Hayes v City of New York
2021 NY Slip Op 32308(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 152801/2015
Judge: Sweeting J. Machelle
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING, J.S.C.** **PART 62**

Justice

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PEARL L. HAYES, as Administrator of the Estate of ARTHUR BLAKE, JR., deceased,

Plaintiff,

- v -

THE CITY OF NEW YORK, POLICE OFFICER MICHAEL PALAM, POLICE OFFICER JOHN KIERMAN, AND DETECTIVE LAWRENCE ZEUFLE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS POLICE OFFICERS EMPLOYED BY THE CITY OF NEW YORK

Defendants.

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INDEX NO. 152801/2015

MOTION DATE 12/30/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 82, 83, 84, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries that plaintiff-decedent Arthur Blake, Jr. ("plaintiff"/"decedent") allegedly sustained on March 25, 2014, at the hands of defendants Police Officer Michael Palam ("Officer Palam"), Police Officer John Kierman ("Officer Kierman"), and Detective Lawrence Zeufle ("Detective Zeufle").[1] The City of New York (the "City") is also a defendant. The defendants (collectively the "City defendants") move for summary judgment dismissing the complaint in its entirety, pursuant to CPLR 3212. Upon the foregoing documents, defendants' motion is granted in part and denied in part.

[1] Palam and Kierman have since been promoted to the rank of detective and Zeufle to lieutenant. For purposes of this decision, however, the titled used herein are the ones held at the time of the incident.

According to the notice of claim (NYSCEF Doc. No. 67), on March 25, 2014, plaintiff exited a store located at 464 9th Avenue with a bag that he had found on a bench.[2] The notice states that plaintiff grew frightened when a man – who turned out to be a police officer – yelled that he had dropped something from the bag and then ordered him to "come here." Plaintiff alleges that he ran from the individual and that, shortly thereafter, he fell to the ground. "[A]bout 30 seconds later," the three individual defendants handcuffed him, twisting his right arm violently in the process. The notice states that due to defendants' conduct, plaintiff sustained severe injuries to his right shoulder. The notice further contends that plaintiff asked defendants to take him to the hospital but they refused.

The complaint (NYSCEF Doc. No. 68) asserts five causes of action against the City, only three of which remain.[3] The first cause of action asserts that the City is liable for the "intentional torts" of the police officers – specifically, the use of excessive force and assault and battery (*id.*, ¶ 16). The third cause of action states that the City is jointly and severally liable for defendants' alleged assault and battery. The fifth cause of action asserts that the City "permitted and tolerated a pattern and practice [among its police officers] of unreasonable search[es] and seizures, stop and frisks, denial of prompt medical treatment, and deprivations of liberty without due process of law" (NYSCEF Doc. No. 68, ¶ 27).

[2] At his deposition, plaintiff clarified that he was carrying a leather messenger bag (NYSCEF Doc. No. 73, at p 20 lines 1-9).

[3] Plaintiff withdrew his second and fourth causes of action in response to defendants' motion (NYSCEF Doc. No. 82 [Aff in Opp], ¶ 19).

The complaint asserts two causes of action against Officer Kierman.[4] The first cause of action states that Officer Kierman used excessive force in the course of the arrest, and that he did so "with actual malice . . . and with willful and wanton indifference" to plaintiff's rights. It alleges that this use of force violated his Fourth Amendment rights. The second cause of action alleges that Officer Kierman committed assault and battery against plaintiff. Finally, the complaint asks for $5 million in damages and $5 million in punitive damages.

Plaintiff Pearl L. Hayes (Ms. Hayes) was appointed the administrator of the estate of her son after his death in June 2018 (NYSCEF Doc. No. 76). Ms. Hayes filed the note of issue on October 29, 2019 (NYSCEF Doc. No. 63). Shortly thereafter, defendants filed this motion.

