

Butler v City of New York
2020 NY Slip Op 32239(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 157325/2014
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. LAURENCE L LOVE PART 62

Justice

-----X

CATHERINE BUTLER

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 157325/2014

MOTION DATE 10/11/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

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

Upon the foregoing documents, defendant's motion for summary judgment, dismissing this action is decided as follows:

The instant action stems from an alleged shove and verbal abuse by police officers on plaintiff, while arresting a different individual. Plaintiff alleges causes of action for assault and battery; and negligent training, hiring, supervision, and control of the police officers.

Plaintiff commenced this action on or about July 26, 2014. The City of New York joined issue by service of its answer on or about August 13, 2014. A notice of claim was filed on or about August 27, 2013. Plaintiff appeared on November 4, 2013 for a hearing pursuant to General Municipal Law 50-h and testified to the following facts: An incident took place on July 28, 2013 at 9:00 or 10:00 pm at St. Nicholas Park between 133rd Street and 132nd Street in Manhattan, New York. Plaintiff's granddaughter engaged in a hostile, verbal altercation with another person. A crowd gathered around the altercation and plaintiff approached to investigate. Plaintiff observed "shoving and hollering" and that police officers were apprehending her granddaughter, who was on the ground with "her hands ... behind her back." Plaintiff "started screaming...Oh, my God,

that is my granddaughter. The police told me get the F away. I was pushed really hard and I was shoved in my side.” Plaintiff further testified that she was “warned to get back before [she] was pushed.” Plaintiff continued that when she was pushed on her right shoulder, she did not fall to the ground. Plaintiff was not arrested, but her grandson and son were.

On or about September 1, 2016, Lieutenant Edwin Reyes appeared for an examination before trial. Lieutenant Reyes testified that he responded to the altercation and grabbed the two individuals who were fighting and attempted to separate them. Lieutenant Reyes saw another group of individuals fighting, causing another crowd to form. Additional officers were called to the scene to assist in crowd control and in apprehending the aggressors. While attempting to stop the fight, Lieutenant Reyes was pushed and shoved multiple times and ordered everyone to “step back” and “move back.” No one who was pushed fell to the ground. Defendant, the City of New York now moves for summary judgment, dismissing this action.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). 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]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible

form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The common-law “doctrine of governmental immunity” reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts; it further 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 function, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for injury (see *Valdez v City of New York*, 18 NY3d 69 [Ct Appeals 2011]).

Under the “public duty rule,” although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created; this is an offshoot of the general proposition that to sustain liability against a municipality, the duty breached must be more than that owed the public generally (*id.*)

Plaintiff argues that although “[p]olice officers seeking to arrest or detain someone are entitled to use sufficient force they reasonable believe necessary to accomplish that law enforcement goal without being subject to civil assault and battery claims” (see *Holland v City of Poughkeepsie*, 90 ad3D 841, 846 [2nd Dept 2011]) that, “[h]owever, the facts alleged here by plaintiff and defendant do not amount to either an arrest or a detention, so the defense of the reasonableness of the injury as the result of an arrest is inapplicable. Plaintiff further argues that defendant does not even have an immunity, good faith, or justification defense to the plaintiff’s claim.”

Plaintiff appears to be arguing that the officers involved should have arrested or detained plaintiff to avoid the potential of civil litigation. This is clearly an improper message to send and the Court will not entertain such an argument. The facts brought forth by plaintiff’s testimony and the testimony of Lieutenant Reyes show there was an arrest in relation to the incident on July 28, 2013. The plaintiff’s son and grandson were arrested. It is true that plaintiff, herself, was not arrested but the Court in *Holland* states, “police officers seeking to arrest or detain someone.” The language in *Holland* states a very broad application.

It is well-settled that reasonable force used during the course of an arrest is privileged, and claims of assault and battery cannot be sustained absent a showing of excessive force (see *Kramer v City of New York*, 2004 US Dist LEXIS 21914 at *35 [SDNY 2004]). Here, plaintiff’s own testimony was that she was “shoved,” which did not have enough force to even push her to the ground. As such, there can be no showing of excessive force. Further, the police function of determining what actions to take in performing crowd control and responding to criminal activity necessarily requires the use of discretion (see *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]). As such, defendant’s motion must be granted.

ORDERED that defendant's 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.

LAURENCE L. LOVE, J.S.C.

7/10/2020
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: