McBurnie v City of New York
2020 NY Slip Op 35690(U)
August 31, 2020
Supreme Court, Queens County
Docket Number: Index No. 702613/18
Judge: Kevin J. Kerrigan
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.

FILED: QUEENS COUNTY CLERK 09/01/2020 11:02 AM
INDEX NO. 702613/2018
NYSCEF DOC. NO. 43
RECEIVED NYSCEF: 09/01/2020

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Justice — Part **10**

FILED
9/1/2020
11:02 AM
COUNTY CLERK
QUEENS COUNTY

--X

Brian McBurnie,

Plaintiff,

- against -

The City of New York, Police Officer Diana Vasquez and John and Jane Does - Police Officers as yet unidentified,

Defendants.

--X

Index Number: 702613/18

Motion Date: 8/24/20

Motion Seq. No.: 3

The following papers numbered E21-E42 read on this motion by defendants, The City of New York and Police Officer Diana Vasquez, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits................	E21-37
Affirmation in Opposition-Exhibits....................	E38-41
Reply..	E42

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City and Vasquez for summary judgment dismissing plaintiff's federal and state law claims for false arrest and false imprisonment, federal and state law claims for malicious prosecution, and state law causes of action for negligent hiring and retention and intentional and negligent infliction of emotional distress, and the cause of action for punitive damages, and, pursuant to CPLR 3211(a)(7), to dismiss plaintiff's ostensible federal Monell claim is granted.

Plaintiff alleges that he was falsely arrested on March 29, 2017 inside his basement apartment residence at 117-18 125th Street in Queens County. The arresting NYPD officer, defendant Vasquez, testified in her deposition that she and other officers were dispatched to the subject location and upon arrival met one Ms. Williams who was standing near the side entrance of the house. Vasquez testified that Williams identified herself as plaintiff's landlord and told Vasquez that she feared for her life, informing Officer Vasquez that she had an open police complaint against him. She informed the officers that plaintiff was downstairs, whereupon the officers proceeded down the stairs to the basement. When asked whether Williams made any statements indicating that plaintiff was an immediate threat, Vasquez replied that Williams told her that plaintiff was downstairs and that she was afraid for her life.

Vasquez also testified that she verified that plaintiff had filed a complaint on March 25, 2017 alleging that plaintiff had, on that date, threatened to stab her and her grandchildren and burn down the house, and that she also filed another complaint on March 28, 2017 alleging that after confronting plaintiff about smoking, plaintiff grabbed a knife and pointed it at her and stated that he was going to cut her like a chicken. Vasquez also testified that she had a conversation with Williams about the allegations of her complaints and that Williams reiterated that plaintiff had threatened her with a knife. Copies of plaintiff's complaints are annexed to the moving papers. Plaintiff was thereupon arrested. Vasquez also related that plaintiff was informed as he was being transported to the police precinct that his landlord had made a complaint against him five days prior to his arrest and he replied that he "didn't do it". The arrest report annexed to the moving papers states that plaintiff was charged with a misdemeanor for child endangerment, second degree harassment and third degree menacing. Plaintiff's criminal case was dismissed on December 18, 2017 on speedy trial grounds.

The complaint alleges a first cause of action for assault and battery, a second cause of action for negligent hiring and retention of police officers, a third cause of action for false arrest, a fourth cause of action for false imprisonment, a fifth cause of action for intentional and negligent infliction of emotional distress, a sixth cause of action for malicious prosecution, a seventh cause of action for "civil rights violation" and an eighth cause of action for punitive damages. This Court note, parenthetically, that although the complaint does not specify the basis for his cause of action for civil rights violations, the bill of particulars states that plaintiff is asserting a claim pursuant to 42 U.S.C. §1983.

Plaintiff's counsel, in his affirmation in opposition, does not oppose dismissal of plaintiff's causes of action for negligent hiring and retention and intentional and negligent infliction of emotional distress, but contends that defendants have failed to establish a prima facie entitlement to summary judgment on plaintiff's causes of action for false arrest/false imprisonment, and while conceding that a claim for punitive damages may not be asserted against the City as a matter of public policy, asserts that punitive damages may be asserted against individual police officers. Defendants have not moved for dismissal of plaintiff's cause of action for assault and battery, which, apparently, both sides consider to be a claim alleging excessive force, and which this Court, consequently, deems as alleging excessive force.

As to plaintiff's causes of action for false arrest/imprisonment, a finding of probable cause operates as a complete defense to an action alleging false arrest and false imprisonment (<u>see</u> <u>Carlton v. Nassau County Police Dept.</u>, 306 AD 2d 365 [2nd Dept 2003]). Information provided by an identified citizen accusing another individual of a crime constitutes sufficient

probable cause for the police to arrest, unless under the circumstances a reasonable person would have made further inquiry and the arresting officer failed to do so (see id). Plaintiff was arrested based upon the accusation of an identified citizen who stated that she feared for her life over specific threats made against her and her minor grandchild by him, which threats were the substance of two open police complaints that had been filed by her against plaintiff five days and one day earlier. The March 28, 2017 police complaint indicates that the perpetrator fled and that a canvass was conducted that yielded negative results. Plaintiff informed Vasquez that plaintiff was now in the basement and she feared for her life. Such constituted sufficient probable cause for plaintiff's arrest.

With respect to the cause of action for malicious prosecution, in order to establish a claim for malicious prosecution, a plaintiff must establish, "1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions" (Broughton v State, 37 NY 2d 451, 458 [1975], cert. denied, 423 U.S. 929 [1975]; Rush v County of Nassau, 51 AD 3d 762 [2nd Dept 2008]). Since the record on this motion fails to establish that plaintiff's arrest and prosecution was motivated by actual malice and since this Court has determined that Vasquez had probable cause to arrest him, his cause of action alleging malicious prosecution must be dismissed. Indeed, plaintiff's counsel does not address, and thus offers no opposition, to this branch of the motion.

It is also a well-established principle that no action for negligent hiring, training or supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent hiring, training and supervision would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324).

This principle applies to the instant matter, even as to plaintiff's claims alleging assault. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 AD 2d 777 [2nd Dept 1990]). An assault by a police officer who is engaged in police business may be found to be within the scope of his employment (see generally Garcia v. City of New York, 104 AD 2d 438

[2nd Dept 1984]). And where the employer concedes that its employee was acting within the scope of his employment in the commission of the allegedly tortious act, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]).

Here, the City does not dispute, but concedes that the individual officers were acting within the scope and course of their employment as an NYPD officers when they arrested plaintiff, and indeed, plaintiff alleges in the complaint that they were acting within the scope and course of their employment when they used excessive force to arrest him.

Also, the causes of action for intentional and negligent infliction of emotional distress are not viable, since a cause of action for intentional infliction of emotional distress may not be maintained against a municipality or its employees engaged in official conduct (see Laurer v City of New York, 240 AD 2d 543 [2nd Dept 1997]), and a claim of negligent infliction of emotional distress may also not be maintained since any category of negligence arising from a false arrest claim is subsumed into, and may only be brought, as a false arrest cause of action. Indeed, plaintiff's counsel does not oppose dismissal of the causes of action for negligent hiring and retention and intentional and negligent infliction of emotional distress.

Defendants are also entitled to summary judgment dismissing plaintiff's cause of action alleging "civil rights violation".

The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]). Moreover, a claim under §1983 "by itself creates no independent, substantive constitutional right, but rather serves merely as a vehicle to enforce those rights" (Incorporated Village of Ocean Beach v. Maker Water Taxi, 201 AD 2d 704, 704 [2nd Dept 1994]). Thus, the cause of action in the complaint must not only explicitly specify that it is pursuant to §1983, but it must also set forth the substantive constitutional rights upon which it is based, in order to state a cause of action under 42 U.S.C. §1983 (see id.; Pokoik v. Dept. of Health Service, County of Suffolk, 237 AD 2d 368 [2nd Dept 1997]).

The complaint herein does not include a cause of action under §1983 and, thus, plaintiff's cause of action making the bare allegation that of "civil rights violation" fails to state a cause of action and must be dismissed on this ground alone. Even if, arguendo, the Court were to deem the complaint as seeking damages under §1983 based upon the bill of particulars, neither the

complaint nor the bill of particulars cites any Article, section or Amendment of the Constitution the violation of which is the basis for a cause of action under §1983.

Finally, even if the seventh cause of action actually alleged that it was made pursuant to §1983 based upon violations of specific constitutional rights, a municipality may only be found liable under 42 U.S.C. §1983 where the plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a Constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but can be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, '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" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original).

Plaintiff has failed to show, and there is no evidence on this record to suggest, that the alleged excessive force used against him by defendant police officers (the only surviving cause of action), was as a result of the implementation of an official policy or custom of the City causing plaintiff to be deprived of a constitutional right. Counsel's vague and speculative allegations alleged in the complaint that the City violated plaintiff's civil rights by its policy of knowingly hiring police officers who were unfit and its arrest quota policy that encourages false arrests fails to set forth the required elements of a Monell cause of action. Moreover, since plaintiff does not oppose the dismissal of his causes of action alleging negligent hiring and training and since his causes of action for false arrest and imprisonment are also dismissed, there remains no basis set forth in the seventh cause of action to support a Monell cause of action.

Parenthetically, this Court need not address the City's additional argument that the individual police officer defendants were entitled to qualified immunity insulating them from a claim under §1983, as that argument is moot, since not only has plaintiff failed to allege a cause of action for specific violations of the Constitution pursuant to §1983, alleging merely in bare terms "civil rights violation", but the seventh cause of action is only, ostensibly, a Monell claim against the City only, and does not assert a constitutional cause of action against the individual police officer defendants.

Thus, the seventh cause of action for "civil rights violation" fails to state a cause of action and must be dismissed, as a matter of law.

As to plaintiff's eighth cause of action for punitive damages, such claim is merely an element of damages and not an allegation constituting an independent cause of action (see Stein v Doukas, 98 AD 3d 1024 [2nd Dept 2012]) and thus the eighth cause of action must also be dismissed as failing to state a cognizable cause of action.

Aside from the first cause of action which is deemed to be one alleging excessive force, and which is not the subject of this motion since the City has not moved to dismiss it, plaintiff raises no triable issues of fact in opposition. Plaintiff's counsel's only substantive argument is his unmeritorious contention that there was no probable cause to arrest plaintiff. His additional contention that Vasquez' deposition transcript is inadmissible because it is unsigned is without merit. It is her own deposition transcript being used by her in support of her motion, and therefore, it is irrelevant that her deposition transcript annexed to her moving papers is unsigned by her. Moreover, even if she were not a moving party, her deposition transcript is certified by the reporter and has not been challenged as inaccurate, and, thus, it constitutes admissible evidence (see Rodriguez v Ryder Truck, Inc., 91 AD 3d 935 [2nd Dept 2012]).

Counsel also contends that the complaint reports are inadmissible hearsay because they are uncertified and unauthenticated. Vasquez laid an adequate foundation for their admission in her deposition and, being Omniform police records, they are self-authenticating.

Counsel's final argument is that the motion is premature because discovery has not been completed in that the depositions of the other officers have not been conducted. The mere speculative hope that additional discovery might yield evidence beneficial to plaintiff is not grounds for denial of summary judgment (see JP Morgan Chase Bank v Agnello, 62 AD 3d 662 [2nd Dept 2009]).

Accordingly, plaintiff's second through eighth causes of action alleged in the complaint are dismissed.

Dated: August 31, 2020

KEVIN J. KERRIGAN, J.S.C.

FILED

9/1/2020
11:02 AM

COUNTY CLERK
QUEENS COUNTY