SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

PABLO CRUZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT AND LUCKSON MERISME,

Defendant.

INDEX NO. 107165/2007
MOTION DATE _____
MOTION SEQ. NO. # 002
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: Yes X No

The instant action is brought by Plaintiff Pablo Cruz ("Plaintiff") to recover for injuries sustained due to his allegedly false arrest on February 22, 2006. Plaintiff's complaint against Defendant Luckson Merisme ("Merisme"), the City of New York, and the NYPD alleges causes of action for deprivation of federal rights under 42. U.S.C. 1983, false arrest under 42 U.S.C. 1983, malicious prosecution under 42 U.S.C. 1983, malicious abuse of process under 42 U.S.C. 1983, denial of constitutional right to fair trial under 42 U.S.C. 1983, excessive force under 42 U.S.C. 1983, municipal liability under 42 U.S.C. 1983, assault, battery, false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, and negligent hiring, training, supervision and retention. Merisme now brings this motion to dismiss the Plaintiff's state law claims for assault, battery, false arrest and imprisonment and malicious prosecution as time barred, and for summary judgment as to the remaining causes of action pursuant to CPLR §3212. Plaintiff opposes the motion.

On Wednesday, February 22, 2006, around 3:30 p.m., Merisme and his wife were driving westbound on West 109th Street towards Broadway when they were involved in a motor vehicle accident which resulted in them parking their vehicle on the south side of West 109th Street. Merisme and Plaintiff, who was performing repairs to a vehicle in the vicinity, then became involved in a physical altercation.

Sergeant Favia and Police Officers Michael Mariani, Michael Mandia and Jonathan Salomons, all assigned to the 24th Precinct Grand Larceny Unit, responded to the location, whereby Merisme identified himself as an off-duty police officer. The officers from the 24th Precinct placed Plaintiff under arrest and charged him with assault in the third degree and attempted assault in the third degree. Merisme was transported to Metropolitan Hospital where he was treated and released for a laceration on his lip. Plaintiff was transported to St. Lukes Hospital where he was treated and released for a laceration and fractures to the left side of his face.

According to the "Report Under P.G. 206-10" issued by the Police Department of the City of New York on February 23, 2006, "[t]his incident was investigated by the undersigned under the supervision of Inspector Michael Harrington, Patrol Borough Manhattan North Duty Inspector under the overall direction of Deputy Chief Michael Oveis, Executive Officer, Patrol Borough Manhattan North. Members of Patrol Borough Manhattan North Investigations Unit responded and assisted with the investigation." There were no fewer than four independent witnesses to the incident. As a result of the investigation, Merisme was placed on modified assignment at his police precinct.

On October 5, 2006, the criminal charges against Plaintiff were dismissed on speedy trial grounds.

Whether or not and to what extent Merisme presented himself as a police officer, which of the individuals initiated the altercation, and to what extent the responding officers relied on Merisme's position as a police officer in making the arrest of Plaintiff, are issues of fact for the jury to consider.

"An action to recover damages for assault, battery, false imprisonment, and malicious prosecution" must be commenced within one year of the date of accrual. (CPLR §214[3]). For statute of limitations purposes, "accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." (*Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289 [1993]). Furthermore, "a cause of action for the intentional infliction of emotional distress is governed by the one-year statute of limitations in CPLR §215(3). (*See, CPLR 215[3]*); *see also, Goldner v. Sullivan, Gough , Skipworth, Summers & Smith*, 105 AD2d 1149 [4th Dept 1984]). "As a general proposition, it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run." (*Ackerman v. Price Waterhouse*, 644 N.E.2d 1009 [1994]).

Plaintiff's tort claims for assault, battery, false arrest and false imprisonment, and intentional infliction of emotional distress, accrued on February 22, 2006, when the acts in his complaint are alleged to have taken place. Therefore, pursuant to CPLR §215(3), the statute of limitations expires on February 22, 2007. Plaintiff did not commence this action until May 21, 2007. Since Plaintiff interposed these claims beyond the one year statutory period, they are dismissed as time-barred.

Furthermore, a cause of action for malicious prosecution "accrue[s] when the criminal proceeding terminated favorably to the plaintiff." (*Campo v. Wolosin*, 211 A.D.2d 660 [2d Dept 1995]). Plaintiff's claim for malicious prosecution accrued on October 5, 2006 when his criminal court case was dismissed for a speedy trial violation pursuant to Criminal Procedure Law Section 30.30. Therefore, to timely commence an action for malicious prosecution, Plaintiff would have to interpose his claim by October 6, 2007.

Plaintiff's original complaint dated May 21, 2007, did not allege malicious prosecution. The first time Plaintiff pled this claim was on November 26, 2008 in an amended complaint.

Pursuant to CPLR §203(f):

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

The original complaint alleges the facts surrounding the circumstances of Plaintiff's arrest and further states that "upon investigation of the event by the Office of the District Attorney, all charges against plaintiff PABLO CRUZ were dropped, and he has not been prosecuted for any crimes, violations or misdemeanors arising from the events of February 23, 2006." Therefore, the original pleading provides notice of the transactions and occurrences that support the malicious prosecution claim. As such, the malicious prosecution claim is deemed to have been interposed on May 21, 2007, which is within one year of the date the malicious prosecution cause of action accrued, on October 5, 2006.

Merisme moves for summary judgment on the remaining causes of action. The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970], *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

In support of its motion Merisme submits: Merisme's request for legal assistance form, the affirmation of Merisme's attorney John W. Burns, the summons and verified complaint, plaintiff's amended summons and verified complaint, Merisme's answer to the amended complaint, excerpts from plaintiff's deposition, excerpts from Merisme's deposition, excerpts from police officer

Christopher Kruty's deposition, excerpts from Sergeant Guissepe Favia's deposition testimony, the NYPD complaint report regarding the incident, the NYPD online booking arrest worksheet, the NYPD arrest report for the incident, the NYPD aided report worksheet, the NYPD criminal court complaint with supporting affidavit, the NY County Criminal Court certificate of disposition,and the NYPD Command Log for the 24th precinct.

In opposition, Plaintiff attaches: Plaintiff's deposition, a statement written by Nilo Abreu on February 22, 2006, the owner of the vehicle that Plaintiff had been in, Plaintiff's medical records from St. Luke's/ Roosevelt Hospital Center, a memorandum dated February 23, 2006 from the Duty Captain of Patrol Borough Manhattan North regarding the fight between Plaintiff and Merisme, Merisme's deposition, the NY criminal court complaint, the NYPD arrest report, the NY County criminal court certificate of disposition, the record of court action, a supervisor's complaint report/command discipline election report regarding Merisme, and the verified complaint.

The Request for Legal Assistance, filed by Merisme on October 1, 2008, and signed by Commanding Officer David Colon of the 23rd Precinct, describes the incident as follows:

> On February 22, 2006, at approximately 1515 hrs. officer, Merisme was traveling westbound on West 109 Street, along with his wife, enroute to pick up his son from the daycare center. Suddenly, a vehicular backed up against vehicular traffic striking his car. He immediately stopped, double parked his car to see what damages had occurred. At this time, an individual later identified as Pablo Cruz walked over toward him, waving his arms in an aggressive manner, screaming and cursing, stated to him: "Move your fucking car, mother fucker. I'll fuck you up". Shocked, he attempted to calm Cruz down, at which time he punched Merisme about the face while his wife begged Pablo Cruz to stop, a second unidentified individual grabbed his wife and dragged her away. As he attempted to free his wife from this individual, again Pablo Cruz began to strike and punch him about the face. In a desperate effort to protect his wife and himself, he attempted to hold on to the perpetrator to terminate the attack, and he (the perpetrator) fell. Officers from 24 pct. Responded and placed

> Pablo Cruz under arrest. Merisme was treated at the Metropolitan Hospital for injuries sustained.

The Merisme Affidavit states:

> [O]n February 22, 2006, I was the victim of a crime. Pablo Cruz assaulted me. While I am a New York City Police Officer, I never took police action nor did I ever use any police power or authority to arrest, confine, hold in custody or criminally prosecute Pablo Cruz. All decisions concerning Cruz's arrest and subsequent criminal prosecution were left to the discretion of the New York City Police Department and the Manhattan District Attorney's Office.

Deprivation of Federal Rights under 42 U.S.C. 1983

"42 USC §1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage... subjects or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured." (*Hudson Va. Mar., Inc. v. Town of Cortlandt*, 79 AD3d 700, 912 NYS2d 623 [2nd Dept 2010]). "In order to maintain a section 1983 action, two essential elements must be present: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct complained of must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." (*Pitchell v. Callan*, 13 F.3d 545 [2d Cir. 1994]). Determining whether an individual is acting under the color of law is contingent on "whether there was an abuse or misuse of power conferred upon them by state authority." (*Id.* at 549).

Merisme has failed to make a prima facie showing that he was not acting under the color of law. Merisme states in his deposition that he identified himself as a police officer to the other officers when they arrived. His deposition states:

> Q. Did there come a time when you showed you ID to any individuals, any of the police officers that arrived on the scene?
>
> A. I believe it was the sergeant.

Q. You did show him your ID?

A. Yeah.

Q. Did you show him an ID, or did you show him a badge, or were they both enclosed in the same thing?

A. They were in the same place.

Merisme further describes:

A. As I said, I explained to him briefly the situation, what happened. I was getting assaulted by Pablo Cruz and it was a minor accident. It was just a minor accident and I was assaulted by Pablo Cruz. He asked me, like, you want to press charges, and I said, yes, I want to press charges.

Q. What was his response when you said that you wanted to press charges?

A. Then he went towards Pablo Cruz where he was standing at.

....

Q. Did he ask you to point out who the individual was that you got in a fight with?

A. Yeah.

Merisme's deposition testimony demonstrates that he held himself out as a police officer to the responding officers, and stated that he wanted to press charges against Plaintiff, leading the officers to arrest Plaintiff.

Furthermore, Plaintiff annexes the signed statement of Nilo Abreu, a witness to the altercation, who states that he "saw a gun on [Merisme's] waist that he was holding like showing off."

Accordingly, whether he was acting under the color of law is a question of fact for the jury to decide and the motion for summary judgment as to the §1983 claim is denied.

False Arrest under 42 U.S.C. §1893

"A [42 USC] § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause, is substantially the same as a claim for false arrest under New York law." (*Washington-Herrera v. Town of Greenburgh*, 101 A.D.3d 986, 988, 956 N.Y.S.2d 487, 489 [2012]). To state a claim for false arrest under New York law, a plaintiff must show 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." (*Savino v. City of New York*, 331 F.3d 63, 75 [2d Cir. 2003]) Neither actual malice nor want of probable cause is an essential element of an action for false imprisonment. (*Marks v. Townsend*, 97 N.Y. 590).

Merisme's testimony establishes that he intended to confine Plaintiff when he told the police officers that he wanted to press charges, and that Plaintiff was confined for a period of time of thereafter. As all of the other elements for false arrest have been met, Merisme does not make a prima facie showing that he did not falsely arrest Plaintiff.

This same analysis applies for the tenth and eleventh causes of action for false arrest and false imprisonment respectively. Thus, Merisme's motion for summary judgment is denied as to all causes of action for false imprisonment and false arrest.

Malicious Prosecution and Malicious Abuse of Process under 42 U.S.C. §1893

A claim under 42 U.S.C. §1983 for malicious prosecution is based upon the same elements of a claim under New York law. The elements of a malicious prosecution are: (1) defendant initiated a prosecution against the plaintiff, (2) defendant lacked probable cause to believe the proceeding could succeed, (3) defendant acted with malice, and (4) the prosecution was terminated in the plaintiff's favor." (*Rohman v. New York City Transit Auth. (NYCTA)*, 215 F.3d 208, 215 [2d Cir. 2000]). A claim under 42 U.S.C. §1983 for malicious abuse of process is based upon the same elements of a claim under New York law. Under New York law, Plaintiff is required to show that "(1) the defendant commenced a criminal proceeding against him; (2) the proceeding ended in the plaintiff's favor;

(3) the defendant did not have probable cause to believe the plaintiff was guilty of the crime charged; and (4) the defendant acted with actual malice. (*Cook v. Sheldon*, 41 F.3d 73, 79 [2d Cir. 1994]).

"Regarding the element of malice, a plaintiff need not demonstrate that defendant's intended to do him or her personal harm. Plaintiff need only show a reckless or grossly negligent disregard for his or her rights. This may be manifested in an egregious deviation from proper investigative procedures." (*Hernandez v. State of NY*, 228 AD2d 902, 644 NYS2d 380 [3rd Dept 1996]). Where the plaintiff institutes a malicious prosecution action he must plead lack of probable cause. Under 42 U.S.C. §1983, Plaintiff must additionally allege that there was "a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." *Id.*

Merisme has failed to make a prima facie showing for summary judgment on the malicious prosecution or malicious abuse of process causes of action. It is clear from the evidence provided that Merisme told the police officers that he wanted to initiate a proceeding against Plaintiff and that the prosecution was terminated in Plaintiff's favor. Dismissal of criminal charges for a speedy trial violation is sufficient to establish a favorable termination for malicious prosecution claims purposes. *(See Rivas v. Suffolk Cnty.*, 04-4813-PR(L), 2008 WL 45406 (2d Cir. Jan. 3, 2008]).

