Siler v City of New York
2026 NY Slip Op 31071(U)
March 18, 2026
Supreme Court, New York County
Docket Number: Index No. 151902/2019
Judge: Carol Sharpe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL SHARPE** **PART** **52M**

Justice

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OMAR SILER,

Plaintiff,

- v -

THE CITY OF NEW YORK, SGT. DANIEL FELDMAN, POLICE OFFICER JOHN DOE

Defendant.

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INDEX NO. 151902/2019

MOTION DATE 08/08/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Motion Sequence 1 is decided as follows:

Defendants The City of New York ("The City") and Sgt. Daniel Feldman ("Sgt. Feldman") (collectively "City Defendants") seek an Order granting a motion to dismiss pursuant to CPLR 3211(a)(7) and for summary judgment pursuant to CPLR 3212 (Motion Seq. 1). Written opposition was filed. The motion is granted.

Plaintiff filed his summons and complaint on February 21, 2019, and his amended complaint on March 14, 2019, in this personal injury action against The City, Police Officer Juan Virella, Police Officer Griffin, and Sgt. Feldman seeking damages for physical and emotional injuries which he allegedly sustained when he was detained and arrested by New York Police Department ("NYPD") officers on June 15, 2017. He was released upon making bail on August 1, 2017, and the criminal charges were dismissed on speedy trial grounds, pursuant to CPL 30.30, on November 27, 2017. Issue was joined by the filing of the amended answer by City Defendants on

April 24, 2019 (NYSCEF Doc. #6). The City did not answer for Police Officers Virella and Grifin and they were neither served, otherwise mentioned, nor deposed.

City Defendants seek dismissal of plaintiff's federal law claims on the grounds that the named defendant is not the correct actor under color of law; dismissal of the state law claims in the complaint other than malicious prosecution on the grounds that pursuant to CPLR 217-A and General Municipal Law §50-e and §50-i(1) as plaintiff's claims were filed after the statute of limitations expired; that pursuant to CPLR 3211(a)(7) and CPLR 3212, plaintiff failed to state a cause of action; and the City Defendants are entitled to judgment as a matter of law as the officers had probable cause to arrest him.

This case stems from the arrest of plaintiff by NYPD Officer Giang ("PO Giang") after an encounter with Inspector Raja of the Department of Consumer Affairs ("DCA"), for which plaintiff was charged with assaulting DCA Inspector Raja; attempted assault; harassment; resisting arrest; and various counts of unlicensed ticket vending in Battery Park (NYSCEF Doc. #40).

In support of their motion, The City submitted plaintiff's deposition and 50-H transcripts; deposition transcript of NYPD officers; NYPD arrest reports; and the criminal court file. Plaintiff testified that his job at the time of the arrest was selling tickets to tourists for a boat tour to and around the Statute of Liberty. His location was in front of the New York Film Academy which is across the street from Battery Park. He admitted that before he was approached by DCA Inspector Raja, he had just sold tickets for money to a group of four people and was showing them to the shuttle bus that would take them to the boat when a male called out to him. The person pulled out a badge and asked if he had a vendor license. He explained that he did not have a license but had applied for one. While he was explaining, someone grabbed him from behind and slammed him to the ground causing him to injure his knuckles and knee. He testified that before he was taken to

the precinct he was handcuffed and left on the ground for a long time while tourists took pictures of him, adding to his emotional distress.

Plaintiff testified that he was incarcerated at Manhattan Detention Complex and Riker's Island for approximately fifty days until he made bail, which was set at his arraignment. The bill of particulars stated that plaintiff was confined and imprisoned for approximately two months (NYSCEF Doc. #34, ¶20). Plaintiff admitted that at the time of his arrest he had an outstanding warrant for vending without a license. The charges relating to this arrest were later dismissed in October 2017. Plaintiff testified that he knows Sgt. Feldman because he saw him every day patrolling the area where he sold tickets, that Sgt. Feldman previously arrested him for selling tickets without a vending license, and that Sgt. Felman would taunt him by implying that plaintiff would be eating food typically served in jail. He also testified that Sgt. Feldman did not participate in the arrest on January 15, 2017, although he was present after. The bill of particulars further stated that plaintiff was taken into custody on June 15, 2017, arraigned on June 16, 2017, and released from incarceration on or about June 18, 2016 (sic) (*id.* ¶¶ 44-46).

Police Officer Michael Holman, the assigned NYPD arresting officer, testified at his deposition that on the day of plaintiff's arrest his assignment was to partner with an inspector from DCA to patrol for unlicensed vending in Battery Park. He responded to a radio run that additional officers were needed at 22 Battery Place and saw plaintiff being arrested by PO Giang and DCA Inspector Raja. Although PO Holman arrived after plaintiff was arrested, Sgt. Feldman assigned him to process the arrest.

Retired Sgt. Feldman testified at his deposition that on June 15, 2017, he supervised a team who was working with the DCA inspectors to observe ticket vendors around the area of the Staten Island Ferry and Battery Park which are part of the Parks Department. The purpose was to enforce

park rules and regulations to ensure the ticket vendors were in areas they were legally allowed to be (NYSCEF Doc. #36, pg. 16). He saw plaintiff as he was detained on June 15, 2017, and recognized him as a ticket vendor because he had previous encounters with him, including a prior arrest.

Plaintiff submitted the deposition transcript of PO Giang who testified that on June 15, 2017, he was working jointly with a DCA inspector to address unlicensed vendors (NYSCEF Doc. #44). PO Giang testified that Sgt. Feldman instructed the police officers to pay attention to the ticket sellers in the Battery Park area and if there appeared to be a sale or solicitation, they should approach, request to see their license, and any unlicensed vendors should be arrested. PO Giang testified that he was partnered with DCA Inspector Raja who called his attention to plaintiff who was standing in the park wearing a vest that said "sightseeing and tours." A small group of people approached plaintiff and a woman from the group gave him US currency and he gave her some tickets. PO Giang and DCA Inspector Raja approached plaintiff and asked for his vendor license, and he responded that he did not have one. PO Giang stepped forward to arrest plaintiff who then pushed DCA Inspector Raja who was closer and ran. PO Giang chased him, and while plaintiff stopped when he was ordered to, he struggled while being handcuffed causing both to fall and PO Giang was injured.

Discussion

Pleadings which are the subject of a CPLR 3211 motion to dismiss are liberally construed, the court is to accept the facts as alleged in the complaint to be true, accord plaintiff "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "…[T]he question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated

one…" (*Chanko v Am. Broad. Cos. Inc.*, 27 NY3d 46, 52 [2016]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus…" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]), and "a motion to dismiss pursuant to CPLR 3211 (a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d at 275)" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2nd Dept 2010]).

"The proponent of a motion for summary judgment [pursuant to CPLR 3212] must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Center,* 64 NY2d 851, 853 [1985]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). If the proponent makes the required *prima facie* showing, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 [2000]).

"It is well established that summary judgment may not be granted whenever the pleadings raise clear, well-defined and genuine issues" (*Falk v Goodman*, 7 NY2d 87, 89 [1959]). Upon a motion for summary judgment, the role of the court is issue finding, not issue determination (*Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Esteve v Abad*, 271 AD 725, 727 [1st Dept 1947]). The motion should be denied where different conclusions can reasonably be drawn from the evidence (*Sommer v Federal*

Signal Corp., 79 NY2d 540 [1992]). All evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 [1st Dept 2010]). Issues of credibility are to be resolved at trial, not by summary judgment (*Castillo v New York City Tr. Auth.*, 69 AD3d 487 [1st Dept 2010]). For a summary judgment motion to be denied, the non-moving party must provide evidence showing that triable issues of fact exist. "To defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient" (*Mallad Constr. Corp. v Cty. Fed. Sav. & Loan Ass'n,* 32 NY2d 285, 260 [1973]; *Freedman v Chem. Constr. Corp.*, 43 NY2d 260, 264 [1977]["[I]t is elementary that conclusory assertions will not defeat summary judgment. The opponent of a properly made summary judgment motion must present evidentiary facts sufficient to raise a triable issue of fact [internal citation omitted]"). If there are no material triable issues of fact, summary judgment must be granted (*see Sillman,* 3 NY2d at 404).

CPLR § 217-a provides, in pertinent parts, that "every action for damages or injuries to real or personal property, or for the destruction thereof, or for personal injuries...shall not be commenced unless a notice of claim shall have been served on such governmental entity within the time limit established by section fifty-e of the general municipal law,...[and] an action for damages or for injuries to real or personal property, or for the destruction thereof, or for personal injuries, alleged to have been sustained, shall not be commenced more than one year and ninety days after the cause of action therefor shall have accrued..."

