

Esposito v County of Suffolk
2008 NY Slip Op 30910(U)
March 17, 2008
Supreme Court, Suffolk County
Docket Number: 0015451/2004
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-30-07
ADJ. DATE 11-20-07
Mot. Seq. # 001 - MD

-----X
STEPHEN ESPOSITO, :
 :
 Plaintiff, :
 - against - :
 :
 THE COUNTY OF SUFFOLK, THE SUFFOLK :
 COUNTY POLICE DEPARTMENT, JOSEPH :
 DiGREGORIO, Shield No. 4813, DANIEL :
 TERESKY s/h/a DAVID TERESKY, Shield No. :
 4899, JOHN DOE # 1 through JOHN DOE # 3, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19 - 28; Replying Affidavits and supporting papers 29 - 30; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is denied.

Plaintiff Stephen Esposito commenced this action to recover for personal injuries and property damage allegedly sustained after he fled the scene of a traffic stop and his motorcycle was struck by a police patrol car that was pursuing him. Plaintiff alleges that after the collision, as he was lying on the ground, he was kicked in the body and head by Suffolk County police officers present at the scene of the arrest. He alleges that he suffered numerous personal injuries due to the collision, including a compound fracture of the left leg, lower back pain, abrasions and bruises on his chest, shoulders, arms and face. He also alleges that he suffered "emotional trauma and damage due to the defendant police officers' actions at the scene of the accident." Defendant Joseph DiGregorio, who is employed as a police officer by defendant Suffolk County Police Department, was driving the patrol car that struck

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plaintiff's vehicle. Defendant David Teresky, also a Suffolk County police officer, was riding in the patrol car with defendant DiGregorio at the time of the incident. Plaintiff later pled guilty to misdemeanor charges of reckless driving and aggravated unlicensed operation of a motor vehicle.

The first and second causes of action set forth in the complaint seek damages pursuant to 42 USC § 1983 for violation of plaintiff's federal civil rights. The third and fourth causes of action seek damages for assault and battery, and the fifth cause of action seeks damages for deprivation of plaintiff's rights under the State Constitution. The sixth cause of action seeks damages under Insurance Law § 5104 for "serious injury" suffered by plaintiff as a result of the accident, and the seventh and eighth causes of action seek property damages. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded from seeking compensation for his injuries, because such injuries are a direct result of plaintiff's criminal conduct. Alternatively, defendants assert that they are protected from civil liability for plaintiff's injuries, as they were engaged in an emergency operation at the time of the incident and there is no evidence that they acted with reckless disregard for plaintiff's safety. Defendants' submissions include copies of the pleadings; transcripts of plaintiff, defendant DiGregorio and defendant Teresky's deposition testimony; and hospital records prepared by Brookhaven Hospital relating to plaintiff's alleged injuries.

Plaintiff opposes defendants' motion, arguing that issues of fact exist as to how the accident between the patrol car and plaintiff's motorcycle occurred, and whether the police officers violated plaintiff's civil rights after the pursuit ended. In opposition, plaintiff submits an affidavit recounting the chase, the collision, and the conduct of the police officers at the scene after the collision. He also submits, among other things, copies of a written statement of the Suffolk Police Department's rules and regulations pertaining to vehicular pursuits at the time of the subject incident, a copy of an internal Police Department memo regarding the subject incident prepared by defendant DiGregorio, and photographs purporting to show the scene of the incident. The Court notes that as plaintiff failed to provide an evidentiary foundation for the photographs, they were not considered in the determination of the motion.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to present evidence establishing the existence of a material question of fact requiring a trial (*Alvarez v Prospect Hosp.*, *supra*, at 324, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The opposing party must meet this burden by producing evidentiary proof in admissible form, or by demonstrating a reasonable excuse for failing to meet the requirement of tender in admissible form (*see Zuckerman v City of New York, supra*).

The public policy of this State generally denies judicial relief to individuals injured in the course of committing a serious criminal act (*Barker v Kallash*, 63 NY2d 19, 24, 479 NYS2d 201 [1984]; *see*

Carr v Hoy, 2 NY2d 185, 158 NYS2d 572 [1957]). Thus, “where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff’s conduct constitutes a serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation” (*Manning v Brown*, 91 NY2d 116, 120, 667 NYS2d 336 [1997]; see *Barker v Kallash*, *supra*; *Moore v County of Suffolk*, 11 AD3d 591, 783 NYS2d 72 [2d Dept 2004]; *Gaither v City of New York*, 300 AD2d 255, 751 NYS2d 368 [1st Dept 2002]). However, as explained by the Court of Appeals in *Alami v Volkswagen of Am.*, while “the *Barker/Manning* rule is based on the sound premise that a plaintiff cannot rely on an illegal act or relationship to define the defendant’s duty,” such rule will not be applied “beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act” (*Alami v Volkswagen of Am.*, 97 NY2d 281, 287, 739 NYS2d 867 [2002]; see *Reed v City of Syracuse*, 309 AD2d 1195, 765 NYS2d 125 [4th Dept 2003]).

