| **Morales v City of New York** |
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| 2018 NY Slip Op 30753(U) |
| March 27, 2018 |
| Supreme Court, Bronx County |
| Docket Number: 301306/13 |
| Judge: Elizabeth A. Taylor |
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MAR 2 9 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2
JOSE MORALES,

Plaintiff,

- against -

THE CITY OF NEW YORK, and NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICER WILLIAM BUSCHAND, POLICE OFFICER JOHN DOE

Defendants.

Index No. 301306/13

**DECISION/ORDER**

**Present:**
**HON. ELIZABETH A. TAYLOR**

The following papers numbered 1 to ___ read on this motion, ____________

| No___On Calendar of ________ | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed | 1-2 |
| Answering Affidavit and Exhibits | 3-4 |
| Replying Affidavit and Exhibits | 5 |
| Affidavit | |
| Pleadings -- Exhibit | |
| Stipulation -- Referee's Report --Minutes | |
| Filed papers | |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

The motion to for an order dismissing the: 1) state and federal claims of false arrest and false imprisonment; 2) state and federal claims of malicious prosecution; 3) municipal liability claim, and; 4) negligent hiring and supervision claim, is granted as follows.

The branches of the motion pursuant to CPLR 3212, for an order granting summary judgment: 1) dismissing the false arrest and false imprisonment claims, and 2) granting summary judgment dismissing the malicious prosecution claim, are granted.

Plaintiff commenced this personal injury action to recover damages for injuries, allegedly sustained on May 3, 2012, when he was arrested, criminally charged, and the charges were later dismissed. On May 3, 2012, members of the New York City Police Department approached plaintiff while he was sitting on a park bench with a friend. Plaintiff and his friend were arrested, transported to the precinct, and then taken to central booking. Plaintiff was charged with Resisting Arrest, Disorderly Conduct, and Obstructing Governmental Administration. The charges against plaintiff were dismissed

on June 26, 2012. In the complaint, plaintiff alleges six cause of actions. Movants seek to dismiss the first, second, fourth and fifth cause of actions. Specifically, movants seek to dismiss the: 1) state and federal claims of false arrest and false imprisonment; 2) state and federal claims of malicious prosecution; 3) municipal liability claim; and 4) negligent hiring and supervision claim.

It is well settled that "whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful" (*Broughton v State*, 37 NY2d 451, 458 [1975] [citations omitted]). To validate the arrest and relieve the defendant of liability, the defendant has the burden of proving that probable cause existed at the time of arrest (*id.*). To establish "probable cause to arrest, proof beyond a reasonable doubt is not required, but merely information sufficient to support a reasonable belief that an offense has been . . . committed" (*Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006] [citations omitted]). Further, in determining whether a police officer had probable cause to effect an arrest, the emphasis should not be narrowly focused, but rather, should consider "all of the facts and circumstances together" (*id.*).

In the instant matter, movants argue that probable cause existed for plaintiff's arrest, as plaintiff admitted that he was observed in possession of an open can of beer in violation of New York City Administrative Code § 10-125. New York City Administrative Code § 10-125, provides, in pertinent part, that "the consumption of alcohol on the streets" is an "offense punishable by imprisonment," and the "possession of an open container containing an alcoholic beverage [] create[s] a rebuttable presumption that a person intended to consume the contents" of the container. In support of the motion, movants submit, among other things: 1) plaintiff's deposition transcript; and 2) the deposition transcript of Police Officer William Busch. Plaintiff testified that after leaving work, he decided to catch up with a friend. Plaintiff avers that

he and his friend purchased 2 beers and sat on a park bench near the Andrew Jackson Houses, in the Bronx. He asserts that after he "cracked open" the two beers and placed them on the ground next to him, an officer approached and requested his identification. Plaintiff further testified that the officer later informed him that he was being placed under arrest. Officer Busch testified that he was near 765 Courtlandt Avenue, when he observed two males sitting on a park bench drinking beer. Officer Busch attests that he stopped the men and requested identification. Officer Busch testified that the individual's pedigree information was entered in the "mobile data terminal" and he determined that there were active arrest warrants for both men.

Based upon the foregoing, movants established that there was probable cause for plaintiff's arrest (*see* Penal Law 140.10; New York City Administrative Code § 10-125; *People v Mitchell*, 148 AD3d 730, 731 [2d Dept 2017], *lv denied*, 29 NY3d 1083 [2017] [Court held police had probable cause to arrest defendant for violating the local open-container law, although they may have initially only intended to issue a summons]; *People v McCorkle*, 111 AD3d 557, 558 [1st Dept 2013] [Court held there was probable cause to arrest the defendant who was observed in possession of an open container in violation of New York City Administrative Code § 10-125]). Therefore, movants have established entitlement to summary judgment dismissing plaintiff's claim for false arrest and false imprisonment.

As movants have met their initial burden establishing entitlement to summary judgment, the burden shifts to plaintiff to raise an issue of fact.

In opposition to the motion, plaintiff argues there was no probable cause as the basis of the arrest, was solely an open arrest warrant and that at the time of the arrest, there was no open arrest warrant for plaintiff. However, the "arresting officer's. . . subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause" (*People*, 111 AD3d at 558 [citations omitted]).

Plaintiff does not submit evidence raising an issue of fact as to whether he was observed to be in possession of an open container of beer in violation of New York City Administrative Code § 10-125. Further, the mere denial by plaintiff's attorney, that plaintiff did not possess open cans of beer, is insufficient to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As movants established that there was probable cause for plaintiff's arrest, plaintiff's claim for malicious prosecution must also fail (*see Shields v City of New York*, 141 AD3d 421, 422 [1st Dept 2016]; *Agront v City of New York,* 294 AD2d 189, 190 [1st Dept 2002])

The branch of the motion pursuant to CPLR 3212, for an order dismissing plaintiff's cause of action for negligent hiring and retention, on the ground that the officers were acting within the scope of their employment, is granted.

Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of *respondeat superior* and the plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention (*Ashley v City of New York*, 7 AD3d 742, 743 [2d Dept 2004]; *see Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]; *Weinberg v Guttman Breast and Diagnostic Inst.*, 254 AD2d 213, 213 [1st Dept 1998] [Court held that no claim may proceed against the employer for negligent hiring or retention of an employee acting within the scope of his or her employment]).

In the instant matter, movants admit that the police officers were acting within the scope of their employment. Therefore, movants established entitlement to dismissal of plaintiff's negligent hiring and retention claims.

In opposition, plaintiff failed to submit evidence to raise an issue of fact [*see Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012] [Court held plaintiff failed to raise an issue of fact as to the negligent hiring claim as plaintiffs' allegations were insufficient

to support a claim that the employee acted so recklessly or wantonly as to warrant an award of punitive damages]).

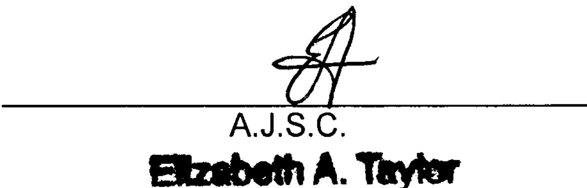
The branch of the motion pursuant to CPLR 3211 (a) (7) for an order dismissing plaintiff's municipal liability claim under 42 U.S.C § 1983, on the ground that plaintiff fails to state a cause of action, is granted.

In reviewing a motion to dismiss the municipal liability claim under CPLR 3211(a) (7), for failure to state a cause of action, the allegations of the complaint are deemed to be true (*see Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318).

In the instant matter, plaintiff failed to demonstrate or allege that the action taken by the police officers resulted from official municipal policy or custom (*see Monell v Dept. of Social Services of City of New York*, 436 US 658, 668 [1978]; *Delgado v City of New York*, 86 AD3d 502, 511 [1st Dept 2011]; *Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]). Therefore, plaintiff's complaint fails to state a cause of action for a civil rights violation pursuant to 42 U.S.C § 1983.

The foregoing shall constitute the decision and order of this court.

Dated: MAR 2 7 2018



A.J.S.C.

**Elizabeth A. Taylor**