

**Rondon v Rondon**

2012 NY Slip Op 31703(U)

June 20, 2012

Supreme Court, New York County

Docket Number: 105291/99

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE  
JUDGE

PART 5

Index Number : 105291/1999  
RONDON, ORLANDO  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
1
2
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
JUN 26 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

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Dated: 6/20/12  
JUN 20 2012

Barbara Jaffe  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
ORLANDO RONDON,

Plaintiff,

-against-

Index No. 105291/99

Motion date.: 3/20/12  
Motion seq. no.: 001

**DECISION AND ORDER**

THE CITY OF NEW YORK, NEW YORK CITY  
POLICE DEPARTMENT, DETECTIVE HAROLD  
HERNANDEZ, INDIVIDUALLY AND IN HIS  
OFFICIAL CAPACITY AND VARIOUS OTHER  
UNNAMED MEMBERS OF THE NEW YORK  
CITY POLICE DEPARTMENT, INDIVIDUALLY  
AND IN THEIR OFFICIAL CAPACITIES,

Defendants.  
-----X

**FILED**

**JUN 26 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

**For plaintiff:**  
Richard K. Hershman, Esq.  
Richard K. Hershman, PLLC  
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**For defendants:**  
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By notice of motion dated November 10, 2011, defendants City of New York, New York City Police Department (NYPD), and Detective Harold Hernandez (collectively, City) move pursuant to CPLR 3211(a)(7) and/or 3212 for an order summarily dismissing the complaint against them. Plaintiff opposes.

In this action, plaintiff sues defendants for false arrest/false imprisonment and malicious prosecution based on the following undisputed facts:

- 1) On February 26, 1998, three individuals invaded the apartment of Dr. and Mrs. Kessler;
- 2) On February 27, 1998, during a photo identification, the Kesslers identified plaintiff as one of the perpetrators;

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- 3) On March 5, 1998, plaintiff was arrested and the Kesslers identified him in a line-up;
- 4) On March 9, 1998, the Kesslers recanted and withdrew their identification of plaintiff before they testified before the grand jury; and
- 5) On March 20, 1998, plaintiff was released from custody.

(Affirmation of Richard K. Hershman, Esq., dated Feb. 2, 2012 [Hershman Aff.]).

On March 11, 1998, plaintiff's criminal defense attorney waived plaintiff's rights to be released timely pursuant to Criminal Procedure Law 180.80 until March 20, 1998. (Affirmation of Andrew Lucas, ACC, dated Oct. 2, 2011, Exh. H3 [Lucas Aff.]).

At an examination before trial held on March 31, 2011, Hernandez testified, as pertinent here, that after the Kesslers's photo identification of plaintiff, it was Hernandez's professional opinion that based on plaintiff's prior crimes, he did not fit the *modus operandi* of someone who would have committed the type of crime at issue, but he "didn't have any information to prove or disprove that [plaintiff] was not involved in this crime," that a search conducted of plaintiff's apartment did not yield any results, and that he told his supervisor that his "gut feeling" told him that plaintiff was not involved in the crime but his supervisor reminded him that they had two positive identifications by the Kesslers. As nothing further developed between plaintiff's arrest and the grand jury proceeding, Hernandez told the assigned District Attorney (ADA) of his feeling that plaintiff was not involved. The ADA then met with the Kesslers who told her that they were "pretty sure" that plaintiff was not the perpetrator. The ADA then told Hernandez to continue the investigation and try to gather other leads and they would wait for results of the fingerprints taken of plaintiff. No leads were developed and the case was closed. (Lucas Aff., Exh. G).

As plaintiff concedes that there was probable cause for his arrest based on the Kesslers's

identification of him and that his false arrest claim must thus be dismissed, the only issue remaining is whether plaintiff may maintain his false imprisonment and malicious prosecution claims. Plaintiff contends that once the Kesslers recanted and as Hernandez's investigation led him to believe that plaintiff was innocent, there was no probable cause to continue his imprisonment or prosecution, and alleges that Hernandez and/or the NYPD acted with malice or bad faith in failing to inform the DA of plaintiff's possible innocence. (Hershman Aff.).

City argues that they may not be held liable for plaintiff's continued incarceration after the Kesslers recanted as it had no power to release plaintiff from custody and Hernandez told the ADA the results of his investigation and thereafter had no duty or liability related to the ADA's decision to keep plaintiff in custody. City also observes that plaintiff consented to his continued incarceration until March 20, 1998 by waiving his 180.80 rights, and that plaintiff failed to name Hernandez personally in his notice of claim, thus mandating the dismissal of his state law claims against Hernandez. City asserts that plaintiff's federal claims against it must be dismissed absent any allegation or proof that it engaged in a pattern or practice that deprived plaintiff of his constitutional rights, and that his federal claims against Hernandez must be dismissed as he is entitled to qualified immunity. (Lucas Aff.).

Absent any evidence that Hernandez lied to the ADA about the results of his investigation or withheld any relevant information, neither he nor City may be held liable for the ADA's decision to continue plaintiff's prosecution and thus his claim for malicious prosecution must be dismissed. (*See Romeo v County of Oneida*, 135 AD2d 1099 [4<sup>th</sup> Dept 1987] [City not liable for plaintiff's continued incarceration as "the police have no power to release a suspect who is confined and charged pursuant to lawful process" and could only be held liable if police officer

made false statements to or failed to completely disclose facts to district attorney]; *see also Leftenant v City of New York*, 70 AD3d 596 [1<sup>st</sup> Dept 2010] [District Attorney's actions could not be imputed to City]; *Roche v Vil. of Tarrytown*, 309 AD2d 842 [2d Dept 2003] [as county's officers only arrested plaintiff and district attorney, rather than county, prosecuted him, malicious prosecution claim against county dismissed]).

Moreover, having consented to his continued incarceration for the additional 11 days, plaintiff's claim for false imprisonment fails. (*See Romeo*, 135 AD2d at 1099 [as plaintiff's criminal attorney failed to request release or dismissal and plaintiff consented to three-week delay in holding preliminary hearing, county could not be held liable for plaintiff's continued confinement]). In any event, as plaintiff conceded that there was probable cause for his arrest, his malicious prosecution and false imprisonment claims may not be maintained. (*Leftenant*, 70 AD3d at 596; *Batista v City of New York*, 15 AD3d 304 [1<sup>st</sup> Dept 2005]). I also observe that plaintiff has not opposed City's arguments pertaining to the dismissal of his federal claims or his state law claims against Hernandez. Accordingly, it is hereby

ORDERED, that defendants City of New York, New York City Police Department, and Detective Harold Hernandez's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants, and the clerk is directed to enter judgment accordingly.

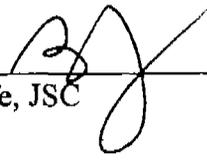
**FILED**

**JUN 26 2012**

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DATED: June 20, 2012  
New York, New York

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Barbara Jaffe, JSC