

**Vazquez v City of New York**

2021 NY Slip Op 33160(U)

November 22, 2021

Supreme Court, Queens County

Docket Number: Index No. 720216/20

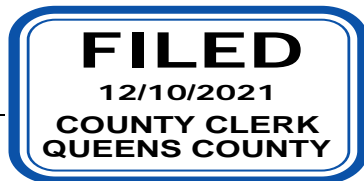
Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Justice

Part 10

-----X

Eva Vazquez,

Index Number: 720216/20

Plaintiff,

- against -

Motion Date: 11/8/21

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

Motion Seq. No.: 7

Defendants.

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The following papers numbered E26-E46 & E48-E57 read on this motion by defendant, The City of New York, for summary judgment.

Papers Numbered

Table with 2 columns: Paper Title, Paper Number. Includes Notice of Motion-Affirmation-Exhibits (E26-46), Affirmation in Opposition-Exhibits (E48-56), and Reply (E57).

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

Motion by defendant City of New York ("City"), for an order pursuant to CPLR §3212(a) dismissing plaintiff's remaining claims is granted.

The portion of City's motion to dismiss the plaintiff's causes of action for malicious prosecution, intentional and negligent infliction of emotional distress, punitive damages, and all federal § 1983 claims, is granted without opposition of plaintiff.

Plaintiff, in her opposition to City's motion expressly states, in salient part, 'It should be noted that based on the evidence adduced in this case, plaintiff does not oppose the portions of the City's motion which seeks to dismiss the following causes of action: malicious prosecution, intentional and negligent infliction of emotional distress, punitive damages, and all federal § 1983 claims.'

The branch of City's motion for dismissal of plaintiff's remaining claims, namely, plaintiff's state law claims for assault and battery, and excessive use of force and false arrest, and false imprisonment is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of an occurrence on September 11, 2015, inside 160-20 Shore Front Parkway, Apartment 6H, County of Queens, the ("Premises"), in which members of the New York City Police Department ("NYPD") are alleged to have assisted in having plaintiff involuntarily removed to a hospital for psychiatric evaluation.

On September 29, 2015, plaintiff filed a notice of claim.

On July 11, 2016, plaintiff commenced this action by serving upon City a summons and complaint.

On July 20, 2016, City interposed a verified answer and demand for a verified bill of particulars.

On November 12, 2019, City filed a motion for summary judgment, which due to defects in the filing, City re-filed on December 28, 2020.

In support of its motion City submits, inter alia, the affirmation of its attorney, the pleadings, transcripts of the 50-h hearing and EBTs of plaintiff and of NYPD Officers Ronan, Knight, Santaniello, Bazarewski, Prehospital Care Report Summary, and a Sprint Report Chronology.

In opposition to the remaining branch of City's motion, plaintiff submits, the affirmations of her attorney dated February 24, 2020 and a second affirmation dated October 11, 2021, which affirmation avers that there exist "significant questions of fact as to plaintiff's state law claims for assault and battery/excessive use of force and false arrest/ false imprisonment."

On September 11, 2015, Officers Ronan and Santaniello responded to a call regarding an 'emotionally disturbed person ("EDP") at the Premises. On arrival, they spoke with plaintiff's husband, who gave them permission to enter the Premises and told them plaintiff had been in the bedroom for hours and that he was worried about her.

Upon examination, the door to the bedroom was found to be locked and Officers Ronan and Santaniello got permission from plaintiff's husband to knock down the door. Plaintiff was not in the bedroom but the officers heard running water in the bathroom adjoining the bedroom. The officers banged on the door and received no response. The officers received permission from plaintiff's husband to break the bathroom door down. The officers saw the lights in the bathroom were off and plaintiff was in the bathtub.

Plaintiff was uncooperative, refused to answer officers' questions about her well being, and became angry when officers told her that she would need to be removed to a hospital. Police told

plaintiff this was necessary based on the officers' observations of plaintiff and because her husband reported that she may have intended to harm herself. The officers noted their concern regarding plaintiff's behavior, her irrational response to officers' presence at the scene and statements to the effect of "leave me alone, I just want to die, I hate my husband" and "I wish I were dead". Plaintiff also stated she "doesn't care about life." Sergeant Knight testified that his determination that plaintiff was an EDP was based on plaintiff's statements, including, in substance, that she was going to kill herself or "so what if I want to kill myself."

Before the officers attempted to remove plaintiff from the bathtub, Sergeant Knight asked plaintiff if she was 'going to be violent' if officers tried to remove plaintiff from the bathtub and plaintiff responded that she would be violent.

While attempting to remove plaintiff from the bathtub, Officer Ronan held plaintiff's ankles while Officer Santaniello held one of plaintiff's arms. These officers were also assisted by Sergeant Knight. Officers lifted plaintiff out of the bathtub and sat her down in a foldable chair used by Emergency Medical Services ("EMS") for transportation of individuals.

After being removed from the bathtub plaintiff was, as described by officers, "physically aggressive" and was "physically trying to grab onto anything" while the officers were trying to transfer and secure plaintiff into the EMS chair. It was at this time that plaintiff kicked Officer Santaniello between his legs necessitating Sergeant Knight to deploy a taser, and the two prongs of which that were ejected from the taser made contact with the right side of plaintiff's back.

Plaintiff was then placed on a stretcher, and when officers covered her with a sheet while she was on the stretcher, plaintiff kicked and pulled the sheet off her body and was threatening to the officers, and demanding that they take the handcuffs off her.

On this record the evidence plainly demonstrates that the officers' entry into plaintiff's residence in response to a call for assistance from her husband was lawful. The evidence further demonstrates that the decision to have plaintiff removed to a hospital for a psychiatric evaluation as an EDP was objectively reasonable based on information conveyed to officers by plaintiff's husband and, based on officers' own observations of plaintiff's behavior at the scene and statements made by plaintiff which indicated an intention to harm herself. The behavior by the officers was required for protection of plaintiff from herself. The evidence demonstrates that the officers' use of force, including the use of a taser to subdue plaintiff, who was behaving in a violent and aggressive manner, was reasonable and justified.

The City filed another motion for summary judgment, on July 23, 2021. The Court notes that, during the time of filing and subsequent re-filing, the New York City Law Department was required to work remotely, on a near-universal basis and City's attorney affirmation states that this contributed to a delay in re-filing the papers. On this record, the filing of the motion by City is deemed timely, and clerical error, by City and its interaction with the County Clerks' Office, delayed City in the re-filing of its motion. The Court notes that this reasonable delay caused no prejudice to plaintiff, and plaintiff has by expressing no opposition to several causes of action being dismissed as a result of the motion, has essentially waived the right to complain about the lateness of the motion.

Plaintiff's opposition regarding the untimely filing of the motion is unpersuasive, and in light of plaintiff's consent to the granting of the substance of the motion, the opposition is disingenuous.

Plaintiff's note of issue and certificate of readiness was filed with the Court on July 15, 2019; therefore, the last day to timely file a summary judgment was November 12, 2019- the date on which City filed its motion for summary judgment. The City's motion was therefore timely.

Thereafter, the City failed to complete a motion submission form, and accordingly the motion was "marked off" the calendar by this Court on March 1, 2021. The timely motion by City was not considered by the Court and was not disposed of on the merits.

The Court has broad discretion in determining whether a party who has filed a late motion for summary judgment has established good cause for the delay, and its determination will not be overturned unless it is improvident. (See Lewis v. Rukovsky, 153 A.D.3d 450 [2017]).

Pursuant to CPLR 3212(a) the Courts can extend the time to move for summary judgment upon a showing of good cause for the delay in making the motion, that is, a satisfactory explanation for the untimeliness. (See Brill v. City of New York, 2 NY3d 648 (2004). In the instant matter the Court considers the reason for the delay, and prejudice, if any, caused to plaintiff by the delay. The Court notes the confluence of factors leading to the clerical delay by defendants, such as the conversion of the matter from the prior paper system of filing to the present e-filing system, coupled with the remote working requirements on state and city offices. It is of particular note that the complete absence of prejudice to plaintiff, the meritorious defenses of substance proffered by defendant and, as here, a prompt decision on a meritorious motion, serves the interests of judicial economy and, further, where plaintiff has not even alleged, let alone demonstrated, prejudice. (See Bajjnauth v. City of New York, 286 A.D.2d 254, 728 N.Y.S.2d 665; Goodman v. Gudi, 264 A.D.2d 758, 695 N.Y.S.2d 576)

The City contends that it is entitled to summary judgment because there was probable cause for having plaintiff, an EDP, involuntarily removed to a hospital for psychiatric evaluation, and the Court agrees. The Court notes, in this regard, that a finding of probable cause operates as a complete defense to an action alleging false arrest and false imprisonment (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2<sup>nd</sup> Dept 2003]). The City has demonstrated that there was probable cause to take plaintiff into custody so as to entitle it to summary judgment as a matter of law, based upon the record on this motion.

With respect to plaintiff's claims of intentional infliction of emotional distress, such a cause of action requires allegations of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society" (Berrios v Our Lady of Mercy Medical Center, 20 AD 3d 361, 362 [1<sup>st</sup> Dept 2005] [citations and internal quotations omitted]). The allegations of the complaint, and the record on this motion, do not support a claim for intentional infliction of emotional distress against the defendant officers. With regard to the City and the office of the District Attorney, such a claim may not be brought against a municipality (see Clark-Fitzpatrick, Inc. V. Long Island Railroad, 70 NY 2d 382 [1987]). With respect to plaintiff's cause of action for negligent infliction of emotional distress, such cause of action also requires allegations of outrageous and extreme conduct (see Berrios v Our Lady of Mercy Medical Center, supra). The allegations of the complaint, and the record on this motion, do not support a claim for either intentional or negligent infliction of emotional distress.

Without merit also are plaintiff's causes of action for excessive force. No evidence whatsoever is proffered that excessive force was used against plaintiff or that she sustained any injury as a result of the reasonable and necessary force that may have been used to recover her from the scene and remove her to the hospital for care. Further, since there was ample probable cause for the use of limited and non-lethal force reasonably necessary to subdue plaintiff in order to take plaintiff into custody as an EDP, and to have plaintiff involuntarily removed to a hospital for psychiatric evaluation, her claims of assault and battery and excessive use of force stemming from her being subdued by the use of the tazer and then being handcuffed, alleging outrageous conduct based upon her allegation that City and un-named defendant officers arrested and detained her without probable cause, must also fail as a matter of law.

In order to obtain summary judgment, movants must make a prima facie showing that they are entitled to said relief, by tendering sufficient proof, in admissible form, to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Defendant City has met this burden.

If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v. City of New York, 49 N.Y.2d 557).

In their opposition to the instant motion, plaintiff, has not shown the existence of material issues of fact by producing evidentiary proof in admissible form to defeat summary judgment.

Accordingly, the motion by City for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted.

Dated: November 22, 2021



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KEVIN J. KERRIGAN, J.S.C.

