

Howell v County of Wayne

2012 NY Slip Op 30006(U)

January 5, 2012

Sup Ct, Wayne County

Docket Number: 73236/2011

Judge: Daniel G. Barrett

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At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 16th of November, 2011.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

VICTOR HOWELL,

Plaintiff

DECISION
Index No. 73236

-vs-

2011

COUNTY OF WAYNE, WAYNE COUNTY,
SHERIFF'S DEPARTMENT, BRIAN AMEELE,

Defendants

The Defendants have made a motion to dismiss the Complaint of the Plaintiff prior to submitting their Answer. In support of their application Defendants submitted the Summons with Notice, Verified Complaint and press release of the Wayne County Sheriff. The applications of the Defendants and Plaintiff were accompanied by Affirmations of counsel.

On October 3, 2009, the Fast-Trac convenience store in Wolcott was robbed. An eye-witness to the robbery was the on duty store clerk who told the investigators she recognized the Plaintiff as the robber as she had seen him walking his dog in the Village on a prior occasion. This clerk was also presented with a single photo array by the investigators and she identified the Plaintiff as the robber.

Thereafter Wayne County Deputy Ameele arrested the Plaintiff without a warrant, according to the Verified Complaint, on October 4, 2009. The Wayne County Sheriff's Office, the press release, provided factual information about the arrest.

Unable to post bail, the Plaintiff was incarcerated until February 2, 2010. On that date, the Plaintiff was released from jail with conditions. After his arrest the Plaintiff was indicted by the Grand Jury for the robbery.

The Plaintiff was acquitted of the charges pertaining to the robbery on May 27, 2010, by a jury. On August 12, 2010 the Plaintiff filed a Notice of Claim and one year later, August 12, 2011, the Plaintiff filed an action against the Defendants. The causes of action alleged are: intentional infliction of emotional distress; false imprisonment; malicious prosecution; negligent supervision, retention, training and hiring; slander and libel; defamation; slander per se; and civil rights violations.

Intentional Infliction of Emotional Distress

This cause of action pleaded against the municipal Defendants must be dismissed. It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity, (see Laurer v. City of New York, 240 A.D. 2d 543).

As to Deputy Ameele the action should be dismissed as well. The elements of this cause of action are: (I) extreme and outrageous conduct; (II) intent to cause, or disregard of a substantial probability of causing severe emotional distress, Howell v. New York Post Co., 81 N.Y. 2d 115.

Extreme and outrageous conduct is measured by the reasonable bounds of decency tolerated by a decent society, Marmelstein v. Kehillat New Hempstead, 11 N.Y. 3d 15. Whether the conduct complained of is outrageous in the first instance is for the courts to determine, Cavallaro v. Pozzi, 28 A.D. 3d 1075.

False Arrest and False Imprisonment

Under the current and controlling state law, the claims for false arrest and false imprisonment are untimely.

As the Defendants correctly assert, Plaintiff's false arrest and false imprisonment causes of actions stemming from the arrest are statutorily barred pursuant to General Municipal Law § 50-e due to the fact that filing of the Notice of Claim was untimely, (Davidson v. Bronx Municipal Hospital, 64 N.Y. 2d 59). Since the Plaintiff was released from custody on February 2, 2010, he was required to file the Notice of Claim by May 4, 2010, (see Matter of Bush v. City of New York, 76 A.D. 3d 628). However, the Plaintiff filed the Notice of Claim on August 10, 2010, without leave of Court to file a late Notice of Claim. Thus the August 10, 2010 Notice of Claim is a nullity as to these two causes of action, (see Friedman v. City of New York, 19 A.D. 3d 542).

Claim brought pursuant to 42 USC § 1983

The foregoing analysis demonstrates the claims for false arrest and false imprisonment were untimely under state law. If probable cause existed for the arrest then the claims under 42 USC §1983 and state law must fail, (see Carlson v. Nassau County Police Dept., 306 A.D. 2d 365).

On this record the Court decides as a matter of law that the Defendants have sustained their burden of proof that Plaintiff's arrest was based on probable cause. Information from an identified citizen is allowed a high level of reliability and is presumed reliable, (see People v. Chipp, 75 N.Y. 2d 327). Probable cause does not require proof beyond a reasonable doubt. But merely information sufficient to support a reasonable belief that an offense has been committed by the person arrested, (People v. August, 33 A.D. 3d 1046). Prior to making the arrest Defendant, Deputy Ameele, had sufficient information to support the belief that the Plaintiff had committed a crime.

Malicious Prosecution

A necessary element of malicious prosecution is the absence of probable cause for the criminal proceeding, (see Hicks v. City of Buffalo, 295 A.D. 2d 880). As expounded on previously, probable cause was found to exist. In addition, the Grand Jury Indictment provides probable cause for the criminal proceeding. To overcome that presumption, Plaintiff must establish that the Indictment was the product of fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith, (see Santiago v. City of Rochester, 19 A.D. 3d 1061). Since the store clerk had seen the Plaintiff before the robbery occurred, the presentation of the single photo array to the store clerk is not police conduct that overcomes presumption of probable cause.

Negligent supervision; retention; training; and hiring

The Plaintiff's claim against the Defendants County of Wayne and the Wayne County Sheriff's Department for negligent supervision, training

and hiring are not maintainable as the filed Notice of Claim failed to assert such a claim or allege facts which the Defendants could have gleaned Plaintiff's intention to raise such a claim, (Shumueli v. New York Police Department, 295 A.D. 2d 271).

Slander and Libel, Defamation, Slander, Per Se

In the Notice of Claim the three causes of action are listed directly under the caption of the Notice of Claim. The words which supposedly comprise these actions are not set forth in the Notice of Claim.

Likewise the Verified Complaint is silent as to the words which constitute these causes of action.

In an action for libel and slander CPLR 3016(a) requires the particular words complained of shall be set forth in the Complaint. "(a) Defamation. In a libel or slander case the defamatory words must be quoted in verbatim. This is strictly enforced and any paraphrasing or use of qualifying words makes the Complaint defective." Siegel, New York Practice p. 38(4th ed)..

It is the Decision of this Court that the Plaintiff's Complaint is dismissed.

Dated: January 5, 2012
Lyons, New York


Daniel G. Barrett
Acting Supreme Court Justice

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