Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Donnell Dunson,

Plaintiff,

- against -

The City of New York, New York City Police Department,

Defendants.

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Index Number: 5337/09

Motion Date: 10/18/11

Motion Cal. Number: 6

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by the City of New York (sued herein as the City of New York and New York City Police Department) (hereinafter the City) for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is granted.

Plaintiff was arrested and charged with murder in the second degree and criminal possession of a weapon in the second degree on December 8, 2007 in connection with the murder of one Shashuana Sanders at approximately 7:15 A.M. on said date. There were two witnesses to the murder: one Angela Jarrell and one Justin Elder. Jarrell was interviewed by the police at 8:15 A.M. and Elder was interviewed at 9:00 A.M. on said date.

Jarrell stated that she and the victim were picked up by Elder and another male in Elder's car and went to a bar at approximately 2:00-3:00 A.M. on December 8, 2007, stayed at the bar until approximately 3:40 - 4:00 A.M., and then drove back to Elder's

house. They dropped the other male off at some point en route to pick up his car, and said individual followed them back to Elder's house. Jarrell and Elder went to Elder's room in the basement, and the victim and the other man went to another room in the basement. At some point an argument broke out between the victim and the other man because the victim could not find her cell phone and the man left and drove away but then returned. The victim went outside, wielding a kitchen knife, and approached the man's car and started pounding on the window with the knife. The man then rolled down his window, threatened to shoot the victim, and Jarrell states that she then heard one gunshot emanating from the car, saw the victim fall to the ground and saw the car speed off.

Elder stated that he knew plaintiff, whom he referred to by name as Darnell, through his brother with whom he went to school for 4-6 years. At some time in the night of December 8th he met with plaintiff and mentioned that he was going to meet two girls. Plaintiff thereupon accompanied Elder. They met the girls, Angela and Shashauna, and they all went to a club, then a bar, and then went to his residence, a home owned by his grandmother. Elder and Angela went to his basement apartment, while Darnell and Shashauna went to another room. After a while an argument erupted between the latter two over the victim's allegedly lost cell phone and Darnell left. Shashauna grabbed a knife and went outside and Darnell was in his car holding a black gun. She approached the car and began scratching it with the knife. Darnell warned her that he had a gun and that she should go away, but she did not listen. Elder then started going to a neighbor's house, heard a gunshot, looked back and saw the victim lying on the ground and Darnell driving away.

Elder was thereupon shown a confirmatory photograph of plaintiff, and Elder picked up the photograph and stated that it was Darnell and that he shot the girl.

Detective Daniel Bendig, the investigator assigned to the homicide case, when asked in his deposition whether a photo array consisting of more than one photograph should be shown where there is a photo identification to be conducted, explained that such is the procedure if the parties are unknown to each other. But if they know each other and such fact is articulated, then a confirmatory identification consisting of one photo can be done.

Upon the basis of Elder's eyewitness identification of plaintiff, whom he knew by name and identified in a confirmatory photograph, Detective Bendig and other officers arrested plaintiff in his grandmother's home at approximately 11:00 A.M. on December 8, 2007. Detective Bendig testified that plaintiff's grandmother answered the door and gave them permission to enter her home and

search it for plaintiff. Plaintiff testified in his 50-h hearing that his grandmother answered the door, but the police pushed their way into the home. In any event, the entry into the home was not pursuant to an arrest warrant.

At 8:05 P.M. that same day, a physical lineup was conducted before Jarrell, and Jarrell failed to identify plaintiff. Elder likewise failed to identify plaintiff at a subsequent lineup.

Plaintiff was ultimately released from custody on February 8, 2008.

Plaintiff thereafter filed a notice of claim on March 28, 2008 asserting claims for false arrest and unlawful imprisonment. Plaintiff commenced the underlying action on March 6, 2009. In his complaint, plaintiff asserts causes of action for false arrest and unlawful imprisonment, Constitutional violations of his right to due process and liberty pursuant to the Fifth and Fourteenth Amendments, negligent hiring, training, supervision and retention, and intentional and/or negligent infliction of emotional harm.

The City moves for summary judgment upon the grounds that plaintiff's claims for false arrest and false imprisonment must be dismissed upon the ground that plaintiff's arrest was supported by probable cause, that his claims for negligent hiring, training, supervision and retention must be dismissed because they were not alleged in the notice of claim, that plaintiff's negligent hiring, training, supervision and retention claims must additionally be dismissed because the police officers were acting within the scope of their employment, that plaintiff's intentional/negligent infliction of emotional distress claim must fail because such claims do not lie against the City and its employees engaged in official conduct and that, in any event, the facts hereunder do not satisfy the elements of causes of action for intentional or negligent infliction of emotional distress, and that plaintiff's §1983 claim against defendants must be dismissed upon the grounds that the police had probable cause to arrest plaintiff and that plaintiff failed to plead and prove an official policy or custom to deny constitutional rights.

A finding of probable cause operates as a complete defense to an action alleging false arrest and false imprisonment (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2nd Dept 2003]). Information provided by an identified citizen accusing another individual of a crime constitutes sufficient probable cause for the police to arrest, unless under the circumstances a reasonable person would have made further inquiry and the arresting officer

failed to do so (see id). Plaintiff was arrested based upon his identification by an eyewitness to the murder, who specifically mentioned him by name, explained, as detailed in his statement heretofore mentioned, how he knew plaintiff and the circumstances of his presence at the murder scene and confirmed that the photograph shown him of plaintiff was indeed the Darnell that shot the victim. Under the circumstances, the Court finds that the City had ample probable cause to arrest plaintiff, that the arresting officers acted reasonably based upon such positive identification and that no further inquiry was indicated based upon the facts presented at the time. Moreover, such probable cause was not negated by Jarrell's subsequent failure to pick plaintiff out of a lineup or by Elder's failure, on an indeterminate date subsequent to the arrest, to offer a positive identification of plaintiff. Plaintiff's argument that there is a question of fact as to whether there was probable cause to continue to detain plaintiff from the time Elder failed to identify him up to the date he was released from custody is without merit, since there is no evidence or allegation, on this record, as to when the lineup occurred in which Elder failed to identify plaintiff and there is no allegation or showing that plaintiff was detained for an inordinate period of time after Elder failed to offer a positive identification of plaintiff at the lineup.

Therefore, plaintiff's causes of action for false arrest and unlawful imprisonment must be dismissed, as a matter of law.

Plaintiff's causes of action alleging negligent hiring, training, supervision and retention must also be dismissed because they were not alleged in the notice of claim (see Bonilla v City of New York, 232 AD 2d 597 [2nd Dept 1996]). A condition precedent to commencement of a tort action against a municipality or municipal entity is the service of a notice of claim upon the municipality or municipal entity(see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" (General Municipal Law §50-e [2]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785 [2nd Dept 2008] internal quotations and citations omitted]). Even had they been included in the notice of claim, it is a well-established principle that no action for negligent hiring, training, retention or supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause

of action for negligent hiring, training, retention and supervision would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324). Indeed, plaintiff does not oppose that branch of the motion seeking dismissal of these causes of action.

With respect to plaintiff's claims of intentional and/or negligent infliction of emotional distress, both such causes of action require allegations of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society" (Berrios v Our Lady of Mercy Medical Center, 20 AD 3d 361, 362 [1st Dept 2005] [citations and internal quotations omitted]). The allegations of the complaint, and the record on this motion, do not support a claim for either intentional or negligent infliction of emotional distress. In any event, with respect to intentional infliction of emotional distress, such a claim may not be brought against a municipality (see Clark-Fitzpatrick, Inc. V. Long Island Railroad, 70 NY 2d 382 [1987]). Plaintiff does not oppose the granting of summary judgment dismissing his claims of intentional and negligent infliction of emotional distress.

With respect to plaintiff's causes of action for violation of his Constitutional rights, the only vehicle for an individual to seek a civil remedy for violations of Constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]). Although there is no issue that the notice of claim requirements under General Municipal Law §50-e do not apply to claims brought pursuant to 42 U.S.C. §1983 and, therefore, a §1983 claim need not be set forth in a notice of claim as a prerequisite to an action asserting such claim (see Pendleton v. City of New York, 44 AD 3d 733 [2nd Dept 2007]), the complaint herein does not include a cause of action under §1983 and, thus, plaintiff's claims for violation of his Constitutional rights fail to state a cause of action and must be dismissed.

Even if, arguendo, the Court were to deem the complaint as seeking damages under §1983, and indeed the City, in its moving papers, considers plaintiff's claims for "denial of due process" and "denial of liberty right" to be claims brought pursuant to

§1983, a municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a Constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original). Plaintiff has neither shown nor alleged that plaintiff's arrest and prosecution was as a result of the implementation of an official policy or custom of the City.

In any event, the existence of probable cause for the arrest and detention of plaintiff immunizes the City against a claim brought pursuant to §1983 (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]), even had plaintiff alleged an official policy or custom on the part of the City.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: October 24, 2011

KEVIN J. KERRIGAN,,J.S.C.