

Toribio v City of New York

2018 NY Slip Op 32273(U)

September 13, 2018

Supreme Court, New York Court

Docket Number: 154744/2016

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 52

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REILY TORIBIO,

Plaintiff,

- against -

Index No. 154744/2016
DECISION & ORDER
(Motion Seq. 002)

THE CITY OF NEW YORK,
P.O. ORTIZ (tax identification number 952073),
P.O. SHAW, and POLICE OFFICERS JANE and
JOHN DOES 1-10,

Defendants.

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ALEXANDER M. TISCH, J.:

This is an action to recover damages for physical and emotional injuries allegedly sustained by plaintiff Reily Toribio, when he was arrested and issued a summons for disorderly conduct on August 27, 2015. Defendants City of New York, Police Officer Sicelin Ortiz s/h/a P.O. Ortiz, and Police Officer Daniel Shaw s/h/a P.O. Shaw (hereinafter, the “City”) move, pursuant CPLR 3212, for an order granting summary judgment in favor of the City dismissing all claims. For the reasons stated herein, the City’s motion is granted and denied in part.

**FACTUAL ALLEGATIONS, CLAIMS
AND PROCEDURAL HISTORY**

On September 4, 2015, plaintiff served a Notice of Claim upon the City as a result of his arrest, alleging claims of false arrest, the excessive use of force, false imprisonment, and malicious prosecution. On March 15, 2016, plaintiff appeared for a hearing pursuant to General Municipal Law § 50-h. Plaintiff commenced this action on June 6, 2016. The verified complaint alleges state law claims for the violation of the New York State Constitution, assault, battery, false arrest, false imprisonment, intentional infliction of emotional

distress, negligent retention of employment services, and negligence. The verified complaint also purports to allege the following claims under federal law: detainment, due process violation, excessive force, equal protection, malicious prosecution, false arrest, summary punishment, retaliation, and failure to intervene. On June 28, 2016, the City joined issue by service of a verified answer on behalf of all the defendants, denying the material allegations of the verified complaint. The plaintiff and both Officers Ortiz and Shaw were deposed on February 17, 2017.

According to plaintiff's testimony, on August 27, 2015, plaintiff was driving in his mother's white Mercedes SUV on the way to one of his mother's restaurants, where plaintiff works (Toribio EBT Tr. at 10-13). His close friend, Ambioris Tejada, was seated in the passenger seat (*id.* at 15). As he was driving past the 34th precinct on Broadway, plaintiff claims that Officer Ortiz, then in uniform, was backing up (possibly parking) his personal car, a black Audi, when he got too close to the plaintiff's mother's car. Plaintiff testified that he gently used his horn at him once. Officer Ortiz then proceeded to get out of his car, and yelled at the plaintiff, saying something like "do you know who I am?" (Toribio 50-h Tr. at 22-23; Toribio EBT Tr. at 13-14). Plaintiff claims that he lowered his window and said something to the officer like "you're causing traffic," but did not argue with him because he was in uniform and continued to drive towards Broadway once the light turned green (Toribio 50-h Tr. at 23; Toribio EBT Tr. at 14-15).

Officer Ortiz also testified at his examination before trial that he and plaintiff had a traffic interaction shortly before his arrest. Officer Ortiz testified that, as he was parking his black Audi in front of the 34th precinct prior to the start of his tour of duty, he saw a white vehicle with window tints, and then the plaintiff rolled down his window and said "What the f—k are you

doing?” and then plaintiff’s car proceeded to go to the red light (Ortiz EBT Tr. at 6-9). Less than a minute later, Officer Ortiz got into a marked police car that his partner, Office Shaw, was sitting in waiting for the start of their tour (*id.* at 10-11). The officers proceeded towards plaintiff’s vehicle and “pulled him over for dark window tints,” which Officer Ortiz described as “[t]ints where you cannot see the driver inside the vehicle” (*id.* at 10-11).

Regarding the arrest, plaintiff testified that he heard sirens behind him and after parking his car, two officers got out of their police car, one of whom was Officer Ortiz who plaintiff remembered from the earlier incident (Toribio 50-h Tr. at 18; Toribio EBT Tr. at 15-16). Plaintiff testified that Officer Ortiz asked for his license and registration and that he was told that he was being pulled over for “tints” (*id.*; Toribio EBT Tr. at 17). Plaintiff denied that there were illegal tints on his mother’s car, and that it had only the window tints it came out of the factory with (*id.* at 18-19; Toribio EBT Tr. at 23). Plaintiff testified that he responded by asking to be shown “the meter that I know officers are supposed to put to see the percentage of the tints, if they’re legal or illegal” (*id.* at 19). Plaintiff testified that he had been pulled over before for illegal tints, and that the officer did a reading to prove that the tints were illegal before asking for plaintiff’s identification (Toribio EBT Tr. at 17-19). He further claimed that the officers did not have a meter and did not measure the tints in any way (*id.*).

Officer Ortiz allegedly got angry in response to plaintiff’s request; plaintiff described the officer’s demeanor as “stuttering and getting a little aggravated” (Toribio 50-h Tr. at 19-20). Plaintiff admits that Officer Ortiz kept asking for plaintiff’s license, and claims that he was about to hand it over and stated “I am going to hand it over to you,” and “Don’t be such a tough guy,” when Officer Ortiz reached inside the vehicle and unbuckled plaintiff’s seat belt and pulled him out of the vehicle (Toribio 50-h Tr. at 20; Toribio EBT Tr. at 20-21, 24). Plaintiff further claims

that he never refused to hand over the license and registration, but was hesitating, because the officer did not measure the tint of the vehicle's windows (Toribio 50-h Tr. at 21). Plaintiff was allegedly thrown to the ground, and handcuffed (Toribio 50-h Tr. at 25-26). Although plaintiff did not seek medical attention afterwards, he claims that he suffered bruises, chest pain and cuts on his forearms (Toribio 50-h Tr. at 27-28; Toribio EBT Tr. at 32-33). Plaintiff recorded the incident with his cell phone (Toribio 50-h Tr. at 26; Burton affirmation, Exh. I). He was put into the police vehicle and driven to the 34th precinct (Toribio 50-h Tr. at 27). After being searched and held in a holding cell for about two hours, Officer Ortiz handed plaintiff a desk appearance ticket for disorderly conduct (Toribio 50-h Tr. at 30-33), a violation of Penal Law § 240.20. A couple of weeks later, plaintiff received a letter in the mail advising that the charges were being dismissed (Toribio 50-h Tr. at 34; Toribio EBT Tr. at 37). According to the Certificate of Disposition, the charge was dismissed on October 13, 2015 for legal insufficiency (Burton affirmation, Exh. I).

Officer Ortiz also testified about the arrest. He claims that plaintiff was asked to hand over his license, registration and insurance card multiple times and he refused (Ortiz EBT Tr. at 12). When plaintiff asked why was had been pulled over, Officer Ortiz claims he told him "when I get your credentials, I will explain it to you" (*id.*). When plaintiff still refused, Officer Ortiz told plaintiff he pulled him over for window tints (*id.*). Plaintiff was warned that if he continued to refuse, he would take plaintiff out of the vehicle, which he then did, and plaintiff was taken back to the 34th precinct (*id.*). Plaintiff was not give a summons for window tints, but was given a ticket for disorderly conduct, because he refused to comply with a lawful order from an officer (*id.* at 13). Both Officer Ortiz and Shaw testified that they never checked the tints on plaintiff's vehicle with a meter reader (Ortiz EBT Tr. at 14; Shaw EBT Tr. at 8).

According to the cell phone video of the arrest, plaintiff was asked numerous times, mostly by Officer Ortiz, and at least once by Officer Shaw, to turn over his license, registration and insurance card (Burton affirmation, Exh. H). The video corroborates plaintiff's testimony that Officer Ortiz was very agitated. The video also evidences that, in response to the officers' request for plaintiff identification, plaintiff kept insisting that he would give it to them, but was calmly protesting that he did not do anything wrong and was forcibly pulled out of the car after insisting that the officers use a tint meter to prove the window tints on his car were illegal.

DISCUSSION

The City moves for summary judgment, contending that plaintiff's state and federal causes of action for false arrest and false imprisonment should be dismissed as a matter of law, because there was probable cause to stop plaintiff's vehicle and arrest him. The City contends that the malicious prosecution claim should be dismissed on this basis, as well as the fact that plaintiff cannot show that there was a favorable termination of the disorderly conduct charge. The cause of action for retaliation is allegedly insufficient, because plaintiff cannot establish that he was issued the desk appearance ticket in response to his use of protected speech. Plaintiff's cause of action for failure to intervene should be dismissed, because neither office observed conduct that was obviously unconstitutional. The excessive force and assault and battery claims are allegedly deficient, because the officers' use of force was reasonable in the circumstances and plaintiff has no medical proof of lasting injuries. Finally, the City argues that the causes of action for equal protection and due process violation should be dismissed, because plaintiff was not in a protected class and there was no deprivation of due process.

In response, plaintiff only opposes the dismissal of his claims for false arrest and imprisonment, malicious prosecution, and the use of excessive force, and thus all other claims

are dismissed. Plaintiff argues that this case is about the abuse of police power and that summary judgment is inappropriate, because there are drastically different and opposing versions of the truth. Plaintiff asks the court to consider: (1) the earlier encounter between plaintiff and Officer Ortiz, which admittedly occurred just minutes before the vehicle stop and plaintiff's arrest, and which is completely ignored in the moving papers; and (2) the fact that the windows of plaintiff's car were not illegally tinted. These facts, according to plaintiff, demonstrate that a triable issue of fact exists as to whether Officer Ortiz chased after plaintiff's vehicle just to harass and bully him.

In order to establish a claim for false arrest and/or imprisonment, plaintiff must prove the following four elements: "(1) the defendant intended to confine him; (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, 456 [1975]). The existence of probable cause to arrest can constitute a complete defense to the plaintiff's claims of false arrest and unlawful imprisonment (*Broughton*, 37 NY 2d at 458; *Marrero v City of New York*, 33 AD3d 556, 551 [1st Dept 2006]), notwithstanding the subsequent dismissal of the disorderly conduct charge (*Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]; *Arzeno v Mack*, 39 AD3d 341, 341-342 [1st Dept 2007]).

The City has the burden to show probable cause for plaintiff's arrest (*Broughton v State of New York*, 37 NY2d at 458). "[P]robable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed" (*People v Bigelow*, 66 NY2d 417, 423 [1985]; see also *De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]; *Jenkins v City of New York*, 2 AD3d 291, 292 [1st Dept 2003]; *Agront v City of New York*, 294 AD2d 189, 190 [1st

Dept 2002]). Probable cause "exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it" (*Coleman v City of New York*, 182 AD2d 200, 203 [1st Dept 1992]; see also Criminal Procedure Law § 70.10 [2]). Where there is conflicting evidence concerning the existence of probable cause, from which reasonable persons might draw different inferences, summary judgment must be denied as the question is one for a jury to resolve (*Mendez v City of New York*, 137 AD3d 468, 470 [1st Dept 2016]).

Plaintiff's vehicle was stopped, allegedly for a violation of Vehicle and Traffic Law § 375 (12) (b) with respect to window tints. The law does not allow a windshield or front side windows that allow less than 70% of light through them (*id.*). However, plaintiff was given a desk appearance ticket for violating Penal Law § 240.20, which provides, in pertinent part, that:

"A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose."

The City argues that it was plaintiff's conduct that prevented the officers from checking the tints on the car, and that his refusal to give the officers his license, registration and insurance information and get out of the car justified his arrest and detainment for disorderly conduct.

Plaintiff contends that the issue of probable cause is a sharply disputed issue of fact, especially since the City makes no attempt to explain how the plaintiff's refusal to comply with the officers' requests for identification, had anything to do with a charge of disorderly conduct.

Summary judgment dismissing the sixth cause of action for false arrest and imprisonment is denied as there are issues of fact regarding whether there was probable cause for the vehicle stop in the first place, considering the traffic incident between the plaintiff and Officer Ortiz that admittedly happened minutes before the vehicle stop, and the cell phone video that shows that Officer Ortiz appeared unusually agitated for a routine traffic stop. There is a further question of fact as to whether it is customary, as plaintiff testified, for a police officer to prove that a car window is illegally tinted with a tint meter before issuing a summons for that offense.¹ In the moving papers, the City admits that police officers use an instrument known as a tint meter to check whether a particular window is tinted too dark (*see* Burton affirmation, ¶ 37). Whether Officers Ortiz and Shaw even had such a meter with them is in dispute.

There is also an issue of fact as to whether there was probable cause for plaintiff's arrest for disorderly conduct, which requires conduct intended to annoy, harass or alarm (*see* Penal Law § 240.20 [3]; *People v Baker*, 20 NY3d 354, 357 [2013]). Plaintiff disputes the claim that he refused to comply with the officers' requests for identification and was merely insisting that they justify the tinted window violation before handing over his identification, which he claims that he had in his hand just prior to being pulled out of the car. The City argues that when a driver refuses to provide identification, making it impossible for an officer to issue a summons, an arrest followed by transport to a precinct is warranted, citing *People v Ellis* (62 NY2d 393 [1984]), and *People v Copeland* (39 NY2d 986 [1976]). However, in both of these cases the

¹ Effective January 1, 2017, examination of tinted or shaded windows is required during motor vehicle inspections.

defendants admitted to the police officers that they did not have any identification on their person, and there were other factors, such as the presence of drugs and weapons that justified the defendants' arrest and detainment.

The essence of a cause of action for malicious prosecution is the perversion of proper legal procedures (*Broughton v State of New York*, 37 NY2d at 457). A malicious prosecution claim may be maintained where it is alleged that a legal proceeding was maliciously initiated “without probable cause for doing so which finally ends in failure” (*Curiano v Suozzi*, 63 NY2d 113, 118 [1984]). The elements of the cause of action for malicious prosecution stemming from a prior criminal proceeding, all of which are required for recovery, are (1) the commencement or continuation of a prior criminal proceeding by the defendant; (2) the termination of the prior proceeding in favor of the plaintiff; (3) the absence of probable cause for the initiation of the prior criminal proceeding; and (4) actual malice (*Cantalino v Danner*, 96 NY2d 391, 394 [2001]; *Honzawa v Honzawa*, 268 AD2d 327, 329 [1st Dept 2000]).

The City argues that if there is probable cause to arrest someone, it follows that an ensuing prosecution is also supported by probable cause, citing *Feinberg v Saks & Co.* (83 AD2d 952 [2d Dept 1981], *mod on other grounds*, 56 NY2d 206 [1982]). As stated above, there is a question of fact regarding whether there was probable cause for both the vehicle stop and plaintiff's arrest for disorderly conduct. However, “[a] criminal proceeding terminates favorably to the accused, for purposes of a malicious prosecution claim, when the final disposition of the proceeding involves the merits and indicates the accused's innocence” (*MacFawn v Kresler*, 88 NY2d 859, 860 [1996]). Since plaintiff's criminal case was dismissed on the grounds of legal insufficiency, both the Court of Appeals and the Appellate Division have ruled that this is not considered a final favorable disposition (*MacFawn*, 88 NY2d at 860; *Slatkin v Lancer Litho*

Packaging Corp., 33 AD3d 421, 422 [1st Dept 2006]; *De Cicco v Madison County*, 300 AD2d 706, 707 [3d Dept 2002]). *Smith-Hunter v Harvey* (95 NY2d 191 [2000]), upon which plaintiff relies, involved a dismissal of criminal charges on speedy trial grounds. Accordingly, the malicious prosecution claim is dismissed.

Police officers are entitled as a matter of law to use a degree of force, including utilizing handcuffs, to effectuate an arrest (*see* Penal Law § 35.30; *see also* *Graham v Connor*, 490 US 386, 396 [1989]). In order to determine whether a police officer used excessive force, the claim must be “analyzed under the Fourth Amendment and its standard of objective reasonableness” (*Ostrander v State of New York*, 289 AD2d 463, 464 [2d Dept 2001]). The reasonableness of an officer's use of force must be “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” (*Graham v Connor*, 490 US 386, 396 [1989]; *see also* *Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007]). “The determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest” (*Koeiman*, 36 AD3d at 453, citing *Vizzari v Hernandez*, 1 AD3d 431, 432 [2d Dept 2003]).

Viewing the evidence in plaintiff's favor, as the court must do in deciding a summary judgment motion (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]), there is a question of fact as to whether undue force was used to arrest the plaintiff and whether the officers were even engaged in the discharge of an official duty or just harassing the plaintiff. The cell phone video of the plaintiff's arrest depicts Officer Ortiz forcibly removing plaintiff from his car and throwing him to the ground after plaintiff had the temerity to argue with the officer about the legality of the traffic stop for illegal window tints just minutes after their traffic altercation. The

evidence before the court raises a triable issue of fact whether Officer Ortiz's conduct was objectively reasonable, given the minor traffic violation plaintiff's vehicle was initially stopped for and because there is no evidence or suggestion that plaintiff threatened the safety of either officer. Accordingly, summary dismissal of the fourth cause of action is not warranted.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted with respect to all causes of action, except for the sixth cause of action (false arrest and false imprisonment) and the fourth cause of action (assault and battery).

Dated: September 13, 2018

ENTER:



J.S.C.

HON. ALEXANDER M. TISCH