

Reiner v City of New York

2013 NY Slip Op 30952(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 111462/209

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT _____
Justice

PART 5

Index Number : 111462/2009
REINER, ROBERT
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CAL # 70

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

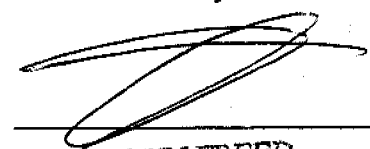
FILED
MAY 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-17-13

APR 17 2013



_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
ROBERT REINER,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, POLICE OFFICER JOHN
MCKIERNAN, POLICE OFFICER JOHN DOE,
POLICE OFFICER JOHN ROE,

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

FILED
NUMBERED
MAY 02 2013
NEW YORK
COUNTY CLERKS OFFICE

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendants move pursuant to CPLR§ 3212 and CPLR§ 3211(a)(7), for dismissal of
plaintiff's complaint. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the
motion.

Factual and procedural background:

Plaintiff seeks damages for injuries he allegedly sustained, emanating from his arrest on

March 26, 2009, wherein he was charged with one count of Penal Law §250.45(1), "Unlawful Surveillance in the Second Degree, a Class E felony. A person is guilty of this, when "[f]or his or her own, or another person's amusement, entertainment or profit, or for the purpose of degrading or abusing a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record, a person dressing, or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's consent."

The arrest was based on the presence of a hidden camera attached to a light bulb in a bathroom located in his office, in the County of New York. On May 1, 2009, this charge was subsequently dismissed upon motion of the New York County District Attorney. Consequently, plaintiff served a Notice of Claim on the City on May 12, 2009. A Summons and Complaint was served on the City on August 12, 2009. Issue was joined via the City's Answer on August 16, 2009. The City served an Amended Answer on December 14, 2009, answering for P.O. John McKiernan. Plaintiff is alleging false arrest, false imprisonment, malicious prosecution, violation of 42 USC § 1983, libel and slander.

According to plaintiff, he is a clinical psychologist and the Founder and Executive Director of "Behavioral Associates," a group of mental health specialists. Behavioral Associates operates on the first floor of 114 East 90th Street, a building where plaintiff also resides. The practice treats approximately 350 patients, with plaintiff conducting intake interviews of prospective clients. Behavioral Associates has eleven offices, a central waiting room and a bathroom, located off the waiting room, across from one office and next to another. The bathroom is accessible to employees as well as patients. Plaintiff works three days per week, and during his absence, other professionals

utilize his office.

On March 26, 2009, during a session with a patient, his secretary contacted him over the intercom, stating, "You better come out here. A patient is calling the police." Plaintiff asserts that said patient was calling the police because the patient found what he thought was a surveillance camera, which appeared to be inside a light bulb, attached to the ceiling in the bathroom. At the time of his arrest, plaintiff had recently purchased a second suite of offices on the same floor as his office. A corridor was in the process of being constructed to connect the two suites, both of which were also undergoing extensive renovations. Due to the continuous construction, office doors were kept open when offices were not in use.

Plaintiff had brought a floodlight camera from his house in Bedford, to his office because he was in need of a new "decoder box," a device that converts images to images comprehensible to humans, without which the floodlight camera does not function. He asserts that he had left the floodlight camera on his desk, and intended to order a new decoder box from Brickhouse Security, the company from which he bought the floodlight camera. The floodlight camera is essentially a closed circuit television system, which transmits its signal solely to a designated monitor. In order for the floodlight to work as intended, a camera, decoder, RCA cable and monitor must be present. Because plaintiff did not have these items at his office, no images that the floodlight camera could have otherwise transmitted could be viewed, broadcast, or stored in any way at the time of plaintiff's arrest.

On March 26, 2009, at 12:06 p.m., P.O. McKiernan was in his patrol car when he received a radio call for a "radio camera in the bathroom." In response, he proceeded to plaintiff's office. Upon his arrival, he spoke with the complainant, Doug Galfand, on the street outside the office.

Upon speaking with a very upset Mr. Gelfand, P.O. McKiernan was “unsure” whether a crime had actually been committed and believed that he had responded to an unusual situation that “needed to be investigated” (McKiernan EBT test. pp. 70-72). Once inside Behavioral Associates, P.O. McKiernan observed a floodlight camera on the receptionist’s counter. It appeared to be a normal floodlight. However, when he picked it up to examine it closely, it appeared to have a lens. P.O. McKiernan was not aware that there was a camera inside the light bulb.

Plaintiff informed P.O. McKiernan that the camera belonged to him and that he utilized it to observe his children when they were in the swimming pool at his home in Westchester. He also advised P.O. McKiernan that he did not place said floodlight camera in the bathroom to observe people using the toilet. Plaintiff offered to show P.O. McKiernan why the floodlight camera was unable to work, but P.O. McKiernan refused to permit plaintiff to do so.

According to the affidavit P.O. McKiernan submitted in support of a search warrant subsequent to plaintiff’s arrest, he stated in pertinent part that complainant Mr. Gelfand informed him that he had “observed a light bulb with a camera inside of it screwed into a fixture directly above the toilet.” Mr. Gelfand also informed P.O. McKiernan that he had “removed said light bulb from the fixture and observed that it had a hidden camera in it.” At his deposition, P.O. McKiernan testified that he believed Mr. Gelfand was telling the truth (Exhibit “T” at 68). He also testified that the light bulb did not look normal because it “had some sort of lens in the bulb that didn’t belong there, that didn’t belong in a normal floodlight for a normal bathroom” (*Id.* at 94).

Positions of the parties:

Defendant City proffers several arguments in support of its motion to dismiss. First, it argues that plaintiff’s action for false arrest and false imprisonment necessitate dismissal because plaintiff’s

arrest was based on probable cause. It also argues that probable cause is a complete defense to an action for false arrest. The City further argues that since probable cause requires in pertinent part “information that would lead a reasonable person who possesses the same expertise as the officer to conclude under the circumstances, that a crime is being or was committed” (People v. McRay, 51 N.Y.2d 594, 602 [1980]), then “finding a hidden camera that was attached to a light bulb in a bathroom with a view of the area where people will urinate is absolutely sufficient probable cause to lead a reasonable person to believe that the crime of unlawful surveillance had been committed by the owner of the camera and director of the business where this camera was located” (Baumrin Aff. ¶ 17)).

Plaintiff argues that defendants failed to establish a prima facie showing of their entitlement to summary judgment on his causes of action for false arrest and malicious prosecution because the very evidence upon which they rely upon in support of their motion, raises triable issues of fact on elements to both causes of action. Plaintiff argues that the issue of probable cause is one that must be decided by the court where there is no real dispute as to the facts or proper inferences to be drawn from such facts. However, where there is conflicting evidence, from which reasonable persons might draw different inferences, the question is one more properly reserved for a jury.

Plaintiff also argues that the evidence that defendants submitted raises a triable issue of fact as to whether P.O. McKiernan had probable cause to arrest plaintiff, in that in his deposition, plaintiff gave an exculpatory explanation for the presence of the floodlight camera in his bathroom and P.O. McKiernan failed to conduct an adequate investigation prior to arresting plaintiff. It is important to note that in his Affirmation in Opposition, plaintiff argues the issue of probable cause extensively, but fails to address the specifics of some of defendants’ several arguments.

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 306 [1st Dept. 2007], citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of fact (*see* Zuckerman v. City of New York, 49 N.Y.2d 557 [1989]; People ex rel Spitzer v. Grasso, 50 A.D.3d 535 [1st Dept. 2008]). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224 [1st Dept. 2002]).

It is well settled that in order to establish probable cause to arrest, proof beyond a reasonable doubt is not required (People v. Steele, 23 A.D.3d 158, 159 [1st Dept. 2005], *lv. denied* 6 N.Y.3d 781 2006]; People v. Chatman, 22 A.D.3d 255 1st Dept. 2005], *lv. denied* 6 N.Y.3d 753 2005], “but merely information sufficient to support a reasonable belief that an offense has been....committed” (People v. Bigelow, 66 N.Y.2d 417, 423 [1985]; *see also* People v. Dickerson, 20 A.D.3d 359 [1st Dept. 2005], *lv. denied* 5 N.Y.3d 852 [2005]). Probable cause to arrest requires the existence of facts and circumstances, which when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed and that defendant committed or is committing that offense (*see* People v. Bigelow, 66 N.Y.2d 417, 423 1985]; People v. McRay, 51 N.Y.2d 594 [1980]; People v. Hicks, 287 A.D.2d 649 [2d Dept.

2001]).

“As the very name suggests, probable cause depends upon probabilities, not certainty” (People v. Rodriguez, 168 A.D.2d 520, 521[1st Dept. 1990], *lv. denied* 78 N.Y.2d 926 [1991]). Probable cause may be based upon circumstantial evidence (*see* People v. Teasley, 88 A.D.3d 490, 491 [1st Dept. 2011], *lv. denied* 19 N.Y.3d 977 [2012]; People v. Rodriguez, *supra*). Furthermore, a finding of probable cause does not require the same quantum of proof necessary to sustain a conviction, or to establish a prima facie case (*see* People v. Bigelow, 66 N.Y.2d at 423; People v. McRay, 51 N.Y.2d at 602). In determining whether a police officer has probable cause to effect an arrest, “the emphasis should not be narrowly focused on ***any *** single factor, but on an evaluation of the totality of circumstances.....” People v. Bothwell, 261 A.D.2 232 1st Dept. 1999] quoting People v. Graham, 211 A.D.2d 55 [1st Dept. 1995], *lv. denied* 86 N.Y.2d 795 [1995]).

In the instant case, the Court finds that defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging malicious prosecution and false arrest, by sufficiently asserting that P.O. McKiernan acted upon information from a private citizen in addition to his own observations, which provided him with probable cause to arrest plaintiff (*see* Martinez v. City of Schenectady, 97 N.Y.2d 78 , 85 [2001]; Wasilewicz v. Village of Monroe Police Dept., 3 A.D.3d 561, 662 [2d Dept. 2004]).

Indeed, despite plaintiff’s adamant contentions to the contrary, P.O. McKiernan was not required to request assistance from any other officer or unit with the technical expertise to comprehend the working of the subject footlight camera, prior to effecting the arrest of plaintiff.

Moreover, it is well settled that the existence of probable cause to arrest is a complete defense to the claims of false imprisonment, false arrest and malicious prosecution (*see* Martinez v. City of

Schenectady, *supra*; Molina v. New York, 28 A.D.3d 372 ; Marrero v. City of New York, 33 A.D.3d 556 [1st Dept.2006]; Brown v. City of New York, 289 A.D.2d 95 [1st Dept. 2001]).

Defendants next argue that plaintiff's 42 USC § 1983 claim warrants dismissal because he has failed to meet the pleading requirements of alleging facts sufficient to establish the existence of a municipal pattern or practice. They argue that in his Complaint, plaintiff's allegation that "Defendants CITY, NYPD, MCKIERNAN, DOE and ROE subjected Plaintiff ROBERT REINER to such deprivation in a malicious, reckless, deliberate, intentional, grossly negligent and with a callous disregard to Plaintiff ROBER REINER's legal rights and with deliberate indifference to those rights...." (*see* Exhibit "B" §48), is "quintessentially conclusory, as it is not supplemented by any factual allegations anywhere in Plaintiff's complaint that even suggest a pattern of conduct or by an official policy of the City of New York that resulted in a violation of plaintiff's Constitutional or federal statutory rights" (*Baumrin Aff.* ¶ 25).

It is well settled that the only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. § 1983 (*see* Giaimox v. Vreeburg & Smith, 192 A.D.2d 41 [2d Dept. 1993], *lv. dismissed* 82 N.Y.2d 803 [1993]). In order to assert a claim against a municipality for civil rights violations pursuant to 42 USC § 1983 based on the alleged tortious actions of its employees, plaintiff must allege and plead that the alleged actions resulted from an official municipal policy or custom (*see* Monell v. Department of Social Services of City of New York, 436 U.S. 658 [1978]; Leftenant v. City of New York, 70 A.D.3d 596 [1st Dept. 2010]; Leung v. City of New York, 216 A.D.2d 10 [1st Dept. 1995]).

There is no respondeat superior for a municipality under 42 USC §1983 and , accordingly, the violation of plaintiff's civil rights by municipal employees, without more, will not render the municipality liable for such violation(s) (*see* Monell v. Department of Social Services of City of New York, 436 U.S.658 at 694; *see also* Ramos v. City of New York, 285 A.D.2d 284, 302 [1st Dept. 2001]). “A municipality can be found liable under 1983 only when the municipality itself causes the Constitutional violation” (Monell v. Department of Social Services of City of New York, 436 U.S. 658 at 691.

Indeed, a municipality causes a constitutional violation only where a specific “official policy is responsible for a deprivation of rights protected by the Constitution” (Monell v. Department of Social Services of City of New York, 436 U.S. 658 at 690). In order to recover on a 1983 claim against a municipality, a plaintiff must specifically plead and prove three elements: 1) an official policy or custom that 2) causes plaintiff to be subjected to 3) a denial of a constitutional right (Monell v. Department of Social Services of City of New York, 436 U.S. 658 at 695; *see also* Leung vv. City of New York, 216 A.D.2d at 11).

In the case at bar, the Court agrees that plaintiff's civil rights claim is entirely conclusory and insufficient, in that it fails to specifically set forth an official policy or custom that caused him to be deprived of any constitutional right (*see* Jackson v. Police Department of City of New York, 192 A.D.2d 641, 642 [2d Dept. 1993], *lv. denied* 82 N.Y.2d 658 [1993]).

Defendants next argue that plaintiff's claim for malicious prosecution must also be dismissed. Defendants argue that although the dismissal of the action by the New York County District Attorney's Office may meet the favorable termination element of a malicious prosecution action, plaintiff must nevertheless, establish the absence of probable cause and the presence of malice to

prevail on this cause of action.

Plaintiff argues that defendants are not entitled to summary judgment insofar as plaintiff's cause of action for malicious prosecution is concerned because an issue exists as to whether P.O. McKiernan had probable cause to arrest him and an inference of malice may be drawn from that showing.

"The elements of an action for malicious prosecution are (1) the initiation of a proceeding; (2) its termination favorably to plaintiff; (3) lack of probable cause; and (4) malice" (Colon v. City of New York, 60 N.Y.2d 78, 82 [1983], *rearg. denied* 61 N.Y.2d 670 [1983]; *see also* Hernandez v. the City of New York, 100 A.d.3d 433 [1st Dept. 2012]). The existence of probable cause to arrest is a complete defense to such claim (*see* Marrero v. City of New York, 33 A.D.3d 556, 557 [1st Dept. 2006]; Brown v. City of New York, 289 A.D.2d 95 [1st Dept. 2001]).

In the case at bar, since the Court has already determined the existence of probable cause to arrest, this cause of action warrants dismissal as a matter of law. Dismissal of the malicious prosecution claim is further warranted since there is no triable issue as to whether the prosecution was motivated by actual malice (*see* Nardelli v. Stamberg, 44 N.Y.2d 500 [1978]; Fernandez v. City of New York, 100 A.D.3d 433 [1st Dept. 2012]). It should also be noted that the actions and statements of the District Attorney, whose office acts within the scope of its own official duties, cannot be imputed to the municipal defendant, which is deemed an entirely different entity (*see* Warner v. City of New York, 57 A.D.3d 767 [2d Dept. 2008]).

The City next argues that plaintiff's claim for negligent hiring, training, supervision and retention must be dismissed because P.O. McKiernan was acting within the scope of his employment, and plaintiff has failed to prove otherwise. Plaintiff argues that "rather than conceding,

in an appropriate manner, that McKiernan was acting within the scope of his employment, defendants denied knowledge or information sufficient to form a belief as to whether McKiernan was acting within the scope of his employment in their answer to the complaint” (Aff. in Opp. ¶ 108). Plaintiff also argues that an issue of fact exists which precludes summary judgment in that defendants have not submitted “one iota” of evidence showing that P.O. McKiernan had received any technical training regarding the operation of security devices, cameras, etc.

In the case at bar, since the Court has already determined that the claim asserted under 42 U.S.C. § 1983 necessitates dismissal for failure to allege that the challenged conduct resulted from official municipal policy and/or custom (*see* Monell v. Department of Social Services of City of New York, 436 U.S. 658 at 690-691), and since P.O. McKiernan was acting within the scope of his employment, plaintiff’s claim of negligent hiring, training and supervision fails (*see* Ashley v. City of New York, 7 A.D.3d 742 [2d Dept. 2004]). Additionally, as the Court has already stated, it was not necessary for P.O. McKiernan to have any special technical training, because he had probable cause.

Defendants further argue that plaintiff’s claim for assault and battery must be dismissed because he has not alleged any physical contact other than being handcuffed when arrested. Plaintiff argues that since a triable issue of fact exists as to whether probable cause existed to arrest him, the act of handcuffing him and forcing him into the patrol car, in itself, can constitute an actionable battery. Additionally, plaintiff argues that since his arrest was unlawful, P.O. McKiernan committed a battery when he touched plaintiff during the arrest.

The elements of a battery are bodily contact, made with intent, and offensive in nature (*see* Siegell v. Herricks Union Free School Dist., 7 A.D.3d 607, 609 [2d Dept. 2004]; *see also* Messina

v. Matarasso, 284 A.D.2d 32 [1st Dept. 2001]). The intent required for battery is “intent to cause a bodily contact that a reasonable person would find offensive” (Jeffreys v. Griffin, 1 N.Y.3d 34, 41 [2003]). However, “[t]here is no requirement that the contact be intentional to cause harm” (*see* Masters v. Becker, 22 A.D.2d 118, 120 [2d Dept. 1964]).

First, the Court finds unavailing, the cases plaintiff cites in his argument which stand for the proposition that an unlawful arrest makes any touching related to said arrest, also unlawful. In the case at bar, the Court has repeatedly and unequivocally stated that it finds that the plaintiff’s arrest was lawful. Furthermore, plaintiff’s allegation that he suffered a battery during his handcuffing is belied by his own deposition testimony, wherein he admitted that other than being handcuffed, he was not subjected to any other physical contact with P.O. McKiernan or other officers (Dep. Test. 53-54). Plaintiff also never testified that he suffered any physical injury or pain during the handcuffing and conceded that the handcuffs were removed before he was placed in the holding cell. The Court is also mindful that handcuffing an individual who has been placed under arrest is basic police procedure. In consideration of this, the Court does not find that a battery occurred.

Finally, the Court finds that plaintiff’s claims for defamation, slander and libel also necessitate dismissal. It is well settled that “[o]n a motion to dismiss the complaint pursuant to CPLR§ 3211(a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v. Martinez, 84 N.Y.2d 83, 87 [1984]; *see also* Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 [1977]; Breytman v. Olinville Realty, LLC, 54 A.D.3d 703, 704 [2d Dept. 2008], *lv. dismissed* 12 N.Y.3d 878 [2009]; 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d

144 [2002]).

In the case at bar, plaintiff has failed to present evidence of any statements made by the City or the individually named officers which constitute these causes of action. It should also be noted that plaintiff fails to respond to respondents' argument.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted; and the complaint and any cross-claims against them are hereby dismissed; and it is further

ORDERED that any conferences scheduled in this case are cancelled; and it is further

ORDERED that defendant movants shall serve a copy of this order on plaintiff and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: April 17, 2013

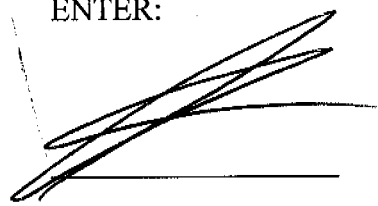
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MAY 02 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**