SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN

Elton Walters v. Robii Abouchacra

CV126028561S

2014 Conn. Super. Lexis 826

April 8, 2014, Decided
April 8, 2014, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

OPINION

MEMORANDUM OF DECISION IN RE MOTION FOR SUMMARY JUDGMENT #127

FACTS

The plaintiff, Elton Walters, by writ, summons, and complaint commenced this action against the defendants, Robii Abouchacra (Abouchacra) and the city of Meriden (the city), on March 14, 2012. In a five-count amended complaint filed on October 23, 2012, the plaintiff alleges the following facts. On April 9, 2010, at approximately 8 p.m., the plaintiff was attempting to visit a family member who resided at 66 Willow Street in Meriden, Connecticut. Abouchacra, a police officer employed by the city, approached the defendant and asked why he was at that address, to which the plaintiff responded that he was visiting a family member. As the plaintiff attempted to enter the residence, Abouchacra "deployed his department issued taser, tased the plaintiff, and placed [him] under arrest," causing the plaintiff to sustain physical injuries and incur damages. In counts one, two, and three respectively, the plaintiff alleges claims of assault and battery, false arrest, and negligence against Abouchacra. In counts four and five, the plaintiff brings two claims against the city for indemnification for the alleged torts of Abouchacra pursuant to General Statutes §§7-101a,[1] 7-465,[2] and 52-557n.[3]

On May 21, 2012, the defendants filed an answer to the plaintiff's original complaint admitting that Abouchacra was employed by the city as a police officer at the time alleged, but denying the remaining allegations. The defendants then filed a motion for summary judgment as to the amended complaint on October 31, 2013, arguing that there is no material fact in dispute that: (1) Abouchacra's use of force on the plaintiff was justified under General Statutes §53a-22(b)[4] and

therefore did not constitute an assault; (2) Abouchacra had probable cause to investigate and arrest the plaintiff, so the plaintiff's claim for false arrest therefore fails as a matter of law; (3) all of the plaintiff's claims are barred by the doctrine of governmental immunity; and (4) the plaintiff's claims against the city pursuant to General Statutes §§7-465 and 7-101a are predicated on Abouchacra's liability for the alleged torts, and, should the court grant summary judgment as to counts one through three, these claims therefore fail as a matter of law. The defendants further argue that General Statutes §7-101a does not provide a right of action by a plaintiff against a municipality, so the plaintiff's claim pursuant to that statute therefore fails. In support of the motion, the defendants submitted certified copies of the depositions of Abouchacra and the plaintiff, a sworn affidavit of Abouchacra, and a copy of the police report from the incident in question.

On December 16, 2013, the plaintiff filed an objection to the motion, accompanied by a memorandum of law, a sworn affidavit of the plaintiff, and a copy of the city police department's policy on the "use of force." The defendants filed a reply to the plaintiff's objection on December 20, 2013. The court heard oral arguments on the motion and the objection thereto on December 23, 2013. The defendants thereafter filed a supplemental memorandum in support of their summary judgment motion on January 4, 2014, to which the plaintiff filed a reply on February 4, 2014.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Internal quotation marks omitted.) *Grenier v. Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way." (Internal quotation marks omitted.) *Dugan v. Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003).

"As the party moving for summary judgment, the [movant] is required to support its motion with supporting documentation, including affidavits." *Heyman Associates No. 1 v. Ins. Co. of Pennsylvania*, 231 Conn. 756, 796, 653 A.2d 122 (1995). Likewise, "[t]he existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence." (Emphasis omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co. v. Shivers*, 136 Conn.App. 291, 296, 44 A.3d 879, cert. denied, 307 Conn. 938, 56 A.3d 950 (2012). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008).

In the present case, the defendants move for summary judgment as to all counts of the plaintiff's amended complaint on the ground that there is no genuine issue of material fact that: (1) Abouchacra's use of force on the plaintiff was justified under General Statutes §53a-22; (2) Abouchacra had probable cause to investigate and arrest the plaintiff; (3) all of the plaintiff's claims against Abouchacra are barred by the doctrine of governmental immunity; and (4) the plaintiff's claims for indemnification against the city pursuant to General Statutes §§7-465 and 7-101a must fail because they are predicated on Abouchacra's liability for the alleged torts. The defendants further argue that §7-101a does not provide a right of action by a plaintiff against a municipality, so the plaintiff's claim pursuant to that statute must fail as a matter of law.

In opposition to the motion for summary judgment, the plaintiff posits three arguments. First, Abouchacra's use of force against the plaintiff was not justified under General Statutes §53a-22 because Abouchacra initially approached the plaintiff for motor vehicle violations, which are not offenses for which the use of reasonable force is authorized under the statute. Second, there exist genuine issues of material fact as to whether Abouchacra had a valid reason to question the plaintiff for the alleged motor vehicle violations and whether he had probable cause to execute the arrest of the plaintiff. Third, summary judgment on the ground of governmental immunity is inappropriate because there are genuine issues of material fact regarding whether Abouchacra acted wantonly in his treatment of the plaintiff, and whether his actions subjected the plaintiff to an imminent harm. In light of these issues of fact surrounding Abouchacra's liability as to the alleged torts, the plaintiff further objects to the issuance of summary judgment as to his claims for indemnification against the city.

I

ASSAULT AND BATTERY

The defendants move for summary judgment as to the plaintiff's claim of assault and battery in count one on the ground that there is no genuine issue of material fact that Abouchacra's use of force was reasonable and necessary under the circumstances to effect the arrest of the plaintiff. The operative statute regarding the use of force by police is General Statutes §53a-22, which provides in relevant part that "a peace officer . . . is justified in using physical force upon another person when and to the extent that he or she reasonably believes such to be necessary to: (1) Effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense . . . or (2) defend himself or herself or a third person from the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape . . ." "The term offense means any crime or violation which constitutes a breach of any law of this state . . . for which a sentence to a term of imprisonment or to a fine, or both, may be imposed *except one that defines a motor vehicle violation or is deemed to be an infraction*." (Emphasis in original; internal quotation marks omitted.) *Odom v. Matteo*, 772 F.Sup.2d 377, 387 n.3 (D.Conn. 2011), citing General Statutes §53a-24(a). "A reasonable belief that a person has committed an offense is defined as a reasonable belief in facts or circumstances which if true would in law constitute an offense." (Internal quotation marks omitted.) *Id.*, citing General Statutes §53a-22(a).

"The question of whether the police officer was in fact acting in the performance of his official duties constitutes a factual [question] for the jury to determine on the basis of all the circumstances of the case and under appropriate instructions from the court." (Citation omitted; internal quotation

marks omitted.) *State v. Nelson*, 144 Conn.App. 678, 694, 73 A.3d 811 (2013). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." (Citations omitted; internal quotation marks omitted.) *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

In the present case, Abouchacra states that he initially approached the plaintiff because he had parked his vehicle in a way that obstructed the sidewalk, and the vehicle was missing a front marker plate. (Robii Abouchacra's Deposition Transcript, p. 28.) The defendants describe the parties' interaction as "hostile" and allege that the plaintiff was "uncooperative," used profanity, and ignored the officer's request for identification "in excess of five times." (Defendants' Memorandum in Support of Motion for Summary Judgment, p. 17.) Abouchacra states that he deployed his taser when the third party whom he claimed to be visiting, the brother of the plaintiff's girlfriend, came outside and the plaintiff attempted to enter his residence. (Robii Abouchacra's Deposition Transcript, p. 52.) It is undisputed that Abouchacra used his taser to strike the plaintiff, and while he was prone on his stomach, Abouchacra used his knee to prevent the plaintiff from moving while he placed him in handcuffs. (Robii Abouchacra's Deposition Transcript, p. 50, 66-67; Elton Walters' Deposition Transcript, p. 28- 29.) The parties' accounts differ as to the duration of the use of the taser, which Abouchacra states was less than five seconds and the plaintiff claims exceeded fifteen seconds. (Meriden Police Department Incident Report, Defendants' Exhibit 1, p. 5; Elton Walters' Deposition Transcript, p. 42.) The parties also disagree as to the exact placement of Abouchacra's knee, which Abouchacra contends was "a standard lockup technique" on "the joint between the back and the shoulder area," and the plaintiff states was on his lower back. (Robii Abouchacra's Deposition Transcript, p. 67; Elton Walters' Deposition Transcript, p. 43.)

Pursuant to the standard set forth above, the defendants' burden on summary judgment is to demonstrate an absence of genuine issue of material fact as to the reasonableness of Abouchacra's use of force to effect the arrest of the plaintiff. Abouchacra claims that he deployed his taser because he was "outnumbered" when a third person arrived on the scene, and because the plaintiff was about to enter the third party's residence. (Robii Abouchacra's Deposition Transcript, p. 52.) The defendants attempt to analogize the circumstances of the present case to the facts in *Selitte v. Pirolo*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-05-5000164-S, 2008 Conn. Super. LEXIS 2962 (November 17, 2008, Tyma, J.), where the court dismissed the plaintiff's claim of assault against an officer, finding that his use of a taser was justified. The defendants' reliance on *Selitte* is misplaced for two reasons. First, the case in *Selitte* was tried to the court, thus rendering the judge the trier of facts and "the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Michael T. v. Commissioner of Correction*, 307 Conn. 84, 91, 52 A.3d 655 (2012). In ruling on the present motion for summary judgment, however, "the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC v. Miller, supra*, 303 Conn. 233.

Moreover, the evidence in *Selitte* clearly demonstrated that the officer deployed his taser after witnessing an assault by the plaintiff on a third party and fired it because he "reasonably believed that another assault was imminent." *Selitte v. Pirolo, supra*, Superior Court, Docket No. CV-05-5000164-S. Here, Abouchacra does not allege that he anticipated an imminent assault from either

the plaintiff or the third party on the scene, but that he deployed his taser because the plaintiff was about to evade arrest by entering the third party's residence. Although the use of force to prevent evasion of an arrest is justified under General Statutes §53a-22, the plaintiff notes in his objection memorandum that Abouchacra approached him to address motor vehicle violations, which are specifically excluded under the statute. The defendants argue in their reply memorandum, however, that Abouchacra was authorized to use reasonable force to effect an arrest for the other offenses with which the plaintiff was charged.[5] Given the discrepancy between the accounts of the arrest by the plaintiff and Abouchacra, however, it is unclear from the evidence whether Abouchacra was executing an arrest for the alleged motor vehicle violations or for the other offenses. The question of whether Abouchacra's use of force was reasonable is therefore one for the trier of fact and is inappropriate for resolution on summary judgment. The plaintiff further notes that, pursuant to the Meriden Police Department's policy on the use of force, a taser should be used "in circumstances where the offense is severe," and "flight alone should not be the sole justification for use." (Meriden Police Department's Use of Force Policy, Plaintiff's Exhibit C.) Although not dispositive, the policy may be considered as a relevant factor in determining the reasonableness of Abouchacra's use of force in the present case, and is sufficient to create a genuine issue of fact regarding his deployment of the taser. See *Odom v. Matteo, supra*, 772 F.Sup.2d 389.

Based on the foregoing, the defendants have not demonstrated "that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact" regarding the reasonableness of Abouchacra's use of force pursuant to General Statutes §53a-22. *Ramirez v. Health Net of the Northeast, Inc., supra*, 285 Conn. 11. The motion for summary judgment is therefore denied as to the claim for assault and battery in count one.

II

FALSE ARREST

The defendants next move for summary judgment as to the plaintiff's claim of false arrest in count two on the ground that Abouchacra had probable cause to arrest the plaintiff. "False imprisonment, or false arrest, is the unlawful restraint by one person of the physical liberty of another . . . False imprisonment is categorized as an intentional tort for which the remedy at common law was an action for trespass . . . [I]n the case of a false imprisonment the detention must be wholly unlawful . . . To prevail on a claim of false imprisonment, the plaintiff must prove that his physical liberty has been restrained by the defendant and that the restraint was against his will, that is, that he did not consent to the restraint or acquiesce in it willingly." (Citations omitted; internal quotation marks omitted.) *Lo Sacco v. Young*, 20 Conn.App. 6, 19, 564 A.2d 610 (1989). "A false arrest claim under [§42 U.S.C.] §1983 is substantially the same as a claim for false arrest under Connecticut law . . . The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether that action is brought under state law or under §1983." (Citations omitted; internal quotation marks omitted.) *Hunter v. Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV97-0344157, 2004 Conn. Super. LEXIS 1501 (June 4, 2004, Dewey, J.), citing *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996); *Jocks v. Tavernier*, 316 F.3d 128, 134-35 (2d Cir. 2003); *Caldarola v. Calabrese*, 298 F.3d 156, 161 (2d Cir. 2002).

"A police officer has probable cause for an arrest when he has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable

caution in the belief that the person to be arrested has committed or is committing a crime." *Swartz v. Insogna*, 704 F.3d 105, 111 (2d Cir. 2013). Probable cause "is a flexible common sense standard that does not require the police officer's belief to be correct or more likely true than false . . . Probable cause is based on the objective facts available to the officer at the time of arrest, not on the officer's subjective state of mind . . . As our Supreme Court has noted, [w]hile probable cause requires more than mere suspicion . . . the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances." (Citations omitted; internal quotation marks omitted.) *Washington v. Blackmore*, 119 Conn.App. 218, 221-22, 986 A.2d 356, cert. denied, 296 Conn. 903, 991 A.2d 1104 (2010). "Whether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court, but when the facts themselves are disputed, the court may submit the issue of probable cause in the first instance to a jury as a mixed question of fact and law." *DeLaurentis v. New Haven*, 220 Conn. 225, 252-53, 597 A.2d 807 (1991).

The defendants claim that it is undisputed that the plaintiff did not have a front license plate displayed on his vehicle and that he had parked his vehicle in a way that obstructed the sidewalk, so Abouchacra therefore had probable cause to detain and investigate him for motor vehicle violations pursuant to General Statutes §14-18(a)(2)[6] and City Ordinance §180-26.[7] They claim that it is also undisputed that the plaintiff failed to provide Abouchacra with identification when asked in excess of five times and attempted to resist arrest by entering a residence, so Abouchacra also had probable cause to arrest the plaintiff for interfering with an officer pursuant to General Statutes §53a-167a. The plaintiff disputes these allegations, however, stating in his deposition that, although he did not have a license plate mounted to the front of his vehicle at the time of the incident, it was visibly displayed in the window. (Elton Walters' Deposition Transcript, p. 19-20.) He further argues that his alleged obstruction of the sidewalk in violation of Meriden Ordinance §180-26 provided Abouchacra with the authority to issue him a citation but not to investigate and detain him.[8] The plaintiff also states that he did not provide Abouchacra with his identification because he refused to tell him why he needed it or why he was being questioned. (Elton Walters' Deposition Transcript, p. 28.)

Although the determination of probable cause is generally a question of law, several judges of the Superior Court have denied summary judgment in cases of false arrest where the facts are in dispute as to whether probable cause existed, and have left that determination to the fact finder. See, e.g., *Svitek v. Martin,* Superior Court, judicial district of New Haven, Docket No. CV-10-6010196-S, 2012 Conn. Super. LEXIS 1392 (May 25, 2012, Wilson, J.) (denying summary judgment as to a claim of false arrest based on evidence which disputed the officer's claim that the plaintiff was driving erratically prior to being stopped and arrested for reckless driving); *Balogh v. Shelton*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-99-0067521-S (March 18, 2002, Alander, J.) (31 Conn. L. Rptr. 566, 569, 2002 Conn. Super. LEXIS 843) (denying summary judgment as to a false arrest claim based on evidence establishing that a party had not occurred at the plaintiff's home but on a neighboring golf course, and she therefore may not have been liable for providing alcohol to minors). In the present case, the plaintiff disputes the factual circumstances leading up to his arrest, including whether his vehicle displayed a front marker plate (Elton Walters' Deposition Transcript, p. 19), whether Abouchacra approached him for purported motor vehicle violations or for other reasons (*id*., 24), and the point during their interaction at which Abouchacra asked the plaintiff for his identification. *Id.*, 27. Such issues of material fact bear on the finding of probable cause for the arrest and are therefore inappropriate for resolution on summary judgment.

The plaintiff further objects to the motion for summary judgment as to his false arrest claim on the ground that the prosecutor entered nolle prosequi plea on the criminal charges against him related to the incident in question, which indicates that there was no finding of probable cause for the arrest. The defendants contend in their supplemental memorandum that the nolle plea does not implicate Abouchacra's finding of probable cause, and may in fact prevent the plaintiff from bringing a false arrest claim. As to the defendants' first argument, it is well established that "it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial." (Internal quotation marks omitted.) *Mott v. Wal-Mart Stores East, LP*, 139 Conn.App. 618, 626, 57 A.3d 391 (2012). Given that the defendants have not met their burden of demonstrating an absence of genuine issue of material fact that Abouchacra had probable cause to detain and arrest the plaintiff, the court need not address the plaintiff's argument that his entry of a nolle plea indicates that there was no finding of probable cause.

The question of whether a plaintiff's nolle plea prevents him from bringing a claim of false arrest has received conflicting treatment in federal and state case law. It is first worth noting that favorable termination of a criminal action on the plaintiff's behalf has not been established as a required element for a claim of false arrest in Connecticut courts. See *Lo Sacco v. Young, supra*, 20 Conn.App. 19-20 (favorable termination included as an element of a claim for malicious prosecution but not as an element of a claim for false arrest); *Weyant v. Okst, supra*, 101 F.3d 853 (noting that "we are not aware of any opinion by Connecticut's highest court addressing the issue of favorable termination in the context of a claim for false arrest where there has been no determination as to guilt"). Moreover, the Connecticut appellate courts and the Second Circuit have yet to rule on whether a nolle constitutes a favorable termination for the plaintiff such that a claim for false arrest under state law or §42 U.S.C. §1983 can be brought. In *Russo v. Bridgeport*, 479 F.3d 196, 204 n.9 (Cir.), cert. denied, 128 S. Ct. 109, 552 U.S. 818, 169 L. Ed. 2d 24 (2007), the court explained that, because the plaintiff was unable to show that his arrest lacked probable cause, the court did not need to determine whether a nolle plea was a favorable termination of the criminal charges in the plaintiff's favor. Within the Superior Court, at least one judge has held that "a nolle of the criminal charge may still permit the plaintiff to satisfy [the element of favorable termination] if the circumstances of the nolle satisfy the *See v. Gosselin* test of 'an abandonment of the prosecution without request from or by an arrangement with [the defendant].'" *St. Paul v. Griffin*, Superior Court, judicial district of New Haven, No. 4001817, 2006 Conn. Super. LEXIS 2781 (September 12, 2006, Levin, J.), citing *See v. Gosselin*, 133 Conn. 158, 160, 48 A.2d 560 (1946).

As set forth above, viewing the evidence in a light most favorable to the plaintiff, the defendant has not demonstrated an absence of genuine issue of material fact as to Abouchacra's finding of probable cause to execute the plaintiff's arrest. The court therefore need not reach a determination as to whether the plaintiff's entry of a nolle prosequi plea constitutes a favorable termination for purposes of this ruling. Based on the issues of fact surrounding the circumstances of the plaintiff's arrest, the court denies the motion for summary judgment as to the false arrest claim in count two.

