[* 1] SCANNED ON 12/27/2011

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

PRESENT: BARBARA JAFFE J.S.C. PART 5
Justice

Brown, Keisha

-v-

City of New York

INDEX NO. 119711/03

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 23

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

FILED

DEC 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12-14-11
DEC 14 2011

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.

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

----------x

KEISHA BROWN, PATSY BROWN, CANTINA FRANCIS, FRANCES NELSON, and SHARMECKA EVANS,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 119711/03

Motion Subm.: 9/13/11
Motion Seq. No.: 001

DECISION & ORDER

BARBARA JAFFE, JSC:

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For City:
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By notice of motion dated May 31, 2011, defendant City moves pursuant to CPLR 3126 for an order striking plaintiffs' pleadings and resolving all issues in favor of City and granting it judgment or, in the alternative, precluding plaintiffs from offering any evidence as to physical injury, lost wages, or special damages, or directing them to comply with City's discovery demands, pursuant to CPLR 3211(a)(7) for an order dismissing plaintiffs Nelson's and Brown's claims for their failure to comply with General Municipal Law § 50-h, and pursuant to CPLR 3212 for an order summarily dismissing plaintiffs' claims of false arrest and imprisonment and malicious prosecution. Plaintiffs oppose.

I. MOTION TO STRIKE

A. Pertinent background

On or about July 12, 2010, City served plaintiffs with a discovery demand seeking medical and employment authorizations and information as to plaintiffs' alleged special damages and lost wages. (Affirmation of Andrew Lucas, ACC, dated May 31, 2011 [Lucas Aff.], Exh. F). At compliance conferences held on September 7, 2010 and December 7, 2010, plaintiffs agreed to respond to the demand. (*Id.*, Exh. G).

At a compliance conference held on February 22, 2011, the parties stipulated that all discovery was complete. (Affirmation of Regina L. Darby, Esq., dated July 14, 2011 [Darby Aff.], Exh. L).

By letter dated March 3, 2011, City again requested a response. (Lucas Aff., Exh. H). On or about April 8, 2011, plaintiffs filed their note of issue, without having served a response. (*Id.*, Exh. I).

On or about May 31, 2011, City filed the instant motion.

B. Contentions

City argues that it is unable to defend the action properly absent a response from plaintiffs, and that plaintiffs' repeated and continued failure to respond to the demand warrants the inference that their conduct has been willful and contumacious. (Lucas Aff.).

Plaintiffs contend that City waived its right to the response as it stipulated that all discovery was complete. (Darby Aff.).

In reply, City maintains that it erroneously stipulated that discovery was complete, and upon discovering that plaintiffs' response was outstanding and before plaintiffs filed their note of

issue, it sent the March 2011 letter to plaintiffs, thereby preserving its right to the discovery. (Reply Affirmation, dated Aug. 4, 2011 [Reply Aff.]).

C. Analysis

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if the party refuses to obey a discovery order or willfully fails to disclose information. The party moving to strike a pleading must establish that the other party's failure to comply with a discovery order was willful, contumacious, or in bad faith. (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010]).

While City may have sent its letter demanding a response before plaintiffs filed their note of issue, it thereafter failed to move to strike the note of issue within 20 days of its service. (22 NYCRR 202.21[e] [party may move to vacate note of issue within 20 days of its service; after 20-day period, no motion shall be allowed except upon good cause shown]). By failing to so move, City waived its right to any outstanding discovery. (*See eg Owen v Lester*, 79 AD3d 992 [2d Dept 2010] [defendant waived right to conduct examination of plaintiff by failing to move timely to strike note of issue]).

However, as plaintiffs do not dispute that they never provided a response to City's demand, and as City erroneously stipulated that discovery was complete and thereafter, and before plaintiffs filed their note of issue, alerted plaintiffs that their response remained outstanding, plaintiffs incorrectly stated in their note of issue and certificate of readiness that discovery was complete. Vacatur of the note of issue is thus warranted. (22 NYCRR 202.21[e] ["At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect"]; *see Blamer v Singh*, 20 AD3d 440 [2d Dept

2005] [although defendant's failure to move timely to strike note of issue constituted waiver of right to further disclosure, court authorized to strike note *sua sponte* as plaintiff misrepresented in note that medical examination had been waived]).

II. MOTION TO DISMISS BROWN'S AND NELSON'S CLAIMS

A. Pertinent background

On October 29, 2002, City noticed Brown and Nelson for examinations pursuant to General Municipal Law § 50-h to be held on December 23, 2002. On that date, Brown and Nelson requested an adjournment to March 28, 2003, and on March 27, 2003 requested an adjournment to July 1, 2003. However, the examinations were adjourned to May 27, 2003, when Brown and Nelson requested an adjournment to September 24, 2003, and on that date requested an adjournment to November 7, 2003. On November 7, 2003, Brown and Nelson failed to appear for the examinations. (Lucas Aff.).

B. Contentions

City asserts that as Brown and Nelson failed repeatedly to appear for their examinations without explanation, they did not satisfy a condition precedent to suing City, thus requiring dismissal of their claims. (Lucas Aff.).

Plaintiffs allege that City is estopped from asserting General Municipal Law § 50-h as an affirmative defense as it did not preserve such defense in its answer and it proceeded through the completion of discovery prior to asserting the defense. Plaintiffs also observe that City already deposed Nelson and Brown. (Darby Aff.).

C. Analysis

Pursuant to General Municipal Law § 50-h, whenever a claim is filed against City, City

may demand an examination of the claimant, and where a demand has been served, no action may be commenced against City until the claimant has complied with the demand. Compliance with this provision is a condition precedent to commencing an action against City, and the failure to comply warrants dismissal of the commenced action. (*Ross v County of Suffolk*, 84 AD3d 775 [2d Dept 2011], *lv denied* 17 NY3d 712; *Wells v City of New York*, 254 AD2d 121 [1st Dept 1998], *lv denied* 92 NY2d 1046 [1999], *cert denied* 527 US 1012).

However, where, as here, City has failed to raise a plaintiff's failure to appear for a 50-h examination as an affirmative defense in its answer, it has litigated the plaintiff's claim for several years, and the statute of limitations on the claim has expired, the claim will not be dismissed. (*See Saunders v New York City Tr. Auth.*, 3 AD3d 312 [1st Dept 2004] [defendant waived right to defend on ground that plaintiff had failed to appear for 50-h examination as it failed to raise it as affirmative defense]; *Hoffman v New York City Hous. Auth.*, 187 AD2d 334 [1st Dept 1992] [City waived right to defend based on plaintiff's failure to appear for 50-h hearing as it never raised failure to appear as affirmative defense, raised issue for first time on motion to dismiss four years after action commenced, and statute of limitations had run]; *see also Lewis v Manhattan & Bronx Surface Tr. Operating Auth.*, 209 AD2d 366 [1st Dept 1994] [defendant waived right to defend as it did not raise issue as affirmative defense in answer, and first raised it in motion made three years after case commenced, after discovery completed and case calendared for trial]).

III. MOTION TO DISMISS CLAIMS FOR FALSE ARREST, FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION

A. Pertinent background

On August 26, 2002, between 10:20 and 10:40 pm, numerous phone calls were made to 9-1-1, stating that a large group of kids was fighting on the corner of Eighth Avenue and West 142nd Street (the location) in Manhattan. (Lucas Aff., Exh. L, Affidavit of Latasha Ortiz, dated Feb. 9, 2011).

1. Plaintiff Evans

On August 27, 2002, plaintiff Evans was interviewed by City's Internal Affairs Bureau (IAB), and stated, as pertinent here, that she was sitting in front of her building near the location when people started running. She ran with them to the corner of 142nd Street and Eighth Avenue and saw many people fighting. When the police arrived, they told the crowd to move back. She did not. And when she observed officers holding her friend, plaintiff Nelson, on the ground with her face in the dirt, she started screaming and yelling, and an officer then pushed her to the ground and arrested her, pulled her hair, and pushed her into a patrol car. (*Id.*, Exh. M).

