Bah v City of New York
2014 NY Slip Op 33501(U)
August 26, 2014
Supreme Court, Kings County
Docket Number: 29770-2010
Judge: Dawn Jimenez-Salta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - PART 25

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AMINA BAH,

Plaintiff,

-against-

Index No. 29770-2010
DECISION

THE CITY OF NEW YORK, NEW YORK POLICE DEPARTMENT, POLICE OFFICER DARRELL SHANNON, POLICE OFFICER GLENDA HOLLOMAN, POLICE OFFICER CHRISTOS DRAKAKIS, AND POLICE OFFICER MOHAMMED RIOS,

Defendants.

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HON. DAWN JIMENEZ-SALTA

Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1. Defendants the City of New York, New York Police Department, Police Officer Darrell Shannon, Police Officer Glenda Holloman, Police Officer Christos Drakakis, and Police Officer Mohammed Rios' Summary Judgment Motion dated December 11, 2013;
2. Plaintiff Aminah Bah's Affirmation in Opposition dated April 2, 2014; and
3. Defendants the City of New York, New York Police Department, Police Officer Darrell Shannon, Police Officer Glenda Holloman, Police Officer Christos Drakakis, and Police Officer Mohammed Rios' (hereafter collectively "the City of New York") Reply Affirmation dated May 29, 2014.

Papers	Numbered
Summary Judgment Motion and Affirmation in Support	Defendant 1-2 (Exhs. A-L)
Affirmation in Opposition	Plaintiff 1 (Exhs. A-B)
Reply Affirmation	Defendant 3

Upon the foregoing papers, Defendants the City of New York, New York Police Department, Police Officer Darrell Shannon (hereafter "Shannon"), Police Officer Glenda Holloman (hereafter "Holloman"), Police Officer Christos Drakakis (hereafter Drakakis"), and Police Officer Mohammed Rios (hereafter "Rios") move for an order pursuant to CPLR 3212 granting partial summary judgment of the Complaint, dismissing every cause of action except the third and fourth as alleged against Defendant the City of New York and the fifth as alleged against Defendant Holloman. For the reasons set forth below, Defendants' motion is GRANTED IN PART and DENIED IN PART.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is an action for damages for personal injuries sustained by Plaintiff Aminah Bah on June 4, 2010, at approximately 8 a.m. in her apartment located at 886 Lafayette Avenue in Brooklyn (hereafter the "Premises").

During the morning of June 4, 2010, Ms. Zela Scott (hereafter "Ms. Scott") called 911 emergency services to report a trespasser within the Premises. Ms. Scott, the landlord and owner of the Premises, reported that a man who did not have permission to be within the Premises was trespassing. Thereafter, a call went out over the police

radio for assistance. All four (4) police officer Defendants responded. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Upon arriving, the police officer Defendants met Ms. Scott outside the Premises to discuss her emergency call. After their discussion, Ms. Scott directed the four (4) officers to Plaintiff's apartment. Upon knocking on the door, a man answered. The man was Mr. Yahya Shakur (hereafter "Mr. Shakur"). The police officer Defendants identified themselves and asked for permission to enter. With Mr. Shakur's permission all four (4) police officer Defendants entered Plaintiff's apartment and walked into the kitchen area to discuss Ms. Scott's criminal complaint. Plaintiff then appeared, entered the kitchen area, and engaged the officers in conversation. After speaking with Mr. Shakur it was established that the alleged trespasser was, in fact, Plaintiff's boyfriend.

Regarding the events that occur immediately thereafter, of which give rise to the present civil action, the parties offer conflicting versions. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Plaintiff served a Notice of Claim on June 25, 2010. Plaintiff appeared and testified at a statutory hearing pursuant to General Municipal Law § 50-h on August 20, 2010. Plaintiff commenced the present action with the filing and service of a Summons and Verified Complaint on November 1, 2010. Defendant the City of New York joined issue by service of its Answer on December 30, 2010. Plaintiff served a Verified Bill of Particulars on February 8, 2011. On March 9, 2012, Plaintiff served a Supplemental Summons and Amended Complaint upon Defendants Shannon, Holloman, Drakakis, and Rios. Defendant the City of New York, served an Answer to Plaintiff's Amended Complaint and Demands on behalf of all Defendants on July 27, 2012. On May 30, 2012, Honorable Richard Velasquez granted Defendants' Motion to Dismiss Plaintiff's proposed amendments to the Complaint to further amplify her *Monell* claims pursuant to 42 U.S.C. § 1983. [Defendant 1-2 (Exhs. A-L).]

A preliminary conference was held on March 24, 2011. On June 22, 2011, Defendants provided a response to the Preliminary Conference Order. On June 5, 2012, November 22, 2012, and March 5, 2013, all parties entered into compliance conference orders. Defendant Holloman appeared for an examination before trial (hereafter "EBT") on December 2, 2011. Defendant Drakakis appeared for an EBT on October 3, 2012. Defendant Rios appeared for an EBT on October 10, 2012. All parties deposed witness Mr. Shakur on December 12, 2011. Defendant Shannon appeared for an EBT on August 8, 2013. Plaintiff served the Note of Issue, and discovery was completed on August 13, 2013. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

ARGUMENTS

Defendant the City of New York now moves for summary judgment on several grounds. Defendant contends that on on the morning of the incident: (1) Ms. Scott, stated that there was a man or people in her building whom she did not recognize, had threatened her, and that Plaintiff was not permitted to bring her boyfriend to her apartment; (2) as the police officer Defendants attained Plaintiff's boyfriend's identity, Plaintiff left their presence and went into her bedroom; (3) Defendant Holloman then made repeated requests that Plaintiff return to the conversation; (4) Defendant Holloman sought after Plaintiff and asked for permission to enter the bedroom; (5) Defendant Holloman entered the bedroom, observed Plaintiff naked, asked her to get dressed, and to return to the kitchen to finish the discussion; Plaintiff refused to return to the discussion; Defendant Holloman then explained that further refusal would require her to lead Plaintiff to the kitchen; (6) after refusing to leave the bedroom, for safety concerns, Defendant Holloman "grabbed [Plaintiff] by the wrist and forearm and led her into the kitchen area" [Defendants 2, paragraph 10.]; and (7) Plaintiff was not arrested, handcuffed, nor was she given a summons. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York now argues that pursuant to General Municipal Law § 50-e and § 50-i Plaintiff is barred from bringing suit against Defendants Shannon, Holloman, Drakakis, and Rios because Plaintiff did not timely file a notice of claim against them. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that Plaintiff's State and Federal causes of action for false arrest and false imprisonment fail because as a matter of law the police officer Defendants had probable cause to detain Plaintiff. The aforesaid probable cause being based on a burglary call from an identified citizen complaint. Defendant the City of New York also points out that: (1) the Answer raises legal justification as an affirmative defense; (2) Ms. Scott accompanied the officers to the Premises; and (3) Defendant Holloman felt the situation was unsafe. Defendant the City of New York contends that probable cause existed at the time that Plaintiff refused Defendant Holloman's directive to exit the bedroom and return to the kitchen. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that Plaintiff's claim for malicious prosecution be dismissed because Plaintiff was not the subject of a criminal proceeding. Plaintiff was detained in her apartment during an investigation of a burglary complaint. Defendant the City of New York points out that the police officer Defendants left the Premises without issuing a summons. And therefore, the malicious prosecution claims must fail. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that the Court should dismiss Plaintiff's claim for excessive force against Defendants Shannon, Drakakis, and Rios because they had no physical contact with Plaintiff. There is no evidence or testimony that any force was used at any time by Defendants Shannon, Drakakis, and Rios. Defendant's point out that Plaintiff testified that Officer Holloman was the only officer who made physical contact with her. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that the Court should dismiss Plaintiff's claim for negligent hiring, retention, and training. Defendant admits that the four police officer Defendants were acting within the scope of their employment at the time of the incident. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that Plaintiff's claims pursuant to 42 U.S.C. § 1983 should be dismissed because the police officer Defendants are protected from liability by the doctrine of qualified immunity. Defendant contends that it was objectively reasonable for the police officer Defendants to detain Plaintiff and investigate Ms. Scott's criminal allegations. Defendant the City of New York reasserts its previous argument that probable cause existed the time of the alleged incident. Additionally, the only force used was that used by Defendant Holloman. Therefore since there is no evidence that Defendants Shannon, Drakakis, and Rios used any force this cause of action as against them must fail. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that the Court should dismiss Plaintiff's claims for violations of the New York State Constitution because there is no such cause of action. Specifically, Defendant argues that Plaintiff's claim for a violation of her New York State Constitutional right to be free from unreasonable search and seizure should be dismissed because there exist alternative remedies, namely, her false arrest claims. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Defendant the City of New York argues that Plaintiff's causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress are not sustainable. Defendant contends that Plaintiff cannot sue on a theory of general negligence for deprivation of civil rights and that the circumstances surrounding Plaintiff's arrest, detention, and prosecution do not rise to the level of extreme outrage, as is required to pursue such causes

of action. Defendant again points out that probable cause existed at the time of the incident and this authorized such police action. Defendant also adds that these causes of action are duplicative of Plaintiff's causes of action for false arrest, false imprisonment, malicious prosecution, assault and battery. [Defendant 1-2 (Exhs. A-L)]

