

Priebe v Colacino

2019 NY Slip Op 30000(U)

January 3, 2019

Supreme Court, Wayne County

Docket Number: 82743

Judge: John B. Nesbitt

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF WAYNE

JACK E. PRIEBE,

Plaintiff,

-vs-

Index No.: 82743

**VILLAGE OF NEWARK POLICE
 OFFICER MATTHEW COLACINO,
 INDIVIDUALLY, AND IN HIS CAPACITY
 AS A PATROLMAN/OFFICER OF THE
 VILLAGE OF NEWARK POLICE
 DEPARTMENT, AND NORWOOD HUGHES**

Defendants.

APPEARANCES: David Lee Foster, Esq.
Attorney for the Plaintiff

Goldberg Segalla LLP
 (Patrick B. Naylor, Esq., of counsel)
*Attorneys for Defendant Matthew Colacino,
 in his individual and municipal capacities*

MEMORANDUM - DECISION

John B. Nesbitt, J.

Defendant Matthew Colacino (“Officer Colacino”) moves pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff Jack E. Priebe’s (“Priebe”) complaint against Colacino in both his individual and municipal capacities. For the reasons that follow, the motion must be granted.

The complaint asserts against Officer Colacino claims of false arrest, malicious prosecution, and abuse of process, as well as intentional infliction of emotional distress. There is no dispute that Colacino arrested Priebe on July 4, 2017 upon the charge of Harassment in the Second Degree (NY Penal Law §240.26[2]). So far as relevant here, a person violates that section when he shoves or otherwise subjects another person to physical contact “with intent to harass, annoy or alarm” that person.

There is no dispute that Priebe shoved defendant Norwood Hughes (“Hughes”) in the presence of Officer Colacino. Priebe argues that he was acting in self-defense and not for the purpose

of harassing, annoying, or alarming Hughes, and that Officer Colacino knew, or should have known, that to be the case. Yet, Officer Colacino arrested and charged Priebe nonetheless. Priebe was eventually acquitted of the charge after trial before the Newark Village Court. This action ensued.

The four causes of action asserted in the complaint are fellow travelers in the sense that they are often joined in an action arising out of alleged police misconduct resulting in criminal prosecution. They do have distinct, albeit sometimes overlapping, elements. Under so much of the facts of this case as are undisputed, none of the causes of action can survive if Officer Colacino had probable cause to arrest Priebe. The issue is whether the Court can make that determination as a matter of law upon the present record without plenary trial.

A police officer, deputed with the power of arrest, as here, may effect an arrest upon “probable cause existing at the time of the arrest” without liability for consequent damages (*Broughton v State of NY*, 37 NY2d 451, 458 [1975])¹. As stated in 2A PJI3d 3:5 (2018):

[Defendant], as a police officer, had the right to arrest [Plaintiff] without a warrant if he had reasonable cause to believe that both a crime had been committed and [Plaintiff] had committed it. [Defendant] must prove that he had reasonable cause for believing that a crime had been committed and that [Plaintiff] was the person who committed it.

Reasonable cause for [Plaintiff’s] arrest existed if the facts and circumstances known to [Defendant], or the information that he had before making the arrest, were such as to lead a reasonably prudent person to believe that both a crime had been committed and [Plaintiff] was the person who had committed it. If the arrest of [Plaintiff] was made with reasonable cause it was lawful even though [Plaintiff] was not convicted of the crime for which he was arrested.

Officer Colacino testified at trial in the Newark Village Court that he was in the roadway with Hughes and Priebe when “they began to have a verbal argument,” and without seeing “Hughes make physical contact with Mr. Priebe” and “in my presence, Mr. Priebe pushed Mr. Hughes in the chest with both hands.” (Tr. 7). Officer Colacino further testified that he did not hear Hughes threaten Mr. Priebe with physical violence or force in any way”(id.)

¹With exception not applicable here, CPL §140.10 gives a police officer the power of arrest without judicial warrant when he has reasonable cause to believe a person has committed an offense.”

Clearly, based upon these facts alone, Officer Colacino would have had probable or reasonable cause to arrest Priebe for Harassment 2nd. But, according to Priebe, this does not tell the whole story. At the trial of the criminal matter, a neighbor of both Hughes and Priebe, Nancy Rohlin testified that she called the police because of the firework activity going on at the Hughes residence. She testified that Officer Colacino responded, and she started conversing with him about the matter while he was seated in the driver seat of his police vehicle, and she standing by the passenger door speaking through the open window. At that point she saw Priebe come from around the corner of his house and yell at the Norwood house to “knock it off there’s a police officer coming.” Hughes then came out of his house and went towards Priebe, vocalizing that he was “sick of this shit” and that he was “gonna knock somebody out.” Priebe responded with “bring it on,” saying it three times. Ending up in close proximity, Priebe and Hughes continued the argument, culminating with Priebe pushing Hughes. Officer Colacino got to the two at or near the time of the push. Ms. Rohlin did not see Hughes “raise a hand or do any threatening gesture towards Priebe.”

Priebe testified at trial that Hughes’ announced his appearance in a loud booming voice, saying “Is that Jack Priebe? I am getting sick of this shit, I’m about to knock somebody out.” Priebe walked into the road, apparently to meet the oncoming Hughes, responding at least twice, “go ahead.” Priebe testified that Hughes “kept coming at me and at the point of contact my arms were probably like this, when they contacted his chest that’s how close he came.”² Based upon the

² In his Gen. Mun. Law §50-h examination, at p. 25, Priebe testified:

“[Officer Colacino and I are] going back and forth about whether the fireworks are legal or not and in a loud booming voice I hear, “Is that Jack Priebe? I’m getting sick of - getting sick of his shit. I think I need to knock somebody out.”

As soon as I started hearing the voice I turned and observed Mr. –well, I didn’t know who it was for sure at the time, but a large black man in front of Mr. Hughes house near his front porch.

I turned and took two or three steps towards his house and I said at least twice, “Go ahead and do it. Knock me out.” I stopped by the edge of the road. I never left the roadway.

Mr. Hughes came from his yard, crossed the sidewalk, crossed the area between the sidewalk and the road and kept coming at me in the roadway and he got – I thought he was either going to chest bump me or sucker punch me.

When he got so close I just pushed him away like that and immediately –

testimony, Justice Miller faulted Hughes for making “that comment” and marching towards Priebe, and faulted Priebe for taking “matters into your own hands and to do so while the police are right there.” Ruling from the bench, Justice Miller viewed the matter of Priebe’s guilt “close,” but with enough doubt on the intent issue to find him not guilty.

As stated above, the Court views the issue dispositive of this motion to be whether Officer Colacino had probable or reasonable cause to arrest Priebe for the offense of Harassment 2nd. That requires a finding of “facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty” (*DeLourdes v Jones*, 26 NY3d 742, 759 [2016], quoting *Colon v City of New York*, 60 NY2d 78, 82 [1983]).³ In the present context, the rules pertaining to summary judgment generally apply with equal force:

Considering the aforementioned law in the context of a summary judgment motion, the defendant moving for summary judgment must establish a defense to the plaintiff’s malicious prosecution and false arrest claims as a matter of law by submitting sufficient evidence to eliminate any material issues of fact. On such a motion, the facts must be viewed in the light most favorable to the plaintiff, and every available inference must be drawn in the plaintiff’s favor. Once the movant’s prima facie showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff on issues of probable cause and malice, the court on a summary judgment motion must indulge all available inferences of the absence of probable cause and the existence of malice (*DeLourdes Torres, supra* at 762-763)(internal citations, quotation marks, and brackets omitted).

Accordingly, here, as in *DeLourdes Torres, supra*, the issue is whether the record, viewed in the light most favorable to Priebe, raises “triable questions of fact regarding whether [Officer Colacino]

immediately right on my left elbow almost with an arm’s reach the police officer says, “you’re under arrest ...”

³ ““Probable 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’ by the suspected individual, and probable cause must be judged under the totality of circumstances” (*DeLourdes, supra*, quoting *People v Bigelow*, 66 NY2d 417, 423 [1985]).

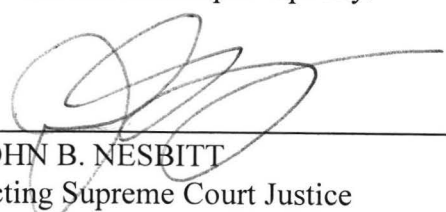
unlawfully arrested him [for Harassment 2nd] without probable cause, improperly commenced the prosecution against [him], and participated in the prosecution out of malice (*id.* at 763).

The unrefuted testimony of Officer Colacino at Priebe’s trial was that he (Colacino) did not recall Hughes “saying anything” as Hughes came out of his house. (Tr. at 12, 13-14). In his affidavit in support of this motion, Officer Colacino states that, “[a]s Mr. Hughes approached Mr. Priebe there was a verbal exchange and I observed Mr. Priebe push Mr. Hughes in the chest with his hands” (Colacino Aff. ¶3). Officer Colacino asked Hughes if he wished to press charges, and being told he did, Colacino prepared an information, which Hughes signed. Thus, Officer Colacino asserts, “[t]he decision to arrest Mr. Priebe on the harassment charge was solely as a result of the events that I observed on July 4, 2017 and Mr. Hughes decision to press the charge against Mr. Priebe” (*id.* at ¶5).

The Court would reject the argument that there is an issue of fact whether Officer Colacino heard a threat by Hughes towards Priebe, saw movements by Hughes indicating that he intended to carry out his threat, and maliciously ignored what was a reasonable attempt by Priebe to defend himself. Rather, the fact is that Hughes and Priebe had gotten into a heated argument and Priebe pushed Hughes, with criminal intent or not, but under circumstances clear enough to satisfy probable cause to believe Priebe committed the offense with which he was charged. So too, even assuming as a fact that Officer Colacino heard Hughes’ threat to “knock somebody [Priebe] out,” then one would have to also consider Priebe’s response challenging Hughes to “bring it on,” “go ahead,” and/or “go ahead, do it, knock me out.” “Combat by agreement, often referred to as ‘mutual combat,’ is an exception that operates as a statutory disqualification from the justification defense of self-defense” (*State v O’Bryan*, 123 A3d 398, 409 [Conn. 2015]). Here, as in *Matter of Kim H.* (112 AD2d 160, 161 [2nd Dept 1985]), a justification defense does not apply where “the physical force used ... was ‘the product of a combat by agreement not specifically authorized by law’ (Penal Law §35.15[1][c]).”

Accordingly, the instant motion is granted, and the complaint dismissed pursuant to CPLR 3212 as against defendant Colacino in his individual and municipal capacity.

Dated: January 3, 2019
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice