

**Sheehan v City of New York**

2011 NY Slip Op 30982(U)

April 13, 2011

Supreme Court, New York County

Docket Number: 108535/2009

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART - 52

Index Number : 108535/2009  
SHEEHAN, JOHN  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 003  
DISMISS

INDEX NO. 108535/09

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

MOTION SEQ. NO. 03

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

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

PAPERS NUMBERED

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 is decided in accordance with the annexed decision.

FILED

APR 15 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/13/11

e9k  
CYNTHIA S. KERN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 52

-----X  
JOHN SHEEHAN,

Plaintiff,

Index No. 108535/09

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK and THE NEW YORK  
CITY POLICE DEPARTMENT, POLICE OFFICER  
PAUL AGUELLO, SHIELD NO. 00142 and  
POLICE OFFICER IGNAZIO SELVAGGIO,  
SHIELD NO. 15460

Defendants.  
-----X

**FILED**

APR 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages he allegedly sustained when he was arrested on April 1, 2004. Defendants now move to dismiss the complaint, or, in the alternative, for summary judgment dismissing plaintiff's claims for false arrest, false imprisonment, malicious prosecution and violation of federal civil rights under 42 U.S.C. §1983. For the reasons set forth below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. It is undisputed that on May 1, 2008, plaintiff was driving north on the West Side Highway when a police car behind him activated its lights and sirens. Not thinking he had done anything wrong, plaintiff drove for eight to ten blocks before

-pulling over. Defendant police officer Paul Aguello approached plaintiff's vehicle and asked him to step out of the car, which plaintiff did. Plaintiff asked why he had been stopped and Officer Aguello responded that he had pulled him over for speeding. Officer Aguello asked plaintiff to take a breathalyzer test at least twice but plaintiff refused. Officer Aguello then attempted to handcuff plaintiff. Plaintiff moved his right hand onto the hood of the police car and a physical altercation between plaintiff, Office Aguello and the other police officer present, Ignazio Selvaggio, ensued. The officers eventually handcuffed plaintiff and brought him to the 28<sup>th</sup> precinct where he again refused to take a breathalyzer test. Where the parties' versions diverge is regarding whether or not plaintiff was speeding and the surrounding details. Plaintiff denies speeding and says his speed was "in the thirties" although he did not look at the speedometer. In contrast, both police officers involved claim that plaintiff was speeding but give different accounts of when they first saw plaintiff's vehicle and how they determined that he was speeding. Defendant Officer Aguello testified that he was parked on a side street when plaintiff's car approached in the right lane of 12<sup>th</sup> Avenue. He states that he made a visual assessment of plaintiff's speed and then used a laser detector to measure plaintiff's speed. Defendant Officer Selvaggio testified that the police car was on 12<sup>th</sup> Avenue when plaintiff's car passed them on the right. He testified that neither he nor Detective Aguello used a laser detector in assessing plaintiff's speed.

Defendants are not entitled to summary judgment dismissing plaintiff's claims for false imprisonment and false arrest because there are questions of material fact as to whether the police officers had probable cause to stop and then arrest plaintiff. Probable cause is a complete defense to an action for false arrest. *See Morel v Crimaldi*, 683 N.Y.S.2d 22, 24 (2<sup>nd</sup> Dept 1998).

The differing accounts of when the police officers saw plaintiff's vehicle and how they assessed its speed raise questions of fact as to whether they had probable cause to stop his car.

Nor are defendants entitled to summary judgment dismissing plaintiffs' claim for malicious prosecution because plaintiff is unable to raise any issue of fact as to whether defendants acted maliciously. "The elements of an action for malicious prosecution are: (1) the initiation of a proceeding; (2) its termination favorably to plaintiff; (3) lack of probable cause; and (4) malice." *Colon v City of New York*, 60 N.Y.2d 78, 82 (1983). Lack of probable cause can support an inference of actual malice. *See Lundgren v Margini*, 30 A.D.3d 476, 477 (2<sup>nd</sup> Dept 2006). Where there is a question of fact as to probable cause, as here, there is therefore necessarily a question of fact as to whether there was malice. *See id.* In addition, there is a question as to whether malice could be inferred from the conduct of the police officers involved. *See Fortunato v City of New York*, 63 A.D.3d 880, 881 (2<sup>nd</sup> Dept 2009).

Defendants are entitled to summary judgment dismissing plaintiff's §1983 claims because he fails to show that a violation of their constitutional rights resulted from a municipal custom or policy as required in order to establish a claim pursuant to 42 U.S.C. §1983. *See Monell v Department of Social Services of the City of New York*, 436 U.S. 658, 694-95 (1978); *Ricciuti v NYC Transit Auth.*, 941 F.2d 119, 122-23 (2<sup>nd</sup> Cir. 1991). "Though this [requirement of a municipal custom or policy] does not mean that the plaintiff must show that the municipality had an explicitly stated rule or regulation... a single incident alleged in a complaint... does not suffice to show a municipal policy. The inference that a policy existed may, however, be drawn from circumstantial proof..." *Ricciuti*, 941 F.2d at 122-23. In the instant case, plaintiff fails to provide any evidence of a municipal custom or policy that resulted in the violation of his constitutional

