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

PRESENT:

PART 52

0401231/2003

MARRERO, ROBERTO

VS

CITY OF NEW YORK

INDEX NO. _____

MOTION DATE 11/8/04

SEQ 2

SUMMARY JUDGMENT

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits Notice of Cross Motion — Opp/	2
Replying Affidavits	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 30, 2004

FAVIOLA SOTO J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

ROBERTO MARRERO and ROSA RODRIGUEZ

Plaintiffs, Index No. 401231/03

-against-

THE CITY OF NEW YORK,

Defendant. DECISION & ORDER

HONORABLE FAVIOLA A. SOTO, J.:

Defendant The City of New York (City) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. Plaintiffs Roberto Marrero and Rosa Rodriguez oppose, and cross-move for summary judgment on the fourth, fifth, eighth and ninth causes of action (plaintiffs having withdrawn the sixth and seventh causes of action); defendants oppose.

Summary Judgment

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". Winegrad v. New York University Med. Center, 64 N.Y.2d 851. Once the proponent has made the showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320,324. Moreover, "[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law...[W] hen there is no genuine issue to be resolved at trial, the case should be summarily decided." Andre v. Pomeroy, 35 N.Y.2d 361. Mere conjecture, speculation and conclusory assertions are insufficient.

The role of the court in determining a summary judgment motion is issue finding, not issue resolution. The opponent of the motion is entitled to all reasonable inferences in its favor.

The Complaint

Plaintiffs' claims arise from their arrest on September 19, 2001. The complaint alleges nine causes of action: (1) violation of 42 USC § 1983, through deprivation of rights secured by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution; (2) violation of 42 USC § 1985; (3) violation of Article 1, sections 1, 6, 8, and 12 of the New York State Constitution; (4) false arrest and unlawful imprisonment; (5) assault and battery; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress; (8) harassment; and (9) negligent hiring and supervision.

By stipulation, dated September 3, 2003, plaintiffs withdrew the sixth and seventh causes of action.

The Motion and Cross-Motion

Defendants' motion for summary judgment is granted as to the first, second, third, eighth and ninth causes of action, and plaintiffs' cross-motion for summary judgment on the eighth and ninth cause of action is denied. (To the extent that plaintiffs seek summary judgment on the first through third causes of action, that part of the cross-motion is denied.)

The court denies the motion and cross-motion as to the fourth and fifth causes of action (infra).

The First Cause of Action

42 USC § 1983 provides, in relevant part, that:

Every person who, under color of any statute, ordinance, regulation, custom, or

> usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... .

To prevail on a section 1983 claim against a municipality, a plaintiff must plead and prove that the denial of a constitutional right, of which he or she complains, resulted from an official governmental policy or custom. Monell v Dept. of Social Services of the City of New York, 436 US 658 (1978). A municipality may not be held liable under section 1983 for an isolated unconstitutional act of its employee. Id.; Sorlucco v New York City Police Dept., 971 F2d 864 (2d Cir 1992).

Here, the single incident of which plaintiffs complain does not suffice to raise an inference of any policy or custom. Indeed, plaintiffs do not even allege that their arrest resulted from an officially promulgated City policy, or from a widespread custom.

Accordingly, the motion is granted as to the first cause of action and it is dismissed.

The Second Cause of Action

42 USC § 1985 provides, in relevant part, that:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USC § 1985 (3).

Plaintiffs have alleged neither a conspiracy to which the City was a party, nor any facts from which it could be inferred that they were deprived of the equal protection of the laws.

Accordingly, the motion is granted as to the second cause of action and it is dismissed.

The Third Cause of Action

Where a plaintiff's alleged wrongs can be fully redressed by the assertion of common-law tort claims, recourse to State constitutional claims is "neither necessary nor appropriate." Lyles v State of New York, 2 AD3d 694, 695 (2d Dept 2003); cf Brown v State of New York, 89 NY2d 172 (1996).

Here, as plaintiffs' rights can be addressed through their common law claims, including those of false arrest and unlawful imprisonment (infra), the motion is granted as to the third cause of action.

Eighth and Ninth Causes of Action

Plaintiffs' cross-motion for summary judgment on the eighth and ninth causes of action is denied, and defendants' motion for summary judgment is granted.

Plaintiffs' eighth cause of action is dismissed, as New York does not recognize a civil cause of action for harassment. Jacobs v 200 E. 366th Owners Corp., 281 AD2d 281 (1st Dept 2001). Plaintiffs' ninth cause of action also is dismissed, because a claim against an employer for negligent hiring, retention, and training does not lie where the employee has acted within the scope of his or her employment. Weinberg v Guttman Breast & Diagnostic Institute, 254 AD2d 213 (1st Dept 1998). The reason for this is that, where the employee commits a tort, while acting within the scope of his or her employment, the employer will be liable for the tort on the theory of respondent superior. Karoon v New York City Transit Auth., 241 AD2d 323 (1st Dept 1997).

Denial of the Motion and Cross-Motion on the Fourth and Fifth Causes of Action

Neither movant nor cross-movant have shown entitlement to summary judgment on these causes of action. As factual issues requiring a trial remain, the court is not inclined to and has

not ruled on certain of the legal arguments advanced by the parties on the issue of probable cause, and all issues are left to the trial court for resolution.

This action arises out of the arrest of plaintiffs on a charge of criminal trespass, on September 19, 2001, outside the perimeter of Ground Zero, the site of the former World Trade Center. Plaintiffs subsequently were arraigned on charges of petit larceny (Penal Law [PL] § 155.20), criminal possession of stolen property in the fifth degree (PL § 165.40), and criminal possession of a forged instrument in the third degree (PL § 170.20). Plaintiffs were jailed at Rikers Island Correctional Facility (Rikers Island) until September 27, 2001. On September 25, 2001, all the charges against plaintiffs were dismissed for failure to prosecute within the time provided by Criminal Procedure Law § 30.30.

A warrantless arrest is lawful if the arresting officer has probable cause to believe that the arrestee is committing, or has committed, an offense. People v McRay, 51 NY2d 594 (1980). Probable cause exists if, at the time of the arrest, the officer has information sufficient to support a reasonable belief that an offense has been committed. People v. Bigelow, 66 N.Y.2d 417 (1985).

An officer has probable cause to arrest a person on the basis of hearsay, where the incriminating information comes from an informant who is reliable, and who has a basis for the information transmitted. Aguilar v Texas, 378 US 108 (1964); People v Bigelow, 66 NY2d 417 (1985). Under the fellow-officer rule in New York, an arresting officer is deemed to have probable cause to arrest a person, if the officer has received, from another officer, information that would constitute probable cause, had the arresting officer observed it directly.

That basis may be ascertained either by the informant's own description of personally

observed matters, or by police investigation that corroborates the information about the defendant or "develops information consistent with detailed predictions by the informant." Id. at 423-24. Where the arresting officer relies on multiple levels of hearsay, reliability and the basis of knowledge must be shown at each level. People v Parris, 83 NY2d 342 (1994); United States v Spach, 518 F2d 866 (7th Cir 1975).

A warrantless arrest is presumptively unlawful, and, where it is challenged, the arresting authority has the burden of proving that the arrest and subsequent imprisonment were lawful. Mubarez v State of New York, 115 Misc 2d 57 (Ct Claims 1982), citing Broughton v State of New York, 37 NY2d 451, cert denied sub nom Schanbarger v Kellogg, 423 US 929 (1975), and Woodson v New York City Housing Auth., 10 NY2d 30 (1961).

Here, the court has searched the record and finds that a genuine issue of fact remains, and, therefore, summary judgment is not appropriate on plaintiffs' claims for false arrest and imprisonment.

As factual issues remain on plaintiffs' cause of action for false arrest and imprisonment, and as all reasonable inferences are resolved in favor of the party opposing summary judgment, the court also finds that neither party has shown entitlement to summary judgment on the fifth cause of action for assault and battery, and both the motion and cross-motion are denied.

Accordingly, it is hereby

ORDERED that defendant's motion is in part granted and in part denied as indicated, the first, second, third, eighth, and ninth causes of action are severed and dismissed, and the fourth and fifth causes of action remain; and it is further

ORDERED that the remaining action shall continue; and it is further

ORDERED that plaintiffs' cross motion is denied; and it is further

ORDERED that defendants shall serve a copy of this decision and order with notice of entry upon the County Clerk and the Trial Support Office within thirty days of entry.

Dated: New York, New York
December 30, 2004

FAVIOLA A. SOTO, J.S.C.

Copies mailed