

Harris v County of Nassau

2012 NY Slip Op 31257(U)

April 30, 2012

Supreme Court, Nassau County

Docket Number: 026035/09

Judge: Thomas P. Phelan

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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

ROSEMARIE HARRIS,

Plaintiffs,

-against-

ORIGINAL RETURN DATE:02/09/2012
SUBMISSION DATE: 03/09/2012
INDEX NO. 026035/09
MOTION SEQUENCE # 02

COUNTY OF NASSAU, P.O. BRENDAN GIBBS,
P.O. THOMAS McDONOUGH, SGT. CHARLES
DUNN, ASHLEY FULFORD, SAMANTHA
ACEVEDO,

Defendants.

The following papers read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Affirmation	3
Reply Affirmation	4

Motion by defendants, County of Nassau (the "County"), P.O. Brendan Gibbs (Gibbs"), P.O. Thomas McDonough ("McDonough") and Sgt. Charles Dunn ("Dunn"), pursuant to CPLR 3212 for summary judgment dismissing the complaint against them is granted.

The informal request by defendant Ashley Fulford, by affirmation of Howard Arber, Esq., to "join in the application" by the County is denied in the absence of proper papers (CPLR 2214).

Plaintiff was arrested on April 1, 2008, on two counts of menacing in the second degree, a violation of Penal Law 120.14(1). Two complaining witnesses stated that during an argument over a parking spot, plaintiff had threatened them with a knife. The charges were ultimately dismissed pursuant to Criminal Procedure Law 170.30(1)(f).

Following dismissal of the charges plaintiff commenced this action against the two complaining witnesses, defendants Ashley Fulford ("Fulford") and Samantha Acevedo ("Acevedo"), the arresting police officers, defendants Gibbs, McDonough and Dunn, and the County. The complaint alleges claims for false arrest/false imprisonment, violation of plaintiff's right pursuant to 42 USC §1983, malicious prosecution, negligent and intentional infliction of severe emotional distress and negligent hiring, training and supervision. On this motion the County and the three defendant police officers seek

summary judgment dismissing the complaint against them.

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Servs v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a prima facie showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a prima facie case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence must be viewed in the light most favorable to the non-moving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]), and the court should refrain from resolving issues of credibility (*Forrest* at 315; *SJ Capelin Assoc., Inc.*, at 341).

False arrest and false imprisonment are two names for the same tort (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844-845 [2d Dept 2011]). Probable cause to believe that a person committed a crime is a complete defense to the claims of false arrest and malicious prosecution (*Holland*; *Fortunato v City of New York*, 63 AD3d 880 [2d Dept 2009]; *Iorio v City of New York*, 19 AD3d 452 [2d Dept 2005]). Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe the plaintiff guilty (*Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Reape v City of New York*, 66 AD3d 755 [2d Dept 2009]). Generally, information provided by an identified citizen accusing another of a specific crime is legally sufficient to provide the police with probable cause to arrest (*Fortunato*; *Iorio*).

Here, defendants Acevedo and Fulford both gave statements that plaintiff held a knife in her hand at the time of their argument with her. Acevedo stated that if it wasn't for plaintiff's husband "she would have gotten at me with the knife." Fulford stated that plaintiff lunged at her with the knife and that she felt in fear of her life. Plaintiff herself admitted that "during the argument I had a knife in my hand because I was gardening" (*Movant's Ex. E*). As the supervising officer at the scene, Sergeant Dunn testified that after he spoke with Fulford and Acevedo, he went to plaintiff's home and asked her about the knife. She showed him that she had put the knife in the kitchen sink (*Dunn tr. p. 30*). At that point he directed Officer McDonough and Officer Gibbs to arrest plaintiff.

On this record, the moving defendants have made out a prima facie case of probable cause for plaintiff's arrest. In opposition plaintiff's attorney questions the accounts of Officers McDonough and Gibbs, neither of whom could recall precisely when the issue of the knife came up (*Gibbs tr. p. 30*; *McDonough tr. p. 16*). Plaintiff alleges that the sworn

testimony of these two police officers casts significant doubts about the complainants' veracity. This argument does not suffice to raise a triable issue of fact as to the existence of probable cause on this record. The arrest here meets the criteria for probable cause in that two identified citizens made specific allegations of conduct constituting the crime of menacing and plaintiff admitted the critical element of holding a knife. Under these circumstances there is no need for the Court to consider defendants' additional arguments. Based on the foregoing the moving defendants are entitled to summary judgment dismissing the claims against them for false arrest/false imprisonment, violation of 42 USC §1983 and malicious prosecution.

The tort of intentional infliction of emotional distress has the following elements: (i) extreme and outrageous conduct; (ii) intent to cause or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). In practice, courts have focused on the first element of extreme and outrageous conduct, as that is the element most susceptible to determination as a matter of law (*Id.*). Liability may be found only where the conduct at issue is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community (*Howell*, 81 NY2d at 122 citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). The same test for extreme and outrageous conduct has been applied to causes of action for negligent infliction of emotional distress (*Tartaro v Allstate Indem Co.*, 56 AD3d 758, 759 [2d Dept 2008]).

The conduct by the moving defendants that is alleged in the complaint and established in the record, does not rise to the level of outrageousness and extremeness necessary to maintain this cause of action as a matter of law. Consequently, the moving defendants are entitled to summary judgment dismissing any claims against them for negligent and intentional infliction of emotional distress.

What remains is plaintiff's last cause of action against the County alleging negligent hiring, training and supervision of its police officers by the County. Plaintiff also appears to invoke 42 USC §1983 in this cause of action (compl., ¶ 36).

Where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training (*Holland*, 90 AD3d at 849; *Eckhardt v City of White Plains*, 87 AD3d 1049, 1051 [2d Dept 2010]). As the three police officers herein were acting within the scope of their employment, plaintiff has no state law claim against the County for negligent hiring, retention, supervision or training.


“[A] 42 USC § 1983 action may lie against a municipality if the plaintiff shows that the action that is alleged to be unconstitutional either implement[s] or execute[s] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers or has occurred pursuant to a practice so permanent and well settled as to constitute a custom or usage with the force of law” (Eckhardt 87 AD3d at 1052, citing Hudson Val Mar, Inc v Town of Cortlandt, 79 AD3d 700, 703 [2d Dept 2011]). The County argues that the record in this case, including plaintiff's deposition transcript, contains no evidence of any municipal policy, decision or custom which resulted in any violation of plaintiff's constitutional rights. In opposition, plaintiff fails to address this cause of action and does not purport to raise a triable issue of fact as to any municipal policy, decision or custom. Based on the foregoing, the County's request for summary judgment dismissing the fifth cause of action for negligent hiring, training, supervision and retention, under both state and federal law, must be granted.

Accordingly, the complaint against the movings defendant's is dismissed, and the caption is amended to read as follows:

ROSEMARIE HARRIS,
Plaintiffs,
 -against-
 ASHLEY FULFORD and SAMANTHA ACEVEDO,
Defendants.

This decision constitutes the order of the court.

Dated: April 25, 2012


 THOMAS P. PHELAN, J.S.C.

ENTERED

APR 30 2012

NASSAU COUNTY
 COUNTY CLERK'S OFFICE

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