However, a question of fact exists as to whether Merisme had probable cause. Merisme states in his deposition that it was Plaintiff who initiated the physical altercation. He alleges that Plaintiff approached him and stated "move your fucking car" and "I am going to fuck you up." Mersime asserts that he told Plaintiff "I am not going to move that car until I found out what's going on." Merisme then states that Plaintiff "swung at [him]". Then, in defense, Merisme allegedly punched him back. Yet in opposition, Plaintiff's deposition states after he asked Merisme to move his car, Merisme replied "Fuck you bitch, what you gonna do." Plaintiff then told him to leave him alone. Plaintiff describes the incident as follows:

> Q. Was there an action or response to your comment?
>
> A. Yes.

Q. What was it?

A. He got closer in my face.

Q. When he got closer in your face did he say anything or do anything?

A. Yes.

Q. What did he do?

A. He said bitch, what you going to do?

Q. What did you say to him?

A. Told him to leave me alone.

Q. What did he say or do?

A. He said fuck you.

Q. What did you say or do?

A. I said leave me alone, I have my own problems.

Q. What did he say to you?

A. He said I'm standing right here, bitch.

Q. What did you say or do?

A. I said stand there all you want.

Q. Then what happened after you said that?

A. He got more aggravated and he kept getting closer and calling me a bitch, repeating fuck you bitch, fuck you bitch, very loud.

Q. Did you make any other responses?

A. He was one inch from my mouth, like if we was going to kiss calling me a bitch.

> Q. What did you do, did you walk away, did you say something, what did you do?
>
> A. I put my hands between me and him, like about an inch that I had and I pushed him back away from me and I told him leave me alone.

Plaintiff then describes how Merisme then came "charging" at him and "whopped" him "upside [his] face".

According to Plaintiff's description of the events, it could be interpreted that Merisme was the initial aggressor. Thus, Plaintiff has raised a question of fact as to whether Defendants had probable cause for his arrest and whether Merisme acted with malice. As such, the motion for summary judgment as to malicious prosecution under 42 U.S.C. §1983 is denied.

This same analysis is applicable for the twelfth cause of action for malicious prosecution. Accordingly, Merisme's motion for summary judgment as to the third and twelfth cause of action is denied.

Denial of Constitutional Right to Fair Trial under 42 U.S.C. §1893

"A person suffers a constitutional violation if an (1) investigating official (2) fabricates evidence (3) that is likely to influence a jury's decision, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of liberty as a result." (*Jovanovic v. City of New York*, 486 F. App'x 149, 152 [2d Cir. 2012])

Merisme makes a prima facie showing that he did not provide false documentation or evidence to the prosecutors. Yet, as indicated by Plaintiff's deposition, he provides a differing description of what happened, by demonstrating that it could have been Merisme who was the intial aggressor rather than Plaintiff. Accordingly, it is a question of fact for the jury to decide whether Merisme provided fabricated evidence which was forwarded to the prosecutor, which is likely to influence a jury's decision. Accordingly, Merisme's motion for summary judgment as to the denial of constitutional rights to fair trial cause of action is denied.

Excessive Force under 42 U.S.C. §1983

Plaintiff's sixth cause of action alleges excessive force under 42 USC 1983, in that "the level of force employed by defendants was objectively unreasonable" and resulted in "severe bodily injuries, including, but not limited to, a fracture of the left zygomatic arch, which requires reconstructive surgery." To succeed on an excessive force cause of action, the defendant's action must have been under the color of law and must not be "objectively reasonable" under the Fourth Amendment. (*Graham v. Connor*, 490 U.S. 386, 388 [1989]).

As detailed above under the 1983 claim, Merisme fails to make a prima facie showing that he was not acting under the color of law. Accordingly, the motion for summary judgment for the excessive force cause of action under 1983 is denied.

Wherefore, it is hereby,

ORDERED that Plaintiff's eighth cause of action for assault, ninth cause of action for battery, tenth cause of action for false arrest, eleventh cause of action for false imprisonment, and thirteenth cause of action for intentional infliction of emotional distress are dismissed as against all Defendants as time-barred; and it is further,

ORDERED that the first cause of action for deprivation of federal rights under 42 U.S.C. §1983, second cause of action for false arrest under 42 U.S.C. §1983, third cause of action for malicious prosecution under 42 U.S.C. §1983, fourth cause of action for malicious abuse of process under 42 U.S.C. §1983, fifth cause of action for denial of constitutional rights to a fair trial under 42 U.S.C. §1983, sixth cause of action for excessive force under 42 U.S.C. §1983, tenth cause of action for false arrest, eleventh cause of action for false imprisonment, twelfth cause of action for malicious prosecution remain; and it is further,

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 22, 2013

HON. EILEEN A. RAKOWER

J.S.C.

Check one: **FINAL DISPOSITION** **X** **NON-FINAL DISPOSITION**

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