

Paredes v City of New York

2008 NY Slip Op 33399(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 112225/05

Judge: Matthew F. Cooper

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

MATTHEW F. COOPER

PRESENT: HON. PAUL G. FENNER

Justice

PART 52

Index Number : 112224/2005

PAREDES, WILSON

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

STRIKE ANSWER

INDEX NO. 112224/05

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

2

3,4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Cross motion

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

DEC 18 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

Dated: 12/15/08

MATTHEW F. COOPER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
WILSON PAREDES,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT AND THE DISTRICT
ATTORNEY OF NEW YORK COUNTY,

Defendants.

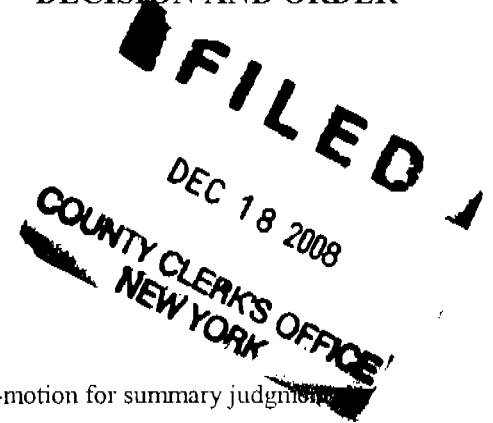
-----X

For the Plaintiffs:
Lisa J. Ruiz
Newman, O'Malley & Epstein, LLC
217 Broadway, Suite 500
New York, NY 10007

For Defendant City of New York
Michael A. Cardozo, Esq.
Corporation Counsel
100 Church Street
New York, NY 10007

Index Number 112225/05
Mot. Seq. No. 002

DECISION AND ORDER



Papers and exhibits considered in review of the motion to strike and the cross-motion for summary judgment:

- Notice of Motion: 1
- Notice of Cross-Motion 2
- Affirmation in Opposition 3
- Reply Affirmation 4

Matthew F. Cooper, J.

This case was brought by plaintiff, Wilson Paredes, for claims of false arrest, false imprisonment, malicious prosecution, civil rights violations under the 4th, 5th, and 14th amendments to the U.S. Constitution, and a violation of 42 U.S.C. §1983, all arising from plaintiff's arrest and detention on July 2, 2004. Plaintiff moves for an order pursuant to CPLR 3126 striking the answer of defendant, the City of New York ("the City"), for willful and contumacious disregard of numerous discovery orders of the court. The City opposes the motion and has filed a cross-motion for an order granting summary judgment dismissing the complaint.

Factual Background

This case stems from plaintiff's arrest on July 2, 2004, for the alleged sale of narcotics to an undercover police officer ("undercover") on June 11, 2004. Plaintiff's arrest was the result of a buy and bust operation conducted at 555 West 173rd Street, New York, NY. This location was chosen based on numerous complaints and arrests lodged by other police officers regarding the sale and use of narcotics in the area.

On June 11, 2004, the undercover approached "JD Papi Low," who the officer would later identify as the plaintiff, at the corner of 173rd Street and Audubon Avenue and asked him for narcotics. "JD Papi Low" told the undercover to "wait for the cops to leave" and then go into 555 West 173rd Street. After waiting, the undercover entered the building and was met by "JD White Shirt," who asked him how many bags he needed. The undercover replied that he needed five bags while another man, "JD Gray," placed a phone call and told the person on the other end how many bags were required. "JD Papi Low" met the undercover halfway up the stairs and handed the undercover five clear plastic bags containing cocaine. The undercover conducted two subsequent buys at this same location from individuals other than "JD Papi Low" and each time the purchased drugs were brought down from Apartment 24.

Prior to arriving at 555 West 173rd Street on the night of July 2, 2004, the police obtained a search warrant for Apartment 24 based on the undercover's multiple buys at the location. After the undercover conducted another buy on July 2, Detective Monique Parker executed the warrant and searched Apartment 24 while the undercover waited outside. All the persons found in the apartment when the warrant was executed, including the plaintiff, were taken outside so the undercover could identify them. The undercover identified Wilson Paredes as the man he had

* 4]
labeled “JD Papi Low” who had sold him cocaine at that same location on June 11.

Plaintiff was arrested and held in custody for approximately three days. He was released on the evening of July 4 or morning of July 5, 2004, after his family posted bail. On March 1, 2005, all criminal charges against the plaintiff were dismissed by the Criminal Court of the City of New York on speedy trial grounds. Plaintiff served a Notice of Claim on the City on April 1, 2005. On August 31, 2005, plaintiff purchased an index number and filed the summons and complaint, commencing this civil action. Plaintiff now moves to strike the City’s pleadings for alleged discovery violations and the City cross-moves for summary judgment.

Analysis

I. Plaintiff’s Motion to Strike the City’s Pleading

CPLR 3126 permits the court to strike a party’s pleadings or parts thereof where the party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed.” CPLR 3126(3). Such extreme action is only permissible when the moving party has met its burden of conclusively demonstrating “that the failure to disclose was willful, contumacious or due to bad faith.” *Roman v. City of New York*, 38 AD3d 442, 443 (1st Dept 2007). “The willful failure to comply with a discovery order assumes ‘an ability to comply and a decision not to comply.’” *Dauria v. City of New York*, 127 AD2d 459, 460 (1st Dept 1987)(citing 3A Weinstein-Korn-Miller, NY Civ Prac ¶ 3126.04). An attempted or partial compliance with a discovery order, without additional information presented by the moving party, is not willful and is insufficient to permit the striking of the pleadings. *Dauria* at 460 (declaring the City’s attempt to comply with plaintiff’s discovery requests as in good faith where the requested information did not exist and the city conducted a search for the

information); *Thomas v. McGuire Serv. Corp.*, 251 AD2d 148 (1st Dept 1998)(holding that partial fulfillment of the discovery order, where the failure to produce the remaining requested information was duly explained, does not amount to willful or contumacious behavior). Before an inference of a willful and bad faith intent to ignore the orders of the Court can be inferred, the non-moving party is afforded the opportunity to offer a reasonable excuse for its failures. *Dauria* at 460; *D'Aloisi v. City of New York*, 7 AD3d 750 (2d Dept 2004); *Bryne v. City of New York*, 301 AD2d 489 (2d Dept 2003). Where the offered excuse is either reasonable or the requested information is impossible to acquire, it will be improper for the court to take the extreme action of striking the pleadings. *Dauria* at 460; *D'Aloisi* at 750; *Bryne* at 490. The court is therefore required to not only consider the claims of bad faith and willful resistance on the part of the moving party, but also to fully consider the reason for the non-moving party's failure to respond.

Plaintiff asserts that the following has not been provided by the defendant: the undercover officer's Daily Reports or DD5's for the particular operation; a copy of the field test reports; the date the undercover officer began his duty at the location in question; a copy of all tapes for the operation; the undercover officer's paperwork and personal file; copies of all tactical plans for the operation; all videotapes and dvds of the scene taken between June 30, 2004, and July 3, 2004; all audio recordings for this period; activity reports for team members Parker, Rolden, Vaugh, Selder, Sherman, Helican, and Carello; copies of NITRO checks, BADS checks, and CARS checks regarding the arrest of the plaintiff; an *in camera* review of the undercover officer's personal file; and a copy of plaintiff's criminal court record. Without citing any additional evidence of willful, contumacious, or bad faith intentions or behavior on part of the defendant, plaintiff asserts that defendant's failure to comply with the requests and orders for

discovery requires this court to strike defendant's pleadings in accordance with CPLR 3126. In response to plaintiff's charges of failure to respond to discovery demands, the City provides explanations for each item the court ordered and why the particular item was not disclosed. The reasons presented, without going into to the particular excuse for each individual item, include: the document or item does not exist, was already turned over, or is unable to be located after a diligent search; it is not the duty of the City to secure the requested document for the plaintiff, absent a motion to compel; and the failure to initially turn over the information was a mere oversight on the part of defendant and has since been submitted to the plaintiff.

The excuses for delay or non-compliance put forth by the City are reasonable and do not reflect a willful intention to disregard the court's orders. Although some of plaintiff's discovery demands have not been met, the City nevertheless has produced two witnesses for depositions, provided plaintiff with numerous documents and records, provided the court with a copy of the affidavit in support of the search warrant (for an *in camera* inspection), and sought to comply to the extent possible with all Compliance Conference and Case Scheduling Orders. The City has also attempted to identify the detectives assigned to the case, searched the archives of the police department for the case file, and contacted Detective Parker to see if she could find her case file.

Not only has plaintiff failed to meet his burden of establishing the willful, contumacious, or bad faith conduct on the part of the City, but the City has demonstrated substantial compliance with the discovery process. For this reason, plaintiff's motion to strike the City's pleadings must be denied. Moreover, the court is not persuaded that whatever discovery remains outstanding is crucial to the determination of the facts of this case so as to bar to the City's cross-motion for summary judgment. A plaintiff's claimed need for discovery materials unsupported by facts

[* 7]

suggesting it might lead to relevant evidence is insufficient to forestall summary judgment. 2386
Creston Ave. Realty, LLC. v. M-P-M Mgmt. Corp., 867 NYS2d 416, 420 (1st Dept 2008).

II. *The City's Cross-Motion to Dismiss*

A. *Failure to File Timely Notice of Claim*

The City cross-moves to dismiss the false arrest and false imprisonment charges on the theory that plaintiff failed to comply with General Municipal Law ("GML") §50-(e) by not filing a Notice of Claim within the required time period. Plaintiff filed the Notice of Claim on all claims asserted on April 1, 2005. This was approximately nine months after plaintiff's release from police custody on July 5, 2004, and one month after the criminal charges were dismissed on March 1, 2005. Although plaintiff was released on bail, he argues that he was still in custody because he was unable to leave the jurisdiction. Plaintiff, therefore, contends that the date from which the ninety day period to file the Notice of Claim for his tort claims against the City should begin on the date the criminal charges were dismissed. Alternatively, plaintiff argues that the City is barred from raising the affirmative defense of a Notice of Claim defect because this defense was not asserted in the answer.

GML §50-(e) requires that a Notice of Claim be filed "within ninety days after the claim arises" to bring a tort claim for personal injuries sustained by the negligence or wrongful act of the City. Compliance with the Notice of Claim provision of GML §50-(e) is a condition precedent to filing suit and as such, must be pleaded in the complaint. *Nicholas v. City of New York*, 130 AD2d 470, 471 (2d Dept 1987). The failure of the defendant to allege a Notice of Claim defect as an affirmative defense in its answer does not waive this defense, since the Notice of Claim requirement is a precondition to plaintiff's suit. *Id.* For purposes of GML §50-(e), the

claims for false imprisonment and false arrest arise on the date plaintiff is released from custody. *Nunez v. City of New York*, 307 AD2d 218, 219 (1st Dept 2003). The claim of malicious prosecution, however, does not arise until after the criminal charges are dismissed by the criminal court. *Id.* Failure to file a timely notice of claim, or apply to the court to file a late notice of claim, is a substantive element of the cause of action and grounds for dismissal if not complied with. *See Saler v. City of New York*, 96 AD2d 583 (2d Dept 1983); *see also Mojica v. New York City Transit Authority*, 117 AD2d 722, 724 (2d Dept 1986).

The Notice of Claim for the false imprisonment and false arrest claims, in this case, was required to be filed no later than October 4, 2004; ninety days after plaintiff was released from custody on July 5, 2004. *See Jackson v. Police Dept. of City of New York*, 119 AD2d 551, 554 (2d Dept 1986)(declaring that the period for filing a notice of claim for a false imprisonment action commences on the date the plaintiff was released from the custody of the police, not on the date the charges were dismissed). Plaintiff did not meet this deadline and has not sought leave of the Court to file a late Notice of Claim. A late Notice of Claim on a tort action against the City may be filed within a year and ninety days of the claim arising, but only if the party serving the late notice petitions the court for permission. *Pierson v. City of New York*, 56 NY2d 950, 955 (1982); GML §50-(e)(5). Plaintiff's failure to file a timely Notice of Claim on the false arrest and false imprisonment claims, or apply to this court to file a late notice of claim, requires the court to grant the motion to dismiss as to these claims. The Notice of Claim for all other claims is timely as it was filed within ninety days of the dismissal of the criminal charges against the plaintiff.

