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

PRESENT: Rakower PART 5

Index Number : 120644/2003

NUNEZ, ELVIS ROMAN

VS

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on ..... motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 11, 2007

EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT, STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

ELVIS NUNEZ,,

Plaintiff,

Index No.
120644/03

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT and P.O. MARK KURYS, SHIELD # 28987

Decision and Order

Defendants

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Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Plaintiff brings this action alleging violations of his rights pursuant to 42 U.S.C. § 1983. Specifically, Plaintiff claims that he was unlawfully searched, seized and imprisoned on November 6, 2002, after Police Officers executed a search warrant at his home. Plaintiff also alleges unlawful conversion of certain of his property during the execution of the search warrant and that this incident happened due to Defendants City of New York and The New York City Police Department's (City) negligent hiring, training and supervision of its employees. City now moves for summary judgment pursuant to CPLR § 3212, dismissing Plaintiff's false arrest and false imprisonment claims, stating that Plaintiffs pleadings have failed to demonstrate an essential element of a §1983 claim, namely City's "official policy or custom," which caused Plaintiff to be subjected to a depravation of his constitutional rights. City also seeks to reargue a compliance conference order, dated March 6, 2007, requesting that the Court vacate a directive which orders City "to provide any and all records for prior similar incidents in New York County by the New York City Police Department for a two(2) year period before the date of the incident . . ." arguing that the directive is vague, overbroad and impossible to comply with. Plaintiff opposes the motion arguing that City should not be permitted to reargue the Court's order. Additionally, he argues that when City complies with the directive in the March 6th order he will have the proof he requires to demonstrate City's "official policy or custom" and to overcome City's motion for summary judgment.

City's motion to reargue the Court's discovery directive in the March 6, 2007 compliance conference order is granted. Upon reconsideration the disputed paragraph is vague and over broad, and the order is withdrawn as written. To the extent not already provided, the City is to turn over any and all training manuals, patrol guide directives, or other materials which demonstrate the official policies and customs in effect for executing search warrants at the time of this incident.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212(f)) However, the opposition must offer more than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. See *Pow v. Black*, 182 AD2d 484 (1st Dept. 1992).

Wherefore, it is hereby

ORDERED that City's motion to reargue the Court's order dated March 6, 2007 is granted and the prior order is amended as follows: City is to turn over any and all training manuals, patrol guide directives, or other materials which demonstrate the official policies and customs in effect for executing search warrants at the time of this incident; and it is further

ORDERED that City's motion for summary judgment is denied as premature, without prejudice.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: May 11, 2007

Eileen A. Rakower, J.S.C.