

Pellegrini v Nassau Health Care Corp.

2009 NY Slip Op 30054(U)

January 7, 2009

Supreme Court, Nassau County

Docket Number: 009188/07

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
ANTHONY PELLEGRINI,

TRIAL TERM PART: 47

Plaintiff,

-against-

INDEX NO.: 009188/07

**MOTION DATE: 10-1-08
SUBMIT DATE: 11-26-08
SEQ. NUMBER - 001 &
002**

**NASSAU HEALTH CARE CORPORATION, NASSAU
UNIVERSITY MEDICAL CENTER, COUNTY OF
NASSAU, NASSAU COUNTY POLICE
DEPARTMENT,**

Defendant.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 9-8-08.....1**
- Memorandum of Law in Support, dated 9-5-08.....2**
- Notice of Motion, dated 9-18-08.....3**
- Affidavit in Opposition, dated 10-27-08.....4**
- Reply Affirmation, dated 11-5-08.....5**
- Reply Affirmation, dated 11-20-08.....6**

Motion (seq. No. 1) by the defendants County of Nassau and Nassau County Police Department (the County) for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint as to the County for failing to state a cause of action and, motion (seq. No. 2) by defendant Nassau Health Care Corporation (the Hospital) for an order pursuant to CPLR

3212 granting summary judgment in favor of the defendant dismissing the complaint as to the Hospital are both granted.

In his complaint the plaintiff alleges as follows:

That Health Care and NUMC failed to expedite plaintiff's release from custody although plaintiff's blood was taken upon arrival at NUMC and said blood was negative for controlled substances and alcohol.

That Nassau County, by its Police Department failed to expedite plaintiff's release from custody although plaintiff's blood was negative for alcohol and controlled substances.

That Nassau County, by its Police Department, failed to advise the Nassau County District Attorney's Office that plaintiff's blood was negative for alcohol and controlled substances and plaintiff was forced to endure the further humiliation and expense of proceeding in a criminal court.

That the acts of the defendants were malicious, improper, illegal and violative of plaintiff's constitutional rights.

That plaintiff was subject to great humiliation, disgrace, embarrassment, discomfort, mental anguish, worry and expense by virtue of the defendants' acts aforesated.

That plaintiffs' reputation was damaged, his character exposed to scorn and ridicule.

That plaintiff was deprived during his incarceration of the companionship of his family.

In his affidavit in opposition where he attempts to amplify the allegations in the complaint, which does not articulate any specific cause of action, the plaintiff asserts his "two main contentions" are that he "should not have been arrested" and he "was forcibly restrained at NUMC from June 29, 2006 to and through the early hours of July 2, 2006." Accordingly, the claim against the County sounds in false arrest, in which NUMC allegedly participated.

Although the County's Notice of Motion seeks dismissal based on CPLR 3211(a)(7) (failure to state cause of action), the County has submitted evidence in support of the application. In support of the motion, the County has submitted a copy of the pleadings, plaintiff's deposition transcript, and the arresting officer's deposition transcripts. The plaintiff too has submitted evidentiary material. Issue has been joined, all discovery has been completed, the action certified ready for trial and a notice of issue filed. The Court therefore will treat the County's motion as one for summary judgment pursuant to CPLR 3212 as the parties have charted that course.

The elements of the tort of false arrest are that the defendant intended to confine the plaintiff; the plaintiff was conscious of the confinement; and did not consent to the confinement, and the confinement was not otherwise privileged. *Martinez v. City of Schenectady*, 97 NY2d 78 (2001). However, the existence of probable cause constitutes a complete defense to claims of false arrest. *Marrero v City of New York*, 33 AD3d 556, 557 (1st Dept. 2006).

The presence or absence of probable cause on the part of law enforcement can be decided as a matter of law where the facts leading up to an arrest and the inferences to be drawn therefrom are not in dispute. *Orminski v Village of Lake Placid*, 268 AD2d 780, 781 (3rd Dept. 2000). Probable cause, a mixed question of law and fact, *People v Gonzalez*, 99 NY2d 76, 83 (2002), "requires the existence of facts and circumstances which, when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed, and that the defendant

committed or is committing that offense.” See *People v Bigelow*, 66 NY2d 417 (1985). “A finding of probable cause does not, however, require the same quantum of proof necessary to sustain a conviction, or to establish a *prima facie* case. . . Rather, it need merely appear more probable than not that a crime has taken place and that the one arrested is its perpetrator.” *People v Hill*, 146 AD2d 417 (1st Dept. 1989).

In determining whether a police officer has probable cause for an arrest, the emphasis should not be narrowly focused on any single factor, but on an evaluation of the totality of circumstances, which takes into account “the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents.” See *People v Bothwell*, 261 AD2d 232, 234 (1st Dept. 1999) citing *People v Graham*, 211 AD2d 55 (1st Dept. 1995). In making the determination to arrest, the officer is not obligated to eliminate all possible innocent explanations for incriminating facts. See *People v Mercado*, 68 NY2d 874, 877 (1986). Further, “[a] party may act with probable cause even though mistaken . . . if the party acted reasonably under the circumstances in good faith.” *New York v Colon*, 60 NY2d 78, 82 (1983).

On the morning of Thursday, June 29, 2006, at approximately 2:30 a.m., the defendant was operating a motor vehicle westbound on Hempstead Turnpike in East Meadow. He was observed by a Nassau County police officer swerving from lane to lane and failing to maintain a single lane. Plaintiff was pulled over. A vehicle stop was conducted and upon approaching the driver’s side window the police officer detected the odor of alcohol from the vehicle. There was a male passenger in the front seat. Upon closer inspection, the police officer claims he noticed that the plaintiff had glassy eyes and poor eye-hand coordination.

As the police officer spoke to the plaintiff he observed an open alcohol container on the floor on the passenger side of the vehicle. According to the police officer the plaintiff appeared confused, and although stating he was going to a club, could not recall its name or location.

Plaintiff was asked to perform standardized field sobriety tests. These tests consisted of the horizontal gaze nystagmus (HGN), nine-step "walk end" and the one legged stand. After the plaintiff failed the latter tests he was given a portable breathalyzer test (PBT). The breathalyzer test was negative. Even though plaintiff passed the breathalyzer test he was arrested for allegedly operating a motor vehicle under the influence of drugs. The police officer made the arrest based on the plaintiff's erratic operation of the vehicle, the observed impairment, as well as 16 years of experience as a police officer.

The plaintiff claims that as soon as he was stopped, he told the police officer he had chest pains and that is why he was not driving properly. The police officer asserts the plaintiff did not indicate he had chest pains until after being told that he was being put under arrest. Plaintiff denies that his eyes were blood shot. Plaintiff alleges he advised the arresting officer he was not able to make some body movements because of a degenerative disc disease which makes some body movements painful and clumsy. Plaintiff also asserts he opened his shirt and advised the police officer that he had a pacemaker planted under his chest. At that point plaintiff argues the police officer should have released him from custody and issued an appearance ticket with the direction for him to return to court.

The plaintiff was transferred to the hospital and admitted at approximately 4:00 a.m. on June 29, 2006. Separate blood samples were drawn for the hospital, and for the police department. He had a cardiogram, chest x-ray and a urine test. The plaintiff tested negative

for drugs. This information was not disclosed to, or shared with, the police by the hospital because of HIPPA regulations. The plaintiff consented to all tests. Plaintiff had been under doctor's care for a heart condition, but had not taken his Norvasc, Plavix or an aspirin for one to two weeks prior to the arrest.

Plaintiff was handcuffed to a bed until late Saturday night or early Sunday morning (July 2) when he was moved to a cell in the hospital, issued an appearance ticket and released from police custody with a requirement of no bail. The plaintiff was charged with the following offenses: VTL § 1192.4 DWAI Driving Under the Influence of Drugs (Misd.); VTL § 1128(A) Failure to Stay in a Single Lane (Viol.); and VTL § 1227 Open Alcohol in a Motor Vehicle (Viol.).

At his deposition the arresting police officer testified that he believed the plaintiff pled guilty to the violations "failing to maintain a single lane and/or open alcohol in [a] vehicle." (McKenna transcript pg. 35, lines 1-10). The plaintiff signed himself out of the hospital in the early morning of Sunday, July 2, 2006. The hospital personnel admonished the plaintiff that it was not in his best interests from a medical point of view for him to check out.

In opposition to both motions the plaintiff asserts that although he was not able to adequately perform the movements required in a field test, there was a plausible explanation in that he was experiencing heart problems of which he advised the arresting officer, in addition to the degenerative disc disease which allegedly made his body movements painful and clumsy.

Plaintiff does not fault the Nassau County Police Department for taking him to the hospital. He does not fault the hospital for rendering medical assistance. However, plaintiff

asserts that once the breathalyzer test was negative he should have been given the benefit of the doubt, a ticket and released. The plaintiff objects to having been restrained to the bed all the time he was in the hospital and being forced to use a bed pan even though he was ambulatory.

The plaintiff makes a number of allegations, *e.g.*, the police officers were on overtime and in no hurry to expedite the arrest procedure; being spoken to in a patronizing way by “someone who was a psychologist or psychiatrist.” Further, the plaintiff claims that a nurse at the hospital threatened to catheterize him if he did not urinate into a container for testing. However, the arresting police officer at his deposition testified that the police requested only a blood sample from the hospital, not a urine sample. Plaintiff also alleges he was put through the criminal system on a bogus charge that required him to pay for the services of a private attorney. He fails to indicate how many court appearances were made, the fees paid to his attorney, or deny that he pled guilty to the two traffic offenses.

In the within action, the Court finds that the County has established probable cause for the initial arrest. This was demonstrated by the erratic weaving in and out by the plaintiff, the smell of alcohol from the car, the presence of an open bottle of alcohol in the car, and the plaintiff’s failing the field sobriety tests. Moreover, although the charge of driving under the influence of drugs was dismissed, plaintiff does not refute the arresting officer’s assertion that the VTL § 1128(A) (failure to stay in a single lane) and VTL § 1227 (open alcohol container in motor vehicle) were not dismissed. In response, the plaintiff has offered nothing to rebut those showings. Probable cause having been shown, the complaint is dismissed against Nassau County.

The claim against NUMC must also be dismissed. The plaintiff acknowledges that he was not able to leave the hospital because the police had him under arrest. He also acknowledges the hospital had nothing to do with his arrest. Eventually, the plaintiff signed out of the hospital against medical advice. There is thus no basis in law or fact to sustain the claims against the hospital.


Both motions for summary judgment dismissing the complaint against all defendants are granted.

This decision is the order of the Court and terminates all proceedings under Index No. 9188/07.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 7, 2009


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

JAN 09 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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