

**Cancel v Port Auth. of N.Y. & N.J.**

2016 NY Slip Op 31885(U)

October 11, 2016

Supreme Court, New York County

Docket Number: 156058/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

KEVIN CANCEL,  
  
Plaintiff,  
  
-against-

INDEX NO. 156058/2014  
MOTION DATE 09/07/2016  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY,  
THE PORT AUTHORITY POLICE OF NEW YORK and  
NEW JERSEY, P.O. DAN GALVIN (Shield No. 2876),  
OF THE PORT AUTHORITY POLICE OF NEW YORK and  
NEW JERSEY, P.O. BRUGNONI (Shield No. 2932) OF THE  
PORT AUTHORITY POLICE OF NEW YORK and  
NEW JERSEY, and JOHN AND JANE DOES OF THE  
PORT AUTHORITY POLICE OF NEW YORK and  
NEW JERSEY,  
  
Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6 - 7</u>

**Cross-Motion:**  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion for summary judgment is granted to the extent stated herein.

Plaintiff commenced this action on June 20, 2014. (Mot. Exh. B). The Complaint asserts five causes of action for injuries sustained by the Plaintiff stemming from his arrest by Port Authority Police on July 11, 2013. (Id.) Plaintiff alleges that during his arrest the arresting officers twisted his hand causing injury to his left middle finger. Issue was joined by Defendants The Port Authority of New York and New Jersey (herein "PANYNJ), P.O. Dan Galvin (herein "Galvin") and P.O. Johany Brugnani (herein "Brugnani") (collectively herein "Movants"). (Mot. Exhs. D & F).

Movants now seek summary judgment dismissing the Complaint pursuant to CPLR §3212. Movants also contend that the Complaint should be dismissed as to the Defendant named Port Authority Police of New York and New Jersey as no such entity

exists; the Port Authority has a Public Safety Department that employs and designates Police Officers, but is not a separate, suable entity. Plaintiff opposes the motion as to only the first cause of action for assault, battery, and excessive force, and the fifth cause of action for punitive damages.

**The First Cause of Action:**

Movants argue that the first cause of action for assault, battery, and excessive force cannot be sustained against Galvin since he did not have any contact with the Plaintiff. Although Galvin was present, he did not apprehend or retrieve any evidence from Plaintiff as, at the time of the incident, Galvin was apprehending two other suspects.

Movants also contend that the first cause of action cannot be sustained against Brugnoni because the evidence proves that Brugnoni did not use excessive force. Movants contend that upon observing the Plaintiff engage in a drug sale, Brugnoni apprehended the Plaintiff, searched him, and removed a \$10 bill from Plaintiff's left hand without incident. Movantx argue that Brugnoni's testimony establishes that Plaintiff's left finger was not touched during the arrest, and that Plaintiff's medical records show that Plaintiff had sustained the broken finger 16 days before his arrest. (Mot. Exhs. I & M; see also Reply Aff. Exh. Q). Further, Movants argue that Brugnoni's actions did not violate any of Plaintiff's rights and are therefore protected by the doctrine of qualified immunity; removing the money from Plaintiff's hand qualifies as objectively reasonable conduct because another police officer in his position would not have acted differently under the circumstances.

Movants further contend that because the evidence establishes that Galvin and Brugnoni did not commit assault, battery, nor did they use excessive force against Plaintiff, the first cause of action must be dismissed as to PANYNJ as well. This is because the first cause of action can only be imputed upon PANYNJ by a theory of respondeat superior.

Plaintiff opposes these arguments on the ground that there remain issues of fact as to the circumstances surrounding his arrest. Plaintiff contends that he was grabbed by his left hand, and his fingers bent backwards causing him injury. (Aff. In Opp. Exh. 1). Plaintiff also contends that the medical records submitted by Movants are not Plaintiff's proper medical records, and they are not admissible because they are not certified. (Id.) However, if the Court does consider the records, the records indicate that any prior fracture predating the arrest was further displaced in the x-rays taken the day of the incident. (Aff. In Opp. Exh. 5). Therefore, to what extent contact during his arrest caused the injury or exacerbated it is a question for the jury.

### The Fifth Cause of Action for Punitive Damages:

Movants argue that a punitive damages claim cannot stand against them because there is no evidence that Brugnoni or Galvin acted with malicious intent, reckless or callous disregard for Plaintiff's rights, or that they intended Plaintiff grievous bodily harm. Further, PANYNJ cannot be held liable for punitive damages as it is immune from a punitive damages claim under federal and state law.

Plaintiff opposes these arguments as to Brugnoni only. Plaintiff contends that the unnecessary bending of the Plaintiff's fingers is indication of recklessness and a conscious disregard for his rights. Therefore, these actions warrant punitive damages, and should be a question for the jury to decide.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966]; Sillman v. 20<sup>th</sup> Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957]; Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination" (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Movants argue and provide evidence for summary judgment on (1) the second cause of action for failure to intervene, (2) the third cause of action for negligent hiring, training, retention and supervision, and (3) the fourth cause of action for intentional infliction of emotional distress. Plaintiff pled guilty to the charges brought against him stemming from his July 13, 2013 arrest, there is no evidence of PANYNJ's negligent hiring, training, retention or supervision of Brugnoni, and there is no evidence that Plaintiff has suffered from emotional distress as a result of the alleged use of excessive force. Plaintiff fails to address these arguments and therefore does not raise any issues of fact. Factual assertions made in a summary judgment motion that are not contested by a Plaintiff may be deemed admitted. (Whelan by Whelan v.

**GTE Sylvania, Inc., 182 A.D.2d 446, 582 N.Y.S.2d 170 [1<sup>st</sup> Dept. 1992], Kuehne & Nagel, Inc. V. F.W.Baiden et al., 36 N.Y.2d 539, 330 N.E.2d 624, 369 N.Y.S.2d 667 [1975]). Thus, Movants are entitled to summary judgment on the second, third and fourth causes of action.**

**Summary judgment is also proper in dismissing the remaining first and fifth causes of action against Defendant Galvin. No evidence has been provided to show that Galvin engaged, apprehended, or touched the Plaintiff. Therefore, these claims asserted against him cannot stand. (Whelan, Supra).**

**The fifth cause of action must also be dismissed as against PANYNJ. A claim for punitive damages based on intentional tort claims "...are not recoverable against a state or its political subdivisions, which includes a municipality." (Dorian v. City of New York, 129 A.D.3d 445, 9 N.Y.S.3d 577 [1<sup>st</sup> Dept. 2015], Sharapata v. Town of Islip, 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104 [1982]).**

**The Complaint must be dismissed as to these causes of action and the caption amended to reflect the removal of the Defendants named The Port authority Police of New York and New Jersey, and Defendants John and Jane Does of the Port Authority Police of New York and New Jersey. PANYNJ employs and designates Police Officers, and there is no separate entity established as the Port Authority Police. Further, there is no evidence of other Port Authority Police Officers having been involved in Plaintiff's arrest that remain unknown. Therefore, the Defendants named John and Jane Does of the Port Authority Police must also be stricken from the caption.**

**The Movants, however, have not established a right to summary judgment on the first and fifth causes of action against Brugnoni, or the first cause of action against PANYNJ. There are conflicting versions of the events that transpired, and therefore there remain issues of fact as to the circumstances surrounding Plaintiff's arrest. Further, notwithstanding the fact that Plaintiff's medical records indicate he had a pre-existing injury to his left middle finger, there remains an issue of fact as to whether or not this injury was exacerbated during his arrest. (Movants provide a certified copy of Plaintiff's medical records- Reply Aff. Exh. Q). These are issues of fact that cannot be decided on a motion for summary judgment, and must be left for the jury to decide.**

**Accordingly, it is ORDERED, that Defendants motion for summary judgment is granted to the extent as follows:**

- dismissing the Complaint as against the Defendants named The Port Authority Police of New York and New Jersey, and John and Jane Does of the Port Authority Police of New York and New Jersey;**
- dismissing the Complaint as against Defendant P.O. Dan Galvin;**
- dismissing the second, third, and fourth causes of action against Defendants P.O. Johany Brugnoni and The Port Authority of New York and New Jersey;**

-dismissing the fifth cause of action as against The Port Authority of New York and New Jersey,

and it is further,

ORDERED, that the Complaint is dismissed as against Defendants P.O. Dan Galvin, The Port Authority Police of New York and New Jersey and John and Jane Does of the Port Authority Police of New York and New Jersey, and it is further,

ORDERED, that the second, third, and fourth causes of action are dismissed as against Defendants P.O. Johany Brugnani and The Port Authority of New York and New Jersey, and it is further,

ORDERED, that the fifth cause of action is dismissed as against The Port Authority of New York and New Jersey, and it is further,

ORDERED, that these causes of action against the Defendants as stated are severed and dismissed,

ORDERED, that the first and fifth causes of action against Defendant P.O. Johany Brugnani remain, and it is further,

ORDERED, that the first cause of action against Defendant The Port Authority of New York and New Jersey remains, and it is further,

ORDERED, that the caption is amended to reflect the dismissal of all causes of action against Defendants P.O. Dan Galvin, The Port Authority Police of New York and New Jersey, and John and Jane Does of The Port Authority Police of New York and New Jersey, and it is further,

ORDERED, that the new caption shall read is follows:

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KEVIN CANCEL,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY,  
and P.O. JOHANY BRUGNONI (Shield No. 2932).

Defendants.

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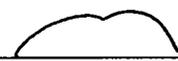
and it is further,

ORDERED, that within 20 days from the date of entry of this Order the moving party shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at, genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly.

ENTER:

Dated: October 11, 2016

  
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MANUEL J. MENDEZ  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST                       REFERENCE