B. Insufficiency of Notice of Claim

The City also cross-moves for dismissal of all claims on the ground that the Notice of Claim fails to adequately identify the location of the plaintiff's arrest. Although the Notice of Claim was insufficient on its face for failing to specify where plaintiff's arrest occurred, the information within the notice, including the name of the plaintiff and the date of arrest, did not prejudice the City as sufficient information was included in the Notice of Claim and the summons and complaint filed four months later, to identify and investigate the arrest in question. *See Mayer v. DuPont Associates, Inc.*, 80 AD2d 799, 800 (1st Dept 1981)(finding that an insufficient notice of claim does not prejudice the defendant and is not grounds for dismissal where the specific location was clearly identified in other documents in the defendant's possession). The City was not prejudiced by plaintiff's insufficient Notice of Claim and as such, this portion of the motion is denied on all remaining claims. Even if the City was prejudiced by the insufficiency of the Notice of Claim, this portion of the motion is moot in light of the above dismissal of the false arrest and false imprisonment claims and the decision below dismissing all remaining claims.

C. Motion to Dismiss the Malicious Prosecution Claim

A claim of malicious prosecution requires plaintiff to prove each of the following elements: (1) the initiation of a proceeding, (2) its termination favorably for the plaintiff, (3) lack of probable cause, and (4) actual malice. *Colon v. City of New York*, 60 NY2d 78, 82 (1983); *Nardelli v. Stamberg*, 44 NY2d 500, 502 (1978). It is undisputed that the first two elements of the claim have been established by the plaintiff. The City asserts that the undercover's arrest was based on probable cause, that plaintiff failed to demonstrate that his arrest was based on a wrong

or improper motive, and that the malicious prosecution claim should be dismissed for failure of plaintiff to establish all elements of the claim.

The “actual malice” prong of a malicious prosecution claim requires proof that defendant commenced the prior criminal proceedings due to a wrong or improper motive: something other than a desire to see the ends of justice served. *Nardelli* at 503. Actual malice may be established by plaintiff demonstrating that defendant was motivated by spite or hatred, or alternatively, where direct evidence of an ulterior and malicious motive on the part of the prosecution is not available, by a demonstration that the prosecution lacked probable cause to initiate criminal proceedings “in so far as it tends to show that the accuser did not believe in the guilt of the accused.” *Martin v. City of Albany*, 42 NY2d 13, 17 (1977); *Nardelli* at 503. In this case, plaintiff has submitted no direct evidence of actual malice or bad faith by the City. Thus, the facts and circumstances surrounding plaintiff’s arrest and prosecution must be reviewed to determine if an inference of actual malice is proper due to the lack of probable cause. *See Martin* at 18. The First Department has established that for purposes of a malicious prosecution claim, probable cause is defined as “the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of.” *Kellermueller v. Port Authority of New York and New Jersey*, 201 AD2d 427, 428 (1st Dept 1994). When determining the existence of probable cause, a court must consider whether there was probable cause to both arrest the plaintiff and to commence and continue the prosecution of the plaintiff for the count with which he was charged. *Id* at 428-29.

In this case, plaintiff was arrested on July 2 based on the undercover’s identification of the plaintiff as the person who sold him cocaine at the June 11, 2004 buy. The officer

conclusively stated in his examination before trial that “JD Papi Low,” the individual who sold him drugs on June 11, and the plaintiff were the same person. This identification, based on the undercover’s own personal observations, establishes probable cause for the arrest. *See People v. McRay*, 51 NY2d 594, 599 (1980); *see also Batista v. City of New York*, 15 AD3d 304 (1st Dept 2005); *see also People v. Williams* 255 AD2d 133 (1st Dept 1998)(all finding probable cause to arrest where an officer observed a suspect engage in behavior which reasonably appeared to be criminal conduct); *see generally* New York Criminal Procedure Law 140.10(1)(declaring that a police officer may arrest a person for “any offense when he has reasonable cause to believe that such person has committed such offense in his presence”). The decision to arrest the plaintiff was not based on his presence in the apartment for which the officers had obtained a search warrant, but rather on his direct involvement in the sale of cocaine to the undercover on June 11. The arresting officer, therefore, had probable cause to arrest the plaintiff based on his prior observations of the plaintiff’s criminal activity.

This court also finds that probable cause existed to commence and continue the prosecution of the plaintiff for the sale of narcotics to the undercover. This finding is based on the information contained in the felony complaint and the District Attorney Datasheet, which plaintiff attaches to his opposition to the cross-motion. Both documents state that plaintiff was involved in the sale of cocaine to the undercover. Plaintiff, however, points to the fact that the complaint refers to “Defendant Wilson Parades acting in concert with . . . an unapprehended individual, JD Papi Low.” Plaintiff contends that the statement, with its allegation that plaintiff and “JD Papi Low” are not one and the same but instead are two separate individuals, creates an issue of fact that requires the case to go to a jury. While the discrepancy raises questions,

particularly with regard to the strength of the criminal case, the court can still conclude, as a matter of law, that the elements of malicious prosecution are not present. Irrespective of whatever confusion there may have been with regard to plaintiff's identity as "JD Papi Low," the undercover's identification of plaintiff as the man who sold him cocaine on June 11, provided the prosecution with the reasonable belief that it had lawful grounds to charge plaintiff with the sale of narcotics. *See Kellermueller* at 428 (defining probable cause as facts strong enough to justify a reasonable man that he has lawful grounds for prosecuting the defendant in the manner complained of).

Plaintiff has failed to establish the elements of malicious prosecution as actual malice cannot be inferred due to the existence of probable cause and there is no evidence demonstrating a malicious intent on behalf of the officers or the District Attorney's office. Accordingly, that portion of the summary judgment motion seeking to dismiss the malicious prosecution claim must be granted. Additionally, it is noted that the existence of probable cause for the arrest would also require the dismissal of the false arrest and false imprisonment claims, were they not already dismissed for untimely filing the Notice of Claim. *See Marrero v. City of New York*, 33 AD3d 556, 557 (1st Dept 2006).

D. Dismissal of Plaintiff's Civil Rights and 42 U.S.C. §1983 Claims

The City also moves to dismiss plaintiff's alleged violations of the 4th, 5th, and 14th amendments to the United States Constitution, giving rise to a claim under 42 U.S.C. §1983. Where probable cause has been established, claims of false arrest, false imprisonment, or malicious prosecution cannot be maintained under New York state law or 42 U.S.C. §1983. *Carlton v. Nassau County Police Dept.*, 761 NYS2d 98, 100 (2d Dept 2003); *Kandekore v. Town*

of *Greenburgh*, 663 NYS2d 274 (2d Dept 1997); see also *Pierson v. Ray*, 386 US 547, 557 (1967)(holding that the defense of a good faith arrest based on probable cause is available in actions for false arrest, false imprisonment and 42 U.S.C. §1983); see also *Miloslavsky v. AES Engineering Soc Inc.*, 808 F.Supp. 351, 354 (2d Dept 1997) (affirming that where probable cause to arrest is demonstrated in a action under 42 U.S.C. §1983, “a law officer cannot be found to have violated arrestee's constitutional rights as a consequence of that arrest”). Due to the demonstrated existence of probable cause to arrest and prosecute, the federal claims under 42 U.S.C. §1983 must also be dismissed.

In light of the foregoing, it is therefore

ORDERED that plaintiff's motion to strike the City's pleadings is denied; it is further

ORDERED that the City's motion to dismiss the false arrest and false imprisonment claims due to the existence of probable cause to arrest and the untimely filing of the Notice of Claim is granted; it is further

ORDERED that the City's motion to dismiss the malicious prosecution claim is granted due to the existence of probable cause to arrest and there being no evidence of malicious intent; it is further

ORDERED that the City's motion to dismiss all 42 U.S.C. §1983 claims and Constitutional violations is granted due to the existence of probable cause; it is further

ORDERED that upon service upon him of this order and decision with notice of entry, the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

Dated: December 16, 2008

ENTER:



Matthew F. Cooper, J.S.C.

FILED
DEC 18 2008
COUNTY CLERK'S OFFICE
NEW YORK