Plaintiff's causes of action alleging unlawful imprisonment and false arrest accrued upon plaintiff's physical release from custody (*see Bumbury v City of NY*, 62 AD3d 621-622, 621 [1st Dept 2009]; *Nunez v City of NY*, 307 AD2d 218, 219 [1st Dept 2003]). "To prevail on such a cause

of action, the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged [internal citations omitted]" (*De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]). A claim of false arrest and unlawful imprisonment fails where the lawful arrest is based on probable cause. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed" by the suspected individual, and probable cause must be judged under the totality of the circumstances (*People v Bigelow*, 66 NY2d 417, 423, 488 NE2d 451, 497 NYS2d 630 [1985])" (*id.*).

"A cause of action for assault accrues on the date of the assault" (*McElveen v Police Dept. of NY*, 70 AD2d 858, 858 [1st Dept 1979]; *Wilkerson v 134 Kitty's Corp.*, 49 AD3d 718 [2d Dept 2008]). CPLR § 215(3) provides that actions to be commenced within one year include assault, battery, false imprisonment and malicious prosecution. Here, the causes of action for assault and battery accrued on June 15, 2017, thus, any action against Sgt. Feldman as an individual had to be commenced within one year and any action against the municipality had to be commenced within one year and ninety days (*see Wright v City of Newburgh*, 259 AD2d 485 [2d Dept 1999]); *Tumminello v City of NY*, 212 AD2d 434 [1st Dept 1995]). The claims must be dismissed as to both The City and Sgt. Feldman as the complaint was filed after both statutes of limitations expired.

"Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention (*Eifert v Bush,* 27 AD2d 950, *affd* 22 NY2d 681). This 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 Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; *Troy v City of NY*, 160 AD3d 410 [1st Dept 2018]). Here, the evidence established that all NYPD officers were acting within the scope of their employment, hence the cause of action for negligent hiring and retention must be dismissed.

A cause of action for intentional infliction of emotion distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121, 612 NE2d 699, 596 NYS2d 350 [1993]; *see Chanko*, 27 NY3d at 56). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303, 448 NE2d 86, 461 NYS2d 232 [1983]; *Howell*, 81 NY2d at 122). Here, plaintiff has not provided sufficient evidence to establish intentional infliction of emotional distress. Defendants have established their entitlement to summary judgment and plaintiff has failed to raise a triable issue of material fact.

A claim of general negligence is not applicable where the gravamen of the complaint and the underlying circumstances of the case is a claim of false imprisonment and malicious prosecution (*see Black v City of New York*, 244 AD3d 404 [1st Dept 2025]; *Ferguson v Dollar Rent A Car, Inc.*, 102 AD3d 600, 601 [1st Dept 2013]).

City Defendants are seeking summary judgment on the malicious prosecution claim as plaintiff's notice of claim for malicious prosecution was timely served on June 4, 2024, within the 90-day statutory period after the criminal case was dismissed (*see Boose v City of Rochester*, 71

AD2d 59, 65 [1979]). To sustain a claim of malicious prosecution, plaintiff must establish that "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice [internal citations omitted]" (*De Lourdes Torres,* 26 NY3d at 760). "Actual malice requires allegations that the City "commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served [internal citation omitted]" (*Burgos-Lugo v City of New York*, 146 AD3d 660, 662 [1st Dept 2017]; *see Black*, 244 AD3d 404]). While plaintiff testified that Sgt. Feldman previously arrested him for selling tour tickets without a vendor license, and disagreed that this sale occurred in the park, he did testify that Sgt. Feldman was not involved in the arrest. Applying the summary judgment analysis and giving all favorable inferences to plaintiff, City Defendants have met their initial burden, but plaintiff has not met his burden of establishing a triable issue of material fact as to actual malice (*see Christian v City of NY*, 211 AD3d 402 [1st Dept 2022]).

"It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence [internal citation omitted]. An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used, *see O'Neill*, 839 F.2d at 11-12; (2) that a citizen has been unjustifiably arrested, *see Gagnon v. Ball*, 696 F.2d 17, 21 (2d Cir. 1982); or (3) that any constitutional violation has been committed by a law enforcement official, *see O'Neill*, 839 F.2d at 11" (*Anderson v Branen*, 17 F3d 552, 557 [2d Cir 1994]; *Wilson v City of N.Y.*, 161 AD3d 1212 [2nd Dept 2018]).

Here, PO Giang testified that plaintiff ran and struggled when he tried to put the handcuffs on causing them to both fall. Plaintiff also admitted that they fell when the police officer grabbed him from behind. "The determination of an excessive force claim requires consideration of all of the facts underlying the arrest..." (*Koeiman v City of NY*, 36 AD3d 451, 453 [1st Dept 2007]). "Use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Graham v Connor*, 490 US 386, 396, 109 S Ct 1865, 104 L Ed 2d 443 [1989])" (*Elias v City of NY*, 173 AD3d 538, 539 [1st Dept 2019]). Here, plaintiff failed to raise a triable issue of material fact. Although Sgt. Feldman instructed PO Holman to process the arrest, he did not participate in plaintiff's apprehension or arrest. Plaintiff failed to raise a triable issue of fact as to the reasonableness of the force used during the arrest or that any other police officer observed the arrest.

42 US § 1983 permits plaintiff to sue the government for violations of the laws and Constitution of the United States and the elements of unlawful arrest and malicious prosecution are the substantially the same as in state court. "[T]he government itself cannot be liable for false arrest or malicious prosecution under 42 USC § 1983 unless an official government policy, custom or widespread practice caused the violation of the plaintiff's constitutional rights (*Monell*, 436 US at 694, 701; *Canton v Harris*, 489 US 378, 385, 109 S Ct 1197, 103 L Ed 2d 412 [1989])" (*De Lourdes Torres,* 26 NY3d at 762; *Monell v New York City Dept. of Social Servs,* 436 US 658, 98 S Ct 2018, [1978]).

To sustain a *Monell* claim, plaintiff must establish that "[o]fficial municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law" (*Connick v Thompson*, 563 US 51, 61 [2011]; *Simpson v New York City Tr. Auth.*, 112 AD2d 89, 91 [1st Dept 1985], *affd* 66 NY2d

1010 [1985] ["The requirement of proof of a policy or custom is "intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers."']). "Stated differently, the existence of such a policy may be shown by proof that the municipality had a custom or practice that was both widespread and reflected deliberate indifference to its citizens' constitutional rights" (*De Lourdes Torres,* 26 NY3d at 768). "[A] section 1983 claim for damages against a state official can only be asserted against that official in his or her individual capacity"; section 1983 claims will not lie against state officials in their official capacity or under a respondeat superior theory (*Al-Jundi v Estate of Rockefeller*, 885 F2d 1060, 1065 [1989]). Instead, it was incumbent upon plaintiff to "allege particular *facts* indicating that [each of the individual defendants] was personally involved in the deprivation of the plaintiff's constitutional rights; mere 'bald assertions and conclusions of law' do not suffice" (*Davis v County of Nassau*, 355 F Supp 2d 668, 677 [ED NY 2005], quoting *Leeds v Meltz*, 85 F3d 51, 53 [1996])" (*Shelton v NY State Liq. Auth.*, 61 AD3d 1145 [3d Dept 2009]; *Fowler v City of NY*, 156 AD3d 512 [1st Dept 2017]). Here, the evidence did not establish that The City had a custom or practice that was both widespread and deliberate in violating individuals' constitutional rights. Defendant established that Sgt. Feldman and other police officers, along with DCA Inspectors, were assigned to patrol Battery Park for unlicensed ticket vendors. Plaintiff was observed and admitted to selling tour tickets without a vendor license. The *Monell* as well as the federal assault and battery claims must also be dismissed. Likewise, any action against Sgt. Feldman must be dismissed as Sgt. Feldman did not participate in apprehending or placing plaintiff under arrest on June 15, 2017 (*see Ortiz v City of NY*, 199 AD3d 422 [1st Dept 2021] ["Furthermore, the federal assault and battery claim fails because the defendant police officer was not personally involved in apprehending and handcuffing plaintiff"]).

Accordingly, it is hereby:

ORDERED, that the motion filed by City Defendants (Motion Seq. 1) is granted in its entirety; it is further

ORDERED, the action is discontinued in its entirety; and it is further

ORDERED, that defendants shall serve a copy of this Decision and Order with Notice of Entry upon all parties within fifteen (15) days of the date herein and file proof of said service.

This constitutes the Decision and Order of the Court.

E N T E R:

3/18/2026
DATE

HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE