

Prophet v Nassau County Police Dept.

2007 NY Slip Op 33022(U)

September 21, 2007

Supreme Court, New York County

Docket Number: 1797-05/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

GLENDA PROPHEP,

Plaintiff,

-against-

NASSAU COUNTY POLICE DEPARTMENT,
HEMPSTEAD VILLAGE POLICE
DEPARTMENT, HEMPSTEAD VILLAGE
POLICE OFFICER RICHARD A. HOLLAND
and HEMPSTEAD VILLAGE LIEUTENANT
VINCENT MONTERA,

Defendants.

TRIAL/IAS, PART 6
NASSAU COUNTY

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MOTION DATE: Aug. 16, 2007
Motion Sequence # 002, 003

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Memorandum of Law..... X

This motion by defendants Hempstead Village Police Department, Hempstead Village Officer Richard A. Holland and Hempstead Village Lieutenant Vincent Montero (hereinafter "defendants"), for an order pursuant to CPLR 3212:

1. granting summary judgment in favor of defendants against the plaintiff, Glenda Propheet, dismissing the plaintiff's complaint, and

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2. such other and further relief as this Court deems just, proper and equitable,

and a cross-motion, by plaintiff, for an order:

- (1) Restoring this action to the Pre-Note of Issue calendar;
- (2) Extending plaintiff's time to file her Notice of Issue to within 60 days following this action's restoration to the Pre-Note of Issue calendar, or, in the alternative on a date of the Court's choosing;
- (3) Reserving defendants' right to hold the non-party deposition of Joseph Randall;
- (4) and for such further and other relief as this Court deems just and proper,

are **both** determined as here and set forth.

FACTS

The plaintiff claims that she sustained injuries after being arrested on December 20, 2003 at approximately 9:00 p.m. for assault in the third degree. The plaintiff's boyfriend, Joseph Randall, sustained physical injuries on December 20, 2003 as a result of falling into a glass table. Mr. Randall was transported to Mercy Medical Center in Rockville Centre, N.Y. by ambulance to be treated for his injuries. The plaintiff was then placed under arrest and transported to the Hempstead Police Department in order to be processed. The plaintiff's subsequent criminal charges were later dropped by the Nassau County District Attorney's Office on April 14, 2004. The plaintiff is asserting that the defendants: falsely arrested and imprisoned plaintiff; negligently supervised the plaintiff; and maliciously prosecuted the plaintiff.

DEFENDANTS' CONTENTIONS

The defendants assert that they had probable cause in arresting, detaining, and subsequently prosecuting plaintiff, in that, upon arriving at the plaintiff's home for a domestic disturbance on December 20, 2003, they found the victim, Joseph Randall, lying on the floor with a contusion to his chest and having difficulty breathing. The defendants contend that the victim told them that the plaintiff caused his injuries and that the plaintiff informed Police Officer Richard A. Holland that she pushed Mr. Randall and he fell into a glass table, which caused the victim's injuries. Furthermore, the defendants argue that the criminal case against the plaintiff was dismissed because Mr. Randall's unwillingness to cooperate with Nassau County District Attorney's Office created a facial insufficiency in the criminal information.

PLAINTIFF'S CONTENTIONS

The plaintiff argues that the defendants lacked probable cause in arresting, detaining, and subsequently prosecuting her; that Mr. Randall had been drinking and fell into the glass table because of his inebriated state; and that Mr. Randall had told the police officer, that came to Mercy Hospital to get a statement, that Plaintiff had not actually caused his injury. Additionally, Mr. Randall asserts that he did not attend the criminal proceeding because of his job. Also, Plaintiff asserts that the criminal case against her was dismissed and was a favorable termination, as is evidenced by the fact that the Assistant District Attorney submitted an official apology after dismissing the criminal charge against plaintiff.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course,

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summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this court, which includes the pertinent pleadings, deposition transcripts and other relevant data.

The plaintiff's cross-motion is **denied** outright because of a defective affidavit of service. The affidavit of service is dated June 27, 2006 and the original recorded date of the notice of cross motion is July 16, 2007, making the service defective.

In order to prevail on a claim for false imprisonment, it must be established: (1) that the defendant intended to confine the claimant, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged. (Broughton v. State of New York, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87, 1975) (citing Restatement, 2d, Torts, s 35). A cause of action for false arrest has been described as essentially the same tort as false imprisonment. (See Poje v. Hopkins, 289 A.D.2d 780, 780, 748 N.Y.S.2d 714, 3rd Dept., 2002). Because there is no dispute that the first three elements have been established, the only issue to be discussed is whether the confinement of plaintiff was privileged.

The existence of probable cause provides legal justification for the arrest, and serves as an affirmative defense to the claim. (See Martinez v. City of Schenectady, 97 N.Y.2d 78, 85, 735 N.Y.S.2d 868, 2001). Probable cause has been defined as consisting of such facts and circumstances which would lead a reasonably prudent person in like circumstances to believe that the claimant is guilty (Hyman v. N.Y. Central R.R. Co., 240 N.Y. 137, 143, 147 N.E. 613, 1925). If an officer, in good faith, believes that a person has committed a felony, and such belief is based upon grounds which an ordinarily

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prudent and cautious person, under similar circumstances, would also believe, such probable cause therefore exists and justifies the arrest. (Coleman v. City of New York, 182 A.D.2d 200, 588 N.Y.S.2d 539, 1st Dept. 1992).

In this case, the defendants had probable cause to arrest plaintiff. The defendants found Mr. Randall with a contusion to his chest and experiencing difficulty breathing. Additionally, there is no proof stating that the plaintiff or Mr. Randall said anything at the time of arrest that denied that the plaintiff caused the injuries to Mr. Randall. Also, according to the police report, the plaintiff and Mr. Randall both told police officers that the plaintiff caused Mr. Randall's injuries. The plaintiff never contests that both she and Mr. Randall made such statements at the scene of the purported crime.

Furthermore, the determination of probable cause is determined based upon "the circumstances known to the police officers at the time that they arrested the plaintiff." (Mercado v. City of New York, 269 A.D.2d 576, 576, 703 N.Y.S.2d 283, 2nd Dept., 2000). The initial arrest, therefore, could not be tainted by the fact that Mr. Randall stated at the hospital that Plaintiff had not in fact caused his injuries. (See Id.).

In order to succeed on a claim based on negligent supervision, the plaintiff must establish that the defendant "knew of the employee's propensity to [commit the alleged acts] or that defendants should have known of such propensity had they conducted an adequate hiring procedure" (Honohan v. Martin's Food of South Burlington, Inc., 255 A.D.2d 627, 679 N.Y.S.2d 478, 479, 3rd Dept., 1998) (quoting Ray v. County of Delaware, 239 A.D.2d 755, 657 N.Y.S.2d 808, 3rd Dept., 1997; citing Mataxas v. North Shore Univ. Hosp., 211 A.D.2d 762, 763, 621 N.Y.S.2d 683, 2nd Dept., 1995).

The defendants submitted the affidavit of Lieutenant Vincent Montera, Officer Holland's supervisor on the date of the plaintiff's arrest. In his affidavit, Officer Montera states that there were no complaints concerning Officer Holland and that Officer Holland "always conducted himself in a professional manner." Because plaintiff "failed to submit any proof" that contradicts Lieutenant Montera's statement, the negligent supervision cause of action must be dismissed. (Ray, 239 A.D.2d at 757).

The plaintiff has also pleaded a cause of for malicious prosecution. The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the

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proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice. (**Broughton**, 37 N.Y.2d at 457) (citing Prosser, Torts (4th ed.), s 119).

It is well settled that someone asserting malicious prosecution may sue the police department that commenced the criminal proceedings through their initial arrest. (See, e.g., **Wasilewicz v. Village of Monroe Police Department**, 3 A.D.3d 561, 771 N.Y.S.2d 170; **Rivera v. City of New York**, 40 A.D.3d 334, 836 N.Y.S.2d 108, 1st Dept., 2007).

With respect to the cause of action for malicious prosecution, the criminal complaint was dismissed for facial insufficiency. Despite the favorable termination, the plaintiff has not submitted evidence that the defendants lacked probable cause, as discussed supra, and has not submitted any evidence of actual malice.

For reasons of public policy, there is heavy burden on the plaintiff to plead the “lack of probable cause...[and a] contrary rule would be against public policy as tending to discourage prosecutions for crime or the vindication of civil rights.” (**Broughton**, 37 N.Y.2d at 457). As with the false arrest cause of action, the presence or absence of probable cause for the criminal proceeding is crucial to this claim. Additionally, “the plaintiff must prove malice, or as the Restatement defines it, a purpose other than the adjudication of a claim, and must further prove an entire lack of probable cause in the prior proceeding. (**Engel v. CBS, Inc.**, 93 N.Y.2d 195, 204, 1999)(citing Restatement [Second] of Torts § 674; **Burt v. Smith**, 19 Bedell 1, 5-6, 181 N.Y. 1, 1905). As discussed previously, the plaintiff did not meet its burden in establishing a lack of probable cause and the defendants did in fact show probable cause for arrest. Therefore, there was sufficient probable cause to commence criminal proceedings against the plaintiff. (*Id.*). The Court must go further, however, and decide whether this probable cause was sufficient to continue with the prosecution of the plaintiff after the initial arrest had been made. (See **Broughton** , 37 N.Y.2d at 457).

This presumption, that the police acted with probable cause, cannot be overcome by the fact that the charges were later dismissed by the Nassau County District Attorney’s office, which is the only evidence that the plaintiff appears to assert to show a lack of probable cause. (See **Colon v. City of New York**, 60 N.Y.2d 78, 468 N.Y.S.2d 453, 1983). Instead, the plaintiff had to show that the “police conduct deviated egregiously from statutory requirements or accepted practices applicable in criminal cases.” (**Gisondi**

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v. Town of Harrison, 72 N.Y.2d 280, 285, 532 N.Y.S.2d 234, 1988) (citing Lee v. City of Mount Vernon, 49 N.Y.2d 1041, 1043, 429 N.Y.S.2d 557, 1980). Because the plaintiff did not submit such evidence, the plaintiff fails at establishing element three.

Additionally, as discussed earlier, the plaintiff also had to establish that there was actual malice, "which has been defined as instituting a criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served. (Nardelli v. Stamberg, 44 N.Y.2d 500, 501, 406 N.Y.S.2d 443, 1978). The plaintiff did not submit any evidence of any evidence that suggested that the defendants proceeded with any actual malice against the plaintiff. (Broughton, 37 N.Y.2d at 457). As a result, the plaintiff has failed to establish actual malice and, therefore, failed to establish malicious prosecution.

In view of the Court's determination that defendant is entitled to summary judgment, the Court does need not determine the issue of the timeliness of the notices of claim.

CONCLUSION

This Court holds the plaintiff has not offered sufficient evidence to establish any material issues of fact. Additionally, because the plaintiff failed to have an affidavit of service on their motion, the cross motion must be denied. The defendants' motion for summary judgment is granted.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So ordered.

Dated SEP 21 2007

Stephen A. Bucaria

XXX J.S.C.

ENTERED

SEP 25 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE