

Rodriguez-Mejia v Gomez

2024 NY Slip Op 33696(U)

October 17, 2024

Supreme Court, New York County

Docket Number: Index No. 157205/2017

Judge: Hasa A. Kingo

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. HASA A. KINGO PART 05M

Justice

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ANDY RODRIGUEZ-MEJIA,

Plaintiff,

- v -

POLICE OFFICER CARLOS GOMEZ, JOHN DOE ONE OF THE NEW YORK CITY POLICE DEPARTMENT, JOHN DOE TWO OF THE NEW YORK CITY POLICE DEPARTMENT, JOHN DOE THREE OF THE NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY POLICE DEPARTMENT, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 157205/2017
MOTION DATE 05/17/2024
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, defendant, the City of New York, moves pursuant to CPLR §§ 3212 and 3211, both on its own behalf and on behalf of the New York City Police Department (“NYPD”), for summary judgment and dismissal of the complaint filed by Plaintiff Andy Rodriguez-Mejia (“Plaintiff”). Plaintiff opposes the motion. For the reasons detailed below, the motion is granted in part, as specified herein.

BACKGROUND

In this civil rights action, Plaintiff seeks to recover damages in connection with his October 9, 2016 arrest by the NYPD and subsequent arraignment on charges of Attempted Gang Assault in the First Degree pursuant to Penal Law § 110/120.07 and Robbery in the Second Degree pursuant to Penal Law § 160.10(1) and 160.10(2)(a). The circumstances leading to Plaintiff’s arrest are sharply disputed. The felony complaint filed against Plaintiff contains the following sworn statement by defendant Police Officer Carlos Gomez (“Officer Gomez”):

I am informed by an individual known to the District Attorney’s Office that informant observed all four defendants kicking and punching the victim, who is also known to the District Attorney’s Office. When I arrived at the above location, I observed the victim lying motionless on the ground, unresponsive. The victim is currently being treated at Harlem Hospital, but is in substantial pain.

I am informed by the victim that while he was on the ground being beaten, he felt someone going through his pockets. The victim's cellphone was found on defendant Lara-Medina.

(NYSCEF Doc No. 31, felony complaint at 1-2).

In a deposition taken in connection with this case, Officer Gomez testified that, on the night of the arrest, he and his partner Police Officer Hodgkins received a radio call of a robbery in progress and they responded to the scene, where they were first met by a woman who "may have been a friend of the victim" (NYSCEF Doc No. 25, deposition tr at 15, 24). The woman "stated that [the victim] was being assaulted by four males, some time later we spoke and she said they were still there she pointed them out, some time later we spoke to the victim who confirmed what she said and also stated that his cellphone had been taken" (*id.* at 15). Four individuals were arrested in connection with the robbery (*id.* at 16). During the deposition, Officer Gomez reviewed and testified to the contents of his memo book from the night of the arrest (*id.* at 17-21). He testified that the memo book indicates that a witness and the victim advised him there were four male assailants in the robbery, who the witness "points out still at location" (*id.* at 18-20). The memo book further states the victim stated he felt someone go through his pockets and the victim's cell phone was recovered from one of the four individuals who were arrested, named "Erabito" (*id.* at 20). Plaintiff is indicated as one of the four individuals arrested (*id.* at 20).

Officer Gomez further testified that he and his partner reported to the scene of the robbery in response to a radio call (*id.* at 24). He stated that when they arrived on the scene, the victim was "a little banged up from being assaulted . . . he wasn't bleeding . . . just seemed to be bruised. His face and body seemed to be in pain" (*id.* at 25). Officer Gomez testified the victim was standing when the officers arrived, and the four individuals who were later arrested were "just standing there . . . not doing anything in particular" (*id.* at 26, 29). He had no recollection of speaking with any of the individuals prior to their arrest (*id.* 37). In connection with prosecution of the four individuals, Officer Gomez testified that he did not recall "speaking to the District Attorney or to anyone about anything before this arrest," and that it is his "assumption" that the informant referenced in the complaint is the witness he encountered at the scene (*id.* at 30, 32).

An NYPD "chronology" also contains several relevant entries that describe the scene, as follows:

05:02:05	ONE PER REDSHIRT W RED SNKRS OTHER 2 PERP WRING WHT T-SHIRT
5:02:34	MALE IS LAYING ON THE GROUND PERP WERE HITTING MALE W WOODED BEAM
5:02:47	AIDED MLE LAYING ON GROUND
05:04:00	PERPS ARE STILL AT LOC
05:05:19	FC STS POSS FAMILY MEMBER ARE DRAGGING AIDED INSIDE BUILDING
05:09:45	FC STS A LOT OF PPL ARE AROUND AND YELING AND ARE DISTRAUT

05:11:06 FC STS PD NEEDED MORE ASSISTANCE THEY WERE OVERWHELMED W CROWD AT LOC SCREAMING AND YELLING WHILE PERPS WERE ON SCENE

05:11:54 FC NOW STS OD HAS PERPS LINE UP AGAINST WALL AND BACK UP ARRIVED

05:12:53 PERPS HAS WOODEN BEAM

05:13:41 FC STS AIDED POSS ROBBED FROM PERPS AND ARE NOW ASSAULTING HIM

05:16:50 FC STS AIDED WAS DRAGGED BY POSS FAMILY MEMBER INTO BUILDING

(*id.* at DEF 000013-000018).

After his arrest, Plaintiff was arraigned and held in jail for three days before being released on bond (NYSCEF Doc No. 23, Notice of Claim). All charges against Plaintiff were dismissed on November 11, 2016 (NYSCEF Doc No. 32, Certificate of Disposition). Plaintiff thereafter filed a notice of claim and commenced this action by filing a summons and complaint on August 10, 2017 (NYSCEF Doc No. 1). The complaint interposes ten causes of action, which are nebulously pled. To the extent that causes of action may be discerned from the pleading, the complaint interposes causes of action for (1) false arrest, (2), malicious prosecution/violations of the Second, Fourth, Fifth, and Fourteenth Amendments of the Constitution in contravention of 42 U.S.C. §§ 1983 and 1985 (3) conspiracy to deprive Plaintiff of civil rights guaranteed by the Second, Fourth, Fifth, and Fourteenth Amendments of the Constitution in contravention of 42 U.S.C. §§ 1983 and 1985, (4) negligent or intentional violations of constitutional rights/*Monell*, (5) intentional infliction of emotional distress and negligent infliction of emotional distress, (6) *respondeat superior*, (7) failure to train, (9) malicious abuse of process, (10) punitive damages, and (11) attorneys' fees.¹ Issue was joined on December 19, 2017 when the City filed an answer on behalf of itself, the NYPD, and Police Officer Carlos Gomez (NYSCEF Doc No. 2). The case then proceeded to discovery, and Plaintiff filed the note of issue on March 13, 2024.

The City now moves on behalf of all Defendants for summary judgment and to dismiss all causes of action. In support of its motion, the City argues that the causes of action for false arrest and malicious prosecution should be dismissed because the NYPD had probable cause to arrest and prosecute Plaintiff based on eyewitness statements, Plaintiff's constitutional claims are inadequately pled, conspiracy is not a cognizable cause of action, the negligent hiring and *respondeat superior* causes of action must be dismissed because the officers were acting within the scope of their employment, the NYPD is not a suable entity, the *Monell* claims are inadequately pled, negligent and intentional infliction of emotional distress cannot lie against a municipal defendant where false arrest and malicious prosecution are also alleged, and the cause of action for negligence is duplicative. The City further argues that punitive damages and attorneys' fees cannot be maintained as causes of action and that unidentified "Doe" officers must be dismissed.

¹ The complaint states the causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress as separate causes of action, both identified as the fifth cause of action. The complaint also does not contain an eight cause of action.

In opposition, Plaintiff argues that contradictions in the record regarding Plaintiff's arrest raise issues of fact regarding whether the NYPD had probable cause to arrest him.

DISCUSSION

A motion for summary judgment “shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party” (CPLR § 3212[b]). “The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013][internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]).

Where a Defendant moves to dismiss pursuant to CPLR § 3211(a)(7), the court must “accept the facts as 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” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994][citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). “However, when evidence is submitted on a motion to dismiss, we look to whether plaintiff has a cause of action, rather than whether it is pleaded” (*Braun v Lewis*, 99 AD3d 574 [1st Dept 2012]; citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

As a threshold matter, the City's motion to dismiss the complaint as against the NYPD is granted because the NYPD is a non-suable entity pursuant to Chapter 17, section 396 of the New York City Charter (*Troy v City of New York*, 160 AD3d 410, 411 [1st Dept 2018]). Dismissal of the Doe defendants is also appropriate because no Does have been identified and the statute of limitations on claims against additional individuals is now long expired (*see Crawford v City of New York*, 129 AD3d 554, 555 [1st Dept 2015]). Additionally, Plaintiff's opposition to the motion only addresses arguments addressed to the first, second, third, and ninth causes of action. For this reason alone, the remainder may be dismissed (*see Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573, 574 [1st Dept 2022]; *R.K. by Fatmir K. v City of New York*, 200 AD3d 584, 584 [1st Dept 2021] [Plaintiffs abandoned claims by failing to oppose motion to dismiss same]). Nevertheless, the causes of action fail on substantive grounds as well, as set forth below.

A. False Arrest and Malicious Prosecution

The City first moves for summary judgment to dismiss Plaintiff's causes of action for false arrest and malicious prosecution. "In New York, the tort of false arrest is synonymous with that of false imprisonment (*Posr v Doherty*, 944 F2d 91, 96 [2d Cir 1991]). The elements of false arrest are "substantially the same" under state and federal law and require the same analysis (*Crooks v City of New York*, 189 AD3d 771, 771 [2d Dept 2020]). "Under the common law, a plaintiff may bring suit for false arrest and imprisonment against one who has unlawfully robbed the plaintiff of [their] 'freedom from restraint of movement'" (*De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016], quoting *Broughton v State of New York*, 37 NY2d 451, 456 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975][other citation omitted]). To prevail on a cause of action for false arrest or imprisonment, a plaintiff must demonstrate that (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not privileged (*DeLourdes Torres*, 26 NY3d at 759 [citations omitted]; see *Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *Broughton*, 37 NY2d at 456-457, *supra*).

"For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause" (*De Lourdes Torres*, 26 NY3d at 759 [citations omitted]; see *Gann v City of New York*, 197 AD3d 1035, 1035 [1st Dept 2021]["showing of probable cause to arrest is a complete defense to an unlawful arrest and imprisonment claim"]). "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Colon v City of New York*, 60 NY2d 78, 82 [1983]; see *De Lourdes Torres*, 26 NY3d at 759; *Atwater v City of Lago Vista*, 532 US 318, 354 [2001]["If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"]). "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances" (*De Lourdes Torres*, 26 NY3d at 759).

Like false arrest, the elements of malicious prosecution are substantially the same under state and federal law (*Crooks*, 189 AD3d at 771, *supra*). To recover damages for malicious prosecution, a plaintiff must establish (1) that a criminal proceeding was initiated against them, (2) it termination favorably to plaintiff, (3) lacked of probable cause for the prosecution, and (4) was brought out of actual malice (*Morant v City of New York*, 95 AD 3d 612 [1st Dept 2012] quoting *Colon v City of New York*, 60 NY2d 78,82 [1983]; *Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]). The existence of probable cause constitutes a complete defense to a claim of malicious prosecution (*Lawson v City of New York*, 83 AD 3d 609 [1st Dept 2011]).

The City contends that the causes of action for false arrest and malicious prosecution fail because there was probable cause for the arrest and prosecution based on "witness and victim statements" and because "the victim's cell phone was in the possession of one of the co-arrestees" (Copperman aff in support ¶ 29). However, there are several discrepancies in the record that raise

questions of fact relevant to the issue of probable cause. First, in the criminal complaint, Officer Gomez attested in the criminal complaint that when he arrived at the location, he “observed the victim lying motionless on the ground, unresponsive” (NYSCEF Doc No. 31, felony complaint at 1-2). This contradicts Officer Gomez’ deposition testimony where he stated that when he arrived on the scene, the victim was conscious, standing, and “a little out of it . . . “a little banged up from being assaulted . . . he wasn’t bleeding . . . just seemed to be bruised” (NYSCEF Doc No. 25, deposition tr at 15, 25-26). When asked to clarify, Officer Gomez stated that he could “not be completely sure” whether the victim was on the ground and unresponsive, but recalled that he was standing (*id.* at 34, ln 3-9). Officer Gomez also could not recall when he spoke to the victim, who may have been unresponsive (*id.*). When questioned regarding the “individual known to the District Attorney’s Office” referenced in the criminal complaint that he attested to, he could not confirm whether this was the female that he encountered when he arrived, stating only that is his “assumption” (*id.* at 32, ln 14).

The NYPD chronology also depicts a scene that varies significantly from the description contained in the criminal complaint. Notably, the chronology identifies three perpetrators rather than four (NYSCEF Doc No. 40, chronology at DEF 000011). Additionally, the report indicates that the victim was lying on the ground while the perpetrators hit him with a wooden beam, was dragged into a building, a lot of people were around and yelling, and that a crowd of people had overwhelmed the responding officers (*id.* at DEF 000013-000014, 000016-000017). Gomez could not recall anything regarding the wooden beam (NYSCEF Doc No. 25, deposition tr at 55. ln 11-17), and the chaotic scene described in the chronology contrasts sharply from the scene described by Gomez wherein he stated that when he arrived, the four suspects were “just standing there . . . not doing anything in particular” (*id.* at 29, ln 20-22).

“In general, the existence or absence of probable cause is a question of fact and becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn therefrom” (*Holland v City of Poughkeepsie*, 90 AD3d 841, 845 [2d Dept 2011][internal quotes omitted]). Here, the discrepancies between the criminal complaint, Gomez’ deposition testimony, and the chronology regarding the arrest create questions of fact regarding whether the NYPD had probable cause for the arrest and the prosecution. The City’s additional argument that the NYPD had probable cause because one of the other individuals arrested had the victim’s cell phone in his possession is unpersuasive because there is nothing in the record that suggests Plaintiff was cooperating with that individual, knew the individual possessed the cell phone, or even that the two “co-arrestees” knew each other. The City’s argument that the complaint does not plead a cause of action for malicious prosecution is also unpersuasive. Although the cause of action for malicious prosecution is not specifically designated as such, the complaint sufficiently alleges the elements of a cause of action for malicious prosecution and the disputed facts elucidated on the motion evidence a colorable claim. Whereas there are outstanding questions of material fact regarding probable cause, the motion is denied as to the causes of action for false arrest and malicious prosecution.

B. Malicious Abuse of Process

The torts of malicious prosecution and malicious abuse of process are closely related. “While malicious prosecution concerns the improper issuance of process . . . abuse of process is

the improper use of process after it is regularly issued” (*Cook v Sheldon*, 41 F3d 73, 80 [2d Cir 1994]). Liability under 42 U.S.C. § 1983 may lie for both torts (*id.*). “In New York, a malicious abuse of process claim lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process” (*id.* at 80). The plaintiff must also establish that the defendant had a “collateral objective” in instituting the process, meaning that the defendant must have “an improper purpose or objective in instigating the action beyond the plaintiff’s criminal prosecution,” not simply an improper motive (*Sforza v City of New York*, 2009 WL 857496 [SDNY, Mar. 31, 2009, No. 07CIV6122DLC], citing *Savino v City of New York*, 331 F3d 63, 77 [2d Cir 2003]). “A malicious motive alone does not give rise to a cause of action for abuse of process” (*id.*). “[T]he basis of the tort lies in the use of the process to gain a collateral objective, the accomplishment of which the process in question was not intended to secure” (*Pagliarulo v Pagliarulo*, 30 AD2d 840, 841 [2d Dept 1968]).

Plaintiff alleges in the complaint that Officer Gomez and the NYPD “used criminal process against plaintiff in order to harass him and in order to cover up their own wrongdoing and to avoid civil liability for their own acts relating to intimidating the plaintiff, and wrongfully taking him into custody by force without warrant or probable cause” (NYSCEF Doc No. 1, complaint ¶ 69). However, no factual allegations are asserted regarding the purported harassment, wrongdoing, intimidation, or an intent to do harm to Plaintiff, nor do the facts elucidated in discovery demonstrate any other collateral objective. In the absence of evidence, or even factual allegations, of a collateral objective and intend to cause harm, the cause of action for malicious abuse of process fails.

C. Constitutional Violations

Plaintiff’s second, third, fourth, and seventh causes of action assert various constitutional violations. The second cause of action alleges violations of Plaintiff’s “civil rights under the Second, Fourth, Fifth and Fourteenth Amendments of the Constitution and in contravention of the letter and spirit of 42 U.S.C. 1983 and 1985,” and the third cause of action asserts that “defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive” Plaintiff of such rights (NYSCEF Doc No. 1, complaint ¶¶ 44, 47). The fourth cause of action asserts that the City and/or the NYPD “negligently and/or intentionally” engaged in a pattern of acts, omissions, failure to train, and failure to supervise NYPD officers, which deprived Plaintiff of his rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States” (*id.* ¶ 51). The seventh cause of action similarly alleges that the City and NYPD negligently “failed to provide proper and adequate training, supervision, and control” of Officer Gomez and unnamed “Doe” NYPD officers, and that such negligence caused Plaintiff to sustain “injuries and violations of his rights” (*id.* ¶¶ 65-66).

Federal law 42 U.S.C. 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured” (42 USC § 1983). However, a municipality “is not vicariously liable for its employees” actions under § 1983 (*Connick v*

Thompson, 563 US 51, 60 [2011], citing *Monell v Dep't of Soc. Servs. of City of New York*, 436 US 658, 691 [1978]). “[I]t is only when the municipality itself commits the misdeed, that is, ‘when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983’” (*Walker v City of New York*, 974 F2d 293 [2d Cir 1992], citing *Monell v Dept of Soc. Servs. of City of New York*, 436 US 658, 694 [1978]).

“Under limited circumstances, proof of a municipality’s failure to train can be the basis for liability under § 1983” (*id.* at 848). To establish liability under a theory of failure to train, a plaintiff must “identify a specific deficiency in the city’s training program and establish that that deficiency is ‘closely related to the ultimate injury,’ such that it ‘actually caused’ the constitutional deprivation” (*Amnesty Am. v Town of W. Hartford*, 361 F3d 113 [2d Cir 2004], citing *City of Canton*, 489 US 378, 390-391 [1989]). “The elements of an identified training deficiency and a close causal relationship, which together require the plaintiffs to prove that the deprivation occurred as the result of a municipal policy rather than as a result of isolated misconduct by a single actor, ensure that a failure to train theory does not collapse into *respondeat superior* liability” (*id.*).

This is permitted “only where the municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983” (*id.*). “To allege deliberate indifference in the context of a failure-to-train claim, a plaintiff must plead facts giving rise to a plausible inference that (1) the municipality knows ‘to a moral certainty’ that its employees will confront a given situation, (2) either the situation presents the employees with a difficult choice of the sort that training will make less difficult, or there is a history of employees mishandling the situation, and (3) the wrong choice by the employee will frequently cause a constitutional deprivation (*id.*; see also *Holland*, 90 AD3d at 847). “A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train” (*Boddie v City of New York*, 2016 WL 1466555 [SDNY 2016]).

To the extent that Plaintiff seeks to assert a cause of action against Officer Gomez for violations of his rights pursuant to 42 U.S.C. § 1983, he may proceed based on the causes of action for false arrest and malicious prosecution *Corcoran v City of New York*, 186 AD3d 1151, 1152 [1st Dept 2020][“A person has a private right of action under 42 U.S.C. § 1983 against police officers who, acting under color of law, violate federal constitutional or statutory rights”]. However, it should be noted that the Second Amendment is not implicated by Plaintiff’s claims.

As to the City, Plaintiff has not alleged or identified any official policy or custom that led to a violation of Plaintiff’s constitutional rights to support a cause of action asserted directly against the City (see *Liu v New York City Police Dept*, 216 AD2d 67, 68 [1st Dept 1995]). Plaintiff also fails to identify a specific training deficiency to support a cause of action under a theory of failure to train, nor has he plead or demonstrated facts to support a finding of deliberate indifference. Therefore, the City is entitled to summary judgment dismissing the causes of action for violations under 42 U.S.C. § 1983 as asserted against it.

Plaintiff also cites to 42 U.S.C. § 1985 as the basis for the second and third causes of action. This section provides the following, in relevant part:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured . . . may have an action for the recovery of damages occasioned by such injury or deprivation[.]

(42 U.S.C. § 1985[3]). This section “provides no substantive rights itself but merely provides a remedy for violation of the rights it designates” (*Spencer v Casavilla*, 903 F2d 171, 174 [2d Cir 1990] [internal quote omitted]). A conspiracy claim under this section requires the plaintiff to demonstrate (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States (*Dolan v Connolly*, 794 F3d 290 [2d Cir 2015]).

“In order to maintain an action under Section 1985, a plaintiff must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end” (*Gilliam v Greenberg Taurig LLP*, 2024 WL 4043348 [SD NY, Sept. 4, 2024, No. 23-CV-06144 (PMH)]). The conspiracy must be “motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus” based on “inherited or immutable characteristics” (*id.* at 296; *N.Y. State Nat’l Org. for Women v Terry*, 886 F2d 1339, 1359 [2d Cir 1989], citing *Volk v Coler*, 845 F2d 1422, 1434 [7th Cir 1988] [“§ 1985(3) extends . . . to conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty.”]). Failure to allege membership in a protective class is a basis to dismiss the claim (*id.*). Plaintiff’s claim fails because he has not plead factual allegations of any element of the claim nor provided a factual basis supporting a meeting of the minds, and he does not allege membership in a protective class. Moreover, employees of a single municipal entity, each acting within the scope of their employment, are legally incapable of conspiring with each other” (*Dunlop v City of New York*, 2008 WL 1970002 [SDNY, May 6, 2008, No. 06 CIV 0433 (RJS)]; *see also Hagans v Nassau Cnty. Dep’t of Soc. Servs.*, 2020 WL 1550577 [EDNY, Mar. 31, 2020, No. 18CV1917JSAYS]). The conspiracy cause of action also fails because there has been no allegation or showing that any NYPD officer was acting outside the scope of their employment or otherwise pursuing personal interests wholly separate and apart from the entity (*see Hagans*, 2020 WL 1550577 at *8 [exception to the intra-corporate conspiracy doctrine applies to individuals within a single entity when they are pursuing personal interests wholly separate and apart from the entity]).

D. Intentional and Negligent Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress is a tort “designed to provide a remedy to an individual who suffers severe emotional distress after being subjected to

extreme and outrageous conduct by another who intends to cause that distress or does so recklessly” (*Brown v Riverside Church in City of New York*, 216 NYS3d 144, 149 [1st Dept 2024]). To maintain a cause of action for intentional infliction of emotional distress, a plaintiff must demonstrate the following four elements: (i) extreme and outrageous conduct, (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and injury, and (iv) severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1st Dept 1993]). With respect to the first element, “[l]iability has been found only where the conduct has been 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 community” (*id.*).

Significantly, the First Department recently reversed prior holdings that a cause of action for intentional infliction of emotional distress cannot lie where the alleged misconduct falls within the scope of another tort (*Brown v Riverside Church*, 216 NYS3d at 151; *see cf. Afifi v. City of New York* (104 AD3d 712, 713 [2d Dept 2013] [Noting that prior holdings were based on non-binding dictum]). In *Brown*, the First Department held that a cause of action for intentional infliction of emotional distress may be pled in the alternative, provided that the claim is not used to subvert a rule of law otherwise barring recovery and that the defendant’s conduct is not privileged as a matter of law (*id.*). Nevertheless, “claims of intentional infliction for emotional distress as against government bodies are barred as a matter of public policy” (*Melendez v City of New York*, 171 AD3d 566, 566 [1st Dept 2019], citing *Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]). As applicable to the individual defendant, there are no allegations that Officer Gomez engaged in any extreme or outrageous conduct sufficient to sustain the cause of action (*see Ball v Miller*, 164 AD3d 728, 730 [2d Dept 2018]). Therefore, the cause of action for intentional infliction of emotional distress must be dismissed.

“[W]hen there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred” (*Taggart v Costabile*, 131 AD3d 243, 252 [2nd Dept 2015]). “Emotional injury is generally compensable only when it is the direct, rather than consequential, result of the breach of a duty owed” (*Brown v New York Design Ctr., Inc.*, 215 AD3d 1, 5 [1st Dept 2023]). “While there may be recovery for emotional trauma in the absence of physical injury, evidence must be produced that is sufficient to guarantee the genuineness of the claim” (*id.*). “Plaintiffs’ psychological traumas [must be] readily and unquestionably understandable, evidencing an especial likelihood of genuine and serious mental distress, arising from the special circumstances” (*Brown v New York Design Ctr., Inc.*, 215 AD3d 1, 6 [1st Dept 2023]). Following this requirement of a guarantee of genuineness, “[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 endangered his physical safety, or caused him to fear for his own safety” (*Sacino v Warwick Val. Cent. School Dist.*, 138 AD3d 717, 719 [2nd Dept 2016]). Here, Plaintiff has presented no evidence of emotional distress or that he was at any point during the arrest placed in a position that endangered his physical safety or caused him to fear for his safety, nor does he allege either. Therefore, the cause of action fails and must be dismissed.

E. Respondeat Superior

Plaintiff’s sixth cause of action seeks to hold the City liable for the intentional torts of its employees under the doctrine of *respondeat superior*. “The doctrine of *respondeat superior* renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment” (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 934 [1999]). “Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment” (*id.*). “[B]ecause the determination of whether a particular act was within the scope of the servant’s employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury” (*Riviello v Waldron*, 418 NYS2d 300, 303 [1979]). Whereas the City concedes the arresting officers were acting in the scope of their employment and there are questions of outstanding fact regarding probable cause, summary judgment is denied regarding the cause of action for *respondeat superior*.

F. Punitive Damages and Attorneys’ fees

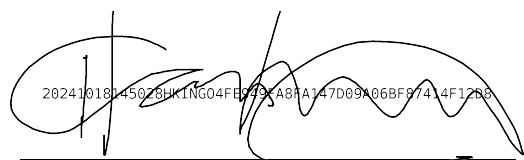
Although New York does not recognize an independent cause of action for punitive damages, an award of punitive damages and attorneys’ fees is permissible on Plaintiff’s remaining causes of action (*see Cardoza v City of New York*, 139 AD3d 151, [1st Dept 2016]). Therefore, the motion to dismiss the request for punitive damages and attorneys’ fees is denied.

Accordingly, it is

ORDERED that the motion for summary judgment is granted in part, and to the extent that the complaint is dismissed as against defendant the New York City Police Department and the third, fourth, fifth, sixth, seventh, and ninth causes of action are dismissed in their entirety; and it is further

ORDERED that the first and second causes of action and the request for punitive damages and attorneys’ fees are hereby severed and shall continue; and it is further

ORDERED that a settlement conference will be held in this matter on November 19, 2024 at 2:15 p.m. at 80 Centre Street, Room 320, New York, New York.



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HASA A. KINGO, J.S.C.

10/17/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: