

**Fehring v County of Suffolk**

2020 NY Slip Op 31872(U)

May 14, 2020

Supreme Court, Suffolk County

Docket Number: 9746/2011

Judge: Denise F. Molia

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.

COPY

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:  
Hon. DENISE F. MOLIA,  
Justice

ROBERT FEHRING,  
  
Plaintiff,

- against -

THE COUNTY OF SUFFOLK, SUFFOLK COUNTY  
POLICE DEPARTMENT, POLICE OFFICER  
JAMES CURLEY, SERGEANT #1055, POLICE  
OFFICER RICHARD SCHMIDT #3533,  
SUPERVISING POLICE OFFICER A.  
O'CALLAGHAN AND POLICE OFFICERS JOHN  
DOE, JANE DOE, Numbers 1-10, the name being  
fictitious, it being the intention of the Plaintiff to  
designate any and all employers of the Defendant  
herein,

Defendants.

CASE DISPOSED: YES  
MOTION R/D: 4/2/15  
SUBMISSION DATE: 9/27/19  
MOTION SEQUENCE No.: 001 MG

ATTORNEY FOR PLAINTIFF  
Law Offices of Cory H. Morris  
33 Walt Whitman Road, Suite 310  
Dix Hills, New York 11746

ATTORNEYS FOR DEFENDANT  
Suffolk County Attorney  
100 Veterans Memorial Highway  
P.O. Box 6100  
Hauppauge, New York 11788

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated March 3, 2015; Affirmation dated February 26, 2015; Exhibits A through L annexed thereto; Affirmation in Opposition dated June 4, 2015; Reply Affirmation dated July 10, 2015; and upon due deliberation; it is

**ORDERED**, that the motion by defendants, pursuant to CPLR 3212 and CPLR 3211(a)(7), for an Order dismissing the Complaint and all cross-claims based upon the fact thta the defendants had probable cause to have plaintiff evaluated by a mental health professional and to search plaintiff's office, vehicle and home, and because defendants are entitled to qualified immunity, is granted.

Plaintiff commenced the instant action against the County of Suffolk ("County"), the Suffolk County Police Department ("SCPD"), and various individual police officers. The Complaint contains causes of action sounding in assault, battery, false arrest, and false imprisonment. The plaintiff also brought claims against the defendant police officers pursuant to 42 U.S.C. §1983, alleging that the actions of the defendant-officers deprived him of his constitutional rights to be free from excessive force, illegal searches and seizures, cruel and inhuman punishment and summary punishment. In addition, claims were brought against the County for the alleged failure to train and supervise its police officers and for negligent hiring and supervision of those officers. In the Answer, the defendants asserted as affirmative defenses,

RST

that the Complaint failed to state a cause of action, that the actions of the defendants was justified under the circumstances, and that the defendants were protected by federal and state immunity.

The plaintiff offered the following testimony at his deposition:

On July 5, 2010 at approximately 9:00 a.m., the plaintiff arrived for work at his office, which was located in a complex with multiple suites. After parking his vehicle in the parking lot, he removed a 20 gauge Mossberg shotgun from the trunk of his vehicle, placing the gun under a raincoat being held in his arms, and continued to walk approximately forty yards to his office. Prior to entering his office, he engaged in a brief conversation with an employee of the physical therapy business located next door to plaintiff's office.

Shortly thereafter, the defendant SCPD received a report that plaintiff had entered his building with a shotgun. The 911 report was made by an off-duty law enforcement officer who had been at the physical therapy office and had seen the plaintiff enter his office with the weapon. The 911 caller advised the responding SCPD officers of his concerns that the plaintiff was suicidal, indicating that the plaintiff had recently been depressed over business issues and the loss of his home.

At 9:50 a.m. the plaintiff received a phone call from a Suffolk County police officer who identified himself as an officer and asked to speak with plaintiff outside. The officers placed plaintiff's hands against a wall and frisked him, explaining that they had received a report that plaintiff had carried a shotgun into his suite. The plaintiff admitted that he had brought the gun into his office and allowed the officers entry into his office in order to secure the firearm. After searching plaintiff's desk, dresser, and safe, the officers found a hunting knife, cash, and a box of gold coins, although they did not discover any ammunition for the shotgun. A search of the plaintiff's vehicle also did not yield the discovery of ammunition for the weapon.

When questioned, the plaintiff advised the officers that he had brought the gun to the office to be used as a visual deterrent in the event that the husband of a recently fired employee attempted to accost plaintiff at the office. There was no testimony that either the former employee or her spouse had threatened the plaintiff.

The officers then advised Fehring that he would be transported to Stone Brook University Hospital ("SBUH"). Plaintiff was then handcuffed, placed in a police vehicle, and transported to SBUH for evaluation by a mental health professional. After spending approximately five hours at SBUH, the plaintiff's wife arrived at the hospital and drove him home. The plaintiff testified that his mental health evaluators advised him that they found nothing wrong with him.

Fehring alleges that as a result of this incident, he sustained raw wrists from his handcuff restraints, and is taking anxiety medication and consulting with a psychiatrist. The plaintiff did not seek medical treatment for his wrists. He has not testified that the events of the day caused him to lose income.

The defendants have moved for summary judgment dismissing the Complaint and all crossclaims asserted against them on the basis that the defendants had probable cause to have plaintiff evaluated by a mental health professional and to search the plaintiff's office, vehicle and home. The defendants also seek dismissal on the basis that they are entitled to qualified immunity for their actions.

To support a claim sounding in false imprisonment, a plaintiff must demonstrate 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, 37 N.Y.2d 451, 456, 335 N.E.2d 310, 314.

Fehring maintains that the defendants have failed to demonstrate that the SCPD had probable cause to take him into custody for a psychological evaluation. However here, the responding officers, who were investigating the sighting of a weapon, were also advised that the plaintiff had recently been depressed and was possibly suicidal. Although the plaintiff has questioned the reliability of his mental state as relayed by the 911 caller, he has not denied that he had experienced the loss of his home and a recent business loss. Acknowledging that he brought a shotgun to his office, Fehring contends that he did not pose a threat to himself or others because the weapon was licensed and unloaded, although the stated purpose of possessing the weapon was to possibly intimidate or deter the spouse of his former employee.

New York Mental Hygiene Law §9.41 (“MHL §9.41) affords to police officers the privilege to “take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others.” Schaller v. County of Suffolk, 2008 WL 4103219. MHL §9.41 “does not require that the threat of substantial harm to oneself or others be evidenced by overt act, attempts or threats.” People v. Yaniak, 190 Misc.2d 84, 87, 738 N.Y.S.2d 492, 495. The decision to take the individual into custody under MHL §9.41 does not require evidence that the person presents an immediate danger to himself or others. Higgins v. City of Oneonta, 28 A.D.2d 1067, 617 N.Y.S.2d 566, lv. to app.den. 85 N.Y.2d 803, 624 N.Y.S.2d 373, 648 N.E.2d 793.

In the instant matter, the defendant police officers responded to a 911 call from an off-duty officer stating that plaintiff was entering his office with a gun under his raincoat. Said defendants interviewed a neighboring business owner who knew plaintiff and advised the officers that Fehring had been depressed because his business was failing and he was about to lose his home. The plaintiff indicated to the police that he had suicidal thoughts at some point, but that he was not going to kill himself and the purpose of the gun was to deter the perceived threat of a former employees spouse, who had not actually threatened him. In light of the tragic accounts of gun violence in this country, the responding officers decided that the proper course of action was to transport plaintiff to a facility where he could receive a psychological evaluation.

Under the circumstances presented, the responding officers acted reasonably and had probable cause to confine Fehring. Accordingly their actions were protected by privilege. The claims for false arrest and false imprisonment are dismissed.

In general, “no claim may proceed against the employer for negligent hiring, retention, supervision or training.” Eckardt v. City of White Plains, 87 A.D.3d 1049, 1051, 930 N.Y.S.2d 22, 25. When the actions complained of were performed by police officers acting within the scope of their employment, no cause of action for negligent hiring and supervision can proceed against the employer-municipality (see, Karoon v. New York City Transit Auth., 241 A.D.2d 323, 324, 659 N.Y.S.2d 27, 29. Here, the defendant-officers were on duty when they received a call that plaintiff had arrived at his office with a shotgun. Acting in their capacity as police officers, they arrived at plaintiff’s location, frisked him, searched his office and car for other weapons, transported him to the hospital for evaluation, and advised his family of his status. The foregoing actions were clearly performed within the course of the defendant-officer’s employment, and do not support a cause of action for negligent hiring and/or negligent supervision.

Claims sounding in excessive force are analyzed under the objective reasonableness standard of the Fourth Amendment. Washington-Herrera v. Town of Greenburgh, 101 A.D.3d 986, 989. Whether the amount of force was reasonable “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Id. (citing Campagna v. Arleo, 25 A.D.3d 528, 529). Courts must take into account that police officers need to make “slit-second judgments about how much force is necessary ‘in circumstances that are tense, uncertain, and rapidly evolving.’” Pacheco v. City of New York, 104 A.D.3d 548, 549-550 (citing Graham v. Connor, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443). Where plaintiff fails to offer proof of injury, a claim for excessive force must fail (see, Diederich v. Nyack Hosp., 49 A.D.3d 41, 494, 854 N.Y.S.2d 411, 415).

Here, the plaintiff testified that the only time the defendant-officers used force against him was when he was frisked and handcuffed. While the plaintiff alleges that the officers “grabbed” him and “put him up against the wall” before they frisked him, such action is reasonable when the officers reasonably believed the plaintiff to be in possession of a shotgun and may have posed an immediate threat to their safety. Likewise, the officers acted reasonably when they adhered to procedure and handcuffed the plaintiff prior to his transport to SBUH for a psychological evaluation. Aside from alleging that he was “banged up”, the plaintiff did not seek or require medical attention resulting from the actions of the defendant officers. “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.” Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443. The plaintiff has failed to offer proof of injury, and his claim for excessive force must fail.

Plaintiff’s claims for assault and battery must also fail inasmuch as his confinement was lawful and any force used against him was reasonable under the circumstances. “Where there has been a lawful arrest, intentional contact with the arrested person does not constitute assault and battery, provided such force is reasonable.” Cunningham v. United States, 472 F.Supp.2d 366, 381 (E.D. N.Y. 2007). As previously noted, the officers were within their right, pursuant to MHL §9.41, to transport Fehring to the hospital for evaluation. Since there was a lawful “arrest” and the amount of force has been found to be reasonable under the circumstances, the claims for assault and battery are dismissed.

42 U.S.C. §1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” Eckardt v. City of White Plains, 87 A.D.3d 1049 at 1051-1052, 930 N.Y.S.2d 22.

A policy or custom may be established by any of the following: (1) a formal policy officially endorsed by the municipality; (2) actions or decisions made by municipal officials with decision-making authority; (3) a practice so persistent or widespread that it constitutes a custom through which constructive notice is imposed upon policymakers; or (4) a failure by policymakers to properly train or supervise their subordinates, such that the policymakers exercised “deliberate indifference” to the rights of the plaintiff (see, e.g., Parker v. City of Long Beach, F. App’x 39, 41).

The plaintiff has failed to provide evidence to demonstrate that the policies or customs under the instant circumstances meet the criteria as set forth above or were violative of his Constitutional rights. The claims for unlawful search and seizure must be dismissed inasmuch as the exigent circumstances justified the actions of the defendant officers, providing one of the exceptions to the general rule that searches and seizures require a warrant (see, Mincey v.

Arizona, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290). In addition, police officer Brennan's entry of plaintiff's home to advise his family of the ongoing situation was not unlawful and did not constitute an invasion of privacy. There is no allegation of physical injury, property damage, injury to Fehring's reputation, or any other result that would be sufficient to support a claim sounding in invasion of privacy.

"The Eighth Amendment's protection against 'cruel and unusual punishment,' . . . applies only to prisoners incarcerated due to a criminal conviction." Lee v. State, Dep't of Corr. Servs., No. 97 CIV. 7112 (DAB), 1999 WL 673339, at \*11 (citing, Graham v. Connor, 490 U.S. 386, 392, 109 S.Ct. 1865, 1869, 104 L.Ed.2d 443 (U.S. 1989)). Since the plaintiff's alleged injuries did not occur subsequent to a criminal conviction, his claims for "cruel and unusual punishment" are dismissed.

Fehring's cause of action based upon defendant's alleged infliction of summary punishment on plaintiff are dismissed since there is "no additional factual detail alleged in support of this cause of action . . . and the claims are duplicative of those asserted in plaintiff's [prior] causes of action." Stone v. Port Auth. of New York & New Jersey, No. 11 CV-3932 SMG, 2014 WL 3110002, at \*7 (E.D.N.Y. July 8, 2014).

The plaintiff has also alleged a §1983 *Monell* claim (Monell v. Dep't of Social Services, 436 U.S. 658, 690-91), contending that the County failed to adequately train and supervise its police officers in the laws of arrests, searches, seizures, and use of force.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Connick v. Thompson, 131 S.Ct. 1350, 1359, 179 L.Ed.2d 417. The plaintiff must "allege facts tending to support, at least circumstantially, an inference that" (i) such a failure to train exists (Santos v. New York City, 847 F.Supp.2d 573, 576), and (ii) that the "failure to train . . . amount[ed] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact,'" Connick, 131 S.Ct. At 1370 (citing City of Canton, Ohio v. Harris, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412). While the plaintiff only alleges the subject incident, "a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy." Ricciuti v. N.Y.C. Transit Auth., F.2d 119, 123 (1991). Where, as here, the plaintiff is unable to establish that the plaintiff suffered a constitutional injury due to the actions of police officers, there is no basis for a *Monell* claim (see, Amato v. City of Saratoga Springs, 170 F.3d 311, 320).

Lastly, under the circumstances presented, the defendants have demonstrated that they are entitled to qualified immunity for their actions. "This entitlement is based on 'sound reasons of public policy' in allowing government officials to execute their duties free from fear or vindictive or retaliatory damage suits." Kelleher v. Town of Southampton, 306 A.D.2d 247, 760 N.Y.S.2d 235.

"Governmental immunity under the decisional law of this State does not attach to every act, but when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant generally is not answerable in damages for the injurious consequences of that action. Whether absolute or qualified, this immunity reflects a value judgment that - despite injury to a member of the public - the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and

retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.” Haddock v. City of New York, 75 N.Y.2d 478, 484.


The concept of governmental immunity for discretionary acts was reaffirmed by the New York Court of Appeals in Valdez v. City of New York, 18 N.Y.3d 69, 960 N.E.2d 356, 936 N.Y.S.2d 587.

Immunity attaches to non-ministerial acts that require the use of reasoned judgment, and where immunity applies there is no tort liability imputed to the municipality even if the alleged conduct is negligent (see, Tango v. Tulevech, 61 N.Y.2d 34, 459 N.E.2d 182, 471 N.Y.S.2d 73). Where discretion is exercised, immunity insulates the defendants from common law liability (see, Harland Enterprises, Inc. v. Commander Oil Corp., 64 N.Y.2d 708, 475 N.E.2d 104, 485 N.Y.S.2d 733). Even if it is determined that probable cause was lacking, an arresting officer is entitled to immunity from suit if he/she can establish that there was “arguable probable cause” to make the arrest (see, Escalara v. Lunn, 361 F.3d 737, 743).

Here, it has been determined that the actions of the defendants in seizing, handcuffing, and transporting Fehring to the hospital for a MHL §9.41 psychological evaluation were reasonable under the circumstances. The defendants are entitled to qualified immunity and the Complaint is dismissed in its entirety.

The foregoing constitutes the Order of this Court.

Dated: May 14, 2020

 Hon. Denise F. Molia  
HON. DENISE F. MOLIA, A.J.S.C. RST