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| Debre-court v City of New York |
| 2016 NY Slip Op 31019(U) |
| March 17, 2016 |
| Supreme Court, New York County |
| Docket Number: 152781/13 |
| Judge: James E. d'Auguste |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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CALVIN DEBRECOURT,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 152781/13

Mot. Seq. No. 001

THE CITY OF NEW YORK, NEW YORK CITY
POLICE OFFICER JAMEL BROWN (SHIELD # 10416),
NEW YORK CITY POLICE AND NEW YORK CITY
POLICE OFFICER ROSETTA ROSENDARY PHILLIPS.
(SHIELD # 10544),

Defendants.

-----X

Hon. James E. d'Auguste

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS | NUMBERED |
|--|-----------------|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED..... | 1, 2 (Exs. A-H) |
| AFFIDAVITS IN OPPOSITION TO MOTION..... | 3 (Exs. A-G) |
| REPLY AFFIRMATION..... | 4 |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action for injuries allegedly sustained by plaintiff Calvin Debrecourt, defendants The City of New York (the "City"), Police Officer Jamel Brown s/h/a New York City Police Officer Jamel Brown ("Officer Brown"), The New York City Police Department ("NYPD"), and Police Officer Rosetta Rosendary-Phillips s/h/a New York City Police Officer Rosetta Rosendary Phillips ("Officer Rosendary-Phillips") (hereinafter, collectively "defendants") move for an order (1) pursuant to CPLR 3212, granting summary judgment in their favor and dismissing plaintiff's complaint; (2) pursuant to CPLR 3211(a)(7), dismissing plaintiff's 42 U.S.C. 1983 claims against the City; and (3) for such other and further relief as this Court deems proper. For the reasons stated herein, defendants' motion for summary judgment is granted in its

entirety.¹

Factual and Procedural History

The instant action arises out of an incident that occurred on March 18, 2012 when plaintiff alleges, *inter alia*, that he was arrested and, as a result of that arrest, maliciously prosecuted when he refused to comply with Officer Rosendary-Phillips' order to back away from a disturbance occurring outside of a Starbucks located at or around 201 West 125th Street between Seventh and Eighth Avenues, in the City, County, and State of New York. At the time, Officer Rosendary-Phillips responded to a 911 call and attempted to contain an emotionally disturbed person ("EDP") as she testified to at her deposition held on June 23, 2015. Ex. E at 7:13–8:11.² Officer Rosendary-Phillips stated that she had asked people walking down the block, including plaintiff, to keep moving. *Id.* at 14:12-23. When plaintiff was first asked to keep moving, he initially passed by. *Id.* at 17:8-21. Plaintiff then approached the EDP and was asked to move away. *Id.* at 18:10-17. Although he first walked away, he returned a second time and asserted his right to stand and observe. *Id.* at 18:18-20, 19:6-14. The EDP then became extremely agitated and Officer Rosendary-Phillips ordered plaintiff to stand back, which he refused. *Id.* at 21:2-23, 22:7–23:3. At his General Municipal Law 50-h hearing on February 14, 2013, plaintiff conceded he was instructed to stand back, to which he responded he had a right to

¹ First, plaintiff and defendants are in agreement that plaintiff's state law claims for false arrest and false imprisonment, as well as plaintiff's federal 42 U.S.C. 1983 claims against the City should be dismissed. Plaintiff's state law claims are dismissed based upon the decision and order of this Court (Chan, J.) dated March 13, 2013 and entered March 15, 2013 that denied plaintiff's motion to file a late notice of claim for false arrest and false imprisonment causes of action. Schaefer Aff., Ex. C. Second, this Court notes that the NYPD is a non-jural entity and is not independently subject to suit. N.Y. City Charter, Ch. 17 § 396. Thus, all claims against the NYPD are dismissed. *Gutierrez v. City of New York*, 756 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2010) (holding that the NYPD is a non-suable entity); *Simpson v. City of New York*, 2014 WL 273858, at *1 (Sup. Ct., N.Y. County Jan. 16, 2014) (Chan, J.) (same).

² Unless otherwise noted, all references are to the exhibits annexed to the affirmation of defendants' attorney, Schaefer, submitted in support of their motion.

observe, as long as he stood back and watched from a distance. Ex. D at 19:5-8, 19:16-20:2.

Plaintiff then became irate and began yelling in protest. Ex. E at 23:15-24:

Upon refusing to follow Officer Rosendary-Phillips' order, plaintiff was arrested and charged with violating the following provisions of the New York Penal Law ("PL"): Obstruction of Governmental Administration in the Second Degree (PL § 195.05)³ and Disorderly Conduct (PL § 240.20(6)).⁴ Karlin Aff., Ex. E (Criminal Court of the City of New York, County of New York Complaint). Although Officer Brown, not Officer Rosendary-Phillips, was credited with plaintiff's arrest, the two officers discussed the facts leading up to his arrest and the charges against him. Ex. F at 11:16-12:14, 13:18-14:6. Plaintiff pled not guilty to the charge of obstruction of governmental administration and the case against plaintiff was ultimately dismissed. Ex. D at 27:20-25, 39:8-13; Karlin Aff., Ex. B (Criminal Court of the City of New York, County of New York Certificate of Disposition). After his arrest, plaintiff commenced this litigation asserting claims for malicious prosecution and violations of his civil rights under 42 U.S.C. 1983 against the individual police officers named herein.

Discussion

I. Plaintiff's Malicious Prosecution Claim

It is well established in New York that in order to state a claim for malicious prosecution, the plaintiff must establish the following elements: "(1) the commencement or continuation of a

³ PL 195.05, entitled "Obstructing governmental administration in the second degree," states, in relevant part, that: "a person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act." *Id.*

⁴ PL 240.20(6), entitled "Disorderly conduct," states: "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: . . . 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." *Id.*

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.” *Broughton v. State*, 37 N.Y.2d 451, 457 (1975); *see also Ramos v. City of New York*, 285 A.D.2d 284, 298 (1st Dep’t 2001). “The existence of probable cause constitutes a complete defense to a claim of malicious prosecution.” *Morant v. City of New York*, 95 A.D.3d 612, 613 (1st Dep’t 2012); *see also Rivera v. City of New York*, 40 A.D.3d 334, 337 (1st Dep’t 2007); *Broughton*, 37 N.Y.2d at 457.

Probable cause to arrest is a subjective inquiry “of [the] facts and circumstances, which when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed” in the officer’s presence by said individual. *Reiner v. City of New York*, 2013 WL 1934368, at *4 (Sup. Ct., N.Y. County Apr. 17, 2013) (Freed, J.); *see also* N.Y. C.P.L. § 140.10(1).⁵ “Once on the scene, however, the officer may make his own observations and reach a conclusion with respect thereto based upon his knowledge of street conditions, sophistication and experience.” *People v. Foster*, 83 A.D.2d 282, 286 (1st Dep’t 1981).

Although plaintiff may satisfy the first two elements of a malicious prosecution claim, here, the police had probable cause to arrest plaintiff for obstructing governmental administration in the second degree, which defeats his claim for malicious prosecution. In *Linehan v. State*, 201 A.D.2d 706 (2d Dep’t 1994), based upon similar facts, the plaintiff resisted efforts of a court

⁵ New York Criminal Procedure Law section 140.10(1), entitled “Arrest without a warrant; by police officer; when and where authorized,” states that: “a police officer may arrest a person for: (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence; and (b) A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise.” *Id.* The terms “reasonable” and “probable” are used interchangeably in statutes and case law. *McPherson v. City of New York Police Dep’t*, 25 Misc. 3d 1220(A), at *1 (Sup. Ct., Bronx County 2009). It is noted that “reasonable cause” may be based on reliable evidence consisting of hearsay. N.Y. C.P.L. § 70.10(2).

officer to stay away from an area where a disturbance was taking place and the court upheld a finding of probable cause to arrest for obstructing governmental administration in the second degree. *Id.* at 706. While disobeying “a police officer is not always an offense punishable by law, . . . a police officer is the guardian of the public order, and the courts cannot weigh opposing considerations as to the police officer’s order when he decide[s] under given circumstances that [such] an order is called for.” *People v. Lo Vecchio*, 185 Misc. 197, 200 (City Ct., City of Utica 1945). In the performance of their duties, police officers may give reasonable directions and “[r]easonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty.” *People v. Galpern*, 259 N.Y. 279, 281-82 (1932).

In the instant case, where plaintiff was ordered to stay away from a disturbance, it would have been up to the police officer on the scene to determine whether such an order was required and how much space was needed so that the plaintiff would not be in a position to arguably interfere with governmental administration. Here, Officer Rosendary-Phillips’ order to plaintiff to stand back did not exceed her authority in making such a determination. Plaintiff was upsetting the EDP and was yelling on the sidewalk, so Officer Rosendary-Phillips ordered him to stand back in order to avoid interference with bystanders or other police officers, especially when public safety was at issue. The multitude of cases on this subject show that Officer Rosendary-Phillips’ order had little to do with the fact that, at the time, she was dealing with someone who was emotionally disturbed or perhaps mentally ill, but more so with the fact that she was focused on her goal of maintaining public order. When plaintiff disobeyed that order, probable cause existed to arrest him for obstructing governmental administration. *See id.; Rivera v. City of New York*, 40 A.D.3d 334, 339 (1st Dep’t 2007). Additionally, the Court notes that

there is no evidence other than plaintiff's personal opinion that he was standing far enough away from the underlying disturbance to challenge Officer Rosendary-Phillips' order to stand back.

Second, even if probable cause was lacking to arrest plaintiff for obstructing governmental administration and Officer Rosendary-Phillips should not have interfered for that purpose, plaintiff was also charged with disorderly conduct, which shows that the officer's actions were authorized. *See Galpern*, 259 N.Y. at 284. When police officers are attempting to clear an area and an individual fails to follow an order to disperse, probable cause exists to arrest said individual for disorderly conduct, even when an officer only senses a potential breach of the peace. *People v. Turner*, 48 Misc. 2d 611, 618-20 (App. Term, 1st Dep't 1965), *aff'd*, 17 N.Y.2d 829 (1966); *Galpern*, 259 N.Y. at 284-85; *People v. Pettigrew*, 69 Misc. 2d 985, 996 (Dist. Ct., Suffolk County 1972) (discussing *People v. Turner*, *supra*). Probable cause to arrest plaintiff for disorderly conduct alone requires dismissal of the malicious prosecution claim. *Rivera*, 40 A.D.3d at 339. In *Rivera v. City of New York*, *supra*, the court noted that "the police engaged in reasonable efforts to induce the protesting plaintiffs to clear the boardwalk, initially approaching them only at a time when the boardwalk became crowded and ask[ed] them to stop . . . and leave." *Id.* However, "[p]laintiffs admit[ed] they refused to leave, argued with the police, . . . remained and in fact, . . . resisted the police who only then tried to take them into custody." *Id.* Although, here, the plaintiff did cooperate with the police, sufficient probable cause existed to arrest him for disorderly conduct due to the fact that he was yelling on the sidewalk and irritating the EDP. "Any rational person . . . would find the police more than justified in their concern that this episode might escalate into violence. They thus appropriately tried to quell a quickly unfolding, potentially explosive situation." *Id.* at 339-40. As a result,

there is no proof that the defendant officers acted with malice in arresting plaintiff in order to maintain public safety on a crowded walkway. *Id.* at 340.

Here, both of the defendant officers had probable cause for plaintiff's arrest. Officer Rosendary-Phillips used reasonable efforts to clear the sidewalk, and upon plaintiff's refusal to obey her order, probable cause existed for his arrest. Although plaintiff acted alone, his conduct "could well have led to a serious conflict with a passerby," especially in an emotionally charged situation. *People v. Maher*, 137 Misc. 2d 162, 169 (Crim. Ct., N.Y. County 1987). Further, Officer Brown, who only processed plaintiff's arrest, reasonably relied on information obtained from Officer Rosendary-Phillips to establish sufficient probable cause for his arrest. *See People v. Ketcham*, 93 N.Y.2d 416, 419 (1999) ("Under the fellow officer rule, a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer . . . in possession of information sufficient to constitute probable cause for the arrest." (internal quotation marks and citations omitted)). Accordingly, plaintiff's claim for malicious prosecution must be dismissed.

II. Plaintiff's Claims Under 42 U.S.C. 1983

Plaintiff's remaining claims for violations of his civil rights under 42 U.S.C. 1983 against Officers Brown and Rosendary-Phillips in their individual capacities must also be dismissed. To the extent that 42 U.S.C. 1983 applies to individual defendants, when acting in their official capacity, the individual police officers are entitled to qualified immunity.

A government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Determination as to whether the doctrine of qualified immunity may be invoked requires a three-part analysis. The court must determine: 1) the

identification of the specific right allegedly violated; 2) whether that right was so “clearly established” as to alert a reasonable official to its constitutional parameters; and 3) whether a reasonable official could have believed that the particular conduct at issue was lawful.

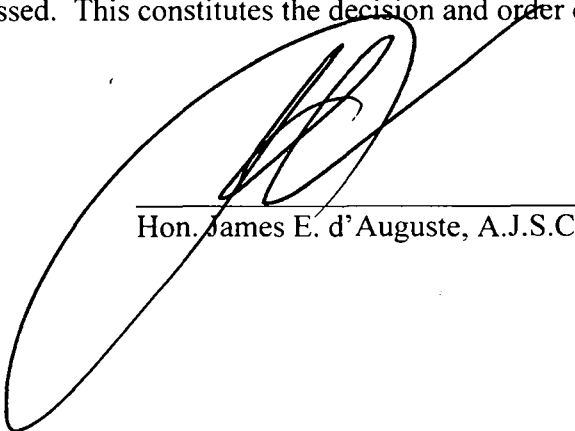
Liu v. New York City Police Dep’t, 216 A.D.2d 67, 68-69 (1st Dep’t 1995) (citations omitted).

“A defendant-government official will prevail if the right asserted by plaintiff was not ‘clearly established’ or if the official reasonably believed that his particular conduct was lawful.” *Id.* at 69. Additionally, “[w]here the objective reasonableness of an official’s conduct rests on establishing whether defendant acted with an impermissible motive or intent, plaintiff must plead such intent with specific evidence.” *Id.* Plaintiff’s federal claim under section 1983 for malicious prosecution fails due to the existence of probable cause and the absence of actual malice, discussed *supra*. *Arenzo v. Mack*, 39 A.D.3d 341; 342 (1st Dep’t 2007). Additionally, since this Court has already found that both Officers Rosendary-Phillips’ and Brown’s actions were objectively reasonable based upon the circumstances and no bad faith was shown, the defendant officers are entitled to qualified immunity. *Id.* Accordingly, plaintiff’s 42 U.S.C. 1983 claims are dismissed against all defendants.

Conclusion

For the reasons stated above, defendants’ motion for summary judgment is granted in its entirety and plaintiff’s complaint is hereby dismissed. This constitutes the decision and order of this Court.

Dated: March 17, 2016



Hon. James E. d’Auguste, A.J.S.C.