Jackson v City of New York
2018 NY Slip Op 30760(U)
March 9, 2018
Supreme Court, Bronx County
Docket Number: 307467/13
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 10

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JANAY JACKSON AND DONNICE MASTERSON,

Index No. 307467/13

Plaintiffs,

- against -

DECISION/ ORDER

THE CITY OF NEW YORK, P.O. MARIA LOPEZ-CRUZ OF NBBX, SHIELD #360, DET. RICARDO BOCACHICA OF NBBX, SHIELD #919, THE SUPERVISING SGT. UNDER DOCKET #2012BX002608 S.H.A. JOHN/JANE DOE I AND OTHER NYPD POLICE OFFICERS S/H/A JOHN/JANE DOE II-V.,

Defendants.

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Hon. Lizbeth Gonzalez

Plaintiffs Janay Jackson and Donnice Masterson commenced the underlying personal injury and civil rights action against defendants claiming that their tortious conduct caused plaintiffs to sustain physical pain and mental suffering. Plaintiffs allege in their notice of claim that on January 12, 2012, they were lawfully inside 1128 Findlay Avenue, Apartment BB, in Bronx County, at approximately 6:00 AM when they were illegally searched and seized, had multiple assaults and batteries committed to their persons, forcibly handcuffed, illegally striped searched, illegally detained for 36 hours and maliciously prosecuted. Plaintiffs contend that defendants' actions were without probable or reasonable cause. Plaintiffs also allege that defendants Police Officer Maria Lopez-Cruz ("PO Lopez-Cruz"), Detective Richardo Bocachica ("Det. Bocachica"), and an unnamed supervising sergeant violated their civil rights pursuant to 42 USC § 1983 by reason of the aforementioned conduct. On July 8, 2013, the charges against both plaintiffs were favorably dismissed.

Defendants the City of New York ("the City"), PO Lopez-Cruz, and Det. Bocachica move for summary judgment dismissing the plaintiffs' action. Plaintiffs oppose defendants' motion.

RELEVANT FACTS

This action arises from the execution of a "no knock" search warrant and the subsequent arrest and prosecution of plaintiffs. The subject search warrant was procured on the basis of an investigation conducted by PO Lopez-Cruz that included information obtained from a confidential informant and three controlled purchases of drugs from the subject apartment by male individuals. The validity of the search warrant, not subject to a challenge herein, was validated in a Criminal Court proceeding in a decision and order dated July 2, 2013 (*People v Jackson*, Docket No. 2012BX002608, 2012BX002609, Crim Ct, Bronx County, Whiten, JCC).[1] The warrant provided for the search of the subject apartment and the seizure of

> property unlawfully possessed, to wit: marijuana and evidence tending to demonstrate that the premises are utilized for the unlawful possession, packaging and sale of marijuana, and other drug paraphernalia and evidence tending to establish ownership of the premises and connect persons found therein to the premises, to wit: personal papers and effects.

On the morning of January 12, 2012, three police officers entered plaintiff Jackson's apartment at approximately 6:25AM without notice. When the police entered the apartment, they encountered plaintiff Masterson and her boyfriend Ulysses Jackson (plaintiff Jackson's uncle) sleeping on a bed in the living room. Ms. Masterson was an overnight guest in the apartment and, according to her testimony, was staying there while she recovered from a surgery performed ten days earlier on January 3, 2012 related to an ectopic pregnancy. Masterson testified that she was in the

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[1] In the criminal action, Jackson moved for suppression of physical evidence or to nullify the search warrant. The Criminal Court, among other things, determined that "the search warrant and related materials establish probable cause of the issuance of a search warrant, and the warrant application demonstrated that there was 'sufficient information to support a reasonable belief that evidence of a crime may be found in a certain place.'"

apartment approximately three or four nights during the week of the incident. Also sleeping in the apartment were plaintiff Jackson, her friend Amanda and Ms. Jackson's minor son.

According to the testimony, after entering the apartment the officers approached Ms. Masterson and her boyfriend, repeatedly asked their names, and allowed them to get and present their identification cards. They were then handcuffed behind their back and asked to sit on the couch. Masterson complained that the handcuffs were too tight and although she asked that the handcuffs be placed in the front to accommodate her surgery, her request was denied. Masterson testified that while she was sitting on the couch, a female officer (possibly PO Lopez-Cruz) entered the apartment. Ms. Masterson testified that one of the officers searched the bed where she had slept while other officer checked through the kitchen cabinets. Masterson testified that she did not know whether the officers searched other areas of the apartment or found anything unlawful in the apartment while she sat on the couch.

Plaintiff Jackson and her friend Amanda were taken from the bedroom of the apartment, handcuffed behind their backs, and placed on another couch in the livingroom. Ms. Jackson testified that she was shown the warrant; she too did not see the officers search her apartment.

Shortly thereafter, plaintiffs were taken downstairs and placed into the back of an unmarked police van. After waiting for a period of time, they were taken to the precinct where they were taken to the bathroom, asked to remove their clothing and a brief pat-down search was conducted.[2] They were placed in a cell and later that day taken to central booking, where they were fingerprinted and photographed.

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[2] It is unclear whether the plaintiffs were required to remove their underwear prior to the search.

After plaintiffs were removed from the apartment,[3] Det. Bocachica conducted a search of the apartment. According to the affidavit of PO Lopez-Cruz filed in the criminal case, Det. Bocachica discovered

> inside of a garment bag, inside of the bathroom, one (1) plastic bag containing a dried green leafy substance with a distinctive odor . . . [and] inside of a shoe on the floor, inside of a closet located in the hallway of said apartment, nine (9) ziplock bags containing a dried green leafy substance with a distinctive odor." A scale and numerous small apple zip lock bags, without residue, were also recovered from the apartment. Laboratory analysis of the green leafy substance was positive for marijuana and totaled 76.556 grams.

PO Lopez-Cruz testified that according to police procedure, everyone in an apartment can be arrested if contraband is found in the apartment pursuant to a warrant. She subsequently clarified that after entering an apartment pursuant to a search warrant, an analysis is needed to determine whether a person is in possession of contraband or whether the contraband was in plain view before arresting that individual. PO Lopez-Cruz asserts that she was not present at the subject location when the search, confiscation or arrests were made in this case. She avers that here, the determination as to who should be arrested was made by supervising officer Sargent Angel Bones. Moreover, based upon information provided by Det. Bocachica. The determination as to who to arrest was based in part on the marijuana was recovered from the bathroom, a common area, and the fact that no one claimed ownership of it.

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[3] While there is no testimony establishing exactly when plaintiffs were arrested, plaintiffs were arrested at 6:25 AM according to the police record. Det Bocachica's field notes indicate that the search warranted was executed at 6:25 AM.

On January 13, 2013, the day after the search, plaintiffs met with their lawyers and were arraigned.[4] Plaintiffs were each charged with one count of Criminal Possession of Marijuana in the fourth degree in violation of Penal Law (PL) § 221.15, one count of Criminal Possession of Marijuana in the fifth degree in violation of PL § 221.10[02], and one count of Unlawful Possession of Marijuana in violation of PL § 221.05. Following arraignment, plaintiffs were released on their own recognizance after approximately 33 hours in custody. On July 8, 2013, after approximately five court appearances, their cases were dismissed and sealed.

CONTENTIONS OF THE PARTIES

In support of their motion for summary judgment, defendants the City, PO Lopez-Cruz and Det. Bocachica proffer, *inter alia*, plaintiffs' arrest reports, copies of the officer's notes, field test reports, property clerk invoices, command log notes, complaint follow-up reports, the search warrant, the search warrant tactical plan, arraignment forms, criminal court files, the respective GML § 50-h hearing transcripts of Jackson and Masterson and the respective deposition transcripts of Jackson, Masterson, PO Lopez-Cruz and Det. Bocachica.

Defendants supply a partial stipulation of discontinuance dated July 2, 2014, which discontinued plaintiffs' state law claims as against all defendants with prejudice. Plaintiffs' fifth, sixth, eleventh, and twelfth causes of action,[5] "which include state law malicious prosecution claims

[4] Jackson testified that while she was being taken to arraignment she complained to the officers that her handcuffs were too tight, but an officer stated that he would not loosen them.

[5] Plaintiffs' fifth and eleventh causes of action allege that defendants maliciously prosecuted plaintiffs, failed to take reasonable steps to stop the prosecution, and deliberately provided false and/or incomplete information to the District Attorney's Office, despite the absence of probable cause. Plaintiffs' sixth and twelfth causes of action are alleged only against the named police officers individually, not in their official capacity, and not the City of New York. These claims assert violations of 42 USC § 1983 and 42 USC § 1988, in that the named police officers allegedly deprived plaintiffs of

against all defendants and federal 42 USC § 1983 claims against all individual defendants" survived. Defendants now seek summary judgment dismissing plaintiffs' 42 USC § 1983 claims based upon unlawful search and seizure, false arrest, false imprisonment, excessive force, assault and battery, and the state law claims based upon malicious prosecution. Defendants also seek dismissal of a federal *Monell* claim against the City.

Defendants argue that plaintiffs' claims of unlawful search and seizure, false arrest, false imprisonment and malicious prosecution must be dismissed as the search was pursuant to a valid search warrant and there was probable cause to arrest plaintiffs for criminal possession of a controlled substance discovered upon execution of the search warrant. With regard to the malicious prosecution claim, defendants further argue that plaintiffs fail to demonstrate actual malice for plaintiffs' prosecutions. Defendants contend that plaintiffs' claims for assault, battery and excessive force under 42 USC § 1983 must be dismissed as they were merely handcuffed during the course of a valid arrest, supported by probable cause, and the contact was therefore privileged and not excessive. Moreover, defendants assert that PO Lopez-Cruz and Det. Bocachica are entitled to qualified immunity for their action. Finally as to the City, defendants contend that plaintiffs fail to sufficiently plead a *Monell* claim and or establish that they have sustained any constitutional injury.

In opposition to defendants' motion, plaintiffs supply an attorney affirmation and incorporate by reference documents submitted by defendants in support of their motion. Plaintiffs argue that the admissible evidence, viewed in the light most favorable to plaintiffs, raises material issues of fact and credibility as to the circumstances surrounding plaintiffs' arrests and whether sufficient probable

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their constitutional rights to be free from assault, battery, illegal search and seizure, false arrest, malicious prosecution, excessive force during the arrest process, unlawful imprisonment and a loss of liberty.

cause to arrest plaintiffs existed. Plaintiffs point out that Ms. Masterson did not reside in the apartment, nor did the police recover any mail or documents connecting Masterson to the apartment. With regard to plaintiff Jackson, plaintiffs argue that although Ms. Jackson was the legal lessee of the apartment, the police possessed exculpatory information that the contraband belonged to someone else and no information that Jackson knew of the contraband or had dominion and control over it. In this regard, plaintiffs point out that the marijuana was allegedly sold from the apartment by persons described as male and black. Plaintiffs contend that contrary to the belief of PO Lopez-Cruz, the police were not entitled to arrest anyone inside of an apartment where concealed contraband is found. Plaintiffs further maintain that they were unlawfully removed from the apartment and arrested before any alleged contraband was recovered.

Plaintiffs contend that some of the material facts upon which the police officers relied to justify the search, arrests and prosecution are disputed. Plaintiffs argue that actual malice can be inferred when an arrest is made without probable cause, and that such a determination must be made by the jury.

With regard to their claims based upon assault, battery and excessive force, plaintiffs assert that they have sufficiently demonstrated an offensive contract, that was "unconsented" and without probable cause. They argue that the question of whether the force used by the police officers was reasonable under the circumstance must be determined by the jury.

Plaintiffs argue that defendants are not entitled to qualified immunity because their conduct violated clearly established constitutional rights and there are material issues of fact in dispute as to the objective reasonableness of the officers' conduct and the degree of force actually employed by defendants. Finally with regard to their *Monell* claim, plaintiffs maintain that PO Lopez-Cruz

testified to a custom or policy of improperly arresting occupants of an apartment, during the execution of a search warrant, without the necessary and required showing of probable cause.

DISCUSSION

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate prima facie entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A court's task is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) in this regard. "It is also well established that courts should deny summary judgment where there is any doubt about the existence of a triable issue of fact" (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]; *see Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185 [1st Dept 1996], *affd* 90 NY2d 953 [1997]). When such a motion is made by defendants, the facts must be viewed in the light most favorable to the plaintiffs, and every available inference must be drawn in the plaintiffs' favor (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

It is well settled that "[s]tate officials are entitled to qualified immunity under 42 USC § 1983 for discretionary functions if either (1) their conduct did not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe that their acts did not violate clearly established rights" (*Rankel v County of Westchester*, 135 AD3d 731, 733 [2d Dept 2016]; *Delgado v City of New York*, 86 AD3d 502, 510 [1st Dept 2011]). An officer will be protected from liability if he or she had "arguable probable cause" to arrest. "Arguable probable cause should not be misunderstood to mean almost probable cause" (*Dancy v McGinley*, 843 F3d 93, 107 [2d Cir 2016],

quoting *Jenkins v City of New York*, 478 F3d 76, 87 [2d Cir. 2007][quotation marks omitted]). Rather, "arguable probable cause" exists when "(a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met" (*Dancy v McGinley*, 843 F3d at 107; *see Delgado v City of New York*, 86 AD3d at 510). Conversely, "[i]f officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer" (*Dancy v McGinley*, 843 F3d at 107 [quotes and citations omitted]).

Thus, in order to demonstrate entitlement to qualified immunity, the moving defendants must show that it was objectively reasonable for them to believe that their acts did not violate clearly established constitutional rights of the plaintiffs (*see Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 704 [2d Dept 2010]). As this inquiry is focused not the correctness of the police's action, but the objective reasonableness, the question may be determined by the court, as a matter of law, when the factual record is not in serious dispute (*see Lennon v Miller*, 66 F3d 416, 421 [1995][district court should assess the reasonableness of the defendants' conduct under the circumstances presented in order to determine on summary judgment whether the defendants are entitled to qualified immunity]; *Liu v NY City Police Dept.*, 216 AD2d 67, 68-69 [1st Dept 1995], *lv denied* 87 NY2d 802 [1995], *cert denied* 517 US 1167 [1996] [the court must determine whether a reasonable official could have believed that the particular conduct at issue was lawful]).

Here, plaintiffs claim that the individually named police officers, acting under color of law, deprived them of their constitutional rights be to be free from unlawful search and seizure, false arrest, false imprisonment, assault, battery and excessive force. The existence of probable cause

forms a complete defense to a claim for false arrest, unlawful imprisonment and malicious prosecution as a matter of law (*see De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016][for purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause]; *Phin v City of NY*, ___AD3d___, 2018 NY Slip Op 00333, *1 [2018]; *Garcia v City of New York*, 115 AD3d 447 [1st Dept 2014]; *Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011]; *Young v City of New York*, 72 AD3d 415 [1st Dept 2010]; *Grant v Barnes & Noble, Inc.*, 284 AD2d 238 [1st Dept 2001]). In addition, an assault and battery cause of action that is based on contact during an arrest will be dismissed on summary judgment if probable cause for the arrest existed (*see Wyllie v DA*, 2 AD3d 714, 718-719 [2nd Dept 2003]). "After the fact judicial participation [, however,] cannot validate an unlawful arrest; only probable cause existing at the time of arrest will validate the arrest and relieve the defendant[s] of liability" (*Broughton v State*, 37 NY2d 451, 458 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]).

"Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty . . . Conversely, the failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause" (*Colon v New York*, 60 NY2d 78, 82 [1983]; *Brown v Sears Roebuck and Co.*, 297 AD2d 205 [1st Dept 2002]). Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed by the suspected individual, when judged under the totality of the circumstances (*De Lourdes Torres v Jones*, 26 NY3d at 759; *People v Williams*, 122 AD3d 502 [1st Dept 2014]; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006]).

Plaintiffs' Claims Under 42 USC § 1983

With respect to plaintiff Jackson, the undisputed evidence establishes that Jackson was the leaseholder of the apartment at the time contraband was discovered pursuant to a valid search warrant (*Boyd v City of NY*, 143 AD3d 609, 610 [1st Dept 2016]; *People v Calise*, 256 AD2d 64, 65 [1st Dept 1998], *lv denied* 93 NY2d 851[1999]["'a presumption of validity' attaches to a search warrant because the information supporting it has already been judicially reviewed and approved"]). Jackson's apartment was also suspected to be a point of distribution for drugs based upon the three controlled buys that took place therein. "[Jackson's] residence and tenancy [establishes] her dominion and control over the apartment, and thus placed her in constructive possession of the contraband found therein" (*Phin v City of NY*, ___AD3d___, 2018 NY Slip Op 00333, *1[leaseholder found in constructive possession of guns found in a shoebox in her premises despite her absence from premises during execution of search warrant and ownership of the contraband admitted to by her children's father]; *see People v Tirado*, 38 NY2d 955, 956 [1976][possession if joint is no less possession]). Jackson's constructive possession of the contraband at the time of her arrest demonstrates probable cause for her arrest and the absence of any triable issue of fact as to whether her subsequent detention, restraint, or prosecution was supported by probable cause (*see Mendoza v City of NY*, 90 AD3d 453, 454 [1st Dept 2011]; *Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *People v Calise*, 256 AD2d at 65).