Defendants first argue that plaintiff has not shown a basis for his claims of assault, battery, and excessive force against Officer Kierman, as alleged in the third cause of action. Defendants point to the officer's deposition testimony, in which he stated that the arrest occurred while plaintiff was running and not when he had fallen to the ground. Defendants allege that when the officers caught up with plaintiff, "we identified ourselves and grabbed him and brought him to the floor" (NYSCEF Doc. No. 75 [Kiernan Tr.] at p 17 lines 10-11). Defendants contend that, as a matter of law, this proves that Officer Kierman used reasonable force in the course of plaintiff's arrest. They contend that because the police officer believed plaintiff was involved in a larceny, and because he ran away, "all force used . . . to arrest Plaintiff was reasonable and privileged" (NYSCEF Doc. No. 65 at *9). Defendants appear to argue that because there was no excessive force and no assault and battery, plaintiff's claims against the City also fail. Defendants also assert that there are no fifth and eighth amendment violations. Specifically, they state that the fifth amendment does not

[4] In response to defendants' motion, plaintiff has stated that he will discontinue the action as it relates to Officer Palam and Detective Zeufle (NYSCEF Doc. No. 82, ¶ 17). Plaintiff notes that he named Officer Palam and Detective Zeufle in the complaint because they were involved in the arrest and processing process of plaintiff. Plaintiff states that the City should have disclosed the identities of the other two arresting officers.

apply to the actions of state and municipal actors, and that the eighth amendment does not attach until after a party is sentenced for a crime. Defendants contend that plaintiff's claim that his fourth and fourteenth amendment rights were violated due to an illegal search and seizure must be dismissed because plaintiff does not point to any searches or seizures. To the extent that plaintiff asserts false arrest in this claim, defendants state that the validity of the arrest is undisputed.

In opposition,[5] plaintiff argues that the constitutional provision on which he relies – the fourth amendment – is properly part of this case because excessive force claims are evaluated under this amendment. Plaintiff relies on the accepted standard that summary judgment must be denied when there are disputed issues of fact. Specifically, plaintiff points to decedent's deposition testimony to support his position that, here, there is a triable issue as to whether Officer Kiernan used excessive force and/or assaulted plaintiff. Plaintiff notes that, according to decedent, he slipped while maneuvering between two parked cars. Then, when the three officers who had been chasing him approached, he stated, "I just rolled over onto my stomach. I just laid right there on my stomach. I wasn't going to try and get up" (NYSCEF Doc. No. 73 [Blake Dep] at p 26 lines 7-9). Further, the decedent stated, one officer "got on my back with his body but it felt like either his knee or his arm was pressed up against my shoulders when he got on top of me" (*id.* at p 27 lines 5-8). After that, he stated, "[o]ne officer took my arm and twisted it like almost to my head. Twisted it real hard. It was intentional" (*id.* at p 30 lines 24-25 to p 31 line 1). According to the testimony, decedent screamed and complained of pain to the officers, but the officers did not respond.

[5] As noted, plaintiff withdrew several claims, and has discontinued the case against Officer Palam and Detective Zeufle. Plaintiff's arguments relate to the remaining causes of action.

Plaintiff also submits certified copies of excerpts from his medical records from Rome Memorial Hospital (the "Hospital") (NYSCEF Doc. Nos. 84, 85). Among other things, the record describes the injury as a "full thickness tear of two tendons seen by Ortho who request[ed] schedule for right rotator cuff repair, open repair" (NYSCEF Doc. Nos. 84, at *4). It further indicates that the repair was performed on September 1, 2015 under general anesthesia. An earlier examination, in August 2014, indicates that the injury occurred "during cuffing" (NYSCEF Doc. Nos. 85, at *11).

Plaintiff argues that his claims under 42 USC §1983 (Section 1983), are proper, as there are viable claims for excessive force and for assault and battery and he did not assert any other constitutional violations under Section 1983. Further, plaintiff argues that the assertion that Officer Kierman was acting jointly and severally with the City suffices as a predicate for a Section 1983 claim against the City. He also argues that his fifth cause of action against the City – that it engaged in a pattern or in practices of permitting officers to violate the fourth amendment rights of civilians – should be sustained because defendants did not explicitly address it. Relying on the Southern District's finding in *Floyd v City of New York* (959 F Supp 2d 540 [SDNY 2013]) that New York City had engaged in an unconstitutional stop-and-frisk policy, plaintiff alleges that the City has engaged in a widespread pattern of illegal searches and seizures. He claims that *Floyd* has "collateral estoppel effect on the issue of the City having a policy and practice of illegal seizures for all future cases" (NYSCEF Doc. No. 82 [Aff in Opp], at *21). Plaintiff further states that, to the extent that defendants argue that Officer Kierman is entitled to summary judgment under the theory of qualified immunity, this argument must be rejected because there is an issue of fact as to the reasonableness of his actions.

In reply, defendants reiterate that, based on Officer Kierman's testimony, it is clear that his actions were reasonable and lawful. They state that "plaintiff's subjective opinion as to the officers' actions" has no weight, particularly in light of the fact that plaintiff did not know the officer's intentions (NYSCEF Doc. No. 87, ¶ 7). Defendants rely on these arguments in support of their application to dismiss plaintiff's first and third causes of action against the City, and plaintiff's first and second causes of action against Officer Kierman. Additionally, defendants reiterate that a Section 1983 claim against an employee must be based on a constitutional violation. They state that the fourth amendment is inapplicable because there was no illegal search or seizure. Further, they state that, because the police exercised reasonable force during the arrest, plaintiff has not shown that Officer Kierman violated the fourth amendment.[6] Moreover, they reiterate that the fifth amendment does not apply to actions of State or municipal employees.

Conclusions of Law

First, this court denies that prong of the motion that seeks to dismiss plaintiff's fourth amendment claim for excessive force and/or assault. Excessive force claims "are analyzed under the Fourth Amendment and its standard of objective reasonableness" (*Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007] [internal quotation marks and citations omitted]). Courts evaluate the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Elias v City of New York*, 173 AD3d 538, 539 [1st Dept 2019] [internal quotation marks and citation omitted]).

[6] Defendants' arguments about plaintiff's failure to satisfy the pleading requirements and about the necessity to allege more than respondeat superior were not raised in the original motion papers and thus are not considered (*see, e.g., All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 835-836 [1st Dept 2015]).

Where the evidence shows that the officer used reasonable force, summary judgment dismissing the claim is warranted (*see Sanchez v City of New York*, 168 AD3d 584, 585 [1st Dept 2019]). However, where "the parties sharply dispute the circumstances leading up to the arrest, 'the question of whether the use of force was reasonable under the circumstances is generally best left to the jury" (*Elias*, 173 AD3d at 539 [citation omitted]). Indeed, "[b]ecause of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left to the jury" (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844 [2d Dept 2011]; *accord Macareno v City of New York*, 187 AD3d 1164, 1166 [2d Dept 2020]).

In the case at bar, plaintiff and defendants' deposition testimony present sharply different accounts of the events leading up to plaintiff's arrest. Moreover, they differ on critical matters. According to defendants, Officer Kiernan caught plaintiff while the latter was running. Therefore, the officer had to stop him and bring him to the ground. Any injury, defendants suggest, occurred during this process and the officer did not use unreasonable, excessive force. In contrast, plaintiff states that he fell and remained on the ground, and he did not attempt to resist arrest. Plaintiff contends that when Officer Kiernan cuffed him, the officer unnecessarily pushed his arm up straight behind his back, causing an injury that subsequently required surgery. In addition, plaintiff states that he informed the officer that he was in pain and that his complaint was ignored. Plaintiff's medical records support his contention that he sustained a potentially compensable injury (*see Elias*, 173 AD3d at 539), and the documents state that the injury occurred during the arrest. Accordingly, plaintiff has "raised a triable issue of fact as to the reasonableness of the use of force" (*id.* at 538).

Defendants' suggestion that the court credit Officer Kiernan's testimony and reject plaintiff's testimony and medical records is contrary to the principles of summary judgment law, as it improperly asks the court to supplant the role of the factfinder and make its own credibility determinations (*see Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] ["'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .'"] [quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986)]). Moreover, it ignores the fact that the burden is on defendants to eliminate all triable issues, including those highlighted by plaintiff in his opposition (*see Holland*, 90 AD3d at 844). This court notes that, in light of plaintiff's medical records and the severity of his injury, a triable issue of fact remains even if the factfinder were to credit Officer Kiernan's testimony and reject the testimony of plaintiff. Also, there is an issue of fact as to whether "there was bodily contact made with intent, and offensive in nature" during the course of plaintiff's arrest (*Cayruth v City of Mount Vernon*, 188 AD3d 1139, 1141 [2d Dept 2020] [internal quotation marks and citation omitted]). Thus, plaintiff's claim for assault and battery stands (*see id.*).

