

Washington v City of New York
2023 NY Slip Op 35197(U)
September 12, 2023
Supreme Court, Queens County
Docket Number: Index No. 702137/2013
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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KHALIF WASHINGTON, CYIRELL LOMAX,
JAHVON DICKERSON, and UNIQUE WOODEN,

Index No. 702137/2013

Part 6

Plaintiffs,

Motion Date: August 21, 2023

-against-

Calendar No. 28

Sequence No. 5

THE CITY OF NEW YORK, P.O. DAVID TETA
[SHIELD #30870], SERGEANT STANLEY XENAKIS
[SHIELD #2233], and PO MICHAEL COHEN,

Defendants.

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The following papers numbered EF92 through EF203 read on this motion by defendants for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3211 and §3212.

Papers
Numbered

Notice of Motion, Affirmation, Facts, Exhibits.....EF92-EF120
Affirmation in Opposition, Memorandum, Exhibits.....EF169-EF197
Reply Affirmation.....EF203

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants' motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3211 and §3212 is granted. Plaintiffs commenced this action arising out of their arrest for gun possession charges on March 16, 2012. Plaintiffs filed the Summons and Complaint on June 10, 2013 and issue was joined via service of defendants' Answer on June 25, 2013.

Defendants argue that they are entitled to summary judgment and dismissal of plaintiffs' Complaint because plaintiffs failed to file a notice of claim, plaintiffs' arrest and prosecution was supported by probable cause, the officers' use of force was reasonable and privileged to effectuate the arrest, the officers are entitled to qualified immunity, plaintiffs' federal claims, negligence claims, and intentional infliction of emotional distress claims are insufficiently pled, the officers were acting within the scope of their employment, and plaintiffs are not entitled to punitive

damages.

Defendants argue that plaintiff Unique Wooden's claims must be dismissed pursuant to CPLR §3211 because Wooden failed to timely file a Notice of Claim as a matter of law. Defendants present the decision by the Honorable Kevin J. Kerrigan denying plaintiff Wooden's motion to file a late Notice of Claim *nunc pro tunc*, which was affirmed by the Appellate Division Second Department. Therefore, defendants argue that plaintiff Wooden's claims must be dismissed. Defendants further argue plaintiffs' claims for incidents after the March 16, 2012 arrest must be dismissed, as plaintiffs failed to timely file a Notice of Claim asserting these new claims, and therefore their state law claims must be dismissed.

Defendants also argue that plaintiffs' state and federal false arrest, false imprisonment, and malicious prosecution claims should be dismissed because plaintiffs' arrest, confinement, and prosecution were based on probable cause. They argue that the arresting and assisting officers had probable cause based upon the cab driver's failure to signal a lane change, plaintiffs' furtive movements including plaintiff Dickerson bending over and then quickly lifting his head up, and the officers' observation of a gun in the car upon opening the passenger side door. Defendants further argue that plaintiff Dickerson's Grand Jury Indictment creates a presumption of probable cause of the malicious prosecution claim and demonstrates proof of probable cause on the false arrest claims. Defendants further argue that there is no evidence that the arresting and assisting officers acted with malice. Additionally, defendants argue that all federal claims against the individually named officers must be dismissed because plaintiffs did not suffer a constitutional rights violation. Defendants argue that based upon the probable cause for plaintiffs' arrest and prosecution, plaintiff Dickerson's indictment, and the lack of evidence of malice, plaintiffs' Complaint should be dismissed.

Defendants also argue that plaintiffs' assault and battery claims should be dismissed because the force used in handcuffing plaintiffs was reasonable and privileged. Defendants presented plaintiff Dickerson's deposition testimony to demonstrate there was no physical altercation prior to or physical injuries as a result of the handcuffing, and officers used reasonable force in effectuating plaintiffs' arrest. Defendants argue that based upon the foregoing, plaintiffs' assault and battery claims should be dismissed.

Defendants also argue that plaintiffs' 42 USC §1983 *Monell* claims should be dismissed against the individually named officer defendants because they are entitled to qualified immunity. Specifically, defendants argue that it was objectively reasonable for the defendant officers to believe that probable cause existed to arrest and prosecute plaintiffs. Therefore, as the officer defendants believed their conduct was lawful and it was objectively reasonable to believe their actions did not violate plaintiffs' rights based upon probable cause, they are entitled to qualified immunity. Defendants also argue that plaintiffs' *Monell* claims should be dismissed against

defendant City of New York because plaintiffs failed to plead a specific policy or custom as a basis for their claim, and defendant City is a separate entity from the District Attorney's Office. Specifically, defendants argue that plaintiffs' Complaint does not provide any facts with respect to a custom or policy purposely adopted by the City that led to plaintiffs' alleged constitutional deprivations. Defendants further argue that a single incident of misconduct, particularly of individuals that are not at a policy-making level, does not demonstrate the existence of a pattern or practice of municipal conduct sufficient to sustain a *Monell* claim. Defendants argue that based upon the foregoing reasons, plaintiffs' 42 USC §1983 claims should be dismissed.

Defendants also argue that plaintiffs' negligent infliction of emotional distress and intentional infliction of emotional distress claims should be dismissed. They argue that the negligent infliction of emotional distress claims are duplicative of plaintiffs' assault, battery, and excessive force claims, and are not sufficiently pled. With respect to plaintiffs' intentional infliction of emotional distress claims, defendants argue that public policy bars that claim as against a governmental entity. Defendants argue that based upon the foregoing reasons, plaintiffs' negligent and intentional infliction of emotional distress claims should be dismissed.

Defendants also argue that plaintiffs' negligent hiring and retention claims must be dismissed because the officer defendants were acting within the scope of their employment. Defendants argue that there is no dispute that the officer defendants were acting within the scope of their employment, and as there is no cognizable common law cause of action in New York for negligent hiring, training, retention, or supervision when the employee was acting within his or her scope of employment rendering the employer liable, these claims should be dismissed.

Defendants also argue that plaintiffs' punitive damages claims must be dismissed. Defendants further argue that generally, municipalities are not liable for punitive damages flowing from its employees' alleged misconduct, and there is no specific legislative authorization to grant punitive damages in this case. Additionally, defendants argue that the officer defendants did not act with malice or reckless disregard with respect to plaintiffs' rights, and punitive damages are therefore not warranted. Defendants argue that based upon the foregoing reasons, plaintiffs' punitive damages claims must be dismissed.

Plaintiffs oppose defendants' motion and argue defendants failed to establish any defense sufficient to warrant judgment as a matter of law, as there was no probable cause for plaintiffs' arrest and prosecution, and the "stop and frisk" practice sufficiently demonstrates their *Monell* claims. Plaintiffs argue that they were lawful passengers in a taxi cab which was improperly stopped by defendants. They further argue that despite lacking probable cause, defendants directed plaintiffs out of the vehicle and improperly searched them as well as the cab, and illegally arrested them for gun possession. Plaintiffs present evidence that the Grand Jury did not indict plaintiffs Washington, Lomax, and Wooden, and that plaintiff Dickerson was found not guilty after trial.

Plaintiffs argue that they have sufficient evidence to support their false arrest and malicious prosecution claims, as defendants arrested plaintiffs without a warrant, performed an illegal and unauthorized search of the car, and illegally obtained and fabricated evidence. They argue that there was no probable cause for plaintiffs' arrest and prosecution and by fabricating evidence, defendants denied plaintiffs their due process right to a fair trial.

Plaintiffs further argue that they adequately stated claims for unlawful stop and frisk and unreasonable search and seizure. Specifically, plaintiffs argue that while the defendant officers contend that plaintiffs made furtive movements, they never questioned plaintiffs regarding the furtive movements. They further argue that instead of intervening to prevent plaintiffs' arrest, defendant officers participating in falsely charging plaintiffs with multiple unwarranted crimes. Plaintiffs further argue that contrary to defendants' contention, assault and battery claims may be based upon any contact during an arrest that is unlawful. Plaintiffs also argue that their state law claims against the individual defendants must be maintained because the failure to comply with the notice of claim requirements only precludes its state law claims against defendant City of New York, not against the individual officer defendants. Plaintiffs further argue that the state law claims against the individual defendants must be maintained because defendants are not entitled to qualified immunity. With respect to the *Monell* claims, plaintiffs argue that the defendant officers unreasonably frisked and searched them pursuant to the New York City Police Department's unlawful customs and practices. Plaintiffs further argue that defendant City failed to train, supervise, and discipline its employees. Plaintiffs further argue that the voluminous discovery documents including sworn testimony remedies any deficiencies in the pleadings. Finally, plaintiffs argue that they are entitled to punitive damages because the Complaint alleges that defendant officers' actions were wanton, reckless, and malicious. Based upon the foregoing, plaintiffs argue that their Complaint should not be dismissed.

Pursuant to CPLR §3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

Pursuant to General Municipal Law §50-e, timely service of a Notice of Claim is a condition precedent to a tort action against the City of New York. (*See Matter of C.N. v. City of New York*, 208 A.D.3d 784 [2d Dept. 2022].) The Court may permit the filing of a late Notice of Claim pursuant to GML §50-e(5) after considering whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days after the claim arose, whether the petitioner made an excusable error concerning the identity of the public corporation, if the delay would substantially prejudice the defendant public corporation and whether Petitioner demonstrated a reasonable excuse for the failure to serve a timely Notice of Claim. (*Matter of Molme v. New York City Tr. Auth.*, 177 A.D.3d 601, 602 [2d Dept. 2019].)

To sustain a cause of action sounding in intentional infliction of emotional distress, a plaintiff must demonstrate extreme and outrageous conduct, the intent to cause or the disregard of a substantial likelihood of causing severe emotional distress, causation, and severe emotional distress. (*Brunache v. MV Transp., Inc.* 151 A.D.3d 1011, 1014 [2d Dept. 2017].) A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him which unreasonably endangers his physical safety or caused him to fear for his own safety. (*Sacino v. Warwick Val. Cent. Sch. Dist.*, 138 A.D.3d 717, 719 [2d Dept. 2016].)

Generally, “where an employee is acting within the scope of his or her employment, the employer is liable for the employee’s negligence under a theory of *respondeat superior*, and no claim may proceed against the employer for negligent hiring, retention, supervision or training. (*Farquharson v. United Parcel Serv.* 202 A.D.3d 923, 928 [2d Dept. 2022].)

Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness. (*Ostrander v. State*, 289 A.D.2d 463, 464 [2d Dept. 2001].) The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, “rather than with the 20/20 vision of hindsight.” (*Owens v. City of New York*, 183 A.D.3d 903, 907 [2d Dept. 2020].) A claim for excessive force shall be dismissed if other than testifying that the handcuffs were too tight, plaintiff fails to submit other evidence that he sustained physical injury as a result. (*See Davidson v. City of New York*, 155 A.D.3d 544 [1st Dept. 2017]; *see also Burgos-Lugo v. City of New York*, 146 A.D.3d 660 [1st Dept. 2017].) If found to be objectively reasonable, the officers’ actions are privileged under the doctrine of qualified immunity. (*Lepore v. Town of Greenburgh*, 120 A.D.2d 1202, 1203 [2d Dept. 2014].)

The existence of probable cause constitutes a “complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution, and this includes causes of action asserted pursuant to 42 USC §1983 to recover damages for the deprivation of Fourth

Amendment rights under color of state law that are the federal-law equivalents of state common-law false arrest and malicious prosecution causes of action.” (*Elie v. City of New York*, 183 A.D.3d 867, 870 [2d Dept. 2020].) It is well settled that “probable cause exists when the facts and circumstances, viewed together, would lead a reasonable person to conclude that an offense was committed, and the person arrested was the perpetrator.” (*People v. Vega*, 197 A.D.2d 552, 553 [2d Dept. 1993].) Information provided by an identified citizen accusing another individual of a specific crime is legally sufficient to provide the police with probable cause to arrest. (*Nolasco v. City of New York*, 131 A.D.3d 683, 685 [2d Dept. 2015].) Probable cause exists based upon the combined import of all the evidence available to the defendant at the time of the arrest. (*Nzegwu v. Friedman*, 605 Fed. Appx. 27, 30 [2d Cir. 2015].)

To prevail on a cause of action to recover damages for a *Monell* claim against a municipality, the plaintiff must specifically plead and prove “(1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right.” (*Nasca v. Sgro*, 101 A.D.3d 963, 964 [2d Dept. 2012].) “A plaintiff may demonstrate the existence of a policy or custom by showing that the acts of the municipal agent were part of a widespread practice that, although not expressly authorized, constituted a custom or usage of which a supervising policy-maker must have been aware.” (*Id* at 965.)

An award of punitive damages is meant to compensate plaintiffs for their injuries, but also serve as a punishment for gross misbehavior for the good of the public in order to deter others from engaging in similar conduct. (*Gomez v. Cabatic*, 159 A.D.3d 62, 64 [2d Dept. 2018].)

Defendants demonstrated a prima facie entitlement to summary judgment. They established that plaintiffs’ arrest and prosecution were supported by probable cause as they demonstrated the car stop was based upon the cab driver’s failure to signal a lane change, as well as the officers’ observation of plaintiff Dickerson making furtive movements and the gun found upon opening the passenger door. (See *People v. Velez*, 100 A.D.2d 603, 604 [2d Dept. 1984][holding that pursuant to Penal Law §265.15(3), the presence of a firearm in an automobile is presumptive evidence of its possession by all persons occupying the automobile at the time the weapon is found, and that presumption established a prima facie case against a defendant automobile passengers].) Defendants further established that the arrest and prosecution were supported by probable cause based upon the Grand Jury Indictment of plaintiff Jahvon Dickerson. Defendants further established that the officers’ use of force was reasonable and privileged to effectuate plaintiffs’ arrest, as defendants demonstrated that there was no physical injury from the handcuffs and the defendant officers are entitled to qualified immunity. Based upon the probable cause for plaintiffs’ arrest and prosecution and the lack of physical injury, plaintiffs’ state and federal assault, battery, and excessive force claims must be dismissed. Additionally, there is no dispute that the defendant officers were acting within the scope of their employment and therefore a claim for negligent hiring, retention, supervision, or training cannot be maintained. Furthermore,

defendants demonstrated that plaintiffs failed to timely file a Notice of Claim and therefore plaintiffs' state law claims against the City of New York must be dismissed.

Defendants further demonstrated that plaintiffs failed to sufficiently plead the *Monell* claims, as plaintiffs failed to plead or demonstrate the existence of a municipal policy or custom that caused plaintiffs' alleged injuries. Plaintiffs failed to establish that the NYPD's training was inadequate, and that the inadequacy amounted to an official policy that led to the deliberate indifference of citizens' constitutional rights. They further established that defendants are entitled to qualified immunity based upon the actions as employees of defendant City, and their actions were within the scope of their employment. Defendants further established that plaintiffs failed to sufficiently plead their intentional infliction of emotional distress and negligent infliction of emotional distress claims, as defendants demonstrated that the defendant officers did not behave in an extreme or outrageous manner or that plaintiffs' safety was unreasonably endangered. Finally, defendants demonstrated that punitive damages are not warranted, as defendants did not act with actual malice or reckless disregard of plaintiffs' rights. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiffs failed to raise a material issue of fact in dispute. They failed to present any evidence to refute the Appellate Division decision which affirmed the denial of plaintiff Wooden's motion for a late Notice of Claim. They further failed to present any caselaw to support their argument that they did not have to file a Notice of Claim with regard to the individual defendant police officers, and their amended claims were not included within a timely Notice of Claim. Plaintiffs also failed to present evidence to oppose defendants' argument to dismiss the claims for negligent infliction of emotional distress, intentional infliction of emotional distress and negligent hiring and retention.

Plaintiffs' argument that the arrest and prosecution was not supported by probable cause is without merit, as the probable cause was supported by the officers' observations, the gun found in the cab, and the Indictment. Their claim that defendant Xenakis' observation of the gun is insufficient to establish probable cause is without merit, as they failed to demonstrate defendant Xenakis' sworn testimony was incredible and unbelievable. Plaintiffs' arguments that the police illegally searched the car is without merit, as they had no reasonable expectation of privacy for the search of the taxi cab and cannot contest the search of the vehicle. Their argument that defendants improperly stopped and frisk plaintiffs is similarly without merit as defendant has probable cause based upon the observations and then finding the gun in the cab.

Plaintiffs' argument that the assault and battery claims should also be maintained based upon the mere contact of placing handcuffs is also without merit, as plaintiffs failed to refute defendants' assertion that plaintiffs failed to suffer injuries as a result of being handcuffed. Additionally, plaintiffs' argument that defendants fabricated evidence is also without merit, as it

is vague and unsubstantiated by competent, admissible evidence. Plaintiffs also failed to present sufficient evidence to support their claims that defendants are not protected by qualified immunity, nor did they present evidence of a municipal policy that was violated to support their *Monell* claims. As plaintiffs failed to refute defendants' prima facie case, plaintiffs failed to raise a material issue of fact in dispute.

Accordingly, defendants' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3211 and §3212 is granted. Plaintiff's Complaint is hereby dismissed. This constitutes the decision and Order of the Court.

Dated: September 12, 2023



Hon. Tracy Catapano-Fox, J.S.C.

