

Desouza v City of New York
2022 NY Slip Op 30805(U)
March 10, 2022
Supreme Court, Kings County
Docket Number: Index No. 504838/2017
Judge: Consuelo Mallafré Meléndez
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 20

ANWAR DESOUZA,

Index No. 504838/2017
DECISION AND ORDER

Plaintiff,

-against-

CITY OF NEW YORK, DETECTIVE NIURCA
QUTNONES (SHIELD NO. 3310) POLICE OFFICER
JESSTCA FUENTES (SHIELD NO. 17413) POLICE
OFFICER, TESSICA FTERRERA (SHIELD NO. 14413),
Individually and as Employees of The NEW YORK CITY
POLICE DEPARTMENT, "JOHN/JANE DOE
CORRECTION OFFICERS 1-10" (fictitious names, the
true names being unknown at this time), Individually and as
Employees of the NEW YORK CITY CORRECTION
DEPARTMENT and ASSISTANT DISTRICT
ATTORNEY LAUREN F. SILVER, Individually and as an
Employee of the KINGS COUNTY DISTRICT
ATTORNEY'S OFFICE,

Defendants.

CONSUELO MALLAFRE MELENDEZ, J.:

The court's Decision and Order is based upon consideration of the following papers:
CPLR 2219(a) Recitation: NYSCEF Numbers: 53-66; 111-123; 138-140.

Plaintiff brought forth this action for state and federal claims stemming from arrests on
criminal charges on July 18, 2013, and in October of 2015. Plaintiff claims to have suffered,
inter alia, false arrest, false imprisonment, illegal search and excessive use of force by members
of the New York City Police Department (hereinafter "NYPD") as well as malicious prosecution
by the Kings County District Attorney's Office. Defendant City now moves to dismiss all of
Plaintiff's state and federal law claims pursuant to CPLR 3211(a)(5) and (7). The court notes
that during oral arguments, Plaintiff advised the court that he voluntarily withdraws all state law
claims relating to the 2015 arrest, but not the federal claims under USC §1983. The court also
made the following rulings from the bench during oral arguments: the court granted Defendant's

motion to dismiss Plaintiffs claims for the following: negligent hiring, retention, supervision and training; negligence; intentional infliction of emotional distress; and cruel and unusual punishment under the Eight Amendment of the United States Constitution. The court denied without prejudice Defendant's motion to dismiss the following as premature: Plaintiff's Monell and due process violation claims and bifurcation of Plaintiff's Monell claims. The court rules on the remaining issues below.

The court finds that Plaintiff's state and federal malicious prosecution claims brought against Assistant District Attorney (ADA) Lauren F. Silver in both her individual and official capacity must be dismissed under the doctrine of absolute immunity (see *Imbler v. Pachtman*, 424 U.S. 409 [1976]). It is well settled that "[p]rosecutors receive absolute immunity from suit under § 1983 when they engage in "advocatory conduct that is 'intimately associated with the judicial phase of the criminal process'" (*D'Alessandro v. City of New York*, 713 Fed. Appx. 1, 5 [2d Cir. 2017] [internal citations omitted]). This immunity extends to claims brought under New York State law: "a prosecutor is entitled to absolute immunity for actions taken within the scope of his or her official duties in initiating and pursuing a criminal prosecution and in presenting the People's case" (*Spinner v. County of Nassau*, 103 A.D.3d 875, 877 [2d Dept. 2013]). The public policies underlying this doctrine "arise out of the general common-law 'concern that harassment by unfounded litigation' could both 'cause a deflection of the prosecutor's energies from his public duties' and also lead the prosecutor to 'shade his decisions instead of exercising the independence of judgment required by his public trust'" (*Van De Kamp v. Goldstein*, 555 U.S. 335, 342 [2009] quoting *Imbler v. Pachtman*, 424 U.S. 409 at 423).

Here, based on the allegations in Plaintiff's Complaint, ADA Silver is entitled to absolute immunity as her alleged conduct fell within the scope of her prosecutorial functions: "a

prosecutor unquestionably acts as an advocate—and therefore receives absolute immunity—when she initiates and pursues a criminal prosecution” (*D’Alessandro v. City of New York*, 713 Fed. Appx. 1 at 5 [internal citation omitted]). Even when taken as true for purposes of determining Defendant’s motion to dismiss, the allegations in Plaintiff’s complaint regarding ADA Silver’s conduct are insufficient to defeat the privilege of absolute immunity doctrine (see *Wyllie v. District Attorney of County of Kings*, 2 A.D.3d 714 [2d Dept. 2003]; *Shmueli v. City of New York*, 424 F.3d 231, 236 [2d Cir. 2005] [“the nature of that function is often clear from the face of the complaint. In that circumstance, the absolute immunity defense may be resolved as a matter of law on a motion to dismiss...”]). The immunity extends to “acts [a prosecutor] undertakes ‘in preparing for the initiation of judicial proceedings or for trial...’ within the scope of [her] prosecutorial duties” (*Id.* at 5 [internal citations omitted]).

In opposition, Plaintiff’s arguments concerning qualified immunity are misguided. It is true that the privilege of absolute immunity will not apply to prosecutors for certain actions taken outside their roles, such as those that are investigative in nature (see *Barr v. Abrams*, 810 F.2d 358 [2d Cir. 1987]). However, Plaintiff does not make any such allegations as the alleged misconduct occurred during the commencement and continuation of Plaintiff’s prosecution, after Plaintiff’s arrest. Therefore, a qualified immunity analysis is not applicable as the claims of misconduct in Plaintiff’s complaint fall within the scope the quasi-judicial prosecutorial functions protected under absolute immunity. Accordingly, Defendant’s motion to dismiss all of Plaintiff’s claims against ADA Silver are dismissed.

The court also finds that Plaintiff’s federal claims related to his 2015 arrest must also be dismissed under CPLR 3211(a)(5) and (7). Pursuant to Plaintiff’s 50-h testimony, Plaintiff pled guilty to the petit larceny charge from his October of 2015 arrest. This negates a finding that the

proceeding terminated in his favor which is an essential element Plaintiff must prove in order to prevail on his federal malicious prosecution, false arrest and false imprisonment claims. “The elements of the tort 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 of New York*, 37 NY2d 451, 457 [1975], cert denied 423 US 929 [1975] [emphasis added]).

The guilty plea is similarly fatal to Plaintiff’s false arrest and imprisonment causes of action. “Under New York law, false arrest and false imprisonment claims are ‘synonymous’” (*Lluberes v. City of Troy*, 2014 WL 1123413, 15 [N.D.N.Y 2014]). To establish a cause of action for false imprisonment and arrest, a plaintiff must show that “(1) the defendant intended to confine him, (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 of New York*, 37 NY2d 451 at 457).

“The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether that action is brought under state law or under § 1983.” *Jenkins v. City of New York*, 478 F.3d 76, 84 (2d Cir.2007) (internal quotation marks and citation omitted). Generally, a guilty plea is equivalent to a conviction, *Saddler v. United States*, 531 F.2d 83, 85 (2d Cir.1976) (citation omitted), and does not change the application of the Heck rule, *Magnotta v. Putnam Cnty. Sheriff, No. 13–CV–2732 (GBD/GWG)*, 2014 WL 705281, at *5 (S.D.N.Y. Feb. 24, 2014) (collecting cases). “By pleading guilty ... [a] plaintiff necessarily acknowledge[s] that he was engaged in some unlawful activity for which the police could properly take him into custody.” *Harris*, 2013 WL 4858333, at *4 (citation omitted) (*Lluberes v. City of Troy*, 2014 WL 1123413 at 15).

The law generally requires that the guilty plea be vacated in order to bring forth state and federal challenges to the validity of an arrest:

“We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983” (*Heck v. Humphrey*, 512 U.S. 477, 487 [1994]).

In his opposition, Plaintiff argues that he has raised an exception to this rule based on his allegations of malicious prosecution for failure to turn over exculpatory evidence and for lack of probable cause. However, these arguments relate to his 2013 arrest for which charges were ultimately dismissed, not the 2015 arrest for which he plead guilty. Further, Plaintiff does not deny that he did in fact plead guilty to the 2015 petit larceny charge. Rather, he asserts that Defendant cannot use the 50-h testimony to establish his guilty plea because the 50-h transcript is not signed. However, in response to this argument, Defendants provide a signed copy of the 50-h testimony in their reply papers. While a party may not raise new arguments in reply papers, here Defendants submitted the signed 50-h transcripts in direct response to the arguments raised in Plaintiff's opposition (*David v. Chong Sun Lee*, 106 A.D.3d 1044 [2d Dept. 2013]; *Baptiste v. Ditmas Park, LLC*, 171 A.D.3d 1001 [2d Dept. 2019]).

Defendant's motion to dismiss Plaintiff's claims as untimely pursuant to CPLR 3211(a)(5) is denied. Defendant failed to raise the affirmative defense of statute of limitations defense in either its original Answer dated March 31, 2017, its first Amended Answer dated June 12, 2017 and second Amended Answer dated August 14, 2017. “The statute of limitations is an affirmative defense which is waived by a party unless it is raised either in a responsive pleading, or by motion prior to the submission of a responsive pleading” (*352 Legion Funding Assoc. v.*

348 Riverdale, LLC, 164 A.D.3d 551, 552-553 [2d Dept. 2018]; [internal citations omitted]; see CPLR 3211 [e]).

Based on the foregoing, Defendant’s motion to dismiss Plaintiff’s complaint pursuant to CPLR 3211(a)(5) and (7) is decided as follows:

Defendant’s motion to dismiss all of Plaintiff’s federal claims stemming from his 2015 arrest is GRANTED. Plaintiff voluntarily withdraws all state law claims relating to the 2015 arrest.

Defendant’s motion to dismiss all of Plaintiff’s state and federal claims against ADA Lauren Silver in both her individual and official capacity is GRANTED, and

As provided above, Defendant’s motion to dismiss Plaintiff’s claims for negligent hiring, retention, supervision and training; negligence; intentional infliction of emotional distress; and cruel and unusual punishment under the Eight Amendment of the United States Constitution is GRANTED, and


Defendant’s motion to dismiss Plaintiff’s state and federal law claims relating to his 2013 arrest based on Statute of Limitations is DENIED, and

Plaintiff’s malicious prosecution claim against Defendant the King’s County District Attorney’s Office is DENIED.

This constitutes the decision and order of the Court.

Dated: March 10, 2022
Brooklyn, NY

ENTER.



Hon. Consuelo Mallafre Melendez
J. S. C.