

Davis v City of New York

2007 NY Slip Op 31993(U)

June 20, 2007

Supreme Court, Queens County

Docket Number: 0014816/2005

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

CECIL DAVIS,

Plaintiff,

Index
Number: 14816/05

- against -

Motion
Date: JUNE 12, 2007

THE CITY OF NEW YORK,

Motion
Cal. Number: 7
Motion Seq. No. 3

Defendants.

-----X

The following papers numbered 1-11 read on this motion by defendant for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition to Motion-Exhibits.....	5-7
Memorandum of Law.....	8-9
Reply Affirmation.....	10-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted.

Plaintiff commenced the underlying action against the City alleging assault and battery, false arrest, false imprisonment and violation of his civil rights pursuant to 42 U.S.C. §1983 arising from his arrest in front of his residence at 220-30 138th Street in Queens County on April 13, 2005. Two detectives of the Metropolitan Transportation Authority (MTA) police, Detective Rucano and Detective Inzinna, responded to a call of a robbery at the Long Island Railroad Queens Village station. The victim reported that she had been robbed at gunpoint. Other than the victim's description of the perpetrator and her version of the events that transpired, there were no witnesses to the crime.

After a canvass of the platform and surrounding area yielded no results, Detective Inzinna contacted Detective Davis of the New York City Police Department, 105th Precinct Robbery Apprehension Team, and arranged to have the victim view photographs of possible suspects in the hope that she might be able to identify the perpetrator. The victim positively identified plaintiff from several photos. Detectives Inzinna and Rucano proceeded to plaintiff's residence along with other MTA police officers and arrested plaintiff as he exited his residence. The victim was brought to the Jamaica police precinct, as was an Assistant District Attorney, and a line-up was conducted. The victim picked plaintiff out of the line-up. Plaintiff was then charged. Plaintiff was transported to Central Booking for arraignment and thereafter detained on Rikers Island for approximately six weeks until he made bail. The charges were subsequently dismissed against him on June 28, 2005.

It is undisputed that plaintiff was arrested by officers of the MTA police, not by the NYPD. The MTA is a legal entity separate and distinct from the City of New York (see Public Authorities Law §1263). Since the MTA has the power to sue and be sued (see, Public Authorities Law §1265[1]), any action alleging tortious acts committed by MTA police must be brought against the MTA and not the municipality (see generally Hampton v. State of New York, 168 Misc 2d 1036 [Court of Claims 1995]). Therefore, plaintiff's cause of action lies, if at all, against the MTA and not against the City.

Since he was not arrested by the NYPD or at the behest of the City, plaintiff's causes of action asserting false arrest and false imprisonment must be dismissed.

Moreover, since there is no allegation or proof that anyone in the NYPD committed an assault or battery upon plaintiff, his cause of action asserting assault and battery must also be dismissed.

As to plaintiff's §1983 claim, asserted in his third cause of action, plaintiff alleges that he was deprived of his constitutional rights by reason of the assault and battery, false arrest and false imprisonment. Since the City did not falsely arrest and imprison plaintiff, and did not commit an assault or battery upon him, there is no basis for plaintiff's claim against it pursuant to 42 U.S.C. §1983.

Moreover, plaintiff fails to set forth specifically what substantive constitutional rights were violated. A claim under § 1983 "by itself creates no independent, substantive constitutional right, but rather serves merely as a vehicle to enforce those rights" (Incorporated Village of Ocean Beach v.

Maker Water Taxi, 201 AD 2d 704, 704 [2nd Dept 1994]). Since the complaint fails to specify the substantive constitutional rights upon which it is based, plaintiff has failed to state a cause of action under 42 U.S.C. §1983 (see id.; Pokoik v. Dept. of Health Service, County of Suffolk, 237 AD 2d 368 [2nd Dept 1997]).

In plaintiff's memorandum of law in opposition to the motion, his counsel is apparently arguing that the NYPD violated plaintiff's due process rights in the flawed way it furnished photographs of suspects to the MTA and the crime victim. Even had the complaint met the pleading requirements for a claim under § 1983, plaintiff still has failed to proffer any evidence of the commission of a constitutional violation by the NYPD.

The only involvement of the NYPD was to give the MTA detectives access to the photo imaging machine (PIMS) so they could have the victim view photos of suspects. In his deposition, Detective Davis explained that the PIMS machine is a computer terminal accessing a database of photographs of everyone arrested in New York City. A physical description of the individual being sought is entered. There are entries for - inter alia - gender, race, height, weight, eye and hair color, hairstyles, facial hair and marks and deformities, such as scars. The PIMS would then display the photographs of individuals matching the description in the form of an array of six photos at a time. There could be anything from zero to thousands of photos, depending on how many match the description inputted. The viewer would scroll through series of photos, six at a time, until he or she identifies someone, if at all.

Since the MTA police did not have access to a PIMS, they would often bring in crime victims and would request the use of the PIMS. The MTA officers would enter the information into the PIMS or, if they were unfamiliar with its operation, an NYPD officer of the precinct would enter the information for them. The victim or witness, in the company of an MTA officer, would view the screen and if he or she did not recognize anyone's photo, he or she would click the mouse to display the next series of six photos. If the victim or witness makes a positive identification, he or she apprises the MTA detective or investigator, who then prints the screen displaying the particular series of six photos which contains the photo of the positively identified suspect. The PIMS only displays photos of individuals in its database by their physical description. It does not further categorize the photographs according to particular crime classifications and limit the display only to photos of, for example, robbers who fit the description. Detective Davis stated that his only involvement is to turn on the machine for the MTA so they could view photos.

Plaintiff's counsel contends that "NYPD officers were part of the law enforcement involved evaluating and assessing whether probable cause was present" and that Detective Davis had "a responsibility to have doubts about whether Mr. Davis was in fact the person sought." The record on this motion fails to establish or even raise an issue of fact as to whether Detective Davis or anyone else in the NYPD had any role in the decision by the MTA to arrest plaintiff or by the District Attorney to charge him. Indeed, there is no basis on this record to raise an issue of fact as to whether Detective Davis or any other officers of the NYPD had either the duty or the authority to decide whether or not plaintiff should be charged. It is uncontroverted that the only role of the NYPD in this matter was granting the MTA and the crime victim access to its criminal database. Plaintiff fails to show that the NYPD had any involvement in his arrest and prosecution.

The basis of plaintiff's allegation of wrongdoing by the NYPD is that it failed to insure that the photos furnished to the MTA were "without any improprieties." The impropriety that plaintiff's counsel alleges is that the photo arrays on the PIMS machine do not differentiate among types of crimes, but rather, it displays everyone that fits a given physical description, so that individuals charged with different types of crimes are displayed together. Counsel fails to cite any authority, and this Court is unaware of any, for the proposition that this method of displaying photos of suspects for identification by a crime victim is in any respect improper, let alone so grossly improper as to rise to the level of a deprivation of constitutional rights.

In any event, plaintiff fails to state for what alleged crime he had been photographed in the first instance and fails to establish for what alleged crimes the other individuals in the photo arrays had been photographed. Therefore, he fails to establish that his "mug shot" in the PIMS database was not related to an arrest for robbery, but for a different and less serious offense, and that the other mug shots were of individuals charged with robbery. Consequently, even if his theory of liability based upon the presentation of a photo array which depicted plaintiff and individuals of different offenses together were logical, he has failed to establish that such was, in fact, the case.

Counsel's statements that the photos from which the victim picked out plaintiff are not available "to see whether or not it tainted the photo array" and that counsel's inability to ascertain how many photos plaintiff viewed before picking the one of plaintiff makes it "even more probable that the photo array was tainted" are pure speculation and fail to raise a question of

fact.

In addition, in order to sustain a cause of action under § 1983, plaintiff must specifically plead and prove an official policy or custom that causes him to be deprived of a constitutional right (see Jackson v. Police Dept. Of City of New York, 192 AD 2d 641 [2nd Dept 1993]). Plaintiff failed to articulate what governmental policy or custom deprived him of his constitutional rights. Therefore, even had plaintiff proffered evidence that the photos that were furnished to the MTA and the crime victim were somehow done so in a manner that did not assure fairness and which, as a result, contributed to the victim picking the wrong person, there is no showing that such constituted an official policy or custom.

The memorandum of plaintiff's counsel does not argue that there was any official municipal policy or custom implemented by the NYPD, but rather that Detective Davis, by his actions, was assisting the MTA in its investigation, and that he failed to exercise diligence by not making sure that the photos were presented properly and by failing to ask "further questions" and take proper measures to insure that plaintiff was, in fact, the perpetrator. Indeed, by these contentions, counsel is not arguing that Detective Davis was implementing an official policy, but rather that he departed from proper procedure. Therefore, counsel merely argues that the NYPD was negligent in the investigatory duties which it shared with the MTA.

Even if such a theory were articulated in the complaint, it offers no basis to sustain any cause of action against the City. No cognizable claim exists for negligent, or even malicious, investigation (see Johnson v. Kings County District Attorney's Office, 308 AD 2d 278 [2nd Dept 2003]). Plaintiff may not recover under general principles of negligence, but must proceed by way of the traditional causes of action for false arrest and imprisonment (id.). Since the City did not arrest or imprison plaintiff, counsel's conjectural arguments as to the improper and irresponsible manner in which the PIMS machine was utilized and the failure of Detective Davis to ask further questions and make a diligent effort to assure that plaintiff was the perpetrator are irrelevant.

Inasmuch as plaintiff has failed to raise a question of fact as to whether he is entitled to maintain causes of action against the City for false arrest and imprisonment and violation of constitutional rights, this Court does not reach the issue of whether the MTA had probable cause to arrest and detain plaintiff.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: June 20, 2007

KEVIN J. KERRIGAN, J.S.C.

