Melendez v City of New York
2023 NY Slip Op 31147(U)
April 11, 2023
Supreme Court, New York County
Docket Number: Index No. 451470/2014
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62
x--x

ANDREW MELENDEZ,

Plaintiff,

-against-

Index No. 451470/14

THE CITY OF NEW YORK, POLICE OFFICER GERNON, INDIVIDUALLY and POLICE OFFICER JOHN DOE, INDIVIDUALLY

Defendants.

DECISION AND ORDER ON MOTION
Motion Seq #001

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HON. J. MACHELLE SWEETING, J.S.C.

Defendants, The City of New York and Police Officer Gernon[1] (collectively "the City"), seek summary judgement and dismissal of the complaint, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212 or, alternatively, they seek an order of dismissal, pursuant to CPLR 3211, on the grounds that the complaint fails to state a cause of action.

This is a tort action to recover damages for personal injuries. The complaint alleges as follows: On June 11, 2011, at approximately 2 a.m., plaintiff was arrested by defendant Police Officer Gernon ("Officer Gernon") and an unidentified police officer (defendant "John Doe"). Plaintiff was charged with menacing in the third degree, pursuant to section 120.15 of the New York Penal Law and harassment in the third degree, pursuant to section 240.26 of the New York Penal Law. Plaintiff claims that the arrest was unjustified. Plaintiff was arraigned in the New York City Criminal Court on June 12, 2011 and released after 42 hours in custody. On July 25, 2011, the charges against plaintiff were dismissed by Justice Schecter of the New York City Criminal Court.

[1] In the City's motion papers, Officer Gernon is referred to as Sergeant Gernon.

The complaint alleges five causes of action. The first alleges damages under 42 USC §1983, for alleged violations of plaintiff's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The second alleges that the City has a policy, custom and practice of improper training, supervision and failure to discipline its officers. The third seeks attorney's fees under 42 USC §1983. The fourth alleges false arrest and malicious prosecution under New York law. The fifth alleges negligent hiring, supervision, training and discipline of the City's individual police officers. All of the causes of action are brought against the City. The first and fourth causes of action are brought against all the defendants jointly and severally.

At a statutory hearing, pursuant to section 50-h of the General Municipal law, plaintiff testified as to the facts leading to his arrest. Plaintiff testified that prior to his arrest, plaintiff was a passenger in the back seat of a vehicle driven by a woman named "Driver."[2] The Driver was pulled over by a police vehicle while on the West Side Highway. Two police officers got out of their vehicle and asked the Driver for their license and registration. At that moment, the other male passenger, "SB," who was sitting next to plaintiff in the back seat, attempted to hand the officers a Police Benevolent Association card. The officers asked plaintiff and SB to step outside the vehicle. Plaintiff testified that once outside, SB began arguing with the officers, claiming that his father was a retired police officer. Both plaintiff and SB were told to get back inside their vehicle.

Plaintiff testified that "GL," who was a passenger in the front seat, was getting argumentative, and so it was decided that plaintiff and GL should switch seats. As plaintiff stepped out of the vehicle and began to open the front passenger side door to switch seats with GL, he was arrested.

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[2] Although full names of the non-party witnesses are used in the parties' submissions, in the interest of privacy, this decision uses pseudonyms and/or initials instead of the actual names of the non-party witnesses.

Plaintiff now seeks damages for the alleged mental distress caused by his arrest and criminal prosecution, which he contends was without probable cause or justification.

The City moves for an order dismissing the federal claims against it on the grounds that the complaint fails to state a cause of action. The City also seeks summary judgment dismissing all claims brought against it. The City argues that the false arrest and malicious prosecution claims should be dismissed because there was a justification for the arrest and prosecution.

In support of its motion, the City submits: the transcripts from plaintiff's 50-h hearing and deposition; Officer Gernon's deposition testimony; the Police Arrest record; and Officer Gernon's notes related to the arrest.

Plaintiff's deposition testimony is similar to his 50-h hearing testimony in that plaintiff testified that after being told to get inside the vehicle, he got back out to switch seats with GL. As he went toward the front passenger door where GL was seated and he was about to open the door, he was arrested.

While Officer Gernon's deposition testimony and description of the events was mostly similar to the account given by plaintiff, their accounts differ in two respects. First, Officer Gernon testified that it was plaintiff and not the other male passenger, SB, who had showed Officer Gernon the PBA card. Officer Gernon testified that he had explained to plaintiff that the card was a courtesy to the driver and that plaintiff should not interfere with the officer speaking with the driver. Second, Officer Gernon testified that plaintiff was told to get back inside the car while the officer went back to his police vehicle to check the driver's information. When Officer Gernon went back to his police vehicle, and while he was sitting in the vehicle with the door open, plaintiff got back outside of his car and approached the front door of the vehicle. Plaintiff opened the door; lunged inside the car; attempted to grab GL, who was the front seat passenger and said, "I'm going

to fuck you up, hoe." Detecting a sign of hostility by plaintiff, Officer Gernon then went over to the vehicle and promptly arrested plaintiff. The incident is noted in Gernon's memo book.

The City argues that Officer Gernon's testimony is sufficient evidence to establish that plaintiff's arrest was privileged and that it was supported by probable cause. The City contends that Officer Gernon's reaction to plaintiff's conduct at the time was appropriate and reasonable under the circumstances, because Officer Gernon reacted to what he perceived to be an attempt to harass a woman.

The City argues that all federal claims should be dismissed against it, because plaintiff failed to plead the federal claims with specificity, which is required under CPLR 3017, and that the pleadings are too conclusory pursuant to federal standards. The City further argues that plaintiff failed to cite or elaborate on a specific custom, policy or practice implemented by the City which resulted in the improper actions of the City's employees. The City contends that an official policy must be alleged that is customarily enforced in order to impose federal violations on a municipality. The City argues that plaintiff failed to do this, therefore, the federal claims must be dismissed.

The City seeks dismissal of the negligent supervision claim because the defendant officers acted in the course of their employment. The City also claims that there was no unreasonable seizure and, therefore, seeks dismissal of the claim that it violated plaintiff's Fourth and Fourteenth Amendment rights by arresting him. Further, the City argues that this claim is subject to dismissal, because it is simply duplicative of the false arrest and malicious prosecution claims.

In opposition, plaintiff withdrew his claims against the City regarding a specific policy that violates federal law as well as his claims alleging negligent training and supervision of the police officers. Plaintiff maintains his position, however, that the City failed to make a *prima facie* case for summary judgment.

In opposition, plaintiff also denies the account given by Officer Gernon which alleges that there was any hostility displayed by plaintiff toward the female passenger GL when plaintiff went to open the door. More specifically, plaintiff denies having made the statement Officer Gernon alleges that plaintiff said. Plaintiff further avers in his opposition that GL was never harmed; never asserted that she was harmed or would be harmed; and never called for plaintiff's arrest. Plaintiff also states that GL was never asked to make a statement after plaintiff's arrest. While the City contends that Officer Gernon had decided to arrest plaintiff based on "common sense," plaintiff refutes the City's account and argues that the circumstances of his arrest and prosecution raise issues of fact that preclude the granting of summary judgment.

In reply, the City maintains that it has established a *prima facie* case for summary judgment and that it has submitted sufficient evidence in its motion papers to justify the action taken by the City against plaintiff in this action.

CONCLUSIONS OF LAW

On a motion to dismiss for failure to state a cause of action, the motion must be denied if, from the four corners of the pleadings, the factual allegations, when taken together, manifest any cause of action cognizable at law (*see Sheila C. v Povich,* 11 AD3d 120, 121 [1st Dept 2004]).

As a preliminary matter, plaintiff withdrew his claims for negligent training and supervision. Therefore, these claims are not the subject of this decision.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]'"(*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Services,* 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*Id.* at 82).

In order to recover for a claim of false arrest, plaintiff must prove that: "(1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged" *(Broughton v State of New York,* 37 NY2d 451, 456-7 [1975]). In order to recover for a claim of malicious prosecution, plaintiff must prove that: (1) a commencement of a criminal proceeding by defendant

against plaintiff; (2) the termination of the proceeding in plaintiff's favor;[3] (3) the absence of probable cause for the criminal proceeding; and (4) actual malice (*see Colon v City of New York,* 60 NY2d 78, 82 [1983]).

Here, the City failed to meet its burden to support a finding of summary judgement in its favor. In support of its argument for probable cause for the arrest, the City relies primarily on Officer Gernon's testimony and account of events, which differs in material ways from the account given by plaintiff. While the City contends that probable cause for the arrest stems from Officer Gernon's observations of plaintiff attempting to grab the front seat passenger and yelling "I'm going to fuck you up hoe." These assertions are disputed by plaintiff and the veracity of the two different accounts cannot be established on this record. Importantly, this court notes the record is devoid of any testimonial or documentary evidence from any of the other persons who were in the vehicle at the time and were eyewitnesses to the event and who could shed light on the veracity of the conflicting accounts. There is no evidence on the record from the Driver, SB, or even GL, the person with whom plaintiff had allegedly interacted and that catapulted Officer Gernon into action to effectuate the arrest. Additionally, the other officer who was allegedly with Officer Gernon at the time of the incident and was also an eyewitness to the events has not been identified to date and no evidence regarding the account of this officer has been proffered on this record.

The totality of the circumstances here raise both questions of fact and issues of credibility, which cannot be determined on this record. Accordingly, summary judgement and the dismissal of plaintiff's complaint is denied (*see Santos v Temco,* 295 AD2d 218 [1st Dept 2002]).

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[3] In *Thompson v Clark,* 596 U.S. ___ (2022) the United States Supreme Court held that "a Fourth Amendment claim under [section] 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence," but rather, "[a] plaintiff need only show that the criminal prosecution ended without a conviction."

CONCLUSION

It is hereby

ORDERED that the claims for negligent hiring, training, supervision and discipline are dismissed as moot, as they have been withdrawn by plaintiff; and it is further

ORDERED that defendants motion to dismiss the remainder of the claims and for summary judgment is DENIED.

4/11/2023

DATE

J. MACHELLE SWEETING, 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