

Taylor v City of New York
2020 NY Slip Op 30423(U)
February 11, 2020
Supreme Court, New York County
Docket Number: 450072/2016
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART 62

Justice

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MICHAEL TAYLOR,

Plaintiff,

- v -

THE CITY OF NEW YORK, P.O. ERIC ELLSWORTH,
SHIELD NO. UNKNOWN, P.O. JOHN DOE,

Defendants.

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INDEX NO. 450072/2016
MOTION DATE 01/16/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents,

The City of New York and police officer Eric Ellsworth move this Court in pertinent part for summary judgment, CPLR 3212, and to dismiss, CPLR 3211, plaintiff's complaint associated with an arrest of plaintiff on June 23, 2014. Plaintiff was a front seat passenger when he was "arrested for grand larceny in relation to the vehicle that Mike [driver, both named Michael] had been operating," in the vicinity of 425 West 123rd Street, New York, New York. This action seeks to recover for alleged personal injuries sustained by plaintiff.

Plaintiff filed a summons and complaint on September 15, 2015 in Kings County, and the instant action was transferred to New York County. The City of New York joined issue by service of its verified answer on October 2, 2015. The City filed an amended answer on behalf of defendants on February 5, 2016.

Plaintiff's complaint states causes of action for 1) false arrest and unlawful imprisonment; 2) negligence; 3) violation of personal constitutional rights under 42 USC § 1983

against The City of New York; 4) violation of constitutional rights under 42 USC § 1983, by the defendant in his individual capacity and as an agent of The City of New York; and 5) intentional infliction of emotional distress.

Plaintiff alleges state law claims of false arrest; false imprisonment; negligent hiring, training, and retention; negligence; defamation; and intentional infliction of emotional distress arising from the June 23, 2014 arrest. Plaintiff also pursues claims of false arrest; false imprisonment; violation of plaintiff's rights to equal protection; violation of plaintiff's right to due process; violation of plaintiff's right to be free from summary punishment without trial; violation of plaintiff's right to be free from cruel and unusual punishment; abuse of process; excessive force; and *Monell* liability, all pursuant to 42 USC § 1983.

Plaintiff testified at an examination before trial on August 21, 2017. Police officer Eric Ellsworth testified at an examination before trial also on August 21, 2017. A notice of claim dated September 17, 2014 has damages at \$100,000. Plaintiff filed a note of issue on April 9, 2019.

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004). "The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Pursuant to General Municipal Law § 50-e(1)(a), a plaintiff must file a notice of claim with respect to all state law claims within ninety-days of accrual. A plaintiff must also “set forth ... the nature of the claim,” per GML § 50-e (2).

Plaintiff’s complaint alleges state law claims involving false arrest; false imprisonment; negligent hiring, training, and retention; negligence; and intentional infliction of emotion distress. The notice of claim only alleges causes of action for false arrest and false imprisonment.

Plaintiff’s notice of claim fails to “set forth ... the nature of claim,” regarding negligent hiring, training, and retention; negligence; intentional infliction of emotional distress; and defamation. It is well-settled that, should a plaintiff fail to raise a cause of action with the notice of claim, said deficiency cannot be corrected through subsequent pleadings (see *Scott v City of New York*, 40 AD3d 408, 409 – 410 [1st Dept 2007]; *Ramos v New York City Bd of Educ*, 107 Ad3d 583, 584 [1st Dept 2013]).

Plaintiff claims false arrest and false imprisonment in relation to the June 23, 2014 arrest. To maintain a cause of action for false arrest, plaintiff must prove that: 1) the defendant intended to confine [the plaintiff], 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 (see *Broughton v State of New York*, 37 NY2d 451, 456 [1975]). No cause of action arises for false arrest where the alleged confinement was privileged (*id.* at 456).

The existence of probable cause to arrest constitutes a privileged confinement and is therefore a complete defense to the claims of false arrest and unlawful imprisonment (see *Strange v County of Westchester*, 29 AD3d 676 [2006]; *Molina v City of New York*, 28 AD3d 372 [2006]). At the time of plaintiff’s arrest, he was sitting inside a motor vehicle which, was

reported stolen, had a broken window, was not registered to plaintiff, and plaintiff did not have permission from the owner to be in the vehicle.

Plaintiff's complaint alleges general negligence stemming from the June 23, 2014 arrest. A plaintiff who seeks damages arising from an arrest and detention cannot recover under a general claim of negligence (see *Ferguson v Dollar Rent A Car, Inc.*, 102 AD3d 600, 601 [1st Dept 2013]; *Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007]).

Plaintiff's complaint continues with allegations of Intentional Infliction of Emotional Distress against defendants. Claims for intentional infliction of emotional distress that are duplicative of other causes of action are subject to dismissal (see *Fischer v Maloney*, 43 NY2d 553, 557-558 [1978]).

Plaintiff alleges a constitutional harm per *Monell*. To recover on a § 1983 claim against a municipality, a plaintiff must specifically plead and prove three elements: 1) an official policy or custom that 2) causes plaintiff to be subjected to 3) a denial of a constitutional right (see *Monell*, 436 US 658; *Batista v Rodriguez*, 702 F2d 393 [2d Cir 1984]). *Monell* requires that plaintiff both plead and prove each element including that the City has adopted an official policy or custom (*id.* at 690). Plaintiff claims that the City had a practice of "using the arrest power against the citizenry when deemed necessary, despite the lack of probable cause, as a law enforcement tool."

Plaintiff claims malicious abuse of process. In order to prevail on a cause of action for abuse of process, it must be demonstrated that the defendant 1) caused the issuance of regularly issued process either criminal or civil; 2) with the intent to do harm without excuse or justification; and 3) that the process was perverted to obtain a collateral advantage (see *Curiano v Suozzi*, 63 NY2d 113 [1984]).

The District Attorney's Office declined to prosecute plaintiff hence process was never issued nor initiated.

Plaintiff alleges a Constitutional violation of the fourteenth amendment, equal protection. To allege a denial of equal protection, plaintiff must show, 1) that he was treated differently from other similarly situated individuals, and 2) that such differential treatment was based on impermissible considerations (see *De Santis v City of New York*, 2011 US Dist LEXIS 99126, at 27 (SDNY 2011); citing (*Harlen Assocs Inc v Village of Mineola*, 273 F3d 494, 499 [2d Cir 2001])). Plaintiff does not identify a similarly situated individual who did not receive the same treatment as him.

Plaintiff claims a violation of his due process rights. It is well settled that probable cause to arrest is a bar to both substantive and procedural due process claims (see *Ortiz v Vill of Monticello*, 2012 US Dist LEXIS 158428 at 33). Plaintiff was inside a reported stolen vehicle with a broken window.

Plaintiff claims his right to be free from summary punishment without trial was violated. Plaintiff does not plead a cause of action for this violation but simply acknowledges this as an alleged federal cause of action without addressing any supposed elements for the claim. In cases where a plaintiff has pled such a claim, the Court has suggested it is duplicative of other causes of action, choosing instead to analyze it within the context of viable alternative claims (see *McDermott v City of New York*, 2002 US Dist LEXIS 2893, at 22-23 [SDNY 2002]).

Plaintiff claims suffrage through a violation of his eighth amendment right to be free from cruel and unusual punishment. It is well settled that protection under the Eighth Amendment to the United States Constitution "does not apply until after conviction and

sentence” (see *United States v Walsh*, 194 F3d 37, 47 [2d Cir 1999]). Plaintiff was never convicted nor sentenced as the District Attorney’s Office declined to prosecute.

Plaintiff claims excessive force used against him by the arresting officers. It is incumbent upon a claimant to allege particular facts indicating each of individual defendants were personally involved in the deprivation of liberty (see *Davis v County of Nassau*, 355 F. Supp2d 668, 677 [EDNY 2005]).

Plaintiff claims defamation. In order to sufficiently plead a cause of action for defamation, the plaintiff must “set forth the particular words complained of” see *LoFaso v City of New York*, 66 AD3d 425, 426 [1st Dept 2009]). Plaintiff’s complaint alleges, “as a direct proximate result of the defendant’s actions, the plaintiff, (sic) was subjected to great indignities and humiliation and was humiliated and defamed thereby.” Plaintiff does not allege any defamatory statements by defendants.

The Court of Appeals recently promulgated the requirements of a complaint to survive a motion to dismiss. Although on a motion to dismiss plaintiffs’ allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss (see *Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Caniglia v Chicago Tribune NY News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

CPLR § 3212 (b) states that, “the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

2/11/2020

DATE

HON. LAURENCE L. LOVE, 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