

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2014

4  
5 (Argued: February 20, 2015 Decided: October 28, 2016)

6  
7 Docket No. 14-0767-cv

8  
9 MELINDA MITCHELL, individually and on behalf of a class of all  
10 others similarly situated, HARVEY MITCHELL, individually and on  
11 behalf of a class of all others similarly situated,

12  
13 Plaintiffs-Appellants,

14  
15 v.

16  
17 THE CITY OF NEW YORK, a municipal entity, NYC POLICE OFFICER  
18 JAMES SCHUESSLER, Shield No. 28718, RICHARD ROES, 1-50 NEW YORK  
19 CITY POLICE SUPERVISORS AND COMMANDERS, JOHN DOES, 1-50 NEW YORK  
20 CITY POLICE OFFICERS, individually, and in their official  
21 capacities, jointly and severally, POLICE OFFICER JOSEPH  
22 BRINADZE, NYPD CAPTAIN JOSEPH GULOTTA, NYPD SERGEANT DANIELLE  
23 ROVENTINI, and NYPD LIEUTENANT KATHLEEN CAESAR,

24  
25 Defendants-Appellees.

26  
27  
28 B e f o r e: WINTER, POOLER, and SACK, Circuit Judges.

29  
30 Appeal from a judgment of the United States District Court  
31 for the Southern District of New York (Lewis A. Kaplan, Judge),  
32 granting appellees' motion for summary judgment and dismissing  
33 appellants' claims. We hold that there is a genuine issue of  
34 material fact as to whether the New York City Police officers had  
35 probable cause to arrest appellants for trespass. The district  
36 court therefore improperly dismissed appellants' false arrest  
37 claim. We affirm as to all other claims.

1 JEFFREY A. ROTHMAN (Jonathan C. Moore &  
2 Joshua S. Moskovitz, Beldock Levine &  
3 Hoffman LLP, New York, NY, on the brief)  
4 New York, NY, for Plaintiffs-Appellants.  
5

6 DRAKE A. COLLEY, for Zachary W. Carter,  
7 Corporation Counsel of the City of New  
8 York, New York, NY, for Defendants-  
9 Appellees.  
10

11  
12 WINTER, Circuit Judge:

13  
14 Melinda Mitchell and Harvey Mitchell -- we will refer to  
15 them as Melinda and Harvey because they are not related -- along  
16 with other similarly situated individuals, appeal from Judge  
17 Kaplan's dismissal of their complaint on a grant of summary  
18 judgment to appellees. We hold that there is a genuine dispute  
19 of material fact as to whether the appellee police officers had  
20 probable cause to arrest appellants for trespass. We therefore  
21 vacate the judgment. We remand the false arrest claim and  
22 appellees' claim of qualified immunity related to the false  
23 arrest. We affirm the dismissal of the malicious prosecution,  
24 abuse of process, and municipal liability claims.

25 **BACKGROUND**

26 This appeal is from a grant of summary judgment, and the  
27 following recitation of facts, therefore, views the evidentiary  
28 record in the light most favorable to appellants, the non-moving  
29 party. Rentas v. Ruffin, 816 F.3d 214, 220 (2d Cir. 2016)  
30 (citation omitted).

1           In December 2010, Lieutenant Kathleen Caesar of the New York  
2 City Police Department ("NYPD") responded to a report of a sexual  
3 assault at a brownstone located at 2142 Atlantic Avenue, in  
4 Brooklyn, New York. When Caesar arrived with another police  
5 officer, she saw two women, one of whom said she was robbed in  
6 the brownstone. After no one responded to her knocks at the  
7 front door, Caesar entered the premises through the back door.  
8 She found no one inside. On the first floor, she observed a bar  
9 area next to the kitchen, a room with a dance pole, and a living  
10 room with no furniture. Caesar concluded that the house was  
11 abandoned. She told her colleague Lieutenant John Hopkins of  
12 this and later made it a point to drive by the brownstone during  
13 her patrol shifts since she believed the brownstone might have  
14 been "being used for parties." J. App'x at 104.

