Oyague v Incorporated Village of Malverne
2008 NY Slip Op 30014(U)
January 2, 2008
Supreme Court, Nassau County
Docket Number: 9159-93/
Judge: Kenneth A. Davis
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

RALPH OYAGUE,

Plaintiff,

SUBMISSION DATE: 10/22/07
INDEX No.:19159/93

-against-

THE INCORPORATED VILLAGE OF MALVERNE, P.O. RICHARD FRISENDA, P.O. WADE ENGEL, and THE MALVERNE POLICE DEPARTMENT,

MOTION SEQ. 10,11,12

Defendants.

The following papers read on this motion:

Notice of Motion/Cross Motion..................	XXX
Answering Papers................................	
Reply...	
Briefs: Plaintiff's/Petitioner's..............	
Defendant's/Respondent's..............	X

Motion by plaintiff Ralph Oyague for an order awarding summary judgment for personal injury against defendants the Incorporated Village of Malverne, Police Officer Richard Frisenda, Police Officer Wade Engel and the Malverne Police Department is denied. Cross-motion by defendants for summary judgment dismissing the complaint is denied, except that the cause of action for false arrest is dismissed. Additional motion by plaintiff Ralph Oyague for an order "dismissing" defendants' cross-motion is denied.

On December 1, 1991 police officers Frisenda and Engel responded several times to complaints of a loud party at premises located at 35 Ogston in the Incorporated Village of Malverne. Plaintiff Ralph Oyague was present at the party as a chaperone. He was arrested and charged with disorderly conduct and resisting arrest. He pleaded guilty to the disorderly conduct charge.

This personal injury action is premised upon plaintiff's claim that although he was not the owner of the premises, Office Engel asked him to come to his police car for an appearance ticket, and that when he stopped in order to call the owner, Officer Engel inflicted two or three blows directly to his nose with "a large heavy metal flashlight" causing serious injury. Oyague alleges

that he suffered a deviated septum and was bleeding so profusely that the Emergency Room at Franklin Hospital Medical Center was unable to stop the bleeding. He went to a specialist at South Shore Otolaryngology, P.C. as the bleeding did not stop by the following day, and a cauterization was necessary. He continued treatment for a few months and eventually was diagnosed with a deviated septum which required surgery. Plaintiff also alleges that his right hand was in a cast at the time of the arrest, and that his hand injury was exacerbated by Officer Engel's use of excessive force.

Police Officer Frisenda's version differed from that of Plaintiff regarding the arrest. He testified at deposition that Oyague refused to come with him and that when he put his hand on Oyague's shoulder, Oyague "swung with his left arm and then he lunged at me." (T38). Officer Frisenda gave another version at the District Court, stating that he was about to handcuff plaintiff and as soon as he placed the handcuffs in the "vicinity" of plaintiff's wrists, Oyague "jerked his hand away from the cuffs, pushed me, stepped back and clenched his fists and stood in a fighting position." It is noted that plaintiff Oyague also gave several versions of the event, initially telling Emergency Room attendants that he fell.

With respect to plaintiff's claim for false arrest, the existence of probable cause to arrest "constitutes a complete defense" to such claim (*Marrero v. City of New York*, 33 AD3d 556 [1st Dept 2006]). A guilty plea to disorderly conduct establishes defendants' affirmative defense to the cause of action sounding in false arrest (*Bennett v. New York City Housing Authority*, 245 AD2d 254 [2d Dept 1997]). Here, as in *Bennett*, plaintiff pleaded guilty to disorderly conduct, thus resolving the "dispositive issue" of probable cause and his cause of action for false arrest is dismissed (*Drayton v. City of New York*, 292 AD2d 182, 183 [1st Dept 2002], *lv app denied* 98 NY2d 604 [2002]).

Turning to the claim for personal injury and excessive force, a police officer is authorized to use "objectively reasonable force" under the prevailing circumstances of an arrest (*Higgins v. City of Oneonta*, 208 AD2d 1067, 1070 [3d Dept 1994], *lv app denied* 85 NY2d 803 [1995]). If the force employed is not reasonable, i.e., it is excessive, liability will attach (*Passino v. State*, 175 Misc2d 733, 736, affd 260 AD2d 915 [3d Dept 1999], *lv app denied* 93 NY2d 814 [1999]; *Jones v. State of New York*, 33 NY2d 275 [1973]). A "fact specific" analysis is necessary to determine whether a police officer wielded excessive force, and may require consideration of "an array of factors . . . including the nature of the officer's intrusion, the severity of the crime, whether the suspect posed an immediate threat and whether the arrest was actively resisted" (*Passino v. State*, *supra*).

The facts and circumstances surrounding the subject arrest are

in serious dispute. There are more than two versions of the arrest, several from each party.

The severity of plaintiff's injuries, contrasted with the relatively minor nature of the crime with which he was charged and the disputed nature of his resistance, preclude an award of summary judgment to defendants. Plaintiff's multiple versions of the event, in particular his withholding of any statement that he was beaten about the face by Police Officer Engel with a flashlight until after he commenced this suit, precludes any award of summary judgment to plaintiff. As in excessive force cases generally, "the fact intensive inquiry of whether a particular use of force was reasonable is best left for a jury to decide" (*Harvey v. Brandt*, 254 AD2d 718, 719 [4 Dept 1998], *supra*)

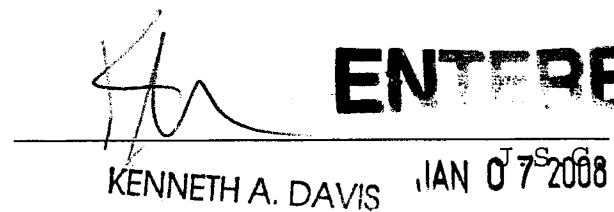
The court rejects the Village's claim that it is immune from liability pursuant to a theory of *respondeat superior*. Under section 1983 of the civil rights law (41 USC 1983) liability against a municipality cannot be predicated solely upon *respondeat superior* , as the Congress did not intend to "impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor" (*Monell v. Department of Social Servs. of City of New York*, 436 US 658, 692 [1978], *Rossi v. City of Amsterdam*, 274 AD2d 874 [3d Dept 2000]). However, this action is not predicated upon section 1983. Plaintiff alleges that the arresting officers used excessive force, which constitutes the tort of assault and battery (*see*, *Campagna v. Arleo*, 25 AD3d 528, 531 [2d Dept 2006]).

With respect to the tort of battery, the State or municipalities "are liable for the actions of their police officers in the line of duty" (*Jones v. State*, 33 NY2d 275 [1973]). Tort liability of municipalities under a theory of *respondeat superior* survives the statutory immunity provided to municipalities under section 1983 and *Monell v Department of Social Servs. of City of N.Y.* , *supra* (*Arteaga v. State*, 72 NY2d 212, 217 [1988]; *Beauchamp v. City of New York*, 3 AD3d 465, 466 [2d Dept 2004]; *Campos v. City of New York*, 32 AD3d 287 [1st Dept 2006], *app denied* 8 NY3d 816 [2007]).

Accordingly, the cause of action for assault and battery cannot be decided upon the cross-motions for summary judgment and judgment shall await trial.

This decision constitutes the order of the court.

Dated: JAN 02 2008



KENNETH A. DAVIS

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