

Ramos v Police Dept. of the City of N.Y.

2013 NY Slip Op 31389(U)

May 10, 2013

Sup Ct, Queens County

Docket Number: 1942/12

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Yahaira Ramos,

Plaintiff,

- against -

Index
Number: 1942/12

Motion
Date: 5/1/13

Police Department of The City of New York,
Police Officer Orlando Sanchez Tax Reg
#935691 and the City of New York,

Defendants.

Motion
Cal. Number: 108

Motion Seq. No.: 1

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The following papers numbered 1 to 17 read on this motion by defendants for summary judgment; and cross-motion by plaintiff for partial summary judgment on the issue of liability.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition(Pltf)-Exhibit.....	9-11
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Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by defendants for summary judgment dismissing the complaint is granted solely to the extent that plaintiff's second cause of action alleging malicious prosecution and third cause of action alleging "Constitutional violations" under the New York State and U.S. Constitutions are dismissed. That branch of the motion for summary judgment dismissing plaintiff's first cause of action alleging false arrest is denied.

Cross-motion by plaintiff for partial summary judgment on the issue of liability as to her first cause of action for false arrest is granted.

Plaintiff was arrested on June 30, 2011 for possession of a

weapon, to wit, a machete. Plaintiff testified in her 50-h hearing that she was a passenger in a Jeep on said date along with several other male passengers and a male driver, Luis, and that Luis had driven to his home to pick something up. She and the rest of the group waited in the vehicle for Luis to retrieve from his home whatever item he went to get. When Luis exited his home, he got into an argument with a neighbor. Thereafter, Luis entered his vehicle. At some point thereafter, while Luis, plaintiff and the other passengers were in the vehicle which was still parked in front of Luis' home, police officers arrived, approximately five police cars. The police asked everyone to come out of the vehicle with their hands raised and began searching the vehicle. A female officer frisked plaintiff but did not find any weapons. Plaintiff was thereafter arrested and was only informed at the police precinct that she was being arrested for possession of a machete that was found in the vehicle.

Officer Sanchez testified in his deposition that he had received a call of a dispute with a firearm. When he arrived at that location, he observed an SUV parked, approached the vehicle, questioned the driver, and ordered him to exit the vehicle and frisked him for weapons. Sanchez thereupon went to the passenger side of the vehicle and asked a passenger to step out. As he frisked that individual, Sanchez saw a machete on the floor of the vehicle. He described it as a machete, approximately 10 inches in length with a handle. When asked, "When you use the term machete, is it the type of thing that you would cut vegetation down with?" Sanchez responded, "Yes." No firearms or other weapons were found on any of the vehicle's occupants. Moreover, he did not observe any altercation or incident in progress at the time of his arrival. After the machete was found in the vehicle, all the occupants, including plaintiff, were arrested.

Sanchez testified that he arrested plaintiff for violation of §265.01 of the Penal Law, criminal possession of a weapon in the Fourth Degree, and the arrest report annexed to the moving papers so reflects. The accusatory instrument subsequently signed by Sanchez, however, does not charge plaintiff with violation of Penal Law §265.01, but rather only with violation of §10-133-B of the New York City Administrative Code, possession of a knife/instrument with a blade length of four inches or more. The action was dismissed and sealed pursuant to CPL 160.50 pursuant to the order issued by Judge D. Modica on July 8, 2011.

Defendants move for summary judgment dismissing plaintiff's cause of action against it alleging false arrest upon the ground that there was probable cause for the arrest. 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]). Defendants argue that the basis for probable cause to arrest plaintiff was the observation by

Sanchez of the machete in plain view in the vehicle and the presumption of possession thereof by all occupants of the vehicle pursuant to Penal Law §265.15(3). Said section provides that the presence in an automobile of specific enumerated weapons is presumptive evidence of the possession thereof by all occupants of the automobile. Moreover, as heretofore noted, Sanchez determined that the machete was a "dangerous instrument" pursuant to §265.01 of the Penal Law, a Class A misdemeanor, and arrested plaintiff for presumptive possession of that dangerous weapon. Therefore, contend defendants, since plaintiff was presumed to be in possession of the machete, a dangerous instrument pursuant to §265.01, by virtue of §265.15(3), Sanchez had probable cause to arrest her for violation of §265.01 of the Penal Law.

A machete is not an enumerated weapon listed in §265(1) of the Penal Law that is per se illegal under that subsection. Therefore, Sanchez considered the machete a "dangerous instrument", which is listed as a weapon in subsection (2), which concerns the possession of "any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another". Therefore, the only subsection of §265.01 under which a machete could be considered illegal is subsection (2). That subsection, however, only applies in a situation where such an instrument is possessed with intent to use the same unlawfully against another. "Possession of a machete is only criminal when the possessor intends to use it unlawfully against another" (People v Campos, 93 AD 3d 581, 581 [1st Dept 2012]). Moreover, a knife, or in this case, a machete, may only be considered a "dangerous" knife or instrument "when the circumstances of its possession including the behavior of its possessor demonstrate that the possessor himself (or herself) considered it a weapon and thus a 'dangerous knife' [or instrument] within the meaning of the statute[s]" (In Re Edwin O., 91 AD 3d 654, 654 [2nd Dept 2012] [internal citations omitted and emphasis added]).

Here, no evidence has been presented that the machete was being possessed by anyone with the intention of using it unlawfully against another. The evidence presented, on this record, is that the police did not observe any altercation or find any weapon on any of the vehicle's occupants. Moreover, it is undisputed that plaintiff herself was not observed to be in physical possession of the machete and that there is no evidence to rebut her testimony that it did not belong to her. Sanchez arrested plaintiff merely upon the basis that he saw the machete on the floor of the vehicle in which she was a passenger. There is no contention that anyone in the vehicle had the intent to use the machete as a weapon against another. Therefore, there was no basis under §265.01 of the Penal Law to arrest plaintiff.

Thus, there is no basis for application of §265.15(3) of the

Penal Law to this matter. Indeed, that section applies only to specific enumerated weapons or weapon accessories. A machete is not one of those listed weapons, and there is no inclusion of a non-specific class of "dangerous instrument" or "dangerous knife" found in §265.01. Therefore, the machete observed in the subject vehicle was not presumptively in the possession of plaintiff so as to form the basis of a probable cause arrest, as a matter of law.

Contrary to defendants' counsel's representation, the case, cited by her, of People v Sanchez (192 AD 2d 562 [2nd Dept 1993]) in support of her contention that machetes are included in the presumption of possession under §265.15(3) does not stand for such proposition. In that case, the Appellate Division, Second Department, upheld the determination of the trial court not to suppress a gun recovered from a vehicle following a search of the vehicle, based upon the fact that the observation of two machetes in plain view in the vehicle justified a search of the vehicle, and also upheld the trial court's charge to the jury that the presumption of possession of the gun by the plaintiff passenger was permissive and that the burden of proof remained with the prosecution. The Appellate Division, Second Department, did not hold that a machete was among the list of weapons covered under the presumption of possession under §265.15(3).

Moreover, since the only basis of the arrest was Sanchez' determination that the machete was a dangerous instrument under §265.01(2), plaintiff could not be presumed to be in possession of it under §265.15(3) since in order to be in violation of §265.01(2), plaintiff herself would have had to be in actual possession of the machete. Therefore, presumptive possession under §265.15(3) is inapplicable to a violation under §265.01(2). In addition, even if, arguendo, plaintiff were in actual possession of the machete, the only basis to arrest her for its possession as a dangerous instrument would be if the circumstances of her possession of it, including her behavior, demonstrated that she considered it to be a weapon and was intending to use it as such against another. The record, on this motion, is entirely devoid of any evidence or allegation that plaintiff possessed the machete with the intention to wield it as a weapon unlawfully against another individual.

As heretofore noted, although Sanchez arrested plaintiff for violation of §265.01 of the Penal Law, the accusatory instrument signed by Sanchez does not charge plaintiff with violation of Penal Law §265.01, but rather only with violation of §10-133-B of the New York City Administrative Code, possession of a knife/instrument with a blade length of four inches or more, a violation carrying a maximum penalty of a fine of \$300 or imprisonment for a maximum of 15 days or both. Defendants' counsel represents in her affirmation in support of the motion that Sanchez spoke with the District Attorney regarding this matter and had to sign a criminal

complaint. It is thus clear that defendants recognized that there was no probable cause to arrest plaintiff for possession of a machete in violation of §265.01(2) and pursuant to §265.15(3) of the Penal Law, and, in an attempt to salvage the arrest, changed the charge to a violation of the Administrative Code §10-133-B.

Such maneuver, however, is unavailing. Although the proscription against possession of an "instrument" with a "blade" length of four inches or more is, in the opinion of this Court, broad enough to cover a machete, that section of the Administrative Code does not contain a provision similar to §265.15(3) of the Penal Law imposing a presumption of possession of such an instrument by all occupants of a vehicle in which it is found. Since plaintiff was not carrying or otherwise in actual possession of the machete, there was no basis to charge her with a violation of Administrative Code §10-133-B.

Therefore, there was no probable cause to arrest plaintiff, as a matter of law and defendants are not entitled to dismissal of plaintiff's first cause of action for false arrest.

However, defendants are entitled to dismissal of plaintiff's second cause of action for malicious prosecution and third cause of action for "Constitutional violations".

In order to establish a claim for malicious prosecution, a plaintiff must establish, "1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions" (Broughton v State, 37 NY 2d 451, 458 [1975], cert. denied, 423 U.S. 929 [1975]). Plaintiff has failed to establish the fourth requirement. There is no evidence that Officer Sanchez or any other members of the NYPD were motivated by actual malice in arresting plaintiff. On the contrary, the evidence presented, on this record, demonstrates that Officer Sanchez believed that the subject machete was a weapon in violation of §265.01(2) of the Penal Law and that plaintiff was presumed to be in possession of it pursuant to §265.15(3) thereof and, therefore, that he was justified in placing plaintiff under arrest.

Defendants are also entitled to summary judgment dismissing plaintiff's third cause of action alleging "Constitutional violations".

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]). The

complaint herein does not include a cause of action under §1983 and, thus, plaintiff's claims for violation of her Constitutional rights fail to state a cause of action and must be dismissed on this ground alone.

Even if, *arguendo*, the Court were to deem the complaint as seeking damages under §1983, with respect to plaintiff's claim against the City, a municipality may only be found liable under 42 U.S.C. §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). Plaintiff has neither shown nor alleged that her arrest and prosecution was as a result of the implementation of an official policy or custom of the City.

With respect to plaintiff's claim against Officer Sanchez, police officers are entitled to qualified immunity where it is established that it was objectively reasonable for them to believe that their actions were appropriate under the circumstances or that reasonable police officers could disagree as to whether their actions were proper (see *Doyle v. Rondout Valley Central School District*, 3 AD 3d 669 [3rd Dept 2004]; (*Colao v. Mills*, __ NY 2d __, 2007 NY Slip Op 03230, supra). It was reasonable for Officer Sanchez to believe that his conduct was appropriate under the circumstances, and officers of reasonable competence could have disagreed as to whether Sanchez correctly concluded that the machete in question seen by him in open sight in the vehicle in which plaintiff was a passenger was a weapon which plaintiff was presumed to be in possession of under the Penal Law and whether the totality of the circumstances observed justified his arrest of plaintiff. There are no sharp factual disputes regarding this issue so as to preclude resolution of the issue of qualified immunity on this record (see *Stipo v. Town of North Castle*, 205 AD 2d 608 [2nd Dept 1994]). Since Officer Sanchez is entitled to qualified immunity, no action lies against him pursuant to 42 U.S.C. §1983 as a matter of law (see *Martinez v. City of Schenectady*, 97 NY 2d 78 [2001]). Since he has established that he had an objectively

reasonable belief that his actions did not violate any clearly established rights, the burden then shifted to plaintiff to disprove Sanchez' 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 in this regard. Indeed, plaintiff has not opposed the granting of those branches of the instant motion dismissing her second cause of action for malicious prosecution and third cause of action for Constitutional violations.

Therefore, the second and third causes of action must be dismissed.

Cross-motion by plaintiff for summary judgment on the issue of liability as to her first cause of action for false arrest is granted, for the reasons heretofore stated. Plaintiff has established, as a matter of law, that there was no probable cause for her arrest.

Defendants' counsel's contention that the cross-motion is untimely is without merit.

Plaintiff filed the note of issue in this action on October 12, 2012. Motions for summary judgment were required to be made within 120 days of said date, by February 7, 2013. Defendants' motion was timely filed on February 5, 2013. The cross-motion was filed on February 27, 2013.

Although the cross-motion is untimely, it may nevertheless be considered because it seeks the same relief sought by defendants' timely motion. The Court may search the record on issues that are the subject of the timely motion in chief and grant summary judgment to any party even in the absence of a cross-motion (see Filannino v. Triborough Bridge and Tunnel Authority, 34 AD 3d 280 [1st Dept 2006]).

Accordingly, the motion is granted solely to the extent that plaintiff's second and third causes of action are dismissed and is denied in all other respects, and the cross-motion for partial summary judgment on the issue of liability as to plaintiff's first cause of action for false arrest is granted.

Dated: May 10, 2013

KEVIN J. KERRIGAN, J.S.C.