SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE STROTH **PART** 52

Justice

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ROBERT MCCULLOUGH,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, P.O. HASTINGS, P.O. JOHN DOES

Defendant.

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INDEX NO. 150263/2018

MOTION DATE 05/25/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISSAL

Plaintiff Robert McCullough (plaintiff) brings this action to recover damages for alleged civil rights violations that arose as a result of his arrest on February 4, 2017. Plaintiff claims that he was protesting with approximately 40 other individuals on behalf of animals at a store that sold animal products. While protesting, plaintiff alleges that he was "…wrongfully arrested, frisked, searched, assaulted, touched, battered and verbally abused" by defendants the City of New York, the New York City Police Department (NYPD), Police Officer Hastings, and Police Officers John Does (together, defendants or the City). (Marino Affirmation in Opposition, ¶ 4, NYSCEF doc. no. 52).

Plaintiff alleges ten causes of action in his complaint: false arrest and deprivation of rights under the First, Fourth, Fifth, and Fourteenth Amendments (first cause of action); negligent hiring, training, supervision, and retention (second cause of action); *Monell* municipal liability and respondeat superior (third cause of action); municipal and/or governmental liability (fourth cause of action); excessive force (fifth cause of action); malicious prosecution (sixth cause of action);

abuse of process; (seventh cause of action); infliction of emotional distress (eighth cause of action); negligence (ninth cause of action); and punitive damages (tenth cause of action).

Defendants move pursuant to CPLR 3211 (a) (7) to dismiss plaintiff's second, third, fourth, sixth, seventh, eighth, and ninth causes of action. Defendants also move pursuant to CPLR 3211 (a) (7) to dismiss all claims against defendant NYPD on the basis that it is a non-suable entity. Defendants have not moved to dismiss plaintiff's claims for false arrest (first cause of action) or excessive force (fifth cause of action).

Through his affirmation in opposition, plaintiff consents to the dismissal of the following causes of action: *Monell* municipal liability (partial third cause of action); malicious prosecution (sixth cause of action); abuse of process (seventh cause of action),[1] infliction of emotional distress (eighth cause of action); and punitive damages (tenth cause of action). Therefore, only the following causes of action remain in dispute: negligent hiring, retention, and supervision (second cause of action); respondeat superior (partial third cause of action); municipal/governmental liability (fourth cause of action); and negligence (ninth cause of action).

I. Analysis

Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See* CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994).

[1] Plaintiff consents to the dismissal of his abuse of process claim, but he notes that he reserves his right to move to amend and re-plead that cause of action. As no motion to amend the complaint is before the Court at this time, no determination will be made as to any potential amendments.

I. Second Cause of Action: Negligent Hiring, Retention, and Supervision

The negligence of an employer for negligent hiring, retention, and supervision "...arises from its having placed the employee in a position to cause foreseeable harm...which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee." *Sheila C. v Povich*, 11 AD3d 120, 129 (1st Dept 2004). Generally, when an employee is acting within the scope of his or her employment, a claim of negligent hiring, training, or retention cannot proceed. *See Karoon v NY City Transit*, 241 AD2d 323, 324 (1st Dept 1997).[2]

Defendants argue that plaintiff's claim for negligent hiring, training, and retention should be dismissed, because defendants concede that the officers complained of were acting within the scope of their employment. (*See* Amended Answer at ¶ 5, NYSCEF doc. no. 5). Plaintiff opposes and argues that an exception to that general rule applies here, because the officers complained of acted intentionally. However, there is no precedent that supports plaintiff's proposition that a distinction exists as to a negligent hiring claim with regard to an intentional act by an employee. The caselaw to which plaintiff cites regarding 42 USC § 1983 claims is inapposite.

Therefore, plaintiff's claim for negligent hiring, training, and retention is dismissed, because there are no allegations that the police officers complained of were acting outside of their employment. *See e.g., Zellner v City of New York*, 2019 NY Slip Op 32921(U), at *7 (Sup Ct NY County, Oct. 4, 2019); *Coleman v City of New York*, 2013 NY Slip Op 31443(U), at *5 (Sup Ct NY County, July 9, 2013); *Ali v City of New York*, 2011 NY Slip Op 31218(U) (Sup Ct NY County, May 4, 2011).

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[2] The First Department reasons that, "[t]his is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training." *Karoon v NY City Transit*, 241 AD2d 323, 324 (1st Dept 1997).

II. Third Cause of Action: Respondeat Superior

Plaintiff asserts a *Monell* claim and a respondeat superior claim as a collective third cause of action. Plaintiff consents to dismiss his third cause of action, entitled "Monell Claim Pursuant to 42 USC § 1981, 1983, 1985, 1986, and respondeat superior," only with respect to its Monell Claim. (*See* Summons and Verified Complaint at 9, NYSCEF doc. no. 1). Plaintiff does not agree to dismiss or discontinue his respondeat superior claim. The City's only opposition to plaintiff's respondeat superior claim is that it is not a stand alone cause of action, but, rather, it is a theory of recovery vis-à-vis another cause of action alleged against the City.

New York recognizes respondeat superior, or an employer's liability for an employee's negligence or misconduct, as a cause of action. *See e.g. Swierczynski v O'Neill*, 41 AD3d 1145, 1145 (4th Dept 2007); *Matos v DePalma Enters*, 160 AD2d 1163, 1163 (3d Dept 1990). Therefore, plaintiff's third cause of action is dismissed only with respect to its *Monell* claim pursuant to federal law, on consent. Plaintiff's cause of action for respondeat superior survives.

III. Fourth Cause of Action: Municipal/Governmental Liability

Defendants argue that the fourth cause of action for municipal/governmental liability should be dismissed, because it is duplicative of the *Monell* claim that has been discontinued by plaintiff. Plaintiff argues in opposition that the City fails to provide any legal authority to support its position that this claim is duplicative. Plaintiff offers no additional reasoning as to why his fourth cause of action should not be dismissed.

The language of plaintiff's fourth cause of action "Municipal and/or Governmental Liability" reads as an amalgam of other causes of action pled his complaint. Plaintiff provides no explanation of how this cause of action is distinguishable from his *Monell* claim[3], which is

[3] A local government can only be sued for violations of 42 USC § 1983 under a *Monell* theory, where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said

dismissed on consent; his negligent hiring and supervision claim, which is dismissed as per the above; or his surviving respondeat superior claim. Therefore, plaintiff's fourth cause of action is dismissed as duplicative of his third and second causes of action, which have been addressed *supra*.

IV. Ninth Cause of Action: Negligence

Plaintiff's ninth cause of action alleges that the City, "...without cause of provocation, negligently, carelessly, and recklessly detained, arrested, videotaped, and threatened the Plaintiff despite knowing that no laws, rules, or regulations were violated, without grounds, and without cause." (*See* Summons and Verified Complaint at ¶ 66, NYSCEF doc. no. 1). Defendants move to dismiss plaintiff's ninth cause of action for negligence as legally insufficient and inconsistent. Plaintiff opposes, arguing that CPLR 3014 permits a plaintiff to plead inconsistent or alternate theories of liability but does not address the legal sufficiency of the ninth cause of action.

i. Negligent Arrest

New York does not recognize a cause of action for "negligent arrest." *See Higgins v City of Oneonta*, 208 AD2d 1067, 1069 (3d Dept 1994) ("Plaintiff's negligence cause of action was properly dismissed since a party seeking damages for an injury resulting from a wrongful arrest and detention is relegated to the traditional remedies of false arrest and imprisonment"); *Secard v Dept. of Social Servs of County of Nassau*, 204 AD2d 425, 427 (2d Dept 1994) ("...a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover under broad general principles of negligence...but must proceed by way of the traditional remedies of false arrest and imprisonment"). Plaintiff cannot seek damages arising out of an alleged

to represent official policy, inflicts the injury." *Monell v Dept. of Social Services of City of New York*, 436 US 658, 694 (1978).

wrongful arrest or detention under a theory of negligence, and he may only proceed by way of a cause of action for false arrest and imprisonment. *Id.*

ii. Negligent Threatening

Similarly, no cause of action exists for "negligent assault" or "negligent battery." *Babikian v Nikki Midtown, LLC*, 60 AD3d 470, 471 (1st Dept 2009), citing *Smiley v N. Gen. Hosp.*, 59 AD3d 179, 180 (1st Dept 2009) ("It is well settled that once intentional offensive contact has been established, the actor is liable for assault and not negligence inasmuch as there is no such thing as a negligent assault" [quotations and citations omitted]) and *Fariello v City of New York Bd. of Educ.*, 199 AD2d 461, 462 (2d Dept 1993). Therefore, to the extent plaintiff's ninth cause of action alleges that he was negligently threatened, that claim is dismissed.

iii. Negligent Videotaping

The last remaining claim for "negligent videotaping" is not a cognizable cause of action. The City argues that, taken together, the complaint alleges that the police officers acted intentionally.[4] If the police officers complained of acted intentionally, it defies logic that they could have "negligently" videotaped plaintiff. Plaintiff provides no support that such cause of action exists or any rationale that plaintiff could recover under this theory. Giving all allegations in the complaint benefit of every possible favorable inference, the complaint fails to state a claim for "negligent videotaping," and that cause of action is dismissed.

[4] Plaintiff pleads intentional conduct throughout his complaint and offers no allegations with respect to separate and distinct actions that constitute negligence on the part of the defendants. (*See e.g.* Summons and Verified Complaint at ¶ 28 [alleging that the officers acted "with the *express intent* of preventing plaintiff from expressing his First, Fourth, and Fourteenth Amendment rights…"] [emphasis added]; at ¶ 33 [alleging that the officers "*knew or had reason to know* that they were making an illegal arrest"]; and at ¶ 55 [alleging that the officers "prepared and filed charges against Plaintiff *with malice and the intent* of depriving Plaintiffs [sic] of his liberty…"] [emphasis added]).

V. Dismiss Action as to NYPD

Finally, that branch of defendants' motion which seeks to dismiss this action as to NYPD is granted. Pursuant to Chapter 17, Section 396 of the New York City Charter, "[a]ll actions and proceedings' for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law." NY City Charter, Ch 17, §396. There is no exception at law which removes NYPD from this rule, and plaintiff does not oppose such dismissal in its opposition papers. Accordingly, NYPD is not a proper party to this action and the Verified Complaint is hereby dismissed as against it (*See e.g.*, *Siino v. Dep't of Educ of City of N.Y.*, 44 AD3d 568 (1st Dep't 2007); *Dimaggio-Campos v Brann*, 2021 NY Slip Op 31868[U] at *4 (Sup Ct, NY County June 2, 2021).

VI. Conclusion

Therefore, it is

ORDERED that defendants' motion is granted, in part, as follows:

It is ORDERED that the following causes of action are dismissed, on consent: *Monell* municipal liability (partial third cause of action); malicious prosecution (sixth cause of action); abuse of process (seventh cause of action), infliction of emotional distress (eighth cause of action); and punitive damages (tenth cause of action), and it is further

ORDERED that the following causes of action are dismissed: negligent hiring, retention, and supervision (second cause of action); municipal/governmental liability (fourth cause of action); and negligence (ninth cause of action), and it is further

ORDERED that the motion of defendant New York Policy Department (NYPD) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said

defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein, and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh), and it is further

ORDERED that counsel are directed to appear for a status conference to be held via Microsoft Teams on November 9, 2022 at 3:30 p.m. regarding any outstanding discovery with respect to the third-party complaint.

This constitutes the decision and order of the Court.

9/8/2022
DATE

LESLIE A. STROTH, 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