

Sasso v City of New York

2009 NY Slip Op 31062(U)

May 13, 2009

Supreme Court, Kings County

Docket Number: 18729/05

Judge: Robert J. Miller

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**Supreme Court of the State of New York
County of Kings**

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ROBERT SASSO,

Hon. Robert J. Miller

Plaintiff,

**Decision
and Order**

-against-

THE CITY OF NEW YORK, JAMES W. BECK, MARINA
HOLDING CORP. d/b/a VENICE MARINA and ALBERT
LEVI,

Defendant. (s)

Index No. 18729/05

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THE FOLLOWING PAPERS NUMBERED 1 to 8 READ ON THIS MOTION

	Papers Numbered
NOTICE OF MOTION - ORDER TO SHOW CAUSE - PETITION(S) AFFIDAVIT(S) - AFFIRMATION(S)	1-2, 3-4
ANSWERING AFFIDAVIT(S) - AFFIRMATION(S)	5,6
REPLY AFFIDAVIT(S) - AFFIRMATION(S)	7,8
AFFIDAVIT(S) - AFFIRMATION(S)	
EXHIBITS AND OTHER PAPERS -	

The plaintiff is represented by the law firm of Eugene M. Bellin, Esq., by Eugene M. Bellin, Esq., of counsel, the defendants the City of New York and James W. Beck are represented by Michael A. Cardozo, Esq., Corporation Counsel of the City of New York by Dana Wiczzyk, Esq., of counsel, the defendants Venice Marina and Albert Levi are represented by the law firm of Ahmuty, Demers & McManus, Esqs., by Patrick J. Pickett, Esq., of counsel.

Defendants Marina Holding Corp, d/b/a Venice Marina (Marina), and Albert Levi (Levi) move for an order pursuant to CPLR § 3212 dismissing the plaintiff Robert Sasso's (Sasso) complaint for claims of malicious prosecution, defamation, false imprisonment, and breach of contract. The defendants the City of New York (City) and Detective James W. Beck (Beck), move for an order pursuant to CPLR § 3212 or in the alternative an order pursuant to CPLR § 3211 for partial summary judgment dismissing the complaint. The City and Beck move for dismissal of "plaintiff's causes of action for false arrest, false imprisonment and malicious prosecution" as well as the 42 USC § 1983 claims. This encompasses the first, third, fourth, and fifth causes of action the complain. The fourth cause of action for "intentional constitutional tort" is essentially a re-pleading of the first and third causes of action and thus is encompassed by the City's motion.

The plaintiff alleges that on June 1, 2004, Levi, the manager of Venice Marina where plaintiff kept a boat, made false and defamatory statements to the New York City Police Department (NYPD) accusing the plaintiff Sasso, of slashing the tires on Levi's vehicle. Sasso also alleges that the Marina terminated his contract to keep his boat at the Marina in breach of contract. On June 14, 2004, Sasso was arrested and charged with Criminal Mischief in the Fourth Degree, under Penal Law § 145.00. Levi signed a supporting deposition in support of the criminal charges. The charges were ultimately dismissed on March 1, 2005 pursuant to Criminal Procedure Law § 30.30 for failure to prosecute in the requisite period of time required.

Plaintiff commenced suit against the defendant Marina and Levi on May 31, 2005. Marina and Levi joined issue by service of an answer on August, 29, 2005. Plaintiff filed a petition for a late Notice of Claim which was granted and a Notice of Claim was served upon the City on May 3, 2005. Plaintiff then filed a Summons and Complaint against the City and Beck, a detective with the NYPD Harbor

Unit, on June 17, 2005. The City and Beck joined issue by service of an amended answer on August 18, 2005. Both actions were consolidated by an order dated January 19, 2006. Without leave of Court and subsequent to the service of the instant motions, on September 12, 2008, the plaintiff served an amended complaint. The amended complaint was rejected as untimely by the attorneys for the Marina defendants. Since it was filed without leave of court or pursuant to a stipulation by the parties, the Court will consider it a nullity. (CPLR § 3025 (a)).

The Court will review the facts of the dispute between the parties as set forth in the deposition testimony and affidavits submitted in connection with these motions.

SASSO'S DEPOSITION TESTIMONY

Sasso testified that he was at Venice Marina on Memorial Day Weekend, Friday, May 28, 2004 when his boat was launched for the first time and was removed from the water immediately due to a leak. The person who was to work on the boat, "Billy", could not work on the boat that day so Sasso's boat could not get it into the water for the Memorial Day weekend. Sasso testified that he stayed at the Marina for several hours stopping in and out of the Marina shop several times to get products to work on his boat. Levi was a manager in the Marina shop. At some point in time, Sasso said that Levi became hostile and asked him if he wanted his money back for the boat. Sasso testified that he went home shortly thereafter, but immediately returned to the Marina because he read that one of the provisions in his agreement with the Marina referred to being dismissed from the Marina for disorderly conduct. He was concerned about his boat because giving him back his money was not giving him back his boat. Sasso was asked "did you feel like you were being disorderly" and he answered "I was not, no". Sasso states that when he returned to the Marina store, Levi accused him of damaging his car. Sasso testified that he walked out of the store and walked around Levi's car which was a Mercedes, but did not see any damage. Sasso remembers being at the Marina for the whole weekend and that at one point, Levi again

called him over to his car which was parked in the rear parking lot of the store (in a different parking lot from when he saw it on Friday) and that he went with Levi to his car and was shown three deflated tires and was accused of damaging the car. Sasso says he “did not say anything to (Levi)” and went back to work on his boat. Sasso remembers one other interaction with Levi that weekend but does not remember the time frame it occurred in. He stated that Levi called him in to the shop to have Sasso sign a work order to have work done on the boat.

On June 1, 2004, Sasso first became aware that a complaint for damage to Levi’s car was filed against him. Detective Beck called his cell phone and introduced himself as a detective from the Harbor Unit asking Sasso to surrender on the criminal charges and suggesting he get an attorney. Sasso states that the detective “all of a sudden” stated that if Sasso did not come in, the detective would “hunt him down”. Sasso says he informed the detective that he was a retired detective himself and that he kept silent for most of the phone call. Later in the deposition, Sasso stated that during the initial conversation with Beck, he questioned the detective as to why he was involved in the case since he was from the Harbor Unit and the case involved a parking lot. Sasso testified that this questioning made Beck upset.

After the phone conversation with Beck, Sasso retained an attorney who spoke to a detective at the 61st Precinct to arrange for a surrender. Sasso states that his first appointment to surrender was cancelled after which Sasso called and spoke to a lieutenant at the 61st precinct to ask why Beck was assigned to the case. Sasso says he did this because when he himself worked at the 61st precinct, the Harbor Unit was not usually assigned to cases. It was in this conversation with the lieutenant that Sasso learned about video evidence against him. Sasso says he did not see the video until after his arrest. On June 14, 2004, Sasso surrendered at the 61st precinct. Sasso testified that Beck took him down a rear staircase and verbally abused him. Sasso further testified that he was taken to an interview room and

handcuffed to a pipe. While in custody, he was interviewed by Beck who said they had him on video tape slashing Levi's tires. Sasso says he responded by asking Beck "what part of my boat he was getting" and whether the detective was getting part of the \$4300 (presumably the money Sasso paid the Marina). The plaintiff testified he was eventually charged with a felony and taken to central booking. On June 14, 2004, the plaintiff was arraigned for felony criminal mischief. He was held overnight and released on his own recognizance the next day. Sasso testified that he viewed the surveillance footage of the incident in question and stated that he was the person depicted in the video.

SASSO'S AFFIDAVIT

In plaintiff's affidavit, he states that in the Spring of 2004, he signed a renewal agreement with the Marina for a fee of \$4,371. He states that "It is now clear to me that Mr. Levi's purpose in sending me to look at his car was to have me photographed by the marina's surveillance camera's". Sasso also states "I did not slash the tires of Mr. Levi's car". An invoice for the work order was issued to Sasso by Levi on May 30, 2004. On June 11, 2004, Sasso went to the Marina to see what work had been performed on his boat, he questioned the people who were working on the boat regarding how they were doing the work, and took pictures of the work being done. Mr. Rondot, who worked with Levi came out and asked Sasso to leave. On June 15, 2004, Sasso was served with an order of protection to stay away from Levi. During the time the criminal charges were pending, Levi took steps to seize the boat. Sasso's marina privileges were terminated. Sasso was never notified to remove the boat from the Marina. Sasso believed that the temporary restraining order prevented him from removing his boat from the Marina. Levi and Marina filed a lien against the boat for unearned storage charges. The lien was paid by check on July 25, 2005. On August 23, 2004, Mr. Shine, a colleague of Sasso's, took pictures showing that the work for which the lien was filed had not yet been performed. Sasso states that "by having me

arrested on a false criminal charge, defendant Levi was able to seize my \$4371.60 marina fee and obtain from the defendant Marina Holding Corp. payment of \$2557.20 for a lien for work which had not been performed”.

BECK'S DEPOSITION TESTIMONY

Beck testified that he was assigned to the NYPD Harbor Unit and that his job is to conduct all investigations related to crimes in New York City waters and any marina. Beck met the defendant Levi sometime in the late 1990's or early 2000s. He did not socialize with Levi but knew him through investigation of prior incidents involving the Venice Marina. Beck first learned of the accusation against the plaintiff on June 1, 2004 when he arrived with a partner at the Venice Marina to investigate an unrelated matter. Levi asked Beck if he had come to investigate the criminal complaint that Levi had made earlier in the day. Beck was not initially aware that Levi had filed a complaint with the local precinct related to the slashing of the tires, nor did he have a copy of the complaint and he told Levi that he would look into the complaint. Levi explained the details of the complaint to Beck. Levi told him that Sasso and Levi had a verbal altercation concerning Sasso's boat. Levi told Beck that he went out of his way to get Sasso's boat in the water that weekend however, when they got it in the water, it was leaking and had to be taken out. Levi told Beck that Sasso wanted his boat fixed right way, which Levi said he could not accommodate. Levi told Beck that this is when Sasso became verbally abusive, using inappropriate language and that Sasso had threatened some of the Marina employees. Levi told Beck that when he went to his car at the end of the day on Friday, he found three of his tires slashed. Levi informed Beck that he had already filed a complaint with the local police precinct as he had viewed the plaintiff on a video surveillance tape. Beck was provided with copies of the video tape and viewed the portion of the tape which showed Sasso walking over to Levi's car and ducking down, walking back to

the building and walking to the vehicle a second time. Levi retained the original CD and Beck was given a copy which he watched being made. Beck did not examine the damaged car because the car had been removed to be repaired. Beck says he spoke to the receptionist at the car repair shop and received copies of the bills for repair and the tow. Beck testified that along with the detective unit in the local precinct, they decided that since the occurrence took place in a marina and because Beck had already started to look into the matter that the harbor unit would continue to investigate.

Beck testified that he contacted the plaintiff on June 2, 2004 and that he advised Sasso that Levi had made a complaint. Sasso questioned Beck and asked him how he intended to prove that he caused the damage. Beck says that Sasso was verbally abusive and that he advised Sasso to retain an attorney to arrange a surrender at the precinct. Detective Beck consulted with his lieutenant and the commanding officer to make the decision to arrest the plaintiff. Beck testified that he had numerous conversations with Levi to obtain information related to the criminal case. Beck processed the plaintiff for his arrest.

LEVI'S DEPOSITION TESTIMONY

Levi testified that he was the managing director of the Marina. The Marina rents boat slips, hauls and launches boats and sells boating supplies. The Marina employs workers to do repairs and also retains independent contractors. The Marina had sixteen security cameras secured to the main building which were installed by Tomex Electronics. The cameras recorded into a hard drive. Tomez Electronics had access to the system. Levi testified that he was not familiar with the technical way that Tomex operated, that Tomex had access to the recording devices for the security cameras, and that no one at the Marina had access to the recording devices.

Levi testified that he knew Beck before he worked on the criminal case involving Sasso, because the detective had previously investigated other criminal incidents at the Marina. Levi stated that he

never socialized with Beck.

Levi said that he first met Sasso when he rented the boat slip at the Marina and signed a “bare license”. Levi testified that there was a bare license for May 1, 2004 through April 30, 2004 and May 1, 2004 through April 30, 2005, and that the license included launching of the boat and storage.

Levi stated that Sasso’s boat was launched before May 28, 2004 but he did not know how long before that date it was launched. The boat was taken out of the water because it had a leak. Sasso then requested that William Galucci repair his boat. Levi recalled that on May 28, 2004 he had a discussion with Sasso in the late part of the morning concerning the repairs. Levi testified that he left the Marina in his Mercedes and returned at approximately 2 - 3 p.m. and parked his car along the fence in the front of the Marina store. When Levi left to go home at around 7 p.m., he was with a co-worker and discovered three flat tires on his car as he was backing up. When Levi went to put air in his tires, he realized that they were punctured with straight lines on the sides of the tires. The car was towed to be repaired.

The day after Levi discovered his car was damaged, he called Tomex Electronics to review the surveillance tapes because he had seen Sasso walking in and out of the store toward the parking lot where his car was parked a number of times on Friday, May 28, 2004. He testified that “every time we need access (to the recording device) we call Tomax Electronics”. On Saturday, May 29, 2004, Tomax came to review the tapes with Levi, after which Levi was able to see Sasso go back and forth two times to his car. Levi spent “between one and two hours” to initially review the tapes with Tomax to locate the video portion where Sasso walked up to his car. Levi and the other Marina manager, Mr. Rondat, approached the plaintiff and tried to come to an agreement regarding the alleged damage to the car, however, Sasso refused. Levi then filed a criminal complaint with the local precinct. Tomex Electronics prepared a copy of the surveillance video for Levi who then provided copies to Beck and the district

attorney.

On Saturday May 29, 2004, after Sasso was told he was seen on the video tape and asked to reimburse Levi, Levi testified that Sasso came back to the Marina and threatened employees and to give the Marina trouble by calling the labor department, and other agencies. Sasso also said that he had the name of the Marina's corporate lawyer and corporate officers and he was going to make a complaint. Levi testified that it was this behavior of the plaintiff which eventually prompted the termination of the plaintiff's license agreement with the Marina.

CHARLES RONDAT'S DEPOSITION TESTIMONY

Mr. Rondat is the Marina Manager and oversees the day to day operations of the Marina. Rondat knew the plaintiff. Rondat observed the slashed tires on Levi's car. After Levi's tires were slashed, Tomax Electronics was called to help view the video camera tapes. Rondat stated that he viewed the video for about an hour which depicted the plaintiff walking out the door of the Marina store, approach Mr. Levi's car, walk away come back and bend down a second time. After seeing the video Rondat was shocked and he went out to the ship yard and told the plaintiff what he saw, the plaintiff denied that he was the one to damage the tires. Rodat testified that he saw the plaintiff, with a folder in his hand, saying that Jordache [the Marina] "was going to get it".

ANALYSIS

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor. (GTF Mtkg, Inc. v. Colonial Aluminum Sales, Inc., 66 N.Y.2d 965, 967 [1985] .) Issue finding rather than issue determination is its function (Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 [1957] .) The evidence will be construed in the light most favorable to the one moved against (Weiss v. Garfield, 21

A.D.2d 156 [3rd Dept 1964] .) Bare conclusory allegations are insufficient to defeat a motion for summary judgment. (Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc., 226 A.D.2d 227 [1st Dept 1996], Lee v. Weinstein, 116 A.D.2d 700 [2d Dept], lv denied 68 N.Y.2d 601 [1986]).

In this case, the claims against Levi, the Marina, the City and Beck for malicious prosecution, for false imprisonment and false arrest cannot be sustained if there was probable cause for the arrest. In order to recover damages for malicious prosecution, the plaintiff must prove four elements: that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice. (Smith-Hunter v Harvey, 95 NY2d 191 [2000], (Broughton v State of New York, 37 NY2d 451 [1975], cert. denied sub nom., Schanbarger v Kellogg, 423 US 929, Diederich V Nyack Hospital, 2008 WL 607482, [2nd Dept 2008].) In order to sustain a cause of action for false arrest and false imprisonment, the plaintiff must prove that the defendants intended to confine the plaintiff, the plaintiff was conscious of the confinement, the plaintiff did not consent to the confinement and the confinement was not otherwise privileged. (Broughton v State of New York, 37 NY2d 451 [1975], cert. denied sub nom., Schanbarger v Kellogg, 423 US 929.) Probable cause existing at the time of confinement bars a cause of action for false arrest. (Guzman v City of New York, 236 AD2d 444 [2nd Dept 1997].)

Probable cause consists of facts and circumstances which would lead a reasonably prudent person in like circumstances to believe the plaintiff was guilty. Where facts giving rise to the arrest are undisputed, whether or not the arrest was based on probable cause, is for the court to decide as a matter of law. (Parkin v Cornell Univ., 78 NY2d 523 [1991], Fausto V City of New York, 17 AD3rd 520 [2nd dept, 2005], Veras v Truth Verification Corp., 87 AD2d 381 [1st Dept 1982], aff'd 57 NY2d 947.) Where the defense is based upon conflicting evidence, from which a reasonable person might draw different inferences, it is a question for the jury. (Smith v County of Nassau, 34 NY2d 18 [1974], Clark v Nannery, 292 NY 105 [1944]. It is well established that a warrantless arrest is presumptively unlawful

and that the defendant has the burden of proving legal justification as an affirmative defense by showing that probable cause existed at the time of the arrest. (Broughton v State of New York, 37 NY2d 451 [1975], cert. denied sub nom., Schanbarger v Kellogg, 423 US 929). Information provided to a police officer by an identified citizen accusing another of a crime is sufficient to provide the police with probable cause. (Minott v City of New York, 2003 AD2d 265 [2d Dept 1994], Catanzaro v City of Middletown Police Department, 33 AD2d 415 [2d Dept 1996].) Hearsay information provided to a police officer is presumed reliable. (People v Crower, 198 AD2d 369 [2d Dept 1993, app. den., 83 NY2d 851.) “An arrest need not be supported by information and knowledge which at the time, excludes all possibility of innocence and points to the defendant's guilt beyond a reasonable doubt, in short, probable cause depends upon probabilities, not certainty.” (People v. Bigelow, 66 N.Y.2d 417 [1985]).

Here, the court finds that the undisputed evidence is that the plaintiff had a dispute with Levi on May 28, 2004, that Levi's car tires were slashed, and that this was confirmed by Beck by making phone calls to the car dealership and by obtaining a copy of the repair receipt. Additionally, Levi and Rondat, viewed a video tape depicting the plaintiff kneeling down by the tires; that the detective was told of all these details and also viewed the video tape; that the detective determined that the tape showed the plaintiff walk up to Levi's car on one side, duck down, walk away come back to the car on the opposite side of the car and duck down. The plaintiff testified that he approached Levi's car on more than one occasion and admitted that he was the person depicted on the video. Additionally, an invoice of repairs to Levi's car for three slashed tires dated June 1, 2004 is part of the record.

Plaintiff argued at oral argument that the video tape was not properly authenticated as it was submitted as an exhibit by the defendants Levi and Marina and that therefore the court should not review it as independent evidence. However, the court did not have to view the tape in order to reach the

conclusion that there was probable cause for the arrest of the plaintiff. The defendants have met their burden with the facts standing alone, without the video tape. After a review of all the exhibits and testimony, the court finds that the facts and circumstances in this case would have led a reasonably prudent person in like circumstances to have concluded that the plaintiff slashed Levi's tires, i.e. probable cause for the arrest existed.

The burden now shifts to the plaintiff to come forward with triable issues of fact, or tender an acceptable excuse for his or her failure to do so. (Zuckerman v. City of New York, 49 NY2d 557 [1980], Alvarez v Prospect Hosp., 68 NY2d 320 [1986], Gong v Gjoni, 294 AD2d 648 [3d Dept 2002] .) The plaintiff asserts that there are triable issues of fact concerning whether there was probable cause for the arrest. Sasso argues that his bending down next to the car in the video is consistent with innocence. Sasso further argues that Beck did not observe the slashed tires personally, that the tires were not preserved and that Beck did not have proper physical evidence to draw the conclusion that plaintiff slashed the tires. Sasso further asserts that because Beck did not interview him before the decision to bring charges that Beck should not have drawn the conclusion that he slashed the tires. Lastly, Sasso attempts to assert that the video tape was edited into a 14 minute segment and that because there was only an hour's worth of video submitted to the District Attorneys office, in regards to the criminal charges, that exculpatory evidence was withheld. However, the plaintiff does not submit any expert testimony regarding whether the recorded tape was sliced or doctored to manipulate what was depicted. Further, there is an assertion by plaintiff that Levi and Beck were out to get the plaintiff and his boat. The court finds that these arguments are mere speculation. There were at least three different people who initially viewed the tape and identified the plaintiff prior to his arrest. Additionally, there is no testimony or evidence submitted that would lead to the conclusion that there was a conspiracy to create probable cause and have the plaintiff arrested.

Although there are some discrepancies in the facts, they are minor, as discrepancies often arise at the investigation of a crime. Discrepancies may impair the ability to prove guilt beyond a reasonable doubt but generally they have little bearing at the preliminary stages where there is sufficient evidence to show that there was probable cause for the arrest. (Gisondi v Harrison, 72 NY2nd 280 [1988], People v Hodge, 53 NY2nd 313 [1987].) Moreover, whether one accepts the plaintiff's version or the other witnesses' versions of what occurred, the facts which led to the arrest are consistent with all the witnesses. The court finds that the plaintiff has not met his burden on the claims of malicious prosecution and false imprisonment and false arrest as against any of the defendants.

In order to prove a claim of defamation and libel against Levi and the Marina, the plaintiff must show that the statements made by Levi were substantially inaccurate. (Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369 [1977].) The evidence here is that Levi made statements initially to the local precinct and then to Beck. There is also evidence that more than one person, including the plaintiff, observed that the tires on Levi's car had been slashed and that an invoice of the repairs exists. Furthermore as indicated, the court does not find that there is any evidence to suggest a conspiracy in which false statements by Levi were made. Therefore the court finds that the plaintiff has not met his burden on the claim of defamation.

Moreover, plaintiff failed to demonstrate that Levi's communication with the police was motivated solely by malice and both the alleged slanderous and libelous statements were made by Levi in connection with reporting the incident to the police and as such are qualifiedly privileged (Toker v Pollack, 44 NY2d 211 [1978], Golden v Stiso, 279 AD2d 607 [2d Dept 2001]).

The court next examines the claim of breach of contract against the Marina for termination of the plaintiff's "Bare License". The Marina asserts the "Bare License" is not a contract but a license, which is revocable at the request of the licensor as stated in the document. Paragraph ten (10) provides that the

Marina reserves the right to cancel the agreement without any refund of the agreement fee (\$4,371.60) if the licensee “becomes disorderly” while on the premises or if the licensee violates any of the provisions of the license. However, the license does not define or determine what might constitute disorderly conduct. The Marina alleges that the conduct of Sasso in threatening to report the Marina to the “Authorities” constitutes disorderly conduct. Paragraph eleven (11) provides that if the license agreement is terminated the licensee will remove his vessel or will be liable for storage charges of \$35.00 a day. The court finds that there are factual issues to be resolved concerning the plaintiff’s conduct and whether it constituted disorderly conduct in breach of the license.

The court examined the plaintiff’s claims as they relate to a violation of 42 U.S.C. §1983 as asserted against Beck. In Weyant v. Okst., 101 F.3d 845, 852 (2d Cir.1996) the court stated that;


“ A § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause, see, e.g., Lennon v. Miller, 66 F.3d 416, 423 (2d Cir.1995), is substantially the same as a claim for false arrest under New York law, see, e.g., Singer v. Fulton County Sheriff, 63 F.3d 110, 118 (2d Cir.1995), cert. denied, 517 U.S. 1189, 116 S. Ct. 1676, 134 L.Ed.2d 779 (1996); Hygh v. Jacobs, 961 F.2d 359, 366 (2d Cir.1992); Posr v. Doherty, 944 F.2d 91, 96 (2d Cir.1991). The existence of probable cause to arrest constitutes justification and “is a complete defense to an action for false arrest,” Bernard v. United States, 25 F.3d 98, 102 (2d Cir.1994), whether that action is brought under state law or under § 1983.”

Here, the court has determined that Beck had probable cause to arrest the plaintiff. Therefore, the plaintiff cannot sustain his burden on the § 1983 claim against the defendant Beck.

Accordingly the defendants Levi and the Marina’s motion for summary judgement is granted,

and the first, second, third, fourth and fifth causes of action in the complaint against the Marina and Levi are dismissed. The sixth cause of action survives. The City and Beck's motion for partial summary judgment is granted and the first third, fourth and fifth causes of action against them are dismissed. The second cause of action survives.

The foregoing constitutes the decision and Order of the Court.


Robert J. Miller
J.S.C.

May 13, 2009