

Delgado v City of New York

2024 NY Slip Op 34971(U)

July 11, 2024

Supreme Court, Bronx County

Docket Number: Index No. 25772/2020E

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33

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#05

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LEE DELGADO, JR.,

Index №. 25772/2020E

-against-

Hon. Mitchell J. Danziger

CITY OF NEW YORK, et. al.,

Justice Supreme Court

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The following papers were read on this motion (Seq. No. 5) for partial SJ noticed for March 28, 2024, and submitted on April 18, 2024

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 92-100
Affirmation in Opposition	NYSCEF Doc. # 130
Affirmation in Reply	NYSCEF Doc. # 137

Motion by plaintiff for an order pursuant to CPLR §3212, granting partial summary judgment as to liability for plaintiff’s false arrest and malicious prosecution and dismissing the defendants’ 6th and 7th Affirmative defenses as to those claims, is decided as follows:

This is an action for personal injuries sustained by plaintiff when he was arrested by police officers with the New York City Police Department on July 28, 2019, at or near East 184th Street and Ryer Avenue, Bronx, New York.

Plaintiff was standing with a group of young men nearby where a person was being arrested by defendants, P.O. Edmundo Rivera, and P.O. Joel Ayala for possessing a firearm. The Body Worn Camera footage shows that the group of young men started to become more animated and the officers directed the young men to get back. The officers called for backup. Some of the crowd were speaking directly to the officers saying things such as “why did you have to punch him” or “don’t touch me.” Some expletive language was used. As the officers pushed past one crowd member to put the arrestee in the car, the group began to move toward the officers. Plaintiff can be seen in the background, but within the crowd, with his hands behind his back. Another arrest was made of someone other than plaintiff after conversation about a phone. As the officers were in their vehicle and pulling away from the crowd, someone threw a water bottle and/or other items at and into the police vehicle. It did not appear from a review of the videos that plaintiff had anything in his hands or that he was doing anything other than being present. Thereafter, Lt. Anderson Ortiz arrived on the scene and saw the plaintiff and other crowd members running from the area. Lt. Ortiz chased plaintiff and arrested him. According to plaintiff’s testimony, he ran because he saw his friend look scared and start to run. He did not know he was being chased until he was apprehended. The officer grabbed him, tackled him, then turned him

over and punch him in the face before he was handcuffed. P.O. Ayala issued two summonses to plaintiff in this matter for Disorderly Conduct and for Unlawful Possession of Marijuana. Both summonses were dismissed.

According to Lt. Ortiz, he arrived on the scene and saw a group of officers running north after a group of males. He did not know why the officers were pursuing the group, but he saw plaintiff turn a corner and duck down in order to evade police. Lt. Ortiz was not aware as to whether plaintiff had committed a crime or not, but that he may have because he was being pursued. Lt. Ortiz testified that he had probable cause that plaintiff may have committed a crime or violation based on him running away and hiding from the officers. Lt. Ortiz testified that running from a police officer is not a crime, nor is ducking from the police. He did not see plaintiff with a weapon but did see him grab his waistband area, which could have been attributed to plaintiff trying to hold his pants. Lt. Ortiz testified he ran behind a car and collided with plaintiff, so he grabbed him and guided him to the floor. Two other officers arrived by then and put him in handcuffs. Lt. Ortiz could not testify to a crime or violation that plaintiff committed and did not know at the time of plaintiff's arrest either. Lt. Ortiz testified that plaintiff did not resist arrest.

Sgt. Edmundo Rivera testified that he filled out a Threat Resistance Injury Report regarding plaintiff's injury as a favor to his captain. He never interacted with plaintiff, never saw him, never met him, and never talked to him. He testified he did not interact with plaintiff so he cannot speak to any of his actions. He did not know if there was probable cause to arrest plaintiff.

P.O. Joel Ayala testified that plaintiff was a part of the group that advanced on the officers. However, he testified that he did not remember what plaintiff did. The only thing P.O. Ayala could testify to that plaintiff did was advance to within 5 feet of him. He could not testify that he observed plaintiff with marijuana or who did. P.O. Ayala issued two summonses to plaintiff, one for Disorderly Conduct for failing to disperse and the other for Unlawful Possession of Marijuana.

Plaintiff moves for partial summary judgment as to liability as to his claims for false arrest and malicious prosecution on the grounds that, per the defendant's own testimony, there was no probable cause for plaintiff's arrest and no basis for the defendant's Affirmative Defenses of comparative negligence or assumption of the risk. The City opposes plaintiff's application and submits that the officers had probable cause or arguable probable cause which precludes summary judgment.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party.

(*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). However, to defeat a motion for summary judgment, the non-moving party must establish the existence of triable issues of fact that are, “real, not feigned since a sham or frivolous issue will not preclude summary relief. (*Kornfeld v. NRX Technologies, Inc.* 93 A.D.2d 772 [1st Dept. 1983]). “It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff.” (*Pulka v. Edelman*, 40 N.Y.2d 781, 781 [1976]). “In the absence of a duty, there is no breach and without a breach there is no liability. (Id., see also, *Daubert v. Flyte Time Regency Limousine*, 1 A.D. 3d 396, 396 [2d Dept. 2003]).

To sustain a claim for false arrest, the plaintiff must prove 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 otherwise privileged.” (*Broughton v. State of New York*, 37 N.Y.2d 451 [1975]). The existence of probable cause is a complete defense to both federal and state law false arrest claims. (*Weyant v. Okst.*, 101 F.3d 845 [2d Cir. 1996]). Probable cause is “not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction, but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed” by the person to be arrested. (*People v. McRay*, 51 N.Y.2d 593 [1980]). For an officer to have probable cause to make an arrest, the officer must possess “information sufficient to support a reasonable belief that an offense has been or is being committed.” (*People v. Bigelow*, 66 N.Y.2d 417 [1985]). In order to determine if an officer has probable cause, courts look to the information available to the officer at the time of the arrest, while considering the “totality of the circumstances.” (*Bernard v. United States*, 25 F.3d 98 [2d Cir. 1994]). Where the facts leading up to an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide. (*Parkin v. Cornell University, Inc.*, 78 N.Y.2d 529 [1991]).

Here, plaintiff was arrested and given two summonses. The first was for Disorderly Conduct for failure to disperse pursuant to Penal Law §240.20(6). A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse. As an initial matter, the police did not appear to tell the group to disperse. A review of the body worn camera footage

indicates that the officers told the group to back-up but did not order the group to leave the location. While plaintiff was present at the initial arrests, he was behind the group that was speaking to or yelling at the officers and was not seen throwing anything at the officers or their vehicles. Further, Lt. Ortiz, testified that he had probable cause to arrest plaintiff because other officers were running after the group and plaintiff hid. He also testified that neither of those things were a crime. The information available to Lt. Ortiz at the time of plaintiff's arrest is that he was running from and hiding from officer, both of which he testified are not a crime. When specifically asked what crime or violation that plaintiff committed, Lt. Ortiz testified "I don't know." Lt. Ortiz testified that at the moment that plaintiff was placed in handcuffs, he was unaware of the crime or violation that plaintiff committed. Lt. Ortiz arrested plaintiff because he was running from officers that called for assistance. "Neither the mere presence of an individual at a scene of criminal activity nor an individual's flight, without any other indicia of criminal activity, establishes probable cause." (*People v. Sanchez*, 276 A.D.2d 723 [2d Dept. 2000]). As a result of the foregoing, the Court finds probable cause for plaintiff's arrest did not exist at the time he was arrested.

The Court turns to plaintiff's malicious prosecution claim. The elements of a malicious prosecution are as follows: (1) the defendant commenced or continued a prior criminal proceeding against the plaintiff; (2) the prior criminal proceeding was terminated in favor of the plaintiff; (3) there was no probable cause for the initiation of the prior criminal proceeding; and (4) the defendant acted with actual malice. *Cantalino v. Danner*, 96 N.Y.2d 391, 394 (2001). The failure of a plaintiff to prove one of these elements is fatal to plaintiff's malicious prosecution claim. (*Hollender v. Trump Village Co-op., Inc.*, 58 N.Y.2d 420 [N.Y. 1983]).

The City argues that plaintiff's criminal case did not end in a favorable disposition and therefore, plaintiff cannot prove he was maliciously prosecuted. The City submits that the c-summons issued to plaintiff do not meet the standard for post-arraignment liberty restraint. The City points to *Lacey v. Yates County*, 30 F. Supp.3d 213 (W.D.N.Y. 2014), to support that premise. However, in *Lacy*, plaintiff voluntarily appeared in Town Court and was charged with a misdemeanor. No summons was issued and he was not arrested. After pleading not guilty, he was indicted by a grand jury for felony assault menacing in the second degree. The Court, in dismissing plaintiff, Lacey's malicious prosecution claim, found that plaintiff complaint failed to allege facts that establish a lack of probable cause. In addition, plaintiff failed to rebut the presumption of probable cause that arose from Lacey's grand jury indictment. While the Court said that Lacey's false arrest claim was deficient because he was never confined, that is different than this matter. Here, plaintiff was handcuffed, processed at the precinct, removed to the hospital and thereafter, removed from confinement. As such, plaintiff's arrest and detainment is sufficient to pursue a false arrest or malicious prosecution claim

"In the context of a malicious prosecution claim, probable cause under New York law is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds

