

**Perez v Comparato**

2023 NY Slip Op 31397(U)

April 28, 2023

Supreme Court, New York County

Docket Number: Index No. 157273/2022

Judge: Lynn R. Kotler

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Joseph Perez

INDEX NO. 157273/2022

- v -

MOT. DATE

NYPD Police Officer Michael Comparato, et. al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This action concerns alleged violations of plaintiff's Constitutional rights and arises from a stop and search that occurred in the vicinity of East 115th Street and 1st Avenue, New York, New York. Plaintiff now moves for an order pursuant to CPLR § 3215 granting him a default judgement against the officer who allegedly committed the unlawful stop, question and search, NYPD Police Officer Michael Comparato, Shield No. 15787 ("Comparato"). Plaintiff seeks a default judgment against Comparato and an inquest on damages. The motion has been submitted without opposition despite proof of service of notice of the motion on Comparato via regular mail. Therefore, the motion is considered on default. The court's decision follows.

Plaintiff has provided proof of service of the summons and complaint upon Comparato by delivering a copy of the summons and complaint to a "PAA Gibbs", a person of suitable age and discretion, at Comparato's last known workplace, the 23rd Precinct, 164 East 102nd Street, New York, New York 10029, and by mailing a copy of the same to Comparato at the same address pursuant to CPLR § 308(2). Despite such service, Comparato has not answered the complaint and his time to do so has not been extended by the court. Therefore, plaintiff has established that Comparato has defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in his favor, provided he otherwise demonstrates that he has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v.*

Dated: 4/28/23

  
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 HON. LYNN R. KOTLER, J.S.C.

1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

*Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215(f) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Plaintiff's complaint asserts seven causes of action. The first cause of action is based on a theory of unlawful stop, question and search wherein plaintiff asserts that Comparato and other officer illegally stopped and grabbed him under color of law without any reasonable suspicion of criminality. The second cause of action is based on a theory of unlawful seizure and deprivation of liberty wherein plaintiff claims that Comparato and other officers subjected him to an unreasonable seizure under the Fourth Amendment and deprivation of liberty under the Fourteenth Amendment, and that this conduct caused him to sustain physical, emotional and psychological injuries. The third cause of action is based on a theory of false imprisonment wherein plaintiff declares that his arrest and detainment was a deprivation of his rights. The fourth cause of action is based on a theory of excessive force wherein plaintiff states that Comparato and other officers pointed a gun in his face, threw him to the floor, and roughly handcuffed him. The fifth cause of action is based on a theory of failure to intervene wherein plaintiff asserts that despite being present while Comparato and others violated plaintiff's Constitutional rights, no officer intervened to prevent the unlawful conduct. The sixth cause of action is based on a theory of denial of the right to fair trial and due process wherein plaintiff states that Comparato and other officers filled out false and misleading police reports and manufactured and/or withheld false evidence, thereby violating plaintiff's due process rights. Finally, the seventh cause of action is based on a theory of malicious prosecution wherein plaintiff claims that the commencement and continuation of a criminal proceeding was malicious and without probable cause.

42 USCS § 1983 provides a civil claim for damages against every "person who, under color of any statute... of any state... subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." A §1983 claim for unlawful stop and arrest depends upon the degree to which an officer impedes an individual's ability to leave the scene (see *Terry v. Ohio*, 392 US 1 [1968]). An officer may temporarily detain and frisk a person without probable cause to arrest (*Id.*). However, if a reasonable person would not feel free to leave, the encounter may ripen from a *Terry* stop into an arrest, at which point probable cause is necessary (*Florida v. Bostick*, 501 US 429 [1991]). To determine whether an arrest occurred, it is necessary to consider:

the extent to which an individual's freedom of movement was restrained, and in particular such factors as the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect, including whether or not handcuffs were used.

*United States v. Perea*, 986 F2d 633 (2d Cir. 1993).

A § 1983 claim for unlawful search and seizure looks to the reasonableness of the search when determining whether a constitutional right was violated; the Constitution "forbids... not all searches and seizures, but unreasonable searches and seizures" (*Elkins v. United States*, 364 US 206 [1960]). A §1983 claim for unlawful search and seizure must establish "proximate causation" between the unlawful search and seizure and the damages sought (*Townes v. City of New York*, 176 F3d 138 [2d Cir. 1999]).

Under federal and state law, a plaintiff bringing a false imprisonment claim must demonstrate that "(1) the defendant intended to confine the plaintiff, (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" (*Singer v. Fulton Cty. Sheriff*, 63 F.3d 110 [2d Cir. 1995]).

In determining a §1983 claim for excessive force, the court must use a weighing test; a court must weigh the nature and quality of the intrusion on an individual's Fourth Amendment interests against the counteravailing governmental interests at stake (*Douglas v. City of New York*, 730 FedAppx 12 [2d Cir. 2018] citing *Brown v. City of New York*, 798 F3d 94 [2d Cir. 2015]). The Supreme Court has stated that courts must determine whether the use of force is objectively reasonable "in light of the facts and

circumstances confronting them, without regard to [the officers'] underlying intent or motivation" (*Graham v. Connor*, 490 US 386 [1989]). The intentions of the officer are irrelevant (*Id.*).

A police officer may be liable for a failure to intervene cause of action under §1983 where "(1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene" (*Jean-Laurent v. Wilkinson*, 540 F.Supp.2d 501 [SDNY 2008]).

For a §1983 cause of action for denial of a right to fair trial to be successful based upon the fabrication of evidence, a plaintiff must prove that "an (1) investigating official (2) fabricates evidence (3) that is likely to influence a jury's decision, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of liberty as a result" (*Jovanic v. City of New York*, 486 FedAppx 149 [2d Cir. 2012]).

Finally, to state a malicious prosecution claim under § 1983, the plaintiff must demonstrate (1) the initiation of a prosecution against a plaintiff; (2) without probable cause; (3) the proceedings were begun with malice; and (4) the matter terminated in plaintiff's favor; (5) plaintiff must also have suffered a sufficient post-arraignment deprivation of liberty implicating his Fourth Amendment right (see *O'Brien v. Alexander*, 101 F3d 1479 [2d Cir. 1996]; *Jocks v. Tavernier*, 316 F3d 128 [2d Cir. 2003])

Plaintiff's motion is supported by his sworn affidavit of merit. In this affidavit, Perez states, based on personal knowledge, that on December 9, 2020, he was unlawfully stopped, frisked, and arrested by Comparato in the vicinity of East 115th Street and 1st Avenue in New York, New York. However, Perez does not assert that he felt that he was unable to leave the scene, that he was physically stopped from leaving the scene, that he suffered physical or emotional damages as a result of the stop, and did not otherwise detail the encounter or link the encounter to the damages that he seeks.

Plaintiff has demonstrated that on December 9, 2020, he was stopped by police officers and that he was frisked. However, he has failed to demonstrate that the stop or the frisk were unreasonable or unlawful because he has not demonstrated the necessary elements of those causes of action. Perez has not established that he felt he was unable to leave the stop, that he was restrained from leaving the stop or that probable cause was not present for a stop or an arrest to be made. Plaintiff's general claim of unlawful stop, frisk and arrest are insufficient to demonstrate a *prima facie* cause of action. Additionally, Perez has not made any claims supporting the remaining causes of action. Any reliance that Perez puts upon his verified complaint to demonstrate these elements is misplaced because the complaint is verified by counsel. A complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR § 3215 (*Mullins v. DiLorenzo*, 199 AD2d 218 [1st Dept. 1993]; *Feffer v. Malpeso*, 210 AD2d 60 [1st Dept. 1994]). Therefore, Perez has not made out a *prima facie* cause of action and the motion is granted only to the extent that Comparato's default in appearing is hereby noted. All issues regarding Comparato's liability and plaintiff's damages against Comparato shall be determined at inquest.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that the motion is granted only to the extent that the defendant NYPD Police Officer Michael Comparato, Shield No. 15787 has defaulted in appearing in this action; and it is further

**ORDERED** that all issues regarding defendant NYPD Police Officer Michael Comparato, Shield No. 15787's liability and plaintiff's damages against NYPD Police Officer Michael Comparato, Shield No. 15787 shall be determined at inquest; and it is further


**ORDERED** that plaintiff is directed to file note of issue on or before July 20, 2023 so that this action may be scheduled for an inquest.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

4/28/23  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.