

Albaum v City of New York

2018 NY Slip Op 30555(U)

March 28, 2018

Supreme Court, New York County

Docket Number: 153641/12

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 52

JUDITH ALBAUM,

Index No.: 153641/12

Plaintiff,

- against -

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK
CITY POLICE DEPARTMENT, and
P.O. JOHN DOE 1-10,

Defendants.

TISCH, ALEXANDER M., J.:

In this action, plaintiff Judith Albaum sues the City of New York (City), the New York City Police Department (NYPD), and Police Officers John Doe 1-10 to recover damages for personal injuries allegedly sustained when, against her will, she was removed from her home by NYPD officers and transported to St. Luke’s Roosevelt Hospital (the hospital). The complaint alleges causes of action for false arrest and false imprisonment, malicious prosecution, assault and battery, negligence, and civil rights violations under 42 USC § 1983. Defendants City and NYPD move to dismiss the complaint in its entirety, pursuant to CPLR 3211 and CPLR 3212.

Background

Plaintiff, at times relevant to the complaint, resided at 424 West End Avenue, Apartment 21L, New York, New York. *See* 50-H Hearing Transcript (50-H Tr.), Ex. D to Mazzalunga Affirmation in Support of Motion (Mazzalunga Aff.), at 3, 7. On October 14, 2011, at approximately 6:00 p.m., New York City police officers arrived at plaintiff’s apartment and rang her doorbell. *Id.* at 8; Plaintiff Deposition (Pl. EBT), Ex. E to Mazzalunga Aff., at 9. Police Officer Alan Schlissel (Schlissel), who was deposed on behalf of defendants, testified that he and

his partner were sent to plaintiff's address to check on her after being informed by their precinct station house that a family member of plaintiff called the station house and said that plaintiff threatened to hurt and possibly kill herself. Schlissel Deposition (Def. EBT), Ex. F to Mazzalunga Aff., at 24, 25-26.

When the police rang plaintiff's doorbell, or knocked on the door, as Schlissel testified (Def. EBT at 34), plaintiff was, she testified, sitting at her desk in the living room finishing up work on her computers, and drinking a beer. Pl. EBT at 10, 11. She went to the door, asked who was there, and was told it was the police and asked to open the door. *Id.* at 11. She asked why and was told that they received a call from someone who was worried that she might hurt herself (*id.* at 12) and they needed her to open the door so they could speak to her and make sure she was okay. Def. EBT at 27, 28; Pl. EBT at 13. Plaintiff asked who had called, and when police told her the name of the caller, she identified the caller as her "estranged" daughter. 50-H Tr. at 11, 12; Pl. EBT at 12. She denied that she intended to hurt herself and told the police her daughter was a liar and her call was "ridiculous." Def. EBT at 36, 55; Pl. EBT at 12-13, 25. Plaintiff's daughter did not live with plaintiff; plaintiff believed that she lived in Seattle, and testified that, at the time of the incident at issue, she had last spoken to her daughter a number of weeks before. 50-H Tr. at 11.

Plaintiff asked the police officers if she was under arrest and if they had a search warrant (Pl. EBT at 12-13, 25), and they answered that she was not under arrest and they did not have a search warrant, but she needed to open the door so that they could see her. *Id.*; Def. EBT at 53. She would not open the door but continued to talk to the police through the closed door for between five and twenty minutes. Pl. EBT at 13-14; Def. EBT at 53. Schlissel testified that

when she again refused to open the door, he and his partner called for a patrol supervisor and Emergency Medical Services (EMS), and requested assistance from the Emergency Services Unit (ESU), a team of about five or six officers who arrived at plaintiff's apartment in riot gear, *i.e.*, with shields, helmets and heavy duty vests. *Id.* at 27, 33, 71, 95, 102. According to Schlissel, a deputy inspector also was called to plaintiff's apartment, and after he arrived, Schlissel was no longer in control of the scene. *Id.* at 65, 73.

Police officers subsequently asked plaintiff several times to open the door, and repeatedly told her if she refused to open the door that they would have to break it down, and when she continued to refuse, they did. Pl. EBT at 13-14. The ESU officers forced the door open and several police officers entered plaintiff's apartment, without her consent. Def. EBT at 73, 74. Schlissel did not see what went on in the apartment after police entered it, as he was about 30 feet down the hallway by then, but he testified that he heard yelling. *Id.* at 74, 75. Plaintiff testified that when police officers entered her apartment, no one approached her immediately and she moved to the kitchen area. Pl. EBT at 15-16, 17. She then moved near the front door, and, she testified, suddenly she was knocked to the ground, and a police officer, holding her down, roughly handcuffed her behind her back. *Id.* at 17; 50-H Tr. at 14, 15, 18, 22. She was put on a stretcher, on her back, still "rear-cuffed" (Def. EBT at 121-122), and was wheeled out of her apartment. Pl. EBT at 23-24. As she was being wheeled out, she screamed for someone to get her pocketbook and keys. *Id.*

EMS workers put plaintiff in an ambulance and, accompanied by Schlissel, transported her to the psychiatric unit at St. Luke's Roosevelt Hospital. *Id.* at 26-27; Def. EBT at 109, 122. Schlissel testified that plaintiff was taken to the hospital as an emotionally disturbed person

(EDP). *Id.* at 108-109. He made the determination that plaintiff was an EDP (*id.* at 44-45) because, he said, she was “speaking erratically, possibly a little incoherently,” and “very aggressively toward us, just a behavior that I feel a normal person wouldn’t exhibit.” *Id.* at 53-54. Schlissel testified that she was angry and cursing (*id.* at 54), and, at one point he thought she was threatening him when she said she had knives in her apartment, and he believed that a “normal behaving person would not threaten a police officer with a knife.” *Id.* at 55. Schlissel also testified that in the case of suicidal EDPs, NYPD procedures are to “isolate and contain” and call for help, if needed. Def. EBT at 42. He stated that third-party complaints about a possible suicidal EDP must be taken seriously (*id.* at 42-43), and he assumes such complaints are legitimate. *Id.* at 43. He testified that, although he can make a determination that an EDP is suicidal, usually he lets a medical professional make that decision and does not make that decision without conferring with a patrol supervisor and EMS personnel. *Id.* at 46-47.

When plaintiff was brought into the hospital, she was taken off the stretcher and put in a waiting room; her handcuffs were then removed, although, she testified, she had “begged” to have them taken off in the ambulance because they were cutting into her hands and wrists, and causing her pain. Pl. EBT at 27. Once the handcuffs were removed, she saw that her wrists had severe abrasions, her right wrist was bleeding, and her left arm was severely bruised. *Id.* at 29, 30; 50-H Tr. at 18.

After waiting for hours at the hospital, plaintiff spoke to a doctor, who told her that he was going to telephone her daughter, and she suggested he also call her ex-husband. Pl. EBT at 32-33, 34. The doctor eventually returned, and during a brief conversation, asked her some questions about her daughter and her drinking and whether she was seeing a therapist, to which

she responded she was (*id.* at 35-36); and he then told her she could leave. *Id.* at 36-37. She asked to have her wounds treated, and a nurse took her to the hospital's emergency room, but after being told she would have to wait another few hours, she decided to go home and return the next day. *Id.* at 37, 39; 50-H Tr. at 19-20. She went home to her apartment, but found that the lock on her door had been changed, and the doorman told her he could not let her in; more than an hour later, the building superintendent arrived with two police officers and she was escorted to her apartment and given a key. Pl. EBT at 39-40, 43-44; 50-H Tr. at 20.

Discussion

It is well settled that to prevail on a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment, the opposing party must "establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, "or where the issue is 'arguable.'" *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (citations omitted); *see Rotuba Extruders, Inc.*

v Ceppos, 46 NY2d 223, 231 (1978). Further, “[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations.” *Vega v Restani Corp.*, 18 NY3d 499, 505 (2012), citing *Sillman*, 3 NY2d at 404. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013), quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986); see *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002).

On a motion to dismiss addressed to the pleadings pursuant to CPLR 3211 (a) (7), it is also well settled that the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002). “[T]he court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint.” *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 (1st Dept 2002); see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Dismissal is appropriate, however, where a plaintiff cannot succeed upon “any reasonable view of the facts stated.” *People v New York City Tr. Auth.*, 59 NY2d 343, 348 (1983); *Cf. Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 318 (1995).

Defendants move for summary judgment dismissing plaintiff's claims for false arrest, false imprisonment, and malicious prosecution on the grounds that, as a matter of law, they had probable cause to detain plaintiff. Defendants move to dismiss the claims for assault, battery,

and/or excessive force on the basis that defendants were justified in their use of force and the force was reasonable under the circumstances. Defendants also move to dismiss the claims for negligent hiring and retention on the grounds that the police officers involved were undisputedly acting within the scope of their employment; and move to dismiss the claims for civil rights violations under 42 USC § 1983 on the grounds that plaintiff has not pled and cannot prove an official municipal custom or policy caused plaintiff to be deprived of a constitutional right. In support of their motion, defendants submit the deposition testimony of plaintiff and Schlissel, a transcript of the 50-H hearing, and a post-incident Aided Report filed by Schlissel (report); as well as the pleadings, plaintiff's Notice of Claim and the bill of particulars.

At the outset, plaintiff offers no opposition to, and does not otherwise address, the portions of defendants' motion seeking dismissal of the causes of action for negligence and for violations of 42 USC § 1983, and the motion as to those claims is granted. Defendants have, in any event, established their entitlement to dismissal of the claims brought under 42 USC § 1983, by demonstrating that plaintiff failed to allege that an official municipal policy or custom caused the police officers to violate her constitutional rights. *See Bouet v City of New York*, 125 AD3d 539, 540-541 (1st Dept 2015); *Grimes v City of New York*, 106 AD3d 441, 442 (1st Dept 2013); *Leftenant v City of New York*, 70 AD 3d 596, 597 (1st Dept 2010); *see also Monell v Department of Soc. Servs.*, 436 US 658, 691 (1978) ("a municipality cannot be held liable under § 1983 on a *respondeat superior* theory").

The court thus turns to the remaining causes of action, for false arrest and false imprisonment, malicious prosecution, and assault and battery and/or excessive force.

False Arrest/False Imprisonment

“Under the common law, a plaintiff may bring suit for false arrest and imprisonment against one who has unlawfully robbed the plaintiff of his or her ‘freedom from restraint of movement.’” *De Lourdes Torres v Jones*, 26 NY3d 742, 759 (2016) , quoting *Broughton v State of New York*, 37 NY2d 451, 456 (1975), *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 (1975) (other citation omitted).¹ To prevail on a cause of action for false arrest or imprisonment, “the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged.” *DeLourdes Torres*, 26 NY3d at 759 (citations omitted); *see Martinez v City of Schenectady*, 97 NY2d 78, 85 (2001); *Broughton*, 37 NY2d at 456-457.

“For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause.” *De Lourdes Torres*, 26 NY3d at 759 (citations omitted); *see Broughton*, 37 NY2d at 458; *see also Fortunato v City of New York*, 63 AD3d 880, 880 (2d Dept 2009). “Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty.” *Colon v City of New York*, 60 NY2d 78, 82 (1983); *see De Lourdes Torres*, 26 NY3d at 759. In determining whether a police officer had probable cause to make an arrest, the court “should consider ‘all of the facts and circumstances together.’” *Marrero v City*

¹False arrest and false imprisonment are “two names for the same tort.” *Holland v City of Poughkeepsie*, 90 AD3d 841, 844-845 (2d Dept 2011); *see Jackson v Police Dept. of New York*, 86 AD2d 860, 860-861 (2d Dept 1982) (“‘false arrest’ is merely another name for the tort of ‘false imprisonment’”); *see also Baisch v State of New York*, 76 Misc 2d 1006, 1009 (Ct Cl 1974) (“Other than the limited aspect of an arrest being the taking of a person into custody that he may be held to answer for a crime, the torts are, in substance, identical.”).

of *New York*, 33 AD3d 556, 557 (1st Dept 2006), quoting *People v Bigelow*, 66 NY2d 417, 423 (1985); see also *De Lourdes Torres*, 26 NY3d at 759 (“probable cause must be judged under the totality of the circumstances”).

If defendant proves its existence (see *Broughton*, 37 NY2d at 458), “probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment.” *Sinclair v City of New York*, 153 AD3d 877, 878 (2d Dept 2017) (citations omitted); see *Shaw v City of New York*, 139 AD3d 698, 699 (2d Dept 2016); *Paulos v City of New York*, 122 AD3d 815, 817 (2d Dept 2014). “In general, the existence or absence of probable cause is a question of fact and ‘becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn therefrom.’” *Holland*, 90 AD3d at 845, quoting *Fortunato*, 63 AD3d at 882; see *Parkin v Cornell Univ.*, 78 NY2d 523, 529 (1991); *Burgos-Lugo v City of New York*, 146 AD3d 660, 661 (1st Dept 2017); *Mendez v City of New York*, 137 AD3d 468, 470 (1st Dept 2016). Further, “the court on a summary judgment motion must indulge all available inferences of the absence of probable cause.” *De Lourdes Torres*, 26 NY3d at 763.

In this case, plaintiff was not arrested for any crime or violation of law, and, as defendants acknowledge, there was no basis to arrest her or to consider criminal charges against her, because she was doing nothing illegal. Def. EBT at 126, 127-128. Defendants also do not allege or argue that they were authorized to restrain and detain plaintiff under Mental Hygiene Law § 9.41, which permits police to take into custody any person who appears to be mentally ill and is behaving in a manner likely to cause harm to herself or others. Compare e.g. *Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 799 (2d Dept 2015) (defendant argued, unsuccessfully,

that even if no crime committed, it was authorized under Mental Hygiene Law to take plaintiff into custody as an emotionally disturbed person); *Wright v City of Buffalo*, 137 AD3d 1739, 1741 (4th Dept 2016) (issues of fact as to reasonableness of taking plaintiff into custody under Mental Hygiene Law for angrily resisting medical treatment); *see also Verponi v City of New York*, 31 Misc3d 1230(A), 930 NYS2d 177, 2011 NY Slip Op 50908(U) (Sup Ct, Kings County 2011) (plaintiff handcuffed and taken to hospital after she tried to prevent EMT from taking mother to hospital; court found, where no probable cause to arrest for crime or violation, test to be applied is “whether the officers had a reasonable objective basis to believe that Plaintiff was a danger to herself or others”). Rather, defendants argue, relying on Criminal Procedure Law § 140.10 (1),² they had reasonable cause to confine plaintiff as an emotionally disturbed person, based on the phone call made by plaintiff’s daughter informing police that her mother intended to hurt herself, and plaintiff’s refusal to open her door to allow police to see her, despite warnings that the door would be broken down if she did not comply with their request. *Mazzalonga Aff.*, ¶¶ 24-25, 29-30.

Schlissel testified that he suspected, when he and his partner first got the call to go to plaintiff’s apartment, that he would be encountering an EDP, and when he arrived at her apartment, he believed she was an EDP because he heard crying and screaming inside, and plaintiff sounded distressed. Def. EBT at 35-37. He also testified that he determined that plaintiff was an EDP because she was speaking “erratically, possibly a little incoherently” and

²Criminal Procedure Law § 140.10 (1) provides that a police officer may arrest a person for “[a]ny offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence” and for “[a] crime when he or she has reasonable cause to believe that such person has committed such crime.”

“very aggressively,” and was cursing and possibly threatening him, behaving in ways “a normal behaving person would not.” *Id.* at 53-55. He thought she might be intoxicated, but he did not indicate that in his report or other notes. *Id.* at 77. Schlissel further testified that plaintiff was detained against her will because she threatened suicide (*id.* at 129), and was handcuffed and removed from her apartment for “safety reasons,” so that she would not hurt herself or anyone else. *Id.* at 117. Schlissel also testified, however, that he did not see how plaintiff conducted herself with police officers in her apartment and saw or heard no conduct to lead him to believe that plaintiff was threatening her own safety. *Id.* at 119-120, 131-132. Although Schlissel and his partner had plaintiff’s daughter’s telephone number, they did not call her to verify her allegations or to otherwise inquire about the basis for her call; Schlissel does not remember having any contact with plaintiff’s daughter on the date of the incident, and while his report indicates that someone called the daughter at some time during the evening of the incident, he has no recollection of such a call. Def. EBT at 28, 30, 81-82, 83-84.

In contrast to Schlissel’s testimony that she was screaming and crying when he arrived at her apartment, plaintiff testified that she was sitting at her desk in the living room when police officers arrived, having a beer at the end of her work day. She told Schlissel that her daughter, who did not reside with her and, at the time, apparently had not spoken with plaintiff in weeks, was lying; and she denied her daughter’s allegations that she intended to hurt herself. 50-H Tr. at 11; Pl. EBT at 13-14; Def. EBT at 36. Plaintiff further testified that, after speaking with the police officers for about 20 minutes, she asked them if they could not tell that she was okay. Pl. EBT at 13-14. There is no testimony that she was crying or screaming during these conversations with Schlissel, and he testified that once the deputy inspector arrived at plaintiff’s

apartment, he moved away from the door, and did not see what happened after the ESU broke into her apartment. Def. EBT at 75. Plaintiff testified that when police entered her apartment, no one approached her or said anything to her at first, and then suddenly she was knocked down to the ground and handcuffed. Pl. EBT at 17, 18, 19-20. While she was on the ground, for about two minutes, and when she was handcuffed, she testified, she said nothing and no one said anything to her. *Id.* at 21, 22.

In view of plaintiff's testimony giving a different version of events leading up to her arrest, and absent any other testimony or evidence corroborating Schlissel's testimony about plaintiff's behavior, defendants have not eliminated triable issues of fact as to whether they had probable cause, or a reasonable basis, to arrest plaintiff. *See Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 718 (2d Dept 2003) (plaintiff testimony giving a different account of the occurrences preceding her arrest was sufficient to raise triable issues of fact whether defendants acted with probable cause). Also, although information provided to police by an identified citizen may support a finding of probable cause, "the failure to make further inquiry when a reasonable person would have done so may be evidence of lack of probable cause to arrest." *Carlton v Nassau County Police Dept.*, 306 AD2d 365, 366 (2d Dept 2003); *see Colon*, 60 NY2d at 82; *see also Gonzalez v City of New York*, 56 Misc 3d 1215(A), 65 NYS3d 491, 2017 NY Slip Op 51000(U) (Sup Ct, Bronx County 2017) ("Even when there exists sufficient facts giving rise to probable cause 'the failure to make further inquiry when a reasonable person would have done so may' negate the same and makes probable cause an issue of fact rather than one to be decided as a matter of law."). Here, there is an issue of fact as to whether defendants' reliance on the statement of plaintiff's daughter was justified or whether a reasonable person would have made

further inquiry. *See Fortunato*, 153 AD3d at 878-879; *Fausto v City of New York*, 17 AD3d 520, 522 (2d Dept 2005); *Carlton*, 306 AD2d at 366; *Canteen v City of White Plains*, 165 AD2d 856, 857 (2d Dept 1990). Defendants, in addition, do not demonstrate, or argue, that, under the Mental Hygiene Law, it was reasonable to believe that plaintiff had a mental illness and was conducting herself in a manner likely to result in harm to herself or others.

Malicious Prosecution

“The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation. . . . Thus, it has been held that some sort of prior judicial proceeding is the *sine qua non* of a cause of action in malicious prosecution.” *Broughton*, 37 NY2d at 457. “The elements of the tort of 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.*; *see De Lourdes Torres*, 26 NY3d at 760; *Shaw*, 139 AD3d at 698-699. “Failure to establish any one of these elements defeats the entire claim.” *Cardoza v City of New York*, 139 AD3d 151, 162 (1st Dept 2016), quoting *Brown v Sears Robuck & Co.*, 297 AD2d 205, 208 (1st Dept 2002). As it is undisputed here that plaintiff was not arrested and no criminal proceeding was commenced, the malicious prosecution claim cannot stand and is dismissed. *See Orlando v County of Suffolk*, 2015 NY Misc LEXIS 1838, *7, 2015 NY Slip Op 30858(U) (Sup Ct, Suffolk County 2015).

Assault and Battery

Plaintiff’s assault and battery cause of action arises from the NYPD officers’ contact with plaintiff during the alleged unlawful arrest and imprisonment, when they restrained and

handcuffed plaintiff and transported her involuntarily to the hospital. “Since ‘an assault and battery cause of action may be based on contact during an unlawful arrest, the questions of fact regarding whether the plaintiff’s arrest was supported by probable cause also preclude summary judgment on the cause[s] of action for assault and battery.’” *Smolian*, 128 AD3d at 800, quoting *Wyllie*, 2 AD3d at 718-719.

Assault and battery “[c]laims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness.” *Combs v City of New York*, 130 AD3d 862, 864-865 (2d Dept 2015) (citations omitted); see *Holland*, 90 AD3d at 844; *Rivera v City of New York*, 40 AD3d 334, 341 (1st Dept 2007). “Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide.” *Holland*, 90 AD3d at 844; see *Combs*, 130 AD3d at 865; *Lepore v Town of Greenburgh*, 120 AD3d 1202, 1203 (2d Dept 2014).

Defendants argue that, based on plaintiff’s own testimony, there was no assault or battery or use of force that was not reasonable. See *Mazzalonga Aff.*, ¶¶ 46-47. Plaintiff testified, however, that, after the police entered her apartment, she was standing near the front door when she was suddenly thrown to the ground face down and roughly handcuffed while being held down. Pl. EBT at 17. She then was placed on a stretcher on her back, still rear-cuffed. Pl. EBT at 20, 22, 23. She also testified that when she was in the ambulance, she asked to have the handcuffs removed because they were cutting into her wrists, but they were not removed until after she was brought into the hospital and taken off the stretcher; and when they were removed, she had deep abrasions on her wrists and multiple bruises on her left arm.

Defendants offer no evidence to refute plaintiff's testimony, or otherwise to demonstrate that the amount of force used was reasonable under the circumstances. Schlissel testified that he did not enter plaintiff's apartment and did not see what happened in it (Def. EBT at 75); he did not handcuff plaintiff or see her being handcuffed, and does not know if she resisted or whether officers used force. *Id.* at 118, 119. He also testified that he traveled in the ambulance that transported plaintiff to the hospital and does not remember whether plaintiff was yelling in the ambulance about being in pain, but acknowledged it was possible. *Id.* at 78. Defendants thus have not eliminated triable issues of fact as to whether police used excessive force when taking plaintiff into custody and whether any such use of force was objectively reasonable under the circumstances. *See Wright*, 137 AD3d at 1741-1742; *Combs*, 130 AD3d at 865.

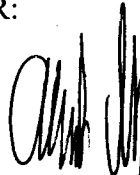
Accordingly, defendants' motion is granted in part and denied in part and it is

ORDERED that defendants' motion is granted to the extent that the claims for malicious prosecution, negligence and violations of 42 USC §1983 are dismissed; and it is further

ORDERED that the motion is otherwise denied and the remaining claims are severed and shall continue.

Dated: March 28, 2018

ENTER:



Alexander M. Tisch, J.S.C.

HON. ALEXANDER M. TISCH