III

GOVERNMENTAL AND QUALIFIED IMMUNITY

The defendants next move for summary judgment as to all counts of the plaintiff's complaint pursuant to the common-law doctrine of qualified immunity and governmental immunity under

General Statutes §52-557n. The defendants argue that the plaintiff does not allege that Abouchacra failed to follow any governing policy or procedure in effecting the arrest, and the plaintiff therefore has not alleged a breach of any ministerial duty. The defendants further contend that the allegedly negligent acts committed by Abouchacra in effecting the arrest of the plaintiff involved the typical job duties of a law enforcement officer, which are inherently discretionary in nature, thus rendering both the city and its employee immune from liability as a matter of law. The plaintiff counters that an immunity defense is inapplicable in this case because it can reasonably be inferred from the amended complaint that Abouchacra acted wantonly and with a reckless disregard for the plaintiff's rights, and that his actions subjected the plaintiff to an imminent harm.

"When a municipal employee is sued, he or she may assert qualified immunity as a common-law defense." *Spears v. Garcia*, 263 Conn. 22, 37, 818 A.2d 37 (2003). "The [common-law] doctrines that determine the tort liability of municipal employees are well established . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature . . . The hallmark of a discretionary act is that it requires the exercise of judgment . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Violano v. Fernandez*, 280 Conn. 310, 318, 907 A.2d 1188 (2006).

While General Statutes §52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages, "§52-557n(a)(2)(B) . . . explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Doe v. Petersen*, 279 Conn. 607, 614, 903 A.2d 191 (2006). "Police officers are protected by discretionary act immunity when they perform the typical functions of a police officer . . . The policy behind discretionary act immunity for police officers is based on the desire to encourage police officers to use their discretion in the performance of their typical duties." (Citation omitted; internal quotation marks omitted.) *Smart v. Corbitt*, 126 Conn.App. 788, 800, 14 A.3d 368, cert. denied, 301 Conn. 907, 19 A.3d 177 (2011).

"There are three exceptions to discretionary act immunity. Each of these exceptions represents a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity-to encourage municipal officers to exercise judgment-has no force . . . First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure . . . Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws . . . Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . ." (Internal quotation marks omitted.) *Violano v. Fernandez*, *supra*, 280 Conn. 319-20. "Our courts have applied the [third] exception when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm . . . The failure to establish any one of the three prongs precludes the application of the identifiable person subject to imminent harm exception."

(Citation omitted; internal quotation marks omitted.) *Merritt v. Town of Bethel Police Dep't.*, 120 Conn. App. 806, 812, 993 A.2d 1006 (2010).

In the present case, the plaintiff contends that the exception to governmental immunity for an identifiable person subject to imminent harm is applicable. "Use of excessive force by a police officer in a situation which subjected a plaintiff to harm which was significant, foreseeable, and of limited duration has been found to raise an issue for a jury in connection with the identifiable person/imminent harm exception." (Internal quotation marks omitted.) *Cohen v. Mortensen*, Superior Court, judicial district of New Britain, Docket No. CV-12-6014762-S, 2013 Conn. Super. LEXIS 1960 (September 4, 2013, Wiese, J.); see also *Crawford v. New London*, United States District Court, Docket No. 3:11cv1371 (JBA), 2014 U.S. Dist. LEXIS 5578 (D.Conn. January 16, 2014). In *Balogh v. Shelton*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-99-0067521-S (March 18, 2002, Alander, J.) [31 Conn. L. Rptr. 566, 2002 Conn. Super. LEXIS 843], the court found that, where police officers allegedly arrested the plaintiff without probable cause or adequate investigation and negligently injured her while handcuffing her and placing her in the patrol car, she was unquestionably an identifiable person with respect to the purported actions of the officers. In *Balogh*, the defendants' actions were specifically directed toward the plaintiff and it was clear that any negligence in the performance of their duties would directly impact her. Likewise, in one District Court decision, the court held that an officer was not entitled to summary judgment as to the plaintiff's claims of assault and battery and negligent infliction of emotional distress because it was undisputed that the officer "purposefully hit and swung his baton at plaintiff [who] was put at risk of imminent harm from [his] hits and baton swings." *Roguz v. Walsh*, United States District Court, Docket No. 09-1052 (TLM), 2012 U.S. Dist. LEXIS 172644 (D.Conn. December 5, 2012).

In the present case, sufficient evidence has been offered by the plaintiff for a jury to reasonably find that he was subjected to an imminent harm. As explained above, a jury could reasonably determine that Abouchacra executed the plaintiff's arrest without probable cause and with excessive force when he struck the plaintiff with his taser and, while the plaintiff was prone on his stomach, placed him in handcuffs. It reasonably follows that a jury could also find that, when the plaintiff was tased and placed under arrest by Abouchacra, he was (1) an identifiable victim who was (2) subjected to an imminent harm (3) by a public official to whom it was apparent that his conduct was likely to subject the plaintiff to that harm. See *Merritt v. Bethel Police Dept., supra*, 120 Conn.App. 812. The defendants' motion for summary judgment on the basis of the common-law doctrine of qualified immunity and the governmental immunity grounds in General Statutes §52-557n(a)(2)(B) is denied pursuant to the imminent harm exception. Accordingly, the court need not consider the plaintiff's other argument against immunity, that Abouchacra acted wantonly and with a reckless disregard for the plaintiff's rights in effecting the arrest.

IV

INDEMNIFICATION

The defendants' final argument on the motion for summary judgment is that, because Abouchacra is not liable for the torts alleged in counts one through three of the amended complaint, the plaintiff's claims against the city for indemnification pursuant to General Statutes §§7-101a, 7-465, and 52-557n in counts four and five must fail as a matter of law. The plaintiff counters that, because genuine issues of material fact exist as to Abouchacra's liability for the alleged torts, summary judgment is inappropriate with regard to his claims for indemnification.

First, with respect to the indemnification claims in count four, "[t]here is no appellate authority as to whether a court can permit summary judgment against a party relative to individual allegations within a single count of a complaint. At the trial court level there is a split of authority on the issue. A review of the decisions finds that the majority of the cases do not allow a party to eliminate some, but not all, of the allegations of a single count through a motion for summary judgment . . . [S]ome courts have found that the language of Practice Book §17-51[9] authorizes the entry of summary judgment on part of a claim within a single count provided final judgment can be entered with respect to that part of the claim and it can be severed from the remainder of the claim." (Internal quotation marks omitted.) *Glidepath, LLC v. Lawrence Brunoli, Inc*., Superior Court, judicial district of Hartford, Docket No. CV 10 6014624, 2012 Conn. Super. LEXIS 3155 (December 21, 2012, Peck, J.). Here, the plaintiff brings claims for indemnification under General Statutes §§7-465 and 7-101a jointly in count four of the amended complaint. Given that the two claims can be severed and judgment may be rendered as to whether the plaintiff is entitled to indemnification under either or both statutes, the court will rule on the summary judgment motion as to each claim separately.

General Statutes §7-465 provides in relevant part: "Any town, city or borough . . . shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person . . . if the employee, at the time of the occurrence . . . was acting in the performance of his duties and within the scope of his employment, and if such occurrence . . . was not the result of any wilful or wanton act of such employee in the discharge of such duty . . ." It is undisputed that Abouchacra was an on-duty police officer employed by the city at the time he effected the arrest of the plaintiff. As set forth above, there exist genuine issues of material fact as to whether Abouchacra is liable to the plaintiff for claims of assault and battery, false arrest, and negligence. Accordingly, those same issues of fact exist as to the city's responsibility to indemnify Abouchacra for the damages alleged, and it is submitted that summary judgment should be denied as to the plaintiff's claim under §7-465.

General Statutes §7-101a provides in relevant part: "Each municipality shall protect and save harmless . . . any municipal employee . . . from financial loss and expense . . . arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer or such employee while acting in the discharge of his duties . . ." The defendants argue that the plaintiff's claim pursuant to this statute is not legally valid because §7-101a is intended to provide a recourse to municipal employees, not a direct right of action by a plaintiff. In *Estate of Gadway v. Norwich*, Superior Court, judicial district of New London, Docket No. CV-05-4003307-S, 2008 Conn. Super. LEXIS 2959 (November 14, 2008, Martin, J.), the court dismissed a cause of action brought under §7-101a on this very ground, finding that the statute does not provide a right of action by a plaintiff against the municipality itself, and that, in any case, the plaintiff made no attempt to oppose the motion for summary judgment as to those claims. Given that the plaintiff in the present case makes no legal argument to support his claim for indemnification under §7-101a, the motion for summary judgment is granted as to that claim.

As to the claim for indemnification raised in count five, General Statutes §52-557n provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person . . . caused by . . . [t]he negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . ." As it is undisputed that Abouchacra was an on-duty police officer acting within the

scope of his employment when he arrested the plaintiff and there exist genuine issues of material fact as to whether Abouchacra is liable to the plaintiff for claims of assault and battery, false arrest, and negligence, summary judgment is denied as to the plaintiff's indemnification claim under §52-557n.

CONCLUSION

Based on the foregoing, the motion for summary judgment is denied as to counts one, two, three and five. Summary judgment is granted as to count four.

Brian T. Fischer, J.

FOOTNOTES

1 General Statutes §7-101a provides in relevant part: "Each municipality shall protect and save harmless . . . any municipal employee, of such municipality from financial loss and expense . . . arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer or such employee while acting in the discharge of his duties . . ."

2 General Statutes §7-465 provides in relevant part: "Any town, city or borough . . . shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property . . . if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty . . ."

3 General Statutes §52-557n provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person . . . caused by . . . [t]he negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . ."

4 General Statutes §53a-22(b) provides in relevant part: "[A] peace officer . . . is justified in using physical force upon another person when and to the extent that he or she reasonably believes such to be necessary to: (1) Effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense, unless he or she knows that the arrest or custody is unauthorized; or (2) defend himself or herself or a third person from the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape . . ."

5 The plaintiff was charged with four offenses related to the incident in question, including interfering with an officer in violation of General Statutes §53a-167a and breach of peace under §53a-181. Section 53a-167a provides in relevant part that "[a] person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . in the performance of such peace officer's . . . duties." Section 53a-181 provides in relevant part that "[a] person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public

place . . ." The defendants claim that both statutes concern offenses for which the use of force is justified under General Statutes §53a-22.

6 General Statutes §14-18(a)(2) provides in relevant part: "Each motor vehicle for which two number plates have been issued shall, while in use or operation upon any public highway, display in a conspicuous place at the front and the rear of such vehicle the number plates . . ."

7 Meriden Ordinance §180-26 provides in relevant part: "It shall be unlawful for any person to commit any act which violates the provisions of this Code or of any ordinance or rule or regulation promulgated thereunder relating to the obstruction of the streets and sidewalks of the City or the interruption of free passage along the same . . ."

8 Meriden Ordinance §180-27 provides in relevant part: "The provisions of . . . §180-26 may be enforced by citation, in addition to other remedies . . ."

9 Practice Book §17-51 provides: "If it appears that the defense applies to only part of the claim, or that any part is admitted, the moving party may have final judgment forthwith for so much of the claim as the defense does not apply to, or as is admitted, on such terms as may be just; and the action may be severed and proceeded with as respects the remainder of the claim."