With respect to Masterson, while probable cause to arrest an individual may be based upon the individual's "constructive possession" of contraband, this requires a showing that the individual exercised "dominion or control" over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized (*People v*

Manini, 79 NY2d 561, 573 [1992]). Moreover, it is settled law that "one's mere presence in an apartment or house where contraband is found does not constitute sufficient basis for a finding of constructive possession" (*People v Edwards*, 206 AD2d 597, 597-598 [3d Dept 1994]; *see Haskins v City of NY*, 2017 US Dist LEXIS 136201, at *16, 2017 WL 3669612 [EDNY Aug. 24, 2017, No. 15-CV-2016 (MKB)]; *People v Perez*, 125 AD2d 236, 237-238 [1st Dept 1986]["Where a gun is found in an area occupied by several people and where no one individual could be said to have dominion and control of the weapon, the People have a heavy burden in establishing constructive possession"]). This is true even where there is evidence that the premises was used for drug dealing (*People v Headley*, 74 NY2d 858, 859 [1989]).

Constructive possession can be based upon factors such as the proximity of the individual to the contraband, the presence of documents pertaining to the individual in the same location as the narcotics, the individual's possession of a key to the location where the drugs are found, the individual fleeing the premises upon seeing police officers and whether the drugs are in plain view (*see Haskins v City of NY*, 2017 US Dist LEXIS 136201, at *15-17). Where there is no proof that the individual "resided in the apartment, frequented it on a regular basis or otherwise exercised dominion or control over the area where the marihuana was found," the inference of constructive possession is not permissible (*People v Dawkins*, 136 AD2d 726, 727 [2d Dept 1988]).

Here, there is insufficient evidence to establish, as a matter of law, that Masterson exercised dominion or control over the premises as she neither owned, leased, resided at or was, at the time of her arrest, known to be a frequent visitor to the premises (*People v Edwards*, 206 AD2d at 597-598). The defendants have identified no evidence that Masterson was aware of the presence of the drugs in the apartment, much less exercised any dominion or control over it (*People v Tejeda*, 73 NY2d

958, 960 [1989]). Significantly, there is no evidence that the drugs were in plain sight. In this regard Det. Bocachica, who could not personally recall any details of the search, stated that drugs were recovered from inside of a garment bag hanging on the back of the bathroom door. He was not able to provide a detailed description of the bag, whether it was see-through, or whether there as an odor. Also, Det. Bocachica could not remember whether the shoe from which marijuana was recovered was a male or female shoe, and the shoe was not confiscated. Det. Bocachica, could not testify as to what other articles were found in the closet sufficient to demonstrate that Masterson exercised any control over the closet. There is thus no evidence as to whether the drugs were in plain sight, in the closet, or concealed within the subject shoe.

In addition, there is no evidence that the drugs were in close proximity to Ms. Masterson, who was found sleeping in the living room and then removed from the apartment prior to the discovery of the drugs. According to the testimony and evidence, no personal effects of Masterson were recovered, such as mail or clothing, albeit it appears that this is because no search for the same was conducted (*People v Edwards*, 206 AD2d at 597-598). It also bears noting that there is an issue of fact, raised by plaintiffs, whether Masterson was removed from the apartment and arrested prior to the discovery of any contraband. While there is no clear testimony from any party as to when the arrest occurred, the police records indicate that Masterson was arrested at 6:25AM, which coincides with the time the search warrant was executed.

"Where there is conflicting evidence concerning the existence of probable cause to arrest the plaintiff, from which reasonable persons might draw different inferences, the question is one for the jury" (*Mendez v City of NY*, 137 AD3d 468, 470 [1st Dept 2016]). Accordingly, defendants have failed to demonstrate their entitlement to summary judgment dismissal of Masterson's claims based

upon search and seizure, assault, battery, false arrest and false imprisonment (*Mendez v City of NY*, 137 AD3d at 471-472).

