Eleazer v County of Suffolk

2007 NY Slip Op 34226(U)

December 20, 2007

Supreme Court, Suffolk County

Docket Number: 0021541/2002

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 02-21541
CAL. No. 07-01042-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-22-07
ADJ. DATE 9-24-07
Mot. Seq. # 001 - MG; CASEDISP

RODNEY ELEAZER,	:	CHERYL KITTON, ESQ.
Plaintiff,	:	Attorney for Plaintiff
	:	103 Bedford Avenue
- against -	:	Bellmore, New York 11710
	:	
THE COUNTY OF SUFFOLK and POLICE	:	CHRISTINE MALAFI, ESQ., Suffolk Cty Atty
OFFICER JAMES ZAPPILLA,	:	By: Diana T. Bishop, Esq.
	:	Attorneys for Defendants
	:	100 Veterans Memorial Hwy, P.O. Box 6100
Defendants.	:	Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 20 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers ___: Replying Affidavits and supporting papers __; Other defendants memorandum of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the unopposed motion by defendants for summary judgment dismissing the claims against them is granted.

On the morning of October 27, 2001, plaintiff Rodney Eleazer was arrested and charged with resisting arrest after attempting to leave the scene of a vehicular traffic stop. It is undisputed that plaintiff, who was riding as a passenger in the vehicle, exited the vehicle after it was stopped and physically struggled with police officers in an attempt to flee the scene. It also is undisputed that plaintiff was struck in the face by defendant James Zappulla, a Suffolk County police officer, as he was being subdued and placed under arrest. Subsequently, plaintiff commenced this action against defendants County of Suffolk ("County") and James Zappulla ("Officer Zappulla"), s/h/a James Zappilla, claiming assault and battery, negligent hiring and training, and violation of his constitutional and civil rights under 42 USC § 1983.

The County and Officer Zappulla now move for summary judgment dismissing the complaint, arguing that plaintiff may not maintain an action for monetary damages related to his personal injuries

because those injuries were sustained during his efforts to resist a lawful arrest. Defendants also argue that plaintiff's subsequent conviction for resisting arrest precludes a claim under 42 USC § 1983. In addition, defendants assert that they are entitled to absolute governmental immunity for their discretionary act of placing plaintiff under arrest and subduing him after he resisted such arrest. Defendants' submissions in support of their motion include copies of the pleadings, transcripts of plaintiff and Officer Zappulla's deposition testimony, and the transcript of plaintiff's nonjury trial on the charge of resisting arrest. Defendants also submit a signed notarized statement from Kenneth Darwell.

At his examination before trial, Officer Zappulla testified that he recognized plaintiff while he was attempting to exit the vehicle, and that he knew there was an active warrant for plaintiff's arrest. Officer Zappulla testified that plaintiff ran between twenty to thirty feet behind the stopped vehicle before he caught up to him and grabbed his shirt. He further testified that plaintiff resisted arrest and attempted to get lose by kicking, pushing and trying to get his hands off him. Officer Zappulla testified that he punched plaintiff on the left side of the face in order to subdue him, and that he told plaintiff to place his hands behind his back before handcuffing him while he was on the ground. He also testified that neither he nor his partner kicked plaintiff.

At his examination before trial, plaintiff testified that at the time of the incident he knew that there was a bench warrant out for his arrest and that he sought to avoid arrest by exiting the car and walking towards its rear after it had been stopped by the police. Plaintiff testified that the police officer told him to stop running and grabbed him while he was heading towards the rear of the car. Plaintiff also testified that the police officer struck him once in the face and kicked him in his ribs when he attempted to move during the handcuffing procedure.

In his affidavit Kenneth Darwell, the driver of the motor vehicle in which plaintiff was traveling, avers that he observed plaintiff's attempt to run from the scene and his struggle with Officer Zappulla before he was handcuffed. Mr. Darwell also states that, just before plaintiff exited the vehicle, plaintiff told him that there was a warrant for his arrest and that he did not want to go to jail.

To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make contact without plaintiff's consent (*see*, ***Fugazy v Corbetta***, 34 AD3d 728, 825 NYS2d 120 [2007]; ***Cotter v Summit Sec. Servs***., 14 AD3d 475, 788 NYS2d 153 [2005]; ***Bastein v Sotto***, 299 AD2d 432, 749 NYS2d 538 [2002]); *see also* ***Merzon v County of Suffolk***, 767 F Supp 432 [1991]). However, a police officer effecting an arrest of a person whom he or she reasonably believes committed a crime may use physical force "...when and to the extent necessary he or she reasonably believes such is necessary to effect the arrest, or to prevent the escape from custody" (Penal Law §35.30; *see*, ***Marrero v City of New York***, 33 AD3d 556, 824 NYS2d 228 [2006]; ***Akande v City of New York***, 275 AD2d 671, 713 NYS2d 341 [2000]; ***Stein v State of New York***, 53 AD2d 988; 385 NYS2d 874 [1976]).

Defendants' submissions establish prima facie that Officer Zappulla was reasonably justified in using force to effect the arrest of plaintiff (*see*, ***Marrero v City of New York***, *supra*; ***Akande v City of New York***, *supra*; *see also*, ***Merzon v County of Suffolk***, *supra).* Plaintiff testified at his deposition that he was

attempting to evade arrest by fleeing the scene of the traffic stop, because he knew that there was an outstanding warrant for his arrest and he feared that the police officers would recognize him. Moreover, while plaintiff testified that he did not run, he also testified that he attempted to escape arrest and struggled with Officer Zappulla. The affidavit of Kenneth Darwell confirms that plaintiff actively resisted arrest by running and fighting with Officer Zappulla before he was subdued.

Plaintiff's claims under 42 USC § 1983 also are without merit. 42 USC § 1983 does not create any substantive rights; rather it provides a procedure for redress of a deprivation of rights established elsewhere (***Chapman v Houston Welfare Rights Organization***, 441 US 600 [1979]; ***Sykes v James***, 13 F3d 515, 519 [1993], *cert denied* 512 US 1240 [1994]). To establish a claim under 42 USC § 1983, a plaintiff must show that the conduct complained of deprived him of a right, privilege or immunity guaranteed by the Constitution or the laws of the United States and that such conduct was committed by a person acting under color of law (***DiPalma v Phelan***, 81 NY2d 754, 593 NYS2d 778 [1992]).

While it is indisputable that Officer Zappulla was acting under "color of law" during the arrest, plaintiff's claim that Officer Zappulla used excessive force must be analyzed under the Fourth Amendment and its standard of objective reasonableness (*see*, ***Ostrander v State***, 289 AD2d 463, 735 NYS2d 163 [2001]; ***Passino v State***, 260 AD2d 915, 689 NYS2d 258 [1999]; *see also*, ***Graham v Connor***, 490 US 386 [1989]). Officer Zappulla's conduct 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***, *supra*). Furthermore, it is necessary to consider all the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officer, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight (*see*, ***Koeiman v City of New York***, 36 AD3d 451, 829 NYS2d 24, *lv denied* 8 NY3d 814, 838 NYS2d 840 [2007]; ***Vizzari v Hernandez***, 1 AD3d 431, 766 NYS2d 883 [2003]). Here, the record indicates that Officer Zappulla acted reasonably under the circumstances and did not use excessive force while placing plaintiff under arrest (*see*, ***Rivera v City of New York***, 40 AD3d 334; 836 NYS2d 108 [2007]; ***Koeiman v City of New York***, *supra*; ***Stein v State of New York***, *supra*). Plaintiff failed to submit any evidence, expert or otherwise, demonstrating that the force used by Officer Zappulla, judged from the perspective of a reasonable officer on the scene, was excessive (*see*, ***Davis v State***, 203 Ad2d 234, 612 NYS2d 88 [1994]; ***Stein v State of New York***, *supra*).

