

Tiburcio v City of New York
2017 NY Slip Op 32183(U)
September 12, 2017
Supreme Court, Bronx County
Docket Number: 303264/2014
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 303264/2014**

Luis Tiburcio,
Plaintiff,

-against-

DECISION and ORDER

The City of New York, et al.,

Defendant.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants' motion to dismiss the complaint pursuant to CPLR 3211 and CPLR 3212.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

As pertinent here, in his complaint plaintiff alleges causes of action for false arrest/imprisonment, malicious prosecution, assault and battery and, as against defendant P.O. Ezeikel Martinez only, intentional and negligent infliction of emotional distress and violations of 42 U.S.C. §1983, ¹ based upon his arrest by the New York City Police Department on October 4, 2013 at approximately 8:00 p.m. Plaintiff was kept in custody until his arraignment on October 5, 2013 at approximately 8:30 p.m. All charges against plaintiff were ultimately dismissed.

Defendants now move, pursuant to CPLR 3211 and/or CPLR 3212, to dismiss the complaint on the grounds that: (1) probable cause existed to arrest and prosecute plaintiff, (2) plaintiff sustained no injury as a result of being handcuffed, (3) the complaint fails to state a cause of action for violation(s) of 42 U.S.C. § 1983, and (4) defendants' conduct is not so outrageous or extreme to be actionable under the common law theories of negligent intentional infliction of emotional distress. As defendants correctly note, and plaintiff does not dispute, the NYPD is a nonsuable entity. As such, the complaint is hereby dismissed as against the NYPD.

¹In his opposition papers, plaintiff discontinues his claims against the City of New York for negligent retention, training, supervision and intentional and negligent infliction of emotional distress, and all claims brought under the Constitution of the State of New York.

In the support of the motion, the City of New York and P.O. Martinez submitted, *inter alia*, the 50-h hearing and deposition testimony of plaintiff, the deposition testimony of P.O. Martinez and various NYPD and Bronx Criminal Court documentation. Based upon plaintiff's 50-h hearing and deposition testimony, the deposition testimony of P.O. Martinez, NYPD property vouchers and photos, the movants established, *prima facie* that: (1) P.O. Martinez observed plaintiff spray painting white graffiti on the black gate to a church; (2) P.O. Martinez observed plaintiff placing an object in the front pocket of his hoodie when he observed the police officers approach in their vehicle, (3) plaintiff was questioned as to what he was doing, (4) plaintiff told P.O. Martinez that he was painting his initials on the gate to the church, (5) plaintiff was searched thereafter and a can of white spray paint was recovered from the front pocket of his hoodie, (6) his backpack was searched and paint brushes and markers were discovered (6) plaintiff was handcuffed and placed under arrest after he was searched and (7) plaintiff did not request medical attention.

In opposition to the motion, plaintiff submitted the affirmation of counsel who points to plaintiff's testimony that he was an art student and was carrying art supplies that he had used at school several hour^s prior to his arrest, he was walking home with a friend with take-out Chinese food when he was stopped by police, without saying anything P.O. Martinez exited his vehicle and pushed plaintiff's back and face against a black gate in the church parking lot and twisted his arm injuring his shoulder, P.O. Martinez patted him down, searched his pockets and unzipped his sweater but did not recover anything, and that he was arrested without being told why.

In addition, counsel contends that triable issues of fact exist as to whether there was probable cause to arrest plaintiff based upon plaintiff's denial that he was spray painting on the church gate and because the NYPD property vouchers and photos indicate that plaintiff did not have white paint in his possession. However, a review of the vouchers and photos reveals that a can of white spray paint was recovered from plaintiff incident to his arrest and that plaintiff had white paint on his hands at the time of his arrest. A photo of the church gate depicts white spray-painted graffiti on the black gate.

* * * * *

In order to establish a claim for false arrest/imprisonment, a plaintiff must prove that: (1) the defendant intended to confine him/her, (2) plaintiff was conscious of the confinement, (3) plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. *See Broughton v. State of New York*, 37 N.Y.2d 451, 456 (1975). The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to a claim of false arrest/imprisonment. *See Martinez v. City of Schenectady*, 97 N.Y.2d 78, 85, 761 N.E.2d 560 (2001). When an arrest and imprisonment are effected without a warrant, as here, a presumption arises that both are unlawful, and the burden of proving justification, including probable cause, is cast upon the defendant. *See Smith v. County of Nassau*, 34 N.Y.2d 18, 23, 311 N.E.2d 489 (1974). Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. *See Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453 (1983). Based upon the record evidence, the Court finds that probable cause existed for plaintiff's arrest. Plaintiff's self-serving and unsubstantiated testimony that he was carrying art materials that he had used several hours earlier in an art class is insufficient to raise a triable issue of fact. Notably, plaintiff submitted no documentary evidence to support his claim that he was enrolled in an art class.

The elements of a claim 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 plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice. *See Broughton v. State of New York*, 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87 (1975). Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. *See Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453 (1983). Arraignment or indictment generates a presumption of probable cause, rebuttable only by proof of fraud, perjury or misrepresentation or falsification of evidence. *See Broughton, supra*, at 455-456; *Mendez v. City of New York*, 137 A.D.3d 468, 471, 27 N.Y.S.3d 8 (1st Dept. 2016). A jury may infer that a defendant acted with actual malice from the fact that there was no probable cause to arrest the plaintiff. *See Martin v.*

City of Albany, 42 N.Y.2d 13, 17, 396 N.Y.S.2d 612 (1977). Here, plaintiff's assertion that the evidence against him, i.e., art materials, was fabricated, with no evidence whatsoever to support that claim, is insufficient to raise a triable issue of fact. There is no evidence that probable cause was vitiated at any time or that any defendant acted with malice.

In order to state a §1983 claim against a municipality, a litigant must allege that the municipality implemented and adopted a 'policy statement, ordinance, regulation, or decision' or established or acquiesced in a custom that caused the unconstitutional activity." *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018 (1978). The allegations in the complaint are insufficient to state a cause of action against the City for a violation of §1983. Nor is there any evidence to support plaintiff's claim that P.O. Martinez violated any right afforded to plaintiff under §1983 as plaintiff was arrested based upon probable cause.

A civil assault is an intentional placing of another person in fear of imminent harmful or offensive contact; civil battery is an intentional wrongful physical contact with another person without consent. *See Charkhy v. Altman*, 252 A.D.2d 413, 414, 678 N.Y.S.2d 40 (1st Dept. 1998). Here, plaintiff was arrested based upon probable cause and he was lawfully handcuffed incident to that arrest. Though plaintiff contends that he was subjected to excessive force when he was handcuffed by P.O. Martinez, there is simply no evidence to support this claim. Notably, plaintiff offered no medical evidence to support his claim that he was injured as a result of his arrest and, by his own admission, plaintiff made no request to the NYPD for medical attention at any time.

As the Court has determined that plaintiff was arrested based upon probable cause, without the use of excessive force, his claims of intentional and negligent infliction of emotional distress also fail.

Based upon the foregoing, the defendants' motion to dismiss the complaint is **granted** and the complaint is hereby dismissed.

Dated: Bronx, New York
September 12, 2017



Hon. Julia I. Rodriguez, J.S.C.