Additionally, "[u]nder the common-law doctrine of respondeat superior, an employer – including the State [or the municipality] – may be held vicariously liable for torts, including intentional torts, committed by employees acting within the scope of their employment" (*Rivera v State of New York*, 34 NY3d 383, 389 [2019] [finding, however, that correction officers were not acting within the scope of their employment]). Therefore, this claim also raises an issue of fact as it applies to the City (*see Galloway v State of New York*, 194 AD3d 1151 [3d Dept 2021]). For these reasons, this court denies the motion as it applies to the first and third causes of action against the City and the first and second causes of action against Officer Kiernan.

The court reaches a different conclusion, however, with respect to plaintiff's Section 1983 claim. The landmark case of *Monell v Department of Social Services of New York City* (436 US 658, 690 [1978]) held that local governments "can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or follows a widespread governmental "custom" that has not been formally approved. Therefore, if the local government employee is not acting pursuant to an official policy or a known custom, it may not be sued under Section 1983 (*315-321 Realty Co. Assoc., LLC v City of New York*, 33 AD3d 509, 509 [1st Dept 2006]). Further, for a claim to survive, a litigant must identify the alleged custom or practice and show a connection between the practice and the alleged injury (*see Thompson v City of New York*, 50 Misc 3d 1037, 1056-1057 [Sup Ct, Bronx County 2015]).

Under these principles, dismissal of the fifth cause of action is appropriate. As defendants correctly argue, plaintiff has not asserted or shown that there was an illegal search and seizure. Instead, his claims arise from the alleged excessive use of force and failure to respond to his requests for medical attention. Although the fifth cause of action alleges that the City's pattern and practice extended to the denial of prompt medical treatment, support for this claim is not borne out on this record (*see Small v St. Barnabas Hosp.*, 165 AD3d 576, 576 [1st Dept 2018] ["A municipal defendant is subject to statutory liability for deliberate indifference to medical needs under 42 USC § 1983 only where an injury results from the execution of an unconstitutional policy or practice"] [citing *Monell*, 436 US at 694). Moreover, for this argument, plaintiff relies wholly on *Floyd*, which found that the City had engaged in a pattern of racial profiling in the implementation of its stop-and-frisk policy, but plaintiff does not connect facts in that case to the facts in the case at hand (*see Miller v Terrillion*, 391 F Supp 3d 217, 223-225 [ED NY 2019]).

Further, plaintiff does not explain the connection between *Floyd* and the injuries plaintiff allegedly sustained. There must be some additional factual showing, here, sufficient to support its application.

This court has considered all of the parties' arguments. Based on the above, and on plaintiff's withdrawal of certain claims, it is hereby:

ORDERED that the second and fourth causes of action against the City are withdrawn by plaintiff; and it is further hereby

ORDERED that the first and second causes of action that are asserted against the individual officers are withdrawn by plaintiff to the extent that they relate to Officer Palam and Detective Zeufle, and the claims against Officer Palam and Detective Zeufle are discontinued; and it is further hereby

ORDERED that the motion is denied as to the first and third causes of action against the City and the first and second causes of action against Officer Kierman; and it is further hereby

ORDERED that the motion is granted as to the fifth cause of action against the City; and it is further hereby

ORDERED that the second, fourth, and fifth causes against the City are severed and dismissed; and it is further hereby

ORDERED that the first and second causes of action against the officers are severed and dismissed; and it is further hereby

ORDERED that the remainder of the case – the first and third causes of action against the City and the first and second causes of action against Officer Kierman – remains; and it is further hereby

ORDERED that the caption in this case is amended to read as follows:

PEARL L. HAYES, as Administrator of the Estate of ARTHUR BLAKE, JR., deceased,

Plaintiff,

- v -

THE CITY OF NEW YORK, AND POLICE OFFICER JOHN KIERMAN, in his individual capacity as a police officer employed by the City of New York,

Defendants.

Index Number 152801/2015

The Clerk is directed to amend the caption accordingly, and the parties are directed to use the amended caption in all future court papers.

This is the Decision and Order of this court.

11/12/2021
DATE

J. MACHELLE SWEETING, J.S.C.

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