15           About a month later, on January 9, 2011, Melinda and Harvey  
16 attended a party at the 2142 Atlantic Avenue brownstone. While  
17 both were invited by acquaintances, neither knew who was hosting  
18 the party or who owned the property. To enter the brownstone,  
19 they opened a small unlocked gate, and proceeded through the  
20 front door. There were no signs prohibiting entrance to the  
21 building. There was, however, a realtor's for-sale sign on the  
22 property.

23           At about 2:15 a.m. on January 9, 2011, Caesar was driving by  
24 the brownstone when she saw three people standing on its stoop.

1 She called Hopkins to inform him that suspicious activity might  
2 be taking place at the premises. After Hopkins, Captain Joseph  
3 Gulotta, and other officers arrived, Caesar knocked at the front  
4 door but no one answered. She tried to open the door, but it was  
5 locked. She and some of the officers proceeded to the rear of  
6 the property and entered the brownstone through the back door.  
7 Caesar then made her way through the brownstone, past "about 30  
8 kids" to the front door to let in more officers. Id. at 127-128.

9 Inside, the officers found at least 30 people. According to  
10 appellants, space was set up for a party, with a bar, a projector  
11 screen, disco lights, running water, working heat, DJ equipment,  
12 and an area with a big TV and some couches. Gulotta testified at  
13 his deposition that he saw that electricity was being routed in  
14 from outside the house via extension cords. Gulotta also  
15 testified at his deposition that he smelled marijuana upon  
16 entering the brownstone, and another officer, James Schuessler,  
17 testified at his deposition that he recalled seeing six or eight  
18 "nickel" or "dime" bags containing what looked to be marijuana  
19 and crack cocaine on the floor of the brownstone.

20 Upon entering the brownstone, the police told everyone to be  
21 quiet and then repeatedly asked who owned the property and who  
22 was hosting the party. Some people replied that they did not  
23 know who the owner was. When no one revealed the owner or host,  
24 Gulotta ordered the arrest of everyone present. The arrests were

1 based on Gulotta's belief that everyone at the party had: (i)  
2 "trespass[ed]"; (ii) "loiter[ed] for the purpose of using  
3 narcotics"; and (iii) "endanger[ed] the welfare of a child  
4 because there was a 12 year-old child present." Id. at 582. The  
5 only issue raised in this appeal with regards to the arrests is  
6 whether there was probable cause for the arrests for trespass.

7 Melinda and Harvey were arrested and both were handcuffed.  
8 Melinda was handcuffed for approximately one hour by an officer  
9 who refused to loosen the handcuffs when she complained they were  
10 too tight. The handcuffs caused bruising to her wrist that  
11 required her to take Advil and use an ice pack for two days.  
12 Harvey was handcuffed for 20 to 30 minutes; he alleged the  
13 handcuffs left marks on his arms but required no medical  
14 treatment.

15 All arrestees were processed at the precinct and their  
16 fingerprints and mug shots taken. Melinda was released with a  
17 "Desk Appearance Ticket" ("DAT"), which required her to appear in  
18 court at a later date. Harvey was processed through the Brooklyn  
19 Central Booking facility and arraigned.

20 After the arrests, several police officers each submitted  
21 statements entitled, "Supporting Deposition - Trespass in a  
22 Dwelling and Resisting Arrest," to the Kings County District  
23 Attorney's Office. The statements attested to the officers'  
24 understanding that the brownstone was categorized as a Formal

1 Trespass Affidavit Program ("FTAP") dwelling and that the NYPD  
2 was the lawful custodian of the property.<sup>1</sup> Notwithstanding the  
3 officers' statement at the time of the arrest, it is now  
4 undisputed that the brownstone was not part of FTAP. The record  
5 does not illuminate whether the building was privately owned or  
6 abandoned to City custody, although demonstrating City custody  
7 would have helped the defense to show probable cause for the  
8 trespass arrests.

9 The Kings County District Attorney's Office later declined  
10 to prosecute Melinda and others who received a DAT following the  
11 arrests at the brownstone. It also dropped all charges against  
12 Harvey pursuant to an Adjournment in Contemplation of Dismissal.

13 On April 6, 2012, appellants filed their original complaint  
14 in the present action, in which they assert Section 1983 claims  
15 for false arrest, malicious prosecution, abuse of process, and  
16 excessive force. On November 5, 2012, appellants filed their  
17 amended complaint asserting the same Section 1983 claims.

18 After discovery, both parties moved for summary judgment.  
19 Appellees moved for summary judgment on all of appellants'

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<sup>1</sup> The FTAP was developed to allow tenants and landlords to complain of drug-related activity occurring in the common areas of multi-dwelling apartment buildings. Landlords participating in the FTAP are asked to sign an affidavit authorizing the police to perform vertical patrols in their buildings. The police are also given keys to common areas and a list of tenant residents. See, e.g., Charles J. Hynes, Ask the DA: Preventing Illegal Activity in Apartment-Building Hallways, Brooklyn Daily Eagle (Sept. 19, 2012), [www.brooklyneagle.com/articles/ask-da-preventing-illegal-activity-apartment-building-hallways-2012-09-19-090000](http://www.brooklyneagle.com/articles/ask-da-preventing-illegal-activity-apartment-building-hallways-2012-09-19-090000); N.Y. Cty. Dist. Atty.'s Office, Trespass Affidavit Program, <http://manhattanda.org/trespass-affidavit-program> (last visited Oct. 26, 2016).

1 claims, whereas appellants moved for partial summary judgment  
2 only on their federal and state law claims for false arrest and  
3 their state law claims for battery. The battery claim arising  
4 under New York law became moot, however, when the New York  
5 Appellate Division, Second Department, reversed the decision of  
6 the Kings County Supreme Court that granted appellants leave to  
7 file late notices of their claims. Mitchell v. City of N.Y., 977  
8 N.Y.S.2d 368, 370 (2013). On February 11, 2013, the district  
9 court granted appellees' motion for summary judgment in its  
10 entirety. Mitchell v. City of N.Y., No. 12 CIV. 2674 LAK, 2014  
11 WL 535046, at \*6 (S.D.N.Y. Feb. 11, 2014). This timely appeal  
12 followed.

### 13 DISCUSSION

14 We review de novo a district court's grant of summary  
15 judgment, "construing the evidence in the light most favorable to  
16 the non-moving party and drawing all reasonable inferences in its  
17 favor." Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir.  
18 2011)(citation omitted). "[I]t is well-settled that [this court]  
19 may affirm on any grounds for which there is a record sufficient  
20 to permit conclusions of law, including grounds nor relied upon  
21 by the district court." Holcomb v. Lykens, 337 F.3d 217, 223 (2d  
22 Cir. 2003) (internal quotation marks and citation omitted).

1  
2 a) False Arrest

3  
4 1) Probable Cause

5  
6 We first address the district court's holding that the  
7 police had probable cause to arrest appellants. See Mitchell,  
8 2014 WL 535046, at \*3-\*4. "The existence of probable cause to  
9 arrest constitutes justification and is a complete defense to an  
10 action for false arrest" brought under Section 1983. Jenkins v.  
11 City of N.Y., 478 F.3d 76, 84 (2d Cir. 2007) (internal quotation  
12 marks and citations omitted). "Probable cause . . . exists when  
13 the [arresting] officers have knowledge or reasonably trustworthy  
14 information of facts and circumstances that are sufficient to  
15 warrant a person of reasonable caution in the belief that the  
16 person to be arrested has committed or is committing a crime."  
17 Id. at 84-85 (internal quotation marks and citations omitted). A  
18 court deciding whether probable cause existed must "examine the  
19 events leading up to the arrest, and then decide whether these  
20 historical facts, viewed from the standpoint of an objectively  
21 reasonable police officer, amount to probable cause." Maryland  
22 v. Pringle, 540 U.S. 366, 371 (2003) (internal quotation marks  
23 omitted). Where "an arrest is not made pursuant to a judicial  
24 warrant, the defendant in a false arrest case bears the burden of  
25 proving probable cause as an affirmative defense." Dickerson v.  
26 Napolitano, 604 F.3d 732, 751 (2d Cir. 2010) (citation omitted).

1           On this record, it appears that no member of the NYPD made  
2 serious efforts to verify the legal status of the brownstone,  
3 i.e., the existence of a person or entity with a claim of  
4 occupancy of ownership, the property's status under the FTAP, or  
5 the lack of any claim or other status. When Lieutenant Caesar  
6 first visited the property in December 2010, she failed to  
7 investigate the ownership status of the brownstone and assumed it  
8 was abandoned, even though there were signs of use. Based on the  
9 evidence in the record, a trier of fact could find that, when  
10 Caesar re-entered the brownstone in the early morning of the day  
11 of the arrests, she did so based solely on her earlier  
12 conjectures that the brownstone was abandoned and that appellants  
13 were therefore trespassing. A trier of fact could further find  
14 this belief was unreasonable, given the for-sale sign in the  
15 front yard. Indeed, as Captain Gulotta conceded, the existence  
16 of a real estate sign suggested that someone claimed ownership of  
17 the brownstone.

18           Other officers stated (inconsistently) that they believed  
19 the brownstone to be part of the FTAP or to be abandoned. It is  
20 conceded that these beliefs were mistaken. Moreover, on this  
21 record, the only basis, if any, for these beliefs appears to be  
22 word of mouth among the officers.

23           Furthermore, in finding that the officers had probable cause  
24 to believe the brownstone was abandoned and that those present

1 were trespassing, the district court also relied heavily on the  
2 police officers' observation once they were inside the brownstone  
3 that there were extension cords running from the brownstone to  
4 another property as well as the fact that when asked, no one  
5 attending the party told the officers who owned the brownstone.  
6 Mitchell, 2014 WL 535046, at \*4. Drawing all inferences in favor  
7 of the appellants, as we must, we conclude to the contrary that  
8 these facts are insufficient to establish on summary judgment as  
9 a matter of law that the officers had probable cause to believe  
10 that the house was abandoned.<sup>2</sup>

11 After the arrests, Officer Girard Moscato, having seen the  
12 for-sale sign outside the brownstone, tried to call Weichert  
13 Realty to inquire about the brownstone, but, after leaving a  
14 voice message, he did not follow up. See Colon v. City of N.Y.,  
15 455 N.E.2d 1248, 1250 (N.Y. 1983) ("[T]he failure to make a  
16 further inquiry when a reasonable person would have done so may  
17 be evidence of lack of probable cause.") (citation omitted).  
18 Indeed, as Captain Gulotta conceded, the existence of a real  
19 estate sign suggested that someone claimed ownership.

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<sup>2</sup> The use of extension cords might have been for one of many reasons apart from the fact that the brownstone was abandoned and the attendees were trespassing, such as to avoid blowing a fuse or tripping a circuit breaker on the property, or because there was insufficient power available from the brownstone's electrical system without the addition of more from another source. Similarly, the silence of those present does not necessarily establish that the officers had a reasonable factual basis for thinking that the brownstone was abandoned.

1 Under New York law, one commits the crime of trespass if one  
2 "knowingly enters or remains unlawfully in or upon premises."

3 N.Y. Penal Law § 140.05. The law provides:

4 A person 'enters or remains unlawfully' in or  
5 upon premises when he is not licensed or  
6 privileged to do so. A person who, regardless  
7 of his intent, enters or remains in or upon  
8 premises which are at the time open to the  
9 public does so with license and privilege  
10 unless he defies a lawful order not to enter  
11 or remain, personally communicated to him by  
12 the owner of such premises or other authorized  
13 person. A license or privilege to enter or  
14 remain in a building which is only partly open  
15 to the public is not a license or privilege to  
16 enter or remain in that part of the building  
17 which is not open to the public.

18  
19 Id. § 140.00(5). The New York Court of Appeals has held "it is  
20 the state's burden to prove that an invitee does not have  
21 privilege or license to remain on the premises. Because it is an  
22 element of the crime, officers must have probable cause to  
23 believe that a person does not have permission to be where she is  
24 before they arrest her for trespass." Davis v. City of N.Y., 902  
25 F. Supp. 2d 405, 426 (S.D.N.Y. 2012) (discussing New York v.  
26 Brown, 254 N.E.2d 755, 756-57 (N.Y. 1969)). Appellees' mass  
27 arrest for trespass, on this record, could easily be found to  
28 have been based entirely on baseless and unreasonable conjectures  
29 and assumptions as to the ownership of the property or its FTAP  
30 status.

31 Under these circumstances, viewing the record in the light  
32 most favorable to appellants, a dispute of material fact exists

1 as to whether the police officers could have reasonably believed  
2 the appellants were trespassers. There was no reasonable basis  
3 for the belief that the building was in the FTAP, and the for-  
4 sale sign belied abandonment. The lack of any known claimant  
5 asserting legal occupancy of the premises on this record may  
6 eliminate any claim of unlawful entry by the police, but it  
7 provides no corresponding individualized probable cause to arrest  
8 appellants for trespass.

9 Accordingly, we vacate the dismissal of appellants' false  
10 arrest claims.

11 2) Qualified Immunity

12 We leave open for decision in the first instance by the  
13 district court on remand the question of whether the appellees  
14 are entitled to qualified immunity with respect to the false  
15 arrest claim. See Tellier v. Fields, 280 F.3d 69, 84 (2d Cir.  
16 2000) ("Because qualified immunity is an affirmative defense,...  
17 the defendants bear the burden of showing that the challenged act  
18 was objectively reasonable in light of the law existing at the  
19 time.").

20 c) Malicious Prosecution

21 We next address the district court's dismissal of appellant  
22 Melinda's federal and state malicious prosecution claims. See  
23 Mitchell, 2014 WL 535046, at \*5. In order to prevail on such a  
24 claim under both Section 1983 and New York State law, a plaintiff

1 is required to demonstrate: (i) the commencement or continuation  
2 of a criminal proceeding against her; (ii) the termination of the  
3 proceeding in her favor; (iii) "that there was no probable cause  
4 for the proceeding"; and (iv) "that the proceeding was instituted  
5 with malice." Kinzer v. Jackson, 316 F.3d 139, 143 (2d Cir.  
6 2003) (citations omitted); see also Colon, 60 N.Y.2d at 82  
7 (similar). When raising a malicious prosecution claim under  
8 Section 1983, a plaintiff must also show a "seizure or other  
9 perversion of proper legal procedures implicating the claimant's  
10 personal liberty and privacy interests under the Fourth  
11 Amendment." Washington v. Cty. of Rockland, 373 F.3d 310, 316  
12 (2d Cir. 2004) (internal quotation marks and citation omitted).

13 We first address Melinda's state law and federal law claims  
14 under the Kinzer test. We have held that, under New York law,  
15 the issuance of a DAT constitutes a criminal proceeding  
16 initiation. See Stampf v. Long Island R.R. Co., 761 F.3d 192,  
17 199 (2d Cir. 2014) ("[W]e adhere to the position we took in  
18 Rosario that, under New York law, the issuance of a DAT  
19 sufficiently initiates a criminal prosecution to sustain a claim  
20 of malicious prosecution."); Rosario v. Amalgamated Ladies'  
21 Garment Cutters' Union, Local 10, 605 F.2d 1228, 1250 (2d Cir.  
22 1979) ("[W]e believe that if a New York court faced the question  
23 before us it would rule that the issuance of [a DAT] commences a  
24 prosecution for purposes of determining whether an action for

1 malicious prosecution lies.”). Accordingly, we find that Melinda  
2 has met the first Kinzer prong. She has also satisfied prongs  
3 two and three by showing, respectively, that the proceeding  
4 terminated in her favor when the District Attorney’s Office  
5 declined to prosecute her, and, as discussed supra, that there  
6 was no probable cause for her arrest. Where her claim fails,  
7 however, is at the fourth prong, because she has not alleged or  
8 proffered any facts that the DAT was issued with malice. Both of  
9 her malicious prosecutions, therefore, fail.

10 As Melinda fails to state a malicious prosecution claim  
11 under the Kinzer test, we need not reach the question of whether  
12 her single court appearance constituted a seizure under the  
13 Fourth Amendment for purposes of her Section 1983 malicious  
14 prosecution claim, and we leave the question for another day.

15 We therefore hold the district court properly dismissed  
16 Melinda’s state and federal malicious prosecution claims.

17 d) Abuse of Process

18 We now turn to appellants’ abuse-of-process claim. To  
19 successfully state such a claim, “it is not sufficient for a  
20 plaintiff to allege that the defendants were seeking to retaliate  
21 against him by pursuing his arrest and prosecution. Instead, he  
22 must claim that they aimed to achieve a collateral purpose beyond  
23 or in addition to his criminal prosecution.” Savino v. City of  
24 N.Y., 331 F.3d 63, 77 (2d Cir. 2003).

1           Whether or not the police officers may have sought to  
2     retaliate against appellants by arresting them, appellants have  
3     proffered no evidence that the police officers attempted to  
4     achieve any other collateral purpose beyond arresting appellants  
5     for trespass. We hold, therefore, albeit for different reasons,  
6     that the district court correctly dismissed appellants' abuse-of-  
7     process claim.

8     e)    Municipal Liability

9           We turn finally to the district court's dismissal of  
10    appellants' municipal liability claim. See Mitchell, 2014 WL  
11    535046, at \*6. To prevail, a plaintiff must identify the  
12    existence of a municipal policy or practice that caused the  
13    alleged constitutional violation. See Monell v. Dep't of Soc.  
14    Servs. of City of N.Y., 436 U.S. 658, 694-95 (1978). A plaintiff  
15    must also demonstrate a sufficient causal relationship between  
16    the violation and the municipal policy or practice. Id.

17           As discussed supra, while appellants have sufficiently  
18    supported their claim that their arrests lacked individual  
19    probable cause, they have not supported their claim of municipal  
20    liability. Appellants have proffered no evidence to show that  
21    the arrests occurred pursuant to a city policy or practice. See  
22    City of Okla. City v. Tuttle, 471 U.S. 808, 823-24  
23    (1985)(plurality) ("Proof of a single incident of  
24    unconstitutional activity is not sufficient to impose liability

1 under Monell, unless proof of the incident includes proof that it  
2 was caused by an existing, unconstitutional municipal policy[]  
3 [that] can be attributed to a municipal policymaker.")  
4 (plurality); accord Fenner v. City of N.Y., No. 08 Civ.  
5 2355(BMC)(LB), 2009 WL 5066810, at \*4 (E.D.N.Y. Dec. 21, 2009)  
6 ("At most, plaintiff has identified a single incident of a  
7 constitutional violation. Even assuming such a violation  
8 occurred . . . the Supreme Court has squarely held that this is  
9 insufficient to create liability under Monell." ) (citation  
10 omitted), aff'd, 392 F. App'x 892, 894 (2d Cir. 2010) (summary  
11 order). Therefore, the district court correctly dismissed  
12 appellants' Monell claim.

#### 13 CONCLUSION

14 For the reasons stated, we vacate and remand the lower  
15 court's summary judgment rulings as to the false arrest claims  
16 and the question of qualified immunity. We affirm the district  
17 court's remaining summary judgment rulings.