

<b>Tanko v City of New York</b>
2018 NY Slip Op 32418(U)
September 24, 2018
Supreme Court, New York County
Docket Number: 161822/2015
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 52

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MUTAWAKILU TANKO,  
Plaintiff,

-against-

THE CITY OF NEW YORK and POLICE OFFICER  
FRANCISCO GARCIA,

Defendants.

-----X

**ALEXANDER M. TISCH, J.:**

DECISION & ORDER

INDEX NO.: 161822/2015

MOTION SEQ. No.#001

This action arises out of damages allegedly sustained by plaintiff Mutawakilu Tanko when he was arrested by Police Officer Francisco Garcia (Garcia). Defendants City of New York and Garcia move, pursuant to CPLR Rule 3212, for an order granting them summary judgment dismissing plaintiff's claims of false arrest and imprisonment, malicious prosecution, and assault and battery. For the reasons stated herein, the defendants motion is denied.

**BACKGROUND**

Factual Allegations

*Plaintiff's EBT and GML §50-h hearing testimony<sup>1</sup>*

At the time of the incident, on August 19, 2014, plaintiff was a home health-aide employed by Aides at Home. Plaintiff was assigned to a patient, Mr. Edgardo Welch, who resided in apartment 3J of a NYCHA owned residential building located in County, City and State of New York.

On the date of the incident he finished his shift at 1:00 pm and left Mr. Welch's apartment. Plaintiff was dressed in his uniform which consisted of a blue t-shirt and pants.

<sup>1</sup> Plaintiff's testimony at his §50-h hearing and EBY was essentially the same, but the Court will only reference his EBT.

Plaintiff took the elevator to the lobby. Upon exiting the elevator, plaintiff observed five police officers standing in the lobby. As plaintiff went to exit the building, the officers shouted at him “come back.” Plaintiff’s exhibit C (Plaintiff’s EBT), 17:2-10 (hereinafter “P’s EBT”). Officer Garcia asked why he was in the building and where he was coming from. Plaintiff told the Garcia that he was a home health-aide and had just finished a shift with a patient, Edgardo, in apartment 3J. At that point, he showed officers his employee identification card, which had his “picture on it.” *Id.* 17:11 – 18:2. The Arrest Report and the Stop, Question and Frisk Report Worksheet both indicate that plaintiff produced an identification card; the former had an ID number written down. *See* Plaintiff’s exhibit H, Arrest Report, p. 2 and Plaintiff’s exhibit I, Stop, Question and Frisk Report Sheet, section marked identification “Photo I.D.”

Upon procuring his ID, Garcia and another officer went to the apartment to corroborate his story while the remaining officers stayed with plaintiff. At that time, the officers took his bag and “threw everything on the floor.” P’s EBT, 18:24 – 19:7. Additionally, the officers searched plaintiff’s person. Plaintiff’s bag contained his school identification, his wallet, documents related to the patient, and his green card.

When Garcia returned from upstairs, he told the other officers that plaintiff was lying and instructed the others to arrest him. Plaintiff attempted to explain to the officers that he was not lying and maybe Garcia just went to the wrong apartment. Plaintiff offered to escort the officers to his patient’s apartment, but they refused his requests. Plaintiff also told Garcia he had “[his] agency number, he can call [the] agency.” *Id.* at 21:1-5. The officers did not call and instead arrested plaintiff and placed him in a police van.

Plaintiff was transported to the precinct where he was fingerprinted, photographed, and searched. He was then issued a desk appearance ticket and released from the precinct. Plaintiff appeared in court on November 19, 2014 where he provided the court with paperwork from his

employer and a letter from the sister of Mr. Welch confirming his legal presence in the apartment. The charges were dismissed. Plaintiff testified that while the criminal case was pending, the State of New York suspended his home health-aide license.

*Garcia's EBT*

On day of the incident, Garcia and Officer Emerson Charles (Charles) were conducting a routine walkthrough of Mr. Welch's building. At 1 pm, the officers observed plaintiff standing in the lobby wearing dark-colored clothing. Garcia believed plaintiff was waiting for the elevator, but when it arrived, plaintiff did not get in the elevator. This prompted him and Charles to approach plaintiff to inquire as to why he was in the building. Garcia acknowledged that plaintiff could have refused to answer their questions. Defendants' exhibit G (Garcia's EBT), 23:4-21 (hereinafter "D's EBT").

Plaintiff stated he was coming from the third floor of the building and was a home health-aide visiting a patient. Garcia and the officers asked plaintiff multiple times to specify the apartment number before he finally said apartment 3G and that the patient's name was "Fernando." *Id.* at 18:21-22. Plaintiff then offered to escort the officers to the apartment, but they refused for safety reasons. Plaintiff's initial answer is why they decided to investigate further, but that they did not yet suspect "anything at all." *Id.* At 23:21-24. Plaintiff was asked to show them an identification card but according to Garcia "he didn't have no ID." *Id.* at 19:23-25. Instead, plaintiff showed the officers a piece of mail with his name and address on it. The Arrest Report and the Stop and Frisk Report indicate plaintiff showed ID because they considered the piece of mail as a sufficient form. Those boxes were ticked because they were able to verify plaintiff's information via the piece of mail even though "they are not supposed to." D's EBT, 42:4-15. At some point during the initial conversation, two other officers approached the group. Garcia noted during his testimony that plaintiff has a heavy accent.

Plaintiff then began to leave the building, which prompted Garcia to inform plaintiff that he was not yet free to leave. Garcia went upstairs with another officer to speak with the tenant of apartment 3G. The other two officers waited with plaintiff in the lobby. A woman, named Laura Coleman, answered the door to 3G and denied having a home health-aide. Garcia then returned to the lobby and informed his partner that plaintiff did not come from apartment 3G. Garcia again asked plaintiff for the apartment number because the tenant did not know plaintiff. Plaintiff said he was not lying and that he worked in the Bronx.

It was then that the officers arrested plaintiff for trespassing and searched him. Plaintiff had a dark colored bag which was searched and contained paperwork and plaintiff's wallet. Garcia and the other officers transported plaintiff to the precinct, where he was processed and issued a desk appearance ticket. Plaintiff was released at 2:31 p.m. after only an hour of detainment. No force was used on plaintiff during the incident.

#### Procedural History

On January 7, 2015, plaintiff filed a notice of claim with the City of New York, claiming damages for "false arrest, false imprisonment, malicious prosecution, assault and battery." Defendant's exhibit A at 1.

On October 22, 2015, plaintiff filed an order to show cause seeking permission to file a late notice of claim with respect to his claims for false arrest, false imprisonment, and assault and battery. The application was heard before this Court (Kotler, J.), and was granted by an order dated January 14, 2016.

Plaintiff subsequently commenced this action on November 16, 2015, alleging false arrest, false imprisonment, malicious prosecution, and assault and battery.

#### Defendants' Motion

Defendants' contend that they should be granted summary judgment dismissing

plaintiff's claims for false arrest, false imprisonment, and malicious prosecution because Garcia had sufficient probable cause to arrest, detain, and prosecute plaintiff under the circumstances. Plaintiff told Garcia that he was returning from apartment 3G and that his client's name was Fernando. Garcia went to the apartment to verify the information, but instead, found that the tenant in 3G had no knowledge of plaintiff. Moreover, plaintiff was unable to provide any other information verifying his employment. As a result, defendants argue, Garcia's own observations of the incident, coupled with plaintiff's alleged inability to provide supplemental information, provided Garcia with probable cause to believe that plaintiff was guilty of criminal trespass in the second degree.

Defendants further contend that they should be granted summary judgment dismissing plaintiff's assault and battery claim, because the record lacks any indication that force was used on plaintiff beyond placing him in handcuffs.

#### Plaintiff's Opposition

In opposition, plaintiff maintains that because Garcia arrested him without a warrant, defendants bear the burden of establishing probable cause. Plaintiff argues that defendants did not meet their prima facie burden of showing probable cause. Plaintiff maintains, that based on his testimony and Garcia's prior inconsistent statements in his EBT and his paperwork related to the arrest, the underlying facts leading up to the arrest are disputed. Therefore, defendants' motion should be denied.

### **DISCUSSION**

#### Summary Judgment Standard

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy,"

and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

#### False Arrest and False Imprisonment

To establish a cause of action for false arrest and imprisonment, plaintiff must prove that defendants “intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged.” *Hernandez v City of New York*, 100 AD3d 433, 433 (1st Dept 2012). A warrantless arrest gives rise to the presumption that the arrest was unlawful. *Broughton v State of New York*, 37 NY2d 451, 458 (1975). Where, like here, there was no initial warrant, defendants then have the burden of proving “legal justification as an affirmative defense . . . . showing that the arrest was based on probable cause.” *Id.* at 451, 458; *Schanberger v Kellogg*, 423 US 929 [1975]. Probable cause for an arrest “constitutes a complete defense to causes of action alleging false arrest [and] false imprisonment . . . [It] 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 committed or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances.” *Shaw v City of New York*, 139 AD3d 698, 699 (2d Dept 2016) (internal quotation marks and citations omitted).

It is well-settled that where facts giving rise to the arrest are undisputed, the existence of probable cause is for the court to decide as a matter of law. *Veras v Truth Verification Corp.*, 87 AD2d 381, 384 (1st Dept 1982), *affd* 57 NY2d 947 (1982). However, when the defense of probable cause is based upon “conflicting evidence, from which reasonable persons might draw different inferences, the existence of probable cause is a question for the jury.” *Id.* at 384.

Probable cause arises when the arresting officer has reasonable or probable grounds, in good faith, to believe “that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise.” *Veras*, 87 AD2d at 385, quoting *People v Coffey*, 12 NY2d 443, 451 (1963). Dismissal of the criminal charge in a false imprisonment case is evidence of the lack of probable cause, although not dispositive. *Broughton*, 37 NY2d at 458-459.

In the instant matter, defendants have not met their prima facie burden demonstrating probable cause existed at the time of the arrest for criminal trespass in the second degree.<sup>2</sup> In support of their motion, defendants submitted the testimony of both Garcia and plaintiff, as well as other relevant documentation. However, the version of events offered by the defendants, which may support a finding of probable cause, are in conflict with those of the plaintiff, and require denial of the motion. *See Lopez v City of New York*, 69 AD3d 476 (1st Dept 2010) (holding that plaintiff’s acquittal, and the conflicting version of events leading up to the arrest, require denial of defendant’s motion for summary judgment).

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<sup>2</sup> In pertinent part, “[a]” person is guilty of criminal trespassing in the second degree when he or she knowingly enters or remains unlawfully in a dwelling.” Penal Law §140.15(1).



Defendants contend that Garcia's belief of probable cause arose when the apartment number given to them by plaintiff, 3G, was incorrect. Notwithstanding the issues of fact surrounding which apartment number plaintiff provided, defendants maintain that plaintiff was unable to provide any information verifying his employment. Therefore, Garcia did not possess any information that would have "dispelled his probable cause that plaintiff not a home health aide." Burton aff, ¶ 36.

However, defendants submitted conflicting evidence regarding what information Garcia possessed at the time of the arrest and whether sufficient probable cause existed. Under the circumstances of this case, reasonable minds could draw different inferences regarding what was known to Garcia at the time of the arrest. Plaintiff testified that when first approached, he showed Garcia his employment identification. Plaintiff's assertion is further supported by the Arrest Report and the Stop and Frisk report, both of which indicate plaintiff produced ID. Garcia maintains that plaintiff only produced a piece of mail with his name and address on it. This issue of fact could lead a reasonable person to draw different inferences regarding the existence of probable cause. If a work ID with plaintiff's photo was produced, then Garcia would have possessed information that would lead him to believe plaintiff was not criminally trespassing.

Reasonable minds could also differ as it relates to plaintiff's presence in the building's lobby. Garcia maintains that he first noticed plaintiff when he observed the latter "lingering" in the lobby. Plaintiff claims however, that he was not lingering, but rather exiting the building. It was while he was exiting that Garcia shouted at him to stop. Additionally, both Garcia and plaintiff testified that plaintiff offered to escort the officers to the apartment to prove his lawful presence. Garcia testified that they refused plaintiffs request because of safety reasons, even though there were *four* officers present.

Finally, plaintiff maintains that when Garcia returned from apartment 3G, plaintiff testified that he asked Garcia to call his employer and told them he had the phone number. Plaintiff stated that they did not ask for it. Garcia testified that the officers did ask for a phone number, but plaintiff did not know it. Once again, if the phone number was available, Garcia would have possessed information to dispel his suspicions. While Garcia was not required to try and find the phone number, if known, Garcia could not have ignored its availability. Even though arresting officers are not required to investigate exculpatory justifications, they also cannot “deliberately disregard exculpatory evidence which establishes a justification.” *Jocks v Tavernier*, 316 F3d 128, 138 (2d Cir 2003). Moreover, in some cases, “failure to make a further inquiry, when a reasonable person would have done so, may be evidence of lack of probable cause.” *Manganiello v City of New York*, 612 F3d 149, 161 (2d Cir 2010). Here, Garcia’s failure to call, or to inquire about the phone number, could be evidence of the lack of probable cause. Accordingly, whether probable cause existed is a question for the jury.

Even if defendants met their prima facie burden demonstrating that probable cause existed, plaintiff raised an issue of fact in opposition by submitting his testimony and relevant documentation. For the reasons set forth above, plaintiff raised material questions of fact related to what information was available to Garcia at the time of the arrest. Plaintiff argues that therefore, the existence of probable cause is for a jury to determine. This Court agrees. The defendants’ motion to dismiss the claims of false arrest and imprisonment is denied.

#### Malicious Prosecution

“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.” *De Lourdes Torres v Jones*, 26 NY3d 742, 760 (2016)

(internal quotation marks and citations omitted). “Probable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution.” *Batten v City of New York*, 133 AD3d 803, 805 (2d Dept 2015) (internal quotation marks and citations omitted). Here, as set forth above, this Court cannot say as a matter of law that there was or was not probable cause for the criminal proceeding. Therefore, the defendants’ motion to dismiss the claim of malicious prosecution is denied.

#### Assault and Battery

Plaintiff contends that he was assaulted and battered at the time of the arrest because the arresting officer lacked probable cause to believe he committed a crime. “The rule here is that any use of force during the commission of an unlawful arrest is actionable.” *Budgar v State of New York*, 98 Misc 2d, 588 (Ct Cl 1979). As set forth above, the existence of probable cause has yet to be determined. As such, defendants’ motion to dismiss the claim of assault and battery is denied.

#### CONCLUSION

Accordingly, it is ORDERED that defendants’ motion for summary judgment dismissing plaintiff’s complaint is denied.

This constitutes the decision and order of the Court.

Dated: September 24, 2018

ENTER:



Alexander M. Tisch, A.J.S.C.

HON. ALEXANDER M. TISCH