Orlando v County of Suffolk
2015 NY Slip Op 30858(U)
May 5, 2015
Supreme Court, Suffolk County
Docket Number: 08-3117
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 08-3117
CAL. No. 14-01269OT

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12-18-14
ADJ. DATE 12-18-14
Mot. Seq. # 002 - MG

CHRISTINE L. ORLANDO,

Plaintiff,

- against -

THE COUNTY OF SUFFOLK, THE SUFFOLK COUNTY POLICE DEPARTMENT and POLICE OFFICER "JOHN DOE",

Defendants.

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 -12; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 14; Replying Affidavits and supporting papers 15 - 16; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants County of Suffolk and Suffolk County Police Department for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted, and it is further

ORDERED that upon a search of the record, the complaint is dismissed in its entirety against Police Officer "John Doe".

This is an action to recover damages for personal injuries plaintiff allegedly suffered to her neck, arm, and shoulder as a result of an altercation with Suffolk County Police Officer James Gonzales while receiving medical attention in her home. On October 27, 2007, Suffolk County Police were called to plaintiff's residence. Although plaintiff claims she accidentally dialed "911" and hung up, Officer Gonzales testified that he responded to a dispatch detailing a domestic violence disturbance. Officer Gonzales arrived at plaintiff's residence at approximately 12:45 a.m., and officer Thomas Vicinanza

arrived thereafter. The officers were granted access to the home by plaintiff's family members. According to Officer Gonzales, plaintiff's husband told him plaintiff was highly inebriated, having drank three and one-half bottles of wine, was asthmatic, and "tearing up the house". When Officer Gonzales arrived, plaintiff was lying in her bed, breathing heavily and non-responsive. After making these observations, Officer Gonzales called for paramedics.

By the time the paramedics had arrived, plaintiff had awakened and was visibly upset and verbally abusive. After much cajoling, plaintiff eventually agreed to go to the hospital. According to plaintiff, it was at this point, without notice or warning, a paramedic placed an oxygen mask over her face. Believing she was about to be hit, plaintiff raised her hand to remove the mask. Officer Gonzales testified that plaintiff kicked a paramedic in the stomach and groin region and flailed her arms as if she was going to then punch him. Officer Gonzales responded by placing plaintiff's left arm against her side and holding that position for approximately 30 seconds. When plaintiff continued to resist, he placed her left arm in an upward position behind her back for a "few seconds" while the paramedics secured plaintiff to the transporting chair. According to plaintiff, Officer Gonzales let go of her arm after being instructed to do so by Officer Vicinanza. It is undisputed that plaintiff was neither arrested nor placed in handcuffs during the incident.

Following the completion of discovery, defendants move for summary judgment dismissing the complaint. Specifically, defendants argue that the individual officers' conduct did not amount to excessive force, and that they are further entitled to immunity for the discretional acts of their police officers. Defendants further contend that the remaining claims are either inapplicable and/or plaintiff failed to state a cause of action for which relief may be granted.

In support of the motion, defendants submit, amongst other things, the notice of claim, transcript of testimony from the 50-H hearing of plaintiff, transcripts from the deposition testimony of plaintiff and Officers Vicinanza and Gonzales, and the pleadings. In opposition, plaintiff submits her medical records and the affirmation of counsel. Plaintiff did not submit an affidavit in opposition.

Initially, plaintiff's assertion that the motion should be denied because movants failed to submit a copy of the bill of particulars is unfounded. As required, defendants attached a copy of the pleadings to their motion. However, a bill of particulars is not a pleading, just an expansion of one, and thus need not be submitted on a motion for summary judgment (*see* Siegel, NY Prac. § 238, at 401 (4th ed.)).

The first and second causes of action in the complaint set forth the damages plaintiff seeks should she prevail, and, as such, are not germane to determining defendants' motion for summary judgment. With regard to the third cause of action for abuse of process, defendants demonstrated prima facie entitlement to summary judgment. To assert a claim for abuse of process, plaintiff must establish that defendants utilized (1) regularly issued process, either civil or criminal, compelling performance or forbearance of some act, (2) with an intent to do harm without excuse or justification, (3) in a perverted manner to obtain a collateral objective (***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466 [1984]). "The gist of the action for abuse of process lies in the improper use of process after it is issued" (***Williams v Williams***, 23 NY2d 592, 298 NYS2d 473 [1969]). Where, as is the case here, no process has been

issued, the claim for abuse of process must fail. It is undisputed that plaintiff was not arrested and no criminal or civil proceedings were initiated against her related to the instant matter. Plaintiff failed to raise an issue of fact in opposition. Accordingly, the abuse of process claim (third cause of action) is dismissed.

Defendants further established their entitlement to summary judgment dismissing the fourth and fifth causes of action for false arrest and false imprisonment, respectively. False arrest and false imprisonment are "two names for the same tort" (*see* ***Lee v City of New York***, 272 AD2d 586, 709 NYS2d 102 [2d Dept 2000]). To establish either claim under common law, plaintiff must show (1) defendant intended to confine plaintiff, (2) plaintiff was conscious of the confinement, (3) plaintiff did not consent, and (4) the confinement was not otherwise privileged (***Holland v City of Poughkeepsie***, 90 AD3d 841, 935 NYS2d 583 [2d Dept 2011]). Officers Gonzales and Vicinanza both testified that Officer Gonzales restrained plaintiff's left arm after plaintiff kicked the paramedic. Officer Gonzales further testified that upon his arrival at the residence, he observed plaintiff in various states of consciousness, she was acting belligerently and defiantly, and it was reported that she was asthmatic and had imbibed three and one-half bottles of wine.

The Court concludes that Officer Gonzales' restraint of plaintiff was reasonable under the circumstances. The Court of Appeals has held that "[g]enerally, restraint or detention, reasonable under the circumstances and in time and manner, imposed for the purpose of preventing another from inflicting personal injuries or interfering with or damaging real or personal property in one's lawful possession or custody is not unlawful" (***Parvi v City of Kingston***, 41 NY2d 553, 394 NYS2d 161 [1977]). Since Officer Gonzales observed plaintiff kick the paramedic and flail her arms in a violent manner, he was justified in restraining plaintiff while the paramedics secured plaintiff to the transporting chair. The decision not to arrest or press charges is not determinative in deciding whether the Officer Gonzales acted in an objectively reasonable manner. Accordingly, defendants demonstrated prima facie entitlement to summary judgment dismissing the false arrest and false imprisonment claims. In opposition, plaintiff did not refute that she kicked the paramedic or that she flailed her arms in a confrontational manner. Instead, a review of the transcript from her 50-H examination reveals that the gravamen of plaintiff's claims are predicated upon the amount of force and the length of time Officer Gonzales restrained her arm as opposed to the act of restraining her itself. Since plaintiff did not submit an affidavit refuting any of defendants' testimony about her aggressive and violent conduct, she failed to raise an issue of fact. Moreover, counsel's conclusory affirmation submitted in opposition is insufficient to defeat summary judgment (*see* ***Utica Mutual Ins. Co. v Magwood Enters., Inc.***, 15 AD3d 471, 790 NYS2d 179 [2d Dept 2005]). Under these circumstances, the fourth and fifth causes of action are dismissed.

The sixth cause of action in the complaint for malicious prosecution must also be dismissed as a matter of law. In order to prevail on a cause of action seeking to recover damages for malicious prosecution, plaintiff must establish that (1) a criminal proceeding was commenced, (2) it was terminated in favor of the accused, (3) it lacked probable cause, and (4) it was commenced out of actual malice (***Martinez v Schenectady***, 97 NY2d 78, 735 NYS2d 886 [2001]; ***Rivera v County of Nassau***, 83 AD3d 1032, 922 NYS2d 168 [2d Dept 2011]). Since it is undisputed that plaintiff was neither arrested

nor issued a summons or appearance ticket, a criminal proceeding had not been commenced. Accordingly, the claim cannot stand, and the malicious prosecution cause of action is dismissed. That branch of defendants' motion seeking to dismiss plaintiff's seventh cause of action for defamation is granted because the complaint fails to comply with CPLR 3016(a) which requires a complaint sounding in defamation to set forth "the particular words complained of" (***Horbul v Mercury Ins. Group***, 64 AD3d 682, 881 NYS2d 911 [2d Dept 2009]). Section 3016(a) is strictly enforced, and here, plaintiff's complaint is devoid of the alleged slanderous or libelous words attributed to defendants (***id.***). As a result, the seventh cause of action is dismissed.

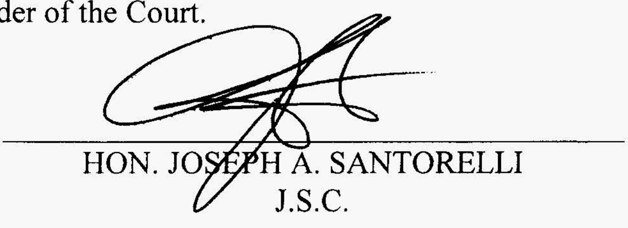
With regard to the eight cause of action, the tort of intentional infliction of emotional distress has four separate elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress (***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]; ***Bernat v Williams***, 81 AD3d 679, 916 NYS2d 614 [2d Dept 2011]). Defendants established prima facie entitlement to summary judgment dismissing this cause of action. Even accepting as true the allegations in the complaint, and affording plaintiff the benefit of every possible inference, the record before this Court establishes that Officer Gonzales' actions cannot reasonably be construed to be "so outrageous in character, and so extreme in degree" as to qualify as intentional infliction of emotional distress" (***Zapata v Tufenkjian***, 123 AD3d 814, 998 NYS2d 435 [2d Dept 2014]; ***Borawski v Abulafia***, 117 AD3d 662, 985 NYS2d 284 [2d Dept 2014]). Moreover, public policy bars claims for the intentional infliction of emotional distress against governmental entities (***Sangermano v County of Nassau***, 115 AD3d 732, 981 NYS2d 612 [2d Dept 2014]; ***Rodgers v City of New York***, 106 AD3d 1068, 966 NYS2d 466 [2d Dept 2013]). In opposition, plaintiff failed to raise any issues of fact. Under these circumstances, the eighth cause of action for intentional infliction of emotional distress is dismissed.

With regard to the ninth cause of action for excessive force, defendants have demonstrated prima facie entitlement to summary judgment. Claims of excessive force are analyzed under the Fourth Amendment and its standard of objective reasonableness (*see* ***Holland***, *supra*). The standard in determining the reasonableness of an officer's use of force is "judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight" (***Lepore v Town of Greenburgh***, 120 AD3d 1202, 992 NYS2d 329 [2d Dept 2014]). Where the conduct is found to be objectively reasonable, the officer's actions are privileged under the doctrine of qualified immunity (*see* ***Hayes v City of Amsterdam***, 2 AD3d 1139, 770 NYS2d 138 [2d Dept 2003]). Here, it was reasonable for Officer Gonzales to become involved in the incident due to the plaintiff's unruly state and inebriation. Officer Gonzales testified that plaintiff kicked a paramedic in the stomach and groin region and flailed her arms as if she was going to then punch him. Officer Gonzales responded by placing plaintiff's left arm against her side and holding that position for approximately 30 seconds. When plaintiff continued to resist, he placed her left arm in an upward position behind her back for a "few seconds" while the paramedics secured plaintiff to the transporting chair. The plaintiff was required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition, plaintiff testified during her 50-H examination that she was sitting in the stair chair when Officer Gonzales "pulled [her] arm up in the range of motion towards [her] neck, towards the ceiling; and he pushed on [her] back with his other hand" (*see* 50(H) Hearing, Transcript at 30-31, Defendants'

Motion, Exh. B). Plaintiff has failed to rebut the prima facie showing of entitlement to summary judgment. Under these circumstances, the ninth cause of action for excessive force is dismissed.

Upon a search of the record, the complaint should be dismissed against Police Officer "John Doe" because plaintiff has yet to serve Officer Gonzales, or any other police officer, with process or move to amend the caption notwithstanding knowing the responding officers' identities for several years (*see* ***Lepore***, *supra*).

The foregoing constitutes the decision and Order of the Court.



Dated: MAY 0 5 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION