Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Maria De Lourdes Torres,

Plaintiff,

- against -

The New York City Police Department, Irma Santiago, Denitor Guerra, Erik Hendriks, "John" Vilardi, first name being fictitious and unknown, and Daniel Corey,

Defendants.

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Index Number: 1590/10

Motion Date: 7/10/12

Motion Cal. Number: 15

Motion Seq. No.: 2

The following papers numbered 1 to 8 read on this motion by defendants, The City of New York (sued herein as New York City Police Department), Irma Santiago, Denitor Guerra and Erik Hendricks (sued herein as Eric Hendriks), for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition (Index No. 24709/07)	5-7
Reply	8

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City, Santiago, Guerra and Hendricks for summary judgment dismissing the complaint against them is granted.

Plaintiff alleges she was falsely arrested on September 24, 2002 for the murder of one Einstein Acuna. The evidence presented on this record indicates that subsequent to the murder, plaintiff was questioned by police after their retrieval of telephone records listed several calls between plaintiff and Acuna in proximity to the estimated time of his death. Defendants Detective Santiago and Detective Guerra came to her apartment and questioned her in Spanish, as plaintiff only spoke that language, and showed her a photograph of Acuna. She denied knowing him, whereupon said

defendants left. Approximately one to two weeks later, said defendants returned and asked her to come to the police precinct for questioning. She agreed and went voluntarily. After being shown photographs, she then admitted that she knew Acuna. Plaintiff admitted that she was romantically involved with Acuna and that she engaged in sexual relations with him in exchange for his payment to her of money. She was subsequently given a polygraph examination, which she failed, and after being Mirandized, she signed a confession to the murder on November 9, 2002. Said confession was written by Detective Santiago and read it to plaintiff, as plaintiff stated that she could not write well, whereupon she signed it. She was thereupon arrested. In January 2003 plaintiff was indicted by a Grand Jury on two counts of second degree murder and criminal possession of a weapon in the fourth degree. Pursuant to the memorandum issued by Justice Robert J. Hanophy on March 19, 2003, Torres' motion in the criminal matter, inter alia, to inspect the Grand Jury minutes and to dismiss the indictment was granted solely to the extent that upon inspection of the Grand Jury minutes, the Court found that there was sufficient evidence to sustain the indictment and, accordingly, denied that branch of the motion to dismiss the indictment. On June 4, 17 and 22, 2003, a Huntley/Mapp hearing was conducted by Judicial Hearing Officer (JHO), the Honorable Thomas A. Demakos, who issued the following findings of fact and conclusions of law.

The victim, Acuna, was stabbed to death on September 24, 2002. Based upon telephone records that calls were made from plaintiff's apartment, Detective McEntee went to the apartment and showed plaintiff a photograph of the victim and asked her if she knew him, whereupon she responded in the negative and McEntee left. On October 25, 2002, Santiago and Hendricks went to the apartment and Santiago questioned plaintiff. Plaintiff denied knowing the victim and denied making any telephone calls to the victim's cell phone. At that point, since the individuals with whom plaintiff resided were present at the time of the conversation, Santiago, for purposes of privacy, asked plaintiff to come to the 115th Precinct. Plaintiff consented.

At the Precinct, plaintiff was questioned again as to whether she knew the victim and placed telephone calls to him. After being confronted with the telephone records, plaintiff admitted that she knew the victim and lied about the phone calls because she did not wish to admit in front of the owner of the apartment that she had used the telephone, which she did not have permission to use.

On November 8, 2002, plaintiff was again brought to the Precinct and told that she was going to be administered a polygraph test and thereafter was brought to the District Attorney's Office

for the test. Prior to the pre-test interview, conducted through Santiago as the translator, defendant signed a polygraph unit consent. Thereafter the polygraph test was conducted. After the exam, plaintiff was brought back to the 115th Precinct where she was read her Miranda warnings in Spanish by Santiago. Plaintiff acknowledged that she understood each warning by writing "Si" (yes) on the Miranda form.

Thereupon, plaintiff made a statement in Spanish which Santiago wrote out at plaintiff's request. Plaintiff then signed the statement.

JHO Demakos concluded, inter alia, that the People established beyond a reasonable doubt that plaintiff's confession was voluntarily made and should be admissible at trial, since plaintiff was not abused, coerced or otherwise mistreated and the statements were knowingly, intelligently and voluntarily made following her waiver of her Miranda rights. Thereafter, the findings of fact and conclusions of law of the Honorable Demakos were confirmed and adopted in their entirety pursuant to the order of Justice Hanophy issued on September 17, 2003.

On January 25, 2007, the Office of the District Attorney moved to dismiss all charges against plaintiff. She was released from incarceration 72 hours later.

Plaintiff commenced a prior action on October 3, 2007 (Index No. 24709/07) against the City, the individual defendants herein and other individual defendants alleging, as a first cause of action, a claim against the individual defendants under 42 U.S.C. §1983 for violation of her constitutional rights as a result of her false arrest, false imprisonment and malicious prosecution, as a second cause of action, a claim against the individual defendants for wanton, willful and reckless conduct, and, as a third cause of action, a claim against the City for negligent supervision of the actions of the individual defendants and negligent investigation.

It is undisputed that service of the summons and complaint were not effected upon defendants Santiago, Guerra, Hendricks, Corey or Vilardi in that first action. Moreover, the Corporation Counsel interposed an answer only on behalf of the City.

On October 26, 2009, plaintiff filed an order to show cause under that earlier Index Number seeking an extension of time to effect service of the summons and complaint in that action upon Santiago, Guerra, Hendricks, Corey and Vilardi pursuant to CPLR 306-b, or, in the alternative, in the interest of justice, or, in the alternative, for leave to discontinue the action without

prejudice as to said defendants so as to enable plaintiff to commence a new action against them. This Court declined to sign the order to show cause.

On January 21, 2010, plaintiff commenced the instant action against the "New York City Police Department", Santiago, Guerra, Hendricks, Vilardi and Corey. It is undisputed that the aforementioned individuals were served with the summons and complaint in this action. The complaint herein alleges a first cause of action against defendants under 42 U.S.C. §1981, a second cause of action pursuant to 42 U.S.C. §1983, a third cause of action under 42 U.S.C. §1983 as against defendant NYPD, a fourth cause of action against defendants for malicious prosecution and abuse of process, a fifth cause of action against defendants for false arrest and false imprisonment, and a sixth cause of action against the individual defendants for punitive damages. The Corporation Counsel interposed an amended answer on behalf of the City and Santiago, Guerra and Hendricks only. The City did not answer for Vilardi or Corey and these individual defendants have not appeared in this action.

No motion was made for consolidation of these actions. Instead, they have remained separate actions, both including Santiago, Guerra, Hendricks, Vilardi and Corey as defendants in the caption. The Corporation Counsel has made the identical summary judgment motion in both actions on behalf of the City, Santiago, Guerra and Hendricks. The Court notes that counsel for the City annexes the same affirmation to the moving papers of both motions, indicating in each, "The instant motion is being filed concurrently under each of the index numbers for the first and second complaints." The Court also notes that plaintiff's affirmation in opposition submitted under Index No. 24709/07 also constitutes opposition to the instant motion in the present case and has been considered in determining the instant motion.

As mentioned in its order issued this date in the companion case under Index No. 24709/10, the Court notes that since this action was commenced on January 21, 2010 and Vilardi and Corey have not appeared, and since plaintiff has not moved within one year for a default judgment against them, the action is deemed abandoned and dismissed against Vilardi and Corey pursuant to CPLR 3215.

Indeed, plaintiff does not dispute that she has abandoned her claims against all individual defendants except Santiago, Guerra and Hendricks, and counsel for both sides have proceeded upon the basis that the only defendants are the City, Santiago, Guerra and Hendricks.

The City, Santiago, Guerra and Hendricks move for summary judgment dismissing plaintiff's §1983 causes of action against the City and the individual police officers and her false arrest, unlawful imprisonment and malicious prosecution and abuse of process causes of action upon the grounds that there was probable cause to arrest, detain and prosecute plaintiff, that defendants did not act maliciously or wantonly or recklessly, that the individual defendants are entitled to qualified immunity and that there was no allegation or showing of a municipal pattern, custom or policy to support a §1983 action against the municipality. Movants also seek summary judgment dismissing plaintiff's cause of action for punitive damages upon the ground that defendants did not act wantonly, recklessly or with actual malice so as to support such cause of action.

Although movants have not addressed the issue, the Court notes initially that plaintiff's first cause of action for racial discrimination pursuant to 42 U.S.C. §1981 must be dismissed. No cognizable cause of action under §1981 is set forth, since the protections of that section extend only to the making and enforcement of contracts (see Vreeburg v Smith, 192 AD 2d 41 [2nd Dept 1993]). Therefore, no cause of action exists under §1981 and, accordingly, plaintiff's first cause of action is dismissed.

The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]). With respect to plaintiff's causes of action against the City under 42 U.S.C. §1983, a municipality may only be found liable under §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original). There is no showing that plaintiff's arrest, detention and prosecution was as a result of the implementation of an official policy or custom of the City. In any event, the existence of probable cause for the arrest and detention of plaintiff

immunizes the City against a claim brought pursuant to §1983 (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]), even had plaintiff alleged an official policy or custom. The undisputed facts, on this record establish that there was clear probable cause to arrest, detain and prosecute plaintiff. Therefore, plaintiff's second and third causes of action against the City pursuant to §1983 must be dismissed, as a matter of law.

As to plaintiff's second and third causes of action against the individual defendants for civil rights violations pursuant to 42 U.S.C. §1983, police officers are entitled to qualified immunity which may be invoked to protect them from suit under §1983 if it is established that there was probable cause for the arrest and detention (see Scheuer v. Rhodes, 416 U.S. 232 [1974]). No sharp factual dispute regarding the question of whether there was probable cause to arrest plaintiff has been presented, on this record, so as to preclude resolution of the issue by way of summary judgment (see Murphy v Lynn, 118 F. 3d 938 [2nd Cir. 1997]; Stipo v. Town of North Castle, 205 AD 2d 608 [2nd Dept 1994]). As heretofore noted, there was a clear showing of probable cause to arrest plaintiff and, therefore, that it was objectively reasonable for defendants to believe that they were acting in a manner that did not violate plaintiff's constitutional rights. Since probable cause was clearly established, it was the burden of plaintiff to disprove defendants' entitlement to qualified immunity (see Kravits v. Police Dept. Of the City of Hudson, 285 AD 2d 716 [3rd Dept 2001]). Plaintiff has failed to meet her burden. Therefore, plaintiff's causes of action against the individual movants based upon 42 U.S.C. §1983 must fail (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]; Zientek v. State of New York, 222 AD 2d 1041 (4th Dept 1995]).

With respect to plaintiff's fourth cause of action alleging of malicious prosecution and abuse of process, her indictment by a Grand Jury also created the presumption of probable cause which plaintiff has failed to rebut, and therefore, movants are entitled to summary judgment dismissing plaintiff's malicious prosecution cause of action (see Williams v City of New York, 40 AD 3d 847 [2nd Dept 2007]). Moreover, the record on this motion fails to establish that plaintiff's arrest and prosecution was motivated by actual malice, an essential element of a cause of action alleging malicious prosecution (see Rush v County of Nassau, 51 AD 3d 762 [2nd Dept 2008]). Under the same analysis, plaintiff's related cause of action for abuse of process is also without merit.

Plaintiff's fifth cause of action alleging false arrest and false imprisonment must also be dismissed. A finding of probable cause operates as a complete defense to an action alleging false

arrest and false imprisonment (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2nd Dept 2003]).

Finally, plaintiff's sixth cause of action against Santiago, Guerra and Hendricks for punitive damages must also be dismissed. In the first instance, it is settled law that no separate cause of action for punitive damages may be maintained (see Brualdi v Iberia, 79 AD 3d 959 [2nd Dept 2010]). Moreover, since there is no showing of any malicious intent, recklessness or willful conduct on the part of the individual movants, no claim for punitive damages lies, as a matter of law (see Brown v Maple 3, LLC, 88 AD 3d 224 [2nd Dept 2011]).

Accordingly, the motion is granted and the complaint is dismissed in its entirety.

Dated: August 6, 2012

KEVIN J. KERRIGAN, J.S.C.