Turning to plaintiffs' 42 USC § 1983 claims based upon the defendants' alleged use of excessive force, the court must consider all facts underlying the arrest, the severity of the alleged crime and whether the suspect posed a threat to the officer's safety and actively resisted arrest (*see Pacheco v City of New York*, 104 AD3d 548, 549 [1st Dept 2013]; *Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007]). The trier of fact must allow for the police officers' frequent need to make "split-second" judgments about the amount of force necessary in "tense, uncertain, and rapidly evolving" situations (*Pacheco v City of New York*, 104 AD3d at 549). "To prevail on an excessive force claim, a plaintiff must show that law enforcement personnel exceeded the standard of objective reasonableness under the Fourth Amendment" (*Pacheco v City of NY*, 104 AD3d at 549; *see Stephenson v Doe*, 332 F3d 68, 77-78 [2d Cir 2003]).

The single allegation of excessive force in the instant case is the excessively tight handcuffing of plaintiffs by police officers. Plaintiffs' claims, which upon this record did not result in injury, do not rise to the level of objective excess (*Davidson v City of NY*, 155 AD3d 544, 544 [1st Dept 2017][excessive force claim dismissed where there was no showing of injury from the allegation that handcuffs were too tight]; *Burgos-Lugo v City of NY*, 146 AD3d 660, 662 [1st Dept 2017]; *Marshall v City of NY*, 198 F Supp 3d 224, 227 [EDNY 2016][a minor, temporary injury caused by excessively tight handcuffs does not rise to the level of objective excess that reasonable police officers would consider to be unlawful conduct in an arrest situation]; *see generally Gomez v City of NY*, 2008 US Dist LEXIS 41455, at *25 [SDNY May 28, 2008]). Accordingly, as plaintiffs have offered no evidence that they suffered injury as a result of the tightness of the handcuffs, the conduct does not

rise to the level of objective excess that reasonable police officers would consider to be unlawful and these claims are dismissed (*see Wilder v Vil. of Amityville*, 288 F Supp 2d 341, 344 [EDNY 2003]).

An individual can bring a claim under 42 USC § 1983 against the City for an official municipal policy and practices so persistent and widespread as to practically have the force of law and thus causing the police to violate his or her constitutional rights (*see De Lourdes Torres v Jones*, 26 NY3d at 768; *see also Monell v New York City Dept. of Social Servs.*, 436 US 658 [1978]). Here, the plaintiffs' complaint clearly alleges that their sixth and twelfth causes of action are only asserted against the individually named police officers, not in their official capacity, and not against the City. Accordingly, it appears that plaintiffs have not pleaded a *Monell* claim against the City. Plaintiffs' complaint does not allege that an official policy or custom of the City caused the police officers to violate their constitutional rights; they cannot assert such a claim for the first time in their opposition to defendants' motion for summary judgment (*Shaw v City of NY*, 139 AD3d 698, 699-700 [2d Dept 2016]).

Plaintiffs' Claims for Malicious Prosecution

The common law recognizes a cause of action for the separate tort of malicious prosecution, which protects the plaintiff's distinct "interest of freedom from unjustifiable litigation" (*De Lourdes Torres v Jones*, 26 NY3d at 760, quoting *Broughton v State*, 37 NY2d at 457). "The elements of the tort of 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 accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice (Prosser, Torts [4th ed], § 119)" (*Broughton v State*, 37 NY2d at 457; *see De Lourdes Torres v Jones*, 26 NY3d at 760; *Cantalino v Danner*, 96 NY2d 391, 394 [2001]).

Here, it is undisputed that the plaintiffs were criminally prosecuted from the time of their arrest until approximately July 8, 2013, when the criminal actions were dismissed and sealed in the plaintiffs' favor.[6] Thus, the first and second elements of the claim are not in dispute.

Turning to the third element of probable cause, in the context of a malicious prosecution claim, "the element of lack of probable cause traditionally looks to whether probable cause existed to commence the criminal proceeding, not whether there was probable cause to arrest the plaintiff" (*Cardoza v City of NY*, 139 AD3d 151, 162 [1st Dept 2016][citations omitted]). This inquiry involves the determination of whether there were "such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" of the charge (*Colon v City of New York*, 60 NY2d 78, 82 [1983]).

As discussed, Ms. Jackson's arrest was based upon probable cause as the execution of a valid search of her home revealed 76.556 grams of marijuana located in common areas, namely the bathroom and a closet. In addition, there was evidence that three controlled drug buys were conducted from the subject premises. Accordingly, it cannot be said that the subsequent prosecution of Jackson for criminal possession of marijuana pursuant to Penal Law §§ 221.15, 221.10[02] and 221.05 was without probable cause, as a reasonably prudent person in like circumstances could believe that Jackson was guilty of, at a minimum, joint possession of the contraband found in her home and that she knew what she possessed. The lack of a triable issue of fact as to whether there was probable cause is a complete defense to Jackson's malicious prosecution claim (*see Cardoza v City of NY*, 139 AD3d at 163; *Lawson v City of NY*, 83 AD3d at 609; *see also Callan v State*, 73

[6] The record contains some evidence that the charges were dropped because another individual admitted to ownership of the contraband.

NY2d 731 [1988], *revd for reasons stated in dissenting memorandum* 134 AD2d 882, 882 [4th Dept 1987][since probable cause existed at the outset of the prosecution and no exculpatory facts were revealed probable cause remained for the prosecution]).

Turning to Ms. Masterson's claims, there are issues of fact as to whether probable cause for Masterson's arrest existed at the time of her arrest. A lack of probable cause to institute a criminal proceeding and proof of actual malice are independent and indispensable elements of a malicious prosecution action (*see Cardoza v City of NY*, 139 AD3d at 164; *Martin v Albany*, 42 NY2d 13, 17 [1977]). "The 'actual malice' element of a malicious prosecution action does not require a plaintiff to prove that the defendant was motivated by spite or hatred . . . [r]ather, it means that the defendant must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (*Nardelli v Stamberg*, 44 NY2d 500, 502-503 [1978]; *see Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132 [1st Dept 1999]; *see e.g. Robles v City of NY*, 104 AD3d 829, 830 [2d Dept 2013] [inference of actual malice created by evidence that defendants intentionally provided false information to law enforcement officials or withheld material information]). Actual malice "may be proven by circumstantial evidence" (*see Cardoza v City of NY*, 139 AD3d at 164, quoting *Nardelli v Stamberg*, 44 NY2d 500, 502 [1978]).

Here, the absence of probable cause bears on the actual malice issue as "a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding" (*Cardoza v City of NY*, 139 AD3d at 164; *see Martin v Albany*, 42 NY2d at 17). Actual malice may also be inferred from evidence that false information was intentionally provided to law enforcement authorities by the defendant (*see Cardoza v City of NY*, 139 AD3d at

164); however, there is no evidence to support plaintiff's claim that the defendant officer withheld exculpatory information or provided incomplete information to the District Attorney's Office.

The questions concerning whether the police had the requisite probable cause to arrest Masterson and initiate criminal proceedings, accordingly raise issues of fact as to actual malice in prosecuting her (*see Mendez v City of NY*, 137 AD3d at 471; *Lundgren v Margini*, 30 AD3d 476, 477 [2d Dept 2006] [summary judgment dismissing a malicious prosecution claim denied where triable issue of fact existed as to whether there was probable cause to arrest the plaintiff and the lack of probable cause could support an inference of actual malice]). These questions are for the jury, not the court, to resolve (*see Cardoza v City of NY*, 139 AD3d at 165; *Martin v Albany*, 42 NY2d at 18).

CONCLUSION

Those prongs of the defendants' motion seeking summary judgment dismissing plaintiff Jackson's claims are GRANTED and the complaint is DISMISSED as to Ms. Jackson. It is further

ORDERED, that those prongs of the defendants' motion seeking summary judgment on plaintiff Masterson's claim based upon excessive force are GRANTED; and it is further,

ORDERED, those prongs of the defendants' motion seeking summary judgment on Masterson's remaining claims under 42 USC § 1983 and for malicious prosecution are DENIED.

This constitutes the Decision and Order of the Court. A copy of this Decision and Order with Notice of Entry shall be served within 30 days.

Dated: 9 March 2018

E N T E R,

Lizbeth Gonzalez, J.S.C.