

Pervil v Port Auth. of N.Y. & N.J.
2018 NY Slip Op 33059(U)
November 21, 2018
Supreme Court, New York County
Docket Number: 160736/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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ERNEST PERVIL,

Index No. 160736/2013

Plaintiff

- against -

DECISION AND ORDER

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, PORT AUTHORITY OF NEW YORK AND
NEW JERSEY POLICE DEPARTMENT, and P.O.
RAFAEL ALVAREZ,

Defendants
-----X

LUCY BILLINGS, J.S.C.:

Plaintiff has sued defendants Port Authority of New York and New Jersey, Port Authority of New York and New Jersey Police Department, and Police Officer Rafael Alvarez. Defendants Port Authority of New York and New Jersey and Alvarez move "for an Order granting the Port Authority summary judgment pursuant to C.P.L.R. § 3212(e) dismissing plaintiff's Third, Fourth, Fifth, Sixth, and Seventh Causes of Action." Notice of Mot. for Partial Summ. J. at 1 (emphasis added). The Affirmation in Support of defendants' motion makes clear that "Port Authority" refers to Port Authority of New York and New Jersey only and not its Police Officer Alvarez when the Affirmation at the outset introduces defendants as the "Port Authority of New York and New Jersey ('Port Authority') and Police Officer Alvarez." Aff. in Supp. of Cheryl Alterman ¶ 1.

Plaintiff, however, voluntarily and without opposition discontinues all his causes of action against all defendants

except his sixth cause of action against Alvarez and limits ¶ 59 of that cause of action in his Amended Verified Complaint to ¶ 59(g): that Alvarez deprived plaintiff of his right to be free from the use of excessive force against him by police officers. Since plaintiff has discontinued all his claims against defendant Port Authority of New York and New Jersey, and defendants' motion seeks summary judgment in favor of only defendant Port Authority of New York and New Jersey, their motion is moot and, on that basis, denied. See PNY III, LLC v. Axis Design Group Intl., LLC, 148 A.D.3d 550, 550 (1st Dep't 2017); Astil v. Kumquat Props., LLC, 125 A.D.3d 522, 523 (1st Dep't 2015).

Even if defendants' motion might be construed as seeking summary judgment in favor of both defendants Port Authority of New York and New Jersey and Alvarez dismissing plaintiff's sixth cause of action against Alvarez for excessive force, that relief warrants denial in any event. According to defendants' own rendition of plaintiff's deposition testimony, Police Officer Alvarez approached plaintiff November 19, 2012, in the Port Authority Bus Terminal in New York County, and asked him to leave the terminal because he was soliciting customers. Plaintiff rode the escalator to the exit standing a few steps ahead of Police Officer Alvarez, who then jumped on plaintiff's back, knocked plaintiff down the escalator, picked him up, and slammed him against a wall. Plaintiff's complete testimony does not contradict defendants' rendition, but adds that, when Alvarez forced plaintiff to the ground, plaintiff complained to Alvarez

of pain in plaintiff's left arm and inability to lift his arm, at which point Alvarez started "to rip my shoulders off the hinges." Alterman Aff. Ex. E, at 100.

Upon defendants' motion for summary judgment, the court must view the facts most favorably to plaintiff. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). From that perspective, Alvarez jumping onto plaintiff from the rear, forcing him to the ground, and slamming him against a wall, when plaintiff was complying with Alvarez's request to leave the bus terminal, and then exacerbating plaintiff's pain when plaintiff complained of pain and lack of mobility in his arm were unnecessary to protect Alvarez or the public. Under the circumstances these actions by Alvarez, if true as recounted, were unreasonably forceful and hurtful. U.S. Const. amend. IV; Graham v. Connor, 490 U.S. 386, 396-97 (1989); Chavez v. City of New York, 99 A.D.3d 614, 615 (1st Dep't 2012); Delgado v. City of New York, 86 A.D.3d 502, 511 (1st Dep't 2011). See Los Angeles County, California v. Rettele, 550 U.S. 609, 614-15 (2007).

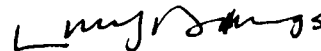
Alvarez's forceful and hurtful actions as described by plaintiff's testimony inflicted intentional, offensive, bodily contact on plaintiff without his consent, causing serious, harmful, physical injury, which is enough to sustain a claim for battery and excessive force. Cagliostro v. Madison Sq. Garden, Inc., 73 A.D.3d 534, 535 (1st Dep't 2010); Lepore v. Town of

Greenburgh, 120 A.D.3d 1202, 1203 (2d Dep't 2014). See Davidson v. City of New York, 155 A.D.3d 544, 544 (1st Dep't 2017).

Plaintiff does not complain merely that Alvarez jumped on his back or yanked his arm or shoulder, but that, in doing so, caused him excruciating pain and impaired the mobility and use of his arm. See Burgos-Lugo v. City of New York, 146 A.D.3d 660, 662 (1st Dep't 2017). Defendants provide no authority that plaintiff must present medical evidence of such an injury to sustain his claim.

Consequently, and based on the parties' stipulation dated October 18, 2018, the court denies defendants' motion for summary judgment dismissing plaintiff's claim against defendant Alvarez for his use of excessive force, but discontinues all other claims in his amended complaint. C.P.L.R. §§ 3212(b) and (e), 3217(b).

DATED: November 21, 2018



LUCY BILLINGS, J.S.C.

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