Defendants’ submissions are sufficient to demonstrate prima facie that the claims for personal injuries and property damage asserted in the third, sixth and seventh causes of action are a direct result of plaintiff’s intentional participation in serious criminal activity that was hazardous to himself, defendant police officers, and the public at large (see *Manning v Brown*, *supra*; *Moore v County of Suffolk*, *supra*; *Johnson v State of New York*, 253 AD2d 274, 687 NYS2d 761 [3d Dept 1999]). Viewing the evidence in the light most favorable to plaintiff and giving plaintiff the benefit of the reasonable inferences that may be drawn from the evidence (see *Mitchell v Fiorini Landscape*, 253 AD2d 860, 678 NYS2d 341 [2d Dept 1998]), the Court finds that plaintiff failed to raise a triable issue as to whether the injuries he sustained as a result of the collision between the motorcycle and the patrol car were a direct result of his participation in serious criminal conduct. Here, plaintiff admits in his affidavit that he fled the scene of the traffic stop and was being pursued by defendants DeGregorio and Teresky when the collision occurred. As mentioned earlier, plaintiff later pled guilty to reckless driving and aggravated unlicensed operation of a motor vehicle. Although plaintiff alleges that he had already brought his motorcycle to a stop when the patrol car struck him, there is no question that the injuries suffered when he and the motorcycle hit the ground were caused by plaintiff’s own criminal activities in the moments immediately preceding the collision (see *Manning v Brown*, *supra*). Plaintiff, therefore, is precluded under the *Barker/Manning* rule from recovering for property damage to his motorcycle and for personal injuries suffered due to the collision. As there is no evidence in the record that other property belonging to plaintiff was intentionally damaged by defendants, the eighth cause of action also is dismissed.

Defendants, however, have failed to establish their entitlement to judgment as a matter of law on the remaining causes of action. The pleadings allege, among other things, that defendants DiGregorio and Teresky, as well as other police officers who responded to the scene of the collision, committed assault and battery and used excessive force against plaintiff in violation of his rights under the Federal and State Constitutions. Civil assault is an intentional placing of another person in apprehension of imminent harmful or offensive conduct (see *United Natl. Ins. Co. v Waterfront New York Realty Corp.*, 994 F2d 105 [2d Cir 1993]; *Higgins v Hamilton*, 18 AD3d 436, 794 NYS2d 421 [2d Dept], *lv denied* 5 NY3d 708, 803 NYS2d 28 [2005]; *Reichle v Mayeri*, 110 AD2d 694, 488 NYS2d 15 [2d Dept 1985]). Physical injury is not required to recover for an assault, as an assault may occur “without the striking of

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a blow or other physical contact” (*Brown v Yaspan*, 256 AD 991, 991, 10 NYS2d 502 [2d Dept 1939]; see *Reichle v Mayeri*, *supra*; *Di Gilio Burns Intl. Detective Agency*, 46 AD2d 650, 359 NYS2d 688 [2d Dept 1974]). Civil battery is an intentional wrongful physical contact with another person without consent (see *United Natl. Ins. Co. v Waterfront New York Realty Corp.*, *supra*; *Fugazy v Corbetta*, 34 AD3d 728, 825 NYS2d 120 [2d Dept 2006]; *Tillman v Nordon*, 4 AD3d 467, 771 NYS2d 670 [2d Dept 2004]). Further, 42 USC §1983 affords an aggrieved individual a civil remedy against “[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State * * * subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights, privileges or immunities secured by the Constitution.” Municipalities and other local government units are “persons” within the scope of 42 USC §1983 (see *Monell v Department of Social Servs.*, 436 US 658, 98 S Ct 2018 [1978]; *Town of Orangetown v Magee*, 88 NY2d 41, 643 NYS2d 21 [1996]; *Huck v City of Newburgh*, 275 AD2d 343, 712 NYS2d 149 [2d Dept], *lv dismissed* 95 NY2d 929, 721 NYS2d 603 [2000]), and will be held liable for the deprivation of a constitutional right if it is shown the municipality itself caused the violation at issue (see *Jackson v Police Dept. of City of New York*, 192 AD2d 641, 596 NYS2d 457 [2d Dept], *lv denied* 82 NY2d 658, 604 NYS2d 557 [1993], *cert denied* 511 US 1004, 114 S Ct 1370 [1994]). A municipality, however, cannot be held liable under 42 USC §1983 under the legal doctrines of respondent superior or vicarious liability (see *Lopez v Shaughnessy*, 260 AD2d 551, 688 NYS2d 614 [2d Dept 1999]; *Liu v New York City Police Dept.*, 216 AD2d 67, 627 NYS2d 683 [1st Dept], *lv denied* 87 NY2d 802, 638 NYS2d 425 [1995]; *Jackson v Police Dept. of City of New York*, *supra*).

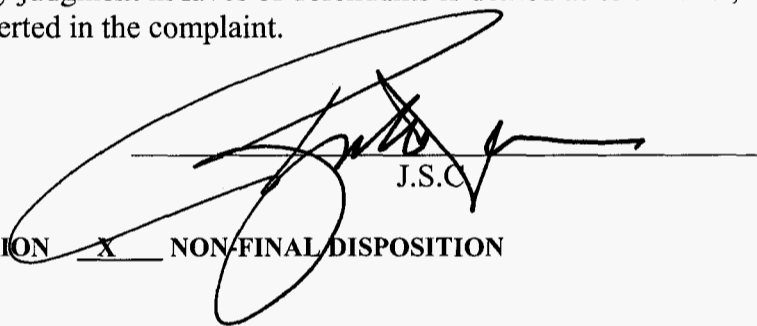
The right to make an arrest or an investigatory stop necessarily includes the right to use some degree of physical coercion or threat to effect the arrest or stop (*Graham v Connor*, 490 US 386, 396, 109 S Ct 1865 [1989]; see Penal Law § 35.30). A citizen’s claim that law enforcement officers used excessive force in the course of making an arrest, investigatory stop or other “seizure” of his person must be analyzed under the Fourth Amendment’s “objective reasonableness” standard (*Graham v Connor*, 490 US at 395, 109 S Ct 1865; *Vizzari v Hernandez*, 1 AD3d 431, 432, 766 NYS2d 883 [2d Dept 2003]). The reasonableness of a police officer’s use of force to effect the seizure of an individual must be judged from the perspective of a reasonable police officer on the scene of the incident, not with the vision of 20/20 hindsight, and must take into consideration the facts and circumstances of the particular case (*Graham v Connor*, 490 US at 396, 109 S Ct 1865; *Koeiman v City of New York*, 36 AD3d 451, 829 NYS2d 24 [1st Dept], *lv denied* 8 NY3d 814, 829 NYS2d 24 [2007]). Therefore, the question that must be asked when a claim of excessive force is made is whether the “officers’ action were ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation” (*Graham v Connor*, 490 US at 397, 109 S Ct 1865).

Here, defendants DiGregorio and Teresky testified at their depositions that the patrol car struck the left side of plaintiff’s motorcycle after the motorcycle made a sudden left turn in front of the car, causing the motorcycle and plaintiff to fall to the right and land on the ground. Defendant Teresky testified that after the initial impact, the patrol car pushed the motorcycle and plaintiff a few feet forward before coming to a complete stop. Defendants DiGregorio and Teresky also testified that plaintiff, who was lying on the pavement with the motorcycle on top of his right leg after the collision, was pulled out from under the motorcycle and handcuffed. Both defendant DiGregorio and Teresky testified that they did not kick plaintiff after the collision. Conversely, plaintiff testified during his examination that his

motorcycle was hit in the rear by the patrol car after he had stopped his vehicle in the parking lot. He testified that police officers repeatedly kicked him in the head and the body after the collision, both before and after he was handcuffed, and that he feared the officers would deliberately kick his broken leg. He also testified that he did not see which of the officers at the scene actually kicked him, because he was lying face-down on the pavement.

While both defendants DiGregorio and Teresky testified unequivocally that they did not intentionally strike plaintiff after the collision, plaintiff testified that he was kicked in the head and body by police officers during and after his arrest. The deposition testimony submitted in support of the motion, therefore, raises triable issues as to whether plaintiff was subject to excessive force, assault and battery after the collision (*see Seigell v Herricks Union Free School Dist.*, 7 AD3d 607, 777 NYS2d 148 [2d Dept 2004]; *Mazzariello v Town of Cheektowaga*, 305 AD2d 1118, 758 NYS2d 564 [4th Dept 2003]; *cf. Higgins v City of Oneonta*, 208 AD2d 1067, 617 NYS2d 566 [3d Dept 1994], *lv denied* 85 NY2d 803, 627 NYS2d 373 [1995]; *see also Reichle v Mayeri, supra*). Defendants' argument that the *Manning/Barker* rule protects them from liability for all acts that occurred in connection with the pursuit and arrest of plaintiff is rejected (*see Alami v Volkswagen of Am., supra; Farley v Town of Hamburg*, 34 AD3d 1294, 824 NYS2d 549 [4th Dept 2006]). Rather, if the trier of fact finds the force used against plaintiff by Suffolk County police officers was more than was necessary under the circumstances, then plaintiff is entitled to recover for intentional tort (*see Jones v State of New York*, 33 NY2d 275, 352 NYS2d 169 [1973]). The argument that the qualified privilege afforded operators of emergency vehicles extends to the officers' alleged actions against plaintiff after the collision also is rejected (*see Vehicle and Traffic Law § 1104; see generally Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297 [1994]). Accordingly, summary judgment in favor of defendants is denied as to the first, second, fourth and fifth causes of action asserted in the complaint.

Dated: MAR 17 2008



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION