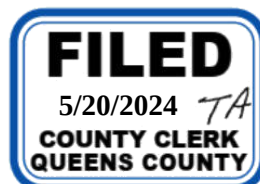


Almonte v City of New York
2024 NY Slip Op 35446(U)
May 20, 2024
Supreme Court, Queens County
Docket Number: Index No. 714126/21
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
JusticePart 10Raymond Almonte, Jeremiah Vega and
Anthony Malave,Index
Number: 714126/21

Plaintiffs,

- against -

Motion
Date: 5/13/24

Motion Seq. No.: 3

The City of New York, New York City Police Detective Steven Mill Water formerly of the Gang Unit Queens, now assigned to the Drug Enforcement Task Unit, Tax Teg#935325, New York City Police Detective Michael Duffy, Tax Reg.923787 of Gang Unit Queens, The Supervising Tactical Team Sergeant on Arrest #Q15662971 n/h/a John/Jane Doe 1, The Investigating Officer on the warrant on said arrest n/h/a John/Jane Doe II, other New York City Police Officers said arrest whose names are now known at this time n/h/a John/Jane Doe III-V, as it pertains to the incident on December 3, 2015, and no other date,

Defendants.

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The following papers numbered E5-E25 & E27 read on this motion by Defendants, The City of New York, Detective Steven Millwater and Detective Michael Duffy, for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E5-22
Affirmation in Opposition.....	E23-25
Reply.....	E27

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

Motion by Defendants, The City of New York, Detective Steven Millwater and Detective Michael Duffy, for summary judgment is

granted solely to the extent that the causes of action for general negligence, negligent hiring, training, and retention, illegal search and seizure, and claims pursuant to Monell are dismissed. The branches of the motion for summary judgment, dismissing the causes of action for false arrest, false imprisonment, malicious prosecution, and assault and battery, are denied.

As a preliminary matter, it appears undisputed that the claims brought by Plaintiff Raymond Almonte have been settled. Accordingly, the motion for summary judgment is brought solely against the remaining Plaintiffs, Jerimiah Vega and Anthony Malave.

The instant action stems from the execution of a search warrant on December 3, 2015. The subject search warrant was issued by the Honorable David M. Hawkins and permitted the New York City Police Department ("NYPD") to search the entire premises, with no restrictions, which was located at 84-21 108th Street in Queens County for firearms, ammunition, and marijuana.

At the time of execution of the search warrant, Co-Arrestee Gonzalez, who is not a Plaintiff in this case, and whose grandmother owns the premises, was situated in the basement. Plaintiff Vargas was asleep in the basement with his girlfriend, Ashley Candelario, Plaintiff Malave was asleep in his room on the first floor, and (prior) Plaintiff Almonte had just entered the premises to fit a toilet on the first floor.

Upon execution thereof, NYPD's "Queens South Gang" recovered controlled substances, a 9 millimeter semi-automatic handgun, and ammunition in the basement of the premises. Plaintiffs were charged with, inter alia, Criminal Possession of a Weapon. The charges were subsequently dismissed on March 31, 2016. It appears undisputed that Gonzalez pled guilty to one or more of the crimes charged.

Malave testified that he lived on the first floor of the home and never once entered the basement. The side door of the house leads to the basement, and Malave never used said entrance. Access to the basement from inside the home was padlocked. When the police entered the home, Malave avers that he was hit with a shield and thrown to the floor, a police officer placed his knee to Malave's back, handcuffed him, and carried him out of the house.

Vega testified that he lived in the basement at the subject location. Only he and Gonzalez had keys to the basement. Half of the basement was sectioned off with a sheet and a dresser, one side belonging to Vega, and the other to Gonzalez. On the date of incident, he was asleep in bed with his girlfriend when he was awoken by the NYPD. He and his girlfriend were pulled out of bed

and handcuffed.

Malave and Vega both testified that during the arrest, they overheard Gonzalez admitting to the NYPD that the contraband in the house belonged to him. Malave and Vega also testified that while they were incarcerated, they heard Gonzalez admit to the NYPD that the contraband discovered in the house belonged to him. Malave and Vega testified that Gonzalez subsequently wrote a statement indicating as much to the police.

Detective Steven Millwater testified that a confidential informant ("CI") had informed him that drugs were being sold from the premises by an individual named Casper, who was ultimately identified as Gonzalez. The CI thereafter performed controlled buys at the location. The CI also informed the NYPD that Gonzalez was in possession of a semiautomatic firearm. The CI never made mention of any other individuals at the premises. Upon execution of the search warrant, Detective Duffy observed Gonzalez attempting to hide something in the ceiling of the basement. The NYPD later discovered the item to be a loaded firearm.

Detective Michael Duffy testified that he was performing outside security during the execution of the search warrant. While outside, he could see into the basement through a window and observed Gonzalez place what he believed to be a firearm in the ceiling. Once all individuals were cleared from the premises, Duffy went to the basement and informed Detective Millwater of his observation, leading to recovery of the firearm.

False Arrest and False Imprisonment Claims:

The branch of the motion for summary judgment, dismissing Plaintiffs' State and Federal claims for false arrest and false imprisonment is denied.

Initially, there is no dispute here that the search of the premises was executed pursuant to a lawfully obtained and facially-valid search warrant (see Lee v. City of New York, 272 A.D.2d 586 [1st Dept. 2000]). There is also no dispute that the search warrant entitled the NYPD to search the entire premises, including the basement, despite the averment that the basement door was locked or potentially considered a separate premises of sorts.

Considering that the NYPD entered the premises with express permission pursuant to the search warrant, the Court turns to the question of whether there was probable cause to arrest the Plaintiffs. A finding of probable cause operates as a complete defense to such causes of action (see Carlton v. Nassau County Police Dept., 306 A.D.2d 365 [2d Dept. 2003]). 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 it must be "judged under the totality of the circumstances" (see Fields v. County of Nassau, 219 A.D.3D 882 [2d Dept. 2023]). "The existence or absence of probable cause 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 drawn therefrom" (see Webster v. City of New York, 181 A.D.3D 756 [2d Dept. 2020]).

Movants aver there was probable cause for the search and subsequent arrest. The warrant was obtained by the NYPD following the report of a CI. The CI reported that he observed a pistol inside the location and had also engaged in "positive controlled buys" for marijuana at the location. Upon entering the premises, the NYPD discovered the aforementioned firearm, ammunition, and controlled substances, to wit, 3, 4-methylenedioxymethamphetamine ("MDMA"), marijuana, and methamphetamine pills.

In contrast, Defendants contend that there was a lack of probable cause because Gonzalez was the only person known to be selling drugs out of the premises, evidenced by the controlled buys. Moreover, the officers observed Gonzalez hiding the handgun, retrieved the ammunition from Gonzalez's dresser, and Gonzalez admitting the contraband belonged to him. Finally, the basement was sectioned off, representing two living areas which were separate and apart from the upstairs living area.

Plaintiffs are correct, in that, a person may not be arrested merely because he or she is in the company of a person engaged in criminal activity (see People v. Batista, 68 A.D.2d 515 [1st Dept. 1979]). However, an individual's presence at a crime scene "might furnish a trained policeman with probable cause to arrest him" (see People v. Martin, 32 N.Y.2d 123 [1973]). The officers may have been entitled to infer that all of the parties within the premises jointly exercised control over the premises, such that they all had constructive possession of the contraband (see People v. Bundy, 90 N.Y.2D 918 [1997]). The inference, however, is not without limits. The mere presence at the location of the contraband does not establish constructive possession (see United States v. Facen, 812 F.3d 280 [2d. Cir. 2016]). Both the Second Circuit Court of Appeals and the New York Court of Appeals have held that an individual is not in constructive possession of contraband where the police failed to establish that: "(1) the defendants were aware of and complicit in the illegal activity, (2) the contraband was in plain view, (3) police officers knew that the defendants were residents

of the apartment or home containing the contraband, or (4) the defendants exercised dominion and control over the area containing the narcotics and were not just in proximity to the location of the narcotics" (see Thomas v. City of New York, 2018 U.S. Dist. LEXIS 136652 citing United States v. Rodroquez, 392 F.3d [2d Cir. 2004]; Jenkins v. City of N.Y., 2013 U.S. Dist. Lexis 33331 [S.D.N.Y. 2013]; People v. Headley, 143 A.D.2d 937 [2d Dept. 1988]). In terms of dominion and control, Court's have weighed a number of facts to determine whether a person has exercised "the power and intention to exercise dominion and control" over the contraband, including possession of a key to the location where the contraband is found, their reaction to the presence of the police (i.e., whether the individual fled), and whether the contraband is in plain view, suggesting an operation of sorts (see United States v. Facen, 812 F.3d at 280).

Here, it is undisputed that drugs and ammunition were found in Gonzalez's dresser in the basement level of the premises, which was not accessible by Malave. It is also undisputed that the officers witnessed Gonzalez attempting to hide the firearm in the ceiling. The Movants aver that it was objectively reasonable for the officers to believe Malave and Vega were residents of the location since they were both asleep inside, and thus, that they had constructive possession of the contraband. This Court disagrees. Being a resident of a premises does not necessarily equate to constructive possession (see supra). With respect to Malave, his un rebutted testimony that he resided on the first floor, did not have access to the basement, and had never entered the basement, raises a question of fact as to constructive possession (see Jenkins, 2013 U.S. Dist. LEXIS 33331 at 28-29; David v. City of NY, 2007 U.S. Dist. LEXIS 10555 [E.D.N.Y. 2007]). This is bolstered by the undisputed fact that the basement entry from within the house was padlocked. In contrast, Vega resided in the basement, where the contraband was discovered. Despite Plaintiff's contentions that the room was separated by a sheet, it appears that it was sufficiently open to conclude that Vega had access to the contraband and the officers could have reasonably inferred constructive possession to him (see People v. Pinchback, 187 A.D.2D 540 [2d Dept. 1992]; Torres v. Hanslmaier, 1995 U.S. Dist. LEXIS 6193 [S.D.N.Y. 1995]). Accordingly, this Court can only conclude that Vega was in constructive possession of the contraband based on his shared residence of the otherwise inaccessible basement. However, despite this finding, the Court nonetheless finds a question of fact as to probable cause based on the un rebutted testimony of Malave and Vega that Gonzalez admitted to ownership of all of the contraband (see People v. Gonzalez, 138 A.D.2d 622 [2d Dept. 1988]). The forgoing represents a materially impeaching circumstance and a credible ground for believing the offense was committed by a person other

than the Plaintiffs, and which identified the perpetrator (see People v. Read, 74 A.D.3d 1245 [2d Dept. 2010]). Moreover, the hearsay statements are admissible in opposition for the purposes of defeating summary judgment since the statements were not proffered as the sole basis in opposition (see Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582 [1st Dept. 2018]). Accordingly, the branch of the motion to dismiss the claims of false arrest and false imprisonment is denied.

Malicious Prosecution Claim:

The branch of the motion for summary judgment, dismissing Plaintiffs' State and Federal claims for malicious prosecution is denied.

The elements of a cause of action for malicious prosecution are as follows: a) the commencement of a criminal proceeding by the defendant against the plaintiff, b) termination of the proceeding in favor of the accused, c) absence of probable cause for the proceeding, and d) actual malice (see Broughton v. State, 37 N.Y.2d 451 [1975]; Wieder v. Home Depot U.S.A., Inc., 208 A.D.3d 535 [2d Dept. 2022]).

It is undisputed that Vega and Malave were charged with, inter alia, Criminal Possession of a Weapon and that the charges were dismissed on March 31, 2016. Movants aver that Plaintiffs' cause of action for malicious prosecution should be dismissed because there was probable cause for the arrest and Plaintiffs cannot establish actual malice. The Court found supra that a triable issue of fact exists with respect to whether the officers had probable cause to arrest Plaintiffs. With respect to actual malice, it is the Movants' burden to establish a lack of actual malice on a motion for summary judgment (see Roberts v. City of New York, 171 A.D.3d 139 [1st Dept. 2019]). Here, Movants merely argue that Plaintiffs cannot establish a showing of malice, but fail to establish a lack of actual malice. Moreover, Plaintiffs raise a question of fact as to actual malice. Actual malice means that the defendant "must have commenced the...criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (see Nardelli v. Stamberg, 44 N.Y.2d 500 [1978]). A jury may infer the existence of actual malice where there is no probable cause to initiate the criminal proceeding (see Martin v. Albany, 42 N.Y.2d 13 [1977]). Accordingly, there is a question of fact with respect to the elements of both probable cause and of actual malice, requiring denial of the instant branch of the motion.

Assault and Battery Claim:

The branch of the motion for summary judgment, dismissing

Plaintiffs' State claims for assault and battery and Federal claims for excessive force is denied.

During their 50-h testimony, both Plaintiffs allege that they were merely handcuffed and carried out of the premises. Subsequently at their depositions, Plaintiffs testified that the officers involved utilized additional force. Notwithstanding the potential conflicting testimony between the 50-h testimony and deposition testimony, the instant branch of the motion must be denied solely based on the act of handcuffing the Plaintiffs.

Generally, the use of handcuffs while effecting a lawful arrest is considered reasonable (see Graham v. City of New York, 928 F.Supp. 2d 610 [N.D.N.Y. 2013]; Budgar v. State, 98 Misc.2d 588 [Court of Claims 1979]). However, Courts have commonly held that where there is an issue of fact as to probable cause, the mere act of placing handcuffs on an arrestee may be considered an unwanted touching, which constitutes battery (see Johnson v. Suffolk County Police Dep't, 245 A.D.2d 340 [2d Dept. 1997]; Budgar, 98 Misc.2d at 592; Pawloski v. State, 45 Misc.2d 933 [Court of Claims 1965]; Lewis v. City of New York, 2019 U.S. Dist. LEXIS 116457 [E.D.N.Y. 2019]; Bates v. City of New York, 2018 U.S. Dist. LEXIS 169640 [S.D.N.Y. 2018]). Accordingly, the instant branch of the motion is denied.

Strip Search Claim:

The branch of the motion for summary judgment, dismissing Plaintiffs' Federal strip search claim is granted, there appearing no opposition. A strip search occurs when a suspect is required to remove his clothes and an officer inspects the subject as the subject stands naked in the officer's presence (see Gullen v. City of New York, 2023 U.S. Dist. LEXIS 45599 [S.D.N.Y. 2023]). A Plaintiff must also demonstrate that a named defendant participated in the alleged strip search (see id.). Accordingly, since the Plaintiffs were unable to establish that either of named Defendants participated in a strip search, the Movants are entitled to summary judgment on Plaintiffs' strip search claim.

General Negligence Claim:

The branch of the motion for summary judgment, dismissing Plaintiffs' claims for general negligence is granted, there appearing no opposition. Indeed any general negligence claim is subsumed by remaining causes of action contained in the complaint and Plaintiffs are not entitled to recover under general principles (see Santoro v. Town of Smithtown, 40 A.D.3d 736 [2d Dept. 2007]; Boose v. Rochester, 71 A.D.2d 59 [4th Dept. 1979]).

Negligent Hiring, Training, and Retention Claims:

The branch of the motion for summary judgment, dismissing Plaintiffs' claims for negligent hiring, training, and retention is granted, there appearing no opposition.

It is a well-established principle that no action for negligent hiring, training or retention may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent hiring, training and retention would be entirely redundant (see Ashley v. City of New York, 7 A.D.3d 742 [2d Dept. 2004]; Karoon v. NYC Transit Authority, 241 A.D.2d 323 [1st Dept. 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (see Karoon, 241 A.D.2d at 324). This principle applies to the instant matter, even as to Plaintiff's claims alleging assault. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 A.D.2d 777 [2d Dept. 1990]). An assault by a police officer who is engaged in police business may be found to be within the scope of his employment (see generally Garcia v. City of New York, 104 A.D.2d 438 [2d Dept. 1984]).

Where the employer concedes that its employee was acting within the scope of his employment in the commission of the allegedly tortious act, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley, 7 A.D.3d 742; Rosetti v. Board of Education, 277 A.D.2d 668 [3rd Dept. 2000]). Here, the City is representing Detectives Millwater and Duffy in this action and does not dispute, but concedes, that the officers were not only employed by the City, but were acting within the scope and course of their employment. Accordingly, the branch of the motion to dismiss Plaintiffs' claims for negligent hiring, training, and retention is granted.

Monell Claims:

The branch of the motion for summary judgment, dismissing Plaintiffs' Monell claims is granted, there appearing no opposition.

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 A.D.2d 373 [1st Dept 1991]). However, 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]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it 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" (Johnson v. King County District Attorney's Office, 308 A.D.2d 278, 293 [2d Dept. 2003]).

"To state there is a policy does not make it so" (see Betts v. Sherman, 2013 U.S. Dist. LEXIS 11139 [S.D.N.Y. 2013]). A review of the complaint demonstrates that Plaintiffs failed to adequately plead a Monell claim, in that the complaint is deficient of any information which would establish an unconstitutional policy or custom, representing a fatal defect. Plaintiffs were required to demonstrate in the complaint what the policy is, and how the policy resulted in the deprivation of Plaintiffs' constitutional rights (see Ashcroft v. Iqbal, 556 U.S. 662 [2009]). Accordingly, the branch of the motion to dismiss Plaintiffs' Monell claim is granted.

Claims Against John Does:

The branch of the motion for summary judgment, dismissing Plaintiffs' claims against "John Doe" Defendants is granted, there appearing no opposition.

It is well established that a plaintiff may not hold a municipality liable pursuant to 42 USC §1983 under the theory of respondeat superior (see Monell, 436 U.S. at 658). To properly plead the claim, a plaintiff must demonstrate "that the conduct at issue [was] committed by a person acting under color of state law and must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States" (see Cornejo v. Bell, 592 F.3d 121 [2d. Cir. 2010]). Accordingly, personal involvement is a prerequisite to an award of damages based on an alleged constitutional deprivation (see McKinnon v. Patterson, 568 F.2d 930 [2d. Cir. 1977]).

Section 1983 actions filed in New York are subject to a three-year statute of limitations (see Hogan v. Fischer, 783 F.3d [2d. Cir. 2013]). State law governs the statute of limitations period in

this action (see Laviero v. City of Bristol, 2024 U.S. App. Lexis 2340 [2d Cir. 2024]). Here, Plaintiffs individually sued Detectives Millwater and Duffy, in addition to John Doe Officers which have yet to be identified. At this juncture, Plaintiffs are barred from amending their complaint to include additional individual officers (see id.; see also CPLR §1024 and §3025[b]). New York courts have interpreted CPLR §1024 to permit John Doe substitutions nunc pro tunc so long as the Plaintiff exercised due diligence and the complaint contains an adequate description of the party (see Bumpus v. N.Y.C. Transit Auth., 66 A.D.3d 26 [2d Dept. 2009]; Hogan v. Fisher, 738 F.3d 509 [2d Cir. 2013]). However, Plaintiffs have failed to proffer any argument in opposition to demonstrate that they have exercised due diligence in identifying any additional officers. Accordingly, the complaint must be dismissed as against John/Jane Doe I, II, and III, IV, and V.

Accordingly, the motion is granted solely to the extent that the causes of action for general negligence, negligent hiring, training, and retention, illegal search and seizure, and claims pursuant to Monell are dismissed. The branches of the motion for summary judgment, dismissing the causes of action for false arrest, false imprisonment, malicious prosecution, and assault and battery, are denied.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: May 20, 2024



KEVIN J. KERRIGAN, J.S.C.

