

Jacobs v City of New York

2010 NY Slip Op 31513(U)

June 7, 2010

Supreme Court, New York County

Docket Number: 100470/07

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 5

Index Number : 100470/2007
JACOBS, JEFFREY
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
COMPEL DISCLOSURE
CALRSY

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ in this motion to/for _____

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER
FILED

JUN 11 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-7-10
JUN 07 2010

Barbara Jaffe
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
JEFFREY JACOBS,

Plaintiff,

-against-

Index No. 100470/07
Motion Date: 4/7/10
Motion Seq. No.: 001
Argued: 4/27/10

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, P.O. "JANE" BROWN, THE FIRST NAME
BEING FICTITIOUS AND PRESENTLY UNKNOWN AND
"P.O. JANE DOE," THE NAME BEING FICTITIOUS AND
PRESENTLY UNKNOWN,

Defendants.

FILED

JUN 11 2010

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

For plaintiff:
Paul Biedka, Esq.
David Scott, Esq.
60 East 42nd St., 40th Fl.
New York, NY 10165
212-661-0001

For defendant City of New York:
Lynn Leopold, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007
212-442-0398

By notice of motion dated December 7, 2009, plaintiff moves pursuant to CPLR 3124 for an order compelling defendants to produce for an *in camera* inspection the employment and Civilian Complaint Review Board (CCRB) records for NYPD officers Diane Brown and Dana Fields. Defendant City opposes the motion and, by notice of cross-motion dated January 12, 2010, moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it.

I. BACKGROUND

In a complaint report prepared by Police Officer Robert Fuhrman at 7:45 a.m. on January 26, 2005, plaintiff's mother, Linda Jacobs, stated that the 16-year-old plaintiff "got upset" when she presented him with a P.I.N.S. warrant and broke her cell phone, and that plaintiff's brother,

Jason Jacobs, “smacked/slapped her in the face with her notebook.” (Affirmation of Lynn Leopold, ACC, dated Jan. 12, 2010 [Leopold Aff.], Exh. F). No injuries were reported, nor arrests made; a Domestic Incident Report (DIR) was prepared. Fuhrman classified the incident as a harassment. (*Id.*).

At approximately 9:00 a.m. that day, Linda Jacobs signed and swore to a DIR, on which the notation “No Offense” was scratched out and replaced with “harassment” as the description of the offense. (*Id.*).

At 8:20 p.m. that evening, Officer Brown arrested plaintiff for criminal mischief with the intent to damage property (Penal Law 145.00[1]) and harassment in the second degree (Penal Law 240.26[3]). (*Id.*, Exh. F). She prepared an arrest report which reflects that plaintiff “did damage/destroy [Linda Jacobs’s] cell phone causing annoyance and alarm to [Linda Jacobs].” (*Id.*).

On January 27, 2005, in a criminal court complaint signed by Brown, plaintiff was charged with criminal mischief in the fourth degree and harassment in the second degree based on Linda Jacobs’s report that plaintiff had yelled and screamed at her, grabbed her cell phone, twisted it, and broke it, rendering it inoperable. (*Id.*).

The police had responded to other complaints involving the Jacobs’s family:

- (1) On June 29, 2004, Linda Jacobs reported that Jason Jacobs became angry and starting throwing and destroying property in their apartment; Jason Jacobs was not arrested; Officer Fields reviewed the DIR;
- (2) On July 11, 2004, Linda Jacobs alleged that plaintiff came home late and threw a fit when she refused to give him money; the responding police officer found that no offense was committed; Brown reviewed the DIR;
- (3) On July 28, 2004, Linda Jacobs reported that she and Jason Jacobs had an argument; he was not arrested as no offense was committed; Brown reviewed the DIR;

- (4) On September 28, 2004, Linda Jacobs reported that Jason Jacobs yelled, screamed, threw her bag at her and then against the wall, punched the wall, shoved a cocktail table at her knees, and screamed in her face and insulted her; Jason Jacobs was not arrested; Brown reviewed the DIR;
- (5) On November 5, 2004, Linda Jacobs reported that Jason Jacobs, along with his father, harassed and intimidated her into withdrawing a pending family court case, and that Jason hit her in the head a few times; Jason Jacobs was not arrested; Brown reviewed the DIR;
- (6) On January 5, 2005, Linda Jacobs reported that Jason Jacobs took a welfare benefit card from her wallet and returned it to her after the police were notified; Jason Jacobs was not arrested; Fields reviewed the DIR; and
- (7) On January 25, 2005, Linda Jacobs reported that Jason Jacobs became upset with her when she refused to give him money and threw a salad bowl on the floor; Jason Jacobs was not arrested.

(Leopold Aff., Exh. F).

On April 25, 2005, City received plaintiff's notice of claim, in which he alleged that police officers physically injured him, falsely arrested him without probable cause, and placed him in a prison cell with dangerous adult inmates. (Affirmation of Lynn Leopold, ACC, dated Jan. 12, 2010 [Leopold Aff.], Exh. A). Plaintiff also alleged that he was in custody for more than 24 hours, and that the New York County District Attorney prosecuted him maliciously, knowing that there was no probable cause for his arrest. (*Id.*).

On or about November 29, 2006, plaintiff commenced the instant action against defendants, asserting claims for false arrest, malicious prosecution, violation of plaintiff's constitutional rights, and negligent hiring, training, and supervision of the arresting officers, Brown and Fields. (Affirmation of Paul Biedka, Esq., dated Dec. 7, 2009 [Biedka Aff.], Exh. B). On or about March 7, 2007, City served its answer. (*Id.*, Exh. C).

On August 26, 2009, plaintiff served on City a notice to produce any CCRB records of complaints filed prior to January 26, 2005 involving Brown and Fields, and their complete

employment records. (*Id.*, Exh. E).

At a 50-h hearing held on November 17, 2006, plaintiff testified that when police officers first came to the Jacobs's apartment the morning of his arrest, they told him and Jason Jacobs to call their father to pick them up in order to give everyone time to calm down, that he returned to the apartment and in the evening was sitting in the lobby when two officers approached him, told him to come with them to his mother's apartment as they were going to arrest him, spoke to his mother, and expressed their intent to arrest him. Plaintiff walked toward his mother and the officers tackled him and shoved him to the ground. He later learned that his mother never told the officers to arrest him, and recognized Brown and Fields from their prior home visits. (Leopold Aff., Exh. D, p. 11, 12, 13, 22-23, 30, 48).

At a deposition dated June 18, 2009, Brown testified that at the time of the incident, she was employed as a domestic violence officer which required that she conduct home visits, effect arrests, and follow up on DIRs and incident reports. On January 26, 2005, she visited plaintiff's home to follow up on the DIR signed by plaintiff's mother that morning and on Fuhrman's complaint report, and given the Jacobs's family history. During the visit, Linda Jacobs told her that plaintiff had broken her cell phone and showed her the broken phone.

According to Brown, plaintiff tried to leave the apartment. She and Fields thus restrained him, with Fields grabbing him first and tripping over his feet, propelling them to the floor. Brown also testified that plaintiff was arrested because of the broken cell phone and the family's domestic violence history, and at Linda Jacobs's request. (Leopold Aff., Exh. E, p. 14-15, 17, 28, 42, 47, 49-53, 84, 90, 109, 121).

At a deposition taken on August 21, 2009, Fields testified that she had visited the Jacobs

residence approximately five times, that she and Brown had discussed arresting plaintiff before going there that day, and decided to go there upon reading Fuhrman's complaint report. Once there, Linda Jacobs showed her the broken cell phone and said that she wanted plaintiff arrested. She and Brown then directed plaintiff to stand up so they could arrest him and that instead, he started running toward the door, and when she tried to stop him, she tripped and they fell on the floor. (Leopold Aff., Exh. G, at 21-23, 31, 35, 38-39).

It is undisputed that plaintiff's arrest was not made pursuant to a warrant and that the charges against plaintiff were dismissed before trial. (Biedka Aff.).

II. CONTENTIONS

City argues that plaintiff's arrest was based on probable cause as the January 26 DIR, signed and sworn to by Linda Jacobs, gave the police officers a reasonable basis to believe that plaintiff had broken Linda Jacobs's cell phone. (Leopold Aff.). It also contends that the negligent hiring, supervision, and retention claims must be dismissed against City as Brown and Fields were acting within the scope of their employment. City observes that neither Brown nor Fields were served with the pleadings and are thus not parties to this action.

Plaintiff argues that there is a triable issue as to whether his arrest was based on retaliation or familiarity with his family's domestic violence history rather than on probable cause, and whether he committed an offense, as Fuhrman had determined that he had committed no crime that morning and did not arrest him. (Reply Affirmation of Paul Biedka, Esq., dated Mar. 29, 2010). He also contends that pertinent discovery remains outstanding, including Brown's and Fields's employment records which are relevant to his negligent hiring, supervision and retention claims, and Fuhrman's deposition.

In reply, City asserts that plaintiff failed to rebut its showing that the officers had probable cause to arrest him, and otherwise argues that plaintiff is not entitled to the additional discovery. (Reply Affirmation of Lynn M. Leopold, ACC, dated Apr. 16, 2010). City also contends that plaintiff's failure to plead and prove that his alleged injuries arose out of an official City custom or policy precludes his constitutional claims.

III. ANALYSIS

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

A. False arrest and malicious prosecution claims

The elements of a false arrest claim are that: (1) the defendant intended to confine the

plaintiff, (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. (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]). A warrantless arrest gives rise to a presumption that the arrest was unlawful, and thus the plaintiff establishes, *prima facie*, a claim of false arrest upon proof that his arrest was made without a warrant. (59 NY Jur 2d, False Imprisonment § 32 [2010]). In order to avoid liability for the arrest, the defendant must then establish that he was legally justified to make the arrest based on proof that at the time of the arrest, the arresting officer had probable cause to believe that the plaintiff had committed a crime. (*Id.*).

Probable cause arises when the arresting officer has reasonable or probable grounds for believing that the arrestee had committed an offense; in other words, grounds which would induce an ordinary prudent and cautious person, under the circumstances, to believe the arrested person guilty. (*Id.* § 33). Generally, information from an identified citizen accusing another individual of committing a specific crime is sufficient to provide the police with probable cause to arrest. (*Norasteh v State*, 44 AD3d 576 [1st Dept 2007], *lv denied* 10 NY3d 709 [2008]). Dismissal of the criminal charge is some evidence of a lack of probable cause, but it is not dispositive (59 NY Jur 2d, False Imprisonment § 34), and the defendant's motives, good or bad faith, or malice or lack thereof are immaterial as to whether she had probable cause to arrest the plaintiff (*id.* § 13).

A person is guilty of criminal mischief in the fourth degree when, having no right to do so nor any reasonable ground to believe that he or she has such right, he or she intentionally damages another person's property. (Penal Law 145.00[1]). A person is guilty of harassment in the second degree when he or she, with intent to harass, annoy or alarm another person, engages

in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. (Penal Law 240.26[3]).

Here, based on Brown's and Fields's review of the DIR signed and sworn to by Linda Jacobs, in which she alleged that plaintiff had broken her cell phone, and their own interaction with her and observation of the broken cell phone, the officers had reasonable grounds for believing that plaintiff had intentionally damaged his mother's property without any right to do so, thereby establishing probable cause to arrest him for criminal mischief in the fourth degree (*See eg Iorio v City of New York*, 19 AD3d 452 [2d Dept 2005] [officer had probable cause to arrest plaintiff based on complaint by identified citizen, officer's investigation and observations at scene, and statements given to him]; *Kramer v City of New York*, 173 AD2d 155 [1st Dept 1991], *lv denied* 78 NY2d 857 [information given to officer by complaining witness, accusing plaintiff of specific crime, provided probable cause to arrest]; *see also People v Smith*, 66 AD3d 1223 [3d Dept 2009], *lv denied* 14 NY3d 773 [2010] [defendant properly convicted of criminal mischief in fourth degree for breaking victim's cell phone]).

That the officers knew of the Jacobs's family history and prior complaints made by Linda Jacobs against plaintiff and his brother does not negate their probable cause (*see Broughton v State*, 37 NY2d 451 [1975] [defendant's motives are immaterial to question of liability for false arrest; valid arrest will not be rendered unlawful by malicious motives]; *Restey v Higgins*, 252 AD2d 954 [4th Dept 1998] [police officer's motives are irrelevant to whether arrest is based on probable cause]), nor does Fuhrman's determination that plaintiff had not committed an offense. Rather, nothing precluded Brown and Fields from conducting a follow-up visit to investigate whether an offense had occurred as it was their duty to review DIRs and decide whether a

domestic violence incident warranted a follow-up.

Defendant has thus established, *prima facie*, that the officers had probable cause to arrest plaintiff and that plaintiff has failed to demonstrate that any triable issues exist as to his false arrest claim. And, as Fuhrman's actions are immaterial to whether Brown and Fields had probable cause to arrest plaintiff, plaintiff has not shown a need to depose him. (CPLR 3212[f]; *Hayden v City of New York*, 26 AD3d 262 [1st Dept 2007] [plaintiff failed to show that additional depositions were warranted by likelihood that proposed deponents possessed information material and necessary to oppose summary judgment motion]; *Bailey v New York City Transit Auth.*, 270 AD2d 156 [1st Dept 2000] [evidentiary basis must be offered to support allegation that further discovery may lead to relevant evidence]).

As the absence of probable cause is also an element of a malicious prosecution claim (*Cantalino v Danner*, 96 NY2d 391 [2001]), plaintiff has failed to establish that there are any triable issues as to this claim as well. (*Leftenant v City of New York*, 70 AD3d 596 [1st Dept 2010] [as officer had probable cause to arrest, defendant established complete defense to malicious prosecution claim, notwithstanding subsequent dismissal of charges]). In any event, actions of the District Attorney's office are not imputed to City. (*Id.*, 70 AD3d at 597).

B. Negligent hiring and retention claims

Absent any dispute that Brown and Fields were acting within the scope of their employment at the time they arrested plaintiff, City may not be held liable for their actions under the theories of negligent hiring, supervision, or retention. (*Id.*, 70 AD3d at 597). For the same reason, plaintiff is not entitled to the production of Brown's and Fields's personnel records or any complaints made against them. (*See Neiger v City of New York*, 72 AD3d 663 [2d Dept

2010] [as plaintiff conceded that driver acted within scope of employment, his personnel records not discoverable]; *Kourtalis v City of New York*, 191 AD2d 480 [2d Dept 1993] [complaints against officer irrelevant as defendant conceded officer acted within scope of employment]).

C. Constitutional claims

Finally, as plaintiff neither pleaded nor proved that the officers' actions resulted from an official City policy or custom, his constitutional civil rights claims have no basis. (*Leftenant*, 70 AD3d 597; *Graham v City of New York*, 279 AD2d 435 [1st Dept 2001] [civil rights claim dismissed absent official policy or custom that caused deprivation of constitutional right]).

IV. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that plaintiff's motion to compel is denied; it is further

ORDERED, that defendant City of New York's cross-motion for an order granting it summary judgment is granted, and the complaint is dismissed against defendant City with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that the action is dismissed in its entirety.

This constitutes the decision and order of the court.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 7, 2010
New York, New York

FILED
JUN 11 2010
NEW YORK
COUNTY CLERK'S OFFICE