

Jolly v City of New York
2019 NY Slip Op 31029(U)
April 9, 2019
Supreme Court, New York County
Docket Number: 158460/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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WADE JOLLY,

Plaintiff,

- v -

CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY POLICE
DEPARTMENT, LIEUTENANT FNU WINDIN, POLICE OFFICER
FNU MEARS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24
were read on this motion to/for JUDGMENT - SUMMARY

DECISION AND ORDER

In an action to recover damages for false arrest and wrongful imprisonment, defendants Metropolitan Transit Authority, Metropolitan Transportation Authority Police Department, Lieutenant FNU Windin, and Police Officer FNU Mears (collectively, the "Authority"), move, pursuant to CPLR 3212 and 3211(a)(7), PAL 1212 and PAL 1276, dismissing the complaint of plaintiff Wade Jolly ("Plaintiff"), with prejudice. In particular, the Authority moves for dismissal of Plaintiff's claims for false arrest, false imprisonment, unlawful search and seizure, negligence, assault and battery, intentional infliction of emotional distress and negligence based on Plaintiff's failure to appear for a pre-suit examination in compliance with PAL 1212(5), Plaintiff's pleading guilty to the underlying criminal charge, and otherwise failing to state a cause of action against the Authority.¹

Plaintiff fails to oppose the motion.

¹ By Decision and Order, dated December 19, 2018, the Hon. Verna L. Saunders of this court granted the motion of defendant the City of New York to dismiss the complaint in its entirety.

BACKGROUND

On or about September 22, 2016, Plaintiff was arrested by officers of the Authority's police department near the 7th Avenue entrance of Penn Station for allegedly selling counterfeit tickets to an Adele concert. After Plaintiff was escorted to the District 4 station in Penn station, a routine search following his arrest revealed 8 counterfeit tickets for the Adele concert. After approximately four hours, Plaintiff was transferred for Central Book for arraignment.

Plaintiff counters that the Authority lacked probable cause to arrest him, that he was grabbed and thrown down the stairs and arrested by officers of the Authority, and that witnesses later showed photographs of the alleged thief to the officers and indicated to them that Plaintiff was not the individual in the photograph. Plaintiff also alleges he was denied medical attention during the course of his transport to the MTA precinct for processing. Plaintiff was charged with the crime of forgery, and ultimately pled guilty.

Upon receipt of Plaintiff's notice of his claim for, inter alia, false imprisonment and false arrest, the Authority's counsel sent to Plaintiff a Notice of Examination Pursuant to Claim Notice, on December 21, 2016. After that time, the public authorities law hearing, pursuant to PAL 1276, was scheduled for January 24, 2017. That hearing was later adjourned seven times due to Plaintiff's unavailability, first due to his incarceration, and ultimately due to his lack of contact with his own attorney, including a cancelation on July 12, 2017, which was noted on the record. The last time the PAL hearing was scheduled, the Authority's attorneys communicated with Plaintiff's counsel, who advised that she was unable to locate her client and would reschedule the PAL hearing once she was able to do so.

Rather than contact the Authority and reschedule a PAL hearing, on September 21, 2017, Plaintiff filed and served the complaint in this action. Issue was joined via service of an Answer

Authority on or about October 17, 2017, and by the City of New York on or about the same date. Later, on December 19, 2018, the court granted the City of New York's motion and dismissed the Complaint against the City in its entirety.

DISCUSSION

Now, the Authority moves, pursuant to CPLR 3212, for an order dismissing the Complaint in its entirety.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]).

Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure of the party opposing summary judgment to come forward with such evidentiary showing warrants the granting of summary judgment in favor of the moving party (*Alvarez v Prospect Hospital*, 68 NY2d 320, 327 [1986]).

Here, the record establishes that there are no triable issues of facts and that the Authority is entitled to summary judgment dismissing the Complaint in its entirety as a matter of law.

Compliance with Public Authorities Law § 1212(5) is a condition precedent to the commencement of an action against the Authority (*Vartanian v City of New York*, 48 AD3d 673,

674 [2d Dept 2008], citing *Lynch v. New York City Tr. Auth.*, 12 A.D.3d 644; *Knotts v. City of New York*, 6 A.D.3d 664, 665 [2d Dept 2004]). Here, it is undisputed that an oral examination pursuant to Public Authorities Law 1212(5) was adjourned seven times at Plaintiff's request, and there is no evidence that he rescheduled a new examination date prior to the commencement of this action (*id.* citing *Scalzo v. County of Suffolk*, 306 A.D.2d 397, 399 [2d Dept 2003]; *Matter of Pelekanos v. City of New York*, 264 A.D.2d 446, 447 [2d Dept 1999]). The Plaintiff's failure to remain in contact with his attorney and his inability to attend the examination due to his incarceration do not constitute sufficient reasons or exceptional circumstances that would excuse his failure to appear for the repeatedly-adjourned examination (*see Misk-Falkoff v Metropolitan Tr. Auth. [MTA]*, 44 AD3d 629 [2d Dept 2007]).

Even if the Plaintiff had complied with PAL 1212(5), the Authority nonetheless established its entitlement to dismissal of the Complaint on the alternative ground that Plaintiff's claims are precluded by his pleading guilty to the underlying criminal charges and otherwise fail to state a cause of action, as detailed in this court's prior decision on the City's motion to dismiss the Complaint (*see* Decision and Order, dated September 19, 2018, NYSCEF Doc. No. 17, pp.1-2). If the court were to analyze the substance of Plaintiff's claims, it would reach the same conclusion and dismiss Plaintiff's complaint in its entirety.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants Metropolitan Transit Authority, Metropolitan Transportation Authority Police Department, Lieutenant FNU Windin, and Police Officer FNU Mears motion for summary judgment is granted and the Complaint is dismissed in its entirety, without costs and disbursements; and it is further

ORDERED that the clerk of the court enter judgment accordingly.

Any requested relief not otherwise discussed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

4/9/19

DATE

WFP

W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE