

Santiago v City of New York
2016 NY Slip Op 30226(U)
January 22, 2016
Supreme Court, Bronx County
Docket Number: 23446/2013
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

-----X
LUIS SANTIAGO,

Index No.: 23446/2013

Plaintiff(s),

DECISION/ORDER

-against-

Present:
HON. MITCHELL J. DANZIGER

CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, POLICE OFFICER
JOHN CARUSO, POLICE OFFICER JOHN DOE
AND POLICE OFFICER JOHN ROE,

Defendant(s).

-----X
Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion for Summary Judgment

Papers Numbered

Notice of Motion, Affirmation & Affidavit in Support with Exhibits	<u>1</u>
Affirmation in Opposition with Exhibit	<u>2</u>
Reply Affirmation in Support with Exhibit.....	<u>3</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants move for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212. Plaintiff's causes of action are as follows - first: false arrest and imprisonment; second-malicious prosecution; third - assault and battery; fourth- for negligent hiring, training and retention of employees; fifth - excessive force; sixth and seventh - violation and deprivation of constitutional rights.

Plaintiff seeks to recover damages for injuries arising from his arrest on April 23, 2013. Plaintiff asserts generally that he was assaulted, arrested in an excessive manner without probable cause, falsely imprisoned and maliciously prosecuted by Defendants. Plaintiff appeared at a 50-H hearing and a transcript of his testimony is submitted to the court as defendants' exhibit "B" to the motion (hereinafter referred to as "transcript").

Defendants submit the affidavit of Detective JOHN CARUSO as exhibit "N" to the motion (hereinafter referred to as the "Caruso Aff'd."). On April 23, 2013, Detective Caruso initiated an investigation after a report of assault and robbery was made by Donald Butler (hereinafter "Butler").

According to Detective Caruso, Butler reported that on April 22, 2013 two perpetrators robbed him in the lobby of his residence located at 271 East 150th Street and forcibly removed his cell phone and \$30.00. Butler described one of the perpetrators as six feet tall, 150 pounds, with close cut brown hair, light skin, clear complexion and Hispanic. Butler further indicated that he often sees the two perpetrators in the area of his residence (Caruso Aff'd. at ¶2). On April 23, 2013 Caruso and his partner, David Rodriguez, canvassed the area around Butler's residence with Butler in the police car. Caruso states that he questioned several individuals in the vicinity and that he was informed by one of the individuals that, while he did not witness the robbery, he heard plaintiff was involved. That individual subsequently led Caruso into the building and showed Caruso where plaintiff lived (id. at ¶3). Caruso does not disclose the name of the individual or whether he verified that the individual lived in the building.

Caruso knocked on the door he was led to by the unidentified informant. Caruso states that the individual who opened the door matched the description of one of the perpetrators given by Butler. It is undisputed that the plaintiff was the individual who opened the door (id. at ¶4). Caruso informed plaintiff that he was investigating a robbery in the building, to which the plaintiff replied that he witnessed the robbery but had no involvement (id.). Caruso indicates that plaintiff agreed to accompany him to the 40th precinct for further questioning and that once the plaintiff exited his apartment, Caruso handcuffed plaintiff for the officers' own safety (id.). Once they exited the building, Butler positively identified plaintiff as one of the men who robbed him after Caruso asked Butler if he recognized anybody (id. at ¶5). Subsequently at the precinct, plaintiff gave a written statement that on the previous night, he witnessed a man he knows as "Pancho" struggling with Butler and that Pancho reached into Butler's pocket and removed his cell phone and money (id.; *see also* plaintiff's written statement annexed as Exhibit 5 to the Caruso Aff'd.). Plaintiff was placed under arrest at that time.

Plaintiff testified that on April 23, 2013, he heard banging on the front door of his residence (transcript at pp. 31-32). When he opened the door, he observed two men in suits who asked for Luis Santiago. The two men did not display any badges or shields but did identify themselves as police officers (id. at pp. 32-33). Plaintiff identified himself and asked why the officers were there. Plaintiff testified that the officers told him that he would find out once he arrived at the precinct. Plaintiff