Defendant the City of New York also contends that Plaintiff's argument that the present motion relies on depositions that were neither signed nor reviewed is without merit. A transcript that is sent out with a sixty (60) day letter and is not signed and not returned can be used as signed. In addition where Plaintiff raises no challenge to the accuracy of her deposition transcript, the lack of signature does not render the deposition transcript inadmissible. Plaintiff also raises no challenge to the accuracy of her deposition and cites to it throughout her Opposition. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Plaintiff in opposition contends that at the time of the incident: (1) the police officer Defendants came into her apartment while she was with her then boyfriend, Mr. Yahya; (2) Plaintiff and Mr. Yahya were not fully dressed; (3) Defendant Holloman proceeded into Plaintiff's bedroom as Plaintiff attempted to "get dressed," told Plaintiff to get out of the bedroom using profanities, grabbed Plaintiff's left hand, pushed her, caused her to fall to the floor, grabbed Plaintiff's left hand again, pulled it behind her back, while pushing Plaintiff into the hallway consequently causing Plaintiff's back to hit an adjacent wall. Plaintiff alleges that during this police investigation, Defendant Holloman handled her in a manner that caused Plaintiff physical injury and falsely arrested, assaulted, battered, and humiliated Plaintiff. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Plaintiff argues that, contrary to Defendant's contention, General Municipal Law Section 50-e does not require that individual employees be served with a notice of claim. Plaintiff timely served a notice of claim upon Defendant the City of New York on June 25, 2010. Plaintiff argues that the purpose of a notice of claim is to allow the appropriate parties to investigate facts of which they were uninformed or to obtain information which subsequently might cease to be available. Plaintiff contends that because the individual Defendants allegedly performed the acts complained of the police officer Defendants needed no advance notice. Plaintiff additionally alleges that: (1) to require the individual officers be named in the Notice of Claim would serve to unjustly shield those officers from liability for their wrongful acts; (2) it is usually difficult to identify the officers involved in a police brutality case within the ninety (90) day statutory period; (3) a lawsuit may only be commenced after a hearing pursuant to General Municipal Law 50-h can be scheduled; and (4) it can often take years of motion practice before the City of New York provides information necessary to identify the relevant police officers. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Plaintiff argues that Defendants have not established that at the time of the incident probable cause existed to arrest her. Defendant Holloman testified that she ascertained that there was no burglary occurring soon after entering the Premises and that she had not suspected another crime had occurred. [Defendant 2 (Exh. H, pg. 46).] Defendant Rios testified that he heard Ms. Scott state to Defendant Drakakis that the female tenant had permission to be [in the Premises], the male did not. [Defendant 2 (Exh. J, pg. 19, ln. 25).] Plaintiff further points out that Defendants' testimony is inconsistent and because the police officer Defendants cannot articulate a consistent explanation for Plaintiff's arrest, they have failed to establish the warrantless arrest was justified. As such the police officer Defendants are not shielded from liability. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Additionally, Plaintiff points out that Defendants' motion is supported by unsigned deposition transcripts. The deposition transcripts submitted in support of Defendant's motion are not signed and fail to include proof that they were forwarded to the relevant witnesses for review pursuant to CPLR § 3116(a). As such, Plaintiff argues that Defendant has failed to provide sufficient evidence and as such the motion should be denied.

Plaintiff also argues that her claim pursuant to 42 U.S.C. §1983 against Defendants Shannon, Drakakis, and Rios should not be dismissed as Defendants have not addressed Plaintiff's eighth (8th) cause of action. Plaintiff argues that the three Defendants had an affirmative duty to intervene to protect Plaintiff's constitutional rights from infringement by Defendant Holloman and that their failure to do so gives rise to liability pursuant to 42 U.S.C. § 1983. Plaintiff testified that Defendants Shannon, Drakakis, and Rios stood by and did nothing as she was forcibly taken from her own bedroom, thrown onto furniture, hoisted up by her neck, and thrown against a wall. Moreover, with regard to Plaintiff's claims for false arrest, Defendant Drakakis testified that Plaintiff was not free to leave until she showed her identification. [Defendant 2 (Exh. I, pg. 49).] Defendant Rios testified that Plaintiff was deprived of her liberty to go. [Defendant 2 (Exh. J, pg. 66).] Defendant Shannon testified that Plaintiff was required to produce her identification. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

Lastly, Plaintiff argues that her causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress should not be dismissed. The aforementioned force used against her and her multiple serious injuries, including a broken toe and a shoulder tear are sufficiently outrageous to support the claim. Plaintiff also notes she was arrested in her home. [Defendant 1-2 (Exhs. A-L); Plaintiff 1 (Exhs. A-B); Defendant 3.]

COURT'S RULINGS

The moving party on a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 [2d Dep't 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 [1985]. Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 A.D.2d 493 [2d Dep't 1989].

NOTICE OF CLAIM

This Court must decide whether the Plaintiff was required to name Defendants Rios, Shannon, Holloman, and Drakakis, individually, in her Notice of Claim as a condition precedent to the commencement of this action insofar as asserted against them. Defendant the City of New York contends that Plaintiff was required to name the individual police officer Defendants. The requirements for a notice of claim are found in General Municipal Law § 50-e (2), which states:

> "The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his [or her] attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable."

The test to determine whether a notice of claim complies with section 50-e of the General Municipal law is "merely whether it includes information sufficient to enable the city to investigate," not whether the plaintiff identifies, by name, the individuals who allegedly committed the wrongdoing (*Scott v. City of New Rochelle*, 986 N.Y.S.2d 819 (N.Y. Sup. 2014); *citing Brown v. City of New York*, 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078 (200); *see also Schiavone v. County of Nassau*, 51 A.D.2d at 981, 380 N.Y.S.2d 711 ["The prime, if not the sole, objective of the notice requirements of .... [General Municipal Law provision at issue] is to assure the [municipality] an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available"]). Accordingly, this Court must determine whether the Plaintiff

sufficiently described the incident to enable Defendant the City of New York to investigate and determine which police officers were involved.

Plaintiff's Notice of Claim stated, in part, that "the claim arose on June 4, 2010, when claimant was falsely arrested while in her apartment at 886 Lafayette Avenue, Brooklyn..." The Notice of Claim included all relevant information which would have enabled the City to conduct a thorough investigation to discover the identity of the individual police officers involved in the alleged incident. *Scott v. City of New Rochelle*, 986 N.Y.S.2d 819, 829-830 (N.Y. Sup. 2014); *citing Goodwin v. Pretorius*, 105 A.D.3d 207, 210-211, 2013 N.Y. Slip Op. 01931, 2 - 3 (2013). The identity of the officers involved in the alleged incident were readily accessible to the Defendants insofar as the Plaintiff gave a detailed description of the time, place, and nature of the acts (see Plaintiff's Notice of Claim attached as Defendants' Exhibit A; *see also Chamberlain v. City of White Plains*, 986 F.Supp. 2d 363, 2013 WL 6477334 [S.D.N.Y. 2013] ["Plaintiff's Notice of Claim contains more than enough information to allow the City to properly investigate the alleged incident and identify the police officers involved. It describes the specific date, time, and address of the incident and includes a detailed description of the alleged facts regarding the interaction between Chamberlain and the police"]; *Verponi v. City of New York*, 31 Misc.3d 1230(A), 2011 WL 1991719 [N.Y. Sup. 2011] ["The notice listed the date, time and place of the incident. It also gave a sufficiently detailed description on the incident and the nature of Plaintiff's claims to enable the City to identify the officers involved and investigate her claims"]). *Scott v. City of New Rochelle*, 986 N.Y.S.2d 819, 829-830 (N.Y. Sup. 2014). Plaintiff was not required to name the individual officers in her notice of claim.

In light of the Court's foregoing case analysis, the Defendants have failed to demonstrate their prima facie entitlement to summary judgment dismissing Plaintiff's causes of action on the ground that Plaintiff failed to name those Defendants in her Notice of Claim. Accordingly, that branch of the Defendants' motion seeking dismissal of Plaintiff's causes of action insofar as against Defendants Shannon, Holloman, Drakakis, and Rios for failure to name them in Plaintiff's Notice of Claim is denied.

