

Vizcaino v City of New York

2019 NY Slip Op 32667(U)

September 6, 2019

Supreme Court, New York County

Docket Number: 160989/2013

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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INDEX NO. 160989/2013

LUIS VIZCAINO

MOTION DATE 09/04/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the City of New York's (the "City") motion for summary judgment is granted.

This action arises out of alleged injuries sustained by plaintiff when he was arrested on July 17, 2011. Plaintiff alleges that he was falsely arrested/imprisoned and maliciously prosecuted¹. The City now moves for summary judgment on the grounds that plaintiff's arrest, detention and subsequent prosecution was supported by probable cause. Plaintiff opposes the instant motion on the issue of probable cause.

Facts

It is worth noting that the underlying conduct of the plaintiff that led to his arrest is mostly not in dispute. Sergeant Barber, testifying for the defendant, said he observed the plaintiff urinate against a tree, head to his car then begin to drive off, at which point Sergeant Barber stopped the plaintiff's vehicle. Both sides agree that plaintiff then took a portable

¹ The plaintiff brought federal causes of action in this case; however, in his response, he agrees that those causes of action should be dismissed.

breathalyzer at the scene, registered a .074, at which point, plaintiff was arrested and taken to the 28th Precinct for a breathalyzer test. Perhaps most importantly, Sergeant Barber testified he was permitted to make an arrest solely for the urination in public.

. The plaintiff fully acknowledges that on the day in question, he was at a barbershop where he consumed approximately three to four beers. He then urinated on a tree in public. After that, he was asked for a phone number, and he then went to his car to retrieve the phone number. At that point, he was approached by an officer and shortly thereafter he was arrested. Plaintiff's testimony corroborates Sergeant Barber's observations except for the allegation that he was driving his vehicle while intoxicated.

The plaintiff was arrested for driving while intoxicated and for urinating in public among other charges. Plaintiff's criminal case was ultimately dismissed on February 19, 2013, though it is unclear from the record presented to the Court the reason for the dismissal.

Summary Judgment Standard

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). A mere shadowy semblance of an issue of fact or bald, conclusory allegations will not suffice to defeat a motion for summary judgment. *Mallad Construction Corp. v County Federal Savings & Loan Assoc.*, 32 NY2d 285, 290 [1973]; *Morowitz v Naughton*, 150 A.2d 536 [2d Dept 1989]. It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v Da Ecib USA*, 259 AD 2d 258 [1st Dept 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

False Arrest/Imprisonment and Malicious Prosecution

With respect to the allegations of false arrest, false imprisonment and malicious prosecution, the Court finds that the arrest and subsequent prosecution of the plaintiff was supported by probable cause as a matter of law. There is no genuine issue of material fact as to the existence of probable cause.

Proof of probable cause to arrest as a matter of law constitutes a complete defense to the claims of false arrest and unlawful imprisonment, *Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006], as well as to claims of malicious prosecution, assuming the initial probable cause is still present at the commencement of the prosecution. *Brown v Sears Roebuck & Co.*, 297 AD2d 205, 211 [1st Dept 2002]. Proof of probable cause is not the equivalent of proof of guilt beyond a reasonable doubt but merely that it was reasonable to believe that a crime had been committed. *Agront v City of New York*, 294 AD2d 189, 190 [1st Dept 2002].

To succeed on a claim for false arrest and false imprisonment, a plaintiff must show that: (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 defendants can prevail if they prove that the arrest and imprisonment were effectuated with probable cause (*Id.*; *Rivera v City of New York*, 40 AD3d 334, 337 [1st Dept 2007]).

An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense (*Ricciuti v. N.Y.C. Transit Auth.*, 124 F 3d 123, 128 [2d Cir. 1997]; see also *People v Oden*, 36 NY2d 382, 384 [1975]). When the facts resulting in an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide (*Parkin v Cornell University, Inc.*, 78 NY2d 523, 528 [1991]).

To prevail on a claim of malicious prosecution, a plaintiff has the burden to plead and prove the following four elements: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice. *Broughton* 37 NY2d 451, 457 (1975). While plaintiff must establish all four elements listed above to prevail, defendant must only prove lack of any one of the elements to establish its prima facie entitlement to judgment.

Discussion

Here, it is undisputed that Sergeant Barber observed plaintiff urinate in public. Plaintiff admits to this conduct and even testifies to admitting it to the officers on the date in question. These facts alone establish probable cause as a matter of law, thus negating the lack of probable cause requirement to sustain a malicious prosecution cause of action. See *Arzeno v Mack*, 39 AD3d 341, 342 [1st Dept 2007].

Although plaintiff attempts to create an issue of fact with respect to plaintiff's charges of driving under the influence, plaintiff violated the law by urinating in public, thus, probable cause has been established. As a result, the arrest of plaintiff was privileged, defeating his charge of false arrest/imprisonment as a matter of law. By establishing probable cause for the plaintiff's arrest and prosecution for this offense, the City has made out their prima facie entitlement to judgment as a matter of law as to both false arrest and malicious prosecution. Finally, the Court agrees with the City that the officers involved in this case were acting within the scope of their employment, thus plaintiff's claims for negligent hiring, training and retention are dismissed. *See Karoon v NY City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997].

In response, the plaintiff has failed to rebut these entitlements. While the matter was dismissed upon motion of the prosecutor, as indicated, there is no indication in the record as to why this occurred. Moreover, even if this information was available, it is extremely unlikely it would have changed the outcome of this motion, as plaintiff freely admitted to committing the offense of urinating in public prior to his arrest. It is therefore

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

9/6/2019
DATE


LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE