Xiaoning He v City of New York
2015 NY Slip Op 30370(U)
March 19, 2015
Supreme Court, Queens County
Docket Number:
Judge: Kevin J. Kerrigan

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan IA Part 10
Justice

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Xiaoning He,

Plaintiff,

- against -

The City of New York, Detective William Martino(Tax #932969), Detective Jonathan Benedict(Shield #7783), Undercover Detective CO167, Undercover Detective CO140, Sergeant William Prokesch(Tax #902228), Sergeant Benjamin Benson (Tax #903422), Detective Shaheed Raheem(Tax #930996), Detective Juan Giarmoleo(Tax #923881), Detective Philip Adaszewski(Tax #926477), Undercover Detective CO142, Undercover Detective CO162 and Tomilu Corp.,

Defendants.

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Index Number: 700008/12

Motion Date: October 3, 2014

Motion Cal. Number: 52

Motion Seq. No.: 4

The following numbered papers read on this motion by defendants The City of New York, Detective William Martino, Detective Jonathan Benedict, Undercover Detective CO167, Undercover Detective CO140, Sergeant William Prokesch, Sergeant Benjamin Benson, Detective Shaheed Raheem, Detective Juan Rodriguez, Detective Dominick Giarmoleo, Detective Philip Adaszewski, Undercover Detective CO142 and Undercover Detective CO162 for partial summary judgment dismissing thirteen causes of action of plaintiff's second amended verified complaint in whole or in part.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 87-117
Answering Affidavits - Exhibits.....	EF 119-127
Reply Affidavits.....	EF 131-132

Upon the foregoing papers it is ordered that the motion is determined as follows:

This action arises out of an undercover police operation by the Queens Vice Enforcement Unit of the New York City Police Department on January 18, 2011, at a salon or beauty parlor located on the third floor of premises known as 135-21 Roosevelt Avenue in Flushing, Queens, where plaintiff was employed. Plaintiff's causes of action against movants are based on her contentions that she was pushed off a rooftop by a uniformed police officer and falsely arrested for prostitution.

In response to this motion, plaintiff has withdrawn the eighth, tenth, eleventh, twelfth, thirteenth, sixteenth, seventeenth and twentieth causes of action asserted in her second amended verified complaint. She has also withdrawn all causes of action as asserted against Detective Jonathan Benedict, Detective Shaheed Raheem, Detective Juan Rodriguez, Detective Dominick Giarmoleo, Detective Philip Adaszewski, Undercover Detective CO142 and Undercover Detective CO162. In addition, plaintiff has withdrawn the seventh cause of action as asserted against the City of New York. The causes of action that have been withdrawn by plaintiff are dismissed.

Plaintiff has submitted opposition to the remaining portion of movants' application for summary judgment, that is, with respect to the first, second, ninth, fourteenth, fifteenth, eighteenth and nineteenth causes of action as asserted against the City of New York, Detective William Martino, Sergeant William Prokesch, Sergeant Benjamin Benson, Undercover Detective CO140 and Undercover Detective CO167 (collectively the City defendants). The court will address the motion for summary judgment as to these causes of action against the City defendants.

The City defendants have failed to establish their prima facie entitlement to summary judgment on the first cause of action for false arrest/imprisonment and the second cause of action for a claim under 42 USC § 1983 based on the false arrest/imprisonment. (*See Diederich v Nyack Hosp.*, 49 AD3d 491 [2d Dept 2008].) While probable cause to believe a person committed a crime is a complete defense to a claim of false arrest/imprisonment, the existence of probable cause may be decided as a matter of law only when there is no real dispute as to the facts or the proper inferences to be drawn from such facts. (*See Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 529 [1991]; *MacDonald v Town of Greenburgh*, 112 AD3d 586 [2d Dept 2013]; *Lundgren v Margini*, 30 AD3d 476 [2d Dept 2006].) Here, the markedly differing accounts provided by the parties in deposition testimony concerning the events leading to plaintiff's arrest raise a triable issue of fact as to whether the City defendants had probable cause for the arrest. (*Id.*; *see also Diederich*, 49 AD3d at 493.) The conflicting evidence also

precludes summary judgment based on the City defendants' assertion of qualified immunity as a defense to the section 1983 claim. (*See MacDonald*, 112 AD3d at 587; *Diederich*, 49 AD3d at 493.) The part of the motion that is for summary judgment dismissing the first and second causes of action, therefore, is denied.

Summary judgment dismissing the ninth cause of action for negligence/gross negligence is granted. There is no cause of action to recover damages for negligent assault in New York. (*See Oteri v Village of Pelham*, 100 AD3d 725 [2d Dept 2012]; *Hernandez v State of New York*, 39 AD3d 709 [2d Dept 2007].) While a pleading may contain alternative theories of recovery (CPLR 3014), the factual allegations of plaintiff's complaint do not support a claim for negligence. (*See Schetzen v Robotsis*, 273 AD2d 220 [2d Dept 2000]; *Wrase v Bosco*, 271 AD2d 440 [2d Dept 2000]; *Wertzberger v City of New York*, 254 AD2d 352 [2d Dept 1998].) Plaintiff alleges in the complaint that after she exited through the back door of the salon onto the roof of the subject premises, the individual City defendants chased her as she ran onto an adjoining rooftop and toward the unprotected edge of the roof. Plaintiff further alleges that she then stopped and, as she stood still, one of the police officers "cursed at her, and viciously and maliciously pushed her forcefully over the edge of the roof ... causing [her] to fall onto the lower rooftop one story below." Plaintiff has not proffered any evidence that would change the gravamen of her claim from assault to negligence. Should plaintiff succeed in establishing the intentional offensive conduct she has alleged, the City defendants will be liable for assault and not negligence. (*See Oteri*, 100 AD3d at 726; *Schetzen*, 273 AD2d at 221; *Wrase*, 271 AD2d at 441; *Wertzberger*, 254 AD2d at 352.)

Plaintiff's attempt to save the negligence cause of action by extending it to the entirety of the City defendants' actions on the night of plaintiff's arrest is unavailing. The allegations in the complaint relating to the alleged wrongful arrest and detention do not form the basis for a recovery under general principles of negligence but under the traditional remedies of false arrest and imprisonment. (*See Ray v County of Nassau*, 100 AD3d 854 [2d Dept 2012]; *Johnson v Kings County Dist. Attorney's Office*, 308 AD2d 278, 284-285 [2d Dept 2003].) There are no other factual allegations sufficient to constitute a cause of action for negligence. (*See Ray*, 100 AD3d at 854.)

On the evidence presented, the City defendants cannot be held liable for the alleged failure of one or more of the individual City defendants to intercede on behalf of plaintiff when her constitutional rights were being violated by other officers. For a plaintiff to succeed on such a cause of action, the alleged

violation must have occurred in the presence of the police officer being charged with not intervening and the circumstances must have been such as to have made it objectively unreasonable for the officer to believe that the other officers' conduct did not violate plaintiff's rights. (*See Ricciuti v New York City Tr. Auth.*, 124 F3d 123, 129 [2d Cir 1997].) The other individual City defendants were not present when the undercover officers conducted the initial phase of the "buy and bust" operation that resulted in the decision to arrest plaintiff or when the undercover officers allegedly blocked the door and prevented plaintiff from leaving the salon. Faced with the information available to them at the time, it was not objectively unreasonable for the non-intervening officers to believe that their fellow officers' conduct did not violate plaintiff's rights. (*Id.*) Nor can a failure to intervene with respect to the alleged act of a police officer in pushing plaintiff off the roof be actionable in this instance. Viewing the evidence in the light most favorable to plaintiff, the alleged push was a single sudden act which provided no realistic opportunity for the other officers to attempt to prevent it. (*See O'Neill v Krzeminski*, 839 F2d 9, 11-12 [2d Cir 1988].) Accordingly, the City defendants are granted summary judgment dismissing the fourteenth and fifteenth causes of action for failure to intervene and a claim under 42 USC § 1983 based upon failure to intervene.

The City defendants are granted summary judgment dismissing the eighteenth and nineteenth causes of action for failure to provide a prompt arraignment pursuant to CPL 140.20(1) and for a claim under 42 USC § 1983 based thereon. Although the tort of false imprisonment includes a right to recover where there was an unnecessary or intentional delay in arraigning plaintiff, there is no separate, private right of action for a violation of the statutory requirement for a prompt arraignment. (*See Watson v City of New York*, 92 F3d 31, 36-37 [2d Cir 1996]; *Devito v Barrant*, 2005 US Dist LEXIS 22444 [ED NY 2005]; *Murray v City of New York*, 74 AD3d 550 [1st Dept 2010].)

Dated: February 19, 2015`

Kevin J. Kerrigan, J.S.C.