SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART** 05RCP

Justice

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OSAMA METWALLY,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POM. ROBERT ANZALONE, POM. MARTIN FOGARTY, SGT. HORSHAM "DOE," LT. GARCIA, JOHN DOES #1-5 (SAID NAMES BEING FICTITOUS, THE INTENT OF PLAINTIFF BEING TO DESIGNATE ALL POLICE OFFICERS INVOLVED OR PRESENT AT THE SCENE OF THE INCIDENT, AND "OTHER POLICE OFFICERS UNKNOWN"), ALBERTO WEIS, YEHYA ABDEEN, FLEET RADIO DISPATCH,

Defendants.

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INDEX NO. 450863/2016

MOTION DATE 02/10/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 110, 112, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 126

were read on this motion for DISMISSAL/SUMMARY JUDGMENT .

Plaintiff brings this action against defendants the City of New York (the "City"), the New York City Police Department ("NYPD"), and NYPD officers Robert Anzalone, Martin Fogarty, Kelly Horsham, and Kim Garcia (collectively, with the City and NYPD, the "City Defendants"), as well as Alberto Weis, asserting claims for, inter alia, negligence, false arrest, and malicious prosecution. The City Defendants now move, pursuant to CPLR §§3211 and 3212, to dismiss the complaint as well as Weis's cross-claims against them. For the reasons set forth below, the City Defendants' motion is granted.

Plaintiff's complaint alleges that on March 20, 2015, plaintiff, a taxi driver, was rear-ended by defendant Weis at the intersection of 63rd Street and Park Avenue, New York, New York (NYSCEF Doc. No. 1 [Complaint at ¶¶25, 31]). After the collision, plaintiff and Weis exited their vehicles and began arguing, eventually engaging in a physical altercation (Id. at ¶¶32-34). After plaintiff and Weiss were separated, plaintiff called the police (Id. at ¶35).

Thereafter, police officers arrived at the collision site and asked plaintiff for an account of the incident (Id. at ¶42). After plaintiff provided an "accurate account of the incident" these officers arrested him (Id. at ¶¶41, 42, 45). Plaintiff was subsequently charged with five counts of assault, including Assault in the Second Degree, two counts of Assault in the Third Degree, Attempted Assault in the Third Degree, and Harassment in the Second Degree (Id. at ¶50; NYSCEF Doc. No. 87 [Criminal Court Complaint]). A grand jury indicted plaintiff on charges of Assault in the Second Degree (NYSCEF Doc. No. 88 [Grand Jury Indictment]). On April 13, 2016, plaintiff was acquitted after a trial (NYSCEF Doc. Nos. 90 [Metwally EBT at p. 152, 154]).

Prior to his acquittal, plaintiff commenced this action against the City Defendants, Weis, Yehya A. Abdeen, and Fleet Radio Dispatch Corp[1] on March 15, 2016, asserting causes of action for: (1) false arrest and false imprisonment; (2) malicious prosecution; (3) assault; (4) battery; (5) failure to intervene; (6) negligence; (7) negligent infliction of emotional distress; (8) intentional infliction of emotional distress; (9) negligent hiring, retention, training, and supervision; (10) violation of civil rights under 42 U.S.C. §§1983 and 1985; and (11) attorney fees pursuant to 42 USC §1988.

By Stipulations of Partial Discontinuance dated September 17, 2019, and June 8, 2022, plaintiff discontinued his claims for battery, excessive force, negligent and intentional infliction of

[1] By stipulations dated June 10, 2016 and October 27, 2016, plaintiff discontinued all claims against defendants Fleet Radio Dispatch Corp and Yehya A. Abdeen (NYSCEF Doc. Nos. 3 and 29).

emotional distress, and civil rights violations under 42 U.S.C §§1983 and 1985, as against the City Defendants (NYSCEF Doc. Nos. 127 and 128 [Stipulations of Partial Discontinuance]), leaving only his claims for: (1) false arrest and false imprisonment; (2) malicious prosecution; (3) failure to intervene; (4) negligence; (5) negligent hiring, retention, training, and supervision; and (6) attorney's fees pursuant to 42 USC §1988. On July 21, 2016, defendant Weis interposed an answer asserting cross-claims against the City Defendants for indemnification and contribution (NYSCEF Doc. No. 83 [Weis Answer]).

The City Defendants now move for an order: (1) pursuant to CPLR §§3211(a)(5), dismissing plaintiff's complaint as barred by a release executed by plaintiff in an unrelated action in Supreme Court, Queens County; (2) pursuant to CPLR §3211(a)(7), dismissing plaintiff's claims for malicious prosecution, negligence, negligent hiring, retention, training and supervision, and attorney fees under 42 USC §1988; and (3) pursuant to CPLR §3211(a)(8), dismissing plaintiff's claims against the NYPD on the grounds that it is a non-suable entity. The City Defendants also move for summary judgment dismissing plaintiff's claims for false arrest and imprisonment, malicious prosecution, and failure to intervene as well as Weis's cross-claims against them.

In support of their CPLR §3211 motion, the City Defendants submit a General Release (the "Release") executed by plaintiff in connection with a false arrest action plaintiff commenced in Supreme Court, Queens County under index number 705076/2017, captioned Osama E. Metwally v The Port Authority of New York and New Jersey, Port Authority Police Department, Detective William Prentice, and City of New York (the "Queens County Action") (NYSCEF Doc. No. 99 [General Release]).

The Release, which was executed on January 9, 2020, provides, in pertinent part, that plaintiff:

> in consideration of the payment of Eighteen Thousand Dollars ($18,000.00), receipt whereof is hereby acknowledged, does hereby release and forever discharge the City of New York… from any and all state and federal tort claims, causes of action, suits, occurrences, and damages, whatsoever, known or unknown, including but not limited to state and federal civil rights claims, actions, and damages, which [Metwally] had, now has, or hereafter can, shall, or may have … for, upon or by reason of any above-stated matter, cause, or thing whatsoever that occurred through the date of this RELEASE, except as indicated below, if applicable.

(NYSCEF Doc. No. 99 [General Release] [emphasis added]).

The Release further directed plaintiff to

> LIST BELOW THE EXLUSION OF OTHER ACTIONS OR CLAIMS FROM THIS RELEASE. DO NOT INSERT THE SUBJECT ACTION. **ALL OUTSTANDING ACTIONS OR CLAIMS ARE INCLUDED IN THIS RELEASE UNLESS EXCLUDED SPECIFICALLY BY NAME BELOW.** LEAVE THE SPACE BELOW BLANK IF NOT APPLICABLE

(Id. [emphasis added]). The executed Release does not list any other actions as exempted from its terms (Id.). The City paid plaintiff $18,000.00 pursuant to the Release on April 14, 2020 (NYSCEF Doc. No. 77 [Traolli Affirm. at ¶13]).

In support of the branch of their motion for summary judgment dismissing this action, the City Defendants submit, inter alia, the affidavit of Officer Martin Fogarty, in which he attests that he and Officer Anzalone reported to the scene of the incident in response to a radio dispatch reporting a car accident and a physical assault in progress (NYSCEF Doc. No. 95 [Fogarty Affidavit ¶3]). Upon arrival, Fogarty noticed that Weis' eye was bruised, swollen, and bleeding (Id. at ¶4]). Weis told Fogarty that he was involved in a physical altercation with plaintiff (Id.) Anzalone and Fogarty left the scene of the collision to follow the ambulance taking Weis the hospital to obtain a statement from Weis (Id. at ¶5]). When they returned to the scene of the

accident, Jose Torres, a doorman who worked in the vicinity, told Fogarty that he witnessed plaintiff striking Weis in the head (Id. at ¶6).

The City also submits the transcript of Robert Anzalone's examination before trial ("EBT") in which he states that he observed Weis's facial injuries but did not speak with Weis (NYSCEF Doc. No. 91 [Anzalone EBT at pp. 19-20, 37]). Anzalone further testified that he spoke with plaintiff at the scene of the accident, and plaintiff acknowledged that he had been in a fight with Weis but stated that Weis had started the fight (NYSCEF Doc. No. 91 [Anzalone EBT at pp. 20-22]).

DISCUSSION

As a preliminary matter, the City Defendants' motion to dismiss this action is granted as to defendant NYPD, without opposition, as the NYPD is a non-suable entity pursuant to Chapter 17, section 396 of the New York City Charter (See Troy v City of New York, 160 AD3d 410, 411 [1st Dept 2018]).

Plaintiff's claims against the remaining City Defendants are also dismissed, as barred by the Release[2]. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release. A release "is a jural act of high significance … [and] [w]here the language is clear and unambiguous, the release is binding on the parties unless it is shown that it was procured by fraud, duress, overreaching, illegality or mutual mistake" (Allen v Riese Org., Inc., 106 AD3d 514, 516 [1st Dept 2013] [internal citations and quotations omitted]). Plaintiff does not dispute that the plain language of the Release—encompassing "any and all state and federal

[2] The City Defendants did not include the affirmative defense of release in their answer. This omission is, however, explained by the fact that the Release was only executed after the interposition of their answer. Since this defense "would be permissibly asserted in an amended answer…the most efficacious course is to deem it asserted, *nunc pro tunc* … [rather than require a] motion for leave to amend the answer" (Ficorp, Ltd. v Gourian, 263 AD2d 392 [1st Dept 1999]; see also United Airconditioning Corp. v Axis Piping, Inc., 194 AD3d 981, 983 [2d Dept 2021]).

tort claims, causes of action, suits, occurrences, and damages, whatsoever, known or unknown, including but not limited to state and federal civil rights claims, actions, and damages, which [plaintiff] had, now has, or hereafter can, shall, or may have"—brings the instant action within its remit. Neither does plaintiff dispute that at the time the Release was executed he was aware that this action was pending (plaintiff was represented in the Queens County Action by the same counsel representing him in this instant action). Therefore the "timing and unequivocal and unconditional language" of the Release demonstrates its applicability to the instant action (Stevens v Town of Chenango (Forks), 167 AD3d 1105, 1107 [3rd Dept 2018] [internal citations omitted]; see also Commissioners of State Ins. Fund v Fortune Interior Dismantling Corp., 7 AD3d 427, 428 [1st Dept 2004]).

Plaintiff nevertheless seeks to rescind or reform the Release on the basis of "inadvertent law office mistake" based on plaintiff's counsel's representation that he intended to include all of plaintiff's then-pending actions against the City as exceptions to the Release in the copy of the Release signed and returned to the City(NYSCEF Doc. No. 100 [Nazrali Aff. at ¶¶10, 17]). To the extent that plaintiff attempts to characterizes this as mutual mistake, he is incorrect. This is not a case where "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (Resort Sports Network Inc. v PH Ventures III, LLC, 67 AD3d 132, 135 [1st Dept 2009] [internal citations and quotations omitted]). Whether plaintiff intended to release the City from claims asserted in his other pending actions against the City was exclusively within plaintiff's knowledge. Accordingly, plaintiff's failure to ensure that his other claims against the City was exempted from the Release is, if anything, a unilateral mistake.

Such a unilateral mistake does not, in and of itself, permit rescission or reformation of a contract (See Rotter v Ripka, 110 AD3d 603, 604 [1st Dept 2013]; Kaplan v Goldbaum, 258 AD2d 620, 621 [2nd Dept 1999]). Rather, "right of recovery on the basis of unilateral mistake, requires [the] complaint to allege facts that would sufficiently establish that its purported unilateral mistake was caused by fraudulent conduct on the part of any of [defendants], and that the mistake occurred despite [plaintiff's] exercise of due diligence" (Wachovia Sec., LLC v Joseph, 56 AD3d 269, 270 [1st Dept 2008] [internal citations and quotations omitted]). Neither requirement is satisfied here.

First, no fraudulent conduct has been alleged by plaintiff. It is undisputed that the City sent the Release to plaintiff's counsel twice (an executed copy was returned once by the City for plaintiff to correct an error in the caption) and plaintiff twice returned the Release to the City without any additional cases listed in the Release's exclusion section. Unlike the case on which plaintiff relies, Sheridan Drive-In, Inc. v State of New York, 16 AD2d 400 (4th Dept 1962), there was no representation, erroneous or otherwise, made by the City on which plaintiff relied in failing to include his other actions as exempted from the Release. While plaintiff makes much of the fact that the City Defendants did not affirmatively flag this omission to plaintiff, the City was not obligated to advise opposing counsel that what appeared to be a considered decision to release all of plaintiff's outstanding claims against the City was unwise (See e.g., Dousmanis v Joe Hornstein, Inc., 181 AD2d 592, 593 [1st Dept 1992] ["neither unilateral mistake nor fraudulent misrepresentation by plaintiff's counsel provide grounds for rescission of the stipulations, since defendant in executing the stipulations, could not have justifiably relied on the legal opinion or conclusion of its adversary's counsel that the action had been timely commenced"]).

Neither has plaintiff established that his unilateral mistake occurred despite his exercise of due diligence. To the contrary, plaintiff's return of the executed Release to the City without ensuring that plaintiff's other lawsuits were exempted was a failure to exercise due diligence (See U.S. Legal Support, Inc. v Eldad Prime, LLC, 125 AD3d 486, 487 [1st Dept 2015] ["Defendant's failure to read the final document before signing it precludes its claim of unilateral mistake induced by fraud based on plaintiff's failure to highlight its deletion of the portion of the provision capping the reimbursement amount, before presenting it to defendant's in-house counsel for defendant's signature"]).

While plaintiff now submits an affidavit attesting that "neither I nor my attorney had any intent of dismissing" the instant action (NYSCEF Doc. No. 117 [Metwally Aff. at 9]), such extrinsic evidence of intent is inadmissible where, as here, the plain language of the Release is unambiguous[3] (See Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC, 61 AD3d 554, 555 [1st Dept 2009]). In light of the foregoing, this action is dismissed as against the City Defendants as barred by the plain terms of the Release (Id.; but see Augustin v City of New York, 2022 NY Slip Op 31196[U] [Sup Ct, Kings County 2022]).

Even ignoring the foregoing, dismissal is mandated on the separate and independent basis that the City Defendants have established their entitlement to dismissal of plaintiff's claims for negligence, negligent hiring, retention, training, and supervision, malicious prosecution, and attorney fees under 42 USC §1988 pursuant to CPLR §3211(a)(7) and, moreover, established their

[3] The Court declines to grant plaintiff's request to import Connecticut's "intent rule"—which permits to "consider extrinsic evidence of the parties' intent regarding the scope of the release regardless of whether the court determines that the language of the release is ambiguous" (Travelers Cas. and Sur. Co. of Am. v Trataros Const., Inc., 11 Misc 3d 1092(A) [Sup Ct, NY County 2006] [internal citations and quotations omitted])—to this state. This is not a situation, as in Travelers, where Connecticut law must be applied in interpreting a release executed in connection with a Connecticut lawsuit and expressly governed by the laws of that state (Travelers Cas. and Sur. Co. of Am. v Trataros Const., Inc., 11 Misc 3d 1092(A) [Sup Ct, NY County 2006]).

entitlement to summary judgment as to plaintiff's claims for false arrest, malicious prosecution, and failure to intervene and all cross-claims against them.

The Court turns first to that branch of the City's motion to dismiss plaintiff's negligence, negligent hiring, retention, training, and supervision, malicious prosecution, and attorney fees under 42 USC §1988 pursuant to CPLR §3211(a)(7). On a motion to dismiss under CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]).

"The cause of action alleging negligence, including negligent hiring, retention, and training, must be dismissed because no cause of action for negligent investigation lies in New York. In addition, the negligent hiring, retention, and training claims must be dismissed because it is undisputed that the officer was acting within the scope of his employment, and plaintiff does not seek punitive damages based on gross negligence in the hiring or retention of the officer" (Medina v City of New York, 102 AD3d 101, 108 [1st Dept 2012] [internal citations omitted]).

Plaintiff's claim for malicious prosecution must also be dismissed. "Where there is an indictment, there is a presumption of probable cause [and] [t]he complaint must therefore allege specific facts to overcome the effect of the indictment" McQueen v City of New York, 209 AD3d 469 [1st Dept 2022] [internal citations and quotations omitted]). Here, "the complaint only conclusorily alleges that the prosecution of plaintiff was commenced and maintained with malice [and therefore] fails to state a claim for malicious prosecution" (Id. [internal citations and quotations omitted]). Finally, plaintiff's claim for attorney fees under 42 USC §1988 must be

dismissed as this claim depends on plaintiff's dismissed federal claims (See Brown v City of New York, 56 Misc 3d 1218(A) [Sup Ct, Bronx County 2017], affd, 170 AD3d 596 [1st Dept 2019]).

The City Defendants have also demonstrated their entitlement to summary judgment on plaintiff's claims for false arrest, false imprisonment, and malicious prosecution. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Here, Anzalone's EBT testimony and Fogarty's affidavit establish that they had probable cause to arrest plaintiff for Assault in the Third Degree based on their observations of the injury to Weis's face as well as the statements of Weis, Torres, and plaintiff himself (See DelGrosso v McCann, 203 AD3d 596, 597 [1st Dept 2022] [probable cause supported by victim's statement to police that plaintiff threw a chemical at her, her visible injuries, and the statement of the victim's neighbor placing plaintiff near the scene of the crime]). In opposition, plaintiff argues that the police should have investigated further before arresting him. This argument is unavailing. Ultimately, Torres's statement to the police was sufficient, in and of itself, "to establish probable cause even if other avenues of police investigation remained" (Alam v City of New York, 174 NYS3d 838 [1st Dept 2022] [internal citations omitted]) as was their observation of Weis's injuries (See Drayton v City of New York, 292 AD2d 182, 182-183 [1st Dept 2002] [complainant's visible injuries resulting from altercation with plaintiff provided probable cause for arrest despite

plaintiff's exculpatory explanation to police]). As probable cause is a complete defense to claims for false arrest and false imprisonment, the City Defendants established their entitlement to summary judgment dismissing these claims (Young v City of New York, 72 AD3d 415, 417 [1st Dept 2010]).

This showing of probable cause to arrest plaintiff also mandates the dismissal of plaintiff's claims against the NYPD officer defendants Anzalone, Fogarty, Kelly Horsham, and Kim Garcia for "failure to intervene in, or prevent, the plaintiff's arrest" (Jones v City of New York, 206 AD3d 635, 640 [2nd Dept 2022] [internal citations omitted]), as well as Weis' cross-claims against the City Defendants (Rasheed v New Star Fashions, 262 AD2d 623, 623 [2nd Dept 1999]).

Finally, probable cause for plaintiff's arrest, as well as the subsequent grand jury indictment, establishes the City Defendants' entitlement to summary judgment on plaintiff's malicious prosecution claim. A grand jury indictment creates a presumption of probable cause for the prosecution (See DelGrosseo v McCann, 203 AD3d 596, 597 [1st Dept 2022]). While this presumption "may be overcome … by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith" (Roberts v City of New York, 171 AD3d 139, 150 [1st Dept 2019], quoting Colon v City of New York, 60 NY2d 78, 83 [1983]), plaintiff has not submitted such evidence here. In opposition, plaintiff emphasizes that, at his EBT, Officer Anzalone testified that he did not recall whether he repeated plaintiff's representation that he acted in self-defense to the Grand Jury. However, even assuming, arguendo, that Anzalone failed to do so, this does not vitiate the presumption of probable cause where plaintiff's pre-arraignment statement to the District Attorney's Office, which included his self-defense claims, was submitted to the grand jury.

In light of the forgoing, it is

ORDERED that the motion by the City of New York, the New York City Police Department, Robert Anzalone, Martin Fogarty, Kelly Horsham, and Kim Garcia, is granted; and it is further

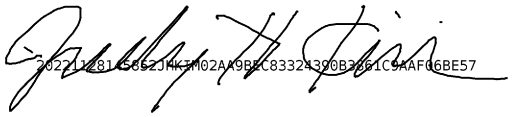
ORDERED that the complaint and all cross-claims are dismissed as against the City of New York, the New York City Police Department, Robert Anzalone, Martin Fogarty, Kelly Horsham, and Kim Garcia without costs and disbursements; and it is further

ORDERED that as the City of New York is no longer a party to this action, the Trial Support Office shall reassign this action to the inventory of a non-City Part; and it is further

ORDERED that counsel for the City of New York shall serve a copy of this order, with notice of entry, on plaintiff, the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) within fifteen days from the date of this decision and order; 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 Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



11/28/2022
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE