

Diallo v City of New York
2015 NY Slip Op 30568(U)
March 19, 2015
Sup Ct, Bronx County
Docket Number: 301592/2011
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

-----X
Abdoulaye Diallo,

Plaintiff,

DECISION and ORDER
Index No 301592/2011

-against-

The City of New York, The New York City Police
Department and Police Officer Burgos
(Tax ID #903510),

Defendants.
-----X

Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion to dismiss or summary judgment:

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2

Plaintiff Diallo commenced the underlying personal injury and civil rights action against the defendants claiming that their negligence caused him to sustain serious injuries. Mr. Diallo alleges in his Notice of Claim that on 3/30/10, at approximately 2:30AM, he was lawfully and rightfully in his vehicle when he was “assaulted, battered, and handcuffed, forcibly searched, illegally detained and unlawfully arrested” by the defendants without probable cause, justification or provocation. Mr. Diallo also alleges that defendant Police Officer Burgos (“PO Burgos”) pointed a gun at his head in a threatening manner and violated his civil rights pursuant to 42 USC § 1983. The encounter resulted in Mr. Diallo being released from custody and issued a summons for leaving the scene of a motor vehicle accident.

Defendants City of New York (“NYC”), New York City Police Department (“NYPD”) and Police Officer Burgos (“PO Burgos”) move to dismiss the plaintiff’s claims pursuant to CPLR 3211 and alternatively move for summary judgment pursuant to CPLR 3212. Plaintiff Diallo opposes the defendants’ motion.

DISCUSSION

A party may move for judgment dismissing one or more causes of action asserted against him on various grounds. (CPLR 3211).

Since summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY 2d 361 [1974]), the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence that eliminates all material issues of fact. (*Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986].) In opposing such a motion, the non-moving party must produce evidentiary proof in admissible form sufficient to establish material questions of fact that must be determined at trial. (*Zuckerman v City of New York*, 49 NY2d 557 [1980].)

In support of their motion, defendants NYC, NYPD and PO Burgos proffer copies of the officer's notes, the summons issued to the plaintiff and the respective 50-h hearing transcripts of plaintiff Diallo and PO Burgos.

In opposition to the defendants' motion, plaintiff Diallo, like the defendants, proffers the transcripts, PO Burgos' "Stop, Question and Frisk" Report and the plaintiff's uncertified medical findings.

During his 6/28/13 50-h hearing, plaintiff Diallo testified that between 2:00AM and 3:00AM he drove a passenger in his taxicab to 845 Lafayette Avenue where he and the passenger were involved in a fare dispute. At some point, Mr. Diallo pressed the gas pedal and struck the parked and unoccupied car in front of him. He then parked his car and spoke with an unidentified witness who was driving a vehicle behind him. Mr. Diallo assumes that this witness called the police. A police car subsequently arrived and the plaintiff assumed that they came regarding the accident. His vehicle was double-parked but "very properly parked" to allow other vehicles to pass. The officers pulled up behind his double-parked vehicle. He waited for the officers to pull up and parallel park next to him so that he could inform them of the accident but they remained behind his vehicle. Mr. Diallo states that he moved his car a second time but this time, he left the block, made a right and then parked his vehicle. The police car followed behind his vehicle. Two officers approached the plaintiff's vehicle with their guns drawn. PO Burgos pointed his gun at the plaintiff's head and instructed him to "park the car, take the keys out, put the keys on top of the car." Comments were made regarding the car being stolen and the plaintiff responded that he did not steal the car and

possessed its papers. Mr. Diallo maintains that before he could get his foot out of the car, PO Burgos pushed him to the ground and handcuffed him. Neighborhood persons began yelling "Fuck you police officer, stop doing this." PO Burgos responded, "Fuck you." The plaintiff was then placed in the police car and transported back to the scene of the accident. He testified that PO Burgos instructed his partner to take the plaintiff to jail but PO Pichardo was unwilling. Mr. Diallo produced his license and registration whereupon he was released from the officers' custody and issued a summons to appear in court.

During a 50-h hearing held on 6/28/13, PO Burgos testified that he and his partner, PO Pichardo, were assigned to the Hunts Point area; Office Pichardo drove the marked police car. On the morning of 3/30/10, they were within their assigned area when someone waved them down, informed them that he witnessed an accident and led them to the scene. PO Burgos stated that they followed the witness' vehicle and turned into Longfellow Avenue, a one-way street with parking on both sides and one lane of travel. The witness identified the plaintiff's vehicle and the vehicle he struck. PO Burgos stated that he and his partner observed the plaintiff's double-parked vehicle a "little further" from the struck vehicle; the plaintiff's car engine was engaged and its parking lights were on. The officer turned on their strobe lights and the plaintiff moved his vehicle about two car lengths. The officer then honked his horn, chirped the siren and parked behind the plaintiff's taxicab. As the officers began to exit the police car, the plaintiff started to move again. PO Burgos determined that the plaintiff was attempting to evade them because he failed to stop, causing them to cut off his taxicab with their vehicle. The officers approached the taxicab with their guns drawn and PO Burgos directed plaintiff Diallo to shut off the engine and exit the vehicle. After he did not respond, PO Burgos opened the taxicab door, grabbed the plaintiff's left arm, pulled him out of the vehicle, went down with him on the ground and handcuffed him. They placed Mr. Diallo in their vehicle and transported him back to the accident scene and checked his information; he had no warrants and he owned the taxicab. PO Burgos released Mr. Diallo and issued him a summons for leaving the scene of an accident. In his UF-250 report, PO Burgos states that he suspected the plaintiff of grand larceny.

False Arrest and Unlawful Imprisonment

The plaintiff claims that he was falsely arrested and unlawfully imprisoned by the police. Probable cause constitutes a complete defense to false arrest and unlawful imprisonment claims as a matter of law; claims thus fail. (*Garcia v City of New York*, 115 AD3d 447 [1st Dept 2014] citing *Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011]; *Young v City of New York*, 72 AD3d 415 [1st Dept 2010]; *Grant v Barnes & Noble, Inc.*, 284 AD2d 238 [1st Dept 2001].) Probable cause exists when the facts and circumstances would lead a similarly situated reasonably prudent person to believe that the plaintiff is guilty. (*Brown v Sears Roebuck and Co.*, 297 AD2d 205 [1st Dept 2002].) It requires information to support a reasonable belief that an offense has been committed versus proof beyond a reasonable doubt. (*People v Williams*, 122 AD3d 502 [1st Dept 2014]; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006].)

In the instant motion, the person who witnessed plaintiff Diallo's vehicle strike the rear of another vehicle, flagged down the police and informed them that he witnessed a rear-end collision with a parked vehicle. The plaintiff's vehicle was identified as the rear-ending vehicle. It is undisputed that the eyewitness made no mention of grand larceny. It is undisputed that Mr. Diallo's vehicle was "standing still," in a parked position, when the police arrived. It is undisputed that Mr. Diallo informed the officers that he owned the vehicle and had its papers prior to his arrest. The defendants contend that when the police car pulled up behind the plaintiff's vehicle and sounded its siren, Mr. Diallo moved his vehicle causing PO Burgos to conclude that he was attempting evasion and that the plaintiff had stolen the vehicle. In his "Stop, Question and Frisk" Report, PO Burgos describes the plaintiff's actions as "indicative of engaging in violent crimes." Yet, PO Burgos testified that when he turned into Longfellow Avenue, the plaintiff's vehicle was initially double-parked with its parking lights on.

Based on the foregoing, this prong of the defendants' motion is denied since there is a triable issue of fact as to whether a similarly situated reasonably prudent person would have deemed Mr. Diallo's behavior as indicative of one who engaged in a violent crime and/or grand larceny and whether the officers thus had probable cause to arrest the plaintiff.

Assault and Battery/Excessive Force

The defendants move to dismiss the plaintiff's claims of assault and battery and excessive force. To establish assault, "there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact." (*Fugazy v Corbetta*, 34 AD3d 728 [2nd Dept 2006] citing *Cotter v Summit Sec. Servs.*, 14 AD3d 475; see *Bastein v Sotto*, 299 AD2d 432.) In order to sustain a cause of action for battery, the plaintiff must demonstrate that an intentional offensive contact occurred (*Cagliostro v Madison Square Garden, Inc.*, 73 AD3d 534 [1st Dept 2010]; *Hughes v Farrey*, 30 AD3d 244 [1st Dept 2006]) or that excessive force was used to make the arrest. (*Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006].) The determination of an excessive force claim requires consideration of all facts underlying the arrest, the severity of the crime and whether the suspect posed a threat to the officer's safety and actively resisted arrest. (*Pacheco v City of New York*, 104 AD3d 548 [1st Dept 2013]; *Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007].) The trier of fact must allow for the police officers' frequent need to make "split-second" judgments about the amount of force necessary in "tense, uncertain, and rapidly evolving" situations. (*Pacheco v City of New York*, 104 AD3d 548, *supra*.)

Here, the defendants state that PO Burgos had his gun pointing at plaintiff Diallo's head and directed him to turn off the engine and exit the vehicle but he failed to comply. The officer testified that it was "like he didn't understand what we were saying" and he therefore had to use force to remove the plaintiff from his vehicle. When describing his arrest of the plaintiff, PO Burgos stated that he "hoisted one arm with his left arm and one hand on his lower back. [He] went down with him on the ground and put cuffs on him right away."

Plaintiff Diallo testified that he attempted to comply but before placing his first foot out of the car, PO Burgos grabbed his arm, pulled him out of the car, pushed him to the ground with a "heavy push" and handcuffed him. In his "Stop, Question and Frisk" Report, PO Burgos describes the plaintiff's demeanor as "combative and belligerent (sic)." During his 50-h hearing, however, the officer testified that when he approached Mr. Diallo's vehicle, his hands were on the steering wheel and he did not resist arrest.

Based on the foregoing, a jury must determine whether the plaintiff was in imminent apprehension of harmful contact or an intentional offensive contact occurred or whether PO Burgos used excessive force resulting in assault and battery. This prong of the defendants' motion is denied.

42 USC § 1983 Claim

Plaintiff Diallo claims that defendant NYC violated his federal civil rights under 42 USC § 1983 ("federal rights"). In order to establish a federal rights claim, the plaintiff must show that a person acting under the color of state law deprived him of a right, privilege or immunity secured by the Constitution or laws of the United States. (*Chavis v City of New York*, 94 AD3d 440 [1st Dept 2012].) The deprivation must be the result of an official policy or custom of the municipality. Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. (*Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997].)

Here, the defendants contend that plaintiff Diallo's single incident fails to establish that defendant NYC engaged in a municipal pattern or practice or that the plaintiff's injuries "were caused by the City and not merely by errant employees."

Plaintiff Diallo proffers no evidence to establish that PO Burgos' actions were the result of an official policy or custom of the defendant NYC; the claim for negligent hiring or retention thus fails. (*Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011].)

Based on the foregoing, this prong of defendants' motion seeking dismissal of the claim against defendant NYC is granted.

CONCLUSION

The defendants move to dismiss the plaintiff's claim and alternatively move for summary judgment. When deciding a motion for summary judgment, the Court's function is issue finding rather than issue determination. (*Sanchez v National Railroad Passenger Corp.*, 92 AD3d 600 [1st Dept 2012].) It is the jury's function to evaluate the credibility of the witnesses where there are numerous inconsistencies as to how an incident occurred. (*James v Farhood*, 96 AD3d 503 [1st Dept 2012].) While some facts are undisputed, some triable issues of fact exist such as PO Burgos and plaintiff Diallo's differing versions of events leading up to the plaintiff's arrest and the

inconsistencies between some portions of PO Burgos' "Stop, Question and Frisk" Report and his 50-h hearing testimony.

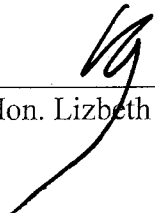
Based on the foregoing, the Court denies the defendants' motion in part and grants the motion in part. The prongs of the defendants' motion seeking dismissal of the plaintiff's claims of false arrest/unlawful imprisonment and assault and battery/excessive force or summary judgment are denied. The prong of the defendants' motion seeking to dismiss the plaintiff's 42 USC § 1983 claim against defendant NYC is granted.

The plaintiff shall serve a copy of this Decision and Order with notice of entry within 30 days.

This is the Decision and Order of the Court.

Dated: March 19, 2015

So ordered,



Hon. Lizbeth González, JSC