

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Shivers v. City Smiles Dental

2023 NY Slip Op 01768 · No. Index No. 24351/18E; Appeal No. 17584; Case No. 2022-00501 · Decided April 4, 2023

SUMMARY

The Appellate Division, First Department, modified an order concerning claims arising from an alleged detention at a dental office. It held that factual issues remained regarding liability under 42 U.S.C. § 1983 and the illegal-detention claims, including probable cause and whether Riverbay's peace officers acted under color of state law. The court dismissed the parties' common-law indemnity cross claims and Riverbay's contractual indemnity cross claims against City Smiles.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Kern, J.P.; Oing, J.; Kennedy, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	April 4, 2023
DOCKET	Index No. 24351/18E; Appeal No. 17584; Case No. 2022-00501
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order of Supreme Court, Bronx County, denying defendants' motions for summary judgment on the plaintiff's 42 U.S.C. § 1983 and illegal-detention claims and on various indemnity cross claims.
STANDARD OF REVIEW	Summary judgment is improper where the record presents conflicting evidence and issues of fact from which reasonable people could draw different inferences. On appeal, the court reviewed the order for errors of law and fact.
PRECEDENTIAL VALUE	published appellate opinion
PARTIES	City Smiles Dental, Sandra Tenzer, DDS, doing business as City Smiles Dental, Riverbay Corporation, Co-Op City Department of Public Safety v. Dolores Shivers et al., Riverbay Corporation et al.

TOPICS

summary judgment

section 1983

false imprisonment

indemnity

civil procedure

PRACTICE AREAS

civil procedure

civil rights

torts

QUESTIONS PRESENTED

1. Whether Riverbay was entitled to summary judgment dismissing Shivers's 42 U.S.C. § 1983 claim on the ground that its peace officers were not acting under color of state law.
2. Whether defendants were entitled to summary judgment dismissing the illegal-detention claims despite conflicting evidence concerning the detention and probable cause.
3. Whether Riverbay's and City Smiles' common-law indemnity cross claims were viable.
4. Whether Riverbay's contractual indemnity cross claims against City Smiles should be dismissed where Riverbay submitted no evidence establishing an applicable contract.

HOLDINGS

1. Riverbay was not entitled to summary judgment because it failed to establish that its two armed peace officers were not acting under color of state law, and factual issues remained as to whether Shivers was deprived of a constitutional right by being detained without probable cause.
2. Summary judgment dismissing the illegal-detention claims was properly denied because issues of fact existed as to whether defendants unjustifiably detained Shivers and whether they had probable cause to do so.
3. Riverbay's contractual indemnity cross claims against City Smiles should have been dismissed because Riverbay submitted no evidence establishing that a contract between the parties existed.
4. Both parties' common-law indemnity cross claims should have been dismissed because neither party was subject to statutory or other vicarious liability not premised on its own negligence.

KEY QUOTATIONS

*“A claim for common-law indemnification is actionable only where a party has been found to be vicariously liable, without proof of any negligence on its own part” ([*2])*

FACTUAL BACKGROUND

Shivers alleged that defendants detained her without probable cause in City Smiles Dental's office. Two armed Riverbay peace officers responded to the scene, and Shivers alleged that their conduct violated her constitutional rights. The record contained conflicting evidence concerning the circumstances of the detention and whether defendants had probable cause. Riverbay also asserted contractual and common-law indemnity cross claims against City Smiles, but submitted no evidence establishing the existence of a contract.

PROCEDURAL HISTORY

Supreme Court denied Riverbay's motion for summary judgment dismissing the § 1983 claim, illegal-detention claims, and common-law indemnity cross claim. It also denied City Smiles' motion for summary judgment dismissing the illegal-detention claim and common-law and contractual indemnity cross claims. The Appellate Division modified the order to dismiss both parties' common-law indemnity cross claims and Riverbay's contractual indemnity cross claims against City Smiles, and otherwise affirmed.

DISPOSITION

affirmed

CASES CITED

- Alvarez v. Prospect Hosp., 68 NY2d 320 (1986)
- Veras v. Truth Verification Corp., 87 AD2d 381, 384-385 (1st Dept 1982)
- Clark v. Nannery, 292 NY 105, 108 (1944)
- Dovin Constr., Inc. v. C. Raimondo & Sons Constr. Co., Inc., 29 AD3d 364, 365 (1st Dept 2006)
- McCarthy v. Turner Constr., Inc., 17 NY3d 369 (2011)

OPINION

PER CURIAM.

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Shivers v City Smiles Dental (2023 NY Slip Op 01768)

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<td align="center">Shivers v City Smiles Dental</td>

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<td align="center">2023 NY Slip Op 01768</td>

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<td align="center">Decided on April 04, 2023</td>

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<td align="center">Appellate Division, First Department</td>

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Decided and Entered: April 04, 2023

Before: Kern, J.P., Oing, Kennedy, Higgitt, JJ.

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Index No. 24351/18E Appeal No. 17584 Case No. 2022-00501

<div align="center">[*1]Dolores Shivers et al., Respondents,

v

City Smiles Dental et al., Appellants, Riverbay Corporation et al., Respondents.

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<p>Malapero Prisco & Klauber LLP, New York (Tracy Frankel of counsel), for appellants-respondents.</p>

<p>Law Offices of Kevin P. Westerman, Elmsford (Richard W. Ashnault of counsel), for respondents-appellants.</p>

<p>Hasapidis Law Offices, South Salem (Annette G. Hasapidis of counsel), for respondents-respondents.</p>

<p>Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 5, 2021, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Riverbay Corporation and Co-Op City Department of Public Safety (collectively, Riverbay) for summary judgment dismissing the cause of action under 42 USC § 1983, the causes of action alleging illegal detention, and the cross claim seeking common-law indemnity, and denied the motion of defendants City Smiles Dental, Sandra Tenzer, DDS, and Sandra Tenzer, DDS doing business as City Smiles Dental (collectively, City Smiles) for summary judgment dismissing the cause of action alleging illegal detention and the cross claims seeking common-law and contractual indemnity, unanimously modified, on the law and the facts, to dismiss the common-law indemnity cross claims interposed by both Riverbay and City Smiles and

the contractual indemnity cross claims interposed by Riverbay against City Smiles, and otherwise affirmed, without costs.

The motion court properly denied the aspect of Riverbay's motion for summary judgment dismissing plaintiff Shivers' 42 USC § 1983 cause of action alleging that defendants' actions violated her rights under the United States Constitution. Here, Riverbay failed to establish that its two armed peace officers, who responded to the scene, were not acting under color of state law (*see Alvarez v Prospect Hosp*., [68 NY2d 320](/opinion/5688388/alvarez-v-prospect-hospital/) [1986]). Further, there are issues of fact as to whether Shivers was deprived of a constitutional right based on her allegation that she was detained without probable cause.

In addition, the motion court properly denied the defendants' motions for summary judgment dismissing the causes of action alleging illegal detention. The record presents issues of fact as to whether defendants unjustifiably detained Shivers in City Smiles' dental office and whether they had probable cause to do so, as there is conflicting evidence from which reasonable people might draw different inferences about the circumstances (*see Veras v Truth Verification Corp.*, [87 AD2d 381, 384-385](/opinion/5991133/veras-v-truth-verification-corp/#384) [1st Dept 1982], *affd* 57 NY2d [1982]; *Smith v Clark v Nannery*, [292 NY 105, 108](/opinion/3611763/clark-v-nannery/#108) [1944]).

However, Riverbay's cross claims for contractual indemnification should have been dismissed. Supreme Court expressly stated in its order that it was granting the branch of City Smiles' motion that sought to dismiss the contractual cross claims as against it, including the cross claim for contractual indemnity. In doing so, the court observed that Riverbay had failed to submit any exhibits proving its contractual cross claims, and in fact, there was no evidence that a contract between the parties even existed. Thus, the decretal paragraph denying that branch of the motion appears to be an error. Riverbay's inclusion in the record of documents that were not submitted to the motion court is improper, and we have not considered those documents (*see* 22 NYCRR 1250.7; *Dovin Constr., Inc. v C[*2]. Raimondo & Sons Constr. Co*., *Inc.*, [29 AD3d 364, 365](/opinion/5844220/dovin-construction-inc-v-c-raimondo-sons-construction-co/#365) [1st Dept 2006]).

Additionally, Riverbay's and City Smiles' cross claims for common-law indemnification should have been dismissed. A claim for common-law indemnification is actionable only where a party has been found to be vicariously liable, without proof of any negligence on its own part (*see McCarthy v Turner Constr., Inc.*, [2006 WL 1000000](#)).

[\[2011\]\). As neither Riverbay nor City Smiles is subject to statutory or other vicarious liability not premised upon actual negligence, the parties' common-law indemnity claims should have been dismissed.](/opinion/2528724/mccarthy-v-turner-construction-inc/)

We have considered the parties' remaining arguments and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 4, 2023

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