

Zellner v City of New York

2019 NY Slip Op 32921(U)

September 30, 2019

Supreme Court, New York County

Docket Number: 400469/2014

Judge: Julio Rodriguez, III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM

Justice

-----X

INDEX NO. 400469/2014

JAMEL ZELLNER,

MOTION DATE 06/06/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, POLICE OFFICER JONATHAN
ACQUAVIVA, SHIELD #3348, POLICE OFFICER JOHN
DOE #1

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for

JUDGMENT - SUMMARY

This action arises out of damages allegedly sustained by plaintiff Jamel Zellner when he was arrested and detained by members of the New York City Police Department (NYPD) for approximately 24 hours. Plaintiff allegedly sustained bruises on his wrists on account of the tight handcuffs placed by defendant Police Officer Jonathan Acquaviva Shield #3348 (Acquaviva) during the arrest. Defendants the City of New York and Acquaviva (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against the City of New York. Defendants also move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint as against Acquaviva, for failure to comply with the notice of claim requirements. For the reasons set forth below, defendants' motion is granted in its entirety and the complaint is dismissed.

Background and Factual Allegations

On December 9, 2012, plaintiff was selling his CDs in front of 1585 Broadway, New York when he was arrested for aggressive begging and disorderly conduct. The relevant facts of the arrest/detainment are as follows: Plaintiff, a trained electrician, had "quit his two-year long job as an electrician . . . and put all of his time and savings into his music career." NYSCEF Doc. No. 22, plaintiff's tr at 16. He creates CDs of music he made and sells them on the street to the public. According to plaintiff, while he was selling his music from behind a table, police officers in plain clothes approached him, told him not to move and then handcuffed him. Plaintiff claims that he sustained bruises to his wrists for three days as a result of the handcuffs being placed too tightly.

The record indicates that plaintiff and two other people were charged with violating both Administrative Code of the City of New York (Administrative Code) § 10-136 (b) (1), aggressive begging in a public place, and Penal Law § 240.20 (5), disorderly conduct.

On April 24, 2015, plaintiff appeared for an examination before trial. In relevant part, plaintiff testified that on the date of the arrest, he had been standing behind his table, which was three feet from the curb, selling his CDs. Plaintiff explained that he would place his CDs on the table. People would see the CDs on the table and then ask plaintiff questions. After plaintiff explained to the pedestrians that he is “trying to get [his] music out there,” some people would buy them, some would not and others would just give a donation to support his musical vision. NYSCEF Doc. No. 22, plaintiff’s tr at 35. Prior to the instant arrest, he had been going out on Saturdays and Sundays to sell his CDs for approximately two years. Plaintiff testified that he had been arrested in the past while attempting to sell his CDs for, among other things, violating the “three foot rule,” for not having a “tax stamp,” and for aggressive begging, so that is how he knew he was required to remain three feet from the curb.

Plaintiff testified that, on the date of the arrest, he was outside selling his CDs with other CD vendors. He had been there since eight that morning and planned to leave at seven that evening. Around four in the afternoon, plain-clothes police officers came up to plaintiff, told him to put his hands behind his back and then handcuffed them. They did not identify themselves to plaintiff and he did not ask them anything. He said he knew they were police officers because they were arresting him.

Plaintiff first testified that that he had been in the middle of talking to a man and his son, when he was arrested. Later on in his deposition, he testified that he could not remember this specific arrest. Plaintiff subsequently testified that he “remember[s] the arrest. I made a mistake. I remember the arrest.” *Id.* at 31. He continued that he was “talking to customers all day but at that specific time when I got arrested I wasn’t talking to anybody.” *Id.* at 32. According to plaintiff, he had spoken to hundreds of customers on the date of his arrest prior to being arrested. Subsequent to this testimony, when asked “[w]hat were you doing in the five minutes before you were arrested?” plaintiff testified “I don’t remember.” *Id.* at 36. When asked “[w]hat were you doing one minute before you were arrested?” plaintiff testified “I don’t remember.” *Id.* at 36. He further stated that at the time of his arrest, he was “at my table three feet from the curb getting arrested.” *Id.* at 37.

Defendants move for summary judgment dismissing plaintiff’s claims grounded in false arrest, false imprisonment and malicious prosecution on the basis that probable cause existed for plaintiff’s arrest.¹ In support of their motion, they submit the transcript from Acquaviva’s examination before trial, also held on April 24, 2015. In pertinent part, Acquaviva testified that he worked in the “conditions unit for peddlers” from September 2008 through the date of plaintiff’s arrest.

¹ It is unclear why defendants addressed a claim for malicious prosecution as there was no cause of action for malicious prosecution in the complaint. Nonetheless, as malicious prosecution was listed on the notice of claim and both parties address it, the court will discuss the merits of the claim.

Acquaviva reviewed his memo book that he had from the date of the arrest and also the criminal complaint, which Acquaviva described as the events he “explained to the ADA’s office.” NYSCEF Doc No. 23, Acquaviva tr at 49. On the date of plaintiff’s arrest, Acquaviva was dressed in plain-clothes “performing peddler conditions,” along with other officers. *Id.* at 59. He testified that he was across the street and observed plaintiff, along with other vendors, for approximately 15 minutes prior to making any arrests. He explained that he waited 15 minutes to see that it “wasn’t just a mistake where he made one person walk around him. . . . But when you keep seeing it over and over, and the same thing occurring, then you know that okay, that wasn’t a mistake, he’s committing a crime.” *Id.* at 81. He was able to see that plaintiff and the other CD vendors were asking the pedestrians for money and that pedestrians were unable to go around them. Pedestrians were stopped and harassed by the vendors, and the vendors’ aggressive begging caused approximately eight other pedestrians to be forced to walk around the vendors. *Id.* at 71. According to Acquaviva, “aggressive” is considered “a situation when the vendor is actually putting a product that’s not wanted by a pedestrian in their face, trying to put it in the person’s hand, trying to stop them from walking. [sic] Surrounding certain individuals, like in an intimidating manner, to try to make people pay for something they don’t want.” *Id.* at 86.

Acquaviva testified that he wrote in his memo book that when he “did approach, all three defendants were surrounding one male in a threatening manner and forcing him not to walk on a public sidewalk.” *Id.* at 73. The memo book noted that this surrounded male had wanted his money back. NYSCEF Doc. No. 20 at 7. “While making this arrest, there was somebody at this particular scene that stated they wanted their \$20 back...” Acquaviva’s tr at 68.

Discussion

I. Summary Judgment

“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). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case 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) (internal quotation marks and citation omitted). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

At the outset, plaintiff argues that defendants’ motion should be denied for lacking factual support. Specifically, plaintiff points out that the deposition transcripts of both plaintiff and Acquaviva are unsigned and are therefore inadmissible. However, this argument is without merit. The deposition transcripts were certified by the court reporter and plaintiff did not return them. *See Luna v CEC Entertainment, Inc.*, 159 AD3d 445, 446 (1st Dept 2018); *see also Baptiste v. Ditmas Park, LLC*, 171 AD3d 1001, 1002 (2nd Dept 2019). Further, in the instant situation,

plaintiff does not challenge the accuracy of the deposition transcripts. "...[A]n unsigned but certified transcript may be used as an admission especially where, as here, there is no dispute as to the accuracy of the transcript." *Id.* at 446 (citation omitted).

In addition, contrary to plaintiff's contention, the attorney's affirmation submitted in support of defendants' motion is sufficient on a motion for summary judgment, as it is submitted with evidence in admissible form, such as the deposition transcripts. *See Zuckerman v New York*, 49 NY2d 557, 563 (1980) ("The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts").

II. False Arrest and False Imprisonment

To establish a cause of action for false arrest and imprisonment, plaintiff must prove that defendants "intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged." *Hernandez v City of New York*, 100 AD3d 433, 433 (1st Dept 2012). Where, like here, there was no initial warrant, defendants have the burden of proving "legal justification as an affirmative defense... showing that the arrest was based on probable cause." *Broughton v State of New York*, 37 NY2d 451, 458 (1975), *cert denied sub nom, Schanberger v Kellogg*, 423 US 929 [1975]. Probable cause for an arrest "constitutes a complete defense to causes of action alleging false arrest [and] false imprisonment... [It] 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 committed or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances." *Shaw v City of New York*, 139 AD3d 698, 699 (2d Dept 2016) (internal quotation marks and citations omitted). It is well settled that a police officer's observations are sufficient to establish the existence of probable cause for an arrest. *Leftenant v City of New York*, 70 AD3d 596, 597 (1st Dept 2010), *citing Lui Yi v City of New York*, 227 AD2d 453, 453 (2d Dept 1996).

Here, defendants have met their burden to establish the existence of probable cause at the time of the arrest for aggressive begging and disorderly conduct. As set forth above, Acquaviva testified that he was trained to work in the peddler's conditions unit and had been assigned there for approximately four years prior to plaintiff's arrest. Prior to plaintiff's arrest, Acquaviva observed plaintiff aggressively trying to sell his CDs to pedestrians by stopping them, holding up the CDs and asking the pedestrians for money. Plaintiff and the other two vendors had blocked the sidewalk and Acquaviva observed eight pedestrians that were forced to walk into the street to avoid them. Acquaviva wrote in his memo book that, at the time he approached plaintiff, plaintiff and the two other vendors had surrounded one male in a threatening manner, prevented him from continuing on his way and this male told Acquaviva that he wanted his money back.

Accordingly, defendants have established that, based on Acquaviva's observations, along with his training, it was reasonable for him to believe that plaintiff was engaging in aggressive begging and disorderly conduct. *See e.g. Thompson v City of New York*, 159 AD3d 654, 654 (1st Dept 2018) ("Plaintiff cannot prevail on his false arrest, false imprisonment, and malicious

prosecution claims because the police officer's observations, based on his training and experience with similar license plates, provided a reasonable basis for him to conclude that plaintiff's temporary plate was forged, granting him probable cause to arrest plaintiff").

Upon a review of his opposition papers, this Court finds that plaintiff has failed to raise a triable issue of fact. Plaintiff first testified that he was in the middle of talking to one man and his son at the time of his arrest. Plaintiff then testified that he had been arrested other times and that he did not remember the arrest that formed the basis of this complaint. Plaintiff then indicated that he made a mistake and that he did remember the arrest. He then changed his testimony to state that he had been talking to hundreds of customers all day but at the time he was arrested, he had not been talking to anyone. He then subsequently testified that he could not remember what he had been doing one minute prior to being arrested except that he had been standing behind his table, which was three feet from the curb. Further, plaintiff could not remember what he had been doing five minutes prior to the arrest. Regardless, "plaintiffs' general denials . . . failed to raise a triable issue of fact [as to whether there was probable cause]." *Walker v City of New York*, 148 AD3d 469, 470 (1st Dept 2017).

Inasmuch as probable cause is a complete defense to false arrest and imprisonment causes of action, defendants are granted summary judgment dismissing the first cause of action for false arrest and imprisonment.

III. Malicious Prosecution

"The elements of the tort of malicious prosecution are: (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." *De Lourdes Torres v Jones*, 26 NY3d 742, 760 (2016) (internal quotation marks and citations omitted). "Probable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution." *Batten v City of New York*, 133 AD3d 803, 805 (2d Dept 2015) (internal quotation marks and citations omitted).

Here, as stated above, defendants had probable cause to arrest plaintiff for the criminal proceeding, which constitutes a complete defense to the malicious prosecution claim. In addition, the claim for malicious prosecution fails as plaintiff cannot establish that criminal proceedings against him terminated in his favor. It is undisputed that plaintiff's criminal case was adjourned in contemplation of dismissal, which is not considered a favorable termination. *See Smith-Hunter v Harvey*, 95 NY2d 191, 197 (2000) ("an adjournment in contemplation of dismissal--a disposition that requires the consent of the prosecutor, the accused and the court (*see*, CPL 170.55 [1])--does not qualify as a favorable termination"). Accordingly defendants are granted summary judgment dismissing the claim for malicious prosecution.

IV. Assault and Battery

In their moving papers, defendants argue that the assault and battery claims must be dismissed because plaintiff did not list same in his notice of claim. However, this argument lacks merit. In the section titled "manner in which claim arose" in the notice of claim, plaintiff alleged

that he was assaulted by police officers and that he suffered bruises from the handcuffs being placed too tightly on his wrists. Accordingly, the court finds that the causes of action for assault and battery “are sufficiently related to the notice of claim... [and do not assert] new, distinct and independent theories of liability.” *Lopez v N.Y. City Hous. Auth.*, 16 AD3d 164, 165 (1st Dept 2005); *see also Perry v New York City Hous. Auth.*, 116 AD3d 511, 511 (1st Dept 2014) (internal quotation marks and citation omitted) (“plaintiff’s notice of claim... fairly implies the more specific allegations set forth in the bill of particulars...”)

“To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff’s consent. *Bastein v Sotto*, 299 AD2d 432, 433 (2d Dept 2002). However, where, like here, “there has been a lawful arrest, intentional contact with the arrested person does not constitute assault and battery, provided such force is reasonable.” *Leibovitz v City of New York*, 2016 US Dist LEXIS 35556, WL 3671232 2016, *8 (SD NY 2016) (internal quotation marks and citations omitted).

In support of his claims for assault and battery, plaintiff alleges that Acquaviva placed the handcuffs on his wrists too tightly and left bruises. “Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness.” *Combs v City of New York*, 130 AD3d 862, 864 (2d Dept 2015) (internal quotation marks and citations omitted). Defendants argue that claims for assault and battery should be dismissed as the force used to handcuff plaintiff was not excessive. They note that plaintiff testified that he was handcuffed for two hours, that he sustained bruises to his wrists that lasted three days, that he did not seek medical care and that he did not take pictures of his bruises. In addition, plaintiff did not allege that any police officer defendants physically or verbally abused him.

Courts have dismissed claims for excessive force where, like here, “plaintiff testified that the handcuffs were too tight, but he did not testify or submit other evidence, that he sustained physical injury as a result.” *Davidson v City of New York*, 155 AD3d 544, 544 (1st Dept 2017). Further, as in the current situation, “for the same reason, coupled with the finding of probable cause for the arrest, . . . claims of assault and battery [have been dismissed].” *Id.* Accordingly, defendants met their burden on summary judgment demonstrating that the force used to effectuate the arrest was objectively reasonable. *See e.g. Wyllie v DA*, 2 AD3d 714, 718 (2d Dept 2003).

In opposition to defendants’ motion, plaintiff reiterates that he suffered injuries to his wrists as a result of the handcuffs. However, this does not raise a triable issue of fact that defendants’ use of force during the arrest by applying tight handcuffs was excessive. Given that probable cause existed for the arrest and plaintiff failed to raise a triable issue of fact as to whether defendants’ use of force was objectively reasonable, defendants are granted summary judgment dismissing the second and third causes of action alleging assault and battery. *See Fowler v City of New York*, 156 AD3d 512, 513 (1st Dept 2017) (internal citations omitted).

V. Fourth Through Sixth Causes of Action

As plaintiff failed to oppose defendants' motion for summary judgment dismissing the causes of action alleging negligent hiring, retention, training and supervision, negligence and negligent infliction of emotional distress, they are deemed abandoned and dismissed. *See e.g. Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (where plaintiff "did not oppose that branch" of defendant's motion for summary judgment dismissing the cause of action for wrongful termination, plaintiff abandoned this claim). In any event, regardless of any opposition, these causes of action are "fatally defective" and are dismissed. *Swinton v City of New York*, 61 AD3d 557, 558 (1st Dept 2009). Plaintiff alleges that defendants were negligent in their initial apprehension of plaintiff when they falsely arrested him and caused him to sustain injuries. However, it is well settled that "[t]he claimant is clearly seeking damages for wrongful arrest and detention. As such, he may not recover under broad general principles of negligence . . . but must proceed by way of traditional remedies of false arrest and imprisonment." *Simon v State*, 12 AD3d 171, 171 (1st Dept 2004) (internal quotation marks and citation omitted).

The complaint states that the City of New York, as the employer, is responsible for Acquaviva's wrongdoing pursuant to the doctrine of respondeat superior. First, as there are no allegations that Acquaviva was acting outside of his employment, the claim for negligent hiring, training and supervision must be dismissed. *See Thompson v City of New York*, 159 AD3d at 654 (citation omitted) ("Furthermore, because the police were acting within the scope of their employment, plaintiff's claim for negligent hiring, training, and supervision must be dismissed").

Second, the doctrine of respondeat superior, "merely provides a theoretical means for transferring the *liability* of an employee to his employer and imposing upon the latter financial responsibility for the legally cognizable culpable conduct of the former. Given this principle, it is manifest that there can be no vicarious liability on the part of the employer if the employee himself is not liable..." *Karaduman v Newsday*, 51 NY2d 531, 545-546 (internal citation omitted). Here, given that plaintiff has not established a viable tort claim against Acquaviva, plaintiff cannot maintain a claim against the City of New York under respondeat superior.

Finally, "a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Sheila C. v Povich*, 11 AD3d 120, 130-131 (1st Dept 2004) (internal quotation marks and citations omitted). In the instant situation, plaintiff has failed to provide any facts that Acquaviva's conduct was so extreme as to substantiate a claim for negligent infliction of emotional distress.

VI. Dismissal of Claims Against Acquaviva

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled

to any such consideration.” *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted).

Prior to the commencement of an action sounding in tort or negligence against an individually-named municipal employee, that individual must be specifically named on the notice claim. See *Tannenbaum v City of New York*, 30 AD3d 357, 358 (1st Dept 2006) (citations omitted).

“Plaintiff was required to allege in [his] complaint compliance with the notice of claim condition precedents to suit.” *Reaves v City of New York*, 177 AD2d 437, 437 (1st Dept 1991). Here, Acquaviva was not specifically named on the notice of claim. Accordingly, the complaint is legally insufficient, and defendants are granted dismissal of the complaint as against Acquaviva. See *Cleghorne v City of New York*, 99 AD3d 443, 446 (1st Dept 2012) (“the action cannot proceed against the individual defendants because they were not named in the notice of claim”).²

Accordingly, it is

ORDERED that defendants the City of New York and Police Officer Jonathan Acquaviva’s motion for an order, pursuant to CPLR 3212 for summary judgment dismissing the complaint and pursuant to CPLR 3211 (a) (7) dismissing the complaint as against Police Officer Jonathan Acquaviva, is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that defendant City of New York is to serve a copy of this order with notice of entry within twenty days of entry upon plaintiff and the General Clerk’s Office; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and that the case be marked disposed.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

September 30, 2019


HON. JULIO RODRIGUEZ III, JSC

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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE

² The claims for false arrest, false imprisonment, assault, battery, and negligence started to accrue on December 9, 2012, with a one year and ninety day statute of limitations. As plaintiff failed to include Acquaviva’s name on the notice of claim and did not seek leave to amend the notice of claim to include Acquaviva, he is now precluded from doing so.