At an examination before trial held on July 24, 2009, Evans testified that she was moving away from the fight when an officer told her to get on the ground. Due to her pregnancy, she moved away from him and did not want to get on the ground, and that he and another officer then threw her to the ground. (*Id.*, Exh. U).

The summonses issued to Evans reflect that she was charged with violating Penal Law § 240.20(6) for failing to obey an order numerous times and Penal Law § 240.20(5) for blocking pedestrian traffic; each summons was dismissed. (*Id.*, Exh.Y).

2. Plaintiff Keisha Brown

On September 17, 2002, IAB interviewed plaintiff Keisha Brown, who stated that she and her mother, plaintiff Patsy Brown, had attempted to enter the park behind the building near the location in order to retrieve her nieces and nephews and remove them from danger. When instructed by officers to move back, she tried to explain that she wanted to get her nieces and nephews, but an officer grabbed Patsy Brown and pushed her to the ground. Keisha Brown then went to see what was happening to her mother and an officer grabbed her and threw her to the ground. (*Id.*, Exh. M).

The summonses issued Keisha Brown reflect that she was charged with violating Penal Law § 240.20(6) for engaging in disorderly conduct; both were dismissed. (*Id.*, Exh. Z).

3. Plaintiff Nelson

On August 27, 2002, during Nelson's IAB interview, she stated that the officers had told her and others to move back, that she and others were complying with the order but that when she saw that officers were holding a female on the ground, she returned to ask why they were arresting the female, at which point the officers threw her to the ground and arrested her. (Affirmation of Andrew Lucas, ACC, dated June 17, 2011 [Lucas June Aff.], Exh. 1).

At an examination before trial held on January 22, 2009, Nelson testified that she was walking away from the crowd toward her building when she saw an officer push Patsy Brown to the ground, and she went over to inquire into Brown's condition when an officer tackled her to the ground. (*Id.*, Exh. W).

The summons issued Nelson reflects that she was charged with violating Penal Law § 240.20(6) for engaging in disruptive behavior and refusing to disperse; it was subsequently

dismissed. (*Id.*, Exh. Z).

4. Police officers' testimony

At an examination before trial held on August 4, 2010, Police Officer Dwayne Starkey testified that he had instructed those on the sidewalk to leave and disperse and go home, and told Keisha Brown to leave. He then ran through a crowd of people chasing a man who appeared ready to strike an officer, and he accidently ran into Keisha Brown. He then arrested her because she had failed to comply with his order to disperse. (*Id.*, Exh. Z).

At an examination before trial held on August 5, 2010, Police Officer Lawrence Neuman testified that he arrived at the location after the fight had ended, observed a large crowd of people, directed people to disperse and leave, and saw Nelson in the crowd, cursing and yelling. When she failed to comply with his order to leave, notwithstanding his repeated warning that if she did not leave, he would arrest her for disorderly conduct, he arrested her. (*Id.*, Exh. Z).

At an examination before trial held on December 2, 2010, Detective Daniel Hull testified that he issued the summonses to Evans, observed her yell, scream, and argue with police officers, and throw a water bottle at them. Pursuant to a sergeant's instruction, he arrested Evans. (*Id.*, Exh. Z).

By affidavit dated April 5, 2011, Detective Mark Dennis states that on August 27, 2002, he investigated allegations of unnecessary force made by Evans, Keisha Brown, and Nelson. Evans told him that she had refused to comply with the officers' demands to move back and disperse, thereby obstructing the officers in their duties, that Keisha Brown stated that she had initially complied with the officers' direction that she return to her home but she then saw her mother on the ground and approached to investigate, at which point she was arrested, and that

Nelson stated that she observed an officer attacking a female and approached to investigate, which led to her arrest. (*Id.*, Exh. M).

B. Contentions

City argues that all of the claims must be dismissed given Evans's admissions to having failed to move away from the scene after being ordered to do so by the officers and having interfered with their attempt to arrest Nelson, Keisha Brown's admission to having to failed to disperse, and Nelson's admission to having re-entered the crowd after being told to disperse. (Lucas Aff.).

Plaintiffs maintain that the police lacked probable cause to arrest them and/or that there are triable issues as to probable cause as Evans never physically intervened or touched the officers, as Keisha Brown moved away from the officers and never approached them, and as Nelson too never approached the officers. (Darby Aff.).

In reply, City observes that it is undisputed that there was a large crowd of people fighting, that the officers gave lawful orders for people to disperse, and that Evans, Keisha Brown, and Nelson did not follow those lawful orders. (Reply Aff.).

C. Analysis

The elements of a cause of action for false arrest and/or false imprisonment are: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]). A warrantless arrest gives rise to a presumption that the arrest was unlawful, and thus the plaintiff establishes, *prima facie*, a claim of false arrest upon proof that her arrest was made without a warrant. (59 NY Jur

2d, False Imprisonment § 32 [2010]). In order to avoid liability for the arrest, the defendant must then establish that the arrest was legally justified based on proof that at the time of the arrest, the arresting officer had probable cause to believe that the plaintiff had committed a crime. (*Id.*).

Probable cause exists when the arresting officer has reasonable grounds for believing that the arrestee had committed an offense, or grounds which would induce an ordinary prudent and cautious person, under the circumstances, to believe the arrested person guilty. (*Id.* § 33). Dismissal of the criminal charge is some evidence of a lack of probable cause, but it is not dispositive. (59 NY Jur 2d, False Imprisonment § 34).

Pursuant to Penal Law 240.20(5), a person is guilty of disorderly conduct when, with the "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," he or she obstructs vehicular or pedestrian traffic, and pursuant to subsection six, he or she "congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

Here, Keisha Brown's admissions reflect that despite being instructed by the officers to disperse and return to her building, she continued going through the crowd, as Officer Starkey observed.

Evans admitted that when she saw Nelson being held on the ground, she went to investigate and was observed by Officer Neuman to having refused to comply with his order, and by Officer Hull who also saw her throw a bottle.

Finally, Nelson admitted that rather than comply with the order to disperse, she approached the officers.

City has thus established, *prima facie*, that the officers had probable cause to arrest

Keisha Brown, Nelson, and Evans for disorderly conduct, regardless of their motives for disobeying the orders. Whether they physically interfered with or touched the officers or yelled or screamed at them is irrelevant. (*See eg Norasteh v State of New York*, 44 AD3d 576 [1st Dept 2007], *lv denied* 10 NY3d 709 [2008] [officers had probable cause to believe that claimant was guilty of disorderly conduct as officer witnessed his agitated state and he refused to cooperate with security personnel]; *Rivera v City of New York*, 40 AD3d 334 [1st Dept 2007], *lv denied* 16 NY3d 782 [2011] [protesters admitted that when police asked them to leave, they refused to do so; thus regardless of protesters' belief that they had right to remain, officers reasonably believed that protesters disorderly]).

Moreover, once probable cause has been established for an arrest, a claim of malicious prosecution following such arrest must also be dismissed. (*See Narvaez v City of New York*, 83 AD3d 516 [1st Dept 2011] [court properly dismissed false arrest and malicious prosecution claims as plaintiff failed to raise triable issue as to whether officer had probable cause to arrest]; *Whyte v City of Yonkers*, 36 AD3d 799 [2d Dept 2007] [same]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to strike is granted unless plaintiffs, within 30 days of service on them of a copy of this order with notice of entry, provide defendant with a response to its July 12, 2010 discovery demand. If plaintiffs fail to comply timely, defendant may submit an affirmation of non-compliance to chambers, at which point sanctions may be assessed; it is further

ORDERED, that defendant's motion to dismiss plaintiffs Brown and Nelson's claims is

denied; and it is further

ORDERED, that defendant's motion for summary judgment dismissing the false arrest, false imprisonment, and malicious prosecution claims of plaintiffs Keisha Brown, Frances Nelson, and Sharmecka Evans is granted.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 14, 2011
New York, New York

DEC 14 2011

FILED

DEC 20 2011

NEW YORK
COUNTY CLERK'S OFFICE