3-18-14

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

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WILLIAM CARDOZA and VIELKA DE LEON,

Plaintiffs,

-against-

THE CITY OF NEW YORK, PO BENJAMIN PEREZ, PO STEVEN TOMALA, PO CARLOS MENDEZ and PO JOHN DOE #1 (SHIELD UNKNOWN),

Defendants.

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Index No.: 307977/2008

DECISION/ORDER

Howard H. Sherman
J.S.C.

The following papers read on this motion to set aside a jury verdict

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affirmation Annexed Vols 1-8	1	
Affirmation in Opposition - Exhibits A, B	2	
Reply/Supplemental Reply	3	4

Defendants City of New York and three individually named New York City police officers, P.O. Mendez, P.O. Perez, and P.O. Tomala move to set aside a jury verdict after trial. Defendants alternatively move to set aside the verdict and granting judgment in favor of defendants for failure of plaintiff William Cardoza to establish a prima facie case in his claims for malicious prosecution , battery /excessive force, and for the award for punitive damages as against the individual police officers, Benjamin Perez and Carlos Mendez. Alternatively, defendants seek an order granting a new trial and setting aside the verdict as against the weight of the evidence ; an order granting a new trial in the interests of justice, and/or an order setting aside as excessive the awards of damages, and granting a new trial on that issue.

The incident which gave rise to this action occurred on May 30, 2008. On that day, Officers Mendez, Perez, and Tomala were working in uniform in an unmarked car. They were assigned to patrol looking for quality of life issues including street corner drug sales, and public drinking. At approximately 8:25 p.m. they approached the area in front of 2894 Grand Concourse when the officers saw Mr. Cardoza drinking a can of beer in front of the building. After they pulled over, Officer Perez walked over to Cardoza while Mendez approached a parked car whose occupants were drinking and playing loud music. Perez testified that he walked up to Cardoza and asked him for identification because he was drinking alcohol in public. He further testified that while consuming alcohol from an open container in public is an arrestable offense, his intent at that time was to issue a summons, and he asked Cardoza for his ID in English and at least once in Spanish.

While there may be some question as to how much if anything plaintiff understood concerning the ID, it is not disputed that he ultimately did take out his wallet in response to the demand, however, he did not produce any identification. It is also clear that his wife Vielka DeLeon was taking to him in Spanish while standing next to him. While this "dialogue" was going on between Perez and Cardoza, Officer Mendez heard their voices getting louder, and he walked over to them while Officer Tomala continued dealing with the men in the car who provided their ID s to him.

After a short period of time during which the two officers and plaintiffs voices get even louder, the officers advised Mr. Cardoza that he was being placed under arrest. The officers testified that it appeared to them that plaintiff understood what was being said, and what was happening, and he simply did not produce any identification. What he did do at some point, less than a minute into the situation, was to commence walking away from them, at which time Officers Tomala joined the

two other officers. As he stepped away, Officers Perez and Mendez pushed him back to the building wall, told him he was under arrest, and directed him to place his hands behind his back.

They also began to turn him around when he did not do so himself, by placing their hands on him. The officers testified that while this was going on for several seconds, it became apparent by his failure to obey and by his stiffening of his arms , that Cardoza was resisting arrest and more force would be necessary. [1] Mendez then sprayed plaintiff with mace. Cardoza still did not submit to the arresting officers.

At this point, plaintiff's step-daughter and subsequently, Ms. DeLeon, involved themselves verbally and physically. After they were both led away by other officers, the officers continued to attempt to place plaintiff's hands behind his back to cuff him. He continued to resist by stiffening his arms, seemingly flailing his arms, and eventually while facing the wall, holding onto a gate attached to the building. After several seconds of attempting to release his arms from the gate, by grabbing his arms and/or legs, the officers still could not subdue plaintiff, who continued to grab the fence. Eventually, Mendez pulled out his baton, and struck plaintiff's right hand four to six times, with what he described as " medium force." This ultimately resulted in plaintiff letting go, and being cuffed , and in suffering an open metacarpal fracture of his right hand. The entire incident, which lasted approximately one minute and fifty seconds, was caught on a street surveillance camera.

Plaintiff was taken to the hospital for treatment while under arrest, and he was ultimately charged by the Bronx District Attorney's office with obstruction of government administration, and resisting arrest, and disorderly conduct . Perez signed the criminal complaint . Cardoza

[1] It is noted that Mr. Cardoza is six feet tall and weighed 220 pounds [Tr. 331].

was arraigned at the hospital. While in the hospital he was handcuffed to the bed using his non-injured hand. He was released from the hospital and from custody on June 3, 2008.

Ms. De Leon was also arrested for interfering with the lawful arrest of Cardoza , and disorderly conduct . She was issued a summons at the precinct and released.

Ultimately, the Bronx District Attorney's Office chose to proceed to trial against Cardoza only on the disorderly conduct charge, and at the bench trial, called Officer Tomala as the sole witness . After trial, the case was dismissed for failure to prove a prima facie case.[2]

In September 2008, plaintiffs Cardoza and DeLeon commenced this action, and by supplemental summons and amended complaint five months later, asserted causes of action on behalf of each plaintiff for false arrest and imprisonment, malicious prosecution, assault and battery, negligence, unlawful search and seizure and deprivation of federal rights (42 U.S.C. 1983. A derivative action was also interposed on behalf of Arianna Cardoza.

By decision and order of this court (Payne, J.) dated February 3, 2012, the City was awarded partial summary judgment dismissing all claims for "negligent infliction of emotional distress, all federal claims brought against the City of New York including the claim of negligent hiring and retention, and all claims of false arrest brought by William Cardoza." In doing so, Justice Payne noted plaintiff's acknowledgment that he had been drinking beer in violation of the NYC Administrative Sec. 26-504.3. That violation of law could have been the basis for an arrest albeit, not one resulting from what one might consider a major crime. Judge Payne's decision left standing

[2] The record provides no information as to how and/or why the case was prosecuted and tried by the Bronx District Attorney and the court will not speculate. However, the record does provide a basis upon which to review whether or not the four- pronged test for purposes of a malicious prosecution claim has been met.

the malicious prosecution and punitive damage claims stemming not from the initial arrest for violation of the administrative code, but rather for the resisting arrest and disorderly conduct charges.

At the close of plaintiff's case, defendants moved pursuant to CPLR 4401for an order granting judgment as a matter of law. This court reserved decision .

After trial, the jury awarded damages for the use of excessive force in effectuating the arrest of Mr. Cardoza; for the malicious prosecution of Mr. Cardoza, as well as punitive damages as against Officers Mendez and Perez. The specific awards were $500,000.00 for past pain and suffering on the excessive force and malicious prosecution claims, along with $2,000,000.00 future pain and suffering for both claims and $750,000.00 in punitive damages against each of the two officers for a total award of $4,000,000.00.

The jury found for defendant each of Ms. DeLeon's claims.

Motion

Defendants argue that the verdict should be set aside in its entirety and the complaint dismissed for failure to establish a prima facie case, or alternatively, the verdict set aside as against the weight of the evidence and/or in the interest of justice.

The court in reviewing the evidence, in particular the testimony of plaintiff and the video, agrees that the finding by the jury concerning the malicious prosecution claim, and the punitive damage claims, are not supported by this record that plaintiff did not meet its burden in proving a prima facie case for malicious prosecution and punitive damages.

In order to establish a claim for malicious prosecution the plaintiff needs to establish that: a) there was a criminal proceeding commenced and/or continued by defendant, b) the proceeding was terminated favorably in favor of plaintiff, c) there was an absence of probable cause for the

proceeding, and d) there was actual malice (see, Broughton v State of New York, 37 NY 2d 451 [1975]).

Initially, it is clear that there was a criminal proceeding commenced and continued and it did terminate in favor of plaintiff. It is the questions of probable cause and malice that present more of a problem. As previously noted, prior to trial Justice Payne dismissed all of plaintiff's false arrest claims finding probable cause to arrest plaintiff. A review of the video, coupled with plaintiff's own statement at trial concerning his behavior on the video, in particular that he was trying not to get arrested can lead to no conclusion other than there was probable cause for the obstruction, resisting, and disorderly conduct arrest. This is apart from the probable cause for the initial stop and arrest for the open container. The fact that plaintiff's prosecution for false arrest and disorderly conduct continued by the Bronx District Attorney and ultimately went to trial on the only one charge for which he was acquitted is not in and of itself sufficient to render an arrest as false nor a prosecution as malicious (Shapiro v County of Nassau, 202 AD 2d 358 [1st Dept. 1994]).

