

**Provenzano v City of New York**

2025 NY Slip Op 30957(U)

March 20, 2025

Supreme Court, New York County

Docket Number: Index No. 159754/2024

Judge: Hasa A. Kingo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. HASA A. KINGO PART 05M

Justice

-----X

SALVATORE PROVENZANO,
Plaintiff,

INDEX NO. 159754/2024

MOTION DATE 01/28/2025

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, ALVIN L. BRAGG, NYPD
POLICE OFFICERS JOHN AND JANE DOES, APPLE INC.

DECISION + ORDER ON
MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15
were read on this motion to DISMISS

Upon the foregoing documents, the motion to dismiss filed by Alvin L. Bragg, Jr., New
York County District Attorney (the "District Attorney"), is granted without opposition.

BACKGROUND

Plaintiff Salvatore Provenzano ("Plaintiff") is an Officer employed by the New York City
Police Department (the "NYPD"). On October 19, 2021, Plaintiff, in his capacity as an NYPD
officer, responded to a call for police assistance concerning an unruly customer at an Apple Store
located at 1981 Broadway in New York, New York (NYSCEF Doc No. 1, complaint ¶ 17).<sup>1</sup>
Plaintiff alleges that upon his arrival at the Apple Store, employees failed to inform him or any
other officers that the unruly customer had a history of "deranged behavior," had previously
threatened store employees with violence, and had been banned from the store for attempting to
kill a store manager (id. ¶¶ 19-20). "When the officers at the scene attempted to get the man to
leave the store, the man charged at the Plaintiff causing Plaintiff to put his hands up in defense"
(id. ¶ 21). The man collided with Plaintiff, which caused severe injury to Plaintiff's thumb (id.).

In the weeks that followed, the NYPD Internal Affairs Bureau ("IAB") investigated
allegations of misconduct against the arresting officers and found no wrongdoing on behalf of the
Plaintiff with respect to the arrest (id. ¶ 22). At some point in the next two years, the IAB
investigated the arrest again and found that Plaintiff had engaged in misconduct (id. ¶ 23). Plaintiff
asserts that the second investigation was initiated at the behest of the District Attorney (id. ¶ 23).
On or about July 19, 2023, Plaintiff was summoned to appear with union counsel at the District
Attorney's office (id. ¶ 24). At the District Attorney's office, Plaintiff was arrested, "tightly
handcuff[ed]" and "subject[ed] to an unlawful pat-down search" (id. ¶ 25). Plaintiff was thereafter

<sup>1</sup> Except where otherwise noted, the facts are recited here as alleged in the complaint and are accepted as true for the
purposes of this motion, as required on a motion made pursuant to CPLR § 3211 (a)(7).

indicted for Assault in the Third Degree in connection with the 2021 incident in the Apple Store (*id.* ¶ 29). At trial, Plaintiff was acquitted, and the charge against him was dismissed and sealed (*id.* ¶ 31).

On October 18, 2024, Plaintiff commenced this action by filing a summons and complaint which interposes causes of action against defendants the City of New York (the “City”), the District Attorney, NYPD police officers designated as John and Jane Does, and Apple, Inc. (“Apple”) (*id.*). Apple and the City filed answers to the complaint on November 20, 2024, and January 21, 2025, respectively (NYSCEF Doc Nos. 5, 11). By this motion, the District Attorney moves pursuant to CPLR § 3211 (a)(7) to dismiss the complaint as against him for failure to state a cause of action. In support of the motion, the District Attorney argues that the complaint fails to state a cause of action against him because it does not allege personal involvement by the District Attorney, the District Attorney cannot be held vicariously liable as head of the agency, he is entitled to absolute immunity, and the complaint otherwise fails to state a cause of action for negligence, malicious prosecution, or violations of the state constitution. There is no opposition to the motion.

### DISCUSSION

On a motion to dismiss brought under 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]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Plaintiff’s complaint interposes three causes of action against the District Attorney, including negligence, malicious prosecution, and violations of the New York State Constitution. With respect to factual allegations made against the District Attorney, Plaintiff pleads that he was “subject to unlawful arrest and detention by defendant Police Officers as directed by [the District Attorney],” that, upon information and belief, the second IAB investigation was conducted “at the behest of” the District Attorney (NYSCEF Doc No. 1, complaint ¶ 23), the District Attorney “re-opened the investigation into the incident” (*id.* ¶ 29), Plaintiff was indicted for Assault in the Third Degree (*id.*), and that “Defendants commenced and continued a criminal proceeding against Plaintiff” with “actual malice and an absence of probable cause” (*id.* ¶ 88-89).

The complaint indicates that the District Attorney is being sued in both his individual and official capacities (*id.* ¶ 6). To state a cause of action for civil rights violations against an official in their individual capacity, the plaintiff must plead personal involvement of the defendant in the alleged constitutional deprivation (*Crawford v New York Cnty. Dist. Atty.*, 99 AD3d 600, 601 [1st Dept 2012] [Section 1983 claim insufficiently pled where plaintiff “does not allege that the District Attorney was personally involved in the illegal search or the prosecution of the criminal matter.”]). “It is incumbent upon plaintiff to allege particular facts indicating that each of the individual defendants was personally involved in the deprivation of the plaintiff’s constitutional rights; mere bald assertions and conclusions of law do not suffice” (*Williams v Rodriguez*, 184 AD3d 699, 701 [2d Dept 2020] [internal quotes omitted]; *see also Ashcroft v Iqbal*, 556 US 662 [2009]). “To establish a violation of § 1983 by a supervisor, as with everyone else, then, the plaintiff must establish a deliberate, intentional act on the part of the defendant to violate the plaintiff’s legal rights” (*Tangreti v Bachmann*, 983 F3d 609 [2d Cir 2020]). The plaintiff must also plead an injury attributable to the conduct and the *mens rea* for the claim (*id.*). Plaintiff’s factual allegations against the District Attorney include only bare legal conclusions and the bald assertion, made upon information and belief, that the District Attorney directed IAB to conduct the second investigation of Plaintiff. Taken together, these factual allegations are insufficient to state a cognizable claim against the District Attorney in his individual capacity because they do not allege intentional acts committed with the intent to violate Plaintiff’s legal rights. The limited facts alleged also do not plead the elements of each cause of action as applicable to the District Attorney.

Nor may Plaintiff rely on the District Attorney’s status as a supervisor to state a cause of action (*Tangreti v Bachmann*, 983 F3d 609, 616 [2d Cir 2020] [“a plaintiff may not rely on a special test for supervisory liability”]). “Rather, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution” (*id.*). Additionally, County Law § 54, which is applicable to counties within New York City, provides that “[n]o head of any agency, department, bureau, or office of a county shall be liable to respond in damages to the county or to any other person for any act or omission of any employee of the county employed within the agency, department, bureau, or office of which he is such head.” The District Attorney qualifies as a head of the county office that he oversees (*see Public Officers Law § 2; Thompson v The City of New York*, 2023 NY Slip Op 34471[U] [Sup Ct, New York County 2023] [“As the elected District Attorneys of New York County, it is beyond question that the D.A. defendants qualify as the heads of that county office”]). Here, Plaintiff’s claims are also barred by County Law § 54 because Plaintiff does not make sufficient factual allegations that the District Attorney was personally involved in his prosecution (*Crawford*, 99 AD3d at 602 [“The claim for malicious prosecution is barred by County Law § 54, since plaintiff does not allege that the District Attorney was personally involved, and the only other basis for the claim is a respondeat superior theory”]).

Moreover, it is well established that “a prosecutor is entitled to absolute immunity for actions taken within the scope of his official duties in initiating and pursuing a criminal prosecution and in presenting the State’s case” (*Shapiro v Town of Clarkstown*, 238 AD2d 498, 500 [2d Dept 1997]; *see also Imbler v Pachtman*, 424 US 409 [1976]; *Savane v Dist. Att’y of New York Cnty.*, 148 AD3d 591 [1st Dept 2017]; *Shmueli v City of New York*, 424 F3d 231, 237 [2d Cir 2005] [“prosecutor has absolute immunity for the initiation and conduct of a prosecution unless he proceeds in the clear absence of all jurisdiction” or “acts without any colorable claim of

authority”]). Plaintiff makes no factual allegations that would overcome prosecutorial immunity in this case. As such, the motion is denied.

Accordingly, it is

ORDERED that the motion of defendant Alvin L. Bragg, Jr., New York County District Attorney, to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

This constitutes the decision and order of the court.

HASA A. KINGO, J.S.C.

3/20/2025  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE