

**Excell v County of Nassau**

2012 NY Slip Op 31278(U)

March 23, 2012

Sup Ct, Nassau County

Docket Number: 121/10

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice  
TRIAL/IAS, PART 3  
NASSAU COUNTY**

**TAFARI EXCELL,**

**Plaintiff,**

**MOTION DATE: 12/19/11**

**- against -**

**MOTION SEQ. NO.: 003  
INDEX NO.: 121/10**

**COUNTY OF NASSAU; Police Officer DANIEL P. KENNEDY, Shield No. 3421; POLICE OFFICER "JOHN" EDUARD, (whose first name being unknown to plaintiff, the person being a police officer); Police Officer BEN JOOB, Shield No. 8737; LT. RICHARD T. PATTERSON; Assistant District Attorney DANA BOYLAN; KATHLEEN RICE, Nassau County District Attorney; JOHN DOES and RICHARD DOES,**

**Defendants.**

**The following papers read on this motion (numbered 1-3):**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

Plaintiff alleges that on or about July 28, 2007 at 1:15 a.m., he was arrested after police officer defendant "JOHN" EDUARD searched his parked vehicle and found a handgun and drugs. Plaintiff asserts that he was arraigned and remanded to the Nassau County Jail and charged with several penal law violations constituting felonies in addition to vehicle and traffic law violations. Plaintiff filed this action on or about January 5, 2010 against defendant COUNTY, certain police officers of the Nassau County Police Department (the "Department"), District Attorney KATHLEEN RICE ("RICE") and Assistant District Attorney DANA BOYLAN ("BOYLAN") alleging false arrest, malicious prosecution, inadequate training and negligence arising out of the arrest and prosecution of plaintiff during the period commencing on July 28, 2007 and resolved on August 22, 2008. Defendants now make a motion for summary judgment pursuant to CPLR §3212. The motion is determined as follows.

## BACKGROUND

In support of their motion, defendants proffer the following facts. On or about July 28, 2007, the Nassau County Police received a dispatched 911 call from a person who identified himself as “Anthony” and informed the dispatcher that there was a suspicious person, wearing a striped shirt and dark pants in a green motor vehicle located in front of 100 Copiague Street, Valley Stream. Anthony stated he saw something in said individual’s hand that appeared to be a gun, and that the suspect was looking through a bag in his vehicle. Officers arrived on the scene and observed an individual matching the description they received from “Anthony” sitting in an idling vehicle. As the suspect was being questioned, the officers shined a flashlight into the rear passenger seat and observed a white bullet proof vest protruding from a black plastic bag, and upon further investigation, discovered a loaded gun and cocaine. The suspect, plaintiff herein, was arrested on felony charges of Criminal Possession of a Weapon in the 2<sup>nd</sup> degree, Criminal Possession of a Control Substance in the 5<sup>th</sup> Degree, Criminal Possession of a Forged Instrument in the 2<sup>nd</sup> Degree and several driving violations [Motion Exh. G].

By Orders, dated August 22, 2008, the Hon. Edward A. Maron granted the District Attorney’s motion to reduce the charged felonies to misdemeanors. Justice Maron found for each felony charged that “although there is reasonable cause to believe that the defendant committed a felony in addition to the non-felony offense, the Court is satisfied that a reduction of the felony offense is in the interest of justice and the District Attorney consents to the reduction” [Motion Exh. I].

## THIS ACTION

In this action, by Order dated November 3, 2010, the Court granted the motion by plaintiff’s prior counsel to withdraw as attorney for plaintiff [Motion Exh. D]. By Order, dated August 10, 2011, the Court denied defendants’ motion for summary judgment pursuant to **CPLR §3212** with leave to renew on grounds that the street address on an “intake” form and the affidavit of service attesting to service of the summons and verified complaint, although identical, seemingly referred to different areas in Queens (the “Prior Order”). The Court stated that it must be assured that plaintiff, at the time *pro se*, receives actual notice of this proceeding.

Defendants now proffer two affidavits of service attesting to service of the Prior Order on plaintiff at 201-14 109<sup>th</sup> Avenue in Hollis Queens and at 201-14 109<sup>th</sup> Avenue in St. Albans Queens, by personal service pursuant to **CPLR §308(1)** both on September 30, 2011 at 12:40 pm. Upon examination of the affidavits, the Court makes two observations. First, although the affidavits attest to service on a suitable age person, that

person is plaintiff himself (the caption on the affidavits erroneously refers to “Taxi Excell” as plaintiff). Considering the process server served plaintiff by in hand service, the Court has discretion to overlook or permit the correction of an irregularity, in the affidavits of service, in the interests of justice. **CPLR §2001.**

Second, as a matter of interest, the Court also performed a cursory internet search and found that the street address of 201-14 109<sup>th</sup> Avenue, whether designated as located in St. Albans or Hollis, is referable to the same location. Although the Court does not ascribe any probative value to its own research, the Court is satisfied that plaintiff has received notice of this application especially considering that plaintiff is represented by new counsel who has proffered opposition to the within motion.

In support of its application, defendants proffer *inter alia* (i) the Summons and Verified Complaint filed on January 5, 2010 and defendants’ Verified Answer dated March 25, 2010 [Motion Exhs. A and B]; (ii) Accusatory documents filed in the underlying criminal case [Motion Exh. G]; (iii) background and event chronology of the 911 call [Motion Exh. H]; and (iv) a copy of the Short Form Orders of Justice Maron, together with the transcript of the proceeding [Motion Exh. I].

The proponent of a summary judgment motion bears the initial burden to come forward with admissible proof demonstrating *prima facie* entitlement to judgment as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320; **Moore v. 3 Phase Equestrian Center, Inc.**, 83 AD3d 677. Once this showing has been made, the burden shifts to the opposing party to submit evidence in admissible form sufficient to raise an issue of material fact. **Id.**

Based on the record before the Court, the Court finds that defendants have established *prima facie* their entitlement to summary judgment as a matter of law and plaintiff has failed to submit opposition in admissible form.

*Causes of action against the District Attorney and Assistant District Attorney, including the Fifth Cause of Action*

At the outset, the Court notes that all causes of action asserted against District Attorney RICE and Assistant District Attorney BOYLAN must be dismissed. “District Attorneys are immune from civil liability for activities ‘intimately associated with the judicial phase of the criminal process’, meaning ‘initiating a prosecution and in presenting the State’s case.’ ” **Johnson v. Kings County District Attorney’s Office**, 308 AD2d 278, 285 *quoting Imbler v. Pachtman*, 424 US 409, 430-431. From the evidence submitted by defendants and not opposed by plaintiff, it is evident that District Attorney BOYLAN’s role was limited to appearing in Court before Justice Maron to request that

the charges against plaintiff be reduced, which the Court finds, is clearly ‘within the judicial phase of the criminal process.’” **Johnson v. Kings County District Attorney’s Office**, *supra*. There is no evidence whatsoever that District Attorney RICE was involved in this matter.

*First, Second and Seventh Causes of Action*

Defendants have demonstrated *prima facie* their entitlement to summary judgment on plaintiff’s first, second and seventh causes of action to the extent that such causes of action assert claims alleging false arrest and malicious prosecution against the COUNTY OF NASSAU, POLICE OFFICER DANIEL P. KENNEDY, Shield No. 3421, POLICE OFFICER “JOHN” EDUARD, POLICE OFFICER BEN JOOB, Shield No. 8737 and LT. RICHARD T. PATTERSON (“PATTERSON”) (collectively, the “COUNTY Defendants”). In order to prevail on a cause of action for false arrest, a plaintiff must prove that “(1) the defendant intended to confine plaintiff; (2) the plaintiff was aware of the resulting confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged.” **Rivera v. County of Nassau**, 83 AD3d 1032, 1033 *citing* **Martinez v. City of Schenectady**, 97 NY2d 78, 85. Although the first three elements have been satisfied, liability turns on whether or not plaintiff’s arrest was privileged. Where an arrest is justified, it is considered privileged. *See Johnson v. Kings County District Attorney’s Office*, *supra*. The Court notes that it is well established that “ ‘the existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim’ of false imprisonment or false arrest.” **Rivera v. County of Nassau**, *supra*, *quoting* **Martinez v. City of Schenectady**, *supra* at 85. *See Redmond v. City of White Plains*, 77 AD3d 902; **Chetrick v. Cohen**, 52 AD3d 449; **Wasilewicz v. Village of Monroe Police Department**, 3 AD3d 561.

On the record presented, the Court finds that defendants have established *prima facie* that the police officers had reasonable cause to arrest plaintiff pursuant to **Criminal Procedure Law §140.10(b)** which provides that a police officer may arrest a person for crime “when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.” In fact, Justice Maron opined in his Short Form Orders that there was reasonable cause to believe that plaintiff committed the felonies he was charged with. The Court notes that reasonable cause under **§140.10(b)** is equivalent to probable cause for this purpose. *See generally* **People v. Johnson**, 66 NY2d 398.

Defendants have also demonstrated *prima facie* their entitlement to summary judgment on plaintiff’s claims alleging malicious prosecution against the COUNTY Defendants. “To obtain recovery for malicious prosecution, a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that

it lacked probable cause, and that the proceeding was brought out of actual malice.” **Martinez v. City of Schenectady**, *supra*. In the case at bar, as discussed above, by showing that the COUNTY defendants had probable cause, the defendants established *prima facie* entitlement to judgment as a matter of law dismissing plaintiff’s malicious prosecution claim. The Court also notes that the reduction of the felony offenses which plaintiff was charged with to non felony offenses, does not constitute a termination in plaintiff’s favor. “A termination is not favorable, for example, where a prosecution ends because of a compromise with the accused.” **Id.** at 84.

*Third, fourth, sixth and seventh causes of action*

Defendants have also demonstrated their *prima facie* entitlement to judgment as a matter of law on plaintiff’s third and fourth causes of action which are based on defendants’ alleged negligent failure to *inter alia* properly train, screen, supervise or discipline employees in violation of plaintiff’s constitutional rights. As noted above, the District Attorney and Assistant District Attorney are immune from liability. As to NASSAU COUNTY, “a claim of inadequate training or supervision will trigger municipal liability only when ‘the failure to train amounts to deliberate indifference to the rights of persons with whom municipal employees come into contact.’” **Johnson v. Kings County District Attorney’s Office**, *supra* at 293 *quoting City of Canton, Ohio v. Harris*, 489 US 378, 388. *See Ellison v. City of New Rochelle*, 62 AD3d 830. Defendants have established that there is no evidence in the record demonstrating that the COUNTY defendants acted with deliberate indifference.

Defendants have also established *prima facie* their entitlement to summary judgment dismissing plaintiff’s fourth cause of action as alleged that de facto policies and practices of NASSAU COUNTY acting through the District Attorney and the Department deprived plaintiff of his constitutional rights. To the extent that plaintiff’s claim against the COUNTY, as opposed to the individual officers, is based on violations of 42 USC §1983, defendants have also established *prima facie* that plaintiff’s claim cannot stand. “For a cause of action pursuant to 42 USC §1983, to lie against a municipality, the action that is alleged to be unconstitutional must implement[ ] or execute[ ] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers or have occurred pursuant to a practice so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” **Ellison v. City of New Rochelle**, *supra* at 832-833 *quoting Pendleton v City of New York*, 44 AD3d 733. To the extent, plaintiff alleges constitutional violations against individual officers, “there is ordinarily no constitutional violation where a person is arrested with probable cause.” **Johnson v. Kings County District Attorney’s Office**, *supra* at 290 *citing Baker v McCollan*, 443 US 137.

Likewise, defendants have demonstrated entitlement to judgment on plaintiff's sixth cause of action alleging intentional infliction of emotional distress. "The tort of intentional infliction of emotional distress predicates liability on the basis of extreme and outrageous conduct which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." **Freihofer v. Hearst Corp.**, 65 NY2d 135, 143. See **Liranzo v. New York City Health & Hospitals Corp.**, 300 AD2d 548. Public policy bars plaintiff's claim for intentional infliction of emotional distress against the County. See **Ellison v. City of New Rochelle**, *supra*; **Liranzo v. New York City Health & Hospitals Corp.**, *supra*. Defendants have also established *prima facie* that there is no basis for plaintiff's seventh cause of action seeking attorneys' fees.

In opposition, plaintiff proffers only an affirmation of his attorney which fails to constitute evidence in admissible form sufficient to raise an issue of fact. The Court notes that in any event, such affirmation only opposes the COUNTY defendants' motion to the extent defendants seek summary judgment on plaintiff's claim for false arrest.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212 is **granted**.

This constitutes the Order of the Court.

Dated: *March 23*, 2012

*F. J. Farrell*  
 J.S.C.

**ENTERED**  
 MAY 01 2012  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE