

Onilude v City of New York

2015 NY Slip Op 32176(U)

October 8, 2015

Supreme Court, Bronx County

Docket Number: 309622/2009

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 3096 22/2009
Motion Calendar No.8
Motion Date: 6/15/15

TOKUNBO ONILUDE,

Plaintiff,

-against-

THE CITY OF NEW YORK, GEORGE CHICO,
KEITH KUCERAK and GREGORY HERNANDEZ

Defendant,

DECISION/ ORDER

Present:

Hon. Wilma Guzman

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1,2
Affirmation in Opposition of Motion and ExhibIts thereto.....	3, 4
Reply Affirmation	5,6

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion and cross motion is as follows:

Defendants move this Court for an Order (1) dismissing all state claims against Det. Chico, P.O. Keith Kucerak and P.O. Gregory Hernandez for the failure to comply with General Municipal Law 50-e; For an Order (2) dismissing all state claims against defendants P.O. Keith Kucerak and P.O. Gregory Hernandez under Index No. 308177/2011; (3)granting summary judgment pursuant to C.P.L.R. 3212 on the basis that there was probable cause to arrest the plaintiff; (4) dismissing the malicious prosecution claim for failure to file a timely Notice of Claim; (5) dismissing pursuant to C.P.L.R. 3211(a)(7) and/or C.P.L.R. 3212 all of the plaintiff's civil rights claims for the failure to plead the federal claim with factual specificity and/or allege a municipal pattern and practice pursuant to which plaintiff's alleged constitutional rights were allegedly violated; and (6) pursuant to C.P.L.R. 3211(a)(7) and/or C.P.L.R. 3212 dismissing the plaintiff's negligent hiring, training and retention claims with prejudice based upon the doctrine of *Respondeat Superior*.

Plaintiff commenced this action seeking damages for, inter alia, false arrests, false imprisonment, malicious prosecution and Section 1983 violations stemming from a September 16, 2008 arrest.

C.P.L.R. § 3211(e) requires a motion to dismiss be made before service of the responsive pleadings. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such a motion or in the responsive pleading. However, “a motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted.” C.P.L.R. §3211(a)(7) allows a party to move to dismiss a cause of action asserted against him on the ground that . . . the pleading fails to state a cause of action.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (see CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where “the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986) and Winegrad v. New York University Medical Center,

64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *See, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *See, Rose v. Da Ecib USA*, 259 A.D.2d 258 (1st Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *See, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

A claim of false arrest and false imprisonment will not stand where it is shown that the police department and the arresting officer had probable cause to arrest. *Kramer v. City of New York*, 173 A.D.2d 155 (1st Dept. 1991). Generally, probable cause will exist where there is information from an identified citizen, who is presumed reliable. However, this reliability is rebuttable and will only support the probable cause to arrest absent any “materially impeaching circumstances or grounds for questioning the complainants credibility.” *Medina v City of New York*, 102 A.d3d 1010 (1st Dept. 2012) (internal quotations omitted). *See also, Grimes v. City of New York*, 106 A.D3d 441 (1st Dept. 2013). The existence of probable cause is a complete defense to the claims of false arrest and false imprisonment. *Marrero v. City of New York*, 33 A.D.3d 556 (1st Dept. 2006); and malicious prosecution. *Garcia v. City of New York*, 115 A.D3d 447 (1st Dept. 2014); *citing Lawson v. City of New York*, 83 A.D3d 609 (1st Dept. 2011).

1. Defendants motion to dismiss the State claims against defendants Chico, Kucerak and Hernandez is denied. Although defendants argue that the December 15, 2008 Notice of Claim did not specifically name the municipal employee as indicated by General Municipal Law 50-e. As such, the State Claims as detailed in the December 15, 2008 Notice of Claim are dismissed as to defendants Jorge Chico, Keith Kucerak and Gregory Hernandez. *Cleghorne v. City of New York*, 99 A.D. 3d 443 (1st Dept. 2012) *citing Tannenbaum v. City of New York*, 30 A.D. 3d 957 (1st Dept. 2006).

2. Defendants motion to dismiss the State claims against defendants Kucerak and Hernandez brought under Index No. 308177/11 as barred by the statute of limitations is hereby granted.

Plaintiff's charges were dismissed in Bronx Supreme Court, Criminal Division on April 20, 2009. However, the complaint which names only defendant Kucerak and Hernandez as defendants bearing Index No. 308177/11 was not filed until September 14, 2011, in excess of the one year and ninety day time period as indicated by General Municipal Law 50-I.

4. Defendants claim that the malicious prosecution claim must be dismissed as it was prematurely plead in the Notice of Claim filed December 15, 2008. To prevail on a claim for malicious prosecution, a plaintiff must prove the following (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding and (4) actual malice. As indicated above, and not in dispute, the plaintiff's charges were dismissed on April 20, 2009. As such, any reference to malicious prosecution as pled in the December 15, 2008 Notice of Claim were premature as plaintiff's proceedings had not yet terminated. Bumberry v. City of New York, 62 A.D3d 321 (1st Dept. 2009).

5. As to the fifth in defendant's motion which seeks to dismiss plaintiff's Federal Civil Rights Claims against the defendants, To maintain a cause of action against a municipality under 42 USC 1983, the plaintiff must show (1) the existence of a municipal policy or custom and (2) the existence of a causal connection between said policy or custom and the deprivation of the plaintiff's constitutional rights. Monnell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). A municipality cannot be held liable under 1983 merely because the municipality employs a tortfeasor.... In other words...under on a *respondeat superior* theory." *id.* at 691. To establish this municipal liability, the plaintiff must show that the "municipal policy or custom actually caused the constitutional tort." Ragland v. City of New York, 45 Misc. 3d 1218(A) (2014) *citing Monnell v. Department of Social Services of the City of New York, supra.* In the instant case, the plaintiff's 1983 claims surround the vicarious liability of City of New York as the employer of the officers involved in the arrest and prosecution of the plaintiff. As such, the defendant's motion to dismiss as to the plaintiff's Federal Claims under 42 USC 1983 and Monnell claims are dismissed as to the City of New York.

6. Defendant's motion to dismiss the negligent hiring, training and retention is granted.

Medina v. City of New York, 102 A.D3d 101 (1st Dept. 2012). At the outset, this Court grants that portion of the defendants motion which seeks to dismiss the State claims as to P.O. Kucerak and P.O. Gregory Hernandez as neither of these officers are named in either Notice of Claim. Cleghorne v. City of New York, 99 A.D.3d 443. However, as to the claims against Det. Chico who was named in the July 9, 2009 Notice of Claim, defendants motion to dismiss for the failure to comply with General Municipal Law 50-e is denied. Cleghorne, *supra* at 446. Incidentally, that portion of the defendants motion which seeks to dismiss the State claims brought under Index No. 308177/2011 which names as solely as defendants, P.O. Kucerak and P.O. Hernandez, is also granted and the action under 308177/2011 is dismissed.

3. A claim of false arrest and false imprisonment will not stand where it is shown that the police department and the arresting officer had probable cause to arrest. Kramer v. City of New York, 173 A.D2d 155 (1st Dept. 1991). Generally, probable cause will exist where there is information from an identified citizen, who is presumed reliable. D.C. ex. rel Coxum v. City of New York, 46 Misc 3d 1227(A)(2015) (internal citations omitted). However, this reliability is rebuttable and will only support the probable cause to arrest absent any “materially impeaching circumstances or grounds for questioning the complainants credibility.” Medina v City of New York, 102 A.d3d 1010 (1st Dept. 2012) (internal quotations omitted). See also, Grimes v. City of New York, 106 A.D3d 441 (1st Dept. 2013). While the cause of action of malicious prosecution cannot stand against a police officer if the decision to initiate prosecution was made by a prosecutor independent of the police officer, where questions of fact surround the actions a police officer is of such a nature that through his actions he encouraged or importuned the prosecutor to act, or where it is shown that the failure to disclose or the misrepresentation of information leads to a prosecution, denial of summary judgement is warranted. Ragland v. City of New York, 45 Misc. 3d 1218(A). The remainder to the defendants motion which seeks summary judgment is granted. A review of the record herein, including the memo book of Det. Chico¹ indicates that the defendant was identified

¹ Both plaintiff and defendants having a full opportunity to be heard and submit papers on this issue, this Court finds no wilful or contumacious conduct so as to warrant preclusion of the memobook of Det. Chico or the striking of the defendants Answer for disclosure violations. See generally, Hernandez v. City of New York, 100 A.D.3d 433 (1st Dept. 20102).

by an eyewitness, who observed two black males running away from the scene of the stabbing. During the investigation, this witness revealed that she knew these individuals from the neighborhood and could identify them. On September 16, 2008, this eyewitness, Ms. Lounds approached a patrol car and indicated that the men were in the area and described an article of clothing. Officers then proceeded to the location and arrested the plaintiff. Testimony reveals that the plaintiff was also identified by the victim of the stabbing, after a photo array and once more identified by Ms. Lounds in a confirmatory identification. Based upon the facts presented herein, this Court finds that the defendants had probable cause to arrest the defendant and have met the prima facie burden and established the absence of triable issues of fact. Luna v. City of New York, 95 A.D3d 4123 (1st Dept. 2012); Hernandez v. City of New York, 100 A.D3d 433 (1st Dept. 2012); Rodgers v. City of New York, 106 A.D3d 1068 (2nd Dept. 2013). Based upon the foregoing, this Court need not reach the defendants remaining issues.

This Court has reviewed the Plaintiff's cross-motion which seeks summary judgment and to strike the defendants Answer and finds it without merit. Based upon the foregoing, Plaintiff's state-law cause of action for false arrest against the City, Plaintiff's Federal cause of action (42 U.S.C. 1983) for false arrest against Kucerak, Hernandez and Chico, plaintiff's state-law cause of action for malicious prosecution against the City and Chico and Plaintiff's federal cause of action for malicious prosecution against Chico is hereby denied.

Accordingly, it is

ORDERED that defendants motion for summary judgment is hereby granted and the plaintiff's complaint dismissed. It is further

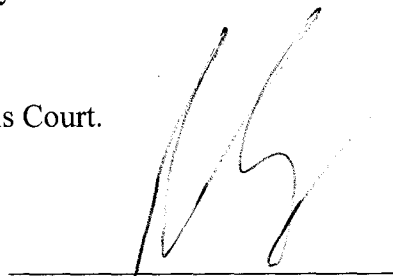
ORDERED that the plaintiff's motion for summary judgment is hereby denied. It is further

ORDERED that the defendants serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of the Order.

This constitutes the decision and order of this Court.

DATE

10/8/15



HON. WILMA GUZMAN, JSC.