Similarly, insofar as plaintiff's complaint may be read to assert a claim against the County under 42 USC § 1983 for negligent hiring and training, plaintiff must demonstrate that the local government itself caused the violation at issue through an official policy or custom that caused plaintiff to be subjected to a denial of a constitutional right, privilege or immunity (***Monell v New York City Dept. of Social Servs.***, 436 US 658 [1978]; ***Jackson v Police Dept. of City of New York***, 192 AD2d 641, 596 NYS2d 457 [1993], *lv denied* 82 NY2d 658, 604 NYS2d 557 [1993], *cert denied* 511 US 1004 [1994]; ***Howe v Village of Trumansburg***, 199 AD2d 749, 605 NYS2d 466 [1993], *lv denied* 83 NY2d 753, 612 NYS2d 107 [1994]). Therefore, only where a municipality's failure to train its employees evidences a deliberate indifference to the rights of its inhabitants can such a short coming be properly thought of as a policy or custom that is actionable under 42 USC § 1983 (***Jackson v Police Dept. of the City of New York***, *supra*; *see also*, ***Wray v City of New York*** , 490 F3d 189 [2007]; ***Jenkins v City of New York***, 478 F3d 76 [2007]). Moreover, such a policy may not ordinarily be inferred from a single incident of alleged illegality, where, as in this case, plaintiff failed to submit any evidence that the County was aware that

Officer Zappulla acted intentionally and recklessly toward other members of the public on prior occasions and acquiesced his conduct (***Sarus v Rotundo***, 831 F2d 397 [1987]). Thus, plaintiff's mere allegation that the County of Suffolk breached its duty by negligently hiring and training Officer Zappulla is insufficient, as a matter of law, to make out such a claim under 42 USC § 1983 (*see*, ***Monnell v New York City Dept. of Social Servs.***, *supra*; ***Neighbour v Covert***, 68 F3d 1508 [1995], *cert denied* 516 US 1174 [1996]; *see also*, ***Mann v Alvarez***, 242 AD2d 318, 661 NYS2d 250 [1997]).

The portion of defendants' motion seeking to dismiss plaintiff's claim for violation of his Fourteenth Amendment right to adequate medical treatment also is granted. In cases involving a pretrial detainee's right to medical treatment, the applicable constitutional protection is the Fourteenth Amendment's Due Process Clause (*see*, ***Bell v Wolfish***, 441 US 520 [1979]; ***Landy v Irizarry***, 884 F Supp 788 [1995]). Although the United States Supreme Court and the Second Circuit have left unresolved precisely what the standard of care is under the Fourteenth Amendment, the Due Process rights of a pretrial detainee is at least as great as the Eighth Amendment protection available to a convicted prisoner (*see*, ***City of Reverre v Massachusetts. Gen. Hospital***., 463 US 239 [1983]; ***Landy v Irizarry***, *supra*). To establish an Eighth Amendment violation arising out inadequate medical treatment, a prisoner must prove that the defendant was deliberately indifferent to the prisoner's medical needs (*see*, ***Estelle v Gamble***, 429 US 97 [1976]). A prisoner must satisfy two requirements – one objective and one subjective – in order to prevail on such a claim (*see*, ***Chance v Armstrong***, 143 F3d 698 [1988]). First, the prisoner must prove that his medical need was a condition of urgency that may produce death, degeneration, or extreme pain (***Hemmings v Gorczyk***, 134 F3d 104 [1998]; ***Hathaway v Coughlin***, 99 F3d 550 [1996]). Second, the prisoner must prove that the charged official acted with a sufficiently culpable state of mind (***Chance v Armstrong***, *supra*).

Here, the record is devoid of any evidence establishing that plaintiff's injuries were of such urgency that they may have resulted in death, degeneration or extreme pain, thereby rising to the level of an Eighth Amendment violation (*see*, ***Chance v Armstrong***, *supra*; ***De La Rosa v State of New York***, 173 Misc2d 1007, 662 NYS2d 921 [1997]). Rather, the record indicates that on the night of the incident, plaintiff's only visible injuries consisted of a swollen eye and a bruised lip. Although plaintiff testified that two police officers refused his request to be taken to the hospital on the grounds that he would miss court the following morning, he also testified that a police lieutenant came to his cell in order to inspect his injuries, and that he was given an ice pack to place on his face. Plaintiff further testified that he was able to place a call to his sister in order to inform her of his arrest and incarceration.

Finally, absent any evidence in the record that Officer Zappulla acted tortiously, summary judgment dismissing the claim against the County for negligent hiring and training also is granted (*see generally*, ***Graham v City of New York***, 279 AD2d 435, 720 NYS2d 452 [2001]; ***Jackson v Police Dept. of the City of New York***, *supra*; ***Mann v Alvarez***, *supra*).

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: DEC 20 2007

J.S.C

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION