

Warner v City of New York

2017 NY Slip Op 31951(U)

August 21, 2017

Supreme Court, Queens County

Docket Number: 701827/15

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Winston A. Warner,

Index
Number: 701827/15

Plaintiff,

Motion
Date: 8/8/17

- against -

Motion
Cal. Number: 137

City of New York, Police Officer Gerard
White, Tax Reg#921854, in his individual
and official capacity, Sergeant Rosenthal,
in his individual and official capacity,

Motion Seq. No.: 2

Defendants.
-----X

The following papers numbered 1 to 9 read on this motion by
defendants to amend the answer and to dismiss.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... 1-4
Affirmation in Opposition-Exhibit..... 5-7
Reply..... 8-9

Upon the foregoing papers it is ordered that the motion is
decided as follows:

Motion by defendants for leave to amend their answer to
include an affirmative defense of collateral estoppel and, upon
such amendment, to dismiss the complaint pursuant to CPLR
3211(a)(5) is denied.

This action arises out of a landlord-tenant dispute between
plaintiff, former tenant in the Astoria Tower apartment building
located at 31-72 31st Street in Queens County, and former defendants
Astoria Tower 31 LLC, the owner of the building, Wvillahdo
Contreras, an employee of Astoria, and HRV Management, Inc., the
management company of the building.

Plaintiff, a rent-stabilized tenant occupying an apartment in

FILED
SEP - 1 2017
COUNTY CLERK
QUEENS COUNTY

the premises pursuant to a two-year renewal lease commencing June 1, 2011 and expiring May 31, 2013, and a lessee of a parking space in the basement garage of the building pursuant to a separate month-to-month lease for the parking space, alleges that he was falsely arrested and maliciously prosecuted for destroying a "boot" placed on his vehicle by defendants to immobilize it after he defaulted in paying his rent for his parking space.

It is undisputed that the aforementioned former defendants "booted" plaintiff's vehicle while it was parked in the demised parking space and that plaintiff removed the boot, placed it in the trunk of his vehicle and drove away with it.

Plaintiff alleges that on February 22, 2014, he called 911 to report that his vehicle had been illegally booted, and that after NYPD Officers arrived, he informed them that he suspected that the boot was placed on his vehicle by former defendants. According to plaintiff, after an officer contacted HRV and HRV and Contreras admitted that they had booted plaintiff's vehicle and that they refused the officer's request to remove it, the officers told plaintiff that the incident was a civil matter and could not assist him. Thereafter, upon inspecting the boot and discovering that it had not been secured properly, plaintiff was able to remove it from the vehicle. He thereupon took possession of the boot and placed it in the trunk of his vehicle. Former defendants thereafter called the police and reported that plaintiff had stolen their boot. Plaintiff was arrested on February 26, 2014 for petit larceny for the theft of the boot.

Plaintiff commenced the present action against the City, the arresting police officer and unnamed "John Doe" Officers, HRV, Astoria Tower and Contreras. The complaint alleges causes of action against the City, the arresting Officer and the "John Doe" Officers under 42 U.S.C. §1983 for violation of his Fourth and Fourteenth Amendment rights by reason of his false arrest, conspiracy to falsely arrest plaintiff and failure on the part of the "John Doe" police officers to intervene to prevent plaintiff's false arrest.

As against HRV, Astoria Tower and Contreras, the complaint alleges causes of action for "negligence" for "unlawfully arresting and unlawfully causing the arrest of Plaintiff", false arrest proper, negligent infliction of emotional distress, malicious prosecution, "abuse of process" and "attempted extortion and duress".

HRV Management, Astoria Tower and Contreras thereafter moved for summary judgment dismissing the complaint against them. Pursuant to its order issued on June 13, 2016, the motion was

granted and the complaint was dismissed against them. In its order granting the motion, this Court stated, in relevant part, as follows:

"With respect to plaintiff's cause of action for false arrest proper, it is well established that "to hold a civilian defendant liable for false arrest, the plaintiff must establish that the defendant did not merely report a crime to the police or participate in the prosecution, but actively importuned the police to make an arrest without 'reasonable cause [to believe] in the plaintiff's culpability'" (Rivera v County of Nassau, 83 AD 3d 1032, 1033 [2nd Dept 2011] [internal citations omitted]). Here, movants have established an entitlement to summary judgment dismissing plaintiff's cause of action against them for false arrest by proffering uncontested evidence that plaintiff, in fact, took movants' immobilizer boot without their permission, which act could reasonably have caused movants to believe that such act constituted theft. In opposition, plaintiff merely avers, parroting his counsel's parenthetical non-sequitur argument, that since the boot was not placed on the wheel of his vehicle properly, it should be deemed to have been abandoned. Moreover, this Court notes that plaintiff does not annex to his opposition papers a certificate of disposition of his criminal case and does not otherwise inform what the outcome of the criminal action was."

The City defendants contend that since this Court dismissed plaintiff's false arrest cause of action against the civilian defendants, the issue of probable cause has been determined and plaintiff is now collaterally estopped from denying that the NYPD had probable cause to arrest him for petit larceny and consequently, since a finding of probable cause to arrest constitutes a complete defense to a cause of action for false arrest, plaintiff's \$1983 causes of action against the City for constitutional violations based upon an allegation of false arrest must be dismissed. The City's argument is without merit.

In granting HRV's, Astoria Tower's and Contreras' motion for summary judgment dismissing, inter alia, plaintiff's false arrest cause of action against them, it did not determine the issue of probable cause of police officers to arrest plaintiff. It merely held that there was no triable issue of fact to support plaintiff's cause of action for false arrest against the civilian defendants, based upon a finding of reasonable cause on their part to believe that plaintiff stole the boot, pursuant to the standard articulated in Rivera v County of Nassau (83 AD 3d 1032, 1033 [2nd Dept 2011]). The City cites no controlling authority holding that the reasonable cause standard applicable to a false arrest cause of action against civilians is the same as the probable cause standard applicable to

police officers. The City has failed to demonstrate that a finding that a civilian reasonably believed that a crime was committed so as to justify calling the police necessarily also establishes that the police had probable cause to make an arrest based upon that call from the civilian. This Court observes that a civilian is not required to conduct the same level of inquiry and investigation prior to calling the police to report a crime as is the responding police officer who must make an independent inquiry as to whether the information provided by the complaining civilian and any other facts that may merit further inquiry supports the making of an arrest. Although the City points out that this Court's determination that the civilian defendants did not falsely procure the arrest of plaintiff was based, in part, upon its finding of fact that plaintiff took the boot and placed it in the trunk of his vehicle, thereby causing the civilian defendants to believe reasonably that he had stolen the boot, such fact does not necessarily also establish that the NYPD also had probable cause to arrest plaintiff, based upon such fact alone. To the extent that the City may be arguing that the Court's finding of fact that plaintiff removed the boot and placed it in his trunk and drove away with it supports a finding of probable cause, such is an argument to be made in support of a motion for summary judgment by the City. It is not a basis for dismissal of plaintiff's false arrest cause of action against the City upon collateral estoppel grounds.

Accordingly, the motion is denied.

Dated: August 21, 2017



KEVIN J. KERRIGAN, J.S.C.

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SEP - 1 2017
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