SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JEANINE R. JOHNSON **PART** 52M
Justice

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JUAN MARTINS,

Plaintiff,

- against -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, DETECTIVE MARCELINO ALVAREZ, SHIELD #5997 OF THE 13TH PRECINCT, POLICE OFFICER WILLIAM INNES SHIELD #7374 OF THE 13TH PRECINCT,

Defendants.

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INDEX NO. 160388/2019

MOTION DATE 09/21/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76
were read on this motion to/for STRIKE ANSWER
and this cross-motion to/for DISMISSAL OF COMPLAINT.

Upon the foregoing documents, Plaintiff's motion to strike Defendants' answer is denied, without prejudice to renewal, and Defendants' motion to dismiss the complaint is denied.

Plaintiff Juan Martins (hereinafter "Martins or Plaintiff") seeks an order striking the answer of Defendants the City of New York (hereinafter "the City"), the New York City Police Department (hereinafter "NYPD"), Detective Marcelino Alvarez (Alvarez), and Police Officer William Innes (Innes, with the City, the NYPD, and Alvarez, Defendants), for failing to produce witnesses for examination before trial, pursuant to CPLR § 3126.

Defendants cross-move, seeking an order (i) denying Martins' motion to strike their pleading as premature; (ii) dismissing Martins' complaint against the NYPD, pursuant to CPLR

§ 3211(a)(7), on the ground that it is "a non-suable entity;" (iii) dismissing Martins' federal *Monell* claims against the City, on the ground that that he "failed to properly plead a sufficient policy and/or custom nor a [causal] affirmative link to the alleged constitutional deprivation;" (iv) dismissing Martins' cause of action for denial of his right to a fair trial under 42 USC § 1983, as his allegations that evidence was fabricated are not pleaded with sufficient specificity to state a claim; and (v) dismissing Martins' state and federal false arrest, false imprisonment, and malicious prosecution causes of action, has he has failed to plead facts sufficient to overcome the indictment presumption, as needed to state a claim.

In his verified complaint, e-filed on October 24, 2019 (NYSCEF Doc No. 1 and 63), Martins alleges that he suffered personal injuries arising from his false arrest and imprisonment, assault, battery, and deprivation of civil rights, without justification, on October 10, 2018. (NYSCEF Doc No. 56 ¶3).

Martins asserted four causes of action. First, he alleged that he was wrongfully subjected to false arrest and imprisonment in violation of 42 USC §§ 1983 and 1985, and New York State law. (NYSCEF Doc. No. 1 ¶¶14-26). In his second cause, he alleged that he has been wrongfully subjected to malicious prosecution in violation of 42 USC §§ 1983 and 1985 and New York State law (*id.* ¶¶27-36); third, Martins alleged that the City and the NYPD must be held liable for the wrongful conduct of its employees, the individual Defendants Alvarez and Innes, under the doctrine of *respondeat superior*, as applied in *Monell v New York City Dept of Social Servs.*, 436 US 658 (1978) (*id.* ¶¶37-47);[1] and fourth, Martins alleged that he was denied his right to a fair trial, in violation of 42 USC § 1983. (*id.* ¶¶48-50).

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[1] As noted below, Martins withdrew this cause of action for *respondeat superior* liability in his opposition to Defendants' cross-motion.

Defendants filed their answer on or about November 15, 2019 (NYSCEF Doc No. 46) to the affirmation of Kevon Z. A. Weekes, Esq. (NYSCEF Doc No. 44), and Defendants Alvarez and Innes joined issue by filing their amended answer on or about October 15, 2020. ([NYSCEF Doc No. 47).

THE MOTION

The Court issued a Case Scheduling Order on August 2, 2023 (NYSCEF Doc No. 57), which required, among other things, that Martins appear for his deposition on August 17, 2023, and required that the City produce its representative(s) for deposition on September 21, 2023, "subject to RDO; if not, w/in 14 days" thereafter.[2] Martins asserts that he was deposed on August 17, 2023 (Andrew Laufer, Esq.'s affirmation of good faith, executed September 21, 2023. (NYSCEF Doc No. 56 ¶4). The e-mails annexed to the Good Faith Affirmation, however, reflects only two messages sent by Martins' counsel, in the afternoons of September 19 and 20, 2023, seeking confirmation that the deposition scheduled for September 21 would go forward, and Defendants' counsels' response sent the morning of September 20, 2023, requesting adjournment.

On the very next day, September 21, 2023, without any further communication, Martins moved, pursuant to CPLR § 3126, for an order striking Defendants' answer for failing to produce witnesses for examination before trial or, in the alternative, compelling Defendants to produce such witnesses. (NYSCEF Doc No. 54). Plaintiff asserts that, despite his own counsel's good faith efforts, the City failed to produce witnesses for examination on September 21, 2023. (NYSCEF Doc. No. 56 ¶4). Plaintiff also asserts that the City did not request an adjournment or present a viable excuse for its violation of the Case Scheduling Order. (*id.* ¶4).

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[2] Neither Martins nor Defendants state what the acronym "RDO" means.

CPLR § 3126 is entitled "Penalties for refusal to comply with order to disclose." It states, among other things, that a party "who refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . ., the court may make such orders with regard to the failure or refusal as are just," including "an order striking out pleadings or parts thereof . . ." (CPLR § 3126 [3]).

This mandate must be balanced against 22 New York Code of Rules and Regulations (NYCRR) Section 202.20-f, which provides, in pertinent part:

> "(a) *To the maximum extent possible*, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.
>
> (b) *Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference.* In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference. . ..
>
> (c) The failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with. . ."

(emphasis added).

Defendants assert that Martins made his motion prematurely because the parties did not first meet and confer, to seek a good faith resolution to their discovery dispute before seeking court intervention. Based on Plaintiff's Good Faith Affirmation, it is clear that Martins did not attempt to satisfy Section 202.20-f, as there is no showing that his counsel sought an in-person or telephonic conference before filing his motion.

As Martins failed to comply with the Uniform Rules, his motion to dismiss Defendants' answer is denied, without prejudice to renewal, once counsel have complied with the provisions of Section 202.20-f.

THE CROSS-MOTION

On March 8, 2024, Defendants submitted a cross-motion, seeking: (i) denial of Martins' motion to strike Defendants' answer on the ground that the motion is premature; (ii) dismissal of the complaint as asserted against the NYPD for failure to state a claim under CPLR § 3211 (a)(7) on the ground that the NYPD "is a non-suable entity;" (iii) dismissal of all federal *Mondell* claims against the City on the ground that Martins did not properly plead a sufficient policy and/or custom or a causal affirmative link to the alleged constitutional deprivation; (iv) dismissal of Martins' cause of action for denial of his right to a fair trial, pursuant to 42 USC § 1983, on the ground that he failed to plead that his allegation of fabricated evidence with the specificity required to state a claim; and (v) dismissal of Martins' state and federal false arrest/imprisonment and malicious prosecution claims, on the ground that Martin has failed to plead facts sufficient to overcome the "indictment presumption," as required to state a claim under CPLR § 3211 (a)(7).

"On a motion to dismiss a complaint pursuant to CPLR § 3211, we must liberally construe the pleading and 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175, *rearg denied*, 37 NY3d 1020 (2021), *quoting Leon v Martinez,* 84 NY2d 83, 87-88 (1994). "Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether

he has properly stated one." *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 (1976) (internal quotation marks and citations omitted).

"Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009) (citation omitted). "Dismissal under CPLR § 3211 (a)(7) is warranted if the Plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Himmelstein*, 27 NY3d at 175 (internal quotation marks and citation omitted).

First, Defendants move to dismiss the causes of action asserted against the NYPD because they contend that the NYPD is "a non-suable entity." This is correct. Where a Plaintiff sues both the City of New York and the NYPD, "Chapter 17, section 396 of the New York City Charter provides that '[a]ll actions and proceedings for the recovery of penalties for violation of any law shall be brought in the name of the city of New York and not that of any agency except where otherwise provided by law.' The NYPD is an agency of the City of New York and is therefore a non-suable entity." *Davis v City of N.Y.*, 2000 WL 1877045, n1 (SD NY 2000) (citation omitted); *see also Matter of Carpenter v New York City Hous. Auth.*, 146 AD3d 674, 674 (1st Dept 2017) (under NYC Charter, ch 17, § 396, no cause of action for money damages lies against NYPD or NYC Human Resources Administration); *Siino v Department of Educ. of the City of N.Y.*, 44 AD3d 568, 568 (1st Dept 2007) (under NYC Charter §§ 396 and 803, the Department of Investigation not proper party in suit against the City). Martins concedes this point (NYSCEF Doc No. 73, ¶56), and so the causes of action against the NYPD have been

withdrawn, and Defendants' motion for an order granting dismissal of these causes of action is denied as moot.

Defendants also assert that Martins cannot maintain his federal *Monell* causes of action under the doctrine of r*espondeat superior* because he failed to plead that the City had adopted a policy or custom that directly led to the violation of his constitutional rights. *see Vargas v City of N.Y.*, 105 AD3d 834, 837 (2d Dept 2013), *citing Monell,* 436 US at 694 ("To hold a municipality liable under section 1983 for the conduct of employees below policy level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy.") In his opposition papers, Martins also withdraws his federal *Monell* causes of action (*see id.*), and so Defendants' motion to dismiss them is denied as moot.

Finally, Defendants assert that they are also entitled to dismissal of Martins' claims for denial of his right to a fair trial under 42 USC § 1983 for failing to plead "the allegedly fabricated evidence with specificity as required to state a claim," and dismissal of Martins' claims for false arrest/false imprisonment and malicious prosecution because Martins failed "to plead facts sufficient to overcome the indictment presumption."

In opposition, Martins, citing excerpts of Officer Innes' testimony at Martins' criminal trial and Martins' deposition transcript (NYSCEF Doc No. 73) and D (NYSCEF Doc No. 76) to the affirmation of Andrew C. Laufer, Esq., opposing the cross-motion and in reply to motion (NYSCEF Doc No. 72), alleges that evidence adduced at his deposition and at his criminal trial shows that Defendants fabricated the criminal complaint against him.

In the excerpted transcript of Innes's trial testimony regarding the complainant's statement that he recorded on his body camera, he admitted on cross examination that the complainant was visibly intoxicated, and, because of her condition, she was unable to provide a

definitive statement identifying or describing her assailant, or even a clear description of how she had been injured. (NYSCEF Doc No. 73).

The transcript trial begins with Officer Innes confirming that, when he returned to the precinct after Martins' arrest, he spoke with Detective Alvarez and said "I sent an e-mail of her making a statement. It's not really a great statement, so I'll send you a bullshit statement" (Innes tr, 225:2-7). After colloquy between the court and counsel, Officer Innes went on to confirm his assessment of the complainant's statement:

Q: Officer Innes, you just said that you did tell Detective Alvarez it's not really a great statement? Referring to the statement that the woman who was bleeding said to you, and that was recorded on your body worn cam?

A: What was on my body cam is what you heard.

THE COURT: We covered this.

Q: So when you said its not a really great statement, you're referring to the fact that because she was intoxicated?

A: Yes.

Q: And at that time when you encountered her you knew she was intoxicated?

A: Yes.

Q: And you knew – you didn't give her a breath test on that scene, right?

A: No.

Q: You didn't measure her blood alcohol level?

A: No.

* * *

Q: So you knew she was drunk?

A: Yes.

Q: And you knew she was drunk from her appearance?

A: Yes.

Q: And from her odor?

A: Yes.

Q: And from the way she was slurring her words?

A: Yes.

Q: And from the way she wasn't able to keep her balance?

A: Yes.

Q: Of some of the things that he [*sic*] said to you in this not really great statement – I'm sorry, you asked her what happened, and her response was I don't know, I think I was just attacked, right?

A: Yes.

Q: And she said she was walking home?

A: Yes.

Q: And she said I'm a trooper not a fruitlooper?

A: Yeah.

Q: She said I did not do or say anything to anybody?

A: Okay, I don't remember, yeah, I don't remember.

Q: That was in the video we just watched?

A: Yes.

Q: I promise you I'm not an instigator?

A: Yes.

Q: Now, when you saw this 40 something nicely dressed woman gushing blood from her head you didn't ask her, did you instigate this?

A: No.

Q: You didn't say what did you do to cause that injury?

A: No.

Q: You didn't say what did you say to cause that injury?

A: No.

Q: So she just volunteered the statement I promise you I'm not an instigator [?]

A: Yes.

Q: And she said I do remember being pushed?

A: Yes.

(Innes tr, 226:19 – 227:10 and 227:23 – 229:10).

"Whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful." *Broughton v State*, 37 NY2d 451, 458, *cert den sub nom. Schanbarger v Kellogg*, 423 US 929 (1975).

"Once a suspect has been indicted, however, the law holds that the Grand Jury action creates a presumption of probable cause." (*id.*). "The rule is founded upon the premise that the Grand Jury acts judicially and it may be presumed that it has acted regularly" (*id.*), and so the presumption "*may be overcome only by evidence establishing 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, that they have withheld evidence or otherwise acted in bad faith*" (*id.* at 82-83). In other words, for a plaintiff "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" (*id.* at 83).[3]

The transcript presented here shows that the police witness, Officer Innes, "may have not made a complete and full statement of the facts to the Grand Jury or to the District Attorney," or may "have misrepresented or falsified evidence," or may have "withheld evidence or otherwise acted in bad faith," by supporting Martins' indictment despite his knowledge that the statement he elicited from the NYPD's principal witness, the injured woman whom he interviewed the night of Martins' arrest, provided no basis to connect Martins to her injuries.

Accordingly, Defendants' motion to dismiss these causes of action is denied, and Martins is granted leave to amend the complaint within twenty days of the date of this order, to eliminate any deficiencies in his pleading by incorporating allegations from the transcript of Innes' trial testimony and Martins' deposition transcript.

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion to strike Defendants' answer is denied, without prejudice to renewal, once counsel have complied with 22 NYCRR Section 202.20-f; it is further

ORDERED that Defendants' motion to dismiss Plaintiff's causes of action with respect to the defendant New York Police Department is denied as moot; it is further

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[3] Defendants are mistaken in their view that the presumption of probable cause could be fatal to Martins' causes of action for both malicious prosecution and false imprisonment. The presumption applies in cases of malicious prosecution, where lack of probable cause is an element to such claim (*see Colon*, 60 NY2d at 82 ["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"], *citing, inter alia, Broughton*, at 457]). The presumption, however, does not apply to false imprisonment, where "neither actual malice nor want of probable cause is an essential element" (*Broughton*, at 457 [citations omitted]).

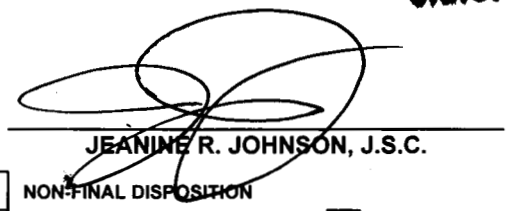
ORDERED that Defendants' motion to dismiss Plaintiff's federal *Monell* causes of action, to impose *respondeat superior* liability against the defendant City of New York for the tortious conduct of individual defendants Detective Alvarez and Officer Innes is denied as moot; it is further

ORDERED that Defendants' motion to dismiss Plaintiff's causes of action for denial of the right to a fair trial, false arrest, false imprisonment and malicious prosecution is denied; it is further

ORDERED that Plaintiff is granted leave to amend the complaint within twenty (20) days' hereof, consistent with the terms of this decision and order; and it is further

ORDERED that counsel to the parties shall appear for a conference in Part DCM of this Court on May 14, 2025, at 2:00 pm.

HON. JEANINE R. JOHNSON
J.S.C.



3/28/2025
DATE

JEANINE R. JOHNSON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE