

<b>Rodriquez v City of New York</b>
2015 NY Slip Op 32472(U)
December 8, 2015
Supreme Court, Bronx County
Docket Number: 307142/2011
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

MARIA LUZ RODRIGUEZ,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 307142/2011

CITY OF NEW YORK, NEW YORK CITY POLICE  
OFFICER JOE PANICO (Shield #2353), NEW YORK CITY  
POLICE OFFICER "JOHN DOE #1" (Shield #C0152) and  
NEW YORK CITY POLICE OFFICER "JOHN DOE #2",

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on March 5, 2015 and duly transferred on May 8, 2015.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Affirmation in Opposition and Exhibits	4, 5
Affirmation in Reply	6

Upon the foregoing cited papers and after reassignment of this matter from Justice Mitchell J. Danziger on May 8, 2015, Defendants, The City of New York and Det. Joseph F. Panico, Shield #2353 S/H/A Police Officer Joe Panico (Shield #2353), seek an Order pursuant to G.M.L. §50-e (1)(a) dismissing Plaintiff's false arrest, false imprisonment and assault and battery claims with prejudice for failure to file a timely notice of claim; an Order pursuant to CPLR 3211(a)(7) dismissing Plaintiff's Section 1983 cause of action with prejudice for failure to state a claim upon which relief may be granted; and/or for an Order pursuant to CPLR §3212 granting summary judgment dismissing Plaintiff's Complaint.

This is an action to recover damages for civil rights violations and personal injuries allegedly sustained by the Plaintiff, Maria Luz Rodriguez, when she was arrested on August 8,

2009 by members of the New York City Police Department in La Lagrimita Bar at 1175 Stratford Avenue, County of Bronx, City and State of New York.

The Court notes that, in her Opposition papers, Plaintiff concedes that she failed to file a timely Notice of Claim as to her False Arrest, False Imprisonment, Assault and Battery claims. Accordingly, Defendants' motion for an Order pursuant to G.M.L. §50-e (1)(a) dismissing Plaintiff's false arrest, false imprisonment and assault and battery claims with prejudice for failure to file a timely notice of claim is **granted**. Plaintiff further concedes that, as to the 42 U.S.C. Section 1983 against the City of New York only, Plaintiff's action cannot be maintained against the municipality without showing the deprivation of constitutional rights was caused by an official policy or custom. Thus, Defendants' motion for an Order pursuant to CPLR 3211(a)(7) dismissing Plaintiff's Section 1983 cause of action is **granted** as to Defendant City of New York only. Plaintiff then alleges that the merits of her remaining causes of action, malicious prosecution under New York Law and violation of constitutional civil rights under 42 U.S.C. Section 1983 couched in malicious prosecution and/or false arrest, should be decided by a Jury.

To state a claim for malicious prosecution, the Plaintiff must prove the initiation or continuation of an action against him; the termination of the proceeding in his favor; the absence of probable cause to commence the proceeding; and actual malice as a motivation for Defendant's actions. See *Colon v. City of New York*, 60 N.Y.2d 78 (1983). With regard to the Section 1983 action predicated on the tort of malicious prosecution, a Plaintiff must show sufficient restraint on liberty to implicate his Fourth Amendment rights, that the Defendant initiated or maintained the prosecution against the Plaintiff without probable cause, that the Defendant acted maliciously, and that the proceeding was terminated in the Plaintiff's favor. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 4.

In this matter, Detective Joseph F. Panico based his arrest on his belief that Plaintiff committed Prostitution, under P.L. §230.00 after: (i) Detective Panico received a communication from a fellow officer, undercover Police Officer, shield #CO152, that at the La Lagrimita Bar, the undercover Police Officer shield #CO152 approached Plaintiff and asked how much did he have to pay for Plaintiff to agree to have sex with him; and (ii) Detective Panico was further informed by the same undercover Police Officer that Plaintiff agreed to have sex with him for \$100.00 United States currency. The involvement of all Defendants and all claims raised by the parties are determinative upon whether sufficient probable cause existed for Detective Panico to conduct a warrantless arrest of Plaintiff. The charges from Plaintiff's arrest were ultimately dismissed by the Criminal Court of the City of New York on November 23, 2010.

First, it should be noted that a warrantless arrest is presumed unlawful. *Veras v. Truth Verification Corp.*, 87 A.D.2d 381 (1<sup>st</sup> Dept. 1982). However, the existence of probable cause to arrest provides a complete defense to claims of false arrest, unlawful imprisonment and malicious prosecution. *Lawson v. City of New York*, 83 A.D.3d 609 (1<sup>st</sup> Dept. 2011); *Marrero v. City of New York*, 33 A.D.3d 556 (1<sup>st</sup> Dept. 2006). Therefore, sufficient probable cause must have existed that Plaintiff committed Prostitution, under P.L. §230.00, at the time of the arrest, as this crime was the basis of Detective Panico's probable cause to arrest Plaintiff.

The Court notes that "[t]he existence of [probable] cause does not require certitude that a crime was, or was being, committed by the person arrested," *People v. Cunningham*, 71 A.D.2d 559 (1<sup>st</sup> Dept. 1979), *aff'd*, 52 N.Y.2d 927 (1981), nor does its existence need to be strong enough to warrant a conviction, *People v. Miner*, 42 N.Y.2d 937 (1977), "the issue of probable cause is a question of law to be decided by the court [only when] there is no real dispute as to the facts or the proper inferences to be drawn from such facts. Where there is conflicting evidence,

from which reasonable persons might draw difference inferences, the question is for the jury” *Parkin v. Cornell Univ.*, 78 N.Y.2d 523 (1991). Additionally, “[i]n determining whether a police officer had probable cause to effect an arrest, the emphasis should not be narrowly focused, but rather should consider all of the facts and circumstances together.” *Marrero*, 33 A.D.3d at 556.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor. *GTF Mktg., Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574 (2<sup>nd</sup> Dept. 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 305 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1<sup>st</sup> Dept. 1998).

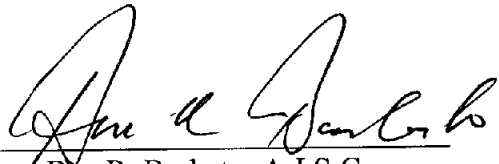
The role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4<sup>th</sup> Dept. 2000). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). Accordingly, because “reasonable persons might draw different inferences” based on the facts known to Defendants, i.e. that Plaintiff’s actions and purported intent establish sufficient probable cause to constitute Prostitution, the issue of probable cause cannot be resolved as a matter of law. Based upon the exhibits and extensive deposition testimony submitted, the Court finds that Defendants have failed to establish that no triable issues of fact exists as to whether there was probable cause for Plaintiff’s arrest and prosecution.

Therefore it is

**ORDERED**, that Defendants, The City of New York and Det. Joseph F. Panico, Shield #2353 S/H/A Police Officer Joe Panico (Shield #2353)'s motion is **granted to the extent** that Defendants' motion for an Order pursuant to G.M.L. §50-e (1)(a) dismissing Plaintiff's false arrest, false imprisonment and assault and battery claims with prejudice for failure to file a timely notice of claim is **granted**; Defendants' motion for an Order pursuant to CPLR 3211(a)(7) dismissing Plaintiff's 42 U.S.C. Section 1983 cause of action is **granted** as to Defendant City of New York only; and Defendants' motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing Plaintiff's Complaint in its entirety is **denied**.

This constitutes the Decision and Order of the Court.

Dated: December 8, 2015

  
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Hon. Ben R. Barbato, A.J.S.C.