Jones v City of New York
2016 NY Slip Op 31343(U)
June 27, 2016
Supreme Court, Bronx County
Docket Number: 308865/11
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 308865/11**

King N. Jones,
Plaintiff,

-against-

DECISION and ORDER

The City of New York, New York City Police Department, Bronx County District Attorney's Office, et al.,

Defendants.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant the City's motion for pursuant to CPLR §§3211(a)(7) and 3212.

Papers Submitted	Numbered
Amended Notice of Motion, Affirmation & Exhibits	**1**
Notice of Cross-Motion, Affirmation & Exhibits	**2**
Affirmation in Partial Opposition	**3**

The instant action arises from the arrest of plaintiff on October 13, 2010 and his re-arrest on January 27, 2011 in connection with an incident that occurred on October 1, 2010 wherein a woman was struck by a motor vehicle while standing on the street next to her vehicle. In or about March of 2011, when a grand jury failed to indict, plaintiff's case was dismissed. In his verified amended complaint, plaintiff alleges causes of action under 42 U.S.C. § 1983 for [false] arrest, detention and confinement, negligent training and negligent supervision; false arrest/imprisonment, assault, battery, malicious prosecution, abuse of process, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress; and prima facie tort.

Defendants The City of New York, The City of New York s/h/a New York City Police Department, Jeannette Rucker, Kenneth Dohan and Detective Craig Crisfield (the City") now move, pursuant to CPLR §3211(a)(7) and/or CPLR §3212, for an order dismissing the verified amended complaint.

Plaintiff cross-moves to amend the verified amended complaint, pursuant to CPLR § 3025(b), to correct the date of plaintiff's second arrest from December 20, 2010 to January 27, 2011 and deem its proposed amended complaint served herewith, to be timely served, *nunc pro tunc*. The City does not oppose this amendment but requests that its third amended answer be deemed responsive to the proposed amended complaint as is, including the revised date proposed by plaintiff, and served, *nunc pro tunc*. Plaintiff's motion is **granted** in its entirety and the City's third amended answer is deemed responsive to the proposed amended complaint and served, *nunc pro tunc.*

In support of its motion, the City contends, *inter alia,* that plaintiff's state law claims stemming from his October 13, 2010 arrest are untimely because the notice of claim was not filed within the 90-day statutory period. The Court agrees. Accordingly, plaintiff's state law claims for false arrest, assault, battery, abuse of process, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and prima facie tort premised upon his October 13, 2010 arrest are hereby dismissed.

In addition, the City contends that: (1) plaintiff's cause of action for malicious prosecution should be dismissed because ADA Jeanette Rucker and the Bronx District Attorney's office are protected by prosecutorial immunity; (2) plaintiff's 42 U.S.C. § 1983 claim premised upon false arrest and imprisonment should be dismissed because there existed probable cause to arrest, detain and prosecute plaintiff; (3) plaintiff's cause of action for intentional infliction of emotional distress should be dismissed because such cause of action does not lie against the state, its governmental subdivision, and their employees engaged in official conduct; (4) plaintiff's cause of action for negligence should be dismissed because a plaintiff who seeks damages arising from an unlawful arrest must proceed by way of the traditional remedy of false arrest; (5) plaintiff's causes of action under 42 U.S.C. § 1983 premised upon negligent hiring, training and retention should be dismissed because there was no underlying constitutional violation; (6) plaintiff fails to state a cause of action against defendant The City of New York under § 1983 because the amended complaint fails to sufficiently allege the existence of a municipal policy or custom which violated a constitutional right; and (7) the amended complaint

should be dismissed as against defendant The New York City Police Department because it is a non-suable agency of The City of New York.

In support of its contentions, the City submitted, *inter alia,* the deposition testimony of plaintiff, Det. Craig Crisfield and ADA Jeanette M. Rucker, the Criminal Court affidavit of Evia Oviawe and various Criminal Court and NYPD documentation. At his deposition, plaintiff testified as follows: He is married with three children and owns a plumbing company. In 2007, he was contacted by Josephine Oviawe to make repairs to her boiler. Approximately one year later, he was again contacted by Oviawe to work on her boiler. Approximately two years later, Oviawe contacted him a third time to work on a different boiler which had a leak. The boiler was in a different location than the boiler that he had previously serviced. Oviawe also asked him to connect a stove in the basement. He declined because the service Oviawe requested was illegal. Oviawe was upset and said "you are going to hear from me." Oviawe took him to small claims court. Oviawe claimed that the leak occurred because of his work. He brought a cross-claim against Oviawe. They both lost so the result was "a draw." The day after the small claims court trial, Oviawe called the police and told them that he came to her residence and struck her with his vehicle. He owns a green 2009 Lexus, a 2000 gray Jaguar and a 2000 Dodge Caravan. On October 13, 2010, after being contacted by police, he appeared at the precinct where Det. Dohan arrested him. He was fingerprinted, photographed and released with a Desk Appearance Ticket ("DAT") for him to appear in court on December 20, 2010. When he appeared with an attorney in court on December 20, 2010, nothing happened and he was told to come back on January 27, 2011. When he appeared in court on January 27, 2011, he was arrested by Det. Crisfield on a felony charge in relation to this incident. He was not told why the charges against him had been increased from one misdemeanor to several additional misdemeanors and felonies including the charge of attempted murder. No one contacted him about the case after his October 13, 2010 arrest until he was re-arrested on January 27, 2011. He was detained in Central Booking for approximately two days. He was very traumatized by the whole situation which affected his reputation in the plumbing business. Controlled with medication prior to this

incident, his blood pressure increased after the incident and he began taking an additional medication.

At his deposition, Det. Crisfield testified that he first met plaintiff when he arrested him in January of 2011. His supervisor was contacted by the DA and was directed to re-arrest plaintiff. As the officer who initially arrested plaintiff had retired, his supervisor asked Crisfield to make the re-arrest. He knew nothing about the prior arrest, he did not know what plaintiff was charged with, he had no conversations in the DA's office about the case, he did not speak with anyone that might have investigated the case, and he did not speak with the alleged victim nor any witnesses with regard to the case. He arrested plaintiff at the Criminal Court building, put him in handcuffs and brought him to the DA's office where he uncuffed his hands and put him in a cell for about one hour while he prepared an online booking sheet. Then, he brought plaintiff to Central Booking. After completing the booking sheet, he spoke to ADA Rucker in order to confirm that he had put in the right charges. He had no other involvement with plaintiff.

At her deposition, ADA Rucker testified as follows: She is the Chief of the complaint room, arraignments and DAT units. Her responsibilities are to deal with all incoming prosecutions and to evaluate the facts of the case. She first became aware of the instant case when a DAT representative brought it to her attention. Initially, a misdemeanor complaint was created by DAT representative Errol Cabral. On December 19, 2010, she reviewed a "summary" of the case and misdemeanor complaint, both prepared by Cabral. The daughter of the victim was the deponent in the complaint and the information included in Cabral's summary was obtained from police "paperwork" and conversations between Cabral, the victim and her daughter. After reviewing the facts, she elevated the complaint to a felony because she "found out there was a motive" based upon the "background of the parties." Based upon the summary, she found out that as soon as the victim walked out into the street, "a van pulls away from the curb, guns, and speeds towards her, and hits her." "That is more than leaving the scene." She did not read any police paperwork prior to deciding to add felony charges. By reading the summary, she "found out that the victim had filed a civil claim against the Defendant for plumbing work that she didn't like and apparently won. And shortly thereafter, this occurred."

No one from her office had met with the victim or her daughter. The police paperwork did not include signed statements from the victim or her daughter. Complainants cannot sign complaints and witnesses cannot sign corroborating statements until the complaint is reviewed and initialed by a supervisor. Once she reviewed and changed the misdemeanor complaint, which included only one charge of leaving the scene of an accident, she sent it back to Cabral to re-write the charges in the complaint. Cabral re-wrote the charges and brought the complaint back to her. She made changes to the summary "to make it read and flow correctly and concisely." She told Cabral "You are giving me too much information." Cabral had the daughter read the complaint and spoke to the victim on the phone about the complaint. She never saw the victim or the daughter on that day. The only person she spoke to about the charges that day was Cabral. She "got pissed off because [the case] came in as a DAT. That is what pissed [her] off. Not the facts themselves]. The fact of the case coming in as a DAT [with only one misdemeanor charge] when this should have been an online arrest." After plaintiff was re-arrested, the victim's daughter signed the complaint and the victim signed her corroborating statement. She never spoke with the plaintiff, the victim, the victim's daughter nor any witness regarding the case. The first time that she reviewed any of the police paperwork was on the day of her deposition. On that day, she looked at some of the police paperwork. She does not know whether the police paperwork is consistent with the felony complaint. When she reviewed the complaint, she did not know whether or not Cabral had reviewed the police paperwork. At the time she approved the felony complaint, she did not know whether plaintiff owned a van. She does not recall if she has ever spoken to any police officers about this case. The only eyewitness that she knew of was the victim's daughter. She does not know if plaintiff had any criminal history prior to this incident. After this case left the complaint room, the only other involvement she had with the case was to change the arrest number. The file in this case went from the complaint room to the grand jury.

In the criminal complaint, signed by Oviawe's daughter as deponent, plaintiff is charged with attempted murder in the second degree, reckless endangerment in the first degree, menacing in the second degree, assault in the second degree, assault in the third degree, reckless

endangerment in the second degree, criminal possession of a weapon, leaving the scene of an incident without reporting, menacing and harassment in the second degree. The complaint states, *inter alia,* that "Deponent is informed by JOSEPHINE OVIAWE that . . . she was standing by the driver's side door of her vehicle and observed a burgundy van pull out of a parking space a couple of houses down and accelerate down the street in her direction. . . she then observed the defendant seated behind the steering wheel and operating said van which veered in her direction and stuck [sic] her on the right side of her body propelling her into the air where she struck the ground and lost consciousness." The criminal complaint also states that "Deponent . . . was standing a few feet from JOSEPHINE OVIAWE and observed the defendant seated in the driver's seat of a burgundy van and further observed the defendant strike JOSEPHINE OVIAWE with said vehicle and a parked vehicle after which the defendant drove away from the scene . . . without stopping to display his personal information." The criminal complaint further states that "Deponent is further informed by JOSEPHINE OVIAWE, that as a result of the defendant's aforementioned actions she suffered bruising and swelling to her right thigh and shoulder, a laceration to her right elbow which required several stitches to close the wound, a laceration [sic] the bottom of her right foot, and substantial pain to these areas, as well as experience annoyance, alarm, and fear for her physical safety." In her supporting deposition, Oviawe states that she read the complaint and "the facts stated in that complaint to be on information furnished by me are true upon my personal knowledge."

A Complaint - Follow Up Information Report, dated October 7, 2010, indicates that Anthony C. Hinds was interviewed by Det. Dohan as a witness to the incident. The report states, *inter alia,* that Hinds stated that he is a neighbor of Oviawe and he observed a van "drive down the block and strike [her] on her right side as she was attempting to enter her vehicle. The van was dark in color and continued southbound on Deceiver Avenue." Hinds did not see the driver. Another police report indicates that, on October 10, 2010, Oviawe and her daughter provided written statements to Det. Dohan stating that they saw plaintiff operating a dark colored minivan

which struck Oviawe and fled the scene.[1] That report also states that Oviawe stated that the plate on the police report was ascertained by a neighbor who drove off to find the vehicle and that Oviawe believes that the neighbor did not see the correct vehicle. A Police Complaint Report prepared less than an hour after the incident indicates that Oviawe told the responding officers that she was struck while entering her car on the right side and that Oviawe and a witness stated that a "dark color van poss. (Burgundy in Color) speed up and strike" Oviawe, knocking her to the ground. Notably, the report does not state that either Oviawe or her daughter identified the operator of the vehicle at that time. The report also states that the "VE. POS SIDE MIRROR RECOVERED AT SCENE." The report further states that Anthony C. Hinds witnessed the accident, a "BK. PAS. SIDE MIRROR (CRACKED)" was invoiced as evidence, and that the license plate number of the vehicle is DPP4398 which corresponds to a red 1998 Ford Econovan. The report states the insurance policy number for the vehicle.

In a Notice of Judgment, dated September 30, 2010, in connection with a Civil Court action brought by plaintiff against Oviawe to recover monies allegedly due for plumbing services, the Hon. Mitchell J. Danziger found in favor of Oviawe. No documentation was provided regarding Oviawe's action against plaintiff.

In opposition to the motion, plaintiff relies on the same evidence that the City relied upon in support of the motion. In her affirmation, plaintiff's counsel alleges that issues of fact exist as to whether probable cause existed to arrest and prosecute the plaintiff. Counsel also alleges that the prosecutor(s) have only qualified immunity because their function in this case was limited to administration and investigation. Counsel further alleges that the amended complaint states a cause of action with regard to each of plaintiff's claims.

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A cause of action under 42 U.S.C. § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom and must

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[1]The City did not provide either statement in support of the motion and plaintiff's attorney alleges that, despite her request for the statements, neither has been provided to her.

be pleaded with specific allegations of fact. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Leung v. City of New York*, 216 A.D.2d 10, 627 N.Y.S.2d 369 (1st Dept. 1995). Here, the complaint is devoid of any factual allegations as to any specific policy or custom initiated by the City which caused plaintiff to suffer a deprivation of a constitutional right. Therefore, the City's motion to dismiss, pursuant to CPLR 3211 (a)(7), plaintiff's causes of action premised upon violations of 42 U.S.C. § 1983 is **granted**.

To prevail on a claim of malicious prosecution, a plaintiff must establish: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice. *See Broughton v. State of New York*, 37 N.Y.2d 451, 456 (1975). Malice may be inferred from a lack of probable cause to arrest. *See Martin v. City of Albany*, 42 N.Y.2d 13, 17, 396 N.Y.S.2d 612 (1977). Although, as a general rule, information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest, the failure to make further inquiry when a reasonable person would have done so may be evidence of lack of probable cause. *See Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453 (1983); *Carlton v. Nassau County Police Department*, 306 A.D.2d 365, 366, 761 N.Y.S.2d 98 (2nd Dept. 2003). Here, plaintiff testified that he was not questioned prior to his re-arrest. And, in their initial statements to the police, neither Oviawe nor her daughter identified the operator of the van. Also, eyewitness Anthony Hind stated that he did not see the driver. Notably, the license plate identified by Hind belonged to a vehicle which matched the description provided by all witnesses, but which was owned by an individual other than plaintiff who was never questioned by either the police or anyone in the office of the Bronx District Attorney. Nor were any of plaintiff's vehicles inspected by police to determine whether any matched the description of the vehicle provided by the witnesses and/or whether any were missing a mirror. Further, ADA Rucker did not discuss the case with anyone other than Cabral who prepared the summary. Nor did Rucker speak with plaintiff, Oviawe, any witnesses, or anyone from the NYPD about the case prior to directing plaintiff's re-arrest on felony charges,

including attempted murder. Instead, she relied solely on a conversation with, and the written summary prepared by, a DAT representative in the complaint unit. As such, triable issues of fact exist as to whether probable cause existed for the arrest and/or prosecution of plaintiff and whether the City acted with malice.[2] Therefore, the City's motion to dismiss plaintiff's malicious prosecution action, pursuant to CPLR § 3212, is **denied**.

In order to establish a claim for false arrest/imprisonment, a plaintiff must prove that: (1) the defendant intended to confine him/her, (2) plaintiff was conscious of the confinement, (3) plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. *See Broughton v. State of New York,* 37 N.Y.2d at 456. A warrantless arrest, as in this case, is presumptively unlawful and defendant has the burden of proving legal justification as an affirmative defense, which may be established by showing probable cause existing at the time of arrest. *See id.* Given that triable issues of fact exist as to whether probable cause existed at the time of plaintiff's arrest, and the City has offered no other justification defense, the City's motion to dismiss plaintiff's state law claims for false arrest/imprisonment premised upon his January 27, 2011 arrest is **denied**.

Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) the use of process in a perverted manner to obtain a collateral objective. *See Curano v. Suozzi,* 63 N.Y.2d 113, 469 N.E.2d 1324 (1984). Here, there is no evidence that plaintiff was arrested to obtain a collateral

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[2]The Court is unpersuaded by the City's claim that the prosecutor(s) are entitled to absolute immunity because they were performing a "quasi-judicial" function. Prosecutors acting in an investigative or administrative capacity are entitled to only qualified immunity. *See Rodrigues v. City of New York,* 193 A.D.2d 79, 602 N.Y.S.2d 337 (1st Dept. 1993). When prosecutors are conducting investigative work in order to decide whether a suspect may be arrested, they are not endowed with absolute immunity. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606 (1993). Here, the prosecutor(s)' function was primarily determining whether to arrest/re-arrest the plaintiff and what charges to bring. As such, they are entitled to only qualified immunity. Inasmuch as issues of fact exist as to whether probable cause existed to arrest plaintiff and whether the prosecutor(s) acted with malice, it cannot be said as a matter of law that the prosecutor(s) did not violate any clearly established statutory or constitutional rights of which a reasonable person would have known at the time the conduct occurred. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

objective. Therefore, the City's motion to dismiss plaintiff's abuse of process cause of action is **granted**.

Nor does the amended complaint state a cause of action for either an intentional or negligent infliction of emotional distress claim. Initially, claims of intentional infliction of emotional distress against government bodies are barred as a matter of public policy. *See Dillon v. City of New York,* 261 A.D.2d 34, 41, 704 N.Y.S.2d 1 (1st Dept. 1999). In any event, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by a defendant "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See Murphy v. American Home Products Corp.,* 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232 (1983). Plaintiff's conclusory allegations, devoid of specific factual allegations as to any outrageous or extreme conduct by the City, are insufficient to state a cause of action for either intentional or negligent infliction of emotional distress. As such, the City's motion to dismiss plaintiff's causes of action for intentional and negligent infliction of emotional distress, pursuant to CPLR §3211(a)(7), is **granted**.

A plaintiff seeking damages for injury resulting from false arrest and detention must proceed by way of the traditional remedy of false arrest. *See Santoro v. Town of Smithtown,* 40 A.D.3d 736, 738, 835 N.Y.S.2d 658 (2nd Dept. 2007). Accordingly, the City's motion to dismiss plaintiff's negligence cause of action, pursuant to CPLR §3211(a)(7), is **granted**.

The only argument advanced by the City in support of its motion to dismiss plaintiff's state law claims for assault, battery and prima facie tort is that they are untimely to the extent they are premised upon plaintiff's October 13, 2010 arrest. However, as discussed above, they are not untimely as to plaintiff's re-arrest on January 27, 2011. The Court finds the allegations in the amended complaint sufficient to state a cause of action for assault, battery and prima facie tort based upon the alleged unlawful handcuffing, detention and patting down of plaintiff. As such, the City's motion to dismiss plaintiff's state law causes of action for assault, battery and prima facie tort is **denied**.

As the City notes, as an agency of the City of New York, the New York City Police Department is not a suable entity because it lacks an independent legal existence. *See Jenkins v. City of New York,* 478 F.3d 76, 93 n.19 (2nd Cir. 2007). Therefore, the City's motion to dismiss all claims asserted against the New York City Police Department is **granted**.

Based upon the foregoing, the first, second, third, fourth, ninth, tenth, eleventh and twelfth causes of the proposed amended complaint are hereby dismissed as against the City. The amended complaint is dismissed in its entirety as to defendant The New York City Police Department. Plaintiff's remaining causes of action against the City (with the exception of the NYPD) remain viable solely to the extent that they are premised upon plaintiff's January 27, 2011 arrest.

Dated: Bronx, New York
June 27 2016

Hon. Julia I. Rodriguez, J.S.C.