plaintiff's arrest and subsequent prosecution was supported by probable cause. Further, defendants argue that because of plaintiff's lack of injury and inconsistent statements regarding force used, his assault and battery claims must fail as a matter of law.

Here, it is undisputed that the police officers were confronted with a statement by a complaining witness. The witness claimed to have been struck by the plaintiff. The above is sufficient to establish probable cause for the arrest and subsequent prosecution as a matter of law.

In opposition, plaintiff fails to raise genuine, material issues of fact regarding the existence of probable cause (*see Agront v City of New York*, 294 AD2d 189, 189–90 [1st Dept 2002] [summary judgment appropriate where the basic “facts leading up to the arrest, and the inferences to be drawn therefrom, were not in dispute”]). To the extent plaintiff claims that the officers did not adequately investigate is irrelevant to the inquiry and is therefore insufficient to oppose defendants' prima facie showing (*see id.* [“The alleged conflicting evidence uncovered in the course of the police investigation is relevant to the issue of whether guilt beyond a reasonable

doubt could have been proven at a criminal trial, not to the initial determination of the existence of probable cause”).

As to plaintiff’s assault and battery claims, defendants argue that plaintiff’s lack of medical treatment, inconsistent statements during his Civilian Complaint Review Board interview and his deposition make his claims incredible. Plaintiff’s deposition testimony that he was kicked in his buttocks, received hits to his neck and back and had his arm twisted and it began bleeding, is sufficient to raise a question of fact. See NYSCEF Doc. 51 pp. 71, 76. The Court rejects the City’s argument and finds that an issue of fact exists as to the reasonableness of the force used, if any. The City urges this Court to make a credibility determination, which is not its function at this juncture. Accordingly, it is hereby

ORDERED that the complaint is dismissed with the exception of plaintiff’s third cause of action for assault and battery.

5/25/2021

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE