

Lin v City of New York
2017 NY Slip Op 32219(U)
October 12, 2017
Supreme Court, Queens County
Docket Number: 701642/14
Judge: Howard G. Lane
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

BILL LIN, XIU JUAN LIN and YUAN Y.
ZHENG,
Plaintiffs,

Index No. 701642/14
Motion
Date July 24, 2017

-against-

THE CITY OF NEW YORK and POLICE
OFFICER WING HAR (SHIELD 8243),
Defendants.

Motion
Cal. No. 72
Motion
Seq. No. 1

Papers
Numbered

Notice of Motion.....	HC A
Cross Motion.....	EF 13
Memo of Law.....	EF 14
Aff. In Opposition.....	EF 15
Exhibits.....	EF 16-24
Aff. Of Service.....	EF 25
Aff. In Reply.....	EF 26
Exhibits.....	EF 27
Aff. Of Service.....	EF 28
Aff. In Opp. to Cross Motion and in Further Support of Motion.....	HC B

Upon the foregoing papers it is ordered that this motion by defendants, the City of New York (the "City") and Police Officer Wing Har for summary judgment pursuant to CPLR 3212 against plaintiffs and cross motion by plaintiffs Bill Lin, Xiu Juan Lin, and Yuan Y. Zheng for summary judgment on all their claims against defendants are hereby decided as follows:

This is an action to recover damages for alleged false arrest and imprisonment, violations of constitutional and civil rights, malicious prosecution, intentional and/or negligent infliction of emotional distress, and negligent hiring, training and supervision, arising out of the arrests of plaintiffs, Bill Lin, Xiu Juan Lin, and Yuan Y. Zheng on May 23, 2012 in front of

142-11 Holly Avenue, Queens, New York. Plaintiffs were arrested by defendant, Police Officer Wing Har for Kidnapping in the First Degree, and were incarcerated for 21 days before bail was set. All charges were dismissed as against all plaintiffs on December 12, 2012. The Notices of Claim were served by plaintiffs upon the City on February 22, 2013.

At the outset, the Court finds defendants' arguments that the state law claims are untimely brought to be unavailing as the state claims accrued on or about December 12, 2012, when plaintiffs' criminal charges were dismissed (*Llerando-Phipps v. City of New York*, 390 F Supp2d 372 [SDNY 2005]). As such, the Notices of Claim which were filed on February 22, 2013 were timely pursuant to General Municipal Law § 50-e (*Id*).

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

In order to maintain an action for malicious prosecution, a party must demonstrate: "(1) the commencement of a judicial proceeding against the [party claiming the malicious prosecution], (2) at the insistence of the [party who prosecuted the judicial proceeding], (3) without probable cause, (4) with

malice, (5) which action was terminated in favor of the [party claiming malicious prosecution,] and (6) to the [injured party's] injury" (*Furgang and Adwar, LLP v. Fiber-Shield Industries, Inc.*, 866 NYS2d 250 [2d Dept 2008]). "To show a termination in its favor, the [party claiming malicious prosecution] must prove that the court passed on the merits of the charge or claim against it under such circumstances as to show its innocence or nonliability, or show that the proceedings were terminated or abandoned at the instance of the [party who prosecuted the action] under circumstances which fairly imply the [party claiming malicious prosecution's] innocence". (*Id.*)

The elements of a false arrest and false imprisonment cause of action are: (1) the defendant intended to confine the plaintiff; (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 NY2d 451 (1975)).

Further, a governmental entity "cannot be liable for false arrest or malicious prosecution under 42 USC § 1983 unless an official government policy, custom or widespread practice caused the violation of the plaintiff's constitutional rights" (*De Lourdes Torres v. Jones, supra* at 762; see, *Combs v. City of New York*, 130 AD3d 862 [2015]; *Holland v. City of Poughkeepsie*, 90 AD3d 841 [2011]).

The existence of probable cause is a complete defense to a cause of action for false arrest and/or false imprisonment under both state and federal law (see, *Rodgers v. City of New York*, 106 AD3d 1068, 1069 [2d Dept 2013]; *Whyte v. City of Yonkers*, 36 AD3d 799 [2d Dept 2007]).

Whether probable cause existed is ordinarily a question of fact that cannot be decided as a matter of law unless there is no real dispute as to the facts and the appropriate inferences to be drawn therefrom (see, *Petrychenko v. Solovey*, 99 AD3d 777, 780 [2d Dept 2012]; *Holland v. City of Poughkeepsie*, 90 AD3d 841, 845 [2d Dept 2011]).

Where an arrest is made without a warrant, there is a presumption that the arrest was unlawful and defendants bear the burden of demonstrating that there was probable cause for the arrest (see, *Fakoya v. City of New York*, 115 AD3d 790, 791 [2d Dept 2014]; *Tsachalis v. City of Mt. Vernon*, 293 AD2d 525, 525-26 [2d Dept 2002]).

Information provided by an identified citizen accusing another individual of a specific crime is generally sufficient to

provide the police with probable cause to arrest (see, *Williams v. City of New York*, 114 AD3d 852, 853 [2d Dept 2014]; *Rivera v. County of Nassau*, 83 AD3d 1032, 1033 [2d Dept 2011]). However, the failure to make a further inquiry when a reasonable person would have done so may be evidence of a lack of probable cause (see, *Colon v. City of New York*, 60 NY2d 78, 82 [1983]).

In the instant case, there is no dispute that the plaintiffs were arrested without a warrant. Defendant, Police Officer Har Wing testified at his examination before trial inter alia, that: the complaining witness' daughter, Tian Ying Chen, walked into the precinct where he was working and stated that her mother was kidnapped by the plaintiffs and she provided the location of where her mother was allegedly being held as well as provided pictures on her cell phone showing inter alia, a semi-automatic gun and handcuffs in a dimly lit room; and that he went to said location and saw the complaining witness run out of the house hysterically crying. Police Officer Har Wing further testified that he arrested the instant plaintiffs after his sergeant spoke to the complaining witness and he was informed that the complaining witness was held against her will.

The record reflects that defendant, Police Officer Har Wing did not interview plaintiffs (who were ready, willing, and able) before processing them for any crime, nor did he make a copy of the photograph depicting the handcuffs and the gun.

Under the circumstances, there remain issues of fact as to inter alia, whether the defendants should have made further inquiry prior to arresting the plaintiffs and conducted a further investigation as to whether exculpatory evidence existed (see, *Sital v. City of New York*, 60 AD3d 465, 466 [1st Dept 2009]; cf. *Grimes v. City of New York*, 106 AD3d 441 [1st Dept 2013]; *Medina v. City of New York*, 102 AD3d 101, 105 [1st Dept 2012]).

As there remain issues of fact regarding whether there existed probable cause for plaintiffs' arrests, there shall be no summary judgment on plaintiffs' causes of action for false arrest, false imprisonment, and malicious prosecution (see, e.g., *Sital, supra*, at 466).

Defendants have established a prima facie case for an entitlement to dismissal of plaintiffs' causes of action alleging a deprivation of constitutional rights pursuant to 42 USC § 1983.

To recover on a § 1983 claim, a plaintiff is required to prove: (1) that defendant's conduct was under color of state law; (2) that this conduct deprived plaintiff of a right protected by

the Constitution of the United States or a federal statute; and (3) that defendant's conduct caused the injuries and damages claimed by plaintiff (see, NY Pattern Jury Instructions [2016] § 3:60)).

In the instant case, plaintiffs have raised a triable issue of fact as to whether there were three (3) wrongful arrests, which arrests deprived plaintiffs of a Constitutionally protected right.

Furthermore, defendants established a prima facie case that the plaintiffs' negligent hiring, training, and supervision claims must fail because it is alleged that City employee's negligent misconduct took place within the scope of his employment within the City. Where an employee "is acting within the scope of 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 Transit Auth.*, 241 AD2d 323 [1st Dept 1997]).

Plaintiffs raise a triable issue of fact regarding this cause of action in that plaintiffs have established a prima facie case that an improper police investigation occurred, which investigation included a failure to conduct a further investigation by inter alia, failing to interview the plaintiffs before arresting them.

Accordingly, summary judgment shall not be granted on the negligent hiring, retention, and training cause of action.

Finally, the Court notes that defendants have made a prima facie case pursuant to CPLR 3212 in support of dismissal of the negligent and/or intentional infliction of emotion distress claims, and said are unopposed by plaintiffs in their opposition and cross motion papers. As such, the claims for negligent and/or intentional infliction of emotional distress shall be dismissed.

This constitutes the decision and order of the Court.

Dated: October 12, 2017

.....
Howard G. Lane, J.S.C.