indicated that he would not go anywhere with the officers until he knew why he was being questioned. However, when the police indicated they had to bring plaintiff to the station to ask him a few questions, he agreed to go. Plaintiff testified, "I said let's go. I said fine, we'll go to the precinct" (id. at p. 34). Plaintiff states that he did not have a chance to leave his apartment and alleges that he was "pushed on the door," handcuffed and "forced" out of the apartment by the police (id. at p. 35). Plaintiff further testified that the officers "bang[ed] him into the wall" (id. at p. 36), and after fifteen or twenty minutes of being in the hallway and in the lobby, he was taken out to the police vehicle. (Id.) Plaintiff testified that he was taken to the 40th precinct and questioned about the robbery that he witnessed the night before (Id. at 39). Plaintiff stated that on the night of the incident, he was returning from the store with his dog when he observed Butler and an individual he knows as "Pancho" arguing about a stolen bike. He observed a struggle between the two. At first, plaintiff tried to break up the fight but then decided to, "mind [his] business." Plaintiff then saw Pancho reach into Butler's pocket and Pancho remove a phone and some money from Butler (see plaintiff's written statement annexed as Exhibit 5 to the Caruso Aff'd). Plaintiff was arrested at the precinct, taken to central booking, and arraigned at which time bail was set at \$10,000. Plaintiff could not make bail (transcript at pp. 48-49). On May 2, 2013, while still in custody, the grand jury dismissed all charges against plaintiff (Defendant's Exhibit "K" at DEF000048).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *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 (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]) . Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue

determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

A plaintiff asserting a claim for false arrest and false imprisonment must demonstrate, “that the defendant intended to confine the plaintiff; the plaintiff was conscious of the confinement; the plaintiff did not consent to the confinement; and that the confinement was not otherwise privileged.” (*Hernandez v. City of New York*, 100 A.D. 3d 433 [1st Dep’t. 2012]). Where an arrest is made without a warrant, as in this case, it is presumed that the arrest was unlawful (*Smith v. County of Nassau*, 34 N.Y.2d 18, 23 [1974]). However, the defendant can prevail provided he proves legal justification for the arrest and imprisonment which “may be established by showing that the arrest was based on probable cause (*Broughton v. State of New York*, 37 N.Y.2d 451, 458 [1975]; *Hernandez* at 433-422).

Probable cause, also known as reasonable cause, exists

[w]here 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, he has such probable cause for his belief as would justify him in arresting without a warrant” (*Smith* at 34).

CPL §70.10(2) provides:

Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.

Accordingly, what is required to establish probable cause for an arrest is not “proof sufficient to warrant a conviction beyond a reasonable doubt, but merely information sufficient to support a reasonable belief that an offense has been committed” (*Jenkins v. City of New York*, 2 A.D.3d 291, 292 [1st Dep’t. 2003]).

Generally, information provided by an identified citizen accusing another of the commission

of a crime is sufficient to provide the police with probable cause to arrest (*People v. Moore*, 32 N.Y. 2d 67, 71, (1973). Further, unlike a paid or anonymous witness, an eyewitness victim of a crime can provide probable cause for the arrest of his assailant despite the fact that his reliability has not been previously established or his information corroborated (*People v. Nichols*, 156 A.D.2d 129, 130 [1st Dep't. 1991] citing *People v. Gonzalez*, 138 A.D. 2d 182 [2d Dep't. 1991]).

However, *Nichols* and *Gonzalez* are distinguishable from the instant case. In *Nichols*, the police arrested the defendant after they themselves witnessed the defendant chasing the complainant. In *Rodriguez*, probable cause was established based on the eleven year old complainant's statement to the police. In this case, the individual who allegedly informed Detective Caruso that he heard plaintiff was involved in the robbery (Caruso Aff'd. at ¶3), is unidentified and unknown. The court notes that Caruso's police memo book (defendants' exhibit H at DEF00003-04) and the DD-5 generated for the investigation on April 23, 2012 (id. at DEF000008) do not memorialize any such individual or interview. In fact, the first mention of the police questioning any individuals is May 18, 2013 (id. at DEF000009), twenty five-days after plaintiff was arrested and sixteen days after plaintiff's release. Based on the forgoing, the court finds an issue of fact regarding the veracity of the unidentified informant and whether the same is sufficient to establish probable cause.

Additionally, Butler described his assailant as six feet tall, 150 pounds, with close cut brown hair, light skin, clear complexion and Hispanic but never indicated his assailant had facial hair. However, at the time plaintiff was arrested and photographed, one day after the robbery, he had a beard and a mustache (Defendants' exhibit "K" at DEF000041). Moreover, Butler identified plaintiff as one of the perpetrators while plaintiff was handcuffed and detained by the police. It is undisputed that plaintiff was handcuffed at the front door (*see* Caruso Aff'd. at ¶4 and transcript at pp. 36-37) before he was identified by Butler. Therefore, the court finds an issue of fact as to the validity of Butler's identification of plaintiff as it may have been unduly suggestive. There was no person of similar appearance to plaintiff presented to Bulter and plaintiff was handcuffed when he was identified (*People v. Garner*, 71 A.D.3d 491 [1st Dep't., 2010] citing *People v. Carroll*, 303 A.D.2d 200, 201 [1st Dep't. 2003]). Did this constitute probable cause for arrest? At this point it is unclear.

Consequently, since an issue of fact remains as to whether the police had probable cause to

arrest plaintiff, summary judgment is denied in connection with plaintiff's claims for false arrest and false imprisonment.

Summary judgment is also denied in connection with plaintiff's claim for malicious prosecution. The elements of an action for malicious prosecution are (1) the initiation of a proceeding; (2) its termination favorably to plaintiff; (3) lack of probable cause; and (4) malice (*Morant v. City of New York*, 95 A.D. 3d 612 [1st Dep't. 2012] quoting *Colon v. City of New York*, 60 N.Y.2d 78,82 [1983]). The existence of probable cause constitutes a complete defense to a claim of malicious prosecution (*Lawson v. City of New York*, 83 A.D. 3d 609 [1st Dep't., 2011]). As discussed above, probable cause has not been established at this time. Moreover, insofar as malice is concerned, an inference of malice may be drawn where there is no probable cause (*35-45 May Associates v. Mayloc Associates*, 162 A.D.2d 389 [1st Dep't., 1990]).

Plaintiff's allegations of assault and battery and excessive force must be analyzed under the Fourth Amendment's objective reasonableness standard (*US Const., 4th Amend*; *Graham v. Conner*, 490 U.S. 386, 388 [1989]; *Ostrander v. State*, 289 A.D.2d 463, 464 [1st Dep't., 2001]). Under this standard, the reasonableness of the officer's use of force must be, "judged from the perspective of a reasonable officer on the scene" (*Graham* at.396). Here, it is undisputed that plaintiff agreed to accompany Detective Caruso and his partner to the police station for further questioning (transcript at p. 34; Caruso Aff'd. at ¶4). The court questions why plaintiff was handcuffed in the first place when he was not under arrest. While Detective Caruso states it was done for his safety, he fails to explain why he felt that his safety may be compromised. Therefore, a question remains as to whether any force was necessary at all. Further, plaintiff's testimony and Detective Caruso's affidavit directly contradict each other regarding whether plaintiff was thrown against a wall and door. Since the question of whether law enforcement used excessive force in the course of an arrest is intensely factual in nature, it is generally best left for a jury to decide (*Holland v. City of Poughkeepsie*, 90 A.D.3d 841, 844 (2d Dep't., 2011)). Based on the foregoing, summary judgment in connection with plaintiff's causes of action for assault and battery and excessive force is denied.

Plaintiff's cause of action for negligent hiring, screening, retention and supervision, on the contrary, is hereby dismissed. Plaintiff did not oppose this portion of defendants' motion. Regardless, the court finds Detective Caruso was acting within the scope of his employment while

the underlying events occurred. Detective Caruso was investigating Butler's claim of robbery at the time he questioned, handcuffed, and arrested plaintiff. "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, 324 [1st Dept 1997]).

Plaintiff's remaining claims against the City of New York, can be properly be characterized as "Monell" claims (*Monell v. Department of Social Services*, 436 U.S. 658 (1978)). Under *Monell*, a municipality may not be held liable solely on the basis of *respondeat superior* (id.) Rather, a plaintiff must show "a direct causal link between a municipal policy or custom, and allege the constitutional deprivation" (*City of Canton v. Harris*, 489 U.S. 378, 385 [1989]). "It is only when the execution of the government's policy or custom...inflicts the injury that the municipality may be held liable under §1983" (id.). The element of causation has two components. The plaintiff must first prove the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries beyond merely employing the misbehaving officer. Second, the plaintiff must establish a causal connection, also described as an "affirmative link" between the policy and the deprivation of his constitutional rights (*Vippolis v. Haverstraw*, 768 F.2d 40, 44 [2d Cir. 1985] citing *Oklahoma City v. Tuttle*, 471 U.S. 808 [1985]). Here, plaintiff alleges that his constitutional rights were violated as a result of Defendants' "Stop, Question & Frisk" policy. However, the record is completely devoid of any indicia that plaintiff's arrest stemmed from any illegal stop, question, and frisk. Thus, plaintiff has failed to make a showing of how the city's alleged policy or custom directly caused his injuries. Summary judgment dismissing plaintiff's federal claims against defendants is hereby granted.

Finally, plaintiff's claims against the NEW YORK CITY POLICE DEPARTMENT are dismissed as the NYPD is not a suable entity (*N.Y. City Charter, Chapter 17, §396; Jenkins v. City of New York*, 478 F. 3d 76, 93 n.19 (2d Cir. 2007)).

Based on the foregoing, it is hereby:

ORDERED, that plaintiff's cause of action for negligent hiring, screening, retention and supervision be dismissed. It is further

ORDERED, that plaintiff's sixth and seventh causes of action sounding in violations of plaintiff's constitutional rights be dismissed. It is further

ORDERED, that the plaintiff's complaint be dismissed entirely as against defendant NEW YORK CITY POLICE DEPARTMENT. It is further

ORDERED, that Defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days of the entry date.

Dated: January 22, 2016
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.