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

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JAMES STEELE,

Plaintiff,

- against -

CITY OF NEW YORK, NEW YORK POLICE DEPARTMENT, DETECTIVE KEITH CARPENTER – Badge No. 5123, POLICE OFFICER "JOHN DOE 1", POLICE OFFICER "JOHN DOE 2" and POLICE OFFICER "JOHN DOE 3", first and last names "JOHN DOE" being Fictitious and unknown at the present time,

Defendants.

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Index No. 161463/2014
DECISION & ORDER
(Motion Seq. 002)

ALEXANDER M. TISCH, J.:

Defendants City of New York, New York City Police Department and Detective Keith Carpenter—Badge No. 5123 (hereinafter, the "City") moves, pursuant to CPLR 3211, for an order dismissing the complaint, and/or, in the alternative, pursuant to 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 in its entirety.

FACTUAL ALLEGATIONS, CLAIMS AND PROCEDURAL HISTORY

On or about October 10, 2013, plaintiff served a Notice of Claim upon the City as a result of his arrest on August 21, 2013, by which he gave notice of the following claims: (i) false arrest and imprisonment; (ii) illegal search and seizure; (iii) negligent hiring and retention; (iv) negligent supervision of officers; (v) violation of plaintiff's civil rights and liberties set forth in the federal and state constitutions; and (vi) negligent, careless and reckless performance of police, enforcement, prosecutorial and investigation duties.

Plaintiff commenced this action on November 18, 2014. The complaint alleges all of the foregoing claims as causes of action and additionally alleges state law causes of action for malicious prosecution and federal causes of action for violation of plaintiff's civil rights under 42 USC § 1983, and the Fourth, Fifth, Eighth and Fourteenth Amendments.

According to the Arrest Report, on August 21, 2013, at approximately 1:50 p.m., plaintiff was arrested by members of the New York City Police Department (hereinafter "NYPD") inside of 2105 Third Avenue, New York, New York as a result of a "buy and bust" operation (Casparie affirmation, Exh. J). Plaintiff was charged with violating Penal Law § 220.39 (1), the criminal sale of a controlled substance in the third degree (*id.*). According to the same report, the crime occurred at a nearby location, inside a New York City Housing Authority building located at 2070 Third Avenue, New York, New York (*id.*). An undercover police officer approached plaintiff, whom he described as "JD Bags" because he was carrying a large duffel bag, on the corner of East 116th Street and Lexington Avenue and asked him if he knew where the officer could get some PCP (*id.*). Plaintiff led the officer to the front of 2070 Third Avenue where plaintiff approached JD Texas[1] who was sitting on a nearby bench. After a brief exchange, the three men entered 2070 Third Avenue, where the officer purchased two Ziploc bags of alleged PCP for $20. The officer then left the scene while informing his field team of what had transpired.

Both the undercover officer, identified as Detective Andrew Ramsaran, and the arresting officer, Detective Keith Carpenter, were deposed. Detective Carpenter had no independent recollection of plaintiff's arrest, and merely referred to his memo book and the Arrest Report. Detective Ramsaran testified that plaintiff had "a bunch of bags on him," "either some sort of

[1] The other individual was described as wearing a tee-shirt with the word "Texas" written in front.

combination of - - like plastic and duffle -," "a lot of stuff on him" (Ramsaran Tr. at 31-32). After the buy at 2070 Third Avenue, a public housing building, the detective left the building and gave a signal to his field team that a drug buy had been made, at which point his "ghost" officer would transmit descriptions of the individuals involved to the field team for apprehension (*id.* at 36, 44-46). Detective Ramsaran testified that that he put the two Ziploc bags into an undercover narcotics envelope and it was vouchered as evidence in his report (*id.* at 49). When questioned about the vouchering procedure, Detective Ramsaran testified that when two individuals are arrested together, the evidence is vouchered for both of them, but could not explain why the narcotics were not vouchered as arrest evidence against plaintiff other than it was a mistake (*id.* at 53 – 55). Detective Ramsaran also testified that he conducted a post arrest identification to confirm that the persons in the custody of the field team where the individuals that were part of this drug transaction (*id.* at 47-48).

At his 50-H hearing, plaintiff testified that he had traveled into the City that day to sell clothes he had in a bag (Steele 50-H Tr. at 10, 13). He was on 115th Street and Third Avenue inside a bodega buying some water, when he was approached by two plain clothes officers who asked him to step outside (*id.* at 10-11). After stepping outside, the officers asked plaintiff if he had information about a robbery and whether he knew anything about drug sales (*id.*). Plaintiff responded that he knew nothing about a robbery or drugs (*id.* at 11-12). The officers then emptied plaintiff's front and back pockets and searched his bag (*id.* at 12). After finding nothing in their search, the officers handcuffed him and put him in the back of a van (*id*). Plaintiff testified that he was kept inside the van for about two hours before he and other arrestees were taken to the police station (*id.* at 12-13). Both at the time of his arrest and at the police station, the officers allegedly refused to tell plaintiff why he was being arrested (*id.* at 12-14).

At the 25th NYPD precinct, plaintiff testified at his 50-H hearing that he voluntarily cooperated in a strip search, "because I know I didn't have anything to hide" (Steel 50-H Tr. at 15). At his examination before trial, he testified that he was taken to a bathroom with his handcuffs on, "and they made me drop my pants and my clothes and stuff and strip-searched me, told me to squat and all of that" (Steele EBT Tr. at 14). He further testified that this search occurred in a bathroom and he was alone, except for one male police officer, and uncuffed at the time (*id.* at 37-38). It is undisputed that the police did not find any drugs on plaintiff's person or amongst his possessions. Plaintiff was held in a cell overnight and was taken to see the judge the next day (Steele 50-H Tr. at 15). At that point, he was charged with the sale of narcotics (*id.* at 15). However, the district attorney's office declined to prosecute the case, because no drugs were found on plaintiff or vouchered as evidence against him at the time of his arrest, and he was released. Plaintiff testified that he is not claiming any physical injury and that the officers never hurt him or put a hand on him (Steele EBT at 46-47).

DISCUSSION

In support of this motion to dismiss, the City argues that plaintiff's causes of action for false arrest and imprisonment and illegal search and seizure should be dismissed, because the officers had probable cause to arrest the plaintiff; that plaintiff's federal claims against the City of New York must also be dismissed, because the complaint fails to allege and prove a pattern or practice that violated plaintiff's Constitutional rights; and that plaintiff's federal claims against Detective Carpenter should be dismissed, because he is entitled to qualified immunity.

In opposition to the City's motion, plaintiff argues that the City is relying entirely on the EBT testimony of Detective Andrew Ramsaran and ignores entirely the testimony of the plaintiff, which creates triable issues of fact regarding the issue of probable cause. Plaintiff

maintains that questions of fact exist regarding probable cause to arrest; that the search and seizure of plaintiff was impermissible; that his civil rights claims against the City are properly pled, and that Detective Carpenter's actions were not subject to qualified immunity. Plaintiff does not, however, dispute that his cause of action for malicious prosecution must be dismissed, based on his failure to comply with General Municipal Law §§ 50-e and 50-i with respect to that claim. Plaintiff also does not dispute the City's arguments for dismissing his claims for negligent hiring and retention; all claims brought against John Doe defendants; and the claims that the City negligently, carelessly, and recklessly performed police enforcement, prosecutorial, and investigation duties. Therefore, all of these claims are dismissed.

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, 557 [lst Dept 2006]), notwithstanding the subsequent dismissal of the criminal charge against plaintiff by the District Attorney (*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], quoting Criminal Procedure Law § 70.10 [2]).

Plaintiff was arrested for violating Penal Law § 220.39 (1), which states: "[a] person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells a narcotic drug . . ." Based on the evidence before the court, the City has established a prima facie showing that Detective Carpenter and the NYPD had a reasonable belief that plaintiff committed the crime of criminal sale of a controlled substance in the third degree. That is, a person fitting the description of plaintiff brought Detective Ramsaran to another individual to obtain PCP and, after the sale, Detective Ramsaran signaled to his field team that a buy had been made and he conducted a post arrest identification to confirm that the persons in the custody of the field team were the individuals that were part of this drug transaction. That reasonable belief constituted probable cause for the officers to effectuate plaintiff's arrest. Plaintiff's testimony denying his involvement in any drug transaction, either now or at the time of the arrest, is insufficient to raise a triable issue of fact regarding whether Detective Carpenter had probable cause to arrest him.

Plaintiff unsuccessfully attempts to raise a triable issue of fact regarding the issue of probable cause by arguing that his testimony about particular details of his arrest is in conflict with that of the NYPD officers. First, he argues that while Detective Ramsaran testified that

plaintiff was arrested with JD Texas, plaintiff testified that he was by himself when he was arrested. However, plaintiff admitted that the police had arrested other people that day, and this minor discrepancy does not defeat the City's prima facie showing that Detective Carpenter had probable cause to arrest plaintiff. Second, plaintiff claims that Detective Ramsaran testified that JD Bags "had a lot of bags" "some sort of combination of – like plastic and duffle" (Ramsaran Tr. at 32), which is at odds with plaintiff's testimony that he had only one bag. However, what is key for purposes of a probable cause analysis is the fact that plaintiff admittedly was in possession of a bag large enough to contain clothing he claims he was in the City to sell at the time of his arrest, was arrested around the corner from the drug buy, and only after the Detective Ramsaran conducted a post arrest positive identification. In addition, the clothing that plaintiff was wearing on the day of his arrest is not in dispute. Third, plaintiff claims that the exact location of the arrest as described in the Arrest Report (a stairway inside 2105 Third Avenue) (*see* Arrest Report; Carpenter EBT Tr. at 25) is not consistent with the location as described by plaintiff (namely, outside a store at Third Avenue and 115th Street) (50-H Tr. at 10-11). However, 2105 Third Avenue is located on the corner of 115th Street, and whether the arrest happened inside or outside that location, does not defeat Detective Carepenter's probable cause to arrest plaintiff after Detective Ramsaran made a positive identification of plaintiff as JD Bags.

The fact that plaintiff was charged with the sale of drugs even though no drugs were found on his body, also does not defeat Detective Carpenter's probable cause to arrest plaintiff. Plaintiff relies on *Perciaccanto v City of New York* (47 Misc 3d 1216[A], 2015 NY Slip Op 50647[U] [Sup Ct, Bronx County 2015]), arguing that it is a nearly identical fact pattern. In that case, the court found that police officers did not have probable cause to arrest Perciaccanto and charge him with the criminal sale of marijuana. Although present during a drug transaction,

Perciaccanto did not actually engage in the sale of marijuana, no drugs were found on him other than Oxycodone pills, and the prerecorded buy money was recovered from the other individual. If Perciaccanto was acting as a lookout, he was not charged with that offense and Perciaccanto gave testimony disputing that the clothing he was wearing when arrested matched the clothing worn by the lookout the undercover officer alleged was involved in the drug transaction. The present case is distinguishable from *Perciaccanto*, because here, the police officers had a reasonable belief that plaintiff facilitated and orchestrated the sale of drugs by bringing Detective Ramsaran to an individual who sold him drugs.

Plaintiff has failed to raise an issue of fact defeating the City's defense of probable cause for his arrest, and his claims for false arrest and/or imprisonment are dismissed.

Plaintiff pleads a cause of action for illegal search and seizure. The principles governing strip searches and body cavity examinations are set forth in *People v Hall* (10 NY3d 303, *cert denied* 555 US 938 [2008]):

> "[A] strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner. To advance to . . . a visual cavity inspection, the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee [has] secreted evidence inside a body cavity and the [ensuing] visual inspection must be conducted reasonably"

(*id.* at 310–311; *see People v Mothersell*, 14 NY3d 358, 366–367 [2010]; *People v Clayton*, 57 AD3d 557, 558 [2d Dept 2008]). A visual cavity search must be conducted reasonably, and "the reasonableness of the manner in which the search is conducted should be evaluated by reference to where, how and by whom the inspection occurred (e.g., usually in a private location, by a person of the same gender and without causing the arrestee to suffer further undue humiliation)" (*People v Hall*, 10 NY3d at 311-312).

In this case, the plaintiff was apprehended after an undercover NYPD officer signaled to his field team that a drug sale had occurred and the undercover officer conducted a positive post-arrest identification. A reasonable police officer could assume that an individual being arrested for the sale of drugs could be carrying additional drugs or a weapon. In addition, there is no dispute that the visual cavity inspection was conducted in a reasonable manner, in a private location by a single male officer. At his 50-H hearing, plaintiff testified that he fully consented to a strip search, since he had nothing to hide (Steele 50-H Tr. at 15). While plaintiff subsequently testified at his EBT that the officers "made me drop my pants and my clothes and stuff and strip-searched me, told me to squat and all of that" (Steele EBT Tr. at 14), where self-serving statements are submitted by a plaintiff that clearly contradict prior sworn testimony, the latter statements can only be considered to have been tailored to avoid the consequences of the earlier testimony, and they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment (*see Fernandez v VLA Realty, LLC*, 45 AD3d 391 [1st Dept 2007]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

For these reasons, plaintiff's claim for illegal search and seizure is dismissed.

The City seeks dismissal of plaintiff's claims alleging the violation of his constitutional rights for both failure to state a claim pursuant to CPLR 3211 (a) (7), or alternatively, pursuant to CPLR 3212's summary judgment standard. The motion is granted insofar as plaintiff fails to plead the existence of a municipal custom and practice or failure to train by the City that caused plaintiff's alleged constitutional violations.

A person has a private right of action under 42 USC § 1983 against an individual who, acting under color of law, violates federal constitutional or statutory rights (*Morgan v City of New York*, 32 AD3d 912, 914–915 [2d Dept 2006] ["The complaint states a cause of action for

violation of the decedent's Fourth Amendment rights pursuant to 42 USC § 1983, alleging both an unreasonable seizure and confinement of the person in the absence of probable cause"]). "[W]here claims are asserted against individual municipal employees in their official capacities, there must be proof of a municipal custom or policy in order to permit recovery, since such claims [those against the individual defendant] are tantamount to claims against the municipality itself" (*Vargas v City of New York*, 105 AD3d 834, 837 [2d Dept 2013]). As established by *Monell v Department of Social Services of the City of New York* (436 US 658, 690 [1977]), a municipality bears liability under 42 USC § 1983 only where the action that "is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."

In addition, municipal liability under 42 USC § 1983 only lies if the municipal policy or custom actually caused the constitutional tort and not merely because the municipality employs a tortfeasor who perpetrated a constitutional tort (*Monell*, 436 US at 691). In other words, causation is an essential element to municipal liability and, thus, no municipal liability will lie under 42 USC § 1983 solely on a theory of respondeat superior (*id.*; *see also Jackson v Police Dept. of City of N.Y.*, 192 AD2d 641, 642 [2d Dept 1993]). Moreover, a cause of action under 42 USC § 1983 must be pleaded with specific allegations of fact; broad and conclusory statements, and the wholesale failure to allege facts of the offending conduct alleged, are insufficient to state a claim under section 1983 (*Pang Hung Leung v City of New York*, 216 AD2d 10, 11 [1st Dept 1995]; *see also Cozzani v County of Suffolk*, 84 AD3d 1147, 1147 [2d Dept 2011] ["Although the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly

unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced"]).

In this case, the complaint alleges in a wholly conclusory fashion that the violation of plaintiff's rights was caused by the implementation of a custom, policy and/or official act of the City and the NYPD (*see* Cmplt., ¶¶ 82 & 83). There are no allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced, and plaintiff's counsel fails to identify such factual allegations in opposition to this motion merely referring the court to the complaint as a whole (*see* Miraglia affirmation at 13). Given the complete absence of any factual allegations in the complaint regarding the alleged "custom, policy and/or official acts of the [City] and [NYPD]" (Cmplt., ¶¶ 82), which led to the plaintiff's arrest and detainment, the plaintiff's causes of action against the City and the NYPD pursuant to 42 USC § 1983 must be dismissed.

Plaintiff's federal claims against Detective Keith Carpenter are dismissed. As plaintiff acknowledges, a police officer is entitled to qualified immunity where "(1) his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was 'objectively reasonable' for him to believe that his actions were lawful at the time of the challenged act" (*Cerrone v Brown*, 246 F3d 194, 199 [2d Cir 2001] [internal citations omitted]). Moreover, an arresting officer's determination is objectively reasonable if there was "arguable probably cause" at the time of the arrest (*Jenkins v City of New York*, 478 F3d 76, 87 [2d Cir 2007]).

In this case, it cannot be said the Detective Carpenter lacked arguable probable cause to arrest plaintiff or that no other reasonable police officer would have made a similar choice. Plaintiff was arrested after orchestrating the sale of narcotics to an undercover officer, and was

arrested and detained around the corner from the drug buy after the undercover office made a positive post-arrest identification. Plaintiff has failed to raise a triable issue of fact regarding whether he fit the description of "JD Bags."

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to the defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 14, 2018

ENTER:

J.S.C.

HON. ALEXANDER M. TISCH