

E.R. v City of New York
2021 NY Slip Op 32098(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 150149/2018
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. LYLE E. FRANK</u></p> <p style="text-align: right; margin-right: 100px;"><i>Justice</i></p> <p>-----X</p> <p>E. R.,</p> <p style="text-align: center; margin-left: 150px;">Plaintiff,</p>	<p>PART</p> <p>INDEX NO. <u>150149/2018</u></p> <p>MOTION DATE <u>N/A</u></p> <p>MOTION SEQ. NO. <u>003</u></p>
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- v -

THE CITY OF NEW YORK, LIEUTENANT SAM RUSSO,
POLICE OFFICER KARIMA HOLMES, POLICE OFFICER
RUTH MATEO, JOHN AND JANE DOES

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This action arises out of allegations by infant plaintiff of assault and battery, false arrest/false imprisonment, negligent hiring and retention, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff, Maria D. Hernandez, alleges loss of services. Defendants, The City of New York, Police Officer Karima Holmes, and Police Officer Ruth Mateo, move for summary judgment on the grounds that the stop was privileged, neither Officer Holmes nor Officer Mateo touched the plaintiff and they were acting within the scope of their employment. Defendant, Lieutenant Sam Russo, cross-moves for summary judgment for the same reasons and alleges that there one only de minimis contact insufficient to sustain assault and battery claims. Plaintiffs oppose both motions. For the reasons set for the below, defendants' motions are granted in part.

Undisputed Facts

On February 7, 2017, at approximately 9:35am plaintiff E.R, 16 years old at the time, and his girlfriend were stopped by Lt. Russo, Police Officer Mateo, and Police Officer Holmes.

Officers stopped plaintiff and his girlfriend as it was a school day, the two people appeared to be under 18 years old, had backpacks on, and were not in school despite most schools starting between 8:00 am and 8:30 am. Officers stopped the police vehicle and called plaintiff and his girlfriend over to their vehicle. After stopping Lt. Russo exited the front passenger side of the vehicle, grabbed, and held plaintiff near the front passenger side seat of the vehicle.

Officer Mateo and Officer Holmes then exited the vehicle from the driver's sides and went to where Lt. Russo was holding plaintiff. At no point did either Officer Mateo or Officer Holmes physically touch plaintiff. Officers then questioned plaintiff about his age, where he went to school, and what time school started.

Plaintiff explained he was sixteen, that he went to CARES High school a few blocks away, and that school started at 9:30 a.m. The officers then allowed plaintiff and his girlfriend to leave the area and walk to school. The entire interaction with officers was a few minutes and at no point was anyone handcuffed or criminally charged.

Applicable Law

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Weiner v Ga-Ro Die Cutting, Inc.*, 104 AD2d 331[1st Dept 1984] *aff'd* 65 NY2d 732 [1985].

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that

deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman*, 3 NY2d 395 [1957]).

Discussion

Defendants have established a *prima facie* entitlement to judgment as a matter of law as to the false arrest/imprisonment claims. The Court agrees with the moving defendants and finds that, based on the undisputed facts in the instant action, the stop of plaintiff was privileged, accordingly there can be no claim for false arrest/imprisonment for the brief confinement of the plaintiff. Plaintiff did not oppose this portion of the motion thus has failed to rebut defendants' *prima facie* showing. Accordingly, all state law and federal law causes of action for false arrest/imprisonment are dismissed.

The Court agrees with the City that Officers Mateo and Holmes were acting within the scope of their employment, thus plaintiff's claims for negligent hiring, training and retention are dismissed. *See Karoon v NY City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997]. Additionally, as to Lt. Russo the City has established that his alleged tortious conduct was unforeseeable, thus the City cannot be liable for negligent hiring and retention. *See Haddock v New York*, 140 AD2d 91 [1st Dept 1988], see also *Gonzalez v City of the NY*, 133 AD3d 65 [1st Dept 2015].

The Court does find however, that there is a question of fact as to the assault and battery claims as they are alleged as against the City of New York and Lt. Russo only. The Court finds that there is a question of fact as to whether the contact made by Lt. Russo was reasonable under the circumstances. The Court declines to make a judicial determination as to the reasonableness

of Lt. Russo's conduct and whether the contact made was privileged, as it is clear that that question is one to be made by a finder of fact, and that is not the Court's role at this juncture. Those claims, however, are dismissed as against Police Officer Karima Holmes, and Police Officer Ruth Mateo as it is undisputed that those officers did not physically touch the infant plaintiff.

It is well established that claims of intentional infliction of emotional distress, against municipalities, are barred as a matter of public policy. *see Dillon v City of NY*, 261 AD2d 34, 41 [1st Dept 1999] internal citations omitted. As to the remaining defendants, the Court finds that plaintiff's cause of action sounding in intentional infliction of emotional distress is duplicative of the intentional torts already sufficiently pled in the complaint. Moreover, the plaintiff does not cite to any additional facts that are not already encompassed by the Additionally, while the intentional infliction of emotional distress cause of action is barred, the negligent infliction of emotional distress cause of action survives as to Lt. Russo only as a possible alternative theory of liability.

As to plaintiff Hernandez's loss of services and society claim, the record before this Court is insufficient to support sustaining that cause of action. The record lacks testimony or any other evidence to substantiate those claims, therefore that cause of action is dismissed. Moreover, plaintiff's cause of action for punitive damages is also dismissed. It is well settled that punitive damages are not a cognizable claim rather an element of the total damages. *See Jean v Chinitz*, 163 AD3d 497, [1st Dept 2018]. Accordingly, it is hereby

ORDERED that the first cause of action in the complaint is dismissed as to defendants Police Officers Karima Holmes and Ruth Mateo only; and it is further

ORDERED that the second, third, fifth, sixth and seventh¹ causes of action in the complaint are dismissed in their entirety; and it is further

ORDERED that the fourth cause of action of intentional infliction of emotional distress in the complaint is dismissed in its entirety; and it is further

ORDERED that the fourth cause of action of negligent infliction of emotion distress is dismissed as to all defendants except Lieutenant Sam Russo; and it is further

ORDERED that the caption be amended and shall now read:

_____x
 E. R., AN INFANT BY HIS MOTHER AND
 NATURAL GUARDIAN, MARIA D. HERNANDEZ,
 Plaintiff,
 - v -
 THE CITY OF NEW YORK AND LIEUTENANT SAM RUSSO,
 Defendants.
 _____x ; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

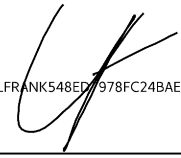
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

¹ As plaintiff has not adequately pled a 'Monell' claim and the federal caused of action of false arrest and imprisonment are dismissed, this cause of action is dismissed.

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


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10/28/2021
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE