

**Rodino v City of New York**

2009 NY Slip Op 33041(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 105008/07

Judge: Eileen A. Rakower

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

RAKOWER

Index Number : 105008/2007

PART 5

RODINO, CHARLES

vs

CITY OF NEW YORK

INDEX NO. 105008/07

Sequence Number : 003

MOTION DATE \_\_\_\_\_

DISMISS ACTION

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1, 2  
3

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

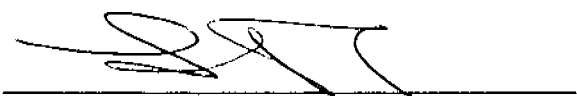
Upon the foregoing papers, It is ordered that this motion

DEC 30 2009

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 12/23/09



**HON. EILEEN A. RAKOWER**

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):

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

-----X  
CHARLES RODINO,

Plaintiff,

Index No. 105008/07

Mot. Seq. No. : 003

- against -

**Decision and Order**

THE CITY OF NEW YORK, POLICE OFFICER  
ANNAMARI BERNAGOZZI, SHIELD #09761, POLICE  
OFFICER DAVIS DENIZARD, SHIELD #2886 AND  
POLICE OFFICER DARYL HARRIS, SHIELD # 25137,

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

**FILED**  
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NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff brings this action for, among other things, false arrest, assault, and malicious prosecution as the result of an arrest which occurred on April 26, 2006 "in the vicinity of East 30<sup>th</sup> Street and 3<sup>rd</sup> Avenue" in the County and State of New York. Plaintiff was released on April 27, 2006 and the complaint against him was dismissed on October 30, 2006. Previously, defendants the City of New York, Police Officer Annamari Bernagozzi, Shield #09761, Police Officer Davis Denizard, Shield #2886, and Police Officer Daryl Harris, Shield #25137 ("City") moved to dismiss plaintiff's First, Second, Third, Fourth and Seventh causes of action pursuant to CPLR 3211(a)(7) for failure to file a timely notice of claim. By an Order of this Court dated September 23, 2009, the motion was granted, and the First through Fourth Causes of action were dismissed. The Court found that notice of claim, as to the Seventh Cause of Action for Malicious Prosecution, was timely. City now moves for summary judgment, dismissing plaintiff's remaining causes of action. Plaintiff opposes.

On the evening of plaintiff's alleged false arrest, at approximately 10:00 to 10:40 p.m.<sup>1</sup>, Angela Gruszka had been robbed at knife point in front of her building which is located at 207 East 30<sup>th</sup> Street, New York, New York. Ms. Gruszka described the perpetrator as a "male, black in the 20s." Ms. Gruska allegedly told Officers Harris and Denizard<sup>2</sup> that the man who was robbing her had waved to and/ or had "eye contact" with a white male across the street.<sup>3</sup> At approximately 11:30 p. m. plaintiff, a Verizon employee, was leaving the Verizon office and returning to a manhole he had been working on in the vicinity of 37<sup>th</sup> and 38<sup>th</sup> Streets and 3<sup>rd</sup> Avenue. At this point Ms. Gruszka allegedly pointed to plaintiff, and identified him as the man who was acting in concert with her assailant. There were never any allegations that plaintiff robbed or interacted with Ms. Gruszka.

According to plaintiff, he was walking on Thirtieth Street, and was approached by a black male (Officer Harris) in plain clothes who yelled "yo, yo come here for a minute." Plaintiff claims that he said "what's up and took a couple of steps closer . . . to see if he had anything in his hands." The man told him to get against the wall and that's when plaintiff claims that he saw another man (Officer Denizard), running towards him. Plaintiff claims that he ran towards the corner because 3rd Avenue was lit and "there were people." As he started to run, the two men jumped on him and started hitting him in the "back and back of the head." Plaintiff concedes that he punched back, but that it was in self defense. Plaintiff was able to free himself from the scuffle and ran into a pizzeria where he called 911. Plaintiff alleges that the police officers did not identify themselves, on approach or in pursuit, and that he believed he was about to be robbed. Plaintiff claims a police officer first pulled a badge out from under his clothing to identify himself in an effort to gain entry into the pizzeria.

Officer Harris' account of events is as follows: As he approached plaintiff for questioning he had his badge out and said "Sir, please may I have word with you." Later, Officer Harris is questioned as to whether he ever identified himself as an

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<sup>1</sup>The times vary according to differing accounts, but Officer Harris lists the time of the incident as "forty five minutes in the past, after us arriving at 22:45, she was robbed . . ."

<sup>2</sup>Either Ms. Gruszka was never deposed or the parties failed to submit her deposition testimony here. All facts regarding Ms. Gruszka's account come from the Officers' testimony at their depositions.

<sup>3</sup>Officer Harris also states at his deposition that Ms. Gruszka claimed plaintiff was walking with the assailant.

“officer.” Officer Harris states that he did not identify himself as an officer. Upon being shown his own witness statement which says that he “clearly identified” himself as an officer before approaching plaintiff, Officer Harris claims that what he actually said was “Police, may I have word with you.” “Not please”. . . . but “Police, may I have a word with you.” Officer Harris claims that plaintiff started to run away and as he was chasing him he was yelling “police stop.” Officer Harris testifies that as he got closer to plaintiff, plaintiff punched him in the face. Officer Denizard, who had reached the two of them, grabbed plaintiff and tackled him. Officer Harris states that plaintiff punched Denizard and that Denizard was “defending himself” against plaintiff.

City, in support of its motion, submits: plaintiff’s notice of claim; the pleadings; the deposition transcript of P.O. Harris; the deposition transcript of P.O. Denizard; and a Criminal Court document. City claims that the remaining causes of action should be dismissed because plaintiff’s arrest was supported by probable cause as a matter of law. As to plaintiff’s Sixth Cause of Action, his “Monell Claims” under 42 USC §1983 must also fail as a matter of law because plaintiff cannot show a policy or custom of the City which led to plaintiff’s injuries.

Plaintiff, in opposition, submits the following, not duplicative of City’s submissions: the 50-h hearing transcript of plaintiff and an amended complaint and amended bill of particulars. Plaintiff argues that there are questions of fact as to whether the police officers had probable cause to arrest plaintiff. Further, plaintiff points out that his account and the officers’ account of the events leading up to his arrest vary, necessitating resolution by a fact finder. Plaintiff consents to dismissal of his Monell Claim, his Sixth Cause of Action, for the reasons stated by City.

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 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to

satisfy this requirement. (*Zuckerman, supra*).

As plaintiff concedes that the Sixth Cause of Action should be dismissed, the issue before the court is whether the officers lacked probable cause to arrest plaintiff, warranting denial of the motion. “Whenever there has been an arrest and imprisonment without a warrant, the presumption is that such arrest and imprisonment are unlawful . . . The defendant has the burden of proving legal justification as an affirmative defense . . . justification is established by showing that the arrest was based on probable cause” (*Veras v. Truth Verification Corp.*, 87 AD2d 381 [1st Dept. 1982]). Probable cause to arrest exists where there is information sufficient to support a reasonable belief that an offense has been or is being committed. To determine whether a police officer has probable cause to arrest, the court looks to the totality of the circumstances at the time of the arrest. (*Marrero v. City of New York*, 33 A.D.3d 556, 556-57 [1st Dept. 2006]). “. . . When the defense of probable cause is based upon conflicting evidence, from which reasonable persons might draw different inferences, the question [is] for the jury.” (*Veras* at 384).

The court cannot conclude that probable cause to arrest plaintiff existed as a matter of law. Under the circumstances, a jury could reasonably conclude that Ms. Gruszka’s assertion, that plaintiff and the assailant waved at each other, was not sufficient cause to arrest plaintiff on the suspicion of robbery. Further, plaintiff and Officer Harris offer divergent accounts of the events leading up to plaintiff’s arrest. Plaintiff’s version is that the officers failed to identify themselves, leading him to believe he was simply being attacked. Officer Harris claims that he identified himself as “police” as he was approaching and chasing plaintiff. Thus, the issue becomes one of credibility and it is well settled that issues of credibility cannot be resolved on a motion for summary judgment (*Medina v. 203 West 109<sup>th</sup> St. Realty*, 16 A.D.3d 220 [1<sup>st</sup> Dept. 2005]; *Santos v. Tempco Serv. Indus.*, 295 A.D.2d 218 [1<sup>st</sup> Dept. 2002]).

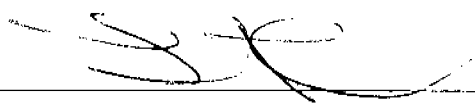
Wherefore, it is hereby

ORDERED that the motion is granted to the extent that the sixth cause of action is severed and dismissed; and it is further

ORDERED that the motion is in all other respects denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 23, 2009



Eileen A. Rakower, J. S. C.

**FILED**  
DEC 30 2009  
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