

Lopez v City of New York

2009 NY Slip Op 30046(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 113638/05

Judge: Matthew F. Cooper

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

MATTHEW F. COOPER
HON. PAUL G. FEINMAN
J.S.C.

PRESENT:

PART 52

Index Number : 113638/2005
LOPEZ, CLAUDIO
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
STRIKE ANSWER

INDEX NO. 113638/2005
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

1-6

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

Dated: 1/9/09

[Signature]

J.S.C.

MATTHEW F. COOPER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Supplemental order to X-motion received in court on 12/3/08

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

-----X

CLAUDIO LOPEZ,

Plaintiff,

Index Number 113638/05
Mot. Seq. No. 003

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, DETECTIVE TROY NEGRON
and POLICE OFFICERS 1-10, whose names
are presently unknown,

DECISION AND ORDER

Defendants.

-----X

For the Plaintiffs:

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For Defendant City of New York

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Papers and exhibits considered in review of the motions and cross-motions:

Notice of Motion:	1
Notice of Cross-Motion	2
Affirmation in Opposition	3
Reply Affirmation	4
Supplemental Affirmation in Opposition	5
Reply to Supplemental Affirmation in Opposition	6

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Matthew F. Cooper, J.

Plaintiff has brought this action for false arrest, false imprisonment, malicious prosecution, and a violation of 42 U.S.C. §1983, all arising from his arrest on September 28, 2003, and his subsequent detention. Plaintiff now 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 cross-moves for summary judgment dismissing the complaint as to the false arrest claim only.

Background

This case stems from plaintiff's arrest for the sale of narcotics. On September 28, 2003,

Detective Troy Negrón, a police officer working undercover, went to a bodega located at 3625 Broadway, New York, New York. His purpose was to investigate narcotics sales based on numerous complaints concerning the premises filed by the general public.

Upon his arrival at the address, Detective Negrón approached a group of six individuals. The six consisted of the plaintiff, Jason Jackson, Thomas Jackson, Marvin McClandon, Yovanny Vicento, and an unapprehended man. Negrón overheard a drug-related discussion among the group and then heard the unapprehended man tell the plaintiff in Spanish to "go get the stuff." Plaintiff then left 3625 Broadway and returned a few minutes later carrying a white, baseball shaped object which Negrón suspected was cocaine wrapped in plastic. Negrón watched from five feet away as plaintiff transferred the white object to the unapprehended man by a handshake/hug type motion. The unapprehended man then gave the white object to Jason Jackson, who left the bodega with Thomas Jackson and Marvin McClandon. Detective Negrón followed these three men to their car and before they were able to drive off, Negrón and his field team stopped the vehicle, arrested the individuals, and retrieved a large amount of cocaine from the car in what appeared to be the same size and shape as the cocaine Negrón had previously observed.

Detective Negrón then returned to 3625 Broadway and arrested the plaintiff and Vicento. Plaintiff does not contest that he was at the location on the date in question. What plaintiff does dispute is Detective Negrón's observations and his interpretation of the situation, which he contends led to him being wrongfully arrested.

Plaintiff was subsequently charged with the criminal sale of a controlled substance in the first degree (Penal Law §220.43 [1]) and indicted by a grand jury. On January 12, 2004, Justice

Brenda Soloff, having reviewed the minutes of the grand jury proceeding, found the indictment supported by legally sufficient evidence. Plaintiff, who waived a trial by jury, was tried before Justice Charles Tejada. On November 17, 2004, Justice Tejada found the plaintiff not guilty on the sole count in the indictment of criminal sale of a controlled substance in the first degree. From the time he was arrested on September 28, 2003, until he was acquitted on November 17, 2004, plaintiff remained in custody.

Plaintiff commenced this action by filing a summons and complaint on September 23, 2005, and the City served its answer on October 20, 2005. Plaintiff now moves to strike the City's pleadings for alleged discovery violations and the City cross-moves for summary judgment dismissing the wrongful arrest claim.

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 a 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). Striking a party's pleading is an extreme action and 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 refusal or 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)(quoting 3A Weinstein-Korn-Miller, NY Civ Prac ¶ 3126.04). An attempted or partial compliance with a discovery order, without additional information presented, is insufficient to infer willful disobedience and will survive a motion to strike the pleadings. *Dauria* at 460; *Thomas v. McGuire Serv. Corp.*, 251 AD2d 148

for failing to comply, and inability to produce certain nonexistent documents, plaintiff failed to meet his burden of establishing a bad faith intent. Plaintiff's motion must therefore be denied. Moreover, plaintiff has failed to demonstrate how the items that remain outstanding might produce facts upon which he could oppose the City's cross-motion with regard to the false arrest claim. *See Home Savings Bank v. Arthur Kill Associates*, 173 AD2d 776 (2d Dept 1991).

II. The City's Cross-Motion for Summary Judgment

The City cross-moves for summary judgment to dismiss plaintiff's claim of false arrest on the grounds that the arresting officer had probable cause to arrest the plaintiff. A summary judgment motion may only be granted where the court determines that "no material and triable issue of fact" was presented." *Sillman v. Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404 (1957). Where there is any doubt as to the existence of an issue, or an issue is arguable, the motion for summary judgment must not be granted. *Id.* For purposes of the City's motion, the issue before this court is whether Detective Negron had probable cause to arrest the plaintiff and whether plaintiff has introduced evidence sufficient to create a triable issue of fact regarding the existence of probable cause.

The existence of probable cause to arrest is a complete defense to a false arrest claim and where probable cause is demonstrated, such a claim cannot withstand a motion for summary judgment. *Arzeno v. Mack*, 39 AD3d 341 (1st Dept 2007); *Marrero v. City of New York*, 33 AD3d 556, 557 (1st Dept 2006). Probable cause to arrest exists where "the body of information available to a police officer '... would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed.' " *People v. Graham*, 211 AD2d 55, 58 (1st Dept 1995), *citing People v. McRay*, 51 NY2d 594, 602

(1980). The emphasis in retrospectively determining the existence of probable cause “should not be narrowly focused, but rather should consider ‘all of the facts and circumstances together.’ ” *Marrero* at 557 (quoting *People v. Bigelow*, 66 NY2d 417, 423 [1985]). With regard to narcotics sale cases, probable cause for a warrantless arrest by a police officer has been found where, based on the totality of the circumstances, the officer observed an individual in a drug-prone location exchange what appeared to the officer, based on his experience and expertise in law enforcement, to be drugs. *See Graham* at 58; *see also People v. Williams*, 255 AD2d 133 (1st Dept 1998).

Plaintiff argues that the summary judgment motion to dismiss the false arrest claim cannot be granted because plaintiff was found not guilty after trial on the criminal charge and because there are facts that call into question the integrity of the arrest. The questioned facts include that no drugs or money were found on plaintiff at the time of his arrest, Detective Negron could not conclusively identify the white object to be cocaine at the time he saw it change hands, and plaintiff was not listed as a criminal defendant on the evidence bag. Plaintiff further argues that Negron’s criminal trial testimony differs from his deposition testimony and that Negron is not completely fluent in Spanish. Plaintiff, however, does not dispute that he was at the bodega at 3625 Broadway on the date and time in question, although he states he was there only to pick up his paycheck.

Plaintiff points to various weaknesses in the case that may very well have prevented the trial court from finding that there existed proof beyond a reasonable doubt that plaintiff was guilty of the sale of narcotics. This is not the same, however, as introducing evidence that raises a triable issue of fact regarding the lack of probable cause to arrest. The strongest argument plaintiff makes with regard to the lack of probable cause is the assertion that Detective Negron

merely suspected that the white object he stated he saw being passed from plaintiff to the unapprehended individual was cocaine as opposed to being able to actually identify it as such. However, in a probable cause analysis, "the emphasis should not be narrowly focused on a recognizable drug package or any other single factor, but on an evaluation of the totality of the circumstances which takes into account the 'realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents.'" *Graham* at 58-9 (quoting *People v. Cabot*, 88 AD2d 556, 557 [1st Dept 1982]).

With regard to the totality of the circumstances, what is presented here is an arrest by an experienced police officer at a drug-prone location. Detective Negron's testimony, both at trial and at his deposition, was that he saw a number of men, including the plaintiff, in front of the bodega and that he overheard a drug-related conversation which he understood because he is conversant in Spanish. He then observed the plaintiff carrying a white object containing what he believed to be cocaine, and saw plaintiff transfer the object to the unapprehended individual. Based on his training as an undercover officer and nearly three hundred undercover buy and busts, Detective Negron interpreted this to be a drug transaction. Again, Negron consistently testified that he followed and arrested the three individuals who he saw receive the package from the unapprehended man, and that upon doing so found a large quantity of cocaine in their car. At this point, he returned to 3625 Broadway to arrest the plaintiff.

These circumstances, combined with Detective Negron's extensive experience and training, provides a sufficient basis for the officer to have concluded that the plaintiff was engaged in criminal activity at the time he arrested him. Because plaintiff has failed to produce evidence that sufficiently calls into question the facts giving rise to the arrest, as testified to by Detective

Negron, the City has established the existence of probable cause as a matter of law. *See Kramer v. City of New York*, 173 AD2d 155 (1st Dept 1991); *See also Coleman v. City of New York*, 82 AD2d 200 (1st Dept 1992). Contrary to plaintiff's position, *Broughton v. State*, 37 NY2d 451 (1975), does not compel a different result simply because plaintiff was found not guilty after trial. In the same way that the indictment is admissible as some proof of probable cause, plaintiff's acquittal is admissible evidence but in no way determinative.

In light of the foregoing, it is

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

ORDERED that the City's cross-motion for summary judgment dismissing the cause of action for false arrest is granted;

This constitutes the decision and order of the court.

Dated: January 9, 2009

ENTER:



Matthew F. Cooper, J.S.C.

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JAN 13 2009
COUNTY CLERK'S OFFICE
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