SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 33

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VICTORIA GOETZ, DAVID DIAZ, and QUINTESHA DIAZ,

Index No: 306086/2013

Plaintiff(s),

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

-against-

THE CITY OF NEW YORK, P.O. JEFFREY SISCO OF THE 48TH PCT., SHIELD #27744, P.O.JEFFREY SISCO'S PARTNER UNDER DOCKET #2013BX027595 S/H/A JOHN/JANE DOE I, THE SUPERVISING SGT. ON 5-9-13 UNDER DOCKET #2013BX0275 S/H/A JOHN/JANE DOE II, THE INVESTIGATION OFFICER ON THE WARRANT UNDER ARREST #B13632617 S/H/A JOHN/JANE DOE III, AND OTHER NYPD POLICE OFFICER S/H/A JOHN/JANE DOE IV-VI,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers Numbered were read on this Motion for Summary Judgment — Papers

Notice of Motion with Affirmation of Support and in Support with Exhibits..... 1
Affirmation in Opposition and in Support with Exhibits..... 2
Reply Affirmation and in Support with Exhibits..... 3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

In this action for, *inter alia,* alleged false arrest, false imprisonment, malicious prosecution, assault, battery, and excessive force, defendants THE CITY of NEW YORK and P.O. JEFFREY SISCO OF THE 48th PCT., ("Officer Sisco") (collectively, "defendants") move, pursuant to C.P.L.R. § 3211 and 3212, for (1) dismissal of plaintiffs' false arrest and false imprisonment claims as there was probable cause to arrest the plaintiffs, or in the alternative, granting Officer Sisco summary judgment on the basis of qualified immunity as it was reasonable for Officer Sisco

to believe that the plaintiffs were engaged in criminal activity; (2) dismissal of plaintiffs' malicious prosecution claims as plaintiffs were arrested with probable cause and plaintiffs have alleged no facts that come to light after their arrests that would have dissipated the probable cause for their prosecution; or in the alternative, granting defendants summary judgment motion on malicious prosecution on the basis of qualified immunity; (3) granting the defendants' summary judgment on plaintiffs' assault and battery and excessive force claims, as the *de minimis* force alleged here by plaintiffs is permissible in the course of a valid arrest; (4) granting defendants' summary judgment on all of QUINTESHA DIAZ'S state claims for failure to file a Notice of Claim; and, (5) dismissing plaintiffs' 42 U.S.C. § 1983 claim against the City of New York, if any, for failure to state a cause of action as plaintiffs' have failed to satisfy the essential elements of causation. All plaintiffs' have withdrawn their 42 U.S.C. § 1983 claim against the City of New York. Therefore, the portion of the motion seeking dismissal of said claim is moot.

Plaintiff opposes the foregoing motion averring that (1) defendants' motion for summary judgment should be denied because defendants have not met their prima facie burden of proof; (2) there are material facts leading up to plaintiffs' arrests that are disputed; (3) defendants are not entitled to summary judgment with respect to plaintiffs' malicious prosecution claims because evidence viewed in the light most favorable to plaintiffs' shows that an issue of fact exists; (3) defendants are not entitled to summary judgment with respect to plaintiffs' assault, battery and excessive force claims; and (4) individual police officers are not entitled to qualified immunity.

The record establishes the following. On the morning of May 9, 2013, at approximately 6:20 a.m. plaintiffs were arrested inside 800 East 180th street, apartment 4K, Bronx, New York. Plaintiffs were detained until May 10, 2013. Police entered the subject apartment pursuant to a search warrant issued by the Honorable James M. Kindler on May 3, 2013. According to the

search warrant, Judge Kindler determined that there were adequate grounds for authorizing the search of 800 East 180th Street, apartment 4K to seize "crack/cocaine and other evidence tending to demonstrate that the premises were utilized for the unlawful possession, packaging, and sale and other drug paraphernalia believed to be unlawfully inside the premises."

All plaintiffs were arrested and charged with: Criminal possession of a controlled substance third and seventh degree (P.L. § 220.50(2) and (3)), criminal possession of a weapon fourth degree (P.L. § 265.01(1)), and unlawful sale, possession, or use of an imitation pistol (A.C. § 10-131(g)(1)). Nonparty, Jonathan Garcia, was present and arrested with plaintiffs' on May 9, 2013, and subsequently pled guilty to criminal possession of a controlled substance (P.L. § 220.03).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.,* 153 A.D.2d 520 [1st Dep't 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA,* 259 A.D. 2d 258

[1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson,* 8 N.Y.2d 8, 12 [1960]).

Initially, plaintiff argues that the information provided by the police reports and Confidential Informant is inadmissible evidence, as the reports are unsworn and the Confidential Informant is unidentified, causing hearsay testimony and observations. Here, the police reports at issue are presumably business records and thus, can generally be admitted for consideration at trial or on a motion upon a proper foundation-namely, that (1) the record be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (C.P.L.R. § 4518; *People v. Kennedy*, 68 N.Y.2d 569, 579 [1986]).

Where the documents submitted by defendants are NYPD records, the same could have been admitted in evidence, and a business foundation laid had they simply borne a certification by someone from the NYPD reciting the elements of business records foundation (C.P.L.R. § 4518[c]; § 2307). Despite defendants' failure to lay the requisite foundation, the Court nonetheless deems that the records submitted (NYPD records memorializing plaintiffs' arrest) are sufficiently self-authenticating so as to warrant their admission in evidence for purposes of this motion absent the requisite foundation (*Kennedy* at n.4 ["No contention is made that the diaries are so patently trustworthy as to be self-authenticating, with no need from a qualifying witness."]; *Niagra Frontier Tr. Metro Sys. V. County of Erie*, 212 A.D.2d 1027, 1027-28, [4th Dep't 1995]). Further, Judge Kindler relied on police reports involving the Confidential Informant, when issuing the search warrant. Where a search warrant has been issued after a court has had the opportunity to review the basis for its issuance, such a personal examination of the informant providing the information, such warrant is presumed valid (*People v. Castillo*, 80 N.Y.2d 578, 607 [1992])

(stating a presumption of validity attached to the warrant given that a Magistrate has already reviewed the purported basis for the search and determined it to be valid)). Therefore, the Court finds the search warrant authorizing the search of 800 East 180th Street, apartment 4K to be valid.

Quintesha Diaz

Quintesha Diaz, age 17 at the time of the incident, testified that on the date of the incident she was living at the subject apartment with her brother, co-plaintiff, David Diaz. She testified that she was able to access all parts of the apartment while living there. When the police arrived, on the day of the incident, she ran into the living room of the home. At around 6:30 a.m. she was arrested, taken out of the home and brought to the 48th precinct. She was handcuffed after a pat-down search. The handcuffs were on her hands for approximately half an hour and caused cuts to her left wrist. After approximately two hours, her left hand swelled up and she could not move her hand. However, no medical attention was requested at any time while she was under the custody of the police. The swelling lasted for one week. After she was released, Quintesha Diaz sought medical attention and received medical advice. There is nothing she cannot do with her hand that she was able to do before this incident.

Under G.M.L. § 50-i(1)(a), no negligence action or special proceeding shall be prosecuted or maintained against a municipality unless "a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section 50-e of this chapter." Additionally, G.M.L § 50e(1)(a) requires that the claimant file said Notice of Claim "within 90 days after the claim arises." Therefore, before pursuing tort claims against the City, a plaintiff must, as a condition precedent, file a timely Notice of Claim with the City. The City states that that they have no record of a Notice of Claim from Quintesha Diaz. Further, there is no Notice of Claim within the record and plaintiff does not contest this fact in their opposition.

Based on the above, Quintesha Diaz's state law claims for false arrest, false imprisonment, malicious prosecution, excessive force, and assault and battery must be dismissed as no Notice of Claim has been served upon the city.

Federal Claims for False Arrest and False Imprisonment

Defendants' motion to dismiss with respect to plaintiff's federal claims for false arrest, and false imprisonment are granted as the arrest was supported by probable cause as a matter of law.

The elements of a false arrest and false imprisonment claim under 42 U.S.C. § 1983, are substantially the same as the elements under New York Law, therefore, the analysis of the remaining federal claims are identical (*Boyd v. City of New York,* 336 F3d 72 [2d Cir. 2003]). To succeed on a claim for false arrest and false imprisonment, a plaintiff must show that: (1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and, (4) the confinement was not otherwise privileged (*Broughton v. State of New York*, 37 N.Y.2d 451, 456 [1975]). The defendants can prevail if they prove that the arrest and imprisonment were effectuated with probable cause (*Broughton v. State of New York*, 37 N.Y.2d 451, 458 [1975]; *Rivera v. City of New York*, 40 A.D.3d 334, 337 [1st Dep't 2007]).

A detention during the execution of a facially valid search warrant is constitutionally permissible (*see Michigan v. Summers*, 452 U.S. 692, 703 [1981]; *Lee v. City of New York*, 272 A.D.2d 586, 586 [2d Dep't 2000]). An arrest or search conducted pursuant to a warrant is presumed reasonable because such warrants may issue only upon a showing of probable cause (*see Walczyk v. Rio*, 496 F3d 139, 144 [2d Cir. 2007]). A detention occurring in connection with a search warrant gives rise to a presumption of probable cause for the detention, which the plaintiffs

must rebut (*see Broughton v. State of New York*, 37 N.Y.2d 451, 458 [1975]; *Lee v. City of New York*, 272 A.D.2d 586, 587 [2d Dep't 2000]).

An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense (*Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 [2d Cir. 1997]; *see also People v. Oden*, 36 N.Y.2d 382, 384 [1975]). When the facts resulting in an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide (*Parkin v. Cornell University, Inc.*, 78 N.Y.2d 523, 528 [1991]).

The defendants argue they had probable cause to arrest plaintiff, because there was constructive possession of the items recovered during the search. Constructive possession may be established when a suspect is present in an area where contraband is found in plain view (*United States v. Heath*, 455 F.3d 52, 57 (2d Cir. 2006); *United States v. Holder*, 301 U.S. App. D.C. 57, 990 F.2d 1327, 1329 [D.C. Cir. 1993] (holding that keeping narcotics "openly on display" in a private residence was indicative that the residence's owner considered a visitor "sufficiently complicit to allow him a full view"); *Hollyfield v. United States*, 407 F.2d 1326, 1326 [9th Cir. 1969] (holding that undercover agent's observation of cocaine and marijuana in plain view throughout an apartment containing six men provided probable cause to arrest all six occupants)). Constructive possession requires a showing that the plaintiff exercised a knowing dominion and control over the property, by a sufficient level or control over the area in which the contraband was found (*People v. Manini*, 79 N.Y.2d 561, 573 [1992]; *People v. Diaz*, 68 A.D.3d 642, 643 [1st Dep't 2009]).

Quintesha Diaz testified that her address was 800 East 180th Street, apartment 4K, Bronx, New York, 10460. She stated that she has been living there for her whole life, with full access to

the apartment. At the time of the incident David Diaz was her guardian. Plaintiffs cite to *Ybarra v. Illinois*, arguing that an individual's mere presence in an apartment where contraband is found does not give the police probable cause to arrest that individual for possession of the contraband (444 U.S. 85, 91 [1979]). However, when a plaintiff owned, rented or had control over or a possessory interest in the apartment where drugs were found, the evidence is legally sufficient to establish his/her constructive possession of such drugs (*People v. Headley*, 143 A.D.2d 937, 938 [2d Dep't 1988]). Here, Quintesha Diaz testified that she received checks due to her parents passing, and contributed to the rent from the money she received. Therefore, there is sufficient evidence to show that Quintesha Diaz had control over or a possessory interest in the apartment where the drugs were found because she paid rent and had dominion and control over the premises. Based on the foregoing, defendants had probable cause as to search of the apartment and plaintiff's arrest. Plaintiff's federal law claim for false arrest and false imprisonment is dismissed.

Federal Claims for Malicious Prosecution

Defendants' motion to dismiss with respect to plaintiff's federal claim for malicious prosecution is granted. Defendants establish the existence of probable cause for the arrest and subsequent prosecution, thereby barring a claim for malicious prosecution.

The elements of a cause of action for malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of proceedings in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and, (4) actual malice (*Broughton v State of New York*, 37 N.Y.2d 451, 457 [1975]). The existence of probable cause constitutes a complete defense to a claim of malicious prosecution. (*Lawson v. City of New York*, 83 A.D.3d 609, 609 [1st Dep't 2001]). As detailed above, probable cause was present in this case.

Further, plaintiff is unable to prove the element of "actual malice." In establishing the element of actual malice, "a plaintiff need not demonstrate the defendant's intent to do him or her personal harm, but need only show a reckless or grossly negligent disregard for his or her rights" (*Ramos v City of New York*, 285 A.D.2d 284, 300 [2001]). Actual malice may be inferred from the facts and circumstances of the case, i.e., "something other than a desire on the part of the defendant to see the ends of justice served" (*Nardelli v. Stamberg*, 44 N.Y.2d 500 [1978]). The facts of this case demonstrate that defendants did not arrest plaintiff out of dishonesty or with improper motives. Therefore, plaintiff's federal law claim for malicious prosecution is dismissed.

Federal Claims for Assault and Battery and, Excessive Force

Defendants' motion for summary judgment on the federal claims of excessive force, and assault and battery are granted as the arrest of plaintiff was lawful, and the record is devoid of any evidence that excessive force was used (*see Marrero v. City of New York*, 33 A.D.3d 556, 557-58 [1st Dep't 2006]).

Because there was probable cause for the arrest, the touching and handcuffing of plaintiff is not unlawful. There is no evidence presented that plaintiff resisted arrest or suffered physical injury due to the arrest. Therefore, plaintiff's claim for assault and battery is dismissed.

Moreover, to establish a § 1983 claim for excessive force, plaintiffs must show that the force used was excessive or unreasonable in light of the circumstances (*Lynch ex rel. Lynch v. City of Mt. Vernon*, 567 F. Supp. 2d 459, 468 [S.D.N.Y. 2008]). Reasonableness is measured using the objective reasonableness standard under the Fourth Amendment (*Graham v. Connor*, 490 U.S. 386, 396-97 [1989]). Objectively, the plaintiff must establish that the deprivation alleged is, "sufficiently serious," or "harmful enough," to reach constitutional dimensions (*Wilson v. Seiter*, 501 U.S. 294, 296 [1991]). Hence, a *de minimis* use of force will rarely suffice to state a

constitutional claim (*Hudson v. McMillian*, 503 U.S. 1, 9 [1992]). In determining whether the use of force was reasonable, the trier of fact must allow for police officers' frequent need to make, "split-second" judgments about how much force is necessary "in circumstances that are tense, uncertain, and rapidly evolving" (*Graham v. Connor*, 490 U.S. 386, 396 [1989]).

Here, although plaintiff made complaints that the handcuffs were too tight, plaintiff did not suffer injuries from the handcuffs (*see Davidson v. City of NY*, 155 A.D.3d 544, 544, 65 N.Y.S.3d 520 [1st Dep't 2017] (finding excessive force claim dismissed where there was no showing of injury from the allegation that handcuffs were too tight); *see also Marshall v City of NY*, 198 F. Supp. 3d 224, 227 [E.D.N.Y 2016] (finding 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)). Additionally, there is no showing of force used other than handcuffing. Therefore, plaintiff's federal law claim for excessive force is dismissed.

David Diaz

David Diaz testified that he was inside his bedroom at 800 East 180th Street, apartment 4K when the police arrived. He had been living at this location for the past fifteen years with his family. Three officers with SWAT gear entered his bedroom and one officer pushed him onto the floor then onto the bed. He did not see the officers search the apartment. Detectives Sisco and Francis came in after the SWAT team and after plaintiffs were all cuffed arrested David Diaz. David Diaz did not suffer any physical injuries from the arrest. The charges against him were dismissed at his subsequent court date. David Diaz testified that he was the "head of the household," paid rent for the apartment, and had access to all areas of the apartment, including the

bedrooms. David Diaz testified that Jonathan Garcia did not live at the apartment, but was staying in a bedroom there.

False Arrest and False Imprisonment

Defendants' motion to dismiss with respect to plaintiff's state and federal claims for false arrest, and false imprisonment are granted as the arrest was supported by probable cause as a matter of law.

The defendants argue they had probable cause to arrest plaintiff because there was constructive possession of the items recovered during the search. Constructive possession requires a showing that the plaintiff exercised a knowing dominion and control over the property, by a sufficient level or control over the area in which the contraband was found (*People v. Manini*, 79 N.Y.2d 561, 573 [1992]; *People v. Diaz*, 68 A.D.3d 642, 643 [1st Dep't 2009]).

David Diaz testified that his address was 800 East 180th Street, apartment 4K, Bronx, New York, 10460 and he has lived there for all his life. He testified that although his sister, Quintesha Diaz, is on the lease, he is the "head of the household" and is the one that signed the lease. David Diaz testified that as the head of household, he is responsible for taking care of the kids, paying rent, and paying bills. When a defendant owns, rents or has control over or a possessory interest in the apartment where drugs are found, the evidence is legally sufficient to establish his/her constructive possession of such drugs (*People v. Headley*, 143 A.D.2d 937, 938 [2d Dep't 1988]). The police recorded in the police report that they recovered crack/cocaine, drug paraphernalia, an imitation pistol, and nun-chucks. Here, David Diaz rented and had control and possessory interest in the apartment where the controlled substances and weapons were found. Therefore, defendants had probable cause as to search of the apartment and plaintiff's arrest. Plaintiff's state and federal law claims for false arrest and false imprisonment are dismissed.

Malicious Prosecution

Defendants' motion to dismiss with respect to plaintiff's state and federal claims for malicious prosecution are granted. Defendants establish the existence of probable cause for the arrest and subsequent prosecution, therefore barring a claim for malicious prosecution.

The existence of probable cause constitutes a complete defense to a claim of malicious prosecution (*Lawson v. City of New York*, 83 A.D.3d 609, 609 [1st Dep't 2001]). As detailed above, probable cause was present in this case. Further, actual malice by defendants was not shown. Plaintiff must make a showing that defendant had a reckless or grossly negligent disregard for plaintiff's rights. Here, plaintiff testified that the officers handcuffed and searched the apartment, and did not make a showing of malice by the officers. Defendants did not arrest plaintiff out of dishonesty or with improper motives. Therefore, plaintiff's state and federal law claims for malicious prosecution are dismissed.

Assault and Battery, and Excessive Force

Defendants' motion for summary judgment on plaintiff's state and federal claims of excessive force, and assault and battery are granted as the arrest of plaintiff was lawful, and the record is devoid of any evidence that excessive force was used.

Because there was probable cause for the arrest, the touching and handcuffing of plaintiff is not unlawful. There is no evidence presented that plaintiff suffered physical injury due to the arrest. Therefore, plaintiff's claim for assault and battery is dismissed.

Further, to establish a claim for excessive force, the plaintiff must establish that the deprivation alleged is, "sufficiently serious," or "harmful enough," to reach constitutional dimensions (*Wilson v. Seiter*, 501 U.S. 294, 296 [1991]). In determining whether the use of force was reasonable, the trier of fact must allow for police officers' frequent need to make, "split-

second" judgments about how much force is necessary "in circumstances that are tense, uncertain, and rapidly evolving" (*Graham v. Connor*, 490 U.S. 386, 396 [1989]).

Here, plaintiff testified that when the SWAT officers arrived, the officers pushed him onto the floor and then the bed. Plaintiff was further handcuffed while the officers searched his bedroom. The Court finds that the officers acted using necessary force, reacting to a search warrant, in an uncertain situation. There is no showing of force used other than handcuffing. There is no evidence that plaintiff was injured or sought medical attention due to the force used in his arrest. Therefore, plaintiff's state and federal law claims for excessive force are dismissed.

Victoria Goetz

Plaintiff, Victoria Goetz ("Goetz") testified that she was visiting the subject apartment and in bed with her boyfriend at the time, Jonathan Garcia, when the police entered the bedroom. Goetz testified that Garcia lived in the upstairs bedroom of the apartment. Goetz was only dressed in a tank top when she was handcuffed; she was not permitted to get dressed while male officers searched the room. After approximately ten minutes, a male officer put leggings on Goetz and she was brought out of the bedroom and into the living room. Police told Goetz that they found a BB gun and "traces of drugs" in the apartment. Goetz testified that she did not know where the drugs were found, or what she was charged with. Goetz was arrested, brought to the precinct, and was released after approximately twenty-nine hours in custody, and the charges against her were dismissed at her following court appearance. Goetz did not make any complaints at any time about the handcuffs being too tight, and did not request medical attention at any time. Goetz did not suffer any physical injuries as a result of this incident. However, she argued she sustained psychological injuries stemming from her being seen naked from the waist down in front of male

officers during the search of the bedroom. She has not sought any treatment for her psychological injuries.

False Arrest and False Imprisonment

Defendants' motion to dismiss with respect to plaintiff's state and federal claims for false arrest, and false imprisonment is granted as the arrest was supported by probable cause as a matter of law.

The defendants argue that they had probable cause to arrest plaintiff because there was constructive possession. The fact that defendant did not own or lease the apartment or that others also stayed in the bedroom where the drugs were found does not preclude a finding of constructive possession since possession may be joint (*People v. Elhadi*, 304 A.D.2d 982, 984 [3d Dep't 2003]; *People v. Robertson*, 61 A.D.2d 600, 608 [1st Dep't 1978]). Here, Goetz did not rent or own the subject apartment, but was sleeping in a bedroom at the time the police entered the apartment. No triable issue of fact exists as to whether the detention, arrest, or prosecution of a plaintiff is supported by probable cause, when police find plaintiff in a state of undress on premises identified in a valid search warrant, and controlled substances were recovered from the premises (*Mendoza v. City of New York*, 90 A.D.3d 453 [1st Dep't 2011]). Goetz was found in only a tank top, without pants on, at the premise. 'Knowing possession' may be established by a plaintiff's close proximity to drugs at the time of their discovery in open view in a room of an apartment (*People v. Elhadi*, 304 A.D.2d 982, 984 [3d Dep't 2003]). Police recovered a quantity of crack/cocaine and a gravity knife in plain view in the room Goetz was found in. For these reasons, defendants had probable cause as to search of the apartment and plaintiff's arrest. Therefore, plaintiff's state and federal law claims for false arrest and false imprisonment are dismissed.

Malicious Prosecution

Defendants' motion to dismiss with respect to plaintiff's state and federal law claims for malicious prosecution are granted. Defendants establish the existence of probable cause for the arrest and subsequent prosecution of plaintiff, barring any claim for malicious prosecution.

The existence of probable cause constitutes a complete defense to a claim of malicious prosecution (*Lawson v. City of New York*, 83 A.D.3d 609, 609 [1st Dep't 2001]). As detailed above, probable cause was present in this case. Further, actual malice by defendants was not shown. Plaintiff must make a showing that defendant had a reckless or grossly negligent disregard for plaintiff's rights. The police officers attempted to call a female officer to the scene in order to help Goetz dress; however, when no female officers were available, a male officer present helped Goetz put on pants in order to cover her up. There is no showing of reckless or grossly negligent behavior. Therefore, plaintiff's state and federal law claims for malicious prosecution are dismissed.

Assault and Battery, and Excessive Force

Defendants' motion for summary judgment on the federal claims of excessive force, and assault and battery are granted as the arrest of plaintiff was lawful, and the record is devoid of any evidence that excessive force was used.

Because there was probable cause for the arrest, the touching and handcuffing of plaintiff is not unlawful. There is no evidence presented that plaintiff resisted arrest or suffered physical injury due to the arrest. Therefore, plaintiff's claim for assault and battery is dismissed.

Further, to establish a claim for excessive force, the plaintiff must establish that the deprivation alleged is, "sufficiently serious," or "harmful enough," to reach constitutional dimensions (*Wilson v. Seiter*, 501 U.S. 294, 296 [1991]). Here, Goetz testified that she did not

make any complaints about her handcuffs or seek medical treatment following her arrest. Officers do not violate plaintiff's privacy rights when, in the course of executing a warrant, they refuse to allow unclothed persons to cover themselves while they sweep and secure a room (*Bancroft v. City of Mount Vernon*, 672 F. Supp. 2d 391, 408 [S.D.N.Y. 2009]). Goetz was found in Jonathan's room wearing only a 'short tank-top' and she repeatedly asked the officers if she could put pants on, and once the search of the room was completed, an officer helped Goetz put on a pair of leggings. Goetz testified at her EBT that she is not claiming the officers touched her inappropriately. She notes that she suffered mental injuries, but did not seek medical treatment as a result. For the reasons above, there is no showing that the officers used excessive force. Plaintiff's state and federal claims for excessive force are dismissed.

Therefore, the motion is granted in full, and the complaint is hereby dismissed in its entirety. Defendants are directed to serve a copy of this order with notice of entry upon plaintiff within 30 days of the entry date.

This constitutes the decision and judgment of the Court.

Dated: 7/26/10
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.