

Spinner v County of Nassau

2012 NY Slip Op 30502(U)

February 21, 2012

Supreme Court, Nassau County

Docket Number: 000680/2009

Judge: Thomas P. Phelan

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SCAU
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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice

TRIAL/IAS PART 2
NASSAU COUNTY

MICHAEL SPINNER,

Plaintiff(s),

-against-

ORIGINAL RETURN DATE: 12/15/2011
SUBMISSION DATE: 01/17/2012

INDEX No.: 000680/2009

THE COUNTY OF NASSAU,
THE METROPOLITAN TRANSIT
AUTHORITY POLICE DEPARTMENT,
DET. RICHARD R. LAGNESE, JR.,
STEVEN SCHWARTZ, ESQ. and
SUSAN LUTTINGER, ESQ.,

MOTION SEQUENCE # 004, 005

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1, 2
Reply Affirmation	3
Reply Affirmation in Opposition.....	4
Reply Affirmation in Further Support	5
Memorandum of Law in Support	6

Motion by defendants Metropolitan Transportation Authority (s/h/a The Metropolitan Transit Authority Police Department) ("MTA) and Det. Richard R. Lagnese, Jr. ("Lagnese") for an order pursuant to CPLR 3212 to dismiss the complaint on the grounds that probable cause existed to arrest and prosecute plaintiff for the assault of Christopher Todd; plaintiff has failed to establish an abuse of process claim; Lagnese is entitled to qualified immunity; the MTA is not liable under a theory of *respondeat superior*; the MTA Police Department is not a proper party; and motion by defendants The County of Nassau (the "County"), Steven Schwartz, Esq. ("Schwartz") and Susan Lutinger (sued incorrectly herein

as Susan Luttinger, Esq.) (“Lutinger”) for an order granting summary judgment dismissing plaintiff’s complaint pursuant to CPLR 3212 on the grounds that defendants Schwartz, Lutinger and the County have prosecutorial immunity from civil suit; there was probable cause to arrest and prosecute plaintiff; there is no valid cause of action for negligent prosecution; the County defendants did not arrest plaintiff, but in any event, there was probable cause for plaintiff’s arrest; there was probable cause to proceed with the prosecution of plaintiff; and therefore there was no “malicious prosecution;” plaintiff has failed to establish the elements of his “abuse of process” cause of action; and plaintiff’s civil rights cause of action should also be dismissed as hereinafter set forth.

Plaintiff brings this action against all defendants for negligence, false arrest, malicious prosecution, abuse of process and violation of 42 USC § 1983 allegedly subjecting plaintiff to deprivation of his rights, privileges and immunities secured by the U.S. Constitution.

By order dated September 17, 2009, the Hon. Joseph P. Spinola dismissed plaintiff’s first cause of action sounding in negligence against the MTA defendants; dismissed plaintiff’s second cause of action for false arrest under state law against the MTA defendants; and dismissed plaintiff’s fifth cause of action alleging a Section 1983 violation as against the MTA. The dismissal of the false arrest claim against the MTA is binding on the County and the second cause of action is dismissed as to the County defendants. The MTA defendants move to have the remaining claims against them dismissed. The County defendants move to have all claims against them dismissed.

The MTA is a public benefit corporation established pursuant to Public Authority Law § 1266. The Public Authorities Law authorizes the MTA to provide and maintain a police department (§ 1266-h(1)). “Under New York Law, departments which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued” (*Caidor v M&T Bank*, 2006 U.S. Dist. LEXIS 22980, at 7 (N.D.N.Y. Mar. 27, 2006) (quoting, *Hall v City of White Plains*, 185 F.Supp. 2d 293, 303 (S.D.N.Y. 2002))). Plaintiff’s claims against the *MTA Police Department* are dismissed.

Plaintiff asserts the doctrine of *respondeat superior* to allege claims of liability against the MTA and the County. Pursuant to the common law doctrine of

respondeat superior an employer may be held “vicariously liable for torts committed by an employee acting within the scope of employment” (*RJC Realty Holding Corp. v Republic Franklin Inc. Co.*, 2 NY3d 158, 164, quoting *Riviello v Waldron*, 47 NY2d 297).

For the doctrine of *respondeat superior* to be operative there must first be a finding that the individual defendants Lagnese, Schwartz and Luttinger were liable for a tort (*See Taraduman v Newsday*, 51 NY2d 531). Justice Spinola already determined that Lagnese was not liable for false arrest and negligence.

With respect to the third cause of action for deprivation of constitutional rights in violation of 42 USC § 1983, plaintiff consented to dismiss only against the Metropolitan Transit Authority Police Department [sic] (should be MTA). To recover for malicious prosecution, a plaintiff must establish that defendant lacked probable cause and that the proceeding was brought out of actual malice (*Martinez v City of Schenectady*, 97 NY2d 78, 84). Probable cause consists of such facts and circumstances as would lead a reasonable prudent person in like circumstances to believe that the charges against plaintiff can be sustained (*Colon v City of New York*, 60 NY2d 78). Actual malice is defined as commencing a proceeding based on a wrong or improper motive (*Nardelli v Stanmberg*, 44 NY2d 500).

To establish a claim for abuse of process, plaintiff must prove that defendants had an ulterior purpose in bringing the disciplinary charges (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass’n, Inc., Local 1889 AFT AFL-CIO*, 38 NY2d 397). An ulterior purpose is the intent to cause harm without excuse or justification (*Curiano v Suozzi*, 63 NY2d 113).

On a motion for summary judgment, the Court’s function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York University Med. Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). Defendants have made an adequate *prima facie* showing of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden

shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (*Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; see *Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. dismissed*, 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition to the within motions, plaintiff alleges that the wrongful prosecution was intentional and knowingly covered up by Lagnese and the District Attorney's office.

On July 29, 2007, an altercation at the Mineola train station took place between two groups. The first group consisted of plaintiff, Benny Kamer, Zach Zachariadis, Michael Testani, Jason Peyer and Laura Papalexis. The second group was Christopher Todd, the victim of the assault, Kevin Kitt, his cousin and other persons unknown to plaintiff. Christopher Todd was knocked unconscious to the ground. He was the complainant in the underlying criminal proceeding. Plaintiff alleges it was Jason Peyer, his friend of many years, who struck Christopher Todd causing him serious injury. Plaintiff further contends that this fact was known to each of the people in his group since they were friends for many years and the identification of Jason Peyer by so many of his friends was a very reliable identification.

The gravamen of the opposition to the motions is that Lagnese, the arresting officer, knew that Jason Peyer who was a friend of plaintiff was the one who struck the victim. Plaintiff claims that Lagnese knew that Jason Peyer's father was a captain with the New York City Police Department and Peyer's brother was a Nassau County Police Officer. Moreover, Lagnese knew that Jason Peyer was a West Point Cadet who could be expelled from West Point if his actions were revealed. The existence of probable cause for the criminal proceeding is different than proximate cause for an arrest.

In *Maxwell v City of New York*, 156 AD2d 28, 34, [1st Dept. 1990] the Court stated that:

Probable cause in this context “consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty” (*Colon v City of New York*, 60 NY2d 78, 82). Notwithstanding that the mere existence of an alibi by plaintiff would not necessary [sic] negate probable cause for the commencement of a proceeding, the presumption of regularity ordinarily attendant upon an accused’s arraignment (*see, Gisondi v Town of Harrison*, 72 NY2d 280) is rebutted “by proof the court orders were the result of fraud, perjury or the suppression of evidence by the police” (*Gisondi v Town of Harrison, supra*, at 284). Consequently, where, as in the instant matter, there is evidence that “the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to 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 82-83) the presumption of probable cause has been overcome, and it can no longer be held as a matter of law that defendant prosecuted plaintiff with probable cause and without malice (*see, Matter of City of New York*, 18 NY2d 6). Certainly, the failure of the prosecutor to investigate further when confronted with the inconsistency between the statements in the accusatory instrument and the lineup identifications by another set of witnesses undermines the assertion that the People possessed probable cause as a matter of law to proceed with the prosecution against plaintiff (*see, Smith v County of Nassau*, 34 NY2d 18, wherein the Court of Appeals specifically noted that the failure of the police to investigate contradictions in the facts available to them precluded a finding of probable cause as a matter of law).

The District Attorney brought the case to trial without the testimony of either Lagnese, the arresting detective, or Jason Peyer. Lagnese was allegedly on vacation. Jason Peyer submitted an affidavit that he was “assigned to temporary duty from 1600 Hours July 7, 2008 to 2400 Hours August 1, 2008 at Air Assault School Camp Smith.” Peyer concluded the affidavit by stating that:

“4. Were I to be called to testify at the trial of this matter, I would invoke my Fifth Amendment Constitutional privilege and refuse to testify.” (Reply Aff., Ex. B).

Benny Kamer was part of plaintiff and Jason Peyer’s group. Lagnese was told by Benny Kamer that it was Jason Peyer who struck the victim (Christopher Todd) (Reply Aff., Ex. F). The statement was given to the police department (not taken by plaintiff for purposes of civil action, but the first statement given by a witness to the police department itself) that Jason Peyer struck Christopher Todd and not plaintiff. According to Benny Kamer’s statement to the police:

“Some other kid came over and punched Peyer with a closed fist in the facial area. Peyer turned around and punched another kid with a closed fist in the face. The kid immediately fell to the ground, [he] did not move.”

According to his statement to Lagnese, made within days of the incident and long before plaintiff was arrested, he witnessed that Peyer was the one who struck the victim, seriously injuring him.

According to Spinner, every boy in his group, Benny Kamer, Michael Testani, Zach Zachariadis and plaintiff (Laura Papalexis was not present on the day after the incident) were at a meeting at Zachariadis’ house on the day after the incident where Jason Peyer admitted that he was the one who struck Christopher Todd in the face, that if this knowledge got to West Point he might be thrown out of West Point and that everybody had to cover it up by saying nobody knew what happened. All four boys, Testani, Kamer, Zachariadis and plaintiff, testified as to what happened at that meeting, that Peyer admitted that he was the one who struck Christopher Todd.

In further opposition to the motion, plaintiff contends that even though no one accused plaintiff of striking the victim, as previously indicated, Lagnese had been informed by Benny Kamer that it was Peyer who struck Christopher Todd, Lagnese put plaintiff’s photo in an array rather than inserting Peyer’s photo in a photo array.

A further contradiction in Lagnese’s testimony comes from the victim himself.

According to Lagnese the victim told him he was 100% sure it was plaintiff. However, if the victim said he was 99% sure, the investigation would have continued further. The record demonstrates the victim told Lagnese he was 99% certain yet Lagnese failed to pursue Peyer.

- Q. Did he – other than say “sure,” were there any words such as “one hundred percent sure,” “positive,” or any other words used?
- A. I always say, “You are one hundred percent positive this is the guy that did it?”
- Q. And he said to you?
- A. “Yes.”
- Q. Had a witness – had a victim ever in your experience said they were 99 percent sure?
- A. No.
- Q. If a victim were to say “I am 99 percent sure,” what would you do?
- A. Keep investigating. Shadow of a doubt to me.

Pages 83-84 of his deposition:

- “Q. Would it have been your duty if Todd had said I am 99 percent sure to continue further investigating.
- A. Yes.
- Q. Would furthering the investigation in this case have included checking out Peyer?
- A. Yes.”

Christopher Todd, the victim himself, testified at the hearing before the Criminal Trial so all of this was known to Lagnese. When asked if he told Lagnese that he was 100 percent sure at the hearing, he responded as follows:

- “Q. What did you say?”
- A. I said I was 99 percent sure.”

There is nothing in the record to demonstrate that Lagnese or the District Attorney's office took any statements from Peyer. On the contrary, Peyer indicated from the beginning of the investigation that he would not cooperate, while plaintiff did cooperate throughout the proceeding.

When allegedly informed there were four independent eyewitnesses that live approximately five miles from the District Attorney's office in New Hyde Park and all four were willing to come in and give statements that Jason Peyer was the one who struck the victim, they were not interviewed. The District Attorney claims that an attempt was made to interview the friends of plaintiff and Jason Peyer who the plaintiff's attorney urged could exculpate plaintiff and inculpate Jason Peyer. The District Attorney asserts there was an attempt to speak to those witnesses but they were uncooperative or unavailable or they did not want to speak. Moreover, the District Attorney contends that a defendant in a criminal case cannot dictate what witnesses to contact and when to commence the actual trial.

Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532, *Gniewek v Consolidated Edison Co.*, 271 AD2d 643; *Judice v DeAngelo*, 272 AD2d 583). The court should refrain from making credibility determinations (*see, S.J. Capelin Assoc. v Globe Mfg Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655; *Greco v Posillico, supra*; *Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*Glover v City of New York*, 298 AD2d 428).

Even where a proceeding was commenced in good faith and with probable cause, a person may be held liable for activity continuing the proceeding after learning it lacked merit (*Broughton v State of New York*, 37 NY2d 451.[1975])

The fifth cause of action against the County defendants for violation of the plaintiff's civil rights pursuant to 42 USC § 1983 is dismissed. Plaintiff has failed to overcome the County's *prima facie* showing that he did not properly plead this cause of action or submit any evidence to substantiate it (*See Monell v New York City Dept. of Social Services*, 436 US 658, 690-91).

New York courts do not recognize a cause of action for negligent prosecution (*Antonious v Muhammad*, 250 Ad2d 559; *Jestic v Long Island Sav Bank*, 81 AD2d 255). The first cause of action against the County sounding in negligence is dismissed.

The individual-named district attorneys are subject to absolute immunity. Neither the individual Assistant District Attorney nor the County can be liable to the plaintiff. The complaint is dismissed as to them (*See Johnson v King's County Dist. Attorney's Off.*, 308 AD2d 278; *Roche v Village of Tarrytown*, 309 AD2d 842; *Minicozzi v City of Glen Cove*, 97 AD2d 815). Since an arresting officer is entitled to dismissal on qualified immunity grounds, it is a question of fact for the jury to determine whether probable cause existed as to Lagnese (*Wilson v Layne*, 526 US 603; *Liv v New York City Police Dept.*, 216 AD2d 67; *Malley v Briggs*, 475 US 335). With respect to defendants MTA and Lagnese who are not cloaked in absolute immunity, plaintiff may proceed against them as to the third (malicious prosecution) and fourth (abuse of process) causes of action.

The caption of the action is hereby amended to read as follows:

“MICHAEL SPINNER,
Plaintiff(s),

-against-

THE METROPOLITAN TRANSIT
AUTHORITY and DET. RICHARD R. LAGNESE, JR.”
Defendant(s).

This decision constitutes the order of the court.

Dated: February 21, 2012

HON THOMAS P. PRELAW
[Signature]
J.S.C.

ENTERED
FEB 24 2012
NASSAU COUNTY
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