In the first instance, Judge Payne's decision leaves the issue of whether or not the police had probable cause to arrest plaintiff for resisting arrest and disorderly conduct to the jury. The jury found probable cause did not exist. This finding is as a matter of law against the weight of the evidence. There is no doubt that plaintiff was drinking in public, that the police approached for this and asked him for identification, that even if one were to believe he understood no English and that none of the officers spoke to him at any time in Spanish you would also have to believe that his wife did not tell him what was going on or that he was actually taking out his wallet for no reason. That is belied by the evidence since he did testify that when he started to step away from the police he was doing so to get more light so that he could find his ID. This is curious since not only the testimony

but the video demonstrate that there was more than sufficient light at the time to see his own wallet and his own ID where he was standing.

Everything that took place after he attempted to walk away was clearly, by video and testimony, precipitated by the action or non action of plaintiff. The testimony that he was told he is under arrest and to turn around, and to place his hands behind his back was uncontroverted. Again, plaintiff's understanding of English may have been an issue if you credit the testimony that he does not understand any English, and that none of the officers spoke to him at any time in Spanish, and that his wife and daughter who were there, and other than placing themselves between the officers and him, were not telling him what was happening. This court, however finds that not only would it be incredulous if all of the above were true but in fact his own words belie the idea that he would not have understood what was going on when he testified, in explaining at least a part of his actions by stating *he did not want to be arrested* (emphasis added).

This testimony is clear when you observe him tensing and flailing his arms and more importantly grabbing the fence and not letting go. While one could certainly conclude he was not punching and kicking at the officers, there is no way on this record that one can conclude that for over one minute on the video he was not resisting arrest. This incident even if viewed in a vacuum and in hindsight, which it shouldn't be, clearly demonstrates that the police had probable cause to arrest plaintiff not only for drinking from an open container, but also for resisting arrest and disorderly conduct. As to the disorderly conduct charge itself, defendants need not demonstrate actual public involvement in the incident, but rather the attention to the incident, by member of the public in proximity to the incident (People v Weiner, 16 NY 3d 123).

The video clearly shows members of the public in close proximity moving away and paying

attention to the incident. Moreover, the conduct of his wife and daughter while intervening, could have , under the facts and circumstances known to the officers at the time, led to much more significant consequences. Plaintiffs refusal to submit to the authority of the police on that street, at that time, under all of the circumstances presented clearly again provided a basis upon which to arrest him for resisting arrest and disorderly conduct. Interestingly , there was evidence submitted that may have explained much of plaintiff's behavior that day. Blood alcohol levels taken several hours after the incident at the hospital indicated that even hours later he had a level of 1.75 which defendant expert testified represented drinking over the course of the day not the one beer he had at the time, but as many as fifteen. This even if one officer testified to not recalling if he appeared intoxicated.

Plaintiffs argue that the lack of probable cause for the prosecution is evident in two ways. First, the video clearly demonstrates that the officers initiated the physical alteration . This argument would be worth consideration if one were to believe that after approaching plaintiff for the administrative code violation and asking for identification and plaintiff stepping away and the officers ultimately telling him he was under arrest, and plaintiff refusing to turn around and place his hands behind his back , there was insufficient reason for an officer to physically place plaintiff under arrest. Placing their hands on him to stop him from walking away and to turn him around to arrest him and his resistance to the arrest was what initiated the incident.

Second, plaintiffs argue that there is further proof of the showing of malicious prosecution stemming from Officer Perez's complaint as submitted to the Office of the District Attorney in that it alleged that Cardoza kicked and used his fists against the officers in the encounter. While the video may not document actual punches thrown or kicking, it must be noted that plaintiff

was not charged with either assault or attempted assault, but with resisting arrest. As above noted, plaintiff has acknowledged resisting arrest. The description by Perez of punches, or of closed fists, rather than flailing arms, or locked arms does not vitiate the complaint in such a way as to make the charges fraudulent, and thus demonstrates a lack of probable cause and with that, malice. Moreover, it is not necessary that a defendant violently resist. It is enough that he engage in conduct which prevents the arrest (People of the State of NY v Stevenson, 31 NY 2d 108 [1972]). There is, quite simply, no evidence in this record that the officers lied about anything in the complaint, or signed it for any nefarious reason or improper motive. Nor is there any evidence of any after acquired knowledge by the police which would have called for them to withdraw the complaint (Callan v State of New York, 73 NY 2d 731 [1989]). Plaintiff's failure to show any lack of probable cause for the arrest and follow up prosecution requires dismissal of the claim (Young v City of NY, 72 AD 3d 415 [1st Dept. 2010]). Again, the record clearly presents a basis for the arrest and the prosecution.

Moreover, on this record, there is no basis for any finding of malice. Plaintiffs essentially argue that malice is demonstrated by the lack of probable cause for the arrest and subsequent prosecution, and from fraudulent statements. There is no such showing in this record. Accordingly, the malicious prosecution award must be vacated and the claim dismissed.

The award for punitive damages must also be vacated and the claim dismissed. There has been no showing by "clear and convincing evidence" that plaintiff Cardoza is entitled to an award for punitive damages. Such an award cannot be made absent a showing that defendants were "motivated by actual malice or acted in reckless disregard of" plaintiffs' rights (see, Nardelli v Stamberg, 44 NY2d 500, 503, 377 NE2d 975, 406 NYS2d 443 [1978]). No such showing was made

by plaintiffs here.

With respect to the jury's determination on the excessive force claim, it is acknowledged that the movant's burden on a motion to set aside a verdict as against the weight of the evidence is a heavy one, with the consideration guided by the following oft-cited criteria ,

> [f]or a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, however, requires a harsher and more basic assessment of the jury verdict. It is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial.
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> Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 499, 382 N.E.2d 1145 [1978]

Based on the evidence at trial here, the court cannot find that no valid line of reasoning exists to support the jury verdict finding defendants liable for the use of excessive force in effecting the arrest of Mr. Cardoza. Question raised by the testimony and the video of the use of mace, and the number of baton strikes, if any, were necessary to subdue and to place plaintiff in handcuffs , and whether alternative means were available to effect the arrest, were resolved by the jury, and the court finds no basis here to disturb their determination .

Damages

However, the court also finds that the awards of $500,000. for damages for past pain and suffering, and $2,000,000. for future pain and suffering excessive. A review of the injuries claimed coupled with a review of prior verdicts for such injuries provides the court with a basis upon which to evaluate an appropriate award.

As a result of the incident, it is undisputed that Mr. Cardoza suffered an open metacarpal fracture of his right hand without joint involvement. . Plaintiff has not received treatment for the injury since 2009. What was disputed at trial by the respective medical experts was the extent of

residuals and permanency of that injury.

Plaintiff also claims that since the incident and continuously, he has suffered from post-traumatic stress disorder (PTSD) and depression. Plaintiff's treating psychiatrist[3] Dr. Morales and defendant's psychiatric expert presented conflicting opinions as to these diagnoses.

While the court will not and can not disregard plaintiff's doctor's opinion, it does note several discrepancies in the testimony in particular concerning the facts of the underlying incident which lead to the PTSD diagnosis.

Defendants' expert, Dr. Kaplan conducted a review of the records and performed an examination of plaintiff, and opined in detail with reference to both the established guidelines and the details of the circumstances of the incident, that Mr. Cardoza does not meet the criteria for a PTSD diagnosis as set forth in the DSM-IV.[4] It was also pointed out that the post-incident hospital records contained no psychiatric complaints , but did contain the evaluation of a social worker who concluded that plaintiff was not in need of further evaluation.

Upon review of the medical testimony and records and the cases submitted with respect to awards for similar injuries, the court finds the awards for past and future pain and suffering to be excessive and vacates those awards unless plaintiff stipulates to an award of $ 200,000.00 for past pain and suffering and $150, 000.00 for future pain and suffering .

This constitutes the decision and order of this court.

Dated: March 14, 2014
Bronx, New York

Howard H. Sherman

[3]Dr. Morales has been treating plaintiff since July 2008, after Mr. Cardoza was referred by counsel

[4]Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.