

<b>Ali v City of New York</b>
2011 NY Slip Op 31218(U)
May 4, 2011
Supreme Court, New York County
Docket Number: 115413/08
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C.

PART 5

Index Number : 115413/2008

ALI, RYAN

vs

CITY OF NEW YORK

Sequence Number : 002

AMEND

INDEX NO. 115413/08

MOTION DATE 3/11/11

MOTION SEQ. NO. 002

MOTION CAL. NO. 2

CAL # 2

The following papers, numbered 1 to 1 were read on this motion to/for amend and for summary judgment.

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

Answering Affidavits -- Exhibits

Replying Affidavits

PAPERS NUMBERED

1

Cross-Motion: [ ] Yes [x] No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAY 09 2011

NEW YORK COUNTY CLERKS OFFICE

Dated: 5/4/11 MAY 04 2011

BARBARA JAFFE J.S.C.

Check one: [ ] FINAL DISPOSITION [x] 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 : IAS PART 5

-----X  
RYAN ALI,

Plaintiff,

Index No.: 115413/08

Motion Date: 3/11/11

Motion Seq. No.: 002

-against-

**DECISION AND ORDER**

CITY OF NEW YORK and THE NEW YORK CITY  
POLICE DEPARTMENT,

Defendants.  
-----X

BARBARA JAFFE, J.S.C.:

**For defendants:**

Lynn M. Leopold, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church St.  
New York, NY 10007  
212-442-0398

By notice of motion dated February 10, 2011, submitted on default, defendants move pursuant to CPLR 3025(b) for leave to amend their answer to assert the affirmative defense of collateral estoppel. They also move pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiff's claims against them.

I. BACKGROUND

On April 16, 2008, New York City Police Department Sergeant Danielle E. Raia conducted a reverse sting operation at 5 Borough Pawn, LLC, a pawn shop located at 93-45A 104<sup>th</sup> Street in Ozone Park, New York. (Affirmation of Lynn M. Leopold, Esq. [Leopold Aff.], Exh. B). Dressed in street clothing, Raia allegedly sold several pieces of stolen jewelry to a person matching plaintiff's description. (*Id.*). Later that day, she returned to the shop and allegedly sold another piece of stolen jewelry to the same person. (*Id.*). On May 6, 2008, a

confidential informant did the same and captured the transaction on an audio recording device. (*Id.*). Raia filed an Investigative Report relating to the informant's transaction, and a search warrant issued. (*Id.*, Exh. H). On May 15, 2008, during the execution of the warrant, New York City Police Department Sergeant Ron Marti arrested plaintiff for criminal possession of stolen property. (*Id.*). Plaintiff remained in custody and was released on May 18, 2008, when all criminal charges against him were dismissed. (*Id.*, Exh. B).

On July 11, 2008, plaintiff served a notice of claim on defendants. (*Id.*, Exh. A). On November 17, 2008, plaintiff served a summons and complaint, asserting claims for false arrest, false imprisonment, malicious prosecution, assault, and violations of 42 USC § 1983. (*Id.*, Exh. B). The City served its answer on December 4, 2008, joining issue. (*Id.*, Exh. C).

On April 23, 2008, a related action, *5 Borough Pawn, LLC., Ruben D. Cabrera, Rebecca Cabrera and Brian Cabrera against the City of New York, New York City Police Department, Commissioner of Police Raymond Kelly and Sergeant Ron Marti*, was commenced in the District Court for the Southern District of New York. (*Id.*, Exh. E). There, the plaintiffs asserted claims for false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress, arising from Marti's arrests of one Brian Cabrera. (*Id.*). As the issues involved there are related to those involved in the instant case, the parties agreed to conduct consolidated discovery informally. (*Id.*).

On March 2, 2010, Marti moved for an order granting him summary judgment in the federal matter, and plaintiff submitted an affidavit in opposition even though he was not a party to that action. (*Id.* Exh. F). By decision and order dated October 22, 2010, the federal court partially granted the motion, noting that Marti had probable cause to arrest plaintiff for the sales

made before May 15, 2008. (*Id.*, Exh. E).

## II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

### A. Contentions

Defendants claim they are entitled to summary judgment because the federal court determined that probable cause for plaintiff's arrest existed and that plaintiff is thereby collaterally estopped from claiming otherwise. (*Id.*) And, even if plaintiff is not collaterally estopped, they argue that probable cause existed for plaintiff's arrest, relying on the fellow officer rule. (*Id.*) Moreover, as defendants maintain that Marti was acting within the scope of his employment in arresting plaintiff, plaintiff's negligent hiring and retention claim must be dismissed, along with all claims against the New York City Police Department because the Department is immune from liability. (*Id.*)

### B. Analysis

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d at 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). The opposing party must "lay bare" its evidence (*Silberstein*,

*Awad & Miklos v Carson*, 304 AD2d 817, 818 [1<sup>st</sup> Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d at 562).

I. False arrest, false imprisonment, malicious prosecution, and civil rights violations under 42 USC § 1983

a. Collateral estoppel

A party seeking to collaterally estopp another party from asserting a claim or defense must satisfy a two-prong test. First, it must be shown that an issue conclusive in the second action “is identical to an issue which was raised, necessarily decided, and material in the first action.” (*City of New York v Welsbach Elec. Corp.*, 9NY3d 124, 128 [2007]). An issue is necessarily decided when it was “properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding.” (*D’Arata v N.Y. Cent. Mut. Fire Ins.*, 76 NY2d 659, 664 [1990]). Second, it must be shown that the party to be estopped had a full and fair opportunity to litigate the issue in the prior action. (*Welsbach Elec. Corp.*, 9 NY3d at 128).

In order to avoid being collaterally estopped, the party must demonstrate that he did not have a full and fair opportunity to litigate the issue in the prior action, and it is well settled that a party may be collaterally estopped even if not a party to the prior action if “his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of the rights of the party to the prior litigation.” (*D’Arata*, 76 NY2d at 664).

Here, the existence of probable cause to arrest plaintiff was neither placed in issue, nor was it actually determined in the federal action. At issue there was whether Sergeant Marti had probable cause to arrest Brian Cabrera, and although the federal court detailed Raia’s reverse sting operation and indicated that there was probable cause for plaintiff’s arrest, it was not necessary to her holding. (*See Leopold Aff.*, Exh. E).

In any event, although plaintiff provided an affidavit in opposition to the motion in the federal action, he was not a party thereto, and his rights here are not contingent upon or derivative of the plaintiffs' rights in the federal action. (*Cf D'Arata*, 76 NY2d at 665 [invoking collateral estoppel against non-party who testified in the prior action because non-party brought second action as a subrogee of defendant in prior action]). Thus, as plaintiff did not have a full and fair opportunity to litigate this issue in the federal matter, he cannot be collaterally estopped from arguing that his arrest was not supported by probable cause.

b. Probable cause and the fellow officer rule

The existence of probable cause to arrest constitutes an absolute defense to plaintiff's claims. (*See Young v City of New York*, 72 AD3d 415, 417 [1<sup>st</sup> Dept 2010]; *Kandekore v Town of Greenburgh*, 243 AD2d 610, 610 [2d Dept 1997]). Probable cause arises when the arresting officer has reasonable or probable grounds to believe that the arrestee had committed an offense, or 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).

Pursuant to the fellow officer rule, "a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer or another police agency in possession of information sufficient to constitute probable cause for the arrest." (*People v Ketcham*, 93 NY2d 416, 419 [1999]; *People v Mims*, 88 NY2d 99, 113 [1996]; *People v*

*Maldonado*, 86 NY2d 631, 635-36 [1995]; *People v Landy*, 59 NY2d 369, 375 [1983]).

Here, as Raia herself alleged to have twice sold plaintiff stolen goods, she possessed probable cause to arrest plaintiff. (*People v Tripoli*, 100 AD2d 633, 633-34 [2d Dept 1984] [police officer that sold defendant stolen goods had probable cause to arrest defendant for criminal possession of stolen property immediately after the transaction]). Moreover, she reviewed an audio recording of a similar transaction between plaintiff and a confidential informant. (*People v Reichbach*, 131 AD2d 515, 515-16 [2d Dept 1987] [confidential informant's sale of goods to pawn shop owner provided police with probable cause to arrest owner for criminal possession of stolen property]). And, in relying on the search warrant, which was issued on the basis of Raia's personal knowledge as conveyed in her Investigative Report, Marti lawfully arrested plaintiff in accordance with the fellow officer rule. (*See People v Robinson*, 8 AD3d 131, 132-33 [1st Dept 2004] [fellow officer rule applied where arresting officer secured and executed search warrant based upon an undercover officer's observations]). Thus, defendants are entitled to summary judgment on plaintiff's claims for false arrest, false imprisonment, malicious prosecution, and civil rights violations under 42 USC § 1983.

## 2. Plaintiff's claim for negligent hiring and retention

Generally, a claim for negligent hiring and retention does not lie where the employee was acting within the scope of his employment when he committed the allegedly tortious act. (*Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1<sup>st</sup> Dept 1997]). Marti was engaged in official police business, and nothing in the record indicates otherwise. (*See Schilt v N.Y. City Tr. Auth.*, 304 AD2d 189, 193 [1st Dept 2003] [defining scope of employment as those actions performed in furtherance of the employer's interests, and not those "brought on by a matter

wholly personal in nature, the source of which is not job related"]). Consequently, there are no factual issues as to whether Marti was acting within the scope of his employment in executing the search warrant and arresting plaintiff. Accordingly, defendants are entitled to summary judgment on plaintiff's negligent hiring and retention claims.

### 3. Section 396 of the New York City Charter

Section 396 of the New York City Charter provides that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law." As a New York City agency, the New York City Police Department is not a suable entity. (*Jenkins v City of New York*, 478 F3d 76, 93 n 19 [Dist Ct. SD NY 2007]). Therefore, the New York City Police Department is entitled to summary judgment on plaintiff's complaint in its entirety.

## III. DEFENDANTS' MOTION TO AMEND

### A. Contentions

Defendants seek leave to amend their answer to assert collateral estoppel as an affirmative defense, asserting that the amendment is meritorious and will not prejudice or surprise plaintiff. (*Leopold Aff.*).

### B. Analysis

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of court, which "shall be freely given upon such terms as may be just, including the granting of costs and continuances." It is well-settled that leave to amend pleadings under this section should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1<sup>st</sup> Dept 2010]).

As plaintiff is not collaterally estopped from arguing that his arrest was not supported by probable cause, this amendment plainly lacks merit. (II.B.1.a.).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted as to defendant New York City Police Department and the complaint is hereby severed and dismissed as against defendant New York City Police Department, and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that defendants' motion for summary judgment is granted as to defendant City of New York to the extent of dismissing plaintiff's claims for false arrest, false imprisonment, malicious prosecution, civil rights violations under 42 USC § 1983, and negligent hiring and retention; it is further

ORDERED, that defendants' motion to amend their answer is denied as moot; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the remaining parties shall appear for the previously-scheduled compliance conference on June 21, 2011 at 2:00 p.m at 80 Centre Street, room 103, New York, New York.

**FILED**

**MAY 09 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

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

DATED: May 4, 2011  
New York, New York

**MAY 04 2011**