SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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SINCERE MILLER,

Plaintiff(s),

-against-

THE CITY OF NEW YORK and NYPD DET. JOHN RAMOS, and NYPD UNDERCOVER OFFICER NUMBER 0036,

Defendant(s).

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304982/15

Index No.: ~~0302983/2015~~

DECISION/ORDER

Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion to Compel	Papers Numbered
Notice of Motion and Affirmation in Support with Exhibits	1
Affirmation in Opposition	2
Reply Affirmation in Support	3

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

Plaintiff moves pursuant to CPLR §3124 for an order compelling defendants to provide all buy reports and arrest reports for under cover drug buys conducted by UC 0036 inside of 1126 Westchester Avenue in the Bronx, a demand for the same having been made by plaintiff in his Second Supplemental Notice for Discovery and Inspection. In the alternative, plaintiff seeks to preclude defendants from offering evidence relating to said buy and bust records mentioned above. The Court notes that the parties broached this subject during a compliance conference and the Court directed plaintiff to make an application by notice of motion.

Plaintiff was arrested on September 9, 2014 for criminal sale and possession of marijuana inside a bodega located at 1126 Westchester Avenue in the Bronx. Plaintiff's complaint alleges, *inter alia*, that he was falsely arrested, assaulted, battered, and maliciously prosecuted. During the deposition of defendant, UC 0036, UC 0036 testified that he started a conversation with a woman, near the bodega and asked for "sour." UC 0036 testified that after a short exchange with the woman, "she looked around at the intersection where we were, and she looked around and she went to the

location where everybody always goes." (Exhibit 3 to the motion at p. 132, lns. 7-10). UC 0036 continues "And it is basically the same MO at that location" (id. at lns. 18-19). UC 0036 also testified he personally made multiple undercover buys inside or in front of this particular bodega (id. at p. 157 - 158). UC 0036 testified that he accompanied the woman to the bodega at which time they met two male individuals, one being plaintiff. UC 0036 testified that the extent of the conversation he had with the two individuals was them "probably" asking how much he wanted. UC 0036 did not testify that plaintiff asked him how much he wanted (id. at p. 140 lns. 8-11). Thereafter, UC 0036 testified that he, the female and one of the males proceeded towards the back of the bodega. UC 0036 testified the plaintiff remained at the front of the store. UC 0036 testified that plaintiff said the word "hurry" while UC 0036 engaged in a hand to hand transaction with another individual at the back of the store. Based upon this, plaintiff as well as the two other individuals were arrested.

In defense counsel's own words, "UC 0036 testified that UC 0036 made the determination to arrest plaintiff based upon plaintiff's involvement in the buy operations, as plaintiff conversed with UC 0036 regarding the purchase of illegal drugs and how much was wanted, acted as a lookout during the sale, and instructed UC 0036 to hurry up in the purchase (defense counsel's affirmation in opposition at para. 8). Moreover, defense counsel affirms that because UC 0036 does not specifically testify that the history of drug trafficking at this particular location was a factor in his analysis of probable cause, evidence of such a history is not material or relevant to plaintiff's prosecution of his claims. Moreover, the defense argues that such records are subject to CPL §160.50(1).

Initially, the Court notes that in his reply papers, plaintiff's attorney offered to withdraw the demand for the buy and bust records on the condition that the City agree not to use such evidence at the time of trial. In an effort to resolve the dispute, the Court spoke with both attorneys via telephone prior to rendering this decision. The Court inquired as to whether the City would agree not to use these records in its defense during trial or for summary judgment purposes. Defense counsel indicated that he would not agree to the same.

Turning to the facts of this case, UC 0036 did not testify that plaintiff asked him how much sour he wanted. UC 0036 did not testify that plaintiff indicated that he would stand by the door and act as a look out. Instead, UC 0036 testified that plaintiff was included in a group of people, with

whom UC 0036 had a conversation about drugs, in front of a location where UC 0036 admits is a high drug trafficking location. Under CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The words "material and necessary" are to be liberally construed to allow for the disclosure of any facts related to issues and controversies in litigation (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y. 2d 403, 406 [1968]). A plaintiff asserting a claim for false arrest and false imprisonment must demonstrate, "that the defendant intended to confine the plaintiff; the plaintiff was conscious of the confinement; the plaintiff did not consent to the confinement; and that the confinement was not otherwise privileged." (*Hernandez v. City of New York*, 100 A.D. 3d 433 [1st Dep't. 2012]). Where an arrest is made without a warrant, as in this case, it is presumed that the arrest was unlawful (*Smith v. County of Nassau*, 34 N.Y.2d 18, 23 [1974]). However, the defendant can prevail provided he proves legal justification for the arrest and imprisonment which "may be established by showing that the arrest was based on probable cause (*Broughton v. State of New York*, 37 N.Y.2d 451, 458 [1975]; *Hernandez* at 433-422).

Probable cause, also known as reasonable cause, exists

> [w]here an officer, in good faith, believes 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, he has such probable cause for his belief as would justify him in arresting without a warrant" (*Smith* at 34).

CPL §70.10(2) provides:

> Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.

Again, UC 0036 testified that this bodega is the place where "everybody goes" to buy drugs. He also said that when people enter this bodega, it is the same "MO" every time. Based on this testimony alone, it is clear that UC 0036 used his understanding of the history of this location, at least in part,

to determine whether an offense was being committed. Therefore, the Court finds that in this case, a history of the prior buy and bust arrests at this location by UC 0036 falls into the category of, "circumstances which are collectively of such weight and persuasiveness as to convince a person... that such offense was committee." Moreover, in *People v. McRay* (51 N.Y.2d 594 [1980]), the Court of Appeals noted that, "a high incidence of narcotic trafficking in a particular community is a relevant circumstance in assessing probable cause." Defendants attempt to distinguish the instant matter from *McRay* on the basis that in *McRay,* officers observed the defendants from across the street exchange glassine envelopes. However, the Court finds this distinction to be of no consequence for purposes of this motion. If anything, in this case, the reputation of the area is more intertwined with probable cause than it was in *McRay*. In *McRay*, police actually observed the transfer while in this case, US 0036 could not testify as to whether plaintiff said anything during the conversation outside of the bodega, prior to entering the same.

Based on the foregoing, the motion is granted to the extent that defendants are directed to provide plaintiff with records showing each and every buy and bust operation conducted by UC 0036 at, or in front of, the subject bodega for the period of one year prior to plaintiff's arrest, that resulted in an arrest. All personal identifying information of the arrestees in such records are to be redacted. Said production shall be made within 45 days of the service of this order by plaintiff with notice of entry.

The Court makes one further note for the record. After speaking with both sides as described above, the Court was copied on a telefax letter from defense counsel to plaintiff's counsel. In the letter, defense counsel advises plaintiff's counsel that after the instant application was made, plaintiff filed his note of issue. The instant application was submitted on June 28, 2018 and plaintiff's note of issue was filed on July 3, 2018. The telefax letter is dated October 1, 2018. Defendants never moved to vacate the note of issue and make no request to the Court in the letter. Therefore, the Court has ruled upon the only application properly made before it, and makes no further comment on plaintiff's filing of his note of issue at this time.

The motion is granted as set forth hereinabove and plaintiff is directed to serve a copy of this decision with notice of its entry upon defendants within 30 days of the entry date.

This constitutes the decision and order of the Court.

Dated: 10/3/18
Bronx, New York

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