

**Williams v City of New York**

2011 NY Slip Op 33868(U)

August 1, 2011

Sup Ct, Bronx County

Docket Number: 23325/04

Judge: Mark Friedlander

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PART 03

AUG 03 2011

Case Disposed   
 Settle Order   
 Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

-----X  
 WILLIAMS, ROHAN

Index No. 0023325/2004

-against-

Hon. ~~HARRY S. SCHLESINGER~~  
**MARK FRIEDLANDER** Justice.

THE CITY OF NEW YORK  
 -----X

The following papers numbered 1 to 4 Read on this motion, DISMISSAL  
 Noticed on July 23 2010 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 2/4/2011

|  | PAPERS NUMBERED |  |
|--|-----------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1-2             |  |
| Answering Affidavit and Exhibits   | 3               |  |
| Replying Affidavit and Exhibits  | 4               |  |
| _____ Affidavits and Exhibits  |                 |  |
| Pleadings - Exhibit  |                 |  |
| Stipulation(s) - Referee's Report - Minutes                              |                 |  |
| Filed Papers   |                 |  |
| Memoranda of Law   |                 |  |

Upon the foregoing papers this

**MOTION IS DECIDED IN ACCORDANCE WITH  
 MEMORANDUM DECISION FILED HERewith.**

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 8 / 1 / 11

Hon.   
~~HARRY S. SCHLESINGER~~, J.S.C.  
**MARK FRIEDLANDER**

C

NEW YORK SUPREME COURT-COUNTY OF BRONX  
PART IA-25

ROHAN WILLIAMS,

Plaintiff,

-against

**MEMORANDUM  
DECISION/ORDER**  
Index No. 23325/04

THE CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, POLICE OFFICER NICHOLAS CIUFFI  
and POLICE OFFICER MICHAEL J. DEPAOLIS,

Defendants.

HON. MARK FRIEDLANDER

Defendants, The City of New York (“City”), New York City Police Department (“Police Department”), and Police Officers Nicholas Ciuffi (“Ciuffi”) and Michael J. Depaolis (“Depaolis”) move for an Order, pursuant to CPLR §§3211 and 3212, dismissing plaintiff’s complaint and/or summary judgment. Defendants’ motion is decided as hereinafter indicated.

Plaintiff seeks to recover monetary damages from the defendants. His complaint contains ten causes of action. The first cause of action alleges that plaintiff was falsely arrested. The second cause of action alleges that plaintiff was maliciously prosecuted and unlawfully imprisoned. The third cause of action alleges that plaintiff was subject to negligent and intentional infliction of severe emotional distress. The fourth cause of action alleges that plaintiff was subject to excessive and unreasonable force. The fifth cause of action alleges that defendant City was negligent in its hiring, retention, training, supervision, instruction and monitoring of defendants Ciuffi and Depaolis. The sixth and seventh causes of action allege that Police Officers Ciuffi and Depaolis violated the New York City Human Rights Law, Title 8 of

the Administrative Code of the City of New York, Section 8-502, *et seq.*, and Article 15 of the New York State Human Rights Law, Executive Law, Section 296, *et seq.*, by engaging in unlawful and discriminatory practices based upon plaintiff's sex, race or ethnic background. The eighth cause of action alleges that defendants engaged in discriminatory conduct based upon plaintiff's sex, race or ethnic background, in violation of 42 U.S.C. §1983. The ninth and tenth causes of action seek attorneys' fees.

The relevant facts are as follows: On July 19, 2003, at approximately 5:20 P.M., in front of the premises located at 835 East 226<sup>th</sup> Street, Bronx, New York, Andre Green was stabbed to death. Two eyewitnesses were interviewed by the police. The accounts of the homicide by these eyewitness, Jamile Wilson and Walter Turner, were substantially similar.

On July 19, 2003, at 7:15 P.M., the following statement (corrected for grammar and readability) was made by Mr. Turner to the police:

The 19<sup>th</sup> of July I saw a friend of mine get killed right in front of me. My friend and I, "Will," were in the living room of my house at about 5:30 p.m. when we heard voices yelling outside my home. So I looked out my window and saw Jamal and Andre walking toward a white [motor vehicle]. I quickly went outside to see what was going on. I saw Jamal and Andre at the driver side front [of the vehicle] fighting with two other males. As they were fighting, I saw the driver pull out a knife and cut Andre on the neck and then cut him again on his left side of his body. He stabbed him in the chest area. After that the two men got back in the car and sped away. They went toward 226<sup>th</sup> Street and White Plains Road. Andre looked up to the sky and fell on his back. His eyes rolled back in his head. I quickly called the police on my portable home phone. The driver was a male black Jamaican between 20-25, 6', thin, dark skin, wearing a "wife beater" and blue jeans. The knife was in his right hand. The passenger was a male black Jamaican, thin, 5'8", short, with a Bob Marley Tee shirt. I saw both of these people in and out of the car on White Plains Road and on 227<sup>th</sup> St. and Barnes Ave. I saw the car before with the same driver.

On July 19, 2003, at 7:45 P.M., the following statement (corrected for grammar and readability) was taken from Mr. Wilson by the police:

States that he was with his friend Drea (Andre) and the two were walking back to Mr. Wilson's home at 835 East 226 Street. They were walking east on East 226 Street from White Plains Road towards Barnes Avenue. When they got to Barnes Avenue there was a white car (possibly a 4dr Maxima or Acura) that was driving erratic. Drea told the driver to slow down and take it easy. Drea got into an argument with the driver of the car. Drea went over to the car and was talking to the driver. Drea at one point was bent over on the car on the driver's side. Mr. Wilson left the car and walked towards his home. The driver backed the car up to the front of 832 East 226 Street got out of the car. He had a silver handle switch blade in his hand. He grabbed Drea by the shirt and pointed the knife at his neck. Mr. Wilson stepped in to break up the two. The male cut Drea under the chin and Drea fell back. Mr. Wilson tried to keep Drea from fighting the male. Drea went towards the male and the male stabbed him in the chest. Drea fell to the ground and the male got into the car and drive off. There was another male in the car with the driver who also exited the car and was telling the driver to open the trunk. The driver never did open the trunk. This other male was in the passenger seat and got back into the passenger seat and fled the scene with the driver.

Mr. Wilson described the driver who stabbed Drea as a M/BK/Jamaican 23-25/6'2"-4"slim/sht hair/must/dark skin/bl/jeans & wh tee shirt//wh. sneakers.

On July 19, 2003, at approximately 7:45 P.M., Mr. Turner viewed Force Field photos at the 47<sup>th</sup> Precinct. Approximately ten minutes later, he positively identified Oneir McIntosh as the male in the company of the person who stabbed Mr. Green, and the passenger in the subject vehicle. Approximately fifteen minutes later, Mr. Turner positively identified Rohan Williams as the person who drove the white vehicle and stabbed Mr. Green.

On July 19, 2003, at approximately 8:30 P.M., Mr. Wilson was shown two photo arrays. One array contained a photo of Rohan Williams and the other contained a photo of someone whose name was redacted on the police report. After review of the arrays Mr. Wilson made no identification.

On July 22, 2003, at approximately 3:20 P.M., Rohan Williams was arrested. At 8:38 P.M., approximately five hours and twenty minutes later, a seated lineup was conducted. Mr. Williams was positively identified by Mr. Turner as the individual who stabbed Mr. Green on July 19, 2003. At 10:00 P.M., approximately one hour and twenty minutes later, Detective Ciuffi, after conferral with an Assistant District Attorney, arrested and charged Mr. Williams with the homicide (Second Degree Murder) of Mr. Green. Williams was later indicted by a grand jury.

Mr. Williams was held at Rikers Island for approximately four months, and was released from custody on December 8, 2003, upon posting of \$10,000.00 bail. After numerous subsequent court appearances, in a written Recommendation for Dismissal ("Recommendation"), dated August 16, 2004, Assistant District Attorney Gary R. Weil recommended dismissal of the charges against Mr. Williams. The Recommendation stated, *inter alia*, that the witness (Mr. Turner) was re-interviewed on July 12, 2004. Mr. Turner confirmed the descriptions he gave the police; that he knew Andre Green to be very tall (6'7") and that the man who stabbed Andre was only a few inches shorter than Andre. When Mr. Weil told Mr. Turner that the man he identified was only 5'9" tall, Mr. Turner immediately stated "Then he's not the guy." He reiterated that the stabber was only 3 or 4 inches shorter than Andre Green. Based upon the fact that Mr. Wilson never identified Mr. Williams as the perpetrator; that both witnesses never viewed Mr. Williams standing up; that both witness descriptions of the perpetrator were consistent with each other; and that both descriptions are inconsistent with the description of Mr. Williams; Mr. Weil stated that the People would be unable to meet their burden of proof at trial and thus recommended the dismissal of the indictment.

Plaintiff's first and second causes of action are dismissed. Plaintiff's first cause of action is for false arrest and/or imprisonment. Plaintiff's second cause of action is for malicious prosecution.

The elements of a cause of action for false arrest and/or imprisonment are: (1) the defendant intended confine him/her; (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. *Broughton v. State of New York*, 37 N.Y.2d 451, 456 (1975).

The elements of a cause of action for malicious prosecution are: (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. *Id.* at 457.

It is undisputed that plaintiff was arrested without a warrant. A warrantless arrest is presumptively invalid and raises a presumption of lack of probable cause. *Lawson v. City of New York*, 83 A.D.3d 609 (1<sup>st</sup> Dept. 2011). However, a grand jury's indictment raises a presumption of probable cause. *Colon v. City of New York*, 60 N.Y.2d 78 (1983); *Narvaez v. City of New York*, 83 A.D.3d 516 (1<sup>st</sup> Dept. 2011). "This presumption may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts to either the Grand Jury or the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith." *Colon v. City of New York*, *supra*, at 83 (citations omitted). Here, the plaintiff has not met the test for overcoming the presumption.

The evidence establishes that Mr. Williams was arrested and charged with the homicide

only after an eyewitness, Mr. Turner, positively identified Mr. Williams, in a seated lineup, as the perpetrator, and Detective Ciuffi conferred with an Assistant District Attorney. An identification by an identified citizen that an individual committed a specific crime is sufficient to provide the police with probable cause to arrest. *Norasteh v. State*, 44 A.D.3d 576 (1<sup>st</sup> Dept. 2007).

Detective Cioffi explained in his deposition that a seated lineup is used "to try and make it as fair as possible" because "sometimes fillers are shorter or taller than the suspect." Detective Cioffi further testified at his deposition that "I don't recall, as I said earlier, anybody telling me that the victim was six foot seven, first of all, but if I'm not mistaken also on his arrest report, it's indicated that he was about five foot nine which is about three inches off six feet which, in my experience, is not a far stretch for people describing things in a traumatic experience and a three inches - - can someone three inches shorter stab someone in the neck, I would say yes, in my opinion."

While a height differential may not be discerned or appreciated in a seated lineup, this does not render the lineup unduly suggestive or taint the identification, as seated lineups have been held to be proper. *People v. Jackson*, 61 A.D.3d 620 (1<sup>st</sup> Dept. 2009); *People v. Amuso*, 39 A.D.3d 425 (1<sup>st</sup> Dept. 2007). Furthermore, the presence of some element of untrustworthiness goes only to the identification's weight, not its admissibility. *Hoyle v. Lape*, \_\_\_ F.3d \_\_\_, 2009 S.S. Dist. LEXIS 29016 (E.D.N.Y., April 3, 2009). Neither the variations in the description of perpetrator nor the evidence presented by the plaintiff demonstrate a withholding or misrepresentation of evidence, or bad faith. Thus, the Court finds that plaintiff failed to rebut the presumption of probable cause. A finding of probable cause is a complete defense to claims of false arrest and imprisonment and malicious prosecution, under both state and federal standards.

*Lawson v. City of New York, supra; Narvaez v. City of New York, supra; Leftenant v. City of New York, 70 A.D.3d 596 (1<sup>st</sup> Dept. 2010); Arzeno v. Mack, 39 A.D.3d 341 (1<sup>st</sup> Dept. 2007).*

Plaintiff's third cause of action is dismissed. Claims of intentional infliction of emotional distress, as a matter of public policy, are barred against governmental bodies (*Dillon v. City of New York, 261 A.D.2d 34, 41 [1<sup>st</sup> Dept. 1999]; Lauer v. City of New York, 240 A.D.2d 543 [2<sup>nd</sup> Dept. 1997]*) and it is undisputed that Police Officers Ciuffi and Depaolis were acting within the scope of their employment. Moreover, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants 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 community." *Sheila C. v. Povich, 11 A.D.3d 120, 130-131 (1<sup>st</sup> Dept. 2004).* Such extreme and outrageous conduct must be clearly alleged in the complaint to survive a motion to dismiss. *Dillon v. City of New York, supra.*

Plaintiff's complaint fails to allege any facts to support said cause of action. Furthermore, assuming arguendo, for the purpose of this motion, that: police officers screamed at plaintiff; Detective Ciuffi said in a nasty tone "You should go back to Jamaica," "I know it was you, you're a killer," and "I know you're a liar," such conduct, while entirely offensive, simply does not rise to the level of conduct necessary to sustain a claim of either intentional or negligent infliction of emotional distress. *Capellan v. Marsh, 71 A.D.3d 505 (1<sup>st</sup> Dept. 2010).*

Plaintiff's fourth cause of action is dismissed. Plaintiff has not demonstrated a triable issue of fact with respect to this cause of action. As previously stated, there was probable cause for the arrest. Consequently, plaintiff must submit evidence of bodily contact and more than a de

minimis injury. *Esmont v. City of New York*, 371 F. Supp.2d 202 (E.D.N.Y. 2005); *Johnson v. Suffolk County Police Dept.*, 245 A.D.2d 340 (2<sup>nd</sup> Dept. 1997). Here, plaintiff has alleged psychological, not physical, injuries.

Plaintiff's fifth cause of action is dismissed. Plaintiff's complaint alleges that Police Officers Ciuffi and Depaolis were employees of the City and Police Department, and with respect to all acts referred to therein, said police officers were acting in the performance of such employment and in the scope of their authority. Here, the City and Police Department in their motion papers acknowledge that Police Officers Ciuffi and Depaolis, in investigating a violent crime, interviewing witnesses, conducting a lineup and effectuating an arrest, were acting within the scope of their employment. "Where an employee is acting within the scope of his employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention." *Karoon v. New York City Transit Auth.*, 241 A.D.2d 323 (1<sup>st</sup> Dept. 1997); *Leftenant v. City of New York*, *supra*; *Griffin v. City of New York*, 67 A.D.3d 550 (1<sup>st</sup> Dept. 2009). Accordingly, plaintiff's fifth cause of action is not viable.

The claim asserted against the City and Police Department under 42 USC §1983 must be dismissed for failure to demonstrate and/or allege that the actions taken by Police Officers Ciuffi and Depaolis resulted from official municipal policy or custom. *Delgado v. City of New York*, 2011 WL 3188287 (1<sup>st</sup> Dept. 2011); *Leftenant v. City of New York*, *supra*, at 597, citing *Monel v. Department of Social Serv. of City of N.Y.*, 436 U.S. 658, 690-691(1978).

The sixth, seventh and eighth causes of action are dismissed. While plaintiff alleges that Police Officers Ciuffi and Depaolis violated the New York City Human Rights Law, Title 8 of

the Administrative Code of the City of New York, Section 8-502, *et seq.*, and Article 15 of the New York State Human Rights Law, Executive Law, Section 296, *et seq.*, his failure to state in his complaint, and on this motion, the specific conduct engaged in warrants dismissal. *Torge v. New York Society for Deaf*, 270 A.D.2d 153 (1<sup>st</sup> Dept. 2000); *Edwards v. Board of Trustees of Colgate Rochester Divinity School*, 254 A.D.2d 709 (4<sup>th</sup> Dept. 1998). Since both eyewitnesses to the homicide identified the perpetrator as a male black Jamaican, plaintiff must provide factual specifics to withstand a motion to dismiss.

The ninth and tenth causes of action seeking attorneys' fees and punitive damages are denied for all the reasons stated above.

Accordingly, plaintiff's complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: \_\_\_\_\_

8/1/11

  
\_\_\_\_\_  
MARK FRIEDLANDER, J.S.C.