

Carter v City of New York
2023 NY Slip Op 35249(U)
April 19, 2023
Supreme Court, Queens County
Docket Number: Index No. 721836/21
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN

Part 10

Justice

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Sekwan Carter,

Index

Number: 721836/21

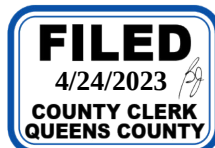
Plaintiff,

- against -

Motion

Date: 3/20/23

The City of New York,



Motion Seq. No.: 3

Defendants.

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The following papers numbered E12-E41 read on this motion by defendant for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E12-34
Affirmation in Opposition-Exhibits.....	E35-38
Reply-Exhibits.....	E39-41

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

Motion by defendant, the City of New York ("City") for summary judgment is granted.

Plaintiff, Sekwan Carter ("Carter") was arrested on March 14, 2014, for second degree murder and second degree criminal possession of a loaded firearm relating to the homicide of an individual on April 11, 2012. Plaintiff was indicted on May 23, 2014, and was acquitted by a jury and released from custody on January 27, 2016. Plaintiff thereafter filed a notice of claim on April 21, 2016, alleging false arrest, malicious prosecution, deprivation of constitutional rights pursuant to 42 U.S.C. §1983, intentional infliction of emotional distress and negligent infliction of emotional distress.

Plaintiff thereafter commenced this action on July 26, 2016, alleging six causes of action: malicious prosecution, "unintentional consequence of an intentional act on the part of the arresting officer", false arrest, abuse of process, deprivation of constitutional rights pursuant to 42 U.S.C. §1983, and intentional infliction of emotional distress.

By order of this Court issued on October 9, 2018, plaintiff's second, fourth, fifth and sixth causes of action were dismissed for failure to state a cause of action.

In that order the second cause of action alleging injury resulting from the "unintentional consequence of an intentional act on the part of the arresting officer" was interpreted as a general common law negligence cause of action, and thus was dismissed since any claim of negligence on the part of the New York City Police Department ("NYPD") in arresting plaintiff is part of a claim of false arrest, and may not be maintained as a separate cause of action (See Santoro v Town of Smithtown, 40 AD 3d 736 [2nd Dept 2007]).

The fourth cause of action alleging abuse of process was also dismissed, since plaintiff failed to assert said claim in his notice of claim (See Bonilla v City of New York, 232 AD 2d 597 [2nd Dept 1996]). The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" (General Municipal Law §50-e [2]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785 [2nd Dept 2008] internal quotations and citations omitted). In any event, the abuse of process claim appears to be part and parcel of plaintiff's malicious prosecution claim and is therefore subsumed into said cause of action. Indeed, plaintiff did not oppose dismissal of the fourth cause of action.

With respect to plaintiff's claim of intentional infliction of emotional distress, such a claim 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" (See Berrios v Our Lady of Mercy Medical Center, 20 AD 3d 361, 362 [1st Dept 2005] [citations and internal quotations omitted]). The allegations of the complaint do not support a claim for intentional infliction of emotional distress. But in any event, as a matter of public policy, an intentional infliction of emotional distress cause of action may not be asserted against a municipality (see Clark-Fitzpatrick, Inc. V. Long Island Railroad, 70 NY 2d 382 [1987]).

Finally, it was determined that the complaint failed to state a cause of action under 42 U.S.C. §1983. The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]).

A municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (See Monell v. Department of Social Services, 436 U.S. 658 [1978]). Although the fifth cause of action alleges a violation of §1983 by reason of the deprivation of plaintiff's Fourth and Fourteenth Amendment rights as a result of his false arrest and the excessive use of force, the complaint failed to set forth what official policies or customs were implemented or practiced that resulted in the violation of those constitutional rights so as to support his fifth cause of action under §1983. Moreover, no cause of action for excessive force was alleged.

The City now moves for summary judgment on the remaining causes of action for false arrest and malicious prosecution.

As noted above, this case arises from the murder of Sidney London, who was shot while driving a car on 118th Avenue, County of Queens, in April 2012. Approximately two years after London's death, acting on information from a cooperating witness Tyshawn Kelly ("Kelly"), NYPD detectives arrested Carter for homicide. Kelly told police that he had been in the car with London at the time of the shooting and identified Carter as the gunman who shot and killed London. Police subsequently arrested Carter, who confessed in writing to shooting London.

Carter was indicted and the case proceeded to trial where the prosecutor informed the jury that it would hear from an eyewitness who saw Carter approach the front passenger door of London's car, bend down, and pull the trigger, shooting and killing London.

In spite of efforts by police to locate Kelly and ensure his appearance at the trial, Kelly failed to appear at trial, thereby depriving the prosecutor of the eyewitness and subsequently, at trial, Carter was acquitted. Carter now alleges that he was falsely arrested and maliciously prosecuted.

To prevail on a cause of action to recover damages for false arrest and false imprisonment, the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement, and that the confinement was not privileged (See De Lourdes Torres v Jones, 26 NY3d 742, 759 [2016]; Broughton v State of New York, 37 NY2d 451, 456 [1975], cert den sub nom. Schanbarger v Kellogg, 423 US 929 [1975]; Cayruth v City of Mount Vernon, 188 AD3d 1139, 1140-41 [2d Dept 2020]; Petrychenko v Solovey, 99 AD3d 777, 780 [2d Dept 2017]). For purposes of the privilege element of a false arrest and false imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause (See De Lourdes Torres v Jones, 26 NY3d at 759).

It is well settled that once a suspect has been indicted, that grand jury action creates a presumption of probable cause for purposes of a malicious prosecution action (See Colon v. City of New York, 60 N.Y.2d 78 [1983]; Lee v. City of Mount Vernon, 49 N.Y.2d 1041, 429 N.Y.S.2d 557; Caminito v. City of New York, 25 A.D.2d 848; Eberhardt v. Consolidated Edison Co., 1 A.D.2d 1001; Boose v. City of Rochester, 71 A.D.2d 59, 62, Restatement, Torts 2d, § 664, subd [2]; Malicious Prosecution—Effect of Grand Jury Indictment on Issue of Probable Cause, Ann., 28 ALR3d 748).

The presumption that the Grand Jury acts judicially, and it may be presumed that it has acted regularly, may be overcome only by evidence sufficient to establish 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, or that they have withheld evidence or otherwise acted in bad faith (See Lee, supra; Hopkinson v. Lehigh Val. R.R. Co., 249 N.Y. 296, 300; Phillips v. City of Syracuse, 57 N.Y.2d 996, aff'd. 84 A.D.2d 957).

The rule in New York differs in this respect from that in some jurisdictions which permits the presumption to be overcome by evidence tending to show the absence of probable cause (See Malicious Prosecution—Effect of Grand Jury Indictment on Issue of Probable Cause, Ann., 28 ALR3d 748, 766-768). In this State, the trial court may not weigh the evidence upon which the police acted or which was before the Grand Jury after the indictment has issued. If plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith. (See Colon supra).

Although other avenues of investigation were open to police before they relied on circumstantial evidence of the killer's identity in arresting the plaintiff, their failure to pursue investigation was not equivalent of fraud or suppression of evidence; thus, presumption of probable cause created by grand jury indictment was not overcome by the malicious prosecution plaintiff (See Colon, supra).

In the instant case, police had probable cause for the arrest of plaintiff. Thus plaintiff has failed to submit evidence of false arrest sufficient to defeat summary judgment.

The elements of an action for malicious prosecution are (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice (See Martin v. City of Albany, 42 N.Y.2d 13, 16; Broughton v. State of New York, 37 N.Y.2d 451, 457.)

Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty (See Hyman v. New York Cent. R.R. Co., 240 N.Y. 137, 143; Boose, supra; and see Munoz v. City of New York, 18

N.Y.2d 6; Colaruotolo v. City of Cohoes, 44 A.D.2d 616, affd. 36 N.Y.2d 716; Restatement, Torts 2d, §662). A party may act with probable cause even though mistaken, for a mistake of fact as to the identity of a criminal may be consistent with probable cause if the party acted reasonably under the circumstances in good faith (See Burt v. Smith, 181 N.Y. 1, 73 N.E. 495; Vennard v. Sunnyside Sav. & Loan Assn., 44 A.D.2d 727; and see Malicious Prosecution-Mistaken Identity, Ann., 66 ALR3d 10).

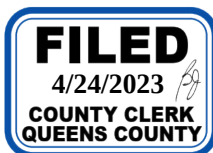
A plaintiff cannot maintain a cause of action for malicious prosecution if the prosecution is based on probable cause. (See Broughton v. State, 37 N.Y.2d at 456-59(1975); see also Kelly v. State of New York, 105 A.D.2d 905, 3d Dep't [1984]; Heath v State of New York, 229 A.D.2d 912 4th Dep't [1996]. Thus, "a plaintiff cannot prevail on [a] cause[] of action based upon . . .malicious prosecution if the arresting officers had probable cause to believe that he or she committed the underlying offense." (See Whyte v. City of Yonkers, 36 A.D.3d 799, citing Burns v. City of New York, 17 A.D.3d 305).

The Appellate Division, Second Department has consistently held that a defendant who has probable cause to subject a plaintiff to a 'reasonable detention' has a complete defense to a cause of action for false arrest or imprisonment and, furthermore, that the existence of such 'probable cause' will serve to bar an action for malicious prosecution as well." (See Feinberg v. Saks & Co., 83 A.D.2d 952 (2d Dep't 1981). The Second Department upheld this well-settled holding that "[o]nce probable cause has been established, causes of action to recover damages for false arrest, false imprisonment, and malicious prosecution do not lie." (See Holmes v. New Rochelle, 190 A.D.2d 713, 714 (2d Dep't 1993).

As stated above, police had probable cause for the arrest of plaintiff. Thus plaintiff has failed to submit evidence of malicious prosecution sufficient to defeat summary judgment.

Accordingly, the motion by defendant, the City of New York, for summary judgment, is granted, and the action is hereby dismissed in its entirety.

Dated: April 19, 2023




KEVIN J. KERRIGAN, J.S.C.