FALSE IMPRISONMENT/ARREST

A plaintiff asserting claims of false imprisonment and false arrest must establish that that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged" (*Petrychenko v. Solovey*, 99 A.D.3d 777, 780, 952 N.Y.S.2d 575 [2d Dep't 2012] [internal quotation marks omitted]). "Under New York law, the torts of false arrest and false imprisonment are synonymous" (*Fincher v. County of Westchester*, 979 F.Supp. 989, 998 [S.D.N.Y. 1997]). Further, "a claim for false arrest under § 1983 is substantially the same as a claim for false arrest under New York Law" (id.). In moving for summary judgment to dismiss causes of actions alleging false arrest and false imprisonment, the defendants "must establish that the plaintiff's arrest and subsequent detention were supported by probable cause in order to demonstrate its entitlement to judgment as a matter of law" (id. at 780, 952 N.Y.S.2d 575). However, "[w]hen an arrest is made without a warrant, as here, a presumption arises that it was unlawful, and the burden of proving justification is cast upon the defendant" (id.). Accordingly, the defendants have the burden of proving justification for the unlawful arrest of the plaintiff. *Scott v. City of New Rochelle*, 986 N.Y.S.2d 819, 833 (N.Y.Sup. 2014).

In an action to recover damages for false arrest based on a warrantless arrest, the burden is on the defendant to prove probable cause. However, if the defendant can establish probable cause for the arrest, it is a complete defense to an action alleging false arrest or false imprisonment. *See Yi v. City of New York*, 227 A.D.2d 453, 453, 643 N.Y.S.2d 123, 124 [2d Dep't 1996]; *see Holmes v. City of New Rochelle*, 190 A.D.2d 713, 714, 593 N.Y.S.2d 320 [2d Dep't 1993]. Probable cause is a complete defense to an action alleging false arrest or false imprisonment whether brought under state law or 42 U.S.C. § 1983. *Carlton v. Nassau County Police Dep't*, 306

A.D.2d 365, 366 (2003); *citing Broughton v State of New York, supra; Zwecker v Clinch*, 279 A.D.2d 572, 573 (2001); *Bernard v United States*, 25 F.3d 98, 102 (2d Cir 1994). In *Yi*, the defendant submitted the deposition testimony of the Officer who arrested the plaintiff, and the court in that case found that this testimony was sufficient to establish the existence of probable cause.

Probable cause requires only information sufficient to support a reasonable belief that an offense has been committed by the plaintiff (*see People v Bigelow*, 66 N.Y.2d 417 [1985]; *Reape v City of New York*, 66 A.D.3d 755 [2d Dep't 2009]). The arrest need not be supported by information and knowledge which excludes all possibilities of innocence at the time of the plaintiff's arrest, and points to guilt beyond a reasonable doubt, rather, probable cause depends on probabilities, not certainties (*see People v Sanders*, 79 A.D.2d 688, 690 [2d Dep't 1980]). If the facts giving rise to the arrest are undisputed, the existence of probable cause is a matter for the court to determine as a matter of law (*see Parkin v Cornell Univ.*, 78 N.Y.2d 523 [1991]; *Diederich*, 49 A.D.3d at 493; *Fausto v City of New York*, 17 A.D.3d 520 [2d Dep't 2005]).

Based upon the conflicting testimony of the police officer Defendants as to Plaintiff's arrest and detention, Plaintiff's causes of action for false arrest and false imprisonment, cannot be dismissed. In his deposition testimony Defendant Drakakis was present, in Plaintiff's apartment, at the time of the incident and testified that Plaintiff was not free to leave. Similarly, Defendant Rios in his deposition testimony testified that he was present at the time of the incident and that Plaintiff was deprived of her freedom to go. Defendant Rios also testified that he heard Ms. Scott, the owner of the Premises, state that Plaintiff belonged in the apartment. The testimonies of Defendant Holloman and Plaintiff also evidences that Defendant Holloman was present at the time of the incident and physically grabbed and detained Plaintiff. Defendants relate a different set of circumstances giving rise to Plaintiff's arrest and detention. Plaintiff relates a different set of circumstances giving rise to her arrest from that of Defendants. Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's cause of action for false imprisonment and false arrest is denied.

MALICIOUS PROSECUTION

As to the claim of malicious prosecution, "to sustain a cause of action alleging malicious prosecution, a plaintiff must establish the following: (1) a criminal proceeding commenced or continued by the defendant against him or her; (2) termination of the proceeding in favor of the accused plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice" *Chetrick v. Cohen*, 52 A.D.3d 449, 450, 859 N.Y.S.2d 705, 707 [2nd Dep't 2008]; *quoting O'Donnell v. County of Nassau*, 7 A.D.3d 590, 591, 775 N.Y.S.2d 902 [2nd Dep't 2004]. Where the defendants have probable cause to believe that a plaintiff committed the underlying crime, it is a complete defense to a claim of malicious prosecution and a plaintiff will not prevail (*see Fortunato v City of New York*, 63 A.D.3d 880 [2d Dep't 2009], supra; *Burns v City of New York*, 17 A.D.3d 305 [2d Dep't 2005]; *Wasilewicz v Village of Monroe Police Dep't*, 3 A.D.3d 561 [2d Dep't 2004]; *Ben-Zaken v City of New Rochelle*, 273 A.D.2d 426 [2d Dep't 2000]; *Kandekore v Town of Greenburgh*, 243 A.D.2d 610 [2d Dep't 1997]). Plaintiff does not oppose this branch of Defendants' motion. Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's claims for malicious prosecution is granted.

ASSAULT & BATTERY

Defendants seek partial summary judgment and dismissal of Plaintiff's cause of action alleging assault and battery as against Defendants Rios, Shannon, and Drakakis. "To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent" (*Holland v. City of Poughkeepsie*, 90 A.D.3d 841, 846, 2011 N.Y. Slip Op. 09277, 4 [2011]; *citing Higgins v Hamilton*, 18 A.D.3d 436, 436 [2005]). Plaintiff testified that Defendant Holloman had involvement in the alleged assault. Plaintiff did not testify that Defendants Drakakis, Rios, and

Shannon had used any force against her at any point before, during, or after their investigation. The Court finds that the evidence presented demonstrates that Defendants Drakakis, Rios, and Shannon did not make any physical contact with Plaintiff.

Defendant the City of New York has met its prima facie burden of establishing that Defendants Rios, Shannon, and Drakakis did not have any physical contact with the Plaintiff during the underlying incident. Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's claims for assault and battery, as against Defendants Drakakis, Rios, and Shannon is granted. Defendant's motion to seeking dismissal of Plaintiff's claims for assault and battery as against Police Officer Holloman is denied as there are still issues of fact as to whether she used excessive force against Plaintiff. Accordingly, Plaintiff's claim for assault and battery as against Defendant Holloman is severed and survives Defendant's motion.

NEGLIGENT HIRING & RETENTION

An employer will be held liable for torts committed by an employee who is acting within the scope of his or her employment under a theory of respondeat superior, and "no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Eckardt v. City of White Plains*, 87 A.D.3d 1049, 1051, 930 N.Y.S.2d 22, 25 [2d Dep't 2011], *quoting Talavera v. Arbit*, 18 A.D.3d 738, 738, 795 N.Y.S.2d 708 [2d Dep't 2005]. Defendant the City of New York admits that Defendants Holloman, Shannon, Rios, and Drakakis acted within the scope of their employment at the time of the incident. Plaintiff does not oppose this branch of Defendant's motion. Accordingly, that branch of Defendant's motion seeking dismissal of Plaintiff's claims for negligent hiring, retention, supervision and training is granted.

42 U.S.C. § 1983

The Court now turns to Plaintiff's cause of action alleging 42 U.S.C. § 1983 violations as against Defendant the City of New York for the actions of the police officer Defendants. To prevail on a claim against a municipality pursuant to 42 U.S.C. § 1983, a plaintiff must plead and prove (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right (*Pendleton v. City of New York*, 44 A.D.3d 733, 736 [2d Dep't 2007]; *Jackson v Police Dep't of the City of New York*, 192 A.D.2d 641, 642 (2d Dep't 1993]).

The Supreme Court has recognized four (4) ways that a plaintiff may demonstrate a municipality's policy or custom: (1) it may be a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by ['the municipalities'] officers (*Monell v Dep't of Soc. Servs.*, 436 US 658, 690 [1978]); (2) it may be "a deliberate choice to follow a course of action [which] is made from amount various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in questions" (*Pembaur v City of Cinn.*, 475 U.S. 469, 483-84 [1986]); (3) it may be a "widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law" (*City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 [1985]); and (4) a city may also be held liable for failure to properly train but "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. (*City of Canton v Harris*, 489 U.S. 378, 388 [1989]; *Pendleton*, 44 A.D.3d at 736-37). In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961) the Supreme Court made clear that an officer who, acting under color of state law, commits an act directly resulting in a constitutional deprivation is liable for damaged under § 1983.

Qualified Immunity

As an initial matter, Plaintiff's claims of municipal liability pursuant to *Monell* were dismissed by the Decision and Order of Justice Richard Velazquez dated May 16, 2012. The present motion seeks dismissal of Plaintiff's § 1983 claims on the basis that the police officer Defendants have qualified immunity.

"Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). The principle of qualified immunity shields government officials from liability for their performance of discretionary actions and offers them the benefit of avoiding costly, time-consuming and, ultimately unsuccessful litigation. *See Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000). When considering the issue of qualified immunity [a court] must first determine whether—viewed in the light most favorable to the injured party—the facts alleged demonstrate that the officer's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034; *see Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (noting that a court should determine "not only the currently applicable law, but whether that law was clearly established at the time an action occurred"). This inquiry is, in essence, a determination "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151; *see Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). If the law was clearly established that the officer's conduct violated a constitutional right, qualified immunity is inappropriate. If, however, "the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727. In such a case, courts must grant an officer qualified immunity. *Caldarola v. Calabrese*, 298 F.3d 156, 160 -161 (2d Cir. 2002).

Failure to Intervene Claims

The Court finds that the Defendant Officers are not entitled to qualified immunity with respect to Plaintiff's surviving claims. In opposition, the plaintiff raised issues of fact as to whether the police officer Defendants conduct was appropriate insofar as she testified that the Defendant Holloman walked into Plaintiff's bedroom while she was naked, grabbed Plaintiff, and led her out of her own bedroom. Defendants relate a different set of circumstances giving rise to Plaintiff's arrest and detention. During that time Defendants Rios, Shannon, and Drakakis were present. There is a question of fact as to whether the police officer Defendants had probable cause to arrest Plaintiff. Viewing the facts in the light most favorable to the Plaintiff, a reasonable jury could find that the police officer Defendants are not entitled to qualified immunity. Accordingly, that branch of Defendant's motion seeking dismissal of Plaintiff's claims pursuant to § 1983 for failure to intervene as against Defendants Rios, Shannon, and Drakakis on the grounds of qualified immunity is denied.

1983 Excessive Force Claims

A person has a private right of action under 42 U.S.C. § 1983 against police officers who, acting under color of law, violate federal constitutional or statutory rights. A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute against that officer (*Delgado v. City of New York*, 86 A.D.3d 502, 511, 928 N.Y.S.2d 487, 496 (1st Dep't 2011); *citing Hodges v. Stanley*, 712 F.2d 34, 35 [2d Cir. 1983]). Even if the seizure was lawful, a plaintiff has a clearly established constitutional right not to be subjected to excessive force. "A claim that a law enforcement official used excessive force during the course of an arrest, investigatory stop, or other seizure of the person is to be analyzed under the objective reasonableness standard of the Fourth Amendment. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Washington-Herrera v. Town of Greenburgh*, 101 A.D.3d 986, 989, 956 N.Y.S.2d 487, 490 (2d Dep't 2012); *citing Campagna v. Arleo*, 25 A.D.3d 528, 529, 807 N.Y.S.2d 629 [citations and internal quotation marks omitted]).

Here the evidence clearly demonstrates that Defendants Rios, Shannon, and Drakakis did not make any physical contact with Plaintiff during the incident complained of. Accordingly, that branch of Defendant's motion seeking dismissal of Plaintiff's claims for excessive force pursuant to § 1983 as against Defendant Rios, Shannon, and Drakakis is granted.

Federal False Imprisonment Claims

The rights implicated in Plaintiff's claims for false imprisonment are more than adequately asserted through Plaintiff's other, multiple counts. The New York Court of Appeals has recognized a limited private right of action for violations of the search and seizure provisions of the State Constitution, the remedy is available "where an alternative remedy will adequately protect the interest at stake. *Mesa v. City of New York*, 2013 WL 31002, 33 (S.D.N.Y. 2013); *citing Coakley v. Jaffe*, 49 F.Supp.2d 615, 628–29 (S.D.N.Y. 1999), abrogated on other grounds by *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268 (2d Cir. 1999) (addressing joint participation of private and state actors under Section 1983). Accordingly, Plaintiff's claims for false imprisonment pursuant to Federal law are adequately protected under the surviving New York State claims for false imprisonment and false arrest. Therefore, that branch of Defendants' motion seeking dismissal of plaintiff's claims for false imprisonment pursuant to Federal Law is granted.

