

Santiago v City of New York

2016 NY Slip Op 30220(U)

January 11, 2016

Supreme Court, Bronx County

Docket Number: 023773/13E

Judge: Eddie J. McShan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ALEXIS SANTIAGO AND MANUEL COLON,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, POLICE OFFICER MANUEL PEREZ,
POLICE OFFICER KENDRICK MALDONADO,
POLICE OFFICER JOHN DOE AND POLICE OFFICER
ROE,

Defendant(s).

DECISION AND ORDER

Index No. 023773/13E

Present:
HON. EDDIE J. MCSHAN

The following papers numbered 1 to 18 were read on this motion for seeking summary judgment and dismissal.

No	on Calendar of	PAPERS NUMBERED
Notice of Motion- Order to Show Cause - Exhibits and Affirmation Annexed-----		<u>1 - 16</u>
Affirmation in Opposition and Cross Motion -----		<u>17</u>
Replying Affirmation -----		<u>18</u>
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Before this Court is defendants' application for an order granting them summary judgment on all of the Plaintiffs' causes of action or, in the alternative, dismissing the complaint against Police Officers Perez and Maldonado. Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained as a result of false arrest, false imprisonment, civil rights violations pursuant to 42 U.S.C. § 1983, assault, battery, abuse of process, negligence, negligent hiring, negligent supervision, use of excessive force and malicious prosecution. Plaintiffs were arrested on July 27, 2012 in the vicinity of 1004 Simpson Street in Bronx, New York.

Defendants assert that they are entitled to a judgment as a matter of law with respect to all of the plaintiffs' causes of action. Defendants argue that the existence of probable cause is a complete defense to both the state and 42 U.S.C. § 1983 causes of action for false arrest and false imprisonment, malicious prosecution, and abuse of process. Defendants contend that police officer

Perez was directed to the vicinity of 995 Simpson Street vicinity after received an anonymous tip naming Plaintiff Colon, with whose criminal history he was familiar, was involved with drug activity. Defendants note that plaintiffs Colon and Santiago as well as police officers Perez and Maldonado have testified that the vicinity of 995-1000 Simpson Street is known to be a high-drug prone location. Defendants also note that both plaintiffs testified to being arrested several times in that neighborhood for marijuana possession, and that police officers Maldonado and Perez were the arresting officers for some of the arrests. Upon arriving at the reported scene shortly after the alleged anonymous tip, Perez allegedly observed plaintiffs' behaviors – namely that the plaintiffs touched hands in what appeared to be a hand-to-hand transfer of drugs from Plaintiff Colon to Plaintiff Santiago. Defendants suggest that the conduct between the plaintiffs was indicative of a drug transaction occurred. Defendants insist that the plaintiffs' conduct was sufficient corroboration of the anonymous tip.

Defendants argue that even if the Court finds corroboration to the anonymous tip insufficient, the police officers' observations, independent of the anonymous tip, paired with their knowledge, training and experience, provided a sufficient basis for reasonable suspicion that the plaintiffs had engaged in the crimes of criminal possession and criminal sale for their arrest. Defendants note that police officers Maldonado and Perez possessed approximately nine years of experience as police officers, some of which was within the Street Narcotics Enforcement Unit. They also note that the officers received specialized training on how to make observations of drug sales and how to recognize hand-to-hand drug transactions. Defendants argue additional circumstances warranted the plaintiffs' arrest after the police officers approached. Defendants assert that Officer Perez observed Plaintiff Santiago drop an item to the ground and cover it with his foot in response to the officers' approach. The note that Officer Perez recovered and concluded that the item was marijuana based on his observations, training and experience. Defendants insist that the plaintiffs' conduct continued

to raise the level of suspicion and established probable cause, thereby permitting the permissible intrusion resulting in plaintiffs' arrests.

Defendants argue that even if the Court finds that no probable cause existed at the time of the arrest, the individual federal claims against the police officers Maldonado and Perez must be dismissed because they enjoy qualified immunity from a civil suit if there existed arguable probable cause to effectuate the plaintiffs' arrest. Defendants insist that actual probable cause is not required. Defendants contend that an objectively reasonable police officer with the same knowledge, expertise and training as the police officers in this action would have come to the conclusion that probable cause existed where the plaintiffs engaged in what appeared to be hand-to-hand transaction in a high drug crime location.

Defendants also argue that plaintiffs' federal and state claims of excessive force, assault, and battery must be dismissed because the police officers used the minimum amount of force necessary to place plaintiffs under arrest. Defendants contend that police officers are permitted as a matter of law to use a degree of force, including utilizing handcuffs, to effectuate an arrest based upon probable cause. Defendants insist that the only force the police officers used was to place the plaintiffs under arrest by placing them on handcuffs. Defendants note that neither Plaintiff alleged that any of the police officers struck them, and neither suffered any physical injury.

Defendants further argue that the strip search of the plaintiffs was warranted. Defendants suggest that the officers conducted strip searches of plaintiffs as they described, reasonable suspicion supported such a search given (1) the police officers' awareness of plaintiffs' narcotics history; (2) the observed hand-to-hand transaction; (3) the drug prone location where the incident occurred; and (4) Plaintiff Santiago's attempt to conceal the marijuana recovered by dropping it and stepping over it with his foot. Defendants insist that strip searches were conducted in a reasonable manner.

Defendants assert that plaintiffs' federal claims brought pursuant to 42 U.S.C. § 1983 must be dismissed because they cannot establish that the police officers violated or deprived them of any of their constitutional rights. Defendants insist that the police officers possessed probable cause and they used minimum amount of force necessary to effectuate the plaintiffs' arrest. Defendants argue that plaintiffs' state law causes of action for negligence and negligent training must be dismissed because the police officers acted within the scope of their employment when they arrested the plaintiffs.

A party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party's evidence, most importantly, must be in admissible form (*Friends of Animals, Inc. v Assoc. Fur Mfr., Inc.*, 46 NY2d 1065 [1979]). The nonmoving party must establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Zuckerman v City of New York*, 49 NY2d 492 [1980]). The nonmoving party cannot provide conclusory allegations of fact or law to defeat a summary judgment application (*Century Ctr. Ltd. v Davis*, 100 AD2d 564 [2d Dept 1984]). In considering whether to grant a summary judgment motion, a "drastic remedy" in this State, this court looks to find issues rather than to determine them, and to evaluate whether the alleged factual issues are genuine or lack substance (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 394 [1957]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

The Court finds that defendants have established a *prima facie* showing of entitlement to a judgment as a matter of law concerning the state and federal causes of action for false arrest and false imprisonment, malicious prosecution, and abuse of process. It is well settled that whenever an arrest and imprisonment arise without a warrant, the presumption is that such arrest

and imprisonment were unlawful (*Smith v County of Nassau*, 34 NY2d 18, 23 [1974]). The defendant can nevertheless prevail if he proves legal justification for the arrest and imprisonment, which “may be established by showing that the arrest was based on probable cause” (*Broughton* at 458; *Martinez* at 85; *Rivera* at 1033).

Probable cause exists where an officer, in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise (*Smith* at 24). In *People v McRay*, the Court of Appeals set forth three factors by which a court can determine whether an officer’s observations of suspected drug activity give rise to probable cause. Those factors are (1) the observation of a “telltale” sign of illicit drug activity; (2) incidence of narcotics trafficking in the area; and (3) training and experience of the officer making the observations (51 NY2d 601 [1980]). Probable cause exists despite the fact that the item exchange could not be observed (*Matter of Devon H*, 225 AD2d 135 [1st Dept 1996]) *citing People v Schlaich*, 218 AD2d 398 [1st Dept 1996]).

In the instant case, the defendants presented admissible evidence suggesting that there was probable cause for the plaintiffs’ arrests. Officer Perez presented sworn testimony that he witnessed what appeared to be a hand-to-hand transfer of drugs from Plaintiff Colon to Plaintiff Santiago upon arriving at the location based upon an anonymous tip. He testified that Santiago dropped an object on the ground and covered it with his foot shortly as he approached the plaintiffs. Officer Perez indicated that he recovered a dime-sized ziploc bag of marijuana shortly before handcuffing both plaintiffs. An inference of probable cause may be drawn where a trained and experienced police officer observes several deliveries of some “hallmark” of a drug transaction in an area notorious for narcotics activity (*People v Schlaich*, 218 AD2d 398 [1st Dept 1996]). “Sophisticated street sellers of narcotics, who now deal in small items of contraband which are . . . easily concealable in the palm of the hand, ‘should not enjoy an immunity from arrest or search merely because they are able to conceal their wares during the exchange;

concealment is itself a common characteristic of illegal conduct (*People v Graham*, 211 AD2d 55 [1st Dept 1995]).

The Court also finds that the defendants have established a *prima facie* showing that the police officers Perez and Maldonado may be entitled to qualified immunity. It is well established that even if probable cause to arrest is ultimately found not to have existed, an arresting officer will still be entitled to qualified immunity from a suit for damages if he can establish that there was “arguable probable cause” to arrest (*See for example Escalera v Lunn*, 361 F 3d 737 [2nd Cir 2004]). Defendants have made a *prima facie* showing on this record “arguable probable cause” for the plaintiffs’ arrests to warrant a finding of qualified immunity.

The Court further finds that the defendants established a *prima facie* showing that the plaintiffs’ federal and state claims of excessive force, assault, and battery must be dismissed. Plaintiffs did not allege anywhere in the record that defendants engaged in excessive force. To prevail on an excessive force claim, a plaintiff must show that law enforcement personnel exceeded the standard of objective reasonableness under the Fourth Amendment (*Pacheco v City of New York*, 104 AD3d 548 [1st Dept 2013] *citing Koelman v City of New York*, 36 AD3d 451 [1st Dept 2007]). Aside from the defendants being touched when they were handcuffed, they were subsequently not touched in any way. There is no indication in this record that the force used to effect the arrest was excessive (*Akande v City of New York*, 275 AD2d 671 [1st Dept 2000]).

Plaintiffs, in the course of the strip search, were asked to undress, squat, spread their butt cheeks and cough. A strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner (*People v Hall*, 10 NY3d 303 [2008]). Applying the reasonable suspicion standard, defendants made a *prima facie* showing that the plaintiffs’ strip search was constitutionally valid because the police officers had reasonable suspicion that the plaintiffs had drugs secreted underneath their clothing and

possibly in their bodies after they were allegedly observed engaging in hand-to hand transfer, and Plaintiff Santiago was allegedly observed dropping and subsequently covering marijuana with his foot.

The Court additionally finds that the defendants have established their *prima facie* entitlement to summary judgment on the plaintiffs' federal claims brought pursuant to 42 U.S.C. § 1983 because the police officers may not have violated or deprived them of any of their constitutional rights. Under 42 U.S.C. § 1983, a party may pursue a civil claim for damages and injunctive relief against any person who acts under color of state law to deprive that party of a constitutional right (*Holland v City of Poughkeepsie*, 90 AD3d 841 [2d Dept 2011]). Here, because the defendants made a showing that the plaintiffs' arrests were supported by probable cause and that they were subject to the minimum amount of force necessary to effectuate their arrests, there may have been no unreasonable seizure of the plaintiffs' persons in violation of the Fourth Amendment.

As to the plaintiffs' state law causes of action for negligence and negligent training, the Court further finds that the defendants have established their *prima facie* entitlement to dismissal because the defendants established that the police officers were acting within the scope of their employment when they arrested the plaintiffs. It is well established that 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 Transit Authority*, 241 AD2d 323 [1st Dept 1997]). The burden now shifts to the Plaintiff to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*See Zuckerman*, 49 NY2d 557).

Plaintiffs vehemently oppose defendants' motion and insist that numerous triable issues of fact exist precluding defendants' entitlement to summary judgment. Plaintiffs insist that the police officers had no probable cause to arrest them. Plaintiffs contend that an alleged anonymous tip

providing a generalized description of a person at a particular location only furnishes the officer with the common law right to inquire. Plaintiffs allege that there is no evidence as to what time the call was received to determine whether the information conveyed was close in time to the arrest. Plaintiffs note that the alleged anonymous tip did not identify the number of persons or describe the individual(s) purportedly involved in "rolling" drugs. Plaintiffs contend that there is a question of fact as to whether the anonymous tip was made in light of Officer Perez' failure to recall anything about the caller or the substance of the call, and his failure to include the call in any of his paperwork.

Plaintiffs assert that officer Perez did not see an item being transferred between them. They contend that Officer Perez did not determine the nature of the item that was purportedly dropped to the ground until he allegedly recovered a zip lock bag with marijuana after they had already been arrested. Plaintiffs argue that given that Officer Perez did not witness any exchange of money or drugs between the plaintiffs, he only possessed the common-law right to inquire. Plaintiffs insist that the police officers lacked the knowledge of the alleged illegality at the time of the plaintiffs' arrests. Plaintiffs submit their sworn statements contained in their 50-h hearings and examinations before trial where they deny possessing, transferring or seeing any marijuana that day.

Plaintiffs allege that prior to the arrest, they were sitting on the bench while Santiago was smoking a cigarette and Colon was drinking coffee. Plaintiffs assert that the criminal proceedings against them were terminated in their favor insisting that an inference of malice may be drawn in their favor for their malicious prosecution cause of action. They also assert that a triable issue of fact exists as to whether the arresting officers had probable cause at the time of their arrest.

Plaintiffs argue that because the police officers had no probable cause to arrest them, the fact that they were handcuffed, frisked, placed in a police car and subsequently strip searched constitute actionable battery and assault, regardless whether the force is deemed reasonable during a lawful

arrest, even if those injuries are superficial. Plaintiffs contend that the strip search alone is sufficient to create a triable issue of fact given that it involved bodily contact that was offensive in nature and without the plaintiffs' consent. Plaintiffs also argue that without proffering any proof that they engaged in an unusual conduct, had pertinent propensities to justify strip search, or that they were seen trying to secrete marijuana or the proceeds from a sale anywhere in their bodies, the strip search was unreasonable.

Plaintiffs acknowledge that negligent hiring, training and supervision must be dismissed where an employer concedes that its employee was acting within the scope of employment. Plaintiffs, however, assert that defendants' attorney affirmation is insufficient to establish that the officers were acting within the scope of their employment. Plaintiffs note that the fact that defendants initially denied sufficient knowledge or information relating to the plaintiffs' allegation that the arresting police officers were acting within the scope of their employment.

The Court finds on this record that the plaintiffs have provided sufficient allegations in reliance on the admissible evidence submitted on this record to require a trial on the disputed facts regarding the probable cause alleged by the police officers (*Zuckerman*, 49 NY2d 492). Particularly, defendants would not be entitled to a judgment as a matter of law based upon the conflicting sworn testimony from officer Perez and officer Maldonado. Perez suggested that they initially approached the plaintiffs based upon an anonymous tip he received at the precinct informing him that "Manny Colon, well, there was drug activities on the benches next to the 995 Simpson, looks like they were rolling up." Maldonado's testimony fails to corroborate the anonymous tip. Maldonado suggests that they were on patrol in an unmarked vehicle and were not receiving radio runs. He stated that ". . . Perez tells me to pull over because he just saw something right now . . . he just saw a transaction so I pulled over the car." Maldonado makes no mention of the alleged anonymous tip suggested by Perez.

In addition, Perez was unable to provide any specifics regarding the anonymous tip. He maintained no record of the anonymous call and provided no information regarding the caller's identity. He was unable to identify whether the caller was a male or female. Questions of material facts clearly exist as to whether there the anonymous call was sufficient to establish a reasonable suspicion or probable cause.

The admissible record presented by defendants also create questions of material fact regarding the probable cause relied upon by the officers to effectuate the plaintiffs' arrest. Plaintiffs' testimony at the 50-h hearing completely disputes the deposition testimony by Perez who instructed Maldonado to pull over based upon observing a possible hand-to-hand transaction. Viewed in a light most favorable to the plaintiffs (*Valderrama v New York City Transit Authority*, 18 AD 3d 71 [1st Dept 2005]), this Court finds that a rational jury could conclude that officers did not have probable cause to effectuate the arrest based upon the conflicting sworn testimony. Even if Perez observed the plaintiffs touch hands, under the facts and circumstances herein, it did not necessarily arise to an authorized arrest based upon probable cause in light of the uncertainty of the alleged anonymous tip and the parties' conflicting testimony. Moreover, plaintiffs vehemently deny passing marijuana between them and insist that Santiago was smoking a cigarette. The role of the Court is to look to find issues rather than to determine them, and to evaluate whether the alleged factual issues are genuine or lack substance (*Sillman*, 3 NY 2d 394). Questions of fact clearly exist regarding the alleged probable cause the officers relied upon to arrest the plaintiffs.

The Court also finds that plaintiffs successfully rebutted the defendants' *prima facie* showing of arguable probable cause. As noted hereinabove, Perez was unable to substantiate the nature of the anonymous tip that led the officers to the location. Maldonado provided no corroborating information that they were at the location based upon an anonymous tip. Moreover, a reasonable officer under the similar facts and circumstances may have exercised a common law right of inquiry

or detained the plaintiffs based upon reasonable suspicion instead of effectuating an immediate arrest as suggested by plaintiffs (*See for example People v Debour*, 40 NY 2d 210 [1976]). Accordingly, Perez and Maldonado are not entitled a finding of qualified immunity as a matter of law. Moreover, in light of the questions of facts regarding probable and arguable probable cause, a rational jury may be able to determine that defendants violated the plaintiffs' federal and state constitutional rights. Questions of probable cause may also allow a rational jury to conclude that there has been an abuse of process in light of the history of interactions and arrests by officers Perez and Maldonado and the plaintiffs.

The Court further finds that the plaintiffs failed to rebut the defendants' *prima facie* showing that the excessive force was used during or after the arrest. 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 (*Vizzari v Hernandez*, 1 AD 3d 431 [2d Dept 2003]). The determination of an excessive force claim requires an analysis of the facts of the particular case, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight" (*Vizzari*, 1 AD 3d 431). Plaintiffs did not indicate that they were physically injured as a result or that they were victims of the officers' assault.

The Court finds however, that the plaintiffs have successfully rebutted defendants' *prima facie* showing that the officers were reasonable in subjecting plaintiffs to a strip search. Caselaw has established that a visual body inspection may be conducted if the police have a factual basis supporting a reasonable suspicion that the arrestee has evidence concealed inside a body cavity and the search is conducted in a reasonable manner (*see People v Hall*, 10 NY 3d 303 [2008]). To the extent that plaintiffs' cause of action for unlawful strip search is pleaded as one for battery and

assault, the Court's findings hereinabove of questions of material fact concerning the officers' probable cause and arguable probable cause to arrest the plaintiffs preclude defendants' entitlement to summary judgment.

The Court lastly finds that plaintiffs failed to rebut the defendants' *prima facie* showing that the negligence claims should be dismissed because the officers acted within the scope of their employment. It has clearly been established that claims for negligent hiring, retention, and training must be dismissed where a police officer was acting within the scope of his employment at the time of the incident (*See for example Medina v City of New York*, 102 AD 3d 101 [1st Dept 2012]). Defendants acknowledged on this record that the officers were acting within the scope of their employment at the time they arrested the plaintiffs. The fact that the defendants may have changed their position from their responsive pleading does not create a question of fact. Moreover, the Court finds that defendants' attorney possess sufficient personal knowledge to make the admission that the officers were acting within the scope of their employment based upon the other admissible evidence presented herein. Caselaw has established that an attorney affirmation coupled with documented evidence submitted on the record may be sufficient to provide probative value to oppose an application for summary judgment (*see for example Adam et al., v Cutner & Rath Kopf, et al.*, 238 AD 2d 234 [1st Dept 1997]). The officers' sworn depositions as well as plaintiffs' sworn testimony all indicate that the officers were working as police officers for the City of New York at the time plaintiffs were arrested.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that defendants are granted partial summary judgment on the plaintiffs' causes of action for negligence, negligent hiring and negligent retention. The Clerk shall dismiss those causes of action with prejudice; and it is further

ORDERED AND ADJUDGED that defendants are granted partial summary judgment on the plaintiffs' cause of action for excessive force relating solely to any claims regarding the officer handcuffing the plaintiffs or using excessive force to effectuated the arrest. The Clerk shall dismiss any such cause of action with prejudice; and it is further

ORDERED AND ADJUDGED that defendants' application for summary judgment dismissing the plaintiffs' remaining causes of action for false arrest, false imprisonment, civil rights violations pursuant to 42 U.S.C. § 1983, assault, battery, abuse of process, and malicious prosecution is hereby denied; and it is further

ORDERED AND ADJUDGED that Plaintiffs shall serve a copy of this Decision and Order with Notice of Entry upon Defendants within thirty (30) days hereof.

The foregoing shall constitute the decision and order of this Court.

Dated: January 11, 2016



A.J.S.C.