

Sanchez v City of New York

2017 NY Slip Op 32185(U)

September 13, 2017

Supreme Court, Bronx County

Docket Number: 303776/2014

Judge: Julia I. Rodriguez

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

-----X **Index No. 303776/2014**

Ariel Sanchez and Maria DeJesus,
 Plaintiff,

-against-

DECISION and ORDER

The City of New York, et al.,
 Defendant.

Present:
 Hon. Julia I. Rodriguez
 Supreme Court Justice

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 Recitation, as required by CPLR 2219(a), of the papers considered in review of the motion of defendants City of New York, Det. Richard Urena and P.O. Michael Pomerantz to dismiss the complaint pursuant to CPLR 3211 and CPLR 3212.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Notice of Cross-Motion, Affirmation & Exhibits	2
City Reply Affirmation & Affirmation in Opposition	3
Pls. Reply Affirmation	4

As pertinent here, in their complaint, plaintiffs allege causes of action under 42 U.S.C. §1983 for false arrest/imprisonment, malicious prosecution, excessive force, assault and battery, and a state law claim for malicious prosecution based upon their arrest by the New York City Police Department on April 11, 2013 at approximately 10:15 p.m.¹ All charges against each plaintiff were dismissed on December 4, 2013.

Defendants the City of New York, Det. Richard Urena and P.O. Michael Pomerantz now move, pursuant to CPLR 3211 and/or CPLR 3212, to dismiss the above-mentioned claims on the grounds that: (1) probable cause existed to arrest and prosecute plaintiffs, (2) plaintiffs sustained no injuries as a result of being handcuffed, (3) the complaint fails to state a cause of action for violation(s) of 42 U.S.C. § 1983 against the individual officers and (4) the officers are entitled to qualified immunity.

Plaintiffs cross-move to amend the complaint, pursuant to CPLR 3025, to add specificity to their 42 U.S.C. §1983 claims against the individual police officers.

¹Plaintiffs previously discontinued all of their state causes of action with the exception of malicious prosecution.

In the support of the motion, the moving defendants submitted, *inter alia*, the 50-h hearing and deposition testimony of Maria DeJesus, the deposition testimony of Maria DeJesus, Ariel Sanchez, Det. Urena and P.O. Pomerantz, and various NYPD and Bronx Criminal Court documentation. Based upon DeJesus' 50-h hearing and deposition testimony, the deposition testimony of Ariel Sanchez, Det. Urena and P.O. Pomerantz, NYPD property vouchers and arrest reports, and the memo book notes of P.O. Pomerantz, the movants established, *prima facie* that: Det. Urena and P.O. Martinez stopped the vehicle in which plaintiffs were passengers due to an issue with one of its tail lights; when the officers approached the vehicle the windows were down; Det. Urena smelled a strong odor of pine or ammonia, indicative of the controlled substance PCP (phencyclidine angel dust), emanating from inside the vehicle; Det. Urena observed the driver of the vehicle reach in the center console in between his legs; for their safety, the officers asked the occupants to exit the vehicle at which time they were told to stand behind the vehicle; one of the officers then searched the vehicle and found 201 bags of PCP under the front passenger seat; all three occupants of the vehicle were searched, arrested and handcuffed after the PCP was discovered; neither plaintiff resisted arrest or requested medical attention; Ariel Sanchez was arraigned and released at approximately 10:28 p.m. on April 12, 2013; and Maria DeJesus was arraigned and released at approximately 11:33 p.m. on April 12, 2013.

In opposition to defendants' motion, plaintiff submitted the affidavit of Maria DeJesus wherein she states as follows: On April 11, 2013 at approximately 8:00 p.m., she was a front-seat passenger in a vehicle being driven by her then boyfriend Leonardo Sanchez. She was familiar with the vehicle and knew that it was in good working order. All tail lights were "intact and functioning properly" at the time they were pulled over by the police. The police did not issue Leonardo Sanchez any traffic ticket or any ticket related to the vehicle's tail lights. At the time they were pulled over, there was no unusual odor or smell inside the vehicle and no smell of pine or ammonia.

In his affirmation in opposition to defendants' motion, plaintiffs' counsel alleges that material issues of fact leading up to the plaintiffs' arrests are disputed. Specifically, counsel contends that it is disputed whether the police had cause to stop the vehicle because, at their

depositions, neither officer could recall what was wrong with the tail light(s), no traffic tickets were issued, and DeJesus stated in her affidavit that the tail lights were functioning properly. Counsel also contends that issues of fact exist as to whether the search of the vehicle was justified based upon DeJesus' statement in her affidavit that the vehicle did not smell like pine or ammonia as alleged by Det. Urena and because, at his deposition, P.O. Pomerantz did not recall the smell of pine or ammonia. Counsel further contends that "there is ample evidence that the police fabricated evidence by claiming that an odor of pine or ammonia was present when no such odor existed." However, counsel does not dispute that a large quantity of PCP was recovered from the vehicle.

Plaintiff cross-moves to amend the sixth and fourteenth causes of action, which allege 42 U.S.C. §1983 claims against the individual police officers, to provide additional facts and information to specify the roles that each officer played in the arrest and prosecution of plaintiffs. Notably, in her affidavit submitted with the cross-motion, DeJesus does not mention that she was mistreated by any police officer or that she suffered any injuries as a result of her arrest and/or prosecution. Ariel Sanchez did not submit his affidavit.

* * * * *

In order to establish a claim for false arrest/imprisonment, a plaintiff must prove that: (1) the defendant intended to confine him/her, (2) plaintiff was conscious of the confinement, (3) plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. *See Broughton v. State of New York*, 37 N.Y.2d 451, 456 (1975). The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to a claim of false arrest/imprisonment. *See Martinez v. City of Schenectady*, 97 N.Y.2d 78, 85, 761 N.E.2d 560 (2001). When an arrest and imprisonment are effected without a warrant, as here, a presumption arises that both are unlawful, and the burden of proving justification, including probable cause, is cast upon the defendant. *See Smith v. County of Nassau*, 34 N.Y.2d 18, 23, 311 N.E.2d 489 (1974). Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. *See Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453 (1983). Based upon the record evidence, the

Court finds that probable cause existed for plaintiffs' arrests. Under New York Penal Law §220.25(1), the presence of a controlled substance in an automobile is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time the controlled substance was found. The self-serving and unsubstantiated statements in the affidavit of Maria DeJesus that there were no problems with the vehicle's tail lights and that there was no smell or odor of pine or ammonia, or any other unusual odor, inside the vehicle are insufficient to raise a triable issue of fact. Notably, there is no dispute that 201 bags of PCP were recovered from under the seat where she had been sitting inside the vehicle and that PCP smells like pine or ammonia.

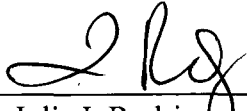
Also, contrary to plaintiffs' contentions, the search of the vehicle after Det. Urena smelled a strong odor of pine or ammonia emanating from inside the vehicle was lawful. *See U.S. v. Belton*, 55 N.Y.2d 49, 447 N.Y.S.2d 873 (1982); *People v. Guido*, 175 A.D.2d 364, 572 N.Y.S.2d 96 (3rd Dept. 1991).

The elements of a claim for malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice. *See Broughton v. State of New York*, 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87 (1975). Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. *See Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453 (1983). Arraignment or indictment generates a presumption of probable cause, rebuttable only by proof of fraud, perjury or misrepresentation or falsification of evidence. *See Broughton, supra*, at 455-456; *Mendez v. City of New York*, 137 A.D.3d 468, 471, 27 N.Y.S.3d 8 (1st Dept. 2016). A jury may infer that a defendant acted with actual malice from the fact that there was no probable cause to arrest the plaintiff. *See Martin v. City of Albany*, 42 N.Y.2d 13, 17, 396 N.Y.S.2d 612 (1977). Here, as discussed above, probable cause existed for plaintiffs' arrests. There is no evidence that said probable cause was vitiated at any time. Nor is there any evidence of actual malice.

A civil assault is an intentional placing of another person in fear of imminent harmful or offensive contact; civil battery is an intentional wrongful physical contact with another person without consent. *See Charkhy v. Altman*, 252 A.D.2d 413, 414, 678 N.Y.S.2d 40 (1st Dept. 1998). Here, plaintiffs were arrested based upon probable cause and they were lawfully handcuffed incident to that arrest. While plaintiffs' counsel asserts that excessive force was used, plaintiffs' respective deposition testimony evidences that neither plaintiff was injured or requested medical attention as a result of their arrest, and that the officers used reasonable force to effect their arrest. Also, in her affidavit, DeJesus does not state that she was subjected to excessive force or injured in any way as a result of her arrest.

Based upon the foregoing, the defendants' motion to dismiss plaintiffs' causes of action under 42 U.S.C. §1983 for false arrest/imprisonment, malicious prosecution, excessive force, assault and battery, and plaintiffs' state law claim of malicious prosecution is **granted**. Plaintiffs' cross-motion to amend the complaint is **denied**.

Dated: Bronx, New York
September 13, 2017



Hon. Julia I. Rodriguez, J.S.C.