

Ruiz v City of New York
2017 NY Slip Op 30381(U)
January 6, 2017
Supreme Court, Bronx County
Docket Number: 308272/11
Judge: Elizabeth A. Taylor
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.

NEW YORK SUPREME COURT-COUNTY OF BRONX
I.A.S. PART 2

VICTOR RUIZ, VICTORIA RIVERA, CASEY RIVERA
and ROBERT SILVA ,

Plaintiffs,

-against-

**MEMORANDUM
DECISION/ORDER**
Index No.: 308272/11

THE CITY OF NEW YORK, DETECTIVE JOSE VARGAS,
DETECTIVE MARQUEZ, DETECTIVE SCALLABA and
DETECTIVE MENDEZ, individually and in their capacity as
members of the NEW YORK CITY POLICE DEPARTMENT,

Defendants.

HON. ELIZABETH TAYLOR

Defendants, The City of New York ("The City"), Det. Jose L. Vargas s/h/a Detective Jose Vargas ("Vargas"), Det. Joseph Marquez s/h/a Detective Marquez ("Marquez"), Det. Joseph Scialabba s/h/a Detective Scallaba ("Scallaba"), and Nelson Mendez s/h/a Detective Mendez ("Mendez"), move for an order: (1) pursuant to CPLR 3211: (a) dismissing plaintiffs' third, fourth, fifth and sixth causes of action in their entirety with respect to The City; (b) dismissing plaintiffs' sixth cause of action in its entirety with respect to Vargas, Marquez, Scallaba and Mendez; (2) pursuant to CPLR 3212: (a) dismissing the first and second causes of action of plaintiffs Victor Ruiz ("Victor") and Casey Rivera ("Casey"); (b) dismissing the third cause of action in its entirety of plaintiffs Victor, Victoria Rivera ("Victoria") and Casey; (c) dismissing the fourth cause of action in its entirety of plaintiffs Victoria and Casey; and (d) dismissing the fifth cause of action in its entirety. The motion is decided as hereinafter indicated.

This is an action by plaintiffs to recover monetary damages for personal injuries allegedly sustained by them on and after September 18, 2010, as a result of alleged false arrest and

imprisonment, assault, battery, malicious prosecution and illegal search and seizure in violation of their constitutional rights.

Plaintiffs' complaint consists of six causes of action. The first cause of action by plaintiffs Victor, Robert and Casey, for assault, alleges that these plaintiffs were approached by defendants and placed in fear for their physical well-being and safety and placed in apprehension of immediate harmful and/or offensive touching. The second cause of action by plaintiffs Victor, Robert and Casey, for battery, alleges that these plaintiffs were intentionally subjected to harmful and offensive touching, without their consent. The third cause of action alleges that they used excessive and unreasonable force in effecting their arrest, depriving them of their civil, constitutional and statutory rights under color of law. The fourth cause of action by plaintiffs Victoria, Robert and Casey, alleges that they were falsely arrested, unreasonably and unjustifiably confined, a condition they were aware of and did not consent to and said confinement was not privileged. The fifth cause of action by plaintiff Casey alleges malicious prosecution. The sixth cause of action by plaintiffs Victor, Robert and Casey, alleges that they were subject to an improper visual body cavity inspection by defendants without a specific factual basis supporting a reasonable suspicion to believe that they secreted evidence inside a body cavity.

This action stems from an incident that occurred on the morning of September 18, 2010, at or near the vicinity of 216th Street and Olinville Avenue, Bronx, New York. Reduced to its essence, Victor was walking down the street with his brother, Casey, and a friend, Genai, when police officers Vargas and Marquez, who were traveling in a minivan, saw Victor smoking a marijuana cigarette ("blunt"). Victor was subsequently arrested by Vargas and Marquez, as were

Victoria, Casey, and Robert. The only documentary evidence submitted pertaining to the arrests of Victor, Victoria, Casey and Robert, submitted on this motion, are contained in defendants' Response to a Preliminary Conference Order. Contained therein are The New York City Police Department Arrest Reports ("Arrest Reports"), for this incident, which stated in relevant part as follows:

As to Victor:

Charge	Attempt	Law Code	Class	Type	Counts	Description
Top	No	P.L. 195.05	M	A	1	Obstruction Gov't Admin. - 2nd
#02	No	P.L. 205.30	M	A	1	Resisting Arrest
#03	No	P.L. 221.10.01	M	B	1	Crim. Poss Marijuana-5th: Public
#04	No	P.L. 240.20.01	V	0	1	Dis/Con: Fight/Violent Behavior

Details: AT T/P/O DEFENDANT WAS OBSERVED TO BE IN POSSESSION OF A QUANTITY OF MARIJUANA IN PUBLIC. AS POLICE APPROACHED TO EFFECT ARREST, DEFENDANT DID FIGHT THE OFFICERS FROM HANDCUFFING HIM BY KICKING, SCREAMING, FLAILING HIS ARM IN AN EFFORT TO PREVENT LAWFUL ARREST. DEFENDANT STRIPPED SEARCHED @ 47PCT

As to Robert:

Charge	Attempt	Law Code	Class	Type	Counts	Description
Top	No	P.L. 195.05	M	A	1	Obstruction Gov't Admin.-2nd
#02	No	P.L. 205.30	M	A	1	Resisting Arrest
#03	No	P.L. 240.20.01	V	0	1	Dis/Con:Fight/Violent Behavior

Details: AT T/P/O DEFT DID ACT IN CONCERT W/OTHER APPREHENDED INDIVIDUALS IN PREVENTING POLICE OFFICERS FROM MAKING A LAWFUL

ARREST. DEFT WAS STRIPPED SEARCHED AT THE 47 PCT

As to Casey:

Charge	Attempt	Law Code	Class	Type	Counts	Description
Top	No	P.L. 195.05	M	A	1	Obstruction Gov't Admin.-2nd
#02	No	P.L. 205.30	M	A	1	Resisting Arrest
#03	No	P.L. 240.20.03	V	0	1	Dis/Con:Obscene Lang/Gestures

Details: AT T/P/O DEFT DID ACT IN CONCERT W/OTHER APPREHENDED INDIVIDUALS IN PREVENTING POLICE OFFICERS FROM MAKING A LAWFUL ARREST. DEFT WAS STRIPPED SEARCHED AT THE 47 PCT

An Accusatory Instrument (Criminal Information, dated September 19, 2010), was filed with Bronx Criminal Court, charging Victor with (1) (M) P.L. 205.30 Resisting Arrest; (2) (M) P.L. 221.10.(1) Criminal Possession of Marijuana 5; and (3) (V) P.L. 221.05 Unlawful Possession of Marijuana.

An Accusatory Instrument (Criminal Information, dated September 19, 2010), was filed with Bronx Criminal Court, charging Casey with (M) P.L. 195.05 Obstructing Governmental Administration.

There was no Accusatory Instrument filed against Robert.

There was no Arrest Report for or Accusatory Instrument filed against Victoria.

The elements of a cause of action for false arrest and/or imprisonment are: (1) the defendant intended to confine him/her; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *Broughton v. State of New York*, 37 N.Y.2d 451, 456 (1975).

The elements of a cause of action for malicious prosecution are: (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. *Id.* at 457.

A warrantless arrest is presumptively invalid and raises a presumption of lack of probable cause. *Lawson v. City of New York*, 83 A.D.3d 609 (1st Dept. 2011). However, a claim for false arrest and imprisonment may be defeated by proving legal justification for the arrest, which “may be established by showing that the arrest was based on probable cause” (*Broughton* at 458; *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 95 (2001); *Rivera v. County of Nassau*, 83 A.D.3d 1032 (2011); which is a complete defense to claims of false arrest and imprisonment and malicious prosecution, under both state and federal standards. *Lawson v. City of New York*, 83 A.D.3d 609 (1st Dept. 2011)); *Narvaez v. City of New York*, 83 A.D.3d 516 (1st Dept. 2011); *Leftenant v. City of New York*, 70 A.D.3d 596 (1st Dept. 2011).

The first three elements of the false arrest claims of Victoria, Casey and Robert, noted above, are not in dispute, and these plaintiffs were all arrested without a warrant. Accordingly, their claims for false arrest hinge on whether there was legal justification (probable cause) for their respective arrests.

Defendants’ motion to dismiss the false arrest claims of Victoria and Casey, asserted in the fourth cause of action, and the malicious prosecution of Casey, asserted in the fifth cause of action, is granted, and these claims are dismissed. The deposition testimony of Vargas, as well as Victoria and Casey, demonstrates that after Victor’s arrest, and as the police officers were trying to drive away, Victoria and Casey stood in front of the van and after being directed four or

five times to step away from the van and refused to comply. This conduct establishes that Victoria and Casey interfered with the police officers' performance of their official duties and is a sufficient intrusion into police activity to establish obstruction of governmental administration. *In re Isaiah C.*, 96 A.D.3d 617 (1st Dept. 2012); *People v. Romeo*, 9 A.D.3d 744 (3rd Dept. 2004); *In re Carlos G.*, 215 A.D.2d 165 (1st Dept. 1995). Accordingly, there was probable cause for the arrest of Victoria and Casey.

Defendants' motion to dismiss the false arrest claims of Robert is denied. Defendants have failed to make an evidentiary showing that they had probable cause for his arrest. Other than inferring that Robert may have interfered with the police, defendants do not articulate the specific conduct of Robert that constituted any interference. Further, no deposition pages are cited by defendants pertaining to Robert's conduct for evaluation by the Court. *Ortiz v. 3115 B'way Dev. Fund*, 73 A.D.3d 540 (1st Dept. 2010).

A plaintiff seeking to recover damages for assault must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact. *Gould v. Rempel*, 99 A.D.3d 759 (2nd Dept. 2012). The Court has determined that there was probable cause for the arrest of Victor and Casey. The right to make an arrest accompanies with it the right to use some degree of physical coercion. *Esmont v. City of New York*, 371 F. Supp.2d 202 (E.D.N.Y. 2005); *Graham v. Connor*, 490 U.S. 396 (1989); *Johnson v. Suffolk County Police Dept.*, 245 A.D.2d 340 (2nd Dept. 1997). Accordingly, defendants' motion to dismiss the assault and battery claims of Victor and Casey, asserted in the first and second causes of action, is granted.

It is beyond cavil that not every push or shove in effecting an arrest constitutes excessive

force. *Graham v. Connor, supra*. Whether excessive force under the Fourth Amendment was used by a police officer in effecting an arrest is determined by the standard of objective reasonableness, judged from the perspective of reasonable officer on the scene, not from hindsight. *Rivera v. City of New York*, 40 A.D.3d 334, 341 (1st Dept. 2007). The facts underlying the arrest, including the severity of the crime at issue, whether the suspect was actively resisting arrest and whether the suspect posed an immediate threat to the safety of the officers, must be considered. *Id.* at 342.

Victor alleges that during his arrest, Vargas twisted his arm behind his back and punched him in the stomach. Victor further alleges that he told Vargas and Marquez that the handcuffs and shackles on his feet were too tight and in response to this complaint, Vargas and Marquez squeezed the cuffs on his hands and feet tighter. As a result thereof, Victor alleges that he sustained permanent injury to his wrist and ankle. More specifically, Victor testified that every time he rotates his ankle, you can hear it click and there is pain. He could not bend his wrist and thumb all the way and this condition lasted a month or two. He also had bruises on both of his ankles and thumbs for a month or two.

Casey alleges that during his arrest, his hair was pulled, he was thrown against a gate, put in a headlock by Scaballa, struck in the side of the face by Scaballa with his fists, punched in the stomach and chest, and suffered from excessively tight handcuffs, which left a scar on his wrist. Casey also complained about the handcuffs being too tight and in response to this complaint the handcuffs were tightened.

Victoria, Victor, Casey and Robert all allege that they suffered pain in their wrists as a

result of the handcuffs being on too tight and they had marks on their wrists for several weeks after the incident. Victor and Robert also allege that on September 20, 2010, they went to St. Luke's Emergency Department.

With respect to their allegations involving tight handcuffs, the viability of such claim rests on whether (1) the handcuffs were unreasonably tight; (2) the defendants ignored the plaintiff's pleas that the handcuffs were too tight; and (3) the degree of injury to the wrists, if any. *Lynch v. City of Mount Vernon*, 567 F.Supp.2d 459, 468 (2nd Cir. 2008). The lack of a significant injury beyond temporary discomfort, is fatal to an excessive force claim. *Id.* at 468. *See, also, Usavage v. Port Authority of New York and New Jersey*, 932 F.Supp.2d 575, 592 (S.D.N.Y. 2013).

Any of plaintiffs' excessive force claims predicated upon the tightness of handcuffs placed upon them are dismissed. None of the plaintiffs have sustained a significant injury as a result of the alleged tightness of the handcuffs. No medical evidence whatsoever was submitted to document their claims of injury. Victor and Robert assert that they went to St. Luke's Emergency on September 20, 2010, but did not submit the hospital records. Casey alleges that he sustained a scar on his wrist, but does not describe its dimensions or submit a photograph thereof.

However, defendants' motion to dismiss the claims of excessive force by Victor and Casey predicated on the allegations that they were punched in the stomach and/or face is denied. There are factual issues as to whether Victor and/or Casey were punched, and if so, whether under established criteria, excessive force was used.

Plaintiffs' third cause of action alleges violation of 42 USC § 1983. The claim asserted against The City under 42 USC § 1983 must be dismissed for failure to demonstrate and/or allege that the actions taken by its police officers resulted from official municipal policy or custom. *Delgado v. City of New York*, 86A.D.3d 502 (1st Dept. 2011); *Leftenant v. City of New York*, *supra*, at 597, citing *Monel v. Dept. of Social Serv. of City of N.Y.*, 436 U.S. 658, 690-691(1978).

The branch of The City's motion, pursuant to CPLR 3211, and the branch of the motion by the individual police officers, pursuant to CPLR 3212, both seeking dismissal of the sixth cause of action, which alleges that plaintiffs, Victor, Casey and Robert, were subjected to an improper visual body cavity inspection by defendants, is denied.

Although neither Victor, Casey or Robert, could specifically identify the name of the individual police officer who conducted their strip search, the Arrest Reports for Victor, Casey and Robert, all state that they were strip searched at the 47th Precinct, and Police Officers Vargas, Scallaba, Marquez and Mendez did not deny conducting a strip search, all testifying at their depositions that they could not recall whether they conducted a strip search of Victor, Casey and/or Robert. Victor, Casey and Robert, all testified at their depositions that this strip search required them to remove all their clothing and bend over. Casey was required to spread his cheeks and Robert was required to cough. At his deposition, Detective Kreshnik Bakraqu ("Bakraqu"), who was identified as the arresting officer on the Arrest Reports, did not know who strip searched Victor, Casey and/or Robert. When asked at his deposition the reason for the strip search, Bakraqu answered:

"We are in Narcotics. In our past experience, every time that we had encountered individuals such as, you know, Class B misdemeanors such as marijuana possession,

individuals tend to have other contrabands hidden in their groin or their inside pants. Therefore, when he put up a fight and refused to be cuffed and refused - - and to run away and refused lawful orders to stop, that's something more than just a marijuana cigarette in his possession that we recovered on the scene."

In order for the police to conduct a visual cavity inspection, they must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity. *People v. Hall*, 10 N.Y.3d 303, 311 (2008); *People v. Colon*, 80 A.D.3d 440 (1st Dept. 2011). Visual cavity inspections cannot be routinely undertaken as incident to all drug arrests or permitted under a blanket police department policy that subjects persons suspected of certain crimes to these procedures. *People v. Hall, supra*; *People v. Colon, supra*. The reasons proffered by Detective Bakraqu are insufficient to create a reasonable suspicion that Victor, Casey and/or Robert secreted evidence inside a body cavity. *People v. Hall, supra*; *People v. Colon, supra*. Further, Detective Bakraqu's testimony creates an issue of fact as to whether the strip searches of Victor, Casey and/or Robert were part of an unconstitutional custom or policy adopted by The City. *Monell v. Dept. of Soc. Servs. of City of N.Y., supra*.

In summary, defendants' motion is granted to the following extent. The first and second causes of action of plaintiffs Victor and Casey are dismissed in their entirety. The third cause of action against of plaintiffs Victor, Victoria and Casey, under 42 U.S.C. § 1983, against The City, alleging excessive force, is dismissed. The fourth cause of action of plaintiffs Victoria and Victor are dismissed in their entirety. The branch of defendants' motion seeking dismissal of the fourth cause of action pertaining to Robert is denied. The fifth cause of action of plaintiff Casey is dismissed in its entirety. The branch of defendants' motion seeking dismissal of the State

excessive force claims of Victor and Robert with respect to their allegations of being punched is denied. The branch of defendants' motion seeking dismissal of the sixth cause of action is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: JAN 06 2017



ELIZABETH A. TAYLOR, A.J.S.C.