NEW YORK STATE CONSTITUTIONAL VIOLATIONS

Summary Judgment must be granted in favor of Defendants with respect to Plaintiff's myriad of New York Constitutional Claims. As part of her Complaint, Plaintiff asserts claims alleging violations of the New York State Constitution. The rights implicated in these state constitutional claims are more than adequately asserted through Plaintiff's other, multiple counts. Moreover while the New York Court of Appeals has recognized a limited private right of action for violations of the search and seizure provisions of the State constitution, the remedy is available "where an alternative remedy will adequately protect the interest at stake. *Mesa v. City of New York*, 2013 WL 31002, 33 (S.D.N.Y. 2013); *citing Coakley v. Jaffe*, 49 F.Supp.2d 615, 628–29 (S.D.N.Y. 1999), abrogated on other grounds by *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268 (2d Cir. 1999) (addressing joint participation of private and state actors under Section 1983). Plaintiff does not oppose this branch of Defendants' motion. Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's claims for violations of her rights under the New York State Constitution is granted.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendant the City of New York is also entitled to summary judgment dismissing the fourteenth cause of action, as "[p]ublic policy bars claims for intentional infliction of emotional distress against a governmental entity" (*Liranzo v New York City Health & Hosps. Corp.*, 300 A.D.2d 548, 548 [2002]; *see Ralin v City of New York*, 44 A.D.3d 838, 839 [2007]; *Mooney v City of New York*, 27 A.D.3d 535 [2006]). *Ellison v. City of New Rochelle*, 62 A.D.3d 830, 833, 2009 N.Y. Slip Op. 04025, 3 (2009). Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiff's cause of action for intentional infliction of emotional distress is granted.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

While claims for negligent infliction of emotional distress cannot generally be maintained against the State or a governmental entity, there are limited circumstances in which they may be maintained (*Lauer v. City of New York*, 95 N.Y.2d 95, 114, 711 N.Y.S.2d 112, 733 N.E.2d 184 [2000]). Such circumstances include when the claim is premised upon "conduct that unreasonably endangers the [claimant's] physical safety" (*Losquadro v. Winthrop Univ. Hosp.*, 216 A.D.2d 533, 628 N.Y.S.2d 770 [2d Dep't 1995]) or upon certain exceptional circumstances that have been specifically delineated by the courts, to wit: incorrectly informing someone of a death (*Johnson v. State of New York*, 37 N.Y.2d 378, 381–82, 372 N.Y.S.2d 638, 334 N.E.2d 590 [1975]); the negligent exposure to the HIV virus (*Ornstein v. New York City Health & Hosps. Corp.*, 10 N.Y.3d 1, 852 N.Y.S.2d 1, 881 N.E.2d 1187 [2008]); and the

negligent mishandling of a corpse (*see Johnson v. State of New York*, 37 N.Y.2d at 382, 372 N.Y.S.2d 638, 334 N.E.2d 590). None of which are alleged herein. Accordingly, that branch of Defendants' motion seeking dismissal of Plaintiffs cause of action for negligent infliction of emotional distress must be and is hereby granted (*see Matter of Human Tissue Litig.*, 38 Misc.3d 184, 955 N.Y.S.2d 721).

For the reasons set forth above, it is hereby

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's complaint as against Defendants Rios, Shannon, Drakakis, and Holloman on the grounds that they were not timely served with notice of claims is DENIED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's state causes of action for false imprisonment and false arrest is DENIED; and it is further;

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for malicious prosecution is GRANTED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for assault and battery as against Defendants Rios, Shannon, and Drakakis is GRANTED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for negligent hiring, retention, supervision and training is GRANTED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for excessive force pursuant to § 1983 as against Defendants Rios, Shannon, and Drakakis is GRANTED; as against Defendant Holloman is DENIED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for failure to intervene pursuant to § 1983 is DENIED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for violations of the New York State Constitution is GRANTED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for intentional infliction of emotional distress is GRANTED; and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's cause of action for negligent infliction of emotional distress is GRANTED.

This constitutes the Decision of the Court.

Dated: August 26, 2014
Brooklyn, New York

Hon. DAWN JIMENEZ-SALTA

Bah v. City, NYPD, POs Rios, Shannon, Drakakis, & Holloman. (Index # 29770/2012)

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court