

**Mackenzie v Victor**

2020 NY Slip Op 32669(U)

August 13, 2020

Supreme Court, New York County

Docket Number: 150343/2014

Judge: Dakota D. Ramseur

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

**PRESENT: HON. DAKOTA D. RAMSEUR PART 5**

-----X	INDEX NO.	<u>150343/2014</u>
LIONEL MACKENZIE,	MOTION DATE	<u>8/11/20</u>
Plaintiff,	MOTION SEQ. NO.	<u>001</u>
- v -		

ERMINDA VICTOR, ERNESTO LEMOS, JOHN DOE 1 50  
FIRST AND LAST NAMES BEING FICTITIOUS, JANE DOE  
1 50 FIRST AND LAST NAMES BEING FICTITIOUS, THE  
CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, CARL FAULCON, MARC GARD SDS,  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number, were read on this motion for summary judgment and/or to dismiss: 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 54

Plaintiff Lionel Mackenzie commenced this tort action to recover damages against Defendants Erminda Victor, Ernesto Lemos, The City of New York and the NYPD, and NYPD employees Officer Carl Faulcon and Sergeant Marc Gard stemming from an incident on January 12, 2012 in which Victor and Lemos accused—falsely, according to Plaintiff—of masturbating in front of two women on the subway, resulting in a physical attack upon, and the arrest of, Plaintiff. The City, NYPD, and Faulcon and Gard move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint, and pursuant to CPLR 3211(a)(7), for failure to state a claim. Plaintiff opposes. For the reasons below, and after remote oral argument on August 11, 2020, the Court grants the motion and directs the Clerk to enter judgment dismissing the Complaint against the City, NYPD, Faulcon, and Gard.

On January 12, 2012, Plaintiff was aboard the uptown A subway train when a man—who Plaintiff learned was Lemos, accused Plaintiff of masturbating in front of two women (*NYSCEF 30/City Exh G/50-h Transcript* [the “50-h”] 8-9). When the train stopped at 181st Street and for the next stops, Lemos requested that subway personnel call the police (*50-h 11:7-25*). Two stops later at Dyckman Street, the train was stopped for about 25 to 30 minutes, during which time Plaintiff and Lemos were on the platform (*50-h 13*). Lemos “rallied up the crowd” of people on the platform, claiming to have captured Plaintiff’s alleged lewd act on his cell phone and miming the act (*50-h 13-15*). Plaintiff, concerned for his safety, also asked onlookers to call the police (*50-h 15:14-23, 16:16*). When Plaintiff tried to film the scene with his own cell phone, it was knocked out of his hand by someone in the crowd; the phone was never found (*50-h 16:23-17:5*). Shortly thereafter, until the police arrived, other people from the crowd physically attached Plaintiff (*50-h 17-19*).

Three undercover officers arrived about 30 minutes later, and Lemos left (50-h 19, 22). According to Plaintiff, the officers made the decision to arrest him—without seeing Lemos’s alleged video—because Victor agreed to press charges on the basis of Lemos’s statement that a video existed (50-h 19-23). Officers brought Plaintiff to the nearest precinct, where he was processed (50-h 23-25, 40-41, 44). After Plaintiff complained of eye pain, officers took him to Harlem Hospital, where he was treated for a fractured orbit (50-h 26-27, 37-38).<sup>1</sup> Plaintiff was thereafter taken to Central Booking, arraigned—where he pled not guilty—and placed under a restraining order limiting contact with Victor before being released on his own recognizance (50-h 28-30, 46). After appearing in court several times, the charges were ultimately dismissed (50-h 31, 42). Plaintiff unequivocally denies any lewd activity (50-h 23:13-19; *see generally* NYSCEF 38 [“*Pl Aff*”]). The video Lemos invoked during the subject events was never produced; it is unclear whether it actually exists.

Plaintiff filed a notice of claim on March 15, 2013 (NYSCEF 24/*City Exh A* [the “Notice of Claim”]).<sup>2</sup> Plaintiff also filed a Summons and Complaint on January 14, 2014 alleging causes of action against the City for (1) assault; (2) battery; (3) intentional infliction of emotional distress; (4) false arrest and unlawful imprisonment; (5) malicious prosecution; (6) negligent hiring, training, and retention; (7) negligence; (8) 42 USC § 1983 violations for false arrest and imprisonment, malicious prosecution and abuse of process, denial of a fair trial, excessive force, and municipal liability (NYSCEF 25/*City Exh B* [the “Complaint”]).

The City now moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint, arguing: (1) that Plaintiff’s claims against the NYPD must be dismissed because the NYPD is a non-jural entity; (2) that all of Plaintiff’s state claims, with the exception of the malicious prosecution claim, should be dismissed for Plaintiff’s failure to timely file a notice of claim; (3) that Plaintiff’s § 1983 claims against the City of New York should be dismissed for failure to plead the allegations with specificity; (4) that Plaintiff’s federal claims against Officer Faulcon and Sergeant Gard should be dismissed pursuant to the qualified immunity doctrine; (5) that Plaintiff’s state and federal false arrest and false imprisonment claims should be dismissed because Plaintiff’s arrest was supported by probable cause; (6) that Plaintiff’s malicious prosecution claim should be dismissed because it was supported by probable cause; (7) that Plaintiff’s state assault and battery and federal excessive force causes of action should be dismissed because there was no use of force by the arresting officers; (8) that Plaintiff’s negligent hiring, training, and retention claim should be dismissed because the officers were acting in the scope of their employment; and (9) that Plaintiff’s intentional infliction of emotional distress claim should be dismissed because such claims cannot be made against governmental bodies and because the arresting officers’ conduct was not objectively outrageous and extreme.

## DISCUSSION

On a CPLR 3211 motion to dismiss, a court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and

<sup>1</sup> Plaintiff acknowledges that his injuries did not stem from his time in police custody, and that he sought only medical, not psychological treatment (50-h 37-38).

<sup>2</sup> Plaintiff’s prior counsel, not moving counsel, filed the Notice of Claim.

determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018]). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” and the court “determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

Summary judgment pursuant to CPLR 3212 is a “drastic remedy” and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant’s initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant’s papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

### ***I. NYPD as a non-jural entity***

The City first argues that Plaintiff’s claims against the NYPD must be dismissed because the NYPD is a non-jural entity. As the City argues, City Charter § 396 provides that “[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law” (*see e.g. Funt v Human Resources Admin. of the City of New York*, 68 AD3d 490 [1<sup>st</sup> Dept 2009] [holding that HRA was not a proper party]). Plaintiff’s only argument in opposition, made without any reference to statutory or precedential support, is that § 1983 claims are the exception to that rule. Numerous courts have held, however, that no such exception exists (*Bailey v NY City Police Dept.*, 910 F Supp 116, 117 [EDNY 1996] [“It has been widely held that because the New York City Police Department is an agency of the City of New York, it cannot be sued independently under § 1983.”]; *accord Waheed v City of NY Gun & License Div.*, 2007 US Dist LEXIS 12010, at \*2 [EDNY Jan. 31, 2007]). Accordingly, all claims against the NYPD are dismissed.

### ***II. Timely notice of claim***

The City next argues that all of Plaintiff’s state claims, except for the malicious prosecution claim, should be dismissed for Plaintiff’s failure to timely file a notice of claim. As the City argues, GML § 50-i(1) provides, in relevant part, that

“No action or special proceeding shall be prosecuted or maintained against a city...for personal injury... alleged to have been sustained by reason of the negligence or wrongful act of such city... or of any officer, agent or employee thereof... unless, (a) a notice of claim shall have been made and served upon the city . . . in compliance with [GML § 50-e]. . .”

GML § 50-e, in turn, provides that notices of claim must be served within “90 days after the claim arises.” “Failure to comply with provisions requiring notice and presentment of claims prior to the commencement of litigation ordinarily requires dismissal” (*Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]). Even timely service of a summons and complaint within the limitations period “does not excuse the failure to file a timely notice of claim” (*Davis v City of NY*, 250 AD2d 368, 369-370 [1st Dept 1998]). Here, with the exception of the malicious prosecution claim, Plaintiff’s 90-day began to accrue, at the latest, upon his release from confinement on January 13, 2012. Thus, Plaintiff had until April 13, 2012 to file a timely notice of claim, or until April 13, 2013, to petition for leave to file a late notice of claim before the 1 year and 90 day limitations period expired (GML § 50-e[5]).

Plaintiff did neither, filing a notice of claim without leave of court on March 20, 2013. Plaintiff’s opposition is limited to two arguments: that § 1983 claims are not subject to the notice of claim requirement (*NYSCEF 39 ¶ 15*), and that the notice of claim was timely with respect to the malicious prosecution claim (*NYSCEF 39 ¶ 102*). The City does not challenge those positions, or indeed even argue for the dismissal of those claims on notice of claim grounds. Accordingly, all of Plaintiff’s state claims, other than the malicious prosecution claim, against the City Defendants are dismissed.

### ***III. Specificity of Plaintiff’s § 1983 claims against the City of New York***

The City next argues that Plaintiff’s § 1983 claims against the City of New York should be dismissed for failure to plead the allegations, as they relate to the City as a municipality, with sufficient specificity. Plaintiff opposes, arguing that the claims are sufficiently specific, or in the alternative that amendment should be permitted.

42 USC § 1983 provides, in relevant part, that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable.

While § 1983 claims against municipalities are permitted, “a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory” (*Monell v Dept. of Social Servs.*, 436 US 658, 691 [1978] [emphasis in original]). Rather, § 1983 “plainly imposes liability on a government that, under color of some official policy, ‘causes’ an employee to violate another’s constitutional rights” (*id.* at 692). Thus, “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983” (*id.* at 694; *accord Higgins v City of NY*, 144 AD3d 511, 513 [1st Dept 2016] [“...the City can be held liable under 42 USC § 1983 only for violating that statute through an unconstitutional official policy or custom.”]).

A municipality can be held liable under § 1983 in four situations: (1) an officially promulgated policy endorsed or ordered by the municipality; (2) a custom or practice that is so pervasive and widespread that the municipality had either actual or constructive knowledge of it; (3) actions taken or decisions made by the municipal employee who, as a matter of state law, is responsible for establishing municipal policies with respect to the area in which the action is taken; or (4) where the failure of the municipality to train its employees rises to the level of deliberate indifference to the constitutional rights of others (*Wahhab v City of NY*, 386 F Supp 2d 277, 284 [SDNY 2005] [collecting cases]). “The mere invocation of the ‘pattern’ or ‘plan’ will not suffice without [a] causal link” (*Batista v Rodriguez*, 702 F2d 393, 397 [2d Cir 1983]; *accord Jackson v Police Dept.*, 192 AD2d 641, 642 [2d Dept 1993]). Failure to “specifically plead the existence of an official policy or custom” which deprived an individual of a constitutional right in violation of 42 USC § 1983 is “fatal to any claim against the municipality” (*Liu v NY City Police Dept.*, 216 AD2d 67, 68 [1st Dept 1995]).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face” (*Ashcroft v Iqbal*, 556 US 662, 678 [2009]). “Although on a motion to dismiss, ... 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” (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). “[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. Tr. Auth.*, 941 F2d 119, 123 [2d Cir 1991]). “[T]he mere assertion...that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference” (*Zahra v Town of Southold*, 48 F3d 674 [2d Cir 1995]). “The inference that a policy existed may, however, be drawn from circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction, or evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation” into the subject allegations (*Ricciuti*, 941 F2d at 123).

In opposition, Plaintiff asserts that the Complaint pled “an official municipal policy” and “that the individual employees, acting under color of state law, were personally involved in the alleged constitutional deprivation” (*NYSCEF 39 ¶ 127*). Specifically, with respect to the Plaintiff argues that he “has alleged that there was an official municipal policy that police officers from the New York Police Department did not rush to the aid of someone who was being accused of committing a sexual crime of some type, here public lewdness,” (*NYSCEF 39 ¶ 134*), and that it was municipal policy to “teach [Plaintiff] a lesson” by allowing the “vigilante mob” to assault Plaintiff before arriving (*NYSCEF 39 ¶¶ 138-140*, citing *Complaint ¶¶ 91-93*). Plaintiff also points to a lengthy list alleged policies amounting to, in Plaintiff’s estimation, an official policy of indifference—“looking the other way”—toward any individual “involved in an alleged sexual crime” (*NYSCEF 39 ¶¶ 143-144*, citing *Complaint ¶¶ 98-107*). As evidence of this alleged policy, Plaintiff cites Sprint records showing that officers arrived 21 minutes after the first 911 calls, and even then arrested only Plaintiff and not the individual(s) who assaulted him; according to Plaintiff, the delay was both significant and evidence of an official policy of delay (*NYSCEF 39 ¶¶ 131-136*, citing *NYSCEF 33/City Exh J* [“the police took their time to come to the scene of the situation, thus causing the plaintiff to be brutally beaten by a vigilante mob”]). As the City argues in reply, however, the relevant inquiry is not the individual officers’ actions in this instance, but the allegation of an official policy beyond “a single incident...especially if it involved only actors below the policy-making level” (*Ricciuti*, 941 F2d at 123; see also *Triano v Town of Harrison*, 895 F Supp 2d 526, 535 [SDNY 2012] [“Plaintiff’s Third Cause of Action, though lengthy, consists of little more than vague, conclusory allegations that the Town permitted, tolerated, and covered up police abuses, while failing to discipline and supervise offending police officers.”]).

To the extent that Plaintiff seeks, in a single paragraph of the entire affirmation in opposition (*NYSCEF 39 ¶ 118*), amendment of the Complaint, the substance of the amendment is unclear and therefore unjustified. To that end, Plaintiff has also not included “the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading” (CPLR 3025[d]). Accordingly, dismissal of Plaintiff’s § 1983 actions against the City is warranted.

#### IV. *Qualified immunity*

“A police officer is entitled to qualified immunity from liability for his discretionary actions if either (1) his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was ‘objectively reasonable’ for him to believe that his actions were lawful at the time of the challenged act (*Cerrone v Brown*, 246 F3d 194, 199 [2d Cir 2001]). An arrest need only be supported by “arguable probable cause” to entitle an officer to qualified immunity as actual probable cause is not required (*id.* at 203 [“It is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable.”]). “Arguable probable cause exists when a reasonable police officer in the same circumstances and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in the light of well established law” (*id.* at 202-203 [emphasis in original]). “Even on summary judgment, where all facts must be viewed in the

light most favorable to the non-moving party, for the purpose of qualified immunity and arguable probable cause, police officers are entitled to draw reasonable inferences from the facts they possess at the time of a seizure based upon their own experiences” (*id.* at 203).

Here, arguable probable cause clearly existed: allegations by numerous complainants, including one claiming—at the time—to have video of the alleged offense. That probable cause *also* existed to arrest other unknown assailants for assaulting Plaintiff does not negate the probable cause to arrest Plaintiff for the separate allegations against him. To the extent that Plaintiff argues that no probable cause existed to arrest Plaintiff, that argument is belied by allegations in Plaintiff’s Complaint: specifically, that Lemos and Victor “caused, created and continued to inform others of incorrect information concerning the Plaintiff’s alleged sexual misconduct on the...subway car;” “were mistaken when they informed others that the Plaintiff allegedly engaged in alleged sexual misconduct activities on the...subway train and/or that a video of the alleged sexual misconduct acts existed;” and “were negligent, careless and reckless when they advised the [City Defendants] and the District Attorney’s office of the alleged sexual misconduct acts of the Plaintiff” (*Complaint* ¶ 75). Indeed, the Complaint states that the City Defendants “justifiably relied upon [Lemos and Victor’s] fraudulent misrepresentations” (*Complaint* ¶ 59). Accordingly, the officers are entitled to qualified immunity and the individual complaints against them are dismissed.

***V. Probable cause as defense to false arrest/imprisonment and malicious prosecution claims***

The City next argues that that Plaintiff’s state and federal false arrest and imprisonment and malicious prosecution claims should be dismissed because Plaintiff’s arrest and prosecution were supported by probable cause.

The elements of false arrest and false imprisonment, also called unlawful detention, are essentially identical in state and federal jurisprudence: (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 (*Broughton v State*, 37 NY2d 451, 456 [1975]; *Jocks v Tavernier*, 316 F3d 128, 134-135 [2d Cir 2003]). With respect to the fourth element, the confinement can be considered privileged based on the existence of probable cause for an arrest, including “evidence of a subsequent arraignment or indictment is admissible as some proof of the presence of probable cause” (*Broughton v State*, 37 NY2d 451, 458 [1975]). Similarly, the elements 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” (*Broughton v State*, 37 NY2d 451, 457 [1975]).

Probable cause “constitutes a complete defense to the allegations of false arrest and imprisonment” and malicious prosecution (*Morel v Crimaldi*, 256 AD2d 188, 189 [1st Dept 1998]; *Broughton*, 37 NY2d at 457). Even the subsequent discovery of additional evidence does not create a cause of action for negligent investigation (*Santiago v City of Rochester*, 19 AD3d 1061, 1062 [4th Dept 2005]; *see also Ricciuti v NY City Tr. Auth.*, 124 F3d 123, 128 [2d Cir 1997] [“Once a police officer has a reasonable basis for believing there is probable cause, he is

not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.”)]. Moreover, arrests, like the one made here, can be based on hearsay, including on information supplied by another person (*People v Moore*, 32 NY2d 67, 69 [1973]; *Draper v US*, 358 US 307 [1959]; CPL § 70.10[2]; *see also People v Phillips*, 120 AD2d 621, 621 [2d Dept 1986] [“A citizen’s reliability, as differentiated from that of a paid or anonymous informant, is assumed, since he could be prosecuted if his report were a fabrication.”]).

In opposition, Plaintiff focuses on the absence of corroborating affidavits or statements and the officers’ difficulty during depositions in recalling conversations with Lemos, Victor, or any other alleged victims of Plaintiff’s alleged transgressions. Plaintiff also highlights the fact that Lemos’s alleged video has never surfaced, and likely does not exist. However, as discussed in the qualified immunity section above, Plaintiff effectively concedes probable cause by alleging in the Complaint that Lemos and Victor’s statements provided probable cause to the arresting officers, which they in turn relied upon to arrest Plaintiff. Accordingly, the unlawful detention and malicious prosecution claims are dismissed on that basis.

#### ***VI. Assault, battery, and excessive force claims***

The City next argues that Plaintiff’s state assault and battery and federal excessive force causes of action should be dismissed because it is undisputed that there was no use of force by the arresting officers. “Where the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, ... [d]etermining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake” (*Graham v Connor*, 490 US 386, 394 [1989]). “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight (*id.* at 396).

As the City highlights in reply, Plaintiff does not dispute that the officers did not actually assault or use excessive force against Plaintiff (50-h 17; *NYSCEF 31/City Exh H/Pl EBT 49*). To the extent that Plaintiff appears to argue that the claims should survive because the Defendant police officers facilitated Plaintiff’s assault by taking too long to arrive at the scene (*NYSCEF 39 ¶ 107*), Plaintiff does not explain how this theory of liability could support state or federal assault, battery, and excessive force claims. Thus, there remains only the limited physical contact with the officers: handcuffing, transport, and processing; even if these caused pain, they are not, absent extenuating circumstances, “severe enough to rise to the level of a constitutional violation” (*Hamilton v Broomfield*, 1998 US Dist LEXIS 352, at \*8 [SDNY Jan. 15, 1998]). Accordingly, Plaintiff’s assault, battery, and excessive force claims against the City Defendants are dismissed.

#### ***VII. Negligent hiring, training, and retention***

The City next argues that Plaintiff’s negligent hiring, training, and retention claims in the eighth cause of action should be dismissed because the officers were acting in the scope of their employment. As the City argues, “generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the

employee’s negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention” (*Karoon v NY City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]). In the absence of any opposition, this branch of the motion is also granted, and the negligent hiring, training, and retention claims are dismissed.<sup>3</sup>

**VIII. Intentional infliction of emotional distress**

The City next argues that Plaintiff’s third cause of action for intentional infliction of emotional distress should be dismissed because such claims cannot be made against governmental bodies and because the arresting officers’ conduct was not objectively outrageous and extreme. As the City argues, “public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity” absent an allegation of “extreme or outrageous conduct which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society” (*Wyllie v DA*, 70 NYS2d 110, 115 [2d Dept 2003]; *Shapiro v County of Nassau*, 202 AD2d 358, 358 [1st Dept 1994]). There is no such allegation made here and, indeed, no opposition at all on this point. Accordingly, the intentional infliction of emotional distress claim is dismissed as against the City Defendants.

**CONCLUSION/ORDER**

For the reasons above, it is

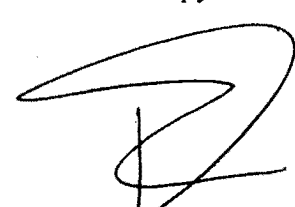
**ORDERED** that the motion to dismiss and/or for summary judgment (001) is **GRANTED** in its entirety, and all claims against the City of New York, New York City Police Department, Carl Faulcon, and Marc Gard are severed and dismissed with prejudice; and it is further

**ORDERED** that the City having been dismissed from this action, the action and surviving claims against the non-City Defendants are respectfully referred to a non-City IAS part; and it is further

**ORDERED** that the City shall, within 30 days, e-file and serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

8/13/20  
DATE

  
\_\_\_\_\_  
DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
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		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

<sup>3</sup> To the extent that Plaintiff argued, at oral argument, that opposition papers did address the City’s negligence and/or negligent hiring, training, and retention argument on page 23, the opposition was conclusory.