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SHORT FORM ORDER

COPY

INDEX No. 09-2669
CAL. No. 10-01421OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-30-10
ADJ. DATE
Mot. Seq. # 004 - MotD
005 - XMD

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MICHAEL J. NUZZO, V an infant by his parents and natural guardians, TINA NUZZO and MICHAEL J. NUZZO, IV and TINA NUZZO and MICHAEL J. NUZZO, IV, individually,

Plaintiffs,

- against -

BOARD OF EDUCATION OF SACHEM CENTRAL SCHOOL DISTRICT, MICHAEL GORDON and RICHARD PALMER,

Defendants.

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JOHN H. MULVEHILL, ESQ.
Attorney for Plaintiffs
220 Cambon Avenue
St. James, New York 11780

DONOHUE, MCGAHAN, et al
Attorney for Defendants
555 North Broadway, P.O. Box 350
Jericho, New York 11753

Upon the following papers numbered 1 to 34 read on this motion for summary judgment and cross-motion to produce and for leave to amend; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 31; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 32 - 34; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint is determined herein; and it is further

ORDERED that this cross motion by the plaintiffs for an order to produce or for leave to amend the complaint is denied.

This is an action to recover damages, personally and derivatively, for the alleged false identification and arrest of the infant plaintiff for vandalizing an unmarked school security vehicle at about midnight on July 8, 2008 at the Sachem Seneca Middle School located in Holbrook, New York. Two roving security guards for the Sachem Central School District (School District), Michael Gordon (Gordon) and Richard Palmer (Palmer), responded to an alarm that night and attempted to apprehend the

boys involved. Two boys were arrested by Suffolk County Police at the scene and taken to the Fifth Precinct, others escaped. The two roving security guards and the two boys who were arrested submitted statements to the Suffolk County Police Department on July 8, 2008 indicating that a Mike Nuzzo was also involved in said incident.

A school security camera video of the subject night showed four boys, one blond and the others dark haired, on the school property. The infant plaintiff's parents, the assistant principal, Jose Cruz, and the School District's head of security, Wayne Wilson, viewed the aforementioned video and a video of a subsequent incident. The School District took no disciplinary action against the infant plaintiff, who was a student at Sachem North High School and the only student named Michael Nuzzo in the school district. The infant plaintiff was subsequently arrested at his home on August 6, 2008, almost one month after the subject incident, and taken to the Fifth Precinct where he was charged with Class E felony of criminal mischief, third degree. The Family Court, Suffolk County (Freundlich, J.), granted the infant plaintiff an adjournment in contemplation of dismissal on October 3, 2008 (*see* Family Court Act § 315.3).

The plaintiffs allege that the individual defendants, the roving security guards, as employees of the School District, filed false complaints with the Suffolk County Police Department based on hearsay and without properly identifying the individual appearing in the two security camera videos. In addition, the plaintiffs allege that the School District, through its assistant principal Jose Cruz and head of security Wayne Wilson, failed or refused to retract said complaints when the true identity of the perpetrator became known 48 hours prior to the infant plaintiff's arrest. By their complaint, the plaintiffs allege causes of action for false arrest and false charges, false imprisonment, malicious prosecution, "words negligently spoken," negligent identification, and defamation. The Court's computer records indicate that the note of issue in this action was filed on June 30, 2010.

The defendants now move for summary judgment dismissing the complaint on the grounds that there is no evidence that the civilian complaints by the individual defendants to the Police Department induced in the infant plaintiff's arrest and imprisonment almost one month later. In addition, the defendants assert that inasmuch as the infant plaintiff accepted an adjournment in contemplation of dismissal, the defendants cannot be held liable for false arrest or malicious prosecution. The defendants also assert that the plaintiffs' allegations of negligence cannot be sustained in this action and that the witness statements of the individual defendants are entitled to qualified privilege.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

The petition dated September 12, 2008 filed by the Suffolk County Attorney's Office indicates that upon information and belief the infant plaintiff committed an act on July 8, 2008 at the Sachem

Seneca Jr. High School which if committed by an adult would constitute the crime of criminal mischief in the third degree in violation of section 145.05 (2) of the Penal Law, a Class E felony. In addition, the petition indicates that, "Michael Nuzzo was identified by Michael Gordon, a school security officer, as being one of the kids gathered around the security vehicle which was damaged. Richard Palmer did not give anyone permission to damage the school security vehicle." The petition further indicates that information and belief was based on the statements of Palmer, Gordon, and the two boys arrested on July 8, 2008.

Gordon's sworn statement dated July 8, 2008 to the Police Department contained the statement, "I saw one kid that I know who is Michael Nuzzo who got away." However, at his deposition Gordon denied that the infant plaintiff, who was also present at the deposition, was the Michael Nuzzo that he was referring to in the statement. Instead, Gordon described the boy as tall and blond and explained that he learned the name of Michael Nuzzo from police when they were called to an incident prior to July 8, 2008 involving a tall, blond haired boy. According to Gordon, the police officer and sergeant at the scene told him that their identification was based on the boy's probation card. Palmer's statement to the Police Department on July 8, 2008 indicated that, "One of the kids, now known to me as Michael Nuzzo jumped over a white fence and disappeared." At his deposition, Palmer explained that he learned of the name from Gordon on the night of the incident when the blond haired boy came out of the woods and Gordon told Palmer that he had a Police Department identification one week prior that the boy's name was Michael Nuzzo. Both Gordon and Palmer testified at their depositions that they did not know the infant plaintiff, who was present during the depositions, and that they did not verify the identifications of the boys allegedly involved in the subject incident. The two boys who were arrested at the scene of the incident submitted sworn statements to the Police Department indicating that Michael Nuzzo was with them but that when the security guards arrived he got away.

The infant plaintiff testified at his General Municipal Law § 50-h hearing that a student at his High School named Richard Avella, a blond boy, told him prior to this incident that he was using the infant plaintiff's name whenever he got in trouble. The infant plaintiff also testified that other than said student, he did not know any of the other boys involved in the subject incident, including the two who gave sworn statements to the police. The infant plaintiff further testified that he did not know the security guards, Gordon and Palmer. The infant plaintiff's mother testified at her General Municipal Law § 50-h hearing that her son informed her in October 2007 that Avella was using her son's name. The hearing testimony of the infant plaintiff reveals that he was never at said middle school during the summer of 2008 and the hearing testimony of his mother indicates that the infant plaintiff was at home on the night of the subject incident.

The assistant principal testified at his deposition that the subject incident came to his attention about one week after its occurrence, and that the infant plaintiff's mother's concerns and complaints prompted him to request that security come in and show her the security video in his office. Both the infant plaintiff's mother and the assistant principal testified that the school security video images that they watched were not clear. According to the assistant principal's testimony, the review of the videos was inconclusive and he, thereafter, advised the building principal that the police were investigating the matter and recommended that the School District not pursue this further as a disciplinary matter. In

addition, he testified that he requested the head of security at the time of their review of the videos to save the video CDs, but that the CDs could not currently be located. The assistant principal also testified that his review of School District records revealed that the infant plaintiff was the only Michael Nuzzo in the School District. He further testified that he never notified the police not to arrest the infant plaintiff. The deposition testimony of the infant plaintiff's mother and the assistant principal reveal that the infant plaintiff's mother insisted during the review of the security videos that the images did not depict her son and that her son did not own clothing that matched what appeared in the videos.

New York courts do not recognize claims for negligent or malicious investigation (***Johnson v Kings County DA's Office***, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003]). With respect to the tort of malicious prosecution, the plaintiff must demonstrate (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice (*see* ***Gebbie v Gertz Div. of Allied Stores of New York, Inc.***, 94 AD2d 165, 169, 463 NYS2d 482 [2d Dept 1983]).

Here, inasmuch as an adjournment in contemplation of dismissal is neither a conviction nor an acquittal, the plaintiffs cannot establish a termination in favor of the infant plaintiff, one of the necessary elements of a cause of action for malicious prosecution (*see* ***Hollender v Trump Vil. Coop., Inc.***, 58 NY2d 420, 425-426, 461 NYS2d 765 [1983]; ***Malanga v Sears, Roebuck & Co.***, 109 AD2d 1054, 1054, 487 NYS2d 194 [4th Dept 1985]). Therefore, the defendants are granted summary judgment dismissing the cause of action for malicious prosecution.

To establish a cause of action for false arrest or false imprisonment, the plaintiff must show that (1) the defendant intended to confine him, (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 (*see* ***Gebbie v Gertz Div. of Allied Stores of New York, Inc.***, 94 AD2d at 169; ***Parvi v Kingston***, 41 NY2d 553, 556, 394 NYS2d 161 [1977]). The defendant has the burden of proving legal justification as an affirmative defense (*see id.*).

An adjournment in contemplation of dismissal is not legally decisive of the causes of action for false arrest or false imprisonment (*see* ***Hollender v Trump Vil. Coop., Inc.***, 58 NY2d at 425). The defendants failed to proffer evidence that they did not affirmatively induce the Police Department to act and therefore failed to establish their prima facie entitlement to judgment dismissing the causes of action alleging false arrest and false imprisonment (*compare* ***Levy v Grandone***, 14 AD3d 660, 789 NYS2d 291 [2d Dept 2005]; ***Cotter v Summit Sec. Servs., Inc.***, 14 AD3d 475, 788 NYS2d 153 [2d Dept 2005]). Notably absent from the submitted evidence is any proof relating to whether Gordon or Palmer merely provided a complaint to police on July 8, 2008 or whether thereafter they had any active involvement in the prosecution of this matter, such as by giving advice or encouragement to the authorities (*compare* ***Levy v Grandone***, 14 AD3d at 661; ***Wasilewicz v Village of Monroe Police Dept.***, 3 AD3d 561, 562, 771 NYS2d 170 [2d Dept 2004]). The deposition transcripts of the Gordon and Palmer fail to elucidate what, if any, actions they took with respect to this matter after submitting their statements to police.

The cause of action alleging "words negligently spoken" by the defendants and relied on by the Police Department most closely resembles an allegation of negligent misrepresentation. To recover on a theory of negligent misrepresentation, a plaintiff must establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false, and that the plaintiff reasonably relied upon the information provided (*see* ***Grammer v Turits***, 271 AD2d 644, 645, 706 NYS2d 453 [2d Dept 2000]). Here, inasmuch as it was the police, not the plaintiffs, who relied upon the security guards' identification, the defendants are entitled to summary judgment dismissing said cause of action (*see* ***Collins v Brown***, 129 AD2d 902, 904, 514 NYS2d 538 [3d Dept 1987]; *see also* ***Antonious v Muhammad***, 250 AD2d 559, 560, 673 NYS2d 158 [2d Dept 1998]).

With respect to the cause of action alleging negligent identification, a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention "may not recover under broad general principles of negligence … but must proceed by way of the traditional remedies of false arrest and imprisonment" (*see* ***Antonious v Muhammad***, 250 AD2d at 559-560, quoting ***Boose v Rochester***, 71 AD2d 59, 62, 421 NYS2d 740 [4th Dept 1979]). Even if said cause of action could be characterized as one for false imprisonment based upon the negligence of the security guards in wrongly identifying the infant plaintiff, the underlying allegations do not support such a cause of action (*see* ***Williams v Buffalo***, 72 AD2d 952, 953, 422 NYS2d 241 [4th Dept 1979], *appeal dismissed* 49 NY2d 799, 426 NYS2d 735 [1980]; ***Maracle v State***, 50 Misc 2d 348, 270 NYS2d 439 [Ct Cl 1966]). Such a cause of action arises in a "misnomer case" when there are two or more persons to whom the name on a warrant applies with complete accuracy, and an officer is privileged to arrest the person whom he reasonably believes is the person intended only after using diligence to verify the defendant's identity (*see id.*). The instant action is not a "misnomer case" inasmuch as there allegedly was error in determining the true identity of the party to be named in the warrant, not in determining that the infant plaintiff was the person named in the warrant (*see* ***Boose v Rochester***, 71 AD2d at 67). Therefore, the defendants are entitled to summary judgment dismissing said cause of action.

Regarding the causes of action seeking damages for defamation, the defendants seek summary judgment on the ground that the security guards' statements were protected by a qualified privilege covering communications with police (*see* ***Toker v Pollak***, 44 NY2d 211, 220, 405 NYS2d 1[1978]; ***Mohen v Stepanov***, 59 AD3d 502, 505-506, 873 NYS2d 687 [2d Dept 2009]; ***Levy v Grandone***, 14 AD3d at 662). However, the defendants must plead qualified privilege as an affirmative defense and thereafter move for summary judgment on that defense, supporting the motion with competent evidence establishing a prima facie showing of qualified privilege (*see* ***Wilcox v Newark Val. Cent. School Dist.***, 74 AD3d 1558, 1562, 904 NYS2d 523 [3d Dept 2010]; ***Demas v Levitsky***, 291 AD2d 653, 661, 738 NYS2d 402 [3d Dept 2002], *lv dismissed* 98 NY2d 728, 749 NYS2d 477 [2002]). In the event that defendants made such a showing, the burden would then shift to the plaintiffs to demonstrate that the statements were uttered with malice, either under the common law or constitutional standard (*see id.*). Inasmuch as the defendants failed to plead qualified privilege as an affirmative defense in their answer, their request for summary judgment dismissing the defamation cause of action is denied.

The plaintiffs now cross-move for an order to produce or for leave to amend the complaint.

Post-note discovery may only be sought under two procedural circumstances set forth in 22 NYCRR 202.21 (*see* ***Tirado v Miller***, 75 AD3d 153, 157, 901 NYS2d 358 [2d Dept 2010]). One method of obtaining post-note discovery is to vacate the note of issue within 20 days of its service pursuant to 22 NYCRR 202.21 (e), by merely showing that discovery is incomplete and that the matter is not ready for trial (***Tirado v Miller***, 75 AD3d at 157; ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 138, 707 NYS2d 137 [2d Dept 2000]). The second method, applicable beyond that 20 days, requires that the movant, pursuant to 22 NYCRR 202.21 (d), meet a more stringent standard and demonstrate "unusual or unanticipated circumstances and substantial prejudice" absent the additional discovery (***Tirado v Miller***, 75 AD3d at 157; ***Audiovox Corp. v Benyamini***, 265 AD2d at 138).

Here, the note of issue of this action was never stricken as a result of any motion filed within the 20-day deadline of 22 NYCRR 202.21 (a). Therefore, any additional discovery sought by the plaintiffs must meet the requirements of 22 NYCRR 202.21 (d) that the discovery is needed due to "unusual or unanticipated circumstances" and that its absence causes "substantial prejudice" (*see* ***Tirado v Miller***, 75 AD3d at 157). The plaintiffs failed to make the requisite showing that "unusual or unanticipated circumstances" arose after the filing of the note of issue (*see* ***Racine v Grant***, 65 AD3d 535, 882 NYS2d 908 [2d Dept 2009]). Therefore, the request for an order to produce is denied. In addition, the plaintiffs failed to indicate in their papers what it is that they seek to amend in their complaint and have not submitted a proposed amended complaint. Therefore, said request is also denied.

Accordingly, the instant motion for summary judgment is granted solely to the extent that the third, fourth and fifth causes of action alleging malicious prosecution, negligent misrepresentation, and negligent identification are dismissed. The cross motion for an order to produce and for leave to amend the complaint is denied.

Dated: April 4, 2011

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**