

Maldonado v City of New York

2007 NY Slip Op 31418(U)

May 25, 2007

Supreme Court, Queens County

Docket Number: 0007580/2005

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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MATILDA MALDONADO, individually,
SABRINA MALDONADO, individually
JOSE BURGOS, individually, SABRINA
MALDONADO as parent and natural guardian
of ISIAH MALDONADO, TAMIKA MALDONADO,
KAMIKA MALDONADO, and SHANAQUA
MALDONADO, infants, MATILDA MALDONADO,
as parent and natural guardian of JIM CRUZ,
MANUELA CRUZ, ANGELA CRUZ, MICHAEL ANGELO
CRUZ, RAFAEL CRUZ and CARLOS CRUZ, infants
Plaintiffs,

Index
Number: 7580/05

- against -

Motion
Date: MAY 1, 2007

THE CITY OF NEW YORK, POLICE OFFICER
ALEXANDER FAGIOLO, POLICE OFFICER
SCOTT POLITANO, LT. BRIAN BRANIGAN,
POLICE OFFICER JOHN DOE(S) 1-4
(whose names being fictitious, the true
names being unknown to Plaintiffs, the
person being police officers),
Defendants.

Motion
Cal. Number: 12
Motion Seq. No. 4

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The following papers numbered 1 to 22 read on this motion by
plaintiffs for summary judgment and cross-motions by defendants
City of New York, Police Officer Alexander Fagiolo, Police Officer
Scott Politano and Lt. Brian Branigan.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that the motion is

decided as follows:

Motion by plaintiffs for summary judgment on their causes of action for violation of their civil rights pursuant to 42 U.S.C. §1983, false imprisonment, assault and Manuela Cruz' cause of action for battery is denied. Cross-motion by the City and the individual defendants dismissing plaintiffs' causes of action pursuant to §1983, for unlawful imprisonment, assault and battery, intentional infliction of emotional distress as against the City only and all causes of action as against Lt. Branigan is granted.

Plaintiffs' claims arise out of a forcible entry into the premises they were occupying by police officers answering a call of a burglary in progress on January 20, 2004 at approximately 7:15 P.M.

Officers Fagiolo and Politano, in their depositions, testified that they answered a call of a burglary in progress. When they arrived at the subject premises, a detached residential home, they were met by two women in front of the premises who represented that they were the daughters of the owner and that no one was supposed to be in the premises. They showed the officers some documentary proof of ownership of the house. The officers could not identify what the document was, only that it indicated that the premises belonged to the women's family. The women apprised the officers that the owner of the house was their father.

Based upon the representations of the women and the proof of ownership they displayed, the officers went to the door of the premises to investigate. They noticed lights and activity in the home. They knocked on the door repeatedly and identified themselves as police officers. They were in plain clothes, but they wore their shields around their necks. They testified that someone opened the door slightly and immediately shut it in their faces. Officer Politano then kicked the door in and both officers entered with guns drawn and ordered the occupants to get down on the floor. The officers testified that when they saw that there were children and that they were obviously living in the house, they holstered their weapons. Officer Fagiolo testified that he and Officer Politano holstered their guns approximately 15 seconds after entering the premises. The officers testified that they asked the occupants to show them a lease to prove their right to occupancy of the premises. They were shown a lease and told that the brother of the women had rented the house to them. Apparently there was a telephone call from the brother to confirm the same. Subsequently, other officers arrived on the scene, including Lt. Branigan.

When the officers came to the determination that plaintiffs

were present in the premises legally, and that no crime had been committed, but that it was merely a Housing Court matter, they withdrew. They made no arrest, did not handcuff or restrain anyone and did not search the house.

This testimony is essentially uncontradicted by plaintiffs, except that Matilda Maldonado, in her 50-H hearing, stated that the officers did not identify themselves before entering the house. She stated that the two women representing that they were the owners of the house entered with the officers accusing plaintiffs of being squatters and demanding that they be arrested. The officers at that point asked her to show them a lease, which she did. It was five to seven minutes before the other officers arrived. Maldonado represented that the police officers were at the house for no more than a half an hour.

Plaintiffs contend that the officers' warrantless entry into the premises was unjustified as a matter of law and, therefore, establishes their right to summary judgment for violation of their Fourth Amendment rights pursuant to 42 U.S.C. §1983 and for unlawful imprisonment, assault and battery.

Warrantless searches are unreasonable *per se*, subject to certain exceptions, including, 1) searches undertaken by consent and 2) those conducted pursuant to exigent circumstances (see People v. Adams, 53 NY 1 [1981]).

A warrant is not required to conduct a search pursuant to the consent of a party who has lawful authority or control over the property (see Schneckloth v. Bustamonte, 412 US 218 [1973]). Plaintiffs argument that since the complainants were not the owners of the house but his daughters, they had no authority to consent to the officers' entry is without merit. Consent may come from a third party "who possessed common authority over or other sufficient relationship to the premises" (United States v. Matlock, 415 US 164 [1974]).

In the instant case, however, the daughters of the owner of the subject premises did not have actual authority to consent to a warrantless entry because plaintiffs were the lawful tenants of the subject premises entitled to exclusive occupancy (see People v. Ponto, 103 AD 2d 573 [Second Dept 1984]). However, the officers had no way of knowing that the house was being occupied by tenants until after they had investigated the complainants' claim. They were not only entitled, but duty-bound, to rely upon the representations of the owner or the owner's apparent agent and investigate the claim of a crime in progress. Therefore, even though the owner's daughters turned out not to have actual

authority to give consent to the officers to enter the house, their apparent authority over the premises, as gleaned objectively from the documentary proof they showed the officers of their relationship to the premises and their representation that there were intruders in the house, together with the confirmation by the officers that there were unknown individuals in the house who had opened the door and then immediately shut it upon seeing them, justified the officers' determination that there was probable cause that a crime was being committed and that there were exigent circumstances to enter the premises. Moreover, it was reasonable for the officers to believe that their conduct in entering the house was not violative of any Constitutional rights. Although police officers generally may not, absent consent or exigent circumstances, effect a warrantless arrest of a suspect while the suspect is in his own home, the officers herein were not seeking to arrest or seize evidence from a suspect in his own home, but were seeking to interdict an intruder in someone else's home. A burglar or trespasser has no expectation of privacy under the Fourth Amendment (see People v. Rogers, 115 AD 2d 293 [4th Dept. 1985]). Therefore, the officers were entirely justified in believing that no violation of anyone's Constitutional rights would result from their entry into the subject premises, especially since their entry was not made for the purpose of arresting a known suspect or seizing evidence.

Plaintiffs lose sight of the fact that this is not the type of case, such as presented in the cases they cite, where a police officer's entry into the house was motivated by an intent to arrest or seize evidence. They were merely responding to a complaint of a crime in progress and performed their duty by investigating. Since their entry into the house was at the behest of family members of the homeowner bearing the indicia of authority and color of right to occupy the premises and was for the purpose of thwarting a possible crime in progress and protecting the owner's property against intruders, plaintiffs' argument that a warrant was required under such circumstances is without merit.

Even if, arguendo, the officers failed to ascertain the actual authority of the homeowner's representatives, since the Fourth Amendment protects only "against unreasonable searches and seizures," and given that since the officers acted in a reasonable fashion in response to the circumstances with which they were confronted, then any error in judgment on their part in failing to uncover that the situation was merely a landlord-tenant dispute and not a burglary or trespass did not give rise to an unreasonable "search" pursuant to the Fourth Amendment (see People v. Adams, 53 NY 2d 1 [1981]). Therefore, no warrant was required as a prerequisite to gaining entry into the subject premises and, thus,

there was no violation of plaintiffs' Fourth Amendment rights, as a matter of law.

Moreover, the officers' entry into plaintiffs' home did not constitute an unreasonable search as defined under the Fourth Amendment since there were sufficient exigent circumstances to justify the intrusion.

In order for exigent circumstances to be found so as to relieve the police of the Fourth Amendment's obligation to obtain a warrant, "the police must have reasonable grounds to believe that an emergency exists or there is an immediate need for their assistance to protect life or property, there must be some reasonable basis to associate the emergency with the area to be searched, and the search must not be motivated by an intent to arrest and seize evidence" (Colao v. Mills, __NY 2d__, 2007 NY Slip Op 03230, *2 [3rd Dept, April 19, 2007]).

The undisputed facts presented on this record establish that the officers were justified under the exigency of the moment to gain entry into the subject premises. They had been summoned to the subject premises by a call of a burglary in progress and upon arrival were informed by individuals with apparent authority over the premises that there were unknown, unauthorized persons in the house. The officers were diligent to ask for verification of the complainants' authority and relationship with respect to the premises. After being presented with documentary proof to their satisfaction, they then proceeded to investigate. They observed that there were lights on in the house. In his deposition, Officer Fagiolo stated that, in his experience, it was not uncommon for burglars to have the lights on in houses they are burglarizing. They knocked on the door and, even though they were not uniformed, they wore their shields around their necks. The door briefly opened then slammed shut.

Officer Fagiolo stated that under the totality of the circumstances, he believed that either there was a burglary in progress or there was a criminal trespass. Based upon the facts presented on this record, there was clearly probable cause for the officers to believe that there was either a burglary in progress or a trespass. Even if there was probable cause only to conclude that the unknown persons in the house were committing merely an ordinary trespass, as opposed to criminal trespass, an arrest would be permissible without a warrant if the trespass was being committed in the presence of the arresting officer (see CPL 140.10[1][a]). In the instant case, the officers observed that there were individuals in the house. Accordingly, they were justified in gaining forcible entry into the premises by kicking the door open, especially since

the complainants who had represented to them that there were intruders in their father's house and had shown documentary indicia of authority over the premises had consented, even insisted, as per the testimony of Maldonado, that they enter the premises and arrest the intruders.

Under the circumstances presented, plaintiffs' argument that there was neither probable cause nor exigent circumstances because the officers had no proof that a crime was taking place inside the house is without merit. There were ample facts for them to conclude objectively that there was a crime being committed - either a burglary or criminal trespass. The fact that the complainants' representations in the aftermath of the incident proved to be either false or mistaken is irrelevant as to the City and the individual defendants.

Information provided by an identified citizen accusing another individual of a crime constitutes sufficient probable cause for the police to arrest, unless under the circumstances a reasonable person would have made further inquiry and the arresting officer failed to do so (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2nd Dept 2003]). Certainly, such an accusation is sufficient probable cause merely to investigate.

The complainants herein called in a burglary in progress and told the officers that there were unauthorized individuals in their house. The officers made further inquiry by seeking verification of the authority of the complainants over the property and, in addition, before entering the premises, knocked on the door repeatedly to ascertain the identity and authority of any occupants. After they entered and secured the premises and ascertained that there was no danger, they asked the occupants to show them a lease to prove they were lawfully occupying the premises. Upon being shown a lease and observing that they were residing in the premises, and upon receiving telephonic confirmation from the owner's brother that the occupants he had rented the premises to them, the officers left. No one was arrested, handcuffed or restrained. Nor were the officers present in the premises for an inordinate period of time. As soon as they discovered that the situation was not as had been represented to them, they left.

If plaintiffs were aggrieved, their cause of action is against the complainants who precipitated the incident by their false or erroneous accusations, not the police officers who discharged their duty by responding to the complaint, investigating whether there was, in fact, a crime in progress, making reasonable inquiries before proceeding and promptly withdrawing upon ascertaining that

no offense had been committed.

Therefore, based upon the undisputed facts presented on this record, there were clearly sufficient exigent circumstances such that no reasonable jury may conclude that the entry into plaintiffs' premises was unreasonable so as to constitute a violation of their rights under the Fourth Amendment of the United States Constitution. Consequently, inasmuch as plaintiffs' Fourth Amendment rights have not been violated, their complaint based upon 42 U.S.C. §1983 must fail.

Even had this Court found that plaintiffs' Fourth Amendment rights were violated, since the record on this motion demonstrates that it was objectively reasonable for the officers to believe that they were acting in a manner that did not violate plaintiffs' Constitutional rights, plaintiffs' cause of action against them based upon 42 U.S.C. §1983 must fail (see Zientek v. State of New York, 222 AD 2d 1041 (4th Dept 1995)).

For the same reason, the officers are entitled to qualified immunity. Police officers are entitled to qualified immunity where it is established that it was objectively reasonable for them to believe that their actions were appropriate under the circumstances or that reasonable police officers could disagree as to whether their actions were proper (see Doyle v. Rondout Valley Central School District, 3 AD 3d 669 [3rd Dept 2004]; (Colao v. Mills, __ NY 2d __, 2007 NY Slip Op 03230, supra). It was reasonable for Officers Fagiolo and Politano to believe that their conduct was appropriate under the circumstances, and officers of reasonable competence could have disagreed as to whether Fagiolo and Politano correctly concluded that the family members of the homeowner had exhibited sufficient authority to authorize their entry into the house and whether the totality of the circumstances observed justified their forcible entry. There are no sharp factual disputes regarding these issues so as to preclude resolution of the issue of qualified immunity on this record (see Stipo v. Town of North Castle, 205 AD 2d 608 [2nd Dept 1994]). Since Officers Fagiolo and Politano are entitled to qualified immunity, no action lies against them pursuant to 42 U.S.C. §1983 as a matter of law (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]). Since they established that they had an objectively reasonable belief that their actions did not violate any clearly established rights, the burden then shifted to plaintiffs to disprove the officers' entitlement to qualified immunity (see Kravits v. Police Dept. Of the City of Hudson, 285 AD 2d 716 [3rd Dept 2001]). Plaintiffs have failed to meet their burden in this regard.

The existence of probable cause for the entry by the officers

also immunized the City from a §1983 claim (see Martinez v. City of Schenectady, supra). In any event, the claim against the City pursuant to §1983 must fail since there was no unreasonable search conducted by the officers and, thus, no violation of plaintiffs' Fourth Amendment rights in the first instance.

Therefore, the Court does not reach the issue of whether a §1983 claim against the City exists by virtue of an official municipal policy or custom that deprived plaintiffs of their Constitutional rights.

As to plaintiffs' claim of unlawful imprisonment, a finding of probable cause operates as a complete defense to an action alleging false imprisonment, whether brought under State law or §1983 (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2nd Dept 2003]). Since the officers had probable cause to believe that a crime was being committed, both the individual defendants and the City are entitled to summary judgment dismissing plaintiff's cause of action against them for unlawful imprisonment.

As to the claims of assault and battery, this Court notes, initially, that the existence of probable cause does not bar causes of action sounding in assault and battery based upon the use of excessive force (see Bennett v. NYC Housing Authority, 245 AD 2d 254 [2nd Dept 1997]).

Plaintiffs' claim of assault is based upon the officers' brandishing of their weapons. There is no allegation of any other threats of physical violence or (with the exception of the claim of Manuela Cruz for battery based upon her allegation that she was struck by the door that had been kicked open) physical contact between the police officers and plaintiffs. Maldonado testified that no one touched any of the defendants (Exhibit "F" p. 93). Plaintiffs argue that the officers' entry into their home with guns drawn constitutes as assault as a matter of law. Plaintiffs' argument, however, is premised upon the assumption that the warrantless entry was unlawful and not justified by probable cause or exigent circumstances.

Since, as heretofore explained, plaintiffs' Fourth Amendment rights were not violated and there was probable cause to believe that a possible burglary was in progress and the existence of exigent circumstances for the forcible entry, and taking into account that the possible burglary in progress was being committed during the nighttime hours (7:15 P.M. in January) and thus posed a greater threat of danger, this Court concludes that it was objectively reasonable for the officers to believe that it was necessary to display their weapons (see Baez v. City of Amsterdam,

245 AD 2d 705 [3rd Dept 1997]). Therefore, defendants are entitled to summary judgment dismissing plaintiffs' claims for assault.

As to the battery claims asserted on behalf of all defendants in the complaint, except for Manuela Cruz, defendants are entitled to summary judgment, since there was no allegation or showing of any physical contact.

As to Manuela Cruz, she alleges that she was struck in the head by the door when it was kicked open. Plaintiffs are correct that direct contact is not required for there to be a battery, but that it is sufficient that defendant set in motion the instrumentality that causes the contact (see DeSantis v. Luger, 257 NY 476 [1931]). However, an essential element of battery, which is an intentional tort, is intent to bring about a harmful or offensive bodily contact (see Messina v. Matarasso, 284 AD 2d 32 [2001]). There is no evidence or allegation that Officer Politano intended to hit Cruz. Therefore, defendants are entitled to summary judgment dismissing the battery claim asserted by Manuela Cruz.

Finally, Lt. Branigan is entitled to summary judgment dismissing all causes of action asserted against him, for the same reasons as heretofore stated with respect to Officers Fagiolo and Politano. In addition, the record on this motion establishes he was not present at the time Fagiolo and Politano entered the premises, but arrived on the scene, even by Maldonado's estimation, about five to seven minutes after they had entered. Moreover, there is no allegation by Maldonado that Lt. Branigan acted in any manner so as to support a claim of intentional or negligent infliction of emotional distress. Indeed, Maldonado states that the lieutenant apologized to her for what had occurred. Therefore, there is no basis for the claims asserted against him.

Plaintiffs concede that a claim of intentional infliction of emotional distress may not be brought against a municipality (see Clark-Fitzpatrick, Inc. V. Long Island Railroad, 70 NY 2d 382 [1987])and, therefore, do not oppose dismissal of its claim for intentional infliction of emotional distress against the City.

Accordingly, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment dismissing plaintiffs' causes of action against the City and the individual named defendants for violation of their civil rights pursuant to 42 U.S.C. §1983, false imprisonment, assault and battery, and their causes of action for intentional infliction of emotional distress as against the City only is granted.

Cross-motion by the City to bifurcate plaintiff's Monell

claims against the City from their §1983 claim against the individual named defendants, to stay discovery related to plaintiff's Monell claims until the issue of liability of the individual named defendants is decided or, in the alternative, for a protective order pursuant to CPLR 3103 for plaintiff's notice of Discovery and Inspection and plaintiff's notice of Deposition is denied as moot.

Dated: May 25, 2007

KEVIN J. KERRIGAN, J.S.C.