

**Rojo v City of New York**

2025 NY Slip Op 32414(U)

July 8, 2025

Supreme Court, New York County

Docket Number: Index No. 151052/2016

Judge: Ariel D. Chesler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARIEL D. CHESLER PART 62M

Justice

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TOMMY ROJO,

Plaintiff,

- v -

THE CITY OF NEW YORK, P.O. JOHN MELENDEZ,

Defendant.

INDEX NO. 151052/2016

MOTION DATE 02/07/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

In this proceeding, defendants the City of New York ("the City") and John Melendez s/h/a P.O John Melendez, Shield No. 3272 ("Melendez") seek an Order (1) pursuant to CPLR 3211 (a)(7) dismissing plaintiff's causes of action for assault, battery, negligent hiring, training, supervision, retention and discipline, negligence, intentional infliction of emotional distress ("IIED"), and negligent infliction of emotional distress for failure to allege said claims within his Notice of Claim in violation of General Municipal Law ("GML") § 50-e; (2) pursuant to CPLR 3212, dismissing plaintiff's state and federal claims for false arrest and false imprisonment because probable cause existed to detain and arrest plaintiff; (3) pursuant to CPLR 3212 dismissing plaintiff's state and federal malicious prosecution claims as there was probable cause to prosecute plaintiff; (4) pursuant to CPLR 3212, dismissing plaintiff's negligent hiring, training, supervision, retention, and discipline claim because Officer Melendez was working within the scope of his employment at the time of plaintiff's arrest; (5) pursuant to CPLR 3211

(a)(7) and 3212, dismissing plaintiff's negligence claim because plaintiff may not assert a general claim of negligence in connection with a claim stemming from an arrest; (6) pursuant to CPLR 3211 (a)(7) and 3212, dismissing plaintiff's IIED and negligent infliction of emotional distress claims because they are duplicative of other claims alleged and are insufficiently pled; (7) pursuant to CPLR 3211 (a)(7) and 3212, dismissing plaintiff's 42 U.S.C. § 1983 claim for municipal liability; (8) pursuant to CPLR 3211 (a)(7) and 3212, dismissing plaintiff's Eighth Amendment violation claims; (9) pursuant to CPLR 3211 (a)(7) and 3212, dismissing plaintiff's assault, battery, and excessive force claims; and (10) pursuant to CPLR 212 dismissing all federal claims against Officer Melendez as he is entitled to qualified immunity.

Plaintiff cross-moves for an Order (1) pursuant to CPLR 3212, granting summary judgment on the following causes of action: state-law false arrest, assault, and battery and malicious prosecution (first, second and third causes of action), civil rights violations pursuant to 42 U.S.C. § 1983 against defendant Melendez based on false arrest and malicious prosecution (seventh and ninth causes of action), or attorney's fees pursuant to 42 U.S.C § 1983 (eleventh cause of action); and (2) pursuant to GML 50-e(6), permitting, if necessary, an amendment to plaintiff's Notice of Claim to correct a non-prejudicial omission.

### FACTUAL BACKGROUND

This action arises out of personal injuries allegedly sustained by plaintiff when he was arrested for allegedly assaulting a woman ("S.O") with a newspaper rack on December 17, 2014, in the vicinity of East 14<sup>th</sup> Street and 4<sup>th</sup> Avenue, New York, New York.

Plaintiff filed a Notice of Claim on June 23, 2015, and on July 17, 2015, filed a Petition for an Order permitting him to file a Late Notice of Claim. On December 3, 2015, the Court granted plaintiff's Petition and deemed the Notice of Claim served *nunc pro tunc*. Within his Notice of Claim, plaintiff asserts causes of actions sounding in false arrest, malicious prosecution, deprivation of civil rights, negligence, carelessness, recklessness, gross negligence, and willful misconduct (*see* Notice of Claim [NYSCEF Doc. 62]).

Plaintiff filed a Summons and Verified Complaint on February 9, 2016, wherein plaintiff alleged state law claims of false arrest, false imprisonment, assault, battery, malicious prosecution, intentional and negligent infliction of emotional distress, negligence, negligent hiring, training supervision retention and discipline (*see* Summons and Verified Complaint [NYSCEF Doc. 63]). Additionally, plaintiff is pursuing federal claims of false arrest, excessive force, malicious prosecution, and *Monell* liability all pursuant to 42 U.S.C. § 1983. On February 26, 2016, the City served its Verified Answer and on July 25, 2016, filed an Amended Answer on behalf of defendants the City and Melendez.

