

**Castro v New York City Police Dept.**

2010 NY Slip Op 33086(U)

October 19, 2010

Supreme Court, New York County

Docket Number: 100456/08

Judge: Barbara Jaffe

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

BARBARA JAFFE

PRESENT: \_\_\_\_\_ J.S.C.

PART 5

Index Number : 100456/2008

**CASTRO, JOSE**

vs.

**CITY POLICE DEPT.**

SEQUENCE NUMBER : 002

DISM ACTION/INCONVENIENT FORUM

INDEX NO. 100456/08

MOTION DATE 8/23

MOTION SEQ. NO. 002

MOTION CAL. NO. 17

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

~~1~~

2

3

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

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

OCT 27 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/19/10  
OCT 19 2010

[Signature]  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

-----X  
JOSE CASTRO,

Plaintiff,

-against-

Index No. 100456/08  
Motion Date: 9/14/10  
Motion Seq. No.: 002  
Calendar No.: 14

NEW YORK CITY POLICE DEPARTMENT,  
THE CITY OF NEW YORK, SGT. JOHN NUNZIATO  
and POLICE OFFICERS "JOHN/JANE DOES"  
names fictitious and real names unknown,

Defendants.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**  
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**DECISION AND ORDER**  
**FILED**  
OCT 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

By notice of motion dated May 28, 2010, defendants move pursuant to CPLR 3211(a)(7), for an order dismissing the complaint, or alternatively, pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes. For the reasons that follow, the motion is granted to the extent that the complaint is summarily dismissed.

I. BACKGROUND

On January 12, 2007, at 3:30 a.m., plaintiff was arrested while standing on a subway platform, after Sergeant John Nunziato saw him reach into the pocket of a man sleeping on a bench.

At a 50-h hearing held on September 11, 2007, plaintiff testified that on January 12, 2007

at approximately 3 a.m., he entered the Queens Boulevard train station with his wife and exited the train at West 4<sup>th</sup> Street in Manhattan. His wife transferred to another train. (Lucas Aff., Exh. B at 19). Plaintiff saw on the platform a man slouched on a bench, apparently extremely intoxicated, sat down next him, tapped him with his elbow, and asked him if he was all right. The man responded that he was fine. (*Id.* at 22-23).

After the man returned to his slouching position, three undercover officers approached him, one with a police badge, and asked him what he had taken. (*Id.* at 23, 25). Plaintiff denied having taken anything and complied with the officers' direction that he empty his pockets. (*Id.* at 23). All he had was \$2 and a Metrocard. (*Id.* at 27).

When asked if plaintiff had touched him, the alleged victim replied that he had not and when told to empty his pockets, he removed a large amount of cash, a watch, and no identification. (*Id.* at 23-24). The man declined to press charges against plaintiff. (*Id.* at 24).

Both men were arrested at the scene and plaintiff was told that he was being charged with attempted grand larceny and jostling. He was read his rights and when he asked why he was being arrested, was told to "shut up, everything is going to be all right." (*Id.* at 30). He was handcuffed, placed in the back of a police car, and taken to the police station. (*Id.* at 27-28). There, he turned over his wallet and identification, and was placed in a cell. (*Id.* at 28). Approximately six hours later, he was taken to Central Booking where he was held for 24 hours before being sent to Rikers Island. (*Id.* at 31). He was unable to make the \$500 bail set at his arraignment. (*Id.* at 31-32).

Plaintiff remained at Rikers Island for seven days. (*Id.* at 32). His attorney informed him that his case was dismissed because the alleged victim did not make a statement. (*Id.* at 33).

At a deposition held on April 28, 2010, Sergeant Nunziato testified that at the time of plaintiff's arrest he was on plainclothes patrol in the subway, targeting pickpockets. (*Id.* at 3-4). On January 12, 2007, he was at the West 4<sup>th</sup> Street Station in Manhattan, at the platform where the B, D, and F trains arrive, working with two other plainclothes officers. (*Id.* at 6). He observed plaintiff on the other side of the platform, standing next to a man sleeping on a bench. No other people around. (*Id.* at 6, 11). Nunziato saw plaintiff sit down next to the sleeping man, put his right hand inside the man's left jacket pocket, remove it, look around, and then attempt two more times to put his arm back inside the jacket. Plaintiff then walked away. (*Id.* at 12).

Nunziato radioed one of the other officers. They approached plaintiff, who was standing approximately five to ten feet from the man sleeping on the bench. (*Id.* at 14). They grabbed and handcuffed him and told plaintiff that he was arrested for grand larceny and jostling. (*Id.* at 15). Nunziato then woke the sleeping man and asked if plaintiff had reached into his pocket or if he was missing any property. The man responded no. (*Id.* at 15-16).

III. CONTENTIONS

Defendants contend that they are entitled to judgment as a matter of law as Nunziato had probable cause to arrest plaintiff, which constitutes a complete defense to plaintiff's complaint. (Lucas Aff.). In support, they rely on plaintiff's and Nunziato's testimony. (*Id.*, Exhs. B, E).

In opposition, plaintiff maintains that because Nunziato arrested him without a warrant, defendants bear the burden of establishing probable cause, and that as Nunziato acknowledged that plaintiff had taken nothing from the alleged victim, as the victim never appeared in the court, as the case was subsequently dismissed, and as he denies having reached into the man's pockets, defendants have not satisfied their burden. Plaintiff also asserts that he has stated a cause of

\* 5]  
action and thus defendants are not entitled to dismissal under CPLR 3211(a)(7). (*Id.*)

(Affirmation of Robert J. Poblete, Esq., dated Aug. 12, 2010).

In reply, defendants argue that notwithstanding the issues of fact as to what actually transpired between plaintiff and the alleged victim, they have satisfied their burden because Nunziato was entitled to arrest plaintiff when he thought he saw him committing a crime. (Reply affirmation of Andrew Lucas, Esq., dated Aug. 10, 2010).

#### IV. ANALYSIS

As defendants have failed to indicate why they believe they are entitled to dismissal under CPLR 3211(a)(7), and as the complaint clearly states a cause of action, there is no need to further address defendants' motion pursuant to CPLR 3211. (*See Kane v City of New York*, Sup Ct, New York County, May 14, 2010, Jaffe, J., Index No. 103963/07).

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

The elements of a cause of action for false arrest and for false imprisonment are that:

1) the defendant intended to confine the plaintiff; 2) the plaintiff was conscious of the confinement; 3) the plaintiff did not consent to the confinement; and 4) the confinement was not

otherwise privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1<sup>st</sup> Dept 2007]).

A warrantless arrest gives rise to a presumption that the arrest was unlawful. (59 NY Jur 2d, False Imprisonment § 32 [2010]; *Broughton v State*, 37 NY2d 451, 458 [1975]). Here, as it is undisputed that plaintiff’s arrest was accomplished without a warrant, in order to avoid liability for false arrest or false imprisonment, defendants must establish legal justification for plaintiff’s arrest based on proof that at the time of the arrest, the arresting officer had probable cause to believe that plaintiff had committed a crime. (*Id.*).

Probable cause arises when the arresting officer has reasonable or probable grounds for believing that the arrestee had committed an offense; in other words, grounds which would induce an ordinary prudent and cautious person, under the circumstances, to believe the arrested person guilty. (59 NY Jur 2d, False Imprisonment § 33). Dismissal of the criminal charge is some evidence of lack of probable cause, but it is not dispositive. (*Id.*, § 34). The defendant’s motives, good or bad faith, or malice or lack thereof are immaterial to the existence of probable cause. (*Id.* § 13; *Broughton*, 37 NY2d at 458-459).

Pursuant to Penal Law § 165.25, a person is guilty of jostling when, “in a public place, he intentionally and unnecessarily, *inter alia*: 1. Places his hand in the proximity of a person’s pocket . . .” The Court of Appeals has observed that this statute, “provides objective criteria which must be observed by a police officer prior to arrest [and that i]t is not dependent upon the subjective conclusions of a complainant or an arresting officer as to what is annoying.” (*People v Nelson*, 69 NY2d 302, 307 [1987]).

As Nunziato testified to witnessing plaintiff reach into the sleeping man’s jacket, he furnished a factual predicate supporting the legal conclusion that he had probable cause to arrest

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plaintiff for jostling, notwithstanding plaintiff's slightly different version of his pre-arrest conduct. *Lopez v City of New York*, is not to the contrary (69 AD3d 476 [1<sup>st</sup> Dept 2010]), as there, the plaintiff was acquitted after a non-jury trial at which the arresting officer testified, thereby raising a triable issue of fact as to the existence of probable cause. Here, by contrast, there is nothing that places Nunziato's testimony materially in issue.

V. CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for dismissal and summary dismissal is granted.

This constitutes the decision and order of the court.

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: October 19, 2010  
New York, New York

**OCT 19 2010**

**FILED**  
OCT 27 2010  
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