Hines v Westchester County
2019 NY Slip Op 34850(U)
September 3, 2019
Supreme Court, Westchester County
Docket Number: Index No. 66897/2016
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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RAYNARD HINES,

Plaintiff,

-against-

WESTCHESTER COUNTY, WESTCHESTER COUNTY DEPARTMENT OF CORRECTIONS, [1] CORRECTIONS OFFICER SCHNOY, individually, CORRECTIONS OFFICER MELVIN, individually, CORRECTION OFFICERS SGT. DIAZ individually, CORRECTIONS OFFICER SGT.COLTON, individually and JOHN DOE, individually,

Defendants.

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INDEX NO. 66897/2016

DECISION/ORDER

Motion Dates: 07/03/2019
07/31/2019
Mot. Seqs. 1, 2

ECKER, J.

The following papers were read on the motion of plaintiff RAYNARD HINES (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendants WESTCHESTER COUNTY, WESTCHESTER COUNTY DEPARTMENT OF CORRECTIONS, CORRECTIONS OFFICER SCHNOY, individually, CORRECTIONS OFFICER MELVIN, individually, CORRECTION OFFICERS SGT. DIAZ individually, CORRECTIONS OFFICER SGT.COLTON, individually and JOHN DOE, individually (defendants), and the cross-motion by defendants [Mot. Seq. 2], made pursuant to CPLR 3212, for an order granting defendants summary judgment dismissing the complaint as against plaintiff:

Papers

Notice of Motion (plaintiff), Affirmation, Exhibits 1-8
Notice of Cross-Motion (defendants), Affirmation in Support and in Opposition, Exhibits A-R
Affirmation in Opposition in Further Support of Motion and in Opposition to Cross-Motion (plaintiff) and Exhibits 1 (CD), 1 (video reproduction of CD)
Affirmation in Reply to Cross-Motion (defendants), Exhibits S-U

[1] The Westchester County Department of Corrections is an agency of Westchester County and is not required to be named as a separate entity. The caption is deemed amended accordingly.

Plaintiff was admitted to the Westchester County Penitentiary to serve a sentence on June 22, 2015.

On September 2, 2015, plaintiff was working as a designated trustee and assigned the job of transporting “oranges” or inmates’ uniforms, exchanging soiled for clean, using a wheeled laundry bin as the manner of transport. As part of the process, plaintiff exited and entered various sectors of the prison. In the course of exiting sectors to enter another sectors of the building, he and a fellow inmate were pat-frisked, as required by the rules and regulations of the Corrections Department.

At approximately 10-11 a.m. plaintiff was in D Block. He was leaving D Block with a supply cart full of oranges, and needed to be searched. Plaintiff was pat-frisked by defendant Schnoy. The pat-frisk was ordered by defendant Melvin, a female.

According to plaintiff in his deposition, and as depicted in the video of the incident, while searching plaintiff, Schnoy appears to have reached toward plaintiff’s private area with other than an open palm. Plaintiff states he immediately protested, stating that his penis had been touched. Schnoy states that he immediately apologized, and remarked that he was “not gay.”

The other officers were involved in taking plaintiff’s complaint and investigating the incident. Plaintiff, at the time that he signed the report, did not allege that he thought the occurrence was other than inadvertent, although he now states that his statement was not of his own wording.

Plaintiff initially filed a summons and a seven-count complaint alleging battery and federal and state civil rights violations. At this time, plaintiff has withdrawn all of the causes of action except the claim for battery. Plaintiff now moves [Mot. Seq. 1], pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendants, and defendants cross-move [Mot. Seq. 2], pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented, even the color of a triable issue of fact forecloses the remedy (*In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004]). If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact (*Zuckerman v City of New York, supra).* On a motion for summary judgment, the court’s function is to determine if a factual issue exists, and the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and a conflict in the testimony or evidence presented merely raises an issue of fact (*Brown v Kass*, 91 AD3d 894 [2d Dept 2012]).

"To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent" (*Higgins v Hamilton*, 18 AD3d 436 [2d Dept 2005]). The presence of bodily contact is not disputed by the parties.

In terms of the issue of consent, plaintiff fails to show *prima facie* that the relevant contact was without legal consent. The contact on which plaintiff predicates the battery claim was made when plaintiff was being legally searched in a prison. Such contact was consensual given plaintiff's status as an inmate. Moreover, plaintiff was offered and accepted the work as a collector of uniforms, and does not deny that part of the position required that he be searched before exiting one section to reach the other (*see Gabriel v Scheriff*, 115 AD3d 791 [2d Dept 2014]). Furthermore, to the extent that plaintiff argues, in essence, that the consent did not extend to the area of his body that was searched, this allegation is, without more, insufficient to set forth a *prima facie* showing (*see Higgins v Hamilton, supra; Gabriel v Scheriff, supra; see generally, Thaw v North Shore University Hosp*., 129 AD3d 937 [2d Dept 2015]). Thus, as a matter of law, plaintiff cannot prove that the touching was without his consent and the action is dismissed (*Higgins v Hamilton, supra*; *see also, Gabriel v Scheriff*, *supra*).

In any event, plaintiff also fails to prove *prima facie* that the requisite level of offense was generated by the alleged wrongful contact. "An action for battery may be sustained without a showing that the actor intended to cause injury as a result of the intended contact, but it is necessary to show that the intended contact was itself 'offensive', i.e., wrongful under all the circumstances" (*Messina v Matarasso,* 284 AD2d 32 [1st Dept 2001]; *Zgraggen v Wilsey*, 200 AD2d 818, 819 [3d Dept 1994]; *see, Villanueva v Comparetto*, 180 AD2d 627[2d Dept 1992]). As such, plaintiff must demonstrate that defendants' actions were "wrongful under all circumstances" (*Messina v Matarasso*, *supra; Gabriel v Scheriff, supra; Higgins v Hamilton, supra; see Goff v Clarke,* 302 AD2d 725 [3d Dept 2003]; *VanBrocklen v Erie County Medical Center*, 96 AD3d 1394 [4th Dept 2012]). On the record presented, plaintiff fails to show that the bodily contact alleged herein was "so offensive" as to be "wrongful under all the circumstances," including during a routine prison search (*Zgraggen v Wilsey, supra; Gabriel v Scheriff, supra; Higgins v Hamilton, supra; see Cecora v De La Hoya,* 106 AD3d 565 [1st Dept 2013]).[2]

Having reviewed the entirety of the parties' submissions, including the plaintiff's 50-H hearing transcript and deposition transcript, the depositions of defendants, the reports, the respective "experts' reports," the video, and the applicable law, the court finds that there was no tortious conduct on the part of defendant Schnoy, i.e., no

[2]Although not pled by plaintiff, at best, Schnoy's action, as shown on the video, may have been performed in a negligent fashion. Such an inadvertent touching that may have been caused by the actor's negligence is not a battery (*See Higgins v Hamilton, supra*; *Messina v Matarasso*, *supra; see Dray v Staten Island University Hospital,* 160 AD3d 614 [2d Dept 2018]).

battery was committed. Consequently, there is no liability ascribed against him, the County of Westchester, or the other corrections officers individually named.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED the motion of plaintiff RAYNARD HINES (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendants WESTCHESTER COUNTY, WESTCHESTER COUNTY DEPARTMENT OF CORRECTIONS, CORRECTIONS OFFICER SCHNOY, individually, CORRECTIONS OFFICER MELVIN, individually, CORRECTION OFFICERS SGT. DIAZ, individually, CORRECTIONS OFFICER SGT.COLTON, individually, and JOHN DOE, individually (defendants), is denied; and it is further

ORDERED that the cross-motion by defendants [Mot. Seq. 2], made pursuant to CPLR 3212, for an order granting defendants summary judgment dismissing the complaint as against plaintiff is granted and the complaint is dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
September 3, 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

All parties appearing via NYSCEF