

Petrychenko v Solovey
2011 NY Slip Op 31366(U)
May 23, 2011
Supreme Court, Richmond County
Docket Number: 100280/09
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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DIMITRI PETRYCHENKO,
Plaintiff,
-against-
IRENE SOLOVEY and CITY OF NEW YORK,
Defendants.

Part C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 100280/09
Motion Nos. 2211-004
4122-005
253-006

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The following papers numbered 1 to 7 were marked fully submitted on the 16th day of March, 2011:

	Pages Numbered
Notice of Motion for Partial Summary Judgment by Defendant Irene Solovey, with Supporting Papers and Exhibits (dated June 13, 2010).....	1
Affirmation and Affidavit by Plaintiff Dimitri Petrychenko (dated October 11, 2010).....	2
Cross Motion for Summary Judgment by Defendant the City of New York, with Supporting Papers and Exhibits (dated January 4, 2011).....	3
Affirmation in Opposition by Plaintiff Dimitri Petrychenko (dated January 25, 2011).....	4
Notice of Cross Motion for Summary Judgment by Plaintiff Dimitri Petrychenko, with Supporting Papers and Exhibits (dated January 25, 2011).....	5
Affirmation in Opposition by Defendants The City of New York (dated March 11, 2011).....	6
Reply Affirmation by Plaintiff Dimitri Petrychenko, with Exhibit (dated March 14, 2011).....	7

Upon the foregoing papers, the motion and cross motion for summary judgment of defendants Irene Solovey (No. 2211) and the City of New York (No. 4122) are granted and the complaint is dismissed. Plaintiff's cross motion for summary judgment (No. 253) is dismissed as academic.

In this cause of action, plaintiff Dimitri Petrychenko alleges that he was falsely imprisoned following a warrantless arrest at his home on Staten Island on September 27, 2008. Defendant Irene Solovey is plaintiff's former spouse and the custodial parent of their two minor sons. Detective Edward Russotto, a New York City police detective, is the arresting officer and claims that he believed plaintiff to be in violation of the custody order at the time of his arrest (*see* City's Exhibit "I" pp 6, 14, 43).

The elements of a cause of action for false arrest or imprisonment are: (1) that the arresting officer intended to confine the plaintiff; (2) that plaintiff was conscious of the confinement; (3) that the confinement occurred without plaintiff's consent; and (4) that the confinement was not otherwise privileged (*see* Rivera v. City of New York, 40 AD3d 334, 341). In civil actions an arrest without a warrant gives rise to a presumption that the arrest was unlawful (*see* Boughton v. State of New York, 37 NY2d 451, 458, *cert den sub nom*; Schanbarger v. Kellogg, 423 US 929). As a result, a plaintiff can establish a *prima facie* case merely by proving that he was arrested without a warrant (*id.* at 458; Tsachlis v. City of Mount Vernon, 293 AD2d 525; *see generally* 59 NY Jur 2d, False Imprisonment and Malicious Prosecution § 32). Once a *prima facie* case has been established, the burden shifts to defendant to establish that the plaintiff was legally arrested based on evidence showing that at the time in question, the arresting officer had probable cause to believe that plaintiff had committed or was committing a crime (*see* Boughton v. State of New York, 37 NY2d at 458; Tsachlis v. City of Mount Vernon, 293 AD2d at 525).

In this regard, it is well settled that probable cause arises when such facts and circumstances exist as would induce a reasonably prudent person to believe that the individual arrested is or was guilty of committing a crime (*see* Colon v. City of New York, 60 NY2d 78, 82). Stated otherwise, probable cause for an arrest without a warrant is justified when an arresting officer has reasonable grounds to believe that the arrestee has or is committing an offense. In such circumstances, a mistake of fact consistent with probable cause is not fatal, as long as the arresting party acted reasonably and

in good faith (Colon v. City of New York, 60 NY2d at 82, CPL 140.10)

Generally, information obtained from an identified citizen accusing another individual of committing a specific crime is sufficient to provide the police with probable cause to affect a warrantless arrest (Norasteh v. State of New York, 44 AD3d 576). Accordingly, although dismissal of the ensuing criminal charge constitutes some evidence of a lack of probable cause, it is clearly not dispositive of the issue (*see* Colon v. City of New York, 60 NY2d at 84; *see generally* 59 NY Jur 2d, False Imprisonment and Malicious Prosecution § 34). Rather, “in determining whether [, as in this case,] a police officer has probable cause for an arrest, the emphasis should not be narrowly focused on [the presence or absence of] any . . . single factor, but on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents” (People v. Wright, 8 AD3d 304, 307 *quoting* People v. Bothwell, 261 AD2d 232, 234 [*internal quotation marks omitted*]).

In opposition to the cross motions to dismiss and in support of his cross motion for summary judgment on his cause of action for false arrest, plaintiff asserts that there was no evidence on which Detective Russotto could base a reasonable belief that a crime had been committed at the time of his arrest; that he was lawfully exercising his visitation rights pursuant to a court order (*see* Plaintiff’s “Exhibit “B”); and that he was not intoxicated. Nevertheless, plaintiff concedes that after the children had gone to sleep on the night of his arrest, he may have consumed an alcoholic beverage (*see* City’s Exhibit “G” p 13”). In addition, plaintiff asserts that the fact that he was neither arraigned nor prosecuted further supports his contention that there was no probable cause for his arrest.

The City’s motion for summary judgment dismissing the complaint against it is granted. In the opinion of this Court, Detective Russotto reasonably believed that he possessed probative facts sufficient to constitute probable cause for plaintiff’s arrest based on (1) the information provided to him by the children’s mother, Ms. Solovey, when she entered the police precinct on September 27, 2008, (2) her exhibition of a copy of the divorce decree providing that she had been awarded custody of the children, (3) her representation that plaintiff had refused to return the children following their period of visitation, and (4) her recent telephone conversation with plaintiff, in which she was led to believe that he was intoxicated, thereby placing the children in danger (*see* City’s Exhibit “I” pp

14,16). Moreover, in an apparent attempt to corroborate her complaint, Detective Russotto personally telephoned plaintiff and found him to be “very combative and hostile” on the phone (*see* City’s Exhibit “I” p 43). In view of the above, Detective Russotto noted in his follow-up report that he informed plaintiff that if the children were not returned to Ms. Solovey, he would have “to go to the residence to retrieve them” (*see* City’s Exhibit J”). As a result of this brief conversation, in which plaintiff remained non-compliant with the mandate of the court, Detective Russotto testified at his deposition that he became convinced that Ms. Solovey’s accusation of plaintiff’s intoxication was trustworthy and, given plaintiff’s telephone demeanor, that the children were in a precarious situation tinged with danger (*see* City’s Exhibit “I” p 44). He also testified that when he arrived at plaintiff’s home, the latter confronted him outside, standing on the porch, that his breath smelt of alcohol, and that he refused to produce the children, who it now appears were only several feet away in another room (*see* City’s Exhibit “I” pp 22-24).

Under these circumstances, and cognizant of the sense of urgency extant in a domestic dispute involving young children and the consumption of alcohol by a non-compliant and combative parent, it is the opinion of this Court that Detective Russotto then and there had probable cause to make the arrest regardless of whether or not the children were actually in physical danger (*id.* at p 45). As stated previously, probable cause does not require “certitude “ that a crime has been committed by an accused (*see* Brown v. City of New York, 92 AD2d 15, 18 *aff’d* 60 NY2d 893); rather, it is the totality of the circumstances then believed to be true which warrants a person of reasonable caution to believe that an arrest is authorized (*see* People v. Smith 44 NY2d 613).

On the basis of this testimony, which has not been contested, the City has rebutted plaintiff’s *prima facie* case and established as a matter of law that the officer had probable cause to make the arrest. In opposition, plaintiff has failed to demonstrate the existence of any triable issues of fact.

Likewise, defendant-mother’s motion for summary judgment must be granted and the complaint against Ms. Solovey dismissed. It is well settled that a civilian complainant, merely by seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether or not, *e.g.*, to make an arrest, will not be held liable for false arrest (*see* Wasilewicz v. Monroe Police Dept, 3 AD3d 561; Celnick v. Freitag, 242 AD2d 436,

437). Rather, liability is warranted only where the civilian complainant has “affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition” (Mesti v. Wegman, 307 AD2d 339, 340 [*internal quotation marks omitted*]; see Eisenkraft v. Armstrong, 172 AD2d 484, 486). No such evidence has been presented in this case, nor has plaintiff adduced any admissible evidence raising a triable issue of fact as to whether his former wife “played an active role in the [arrest,] such as giving advice and encouragement or importuning the authorities to act” (DuChateau v. Metro-North Commuter Railroad Co., 253 AD2d 128, 131). Here, all that has been shown is that Ms. Solovey reported an incident with criminal implications to the police and identified the likely perpetrator.

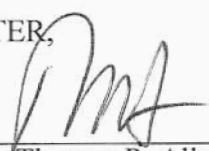
Contrary to plaintiff’s speculative contentions, Detective Russotto’s testimony is replete with statements that he employed his own judgment in forming a reasonable belief that probable cause existed to make the arrest.

Accordingly it is hereby

ORDERED, that the motion and cross motion for summary judgment are granted and the complaint is dismissed; and it is further

ORDERED, that plaintiff’s cross motion for summary judgment is dismissed as academic.

ENTER,



Hon. Thomas P. Aliotta

J.S.C.

Dated: May 23, 2011