SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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REGINALD GREENE,

Plaintiff,

-against-

CITY OF NEW YORK; Police Officer KAROL SABODACHA, Shield #15964; Police Officer DAVID PORRAS, Shield #08967; NYPD Lieutenant KENNETH HERRARTE Tax #941039; NYPD Police Officers/ Sergeants/Detectives John Doe 1-10; NYPD Captain John Doe and Mary Roe,

Defendants.

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DECISION and ORDER ON MOTION

Index No. 450880/2019

Motion Sequence No. 003

HON. J MACHELLE SWEETING, J.S.C.:

In this action to recover damages related to plaintiff's arrest, plaintiff's amended complaint claims the following: numerous constitutional deprivation of rights as to all defendants (first cause of action); municipal liability pursuant to 42 USC §1983 (second cause of action); respondeat superior liability as to the City of New York (third cause of action); assault and battery as to all defendants (fourth cause of action); intentional infliction of emotional distress as to all defendants (fifth cause of action); negligence as to all defendants (sixth cause of action); negligent hiring, screening, retention, supervision and training (seventh cause of action) and malicious prosecution pursuant to state law against all parties (eighth cause of action).

Plaintiff withdrew his claims for (1) intentional and negligent infliction of emotional distress as to the City of New York only (fifth cause of action); (2) negligent hiring, screening, retention, supervision, and training (seventh cause of action); and (3) false arrest to the extent alleged in plaintiff's first cause of action.

Defendants, City of New York; Police Officer Karol Sabodacha; Police Officer David Porras; NYPD Lieutenant Kenneth Herrarte; NYPD Police Officers/Sergeants/Detectives John Doe 1-10; NYPD Captain John Doe and Mary Roe (collectively, "the City"), now move to dismiss, pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7), the claims in the amended complaint of: (1) federal and state law malicious prosecution (a portion of the first cause of action and eighth cause of action); (2) intentional infliction of emotional distress as to the individual police officers (remainder of the fifth cause of action); (3) municipal liability under 42 USC §1983 (second cause of action) and (4) negligence as to all parties (sixth cause of action).

Plaintiff does not oppose that branch of the City's motion regarding the remainder of the fifth cause of action sounding in intentional infliction of emotional distress against the individual officers. Accordingly, that branch of the City's motion is granted with no opposition and the fifth cause of action is dismissed.

The City defendants do not seek dismissal of plaintiff's claims for assault and battery (third cause of action) and respondeat superior (fourth cause of action).

BACKGROUND

Plaintiff was arrested on July 5, 2018 at a New York City Housing Authority ("NYCHA") property located at 10 Catherine Slip, New York, New York, a New York City. Plaintiff was attending a neighborhood barbeque (amended complaint, NYSCEF Doc No. 58 ¶¶ 20-21). Plaintiff avers that while he was on his way back to the barbeque after getting ice from inside the building, he was stopped and questioned by police officers about drugs (*id*. ¶¶ 22-24). He claims that he was subsequently arrested, subjected to excessive force, maliciously prosecuted and that his rights were violated under the due process and equal protection clauses of the New York State and United States Constitutions, and that he was deprived of his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution (*id*. at 4-16).

On July 18, 2018, plaintiff appeared before the Honorable Sandra Roper in the Criminal Court of New York, County of New York (allocution transcript, NYSCEF Doc No. 60). Plaintiff was charged with: (1) criminal trespass in the second degree (New York Penal Law "PL" § 140.15); (2) assault in the second degree (PL § 120.05); (3) tampering with physical evidence (PL § 215.40); (4) criminal possession of a controlled substance in the seventh degree (PL § 220.03), and (5) resisting arrest (PL § 205.30) (certificate of disposition, NYSCEF Doc No. 59). According to the allocution transcript, counts one and two were dismissed and plaintiff pled guilty, pursuant to a plea offer, to count three, (Criminal Trespass in the Second Degree), in satisfaction of the remaining charges "to cover and satisfy the docket" (*id*. at 3). Plaintiff admitted on the record that on July 25, 2018, at approximately 10 p.m. inside 10 Catherine Slip in the County and State of New York he knowingly entered or remained unlawfully in a dwelling and was sentenced to five months incarceration (*id*. at 4-5).

DISCUSSION

"On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Shah v Exxis, Inc*., 138 AD3d 970, 971 [2d Dept 2016]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851–852 [2d Dept 2012]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]).

On motions to dismiss actions alleging violations of 42 USC § 1983 ("§ 1983") for failure to state a cause of action, New York Courts apply the standards under CPLR 3211(a)(7), rather than the federal pleading standards (*see e.g. Vargas v City of New York*, 105 AD3d 834, 834-837 [2d Dept 2013] [In granting defendants' motion seeking to dismiss plaintiff's 42 USC § 1983 claim for failure to state a cause of action, the court applied the standards promulgated by CPLR § 3211[a] [7] and the case law interpreting it]).

I. State and Federal Malicious Prosecution

The elements of a malicious prosecution claim under New York law and § 1983 are substantially the same because the elements of a § 1983 claim are borrowed from state law (*Cook v Sheldon*, 41 F3d 73, 78 [2d Cir 1994]). To succeed on a claim for malicious prosecution, plaintiff must prove "(1) the defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted in actual malice" (*Martin v City of Albany*, 42 NY2d 13, 16 [1977]).

Defendants argue that because plaintiff pled guilty to criminal trespass, he cannot fulfill the second element of a favorable termination.

Plaintiff in opposition argues that his guilty plea to the lesser charge of trespass does not preclude a malicious prosecution claim, when the more serious charges were terminated "in the interest of justice." Plaintiff relies upon the recently decided case of *Thompson v Clark* (142 S Ct 1332, 1333 [2022]). The Supreme Court held in *Thompson* that "a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction" (*Thompson*, 142 S Ct at 1341). While the Thompson decision abrogates the Second Circuit's holding that a favorable termination must affirmatively indicate a plaintiff's innocence, it does not affect the outcome of this motion. Nor does it displace New York's standard that a favorable termination inquiry turns on whether the disposition was "not inconsistent with the innocence of the accused" (*see Smith-Hunter v Harvey*, 95 NY2d 191, 193 [2000]).

Plaintiff also relies on *Janetka v Dabe* (892 F2d 187, 189 [2d Cir 1989]). In *Janetka*, the Second Circuit held that despite plaintiff's conviction on a charge for disorderly conduct, (a violation), his acquittal for resisting arrest, (a misdemeanor), was a favorable termination for purposes of establishing his right to proceed against the police on a malicious prosecution claim. The plaintiff in *Janetka* was charged with

> "two distinct offenses involving distinct allegations. The disorderly conduct charge involved Janetka's actions directed at the unidentified hispanic man; the resisting arrest charge involved his actions directed at the officers' attempts to arrest him. The elements of each charge are different; neither charge is a lesser included offense of the other.
>
> To hold that an acquittal does not constitute a favorable termination would be particularly inappropriate in this case, where the charge for which Janetka was acquitted was more serious than the one for which he was convicted"

(*id*. at 190). Thus, where "multiple offenses are charged, the favorability of termination must be separately assessed as to each" (*Coleman v City of New York*, 2016 WL 4184035, at *3, 2016 US Dist LEXIS 192363, *7 [ED NY Feb. 25, 2016, 11-cv-2394 (ENV-RLM)], *affd*, 688 F Appx 56 [2d Cir 2017]). "Favorable termination is not so much an element of a malicious prosecution claim as it is a prerequisite to commencement of the action" (*Janetka* 892 F2d at 189). "When a charge is dismissed as part of a plea bargain, the dropped charge is not a favorable termination sufficient to support a malicious prosecution claim" (*Wims v New York City Police Dept*, 2011 WL 2946369, at *3,2011 US Dist LEXIS 78641, *10 [SD NY July 20, 2011, No. 10 CIV 6128 (PKC)]; *see Posr v Court Officer Shield # 207*, 180 F3d 409, 418 [2d Cir 1999] ["[I]f the outcome was the result of a compromise to which the accused agreed ... it is not a termination in favor of the accused for purposes of a malicious prosecution claim"][internal quotation marks and citation omitted]).

The instant matter is distinguishable from *Janetka* in that the plaintiff in *Janetka* had been acquitted of one charge but convicted of an unrelated charge and was able to later bring a malicious prosecution claim based on the acquittal. Here, plaintiff pled guilty to trespass in the second degree in satisfaction of the remaining charges for criminal possession of a controlled substance and resisting arrest. The charges, including the felonies that were dismissed, were all the result of one related incident. Thus, plaintiff's guilty plea to trespass in the second degree is inconsistent with innocence and his malicious prosecution claim must fail.

Accordingly, plaintiff's state and federal malicious prosecution claims as set forth in his first and eighth causes of action of the amended complaint are dismissed. The remainder of plaintiff's first cause of action survive.

II. "*MONELL*" CLAIM

A cause of action under 42 USC § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom (*Leung v City of New York*, 216 AD2d 10, 11 [1st Dept 1995]). As established by *Monell v Department of Social Servs. of City of New York* (436 US 658 [1977]), a municipality is only liable under § 1983 where the city itself is the wrongdoer, and where a specific official policy is responsible for a deprivation of rights protected by the Constitution. In order for a complaint to sufficiently allege a *Monell* claim, it must be more than bare conclusions, and must contain factual allegations that support, at least circumstantially, the inference that such a municipal custom or policy existed (*Ashcroft v Iqbal*, 556 US 662 [2009], *Vargas v City of New York*, 105 AD3d 834, 834-837 [2d Dept 2013]). A plaintiff may satisfy the "policy, custom or practice" requirement in one of four ways:

> [i] a formal policy officially endorsed by the municipality; [ii] actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; [iii] a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or [iv] a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.

Brandon v. City of New York, 705 F Supp 2d 261, 276-77 [SD NY 2010] [internal citations omitted]). Liability cannot lie against a municipality pursuant to § 1983 unless a municipal custom or policy caused the constitutional violation and not merely because the municipality employs one who committed a constitutional violation (*Monell*, 436 US at 691). "A single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show municipal liability" (*Harley ex. rel. Johnson v City of New York*, 36 FSupp2d 136, 142 [ED NY 1999][internal quotation marks and citation omitted]). The plaintiff must also show a causal link between the policy, custom or practice and the alleged injury in order to find liability against a municipality (*see Batista v Rodriguez*, 702 F 2d 393, 397 [2d Cir 1983]).

Defendants argue that plaintiff's *Monell* claim should be dismissed because the amended complaint fails to sufficiently plead a "municipal pattern and practice" pursuant to which plaintiff's constitutional rights were allegedly violated. Moreover, while plaintiff claims that he suffered constitutional violations other than false arrest, such as excessive force, questioning without an attorney and equal protection, his amended complaint contains no factual allegations to support these theories.

Plaintiff contends that he has sufficiently alleged that the City had a practice of racially discriminatory enforcement of its "vertical patrol" policy, as outlined in section 212-59 of the NYPD Patrol Guide, in and around NYCHA buildings. Plaintiff's amended complaint states, in part:

> e. In the course of a vertical patrol, multiple NYPD officers approach anyone they observe in the common areas of a building and require them to present identification proving their residency in the building or to affirmatively establish a connection to a specific building resident. If an individual stopped and seized pursuant to a vertical patrol fails to identify herself to the satisfaction of the officer, or is unable to demonstrate to satisfaction of the officer that she is going to, or coming from, a visit to a resident or her own home, she is arrested for trespass. If the individual has not already been searched for contraband pursuant to the seizure, she will be subjected to a search for contraband pursuant to the arrest.
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> …
>
> q. Defendants' failure to provide adequate guidance, training, and support to NYPD officers regarding how to conduct vertical patrols, including whom to stop, question, seize, search and arrest for trespass, results in a de facto roving checkpoint and a pattern and practice of unlawful stops, seizures, and arrests.

(NYSCEF Doc No. 58 ¶ 28). Plaintiff's amended complaint further cites to statistics that claim, *inter alia*, that African Americans within NYCHA buildings are stopped on suspicion of trespass 2½ times more than whites and arrested for trespass almost ten times more than white individuals (*id*. ¶ 29[g]). Plaintiff alleges that as an African American man in a NYCHA building, he was subjected to the City's policy and custom of NYPD's discriminatory vertical patrol policy.

In reply, the City argues that plaintiff's voluntary discontinuance of his claim for false arrest, combined with his admission of guilt in criminal court amounts to an explicit admission that he was not falsely arrested or subjected to the allegedly unlawful policy. As such, plaintiff has failed to suffer the harm he claims the alleged policy creates.

Biton v City of New York (416 F Supp 3d 244, 248 [EDNY 2018]) is factually similar and instructive. In *Biton*, the plaintiff claimed that the NYPD had a pattern and practice of falsely arresting individuals in order to satisfy an arrest quota. However, Biton, like plaintiff here, voluntarily withdrew her false arrest claim. The court in *Biton* held that:

> Assuming, as the Court must at the motion to dismiss stage, that the NYPD has a policy of falsely arresting individuals to meet quotas as Plaintiff alleges, Plaintiff does not allege that such a policy extends to the false initiation or continuation of criminal proceedings. Plaintiff alleges no facts that any arrest quota policy or custom somehow compels NYPD officers to "play an active role" in any subsequent prosecution. If Plaintiff had pursued *Monell* liability with respect to a claim for false arrest, the claim plausibly could have survived a motion to dismiss. No such claim is pleaded, however, and in its absence, *Monell* liability arising from any purported false arrest claim cannot be pursued.

Likewise here, plaintiff voluntarily withdrew his false arrest claim and has failed to allege that the NYPD's vertical patrol policy extends to his other claims of constitutional harm.

Accordingly, plaintiff's second cause of action, sounding in municipal liability pursuant to 42 USC §1983 is dismissed.

III. NEGLIGENCE

Plaintiff advances a negligence claim against all defendants and argues that this claim is distinct from his assault and battery claims because it extends to the City's negligent implementation of the NYPD's vertical patrol policy. However, "a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention 'may not recover under broad general principles of negligence but must proceed by way of the traditional remedies of false arrest and imprisonment'" (*Secard v Department. Of Social Servs. Of County of Nassau*, 204 AD2d 425, 427 [2d Dept 1994] *quoting Stalteri v County of Monroe,* 107 AD2d 1071, 1071 [4th Dept 1985]). This bars plaintiff's negligence claim as to all defendants, including the City of New York (*see*

Burbar v Incorporated Vil. of Garden City, 961 F Supp 2d 462, 474 [ED NY 2013] [holding that a negligence claim against the municipality was barred because, under New York law, "a plaintiff may not recover under general negligence principles for a claim that law enforcement officers failed to exercise the appropriate degree of care in effecting an arrest"] [internal quotation marks and citations omitted]). Moreover, plaintiff's amended complaint is based on allegations of deliberate acts, "carried out intentionally, recklessly, with malice, and in gross disregard of plaintiff's rights," thus preluding any negligence cause of action (NYSCEF Doc No. 58 ¶ 18).

Accordingly, plaintiff's sixth cause of action, sounding in negligence is dismissed.

CONCLUSION

Based upon the foregoing, it is hereby:

ORDERED that the branch of defendant City's motion to dismiss the second, fifth, sixth and eighth cause of action is **GRANTED** and such cause of action are dismissed; and it is further

ORDERED that the branch of defendant City's motion to dismiss plaintiff's state and federal malicious prosecution claims as set forth in the first cause of action of the amended complaint is **GRANTED**, and it is further

ORDERED that the branch of defendant City's motion to dismiss the remainder of plaintiff's first cause of action is **DENIED**; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry within 20 days from the date of entry of this Decision and Order.

8/8/2023

DATE

J. MACHELLE SWEETING, J.S.C.

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