

Ortega v City of New York

2016 NY Slip Op 32009(U)

September 19, 2016

Supreme Court, Bronx County

Docket Number: 7902/2007

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(E)

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JOEL ORTEGA,

DECISION and ORDER

Plaintiff,

Index No.: 7902/2007

- against -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, P.O. MAIER, P.O. SEINKO, AND JOHN
DOE(s)(Unidentified Police Officers involved in the assault
and illegal arrest and imprisonment of the Plaintiff),

Defendants.

-----X

Defendants City of New York (“NYC”), New York City Police Department (“NYPD”) Police Officer Maier (“PO Maier”) and Police Officer Seinko (“PO Seinko”) move to dismiss the plaintiff’s false arrest and false imprisonment claims pursuant to CPLR Rules 3211 and 3212 for failing to comply with GML §§50-e[1] and 50-I[1]. Plaintiff Ortega opposes the defendants’ motion.

Plaintiff claims that he was falsely arrested and unlawfully imprisoned by the police. It is well settled that probable cause constitutes a complete defense to false arrest and unlawful imprisonment claims as a matter of law. (*Garcia v City of New York*, 115 AD3d 447 [1st Dept 2014] citing *Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011]; *Young v City of New York*, 72 AD3d 415 [1st Dept 2010]; *Grant v Barnes & Noble*, 284 AD2d 238 [1st Dept 2001].) Probable cause exists when the facts and circumstances would lead a similarly situated reasonably prudent person to believe that the plaintiff is guilty. (*Brown v Sears Roebuck and Co.*, 297 AD2d 205 [1st Dept 2002].) It requires information to support a reasonable belief that an offense has been committed versus proof beyond a reasonable doubt. (*People v Williams*, 122 AD3d 502 [1st Dept 2014]; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006].)

The defendant moves for summary judgment dismissing plaintiff’s false arrest and false imprisonment claims for his failure to comply with General Municipal Law §§50-E and §50-1.

General Municipal Law §50-e[1] and §50-i[1].

GML §50-E [1] states in pertinent part:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation ... the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from

the appointment of a representative of the decedent's estate.

GML §50-I [1] states the following:

No action or special proceeding shall be prosecuted or maintained against a city ... unless ... (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based...

Once a claimant files a Notice of Claim ("NOC") and the defendant files a demand for a 50-h hearing, the claimant must comply prior to commencing an action. The purpose of a NOC is to allow the municipal defendant an opportunity to make a prompt investigation and preserve relevant evidence. (*Lomax v NYC Health and Hosps. Corp.*, 262 AD2d [1st Dept 1999].)

A party may move for judgment dismissing one or more causes of action asserted against him on various grounds. (CPLR 3211).

Since summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 36 [1974]), the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence that eliminates all material issues of fact. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].) In opposing such a motion, the non-moving party must produce evidentiary proof in admissible form sufficient to establish material questions of fact that must be determined at trial. (*Zuckerman v City of New York*, 49 NY2d 557 [1980].)

In support of their motion, defendants NYC, NYPD, PO Maier and PO Seinko proffer the plaintiff's ("NOC"), Preliminary and Compliance Conference Orders and Responses, plaintiff's arrest complaint and medical report and copies of the officer's notes.

In opposition to the defendants' motion, plaintiff Ortega, like the defendants, proffers the NOC and plaintiff's 50-H hearing transcript.

During his 3/27/06 50-h hearing, plaintiff Ortega testified that on 1/1/06 he and his friend Jose were standing on 175th Street and Weeks Avenue talking after leaving a New Year's celebration at their friend Giselle P.'s house. Plaintiff contends that he was not intoxicated. While Mr. Ortega and Jose were standing there, an unmarked vehicle pulled up and they observed four men (later identified as police officers) jumping out of the vehicle. Plaintiff was leaning on a car when the officer that was riding in the front passenger seat approached Jose. At about the same time, plaintiff started walking away and was approached from behind by the same officer. Plaintiff believes the police officer's name is Siend and describes him as a white, tall, caucasian with spiky hair and big ears. Mr. Ortega states that he was walking away when the police officer "tried to pull him down" and plaintiff resisted. ¹His jacket slipped off and he ran around the block. Mr. Ortega states that he

¹Plaintiff contends that at no time did the police officer have a badge displayed or identify himself as a police officer.

ran around the block then stopped at the same location where he started running from after realizing that he had no reason to run. It was at that time that the police officer caught up with him. Once plaintiff stopped, the police officer told him to kneel and plaintiff complied. Another officer then came to assist the police officer that was in pursuit of Mr. Ortega. Plaintiff states that this officer, like the first one, had no badge displayed. The assisting police officer asked Mr. Ortega to put his hands behind his back. He was then handcuffed and helped off the ground. As plaintiff was directed to the unmarked vehicle, sitting inside and attempting to put both feet inside the car, he was struck about the lower left jaw by the police officer's fist. After he was struck in the jaw, plaintiff stated to the police officer, "I think you broke my jaw." The plaintiff's relative testimony is as follows:

Q. Did Officer Siend respond to your statement?

A. No.

Q. Did you request medical attention?

A. Yes.

Q. Did you fully get into the car?

A. Yes.

Thereafter, Mr. Ortega was transported to the 46th precinct. He was held for two hours and never taken to central booking. He did, however, have a discussion with three police officers while in the precinct. Present were Sergeant Paul, the officer that struck allegedly plaintiff, and one other officer. Plaintiff asserts the discussion took place as follows:

Q. What did Sergeant Paul say to you and what did you respond to him?

A. Refuse first paramedic, charges will be dropped with a written statement that he ran and fell.

Q. Did you write out a statement?

A. No, the officer did.

Q. Who wrote out the statement?

A. The one that gave me the desk appearance ticket.

Q. Do you know the name of that officer?

A. Starts with a K.

Q. After the officer wrote this statement, did you read the statement?

A. Yes.

Q. And did you sign the statement?

A. Yes.

Q. And did you request any changes to be made to the statement?

A. No.

Q. Did the ambulance come after you gave the statement?

A. Before I gave the statement there was two ambulances.

Q. When did the first ambulance come?

A. Like 20 minutes later after I got to the precinct.

Q. And when the first ambulance came did the paramedics treat you from that first ambulance?

- A. No.
Q. When did the second ambulance arrive?
A. A couple of hours later.
Q. Did the second ambulance treat you?
A. Yes.
Q. What kind of treatment did they do?
A. Basically they just told me open my mouth, looked inside and right away they said I had to be rushed to the hospital.

Plaintiff was rushed to St. Barnabas where x-rays were taken of his facial jaw. The doctors determined that Mr. Ortega suffered a fractured bone, fractured jaw and would need an operation. Plaintiff was admitted to St. Barnabas for four days and underwent surgery. Plaintiff's jaw was wired for two months with the requisite follow-up appointments and medical treatment. Mr. Ortega avers that he filed a complaint with the Civilian Complaint Review Board ("CCRB"). Plaintiff asserts that he was told by Sergeant Paul that if he refused to sign the statement at the precinct that he would be charged with a couple of felonies and he also told the plaintiff what to say to the first EMS people that came to the precinct.

Mr. Ortega's arrest took place on 1/1/06. He filed a NOC on 1/17/06. It provides the date, time and address of the incident and identifies and describes the actions and the police officers involved. Mr. Ortega's 50-h hearing took place on 3/27/06, 85 days after his arrest. Both the NOC and plaintiff's 50-H hearing are timely.

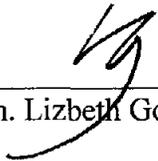
CONCLUSION

Based on the foregoing, the defendants' motion to dismiss the plaintiff's false arrest and unlawful imprisonment claims is denied. The plaintiff's evidence establishes that he met the requisite statutory criteria and there is a triable issue of fact as to whether a similarly situated reasonably prudent person would have deemed Mr. Ortega's behavior as indicative of one who engaged in a violent crime and whether the officers had probable cause to arrest him. The plaintiff withdraws his claims of negligent hiring, retention and supervision, the 42 USC §1983 claim and all claims against defendant New York City Police Department.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: September 19, 2016

So ordered,



Hon. Lizbeth González, JSC