Wong v City of New York
2021 NY Slip Op 33119(U)
December 13, 2021
Supreme Court, Queens County
Docket Number: Index No. 712139/20
Judge: Kevin J. Kerrigan
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Short Form Order -Amended Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Rochel Wong,

Plaintiff,

- against -

The City of New York, Police Officer Kyle Young, Police Officer Ivan Villanueva, and John and Jane Does - Police Officers as yet unidentified,

Defendants.

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Index Number: 712139/20

Motion Date: 11/8/21

Motion Seq. No.: 3

The following papers numbered E37-E66 & E68-E72 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	E37-66
Affirmation in Opposition-Exhibits.....	E68-71
Reply.....	E72

Upon the foregoing papers it is ordered that the motion is decided as follows:

The Court is issuing an amended order based on a letter received via the NYSCEF system from counsel for plaintiff dated December 10, 2021, which included, inter alia, a stipulation entered by counsel for plaintiff and defendants, dated December 6, 2021, apprising the Court that the plaintiff's cause of action one and plaintiff's cause of action seven as to claims of assault and battery and excessive force should not be dismissed, as so stated both the in plaintiff's pleadings and defendants' pleadings.

Motion by defendants the City of New York ("City"),Police Officer Kyle Young (PO Young"), Police Officer Ivan Villanueva ("PO Villanueva") for an order pursuant to CPLR §3212(a) seeking summary judgment dismissing the complaint is granted to the extent that plaintiff's state and federal claims for false arrest and false imprisonment, state claims for negligent hiring and retention, state claim of negligent and intentional infliction of emotional distress, a state claim of malicious prosecution are dismissed and plaintiff's state assault and battery and Federal excessive force claims are not dismissed.

This is an action for personal injuries allegedly sustained by plaintiff as a result of her interaction with police on July 25,2015, at 141-11 185th Street, County of Queens, the ("Premises").

The portion of City's motion to dismiss the plaintiff's causes of action for negligent hiring and retention, intentional infliction of emotional distress, negligent infliction of emotional distress, malicious prosecution is granted without opposition.

In support of the motion defendants submit, inter alia, the pleadings, the affirmation of their attorney, transcripts of the examination before trial ("EBT") of PO Young and PO Villanueva and the certificate of disposition from Queens Criminal Court, for docket number CR-036766-15QN.

In opposition to the motion plaintiff submits the affirmation of her attorney and the transcript of her examination before trial, dated February 15, 2018, and the certificate of disposition from Queens Criminal Court, for docket number CR-036766-15QN.

Plaintiff states in her opposition that plaintiff "does not oppose the portion of the motion which seeks to dismiss the causes of action for negligent hiring and retention, intentional infliction of emotional distress, negligent infliction of emotional distress, malicious prosecution.

Plaintiff avers that there exist questions of fact that preclude the dismissal of plaintiff's claims for false arrest/ false imprisonment and the individual officer's liability.

Plaintiff's assertion that defendants have failed to submit evidence in admissible form asserting that the EBT transcripts , as unsigned by defendants, is without merit.

While the EBT transcripts are unsigned, they are certified by the reporter who recorded the testimony, their accuracy is not challenged by the testifying witness who is a party to the action and has submitted the transcript in support of their motion. Further, the unsigned but certified deposition of the defendant are admissible under CPLR 3116 (a), since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent (See E.W. v City of New York, 2020 N.Y. App Div 142, 2d Dept. [2020]).

The remaining branches of defendants' motion for dismissal of the claims for false arrest, false imprisonment and the individual officer's liability is granted.

The City contends that it is entitled to summary judgment because there was probable cause for the arrest for both Obstruction of Governmental Administration and Disorderly Conduct. The Court agrees.

Section 195.05 of the Penal Law states, in pertinent part: A

person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved...

Section 240.20 (6) of the Penal Law states: A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: (6) He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse...

It is undisputed that on July 25, 2015, plaintiff was present at the Premises, which is not the home of plaintiff, when several uniformed police were heard and seen by plaintiff from a distance, telling people gathered there to leave, dispersing the crowd of people from the Premises and the area appurtenant to the Premises. Plaintiff by her EBT testimony stated that, at a distance from the Premises she could see and hear the police disbursing the people at the Premises and that, nevertheless, she and her husband continued to go to the Premises. Plaintiff also testified that she was instructed by the uniformed police several times to leave the Premises, then instructed to leave the lawn adjacent to the Premises and then instructed to leave the sidewalk at the Premises. It was only after repeated instruction by police to leave the area where police were disbursing the crowd, and plaintiff's refusal to comply with police instructions, did police officers then requested her identification.

PO Villanueva testified that he asked plaintiff for her identification in order to get plaintiff to comply with the police instructions to leave the area of the Premises or to issue a summons to plaintiff.

Plaintiff testified at her EBT that she did not comply with the police officer's request for her identification, but challenged the police officers request for her identification.

PO Villanueva testified that he again asked plaintiff for her identification in order to get plaintiff to comply with the police instructions to leave the area of the Premises or to issue a summons to plaintiff.

Plaintiff was arrested and arraigned on these, and several other charges.

Defendants met their initial burden on the motion by

establishing that they had probable cause to arrest plaintiff, and plaintiff failed to raise a triable issue of fact in opposition (See Durand v. South Nassau Hosp., 172 A.D.3d 1318, 1320, 102 N.Y.S.3d 80 [2d Dept. 2019]). "[T]he existence of probable cause is an absolute defense to a false arrest claim" (See Jaegly v. Couch, 439 F.3d 149, 152 2d Cir. [2006]). This is so even if probable cause exists with respect to an offense other than the one actually invoked at the time of arrest (See Devenpeck v. Alford, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 [2004]; see generally Brown v. Hoffman, 122 A.D.3d 1149, 1150, 997 N.Y.S.2d 767 3d Dept [2014]; Snow v. Schreier, 193 A.D.3d 1346, 147 N.Y.S.3d 274, 276 [2021]).

It is worth noting that plaintiff is correct in stating that the felony assault charge for which plaintiff was arraigned was dismissed. However, plaintiff's statement that "all of the remaining lesser charges were dismissed by an adjournment contemplating dismissal", for which plaintiff submits the certificate of disposition, with the attendant implication that a finding of a lack of guilt on the part of plaintiff was made, is misleading.

An adjournment in contemplation of dismissal...is an adjournment by the court of up to twelve months, with conditions specified by the court. Provided the defendant does not violate any set conditions during the adjournment period, and the conclusion of the adjournment period, the court is to order the sealing of the proceeding, "the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution (See People v. Marabello, 63 Misc. 3d 442, 444, 95 N.Y.S.3d 505, 507 N.Y. City Ct. [2019])

An adjournment in contemplation of dismissal is a negotiated settlement that is possible, in some misdemeanor cases, in New York City. The accused's acceptance of adjournment in contemplation of dismissal was neither conviction nor acquittal, adjournment in contemplation of dismissal, being unadjudicative of innocence as it was of guilt, by its very nature. (See Hollender v. Trump Vill. Co-op., Inc., 58 N.Y.2d 420, 448 N.E.2d 432 (1983).

Thus, in subsequent civil litigation to which a finding of guilt or innocence of the charge is germane, adjournment in contemplation of dismissal, by reason of its sui generis character, will leave the question unanswered. (See Singleton v. City of New York, 632 F.2d 185 2d Cir. [1980]; Cardi v. Supermarket Gen. Corp., 453 F.Supp. 633, 635; Fair v. City of Rochester, 84 A.D.2d 908, 909, 446 N.Y.S.2d 668; Lewis v. Counts, 81 A.D.2d 857, 438 N.Y.S.2d 863).

The Court notes, based upon this record, that a finding of probable cause operates as a complete defense to an action alleging false arrest and false imprisonment (See Carlton v. Nassau County Police Dept., 306 AD 2d 365 2nd Dept [2003]). The City and PO Young and PO Villanueva have demonstrated that there was probable cause to arrest plaintiff for Obstruction of Governmental Administration and Disorderly Conduct, so as to entitle defendants to summary judgment as a matter of law.

Regarding plaintiff's cause of action against PO Young and PO Villanueva asserting the individual officer's liability, police officers are entitled to qualified immunity which may be invoked to protect them from suit if it is established that there was probable cause for the arrest and detention (See Scheuer v. Rhodes, 416 U.S. 232 [1974]). No sharp factual dispute regarding the question of whether there was probable cause to arrest plaintiff has been presented, on this record, so as to preclude resolution of the issue by way of summary judgment (See Murphy v Lynn, 118 F. 3d 938 2nd Cir. [1997]; Stipo v. Town of North Castle, 205 AD 2d 608 2nd Dept [1994]). As heretofore noted, there was a clear showing of probable cause to arrest plaintiff and, therefore, that it was objectively reasonable for the police officers at the Premises, including, PO Young and PO Villanueva, to believe that they, collectively, and each officer individually, was acting in a manner that did not violate plaintiff's constitutional rights. Since probable cause was clearly established, it was the burden of plaintiff to disprove the individual offiers' entitlement to qualified immunity (See Kravits v. Police Dept. Of the City of Hudson, 285 AD 2d 716 3rd Dept [2001]). Plaintiff has failed to meet this burden. Therefore, plaintiff's causes of action against the individual police officers must fail (See Martinez v. City of Schenectady, 97 NY 2d 78 [2001]; Zientek v. State of New York, 222 AD 2d 1041 4th Dept [1995]).

The undisputed facts, on this record, as heretofore summarized, establish that there was clear probable cause to arrest, detain and prosecute plaintiff.

Accordingly, based on the foregoing, the motion is granted to the extent that plaintiff's state and federal claims for false arrest and false imprisonment, state claims for negligent hiring and retention, state claim of negligent and intentional infliction of emotional distress, a state claim of malicious prosecution are dismissed and plaintiff's state assault and battery and Federal excessive force claims are not dismissed.

Dated: December 13, 2021

KEVIN J. KERRIGAN, J.S.C.