Plaintiff now consents to the dismissal of all causes of action except for state law claims of false arrest, assault, battery, and malicious prosecution and federal law claims of false arrest and malicious prosecution (*see* Plaintiff's Affirmation in Opposition and in Support of Cross-Motion, [NYSCEF Doc. 86]). As such, the fourth, fifth, sixth, eighth and tenth causes of action are dismissed, and the remaining causes of action will be decided below.

### DISCUSSION

On a CPLR 3211 motion to dismiss, a court must "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" (*Leon v.*

*Martinez*, 84 NY2d 83, 87-88 [1994]). Under CPLR 3211 (a)(7) “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one’” (*id.* [internal citations omitted]).

To prevail on a motion for summary judgment, the movant must make *a prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833).

#### **State Law Claim of Assault and Battery**

Defendants argue that plaintiff's Complaint asserts state law claims sounding in false arrest, false imprisonment, assault battery, and malicious prosecutions, however, his Notice of Claim only alleges causes of action for false arrest, malicious prosecution, deprivation of civil rights, negligence, carelessness, recklessness, gross negligence and willful misconduct, and as such, since they were not plead in his Notice of Claim these causes of action should be dismissed.

In opposition, plaintiff argues that he is entitled to summary judgment on his state law assault and battery cause of action. Plaintiff argues that he sought and obtained a court Order allowing service of a late Notice of Claim to add false arrest, assault and battery claims.<sup>1</sup> Plaintiff argues that both the Petition and Affirmation supporting the Petition to file the Late Notice of Claim made clear the relief sought was to include claims for assault and battery. Plaintiff asserts that the time to oppose the assault and battery cause of action on an alleged defect in the Notice of Claim was when the Petition was filed. Additionally, plaintiff avers that the omissions of the words “Assault and Battery” in the Notice of Claim attached to plaintiff’s Petition to file a late Notice of Claim was inadvertent and was not done in bath faith and was of no consequence since the actual Petition gave the requisite notice.

For the foregoing reasons, plaintiff argues the Court should deny defendants’ motion to dismiss plaintiff’s assault and battery cause of action on the grounds plaintiff did not file a Notice of Claim for said claim. Alternatively, if necessary, plaintiff requests that the previously filed Notice of Claim be amended to include the words “assault and battery” pursuant to GML 50-e (6). Furthermore, plaintiff argues that because there was no probable cause to arrest plaintiff, the unwarranted touching, including being handcuffed, constitutes an assault and battery, and plaintiff is entitled to summary judgment on this cause of action.

Pursuant to GML § 50-e, a Notice of Claim is a condition precedent to bringing a tort action against a municipality and its employees. It is well settled that “causes of action for which a notice of claim is required, that are not delineated in the plaintiff’s original notice of claim, may not be interposed because [t]he addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of

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<sup>1</sup> The Court notes that the late Notice of Claim filed was the same Notice of Claim originally filed by plaintiff that did not include any claims for assault and battery (*see* NYSCEF Doc. 91)).

the plaintiff[']s claims” (*Garcia v. O’Keefe*, 34 AD3d 334, 335 [1<sup>st</sup> Dept 2006] [internal citations omitted]; *see also*, *Mazzilli v. City of New York*, 154 AD2d 355, 357 [2d Dept 1989] [“Causes of action for which a Notice of Claim is required which are not listed in the plaintiff’s original Notice of Claim may not be interposed”]). “Thus, it would be as if the plaintiff had not served a notice of claim at all-i.e., failed to give notice of a cause of action that cannot be referred to, either directly, or indirectly, in the original notice of claim” (*Boles v. City of New York*, No. 100331/2007, 2012 WL 4040381 [N.Y. County Sup. Ct. September 13, 2012]).

GML § 50-e (6) permits a notice of claim to be amended at any time, in the discretion of the Court, but only to correct good-faith, non-prejudicial, technical defects or omissions and not substantive amendments such as the addition of a party or new theory of liability (*Mahase v. Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411 [1<sup>st</sup> Dept 2004]).

The Court finds plaintiff’s contention that regarding the timing of the City’s argument about the Notice of Claim was defective is unavailing (*Boles v. City of New York*, 2012 WL 4040381 [Sup. Ct. N.Y. Cty. 2012] [holding that the challenging the adequacy of a notice of claim may be raised any time prior to trial]). Moreover, plaintiff’s theory on liability on an assault and battery claim is precluded since it was not asserted in the original notice of claim and the alternative means for asserting it, a late notice of claim pursuant to a GML § 50-e(6) amendment is not appropriate here. (*see Mahase*, 3 AD3d at 411 [“GML § 50-e(6) notice of claim amendment provision merely permits correction of good faith, non-prejudicial, technical mistakes, defects or omissions, not substantive changes in the theory of liability”]).

Accordingly, the second cause of action is dismissed.

### State and Federal Claims of False Arrest and False Imprisonment

In support of its motion to dismiss in respect to these specific claims, defendants argue probable cause was established based on the statements from the complaining victim and eyewitnesses. In support of this argument, defendants point to evidence that (1) plaintiff was involved in an altercation with S.O; (2) that S.O told members of the NYPD that she was assaulted; (3) she identified plaintiff as the assailant, (4) S.O told police that plaintiff hit her stomach and caused her substantial pain; and (5) multiple eyewitnesses corroborated S.O's versions of events (*see* Arrest and Complaint Reports [NYSCEF Doc. 64]; 50-h Transcript [NYSCEF Doc. 65; Officer Melendez's Deposition Transcript [NYSCEF Doc. 680; Sgt Roche's Deposition Transcript [NYSCEF Doc. 69]). In addition, defendants highlight the fact that at the 50-h hearing, plaintiff admits that the police interviewed him (*see* NYSCEF Doc. 65). As such, defendants contend that it was reasonable for defendant Melendez to conclude that plaintiff caused physical injury to S.O., and the investigation Melendez conducted, which included interviewing S.O and obtaining corroborating testimony by interviewing eyewitnesses, constituted "proper police activity" under the circumstances. Accordingly, defendants argue that plaintiff's self-serving defense cannot overcome the presumed veracity of the eyewitness and victim statements.

Defendants claim that the above facts that preceded plaintiff's arrest clearly establish that probable cause existed to arrest plaintiff, and therefore, the Court should dismiss plaintiff's state and federal false arrest and false imprisonment claims.

In opposition to defendants' motion and in support of his cross-motion for summary judgment, plaintiff argues that he is entitled to summary judgment on his state law and federal claims for false arrest. Plaintiff argues that because he was not arrested to an arrest warrant, his

arrest is presumptively invalid, and defendants have failed to meet the burden of showing that his arrests was privileged. Furthermore, plaintiff argues that defendants have not carried out their burden of eliminating all material issues of fact with respect to plaintiff's state and federal false arrest claims, and as such their motion should be denied.

More specifically, plaintiff argues that there was no probable cause as an eyewitness, Victor Malyar, approached Sergeant Roche with information that negated S.O.'s claim that she had been assaulted. Rather than make further inquiry, Defendants arrested Rojo because "when a woman claims to have been assaulted, the police take her side" (*see* Malyar Affidavit at ¶¶12-13, [NYSCEF Doc. 88]). In addition, plaintiff argues that defendants did not reasonably determine the incident caused a "physical injury" as required by the Assault in the Third Degree. Lastly, plaintiff asserts that evidence his arrest was not based on probable cause is further underlined by the fact that the District Attorney moved to dismiss all charges stating that she did not have evidence to support them (*see* Certificate of Disposition, [NYSCEF Doc. 75]).

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]). To prevail on an action for false arrest and imprisonment, "the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged (*De Lourdes Torres v. Jones*, 26 NY3d 742, 759 [2016]). "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" (*id.*). "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]). "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). “An accusation against a specific individual from an identified citizen is presumed reliable” (*Medina v. City of New York*, 102 AD3d 101, 103 [1<sup>st</sup> Dept 2012] [internal citations omitted]). “Probable cause is established absent materially impeaching circumstances, where, as here, the victim on an offense communicates to the arresting officer information affording a credible ground for believing the offense was committed and identifies the accused as the perpetrator” (*id.* at 104 [internal citations omitted]). “The question is whether the police are aware of “materially impeaching circumstances” or grounds for questioning the complainant’s credibility” (*id.*).

“The alleged conflicting evidence uncovered in the course of the police investigation is relevant to the issue of whether guilt beyond a reasonable doubt could have been proven at a criminal trial, not to the initial determination of the existence of probable cause” (*Agront v. City of New York*, 294 AD2d 189, 190 [1<sup>st</sup> Dept 2002]; see *Gisoni v. Harrison*, 72 NY2d 280, 285 [1988] [“In any investigation the police are likely to encounter discrepancies, particularly in cases involving eyewitness identification. These matters may impair their ability to prove guilt beyond a reasonable doubt at trial, but they generally have little bearing at preliminary stages where the only relevant concern is whether there is sufficient evidence to show probable cause to believe the defendant committed the crime”]).

Here, S.O provided Melendez with information which provided a credible basis to believe plaintiff had committed an assault, and identified plaintiff as the perpetrator, and as such, Melendez was not required to investigate further even though plaintiff submitted an Affidavit

from Victor Malyar, plaintiff's co-worker averring that he told a Sergeant present at the scene that S.O started the whole altercation (*see People v. Roberson*, 299 AD2d 300, 300 [1<sup>st</sup> Dept 2002] ["While the police were also in possession of some exculpatory evidence, including an allegedly inconsistent statement by the victim and an assertion by an eyewitness, who was defendant's former girlfriend, that defendant was not one of the perpetrators, this type of equivocation in these circumstances was not so substantial as to undermine probable cause, which clearly does not require proof beyond a reasonable doubt"]).

In sum, the claims for false arrest and imprisonment under the first cause of action must be dismissed.

#### **State and Federal Law Claims of Malicious Prosecution**

Defendants also argue that the Court should dismiss plaintiff's state and federal malicious prosecution claims because there was probable cause to prosecute him for Assault in the Third Degree and Harassment in the Second Degree. Defendants contend that the information Melendez provided to the District Attorney's office was materially accurate and consistent with the information that had been provided to him on scene (*see* Criminal Court Affidavit, [NYSCEF Doc. 73]). Defendants aver that this argument is supported by the Supporting Deposition, where S.O affirmed the accuracy of the information Melendez provided to the District Attorney's Office (*see* Supporting Deposition, [NYSCEF Doc. 74]). Therefore, defendants argue that just as there was probable cause to arrest plaintiff for Assault in the Third Degree, so too was there probable cause to prosecute him for same.

Furthermore, defendants contend that there was probable cause to prosecute plaintiff for Harassment in the Second Degree. In addition, defendants assert that no possible inference of

actual malice can be made, as the evidence in this case demonstrates that Melendez was acting based on credible evidence provided by both the complaining victim and multiple eyewitnesses.

Defendants argue notwithstanding the fact that there was probable cause to prosecute plaintiff for Harassment in the Second Degree, the issue is moot because the District Attorney's office made an independent decision to pursue the charge. Defendants also note that the plaintiff cannot argue that he suffered additional damages as a result of being charged with Harassment since all charges were dismissed at the same time, and plaintiff was never forced to defend himself solely against the Harassment charge. As such, defendants argue plaintiff's state and federal malicious prosecution claims should be dismissed.

In opposition and in further support of his cross-motion for summary judgment, plaintiff argues that he is entitled to summary judgment on his state law and federal cause of action for malicious prosecution. Plaintiff argues that it is uncontested that defendants commenced the prosecution against plaintiff and the District Attorney's decision to prosecute or add charges in addition to those for which plaintiff was arrested is not a superseding cause that cuts off the defendants' liability. Plaintiff notes, that here, it was Melendez and not the District Attorney who arrested plaintiff and also signed the Misdemeanor Complaint under penalty of perjury. Plaintiff also asserts that there is no dispute that the prosecution ended in plaintiff's favor when it was dismissed. Plaintiff argues there was a lack of probable cause to arrest him in the first place.

Plaintiff also argues that there is evidence of actual malice. Plaintiff claims there was no basis for defendants to believe that plaintiff had either assaulted or harassed S.O., however Melendez nevertheless arrested and commenced a prosecution against plaintiff. Moreover, plaintiff argues that Sargent Roche's statement to Victor Malyar that plaintiff was arrested because "when a woman makes a complaint of assault, the police take the woman's side" (*see*

Malyar Affidavit at ¶13 [NYSCEF Doc. 88]), further shows a reckless and or/grossly negligent disregard by the police for plaintiff's rights and the rule of law, evincing malice. Plaintiff also notes that Melendez gave the District Attorney incomplete and false information as Malyar's exculpatory statements to Seargent Roche were not included in the criminal complaint.

“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” (*Hernandez v. City of New York*, 100 AD3d 433, 433 [1<sup>st</sup> Dept 2012]). “[W]hile false arrest and malicious prosecution are ‘kindred actions’ insofar as they often aim to provide recompense for illegal law enforcement activities, each action protects a different personal interest and is composed of different elements” (*De Lourdes Torres*, 26 NY3d at 760). Malicious prosecution elements “typically present a greater obstacle to recover than the elements of false arrest;... The law places a heavy burden on malicious prosecution plaintiffs” (*id.*). Similar to false arrest, the elements and analysis of malicious prosecution are essentially the same under state and federal law (*Crooks*, 189 AD3d at 771).

A defendant may be liable for malicious prosecution “if the defendant demands in bad faith that the public prosecutor initiate the criminal action for supplies the prosecutor with falsified evidence that the defendant knows or should know will cause the prosecutor to prosecute the plaintiff” (*id.* at 760-761). Probable cause constitutes a complete defense to a malicious prosecution claim (*Young v. City of New York*, 72 AD3d 414, 417 [1<sup>st</sup> Dept 2010]), “where no subsequent exculpatory facts are discovered” (*Gann v. City of New York*, 197 AD3d 1035, 1036 [1<sup>st</sup> Dept 2021]; *Flavin v. City of New York*, 171 Ad3d 633, 634 [1<sup>st</sup> Dept 2019] [“Court properly dismissed the malicious prosecution claim, as there was probable cause for the

arrest and the absence of evidence that such probable cause dissipated between the arrest and commencement of the criminal proceedings”]).

As discussed above, there was probable cause for Melendez to arrest plaintiff. In addition, the Court finds plaintiff’s arguments that evidence of the defendants withholding statements made by witnesses Victor Malyar to Sergeant Roche in the Criminal Complaint constitutes actual malice unavailing (*Gisondi v. Town of Harrison*, 72 NY2d 280, 284-285 [1988] [“The police and prosecutors are not required to disclose all of their evidence in an application for an arrest warrant or at a felony hearing and are not generally required to disclose all discrepancies or potential weaknesses in the case uncovered during the investigation”] [internal citations omitted]).

Thus, the claims for malicious prosecution under the third cause of action are dismissed.

In light of the foregoing, none of the remaining claims can be sustained and must likewise be dismissed. As to the seventh cause of action, Officer Melendez is entitled to qualified immunity in relation to any remaining federal constitutional claims because he had arguable probable cause to arrest (*see Caraballo v. City of New York*, 526 F. App’x 129, 131 [2d Cir. 2013]), and thus they cannot continue. Plaintiff also fails to sufficiently allege a policy in relation to his *Monell* claim, or that his constitutional rights were violated, and thus it must be dismissed. Relatedly, the eleventh cause of action for counsel fees also fails because all of the federal law claims fail.

Accordingly, it is hereby

**ORDERED**, that the defendants’ motion to dismiss the complaint is granted in its entirety; and it is further

ORDERED, that defendants' motion to dismiss plaintiff's cause of action for assault and battery (second cause of action) for failure to allege said claims within his Notice of Claim in violation of GML § 50-e is granted; and it is further

ORDERED, that plaintiff's fourth, fifth, sixth, eighth, and tenth causes of action are dismissed on consent; and it is further

ORDERED, that defendants' motion to dismiss plaintiff's state and federal claims for false arrest and false imprisonment (first cause of action) is granted; and it is further

ORDERED, that defendants' motion to dismiss plaintiff's state and federal malicious prosecution claims (third cause of action) is granted; and it is further

ORDERED, that defendants' motion to dismiss the seventh, ninth and eleventh causes of action is granted; and it is further

ORDERED, that plaintiff's cross-motion for an Order granting summary judgment on his first, second, third, seventh, ninth and eleventh causes of action is denied.

This constitutes the Decision and Order of the Court.

7/8/2025  
DATE

ARIEL D. CHESLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE