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

PRESENT: Barbara Jaffe BARBARA JAFFE J.S.C. Justice PART 5

Index Number : 402943/2009
LEE, GABRIEL
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS
CAL #70

INDEX NO. 402943/09
MOTION DATE 3/22/11
MOTION SEQ. NO. 002
MOTION CAL. NO. 70

...n this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause ... Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JUN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/11
MAY 31 2011

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.

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

GABRIEL LEE,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICER MARSHALL MONELL and POLICE OFFICER JOSEPH CARRASCO,

Defendants.

----------x

Index No.: 402943/09

Motion Date: 3/22/11
Motion Seq. No.: 002
Motion Cal. No.: 70

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

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By notice of motion dated November 15, 2010, defendants move pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiff's claims against them. Plaintiff opposes.

I. BACKGROUND

On May 21, 2008, Marshall Monell and Joseph Carrasco, New York City Police Department (NYPD) officers assigned to the prisoner van component of a Street Narcotics unit, were driving in the vicinity of West 121st Street and Eighth Avenue in Manhattan when they saw plaintiff with another individual at the northeast corner. (Affirmation of Andrew Lucas, Esq., dated Nov. 15, 2010 [Lucas Aff.], Exhs. F, H). As the two walked north on Eighth Avenue towards West 122nd Street, the officers observed plaintiff twice adjust the right side of his

waistband. They thus decided to follow the men as they walked around the block to West 121st Street and Seventh Avenue. (*Id.*). Deeming plaintiff's conduct as indicative of his possession of a firearm, and given what they characterized as a circuitous route the two took in a high-crime area, they decided to stop them. (*Id.*).

The officers approached the two and ordered them to stop. (*Id.*). Monell approached plaintiff's companion to question him, turning his back to plaintiff, while Carrasco approached plaintiff, frisked him, and removed from his right pants pocket a firearm. (*Id.*). Carrasco and Monell then arrested plaintiff for criminal possession of a weapon. (*Id.*, Exh. G).

Plaintiff was detained at the 28th Precinct and subsequently transferred to Rikers Island Correctional Facility. (*Id.*, Exh. A). On May 23, 2008, he was indicted for criminal possession of a weapon in the third degree. (*Id.*). A *Mapp* hearing was held on September 9, 2009, during which only Monell testified. (*Id.*, Exh. H). He was unable to testify as to the exchange between Carrasco and plaintiff or as to the specifics of the search. (*Id.*). The judge ordered the gun suppressed, finding that although there may have been a predicate for approaching and inquiring, there was no probable cause for searching plaintiff, absent any evidence that he "said anything in response to [Carrasco's] questioning that was in any way suspicious." (*Id.*, Exh. H). On October 15, 2008, the charge against plaintiff was dismissed. (*Id.*, Exhs. A, G).

On November 5, 2008, plaintiff served a notice of claim on City and the NYPD, and on January 14, 2009, he was examined pursuant to General Municipal Law (GML) § 50-h. (*Id.*, Exh. A). Recounting the events of May 21, 2008, plaintiff stated that he and his friend were walking to lunch and that he never left his friend's side. (*Id.*). He also testified that as soon as the officers approached them, Carrasco ordered him up against a car and frisked him, and that there was no

verbal exchange between them. (*Id.*).

On July 27, 2009, plaintiff served on defendants a summons and complaint in Bronx County, asserting claims for false arrest, false imprisonment, malicious prosecution, negligent and intentional infliction of emotional distress, and civil rights violations under 42 USC § 1983. (*Id.*, Exh. B). On January 25, 2010, City interposed its answer and demand to change venue (*id.*, Exh. C), and venue was changed to New York County by order dated October 14, 2009 (*id.*). On February 11, 2010, plaintiff served defendants with a verified bill of particulars. (*Id.*, Exh. D). Depositions of plaintiff and Monell were conducted on September 27, 2010, and plaintiff filed a note of issue on October 14, 2010. (*Id.*, Exh. E).

On November 5, 2010, Carrasco executed an affidavit setting forth his version of the facts leading to plaintiff's arrest, stating that he observed plaintiff and his friend acting suspiciously, as plaintiff had repeatedly adjusted his waistband, the two had walked around the block in a high-crime area, and plaintiff's friend briefly disappeared from their view, leaving plaintiff standing on the street corner. (*Id.*, Exh. F). He also states that on stopping plaintiff, he asked him to show his hands and inquired as to whether "he had anything he should not have," and that plaintiff did not respond verbally but instead placed his hands on a car parked at the curb and spread his legs. (*Id.*). He observes that plaintiff seemed nervous, as he was "sweating, jittery, and scanning quickly with his eyes" after he asked him again if he "had anything he should not have, and specifically if he had any sharp objects on him," and that he decided to frisk him because he feared for his safety. (*Id.*).

II. CONTENTIONS

As the NYPD may not be sued (New York City Charter § 396), defendants maintain that

all claims against them must be dismissed. (*Id.*). They also argue that there was probable cause for plaintiff's arrest and that his false arrest, false imprisonment, and malicious prosecution claims against City must therefore be dismissed, as evidence constituting "fruit of the poisonous tree" is not excluded in civil proceedings, and plaintiff's indictment raises a presumption of probable cause for his arrest. (*Id.*). Moreover, they contend, even absent probable cause, plaintiff's malicious prosecution claim must be dismissed because plaintiff's case was not favorably disposed for purposes of his claim, given the predicates justifying plaintiff's stop, frisk, and arrest, and plaintiff's failure to establish that City was engaged in a pattern or practice of civil rights violations. (*Id.*). Finally, they assert that all claims against Monell and Carrasco must be dismissed, as well, as plaintiff failed to name them in his notice of claim, and they are entitled to qualified immunity from suit. (*Id.*).

Although plaintiff concedes that the NYPD cannot be sued and that he did not comply with GML § 50-e by failing to name Monell and Carrasco in his notice of claim, he distinguishes the cases defendants cite for the proposition that the fruit of the poisonous tree is not excluded in civil actions and argues that an indictment does not create a presumption of probable cause, as evidence discovered through an illegal search does not give rise to probable cause. (Affirmation of Alan H. Figman, Esq. in Opposition, dated Jan. 20, 2011 [Figman Aff.]). Plaintiff claims that the case against him was favorably disposed, absent any showing that the that the dismissal of the charge against him was inconsistent with his innocence, argues that he has pleaded facts sufficient to show that City engaged in a pattern and practice of civil rights violations, and maintains that there exist material issues of fact as to whether Monell and Carrasco had probable cause to stop and search him. (*Id.*).

In reply, defendants argue that the suppression of the handgun does not annul the presumption of probable cause created by the indictment. (Affirmation of Andrew Lucas, Esq. in Reply, dated Jan. 27, 2010).

III. 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 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d at 562).

Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept

2005]).

A. Claims against the NYPD

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 NYPD may not be sued. (*Jenkins v City of New York*, 478 F3d 76, 93 n 19 [SD NY 2007].

B. Claims against City

1. Common law claims

The existence of probable cause to arrest constitutes an absolute defense to plaintiff's false arrest, false imprisonment, and malicious prosecution claims. (*See Young v City of New York*, 72 AD3d 415, 417 [1st 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. (CPL 70.10(2), 140.10[1][a]). Dismissal of the criminal charge is some evidence of lack of probable cause, but it is not dispositive. (59 NY Jur 2d, False Imprisonment § 34). The defendant's motives, good or bad faith, or malice or lack thereof are immaterial to the existence of probable cause. (*Id.*, § 13).

a. Fruit of the poisonous tree

Pursuant to the exclusionary rule, evidence discovered as a result of information obtained through an unlawful search or other illegal police activity is excluded as evidence in a criminal

proceeding as the "fruit of the poisonous tree." (*People v Jones*, 2 NY3d 235, 242 [2004]). The exclusionary rule does not, however, preclude the admission of such evidence in civil proceedings, and thus, evidence suppressed in an underlying criminal matter may be admitted in a civil case, provide probable cause for an arrest, and thereby mandate dismissal of a claim for which probable cause is a complete defense. (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *Townes v City of New York*, 176 F3d 138, 149 [2d Cir 1999]). Admission of the fruit of the poisonous tree in civil actions is consonant with the purpose underlying the exclusionary rule, namely to protect liberty and deter future unlawful searches and seizures, as exclusion of this evidence "would vastly overdeter state actors . . . and would distort basic tort concepts of proximate causation." (*Townes*, 176 F3d at 145).

"A person is guilty of criminal possession of a weapon in the fourth degree when [h]e or she possesses any firearm . . . ." (Penal Law § 265.02[1]). Here, Carrasco's discovery of a handgun on plaintiff provides a reasonably prudent person with grounds to believe that plaintiff had committed and was committing the crime of criminal possession of a weapon. Therefore, the discovery of the gun furnished probable cause for plaintiff's arrest. (*See People v Nichols*, 250 AD2d 370, 371 [1st Dept 1998] [police officer's discovery of weapon in defendant's pocket provided probable cause for his arrest for criminal possession of a weapon]).

b. Grand Jury indictment

It is well-settled that an indictment creates a presumption of probable cause to believe that the defendant committed the crime charged. (*Colon v City of New York*, 60 NY2d 78, 82 [1983]). This presumption applies to malicious prosecution claims only, and not to claims of false arrest or false imprisonment (*Williams v City of New York*, 40 AD3d 847, 850 [2d Dept

2007]), and it "may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith" (*Colon*, 60 NY2d at 82-83). The trial court may not weigh the evidence upon which the police or the Grand Jury acted, and the dismissal of an indictment due to insufficient evidence does not overcome the presumption. (*Id.* at 84).

Here, there is no evidence in the record indicating that Carrasco and Monell misrepresented, falsified, or suppressed evidence or acted in bad faith, and Carrasco's unlawful frisk of plaintiff (*see infra* III.B.2.c.) neither constitutes fraud nor shows bad faith. (*Cf Kinge v State of New York,* 79 AD3d 1473, 1479 [3d Dept 2010] [police officer's falsification of fingerprint evidence sufficient to overcome presumption]; *Haynes v City of New York,* 29 AD3d 521, 523 [2d Dept 2006] [police department failed to properly investigate owner of pager involved in drug deal and arrested owner of car driven instead; departure from police protocol demonstrated "an intentional or reckless disregard for proper procedures" sufficient to overcome presumption]).

c. Favorable disposition

To state a claim for malicious prosecution, a plaintiff must allege that: (1) a criminal proceeding was commenced; (2) the proceeding was terminated in his favor; (3) there was no probable cause; and (4) the proceeding was brought out of actual malice. (*Martinez*, 97 NY2d at 84). "A criminal defendant has not obtained a favorable termination of a criminal proceeding where the outcome is inconsistent with the innocence of the accused." (*Id.*). Although a criminal defendant need not prove actual innocence, the absence of a conviction is not in and of itself a

favorable termination. (*Id.*). Thus, a final disposition that does not involve the merits and that does not reflect the defendant's innocence does not constitute a favorable termination. (*Id.* at 85; *MacFawn v Kresler*, 88 NY2d 859, 860 [1996]; *Breytman v Olinville Realty*, 46 AD3d 484, 486 [1st Dept 2007]; *Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 422 [1st Dept]).

The charges against plaintiff were dismissed after the gun was suppressed, and neither the merits of the charges against plaintiff nor his innocence led to the dismissal. Thus, plaintiff has not shown that the termination of the criminal proceeding is not inconsistent with his alleged innocence.

2. 42 USC § 1983

a. Claims for false arrest, false imprisonment, and malicious prosecution

When a plaintiff's civil rights claims under 42 USC § 1983 are premised on common law claims for false arrest, false imprisonment, and malicious prosecution, and these claims are dismissed because defendants have demonstrated that there was probable cause for plaintiff's arrest, plaintiff's section 1983 claims must be dismissed as well. (*See, eg, Navarez v City of New York*, 83 AD3d 516 [1st Dept 2011] [dismissing common law claims for false arrest, false imprisonment, and malicious prosecution and claims for same under 42 USC § 1983 as probable cause for arrest existed]).

b. Claims related to his stop

In order to forcibly stop and detain a person, a police officer must have "reasonable suspicion that such person has committed, is committing or is about to commit a crime." (*People v Brannon*, ___ NY3d ___, 2011 NY Slip Op 03676 [2011]). If a person's actions are "at all times innocuous and readily susceptible of an innocent interpretation," reasonable suspicion does

not exist. (*People v Powell*, 246 AD2d 366, 369 [1st Dept 1998]). Presence in a high-crime area and the readjustment of one's waistband do not ordinarily give rise to reasonable suspicion. (*People v Riddick,* 70 AD3d 1421, 1422-23 [4th Dept 2010]; *Powell*, 246 AD2d at 369).

Here, Monell and Carrasco stopped plaintiff and his friend after seeing plaintiff repeatedly adjust his waistband and walk around the block in a high-crime area. Carrasco also claims that their behavior was suspicious because plaintiff's friend disappeared from view for a few minutes, leaving plaintiff alone at the street corner. Plaintiff, however, denies that he left his friend's side. Notwithstanding this factual dispute, plaintiff's actions are susceptible of an innocent interpretation, as plaintiff could have been carrying an innocuous item in his pocket that required repeated adjustment of his waistband, he and his companion could have been taking a walk around the block for an innocent purpose, as claimed, and he could have been waiting while his companion was otherwise innocently occupied. Moreover, neither Monell nor Carrasco saw the outline of a gun in plaintiff's pocket.

c. Claims related to his frisk

A police officer may frisk a detainee "if the officer reasonably suspects that he or she is in danger of physical injury." (*Powell*, 246 AD2d at 369). As with a stop, presence in a high-crime area and repeated adjustments to one's waistband alone do not give rise to the reasonable suspicion required for a frisk. (*Id.* at 369-70). Additionally, "in light of the recognized 'unsettling' aspect of a police-initiated inquiry of citizens" (*Powell,* 246 AD2d at 369-70), a detainee's nervous demeanor does not authorize a frisk (*People v Hollman,* 79 NY2d 181, 194 [1992]).

Believing that plaintiff had a gun, Carrasco decided to search him to protect himself from

physical injury, and he interpreted plaintiff's nervous behavior as indicating that he could attack him. Without more, Carrasco had no authority to frisk plaintiff absent any suspicious responses to or gestures toward Carrasco. (*See People v Newhirk*, 279 AD2d 535, 536-37 [2d Dept 2001] [officer's observation that defendant and his friend's "seemed 'very apprehensive'" did not provide reasonable suspicion for frisk, as there existed no objective indicia of criminality]; *Powell*, 246 AD2d at 369-70 [same]; c*f People v West*, 71 AD3d 435, 436 [1st Dept 2010] [reasonable suspicion warranting frisk where defendant reached for his pockets and failed to heed officer's order not to]; *People v Nelson*, 67 AD3d 486, 487 [1st Dept 2009] [reasonable suspicion warranting frisk where defendant's "conduct went far beyond ordinary nervous behavior," as he failed to heed officer's order to move away from vehicle and reached toward his waistband as he approached officer]). Moreover, there exist material issues of fact as to the verbal exchange between plaintiff and Carrasco: although Carrasco states that he ordered plaintiff to show his hands and asked him whether he had anything he should not have, plaintiff maintains that Carrasco ordered him up against a car and frisked him without saying anything.

d. Custom or policy requirement

In asserting a claim against a municipality under 42 USC § 1983 on the basis of a municipal employee's acts, a plaintiff must demonstrate that the employee was acting pursuant to an official municipal custom or policy in depriving plaintiff of his civil rights. (*Monell v New York City Dept. of Social Servs.*, 436 US 658, 691-94 [1978]). "A municipality may, under certain circumstances, be held liable under section 1983 for constitutional violations resulting from its failure to train its employees. The failure to train, however, must result in deliberate indifference to the constitutional rights of an individual." (*Johnson v Kings County Dist.*

Attorney's Office, 308 AD2d 278, 293 [2d Dept 2003]; *Manti v New York City Tr. Auth.*, 165 AD2d 373, 379 [1st Dept 1991]).

Here, plaintiff alleges that Monell and Carrasco were acting pursuant to official City policy and custom in stopping, frisking, and arresting him, and that City failed to train their employees effectively as to the constitutional limits on their authority to stop and search, encouraged its employees to lie about and cover up their constitutional violations, and failed to remove from duty officers with prior disciplinary records. As defendants have failed to offer evidence demonstrating that they adequately trained and supervised NYPD officers, or that their failure to do so does not constitute "deliberate indifference," they have failed to negate, *prima facie*, an element of plaintiff's claim and have thus failed to satisfy their *prima facie* burden on plaintiff's civil rights claims related to his stop and search. (*Rosabella,* 23 AD3d at 366; c*f Mays v City of Middletown*, 70 Ad3d 900, 903 [2d Dept 2010] [affirming summary judgment on plaintiff's failure to train claim against City under section 1983 as defendants made a *prima facie* showing that police officers adequately trained]).

C. Claims against Monell and Carrasco

1. Common law claims

Pursuant to GML § 50-e, a plaintiff asserting common law claims against City employees must name them in his notice of claim, and the failure to do so warrants dismissal of these claims. (*Tannenbaum v City of New York*, 30 AD3d 357, 358 [1st Dept 2006]).

Here, it is undisputed that plaintiff failed to name Monell and Carrasco in his notice of claim.

2. 42 USC § 1983

A police officer is entitled to qualified immunity "where his conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have known; or (2) it was objectively reasonable for him to believe that his actions were lawful at the time of the challenged act." (*Jenkins v City of New York,* 478 F3d 76, 87 [2d Cir 2007]). An officer's belief is "objectively reasonable" if there was arguable probable cause, which exists "if either (a) it was objectively reasonable for the officer to believe that probable cause existed; or (b) officers of reasonable competence could disagree on whether the probable cause test was met." (*Walczyk v Rio*, 496 F3d 139, 163 [2d Cir 2007]). Immunity should ordinarily be determined by the court on a motion for summary judgment unless the facts concerning its viability are in dispute. (*Kerman v City of New York*, 374 F3d 93, 109 [2d Cir 2004]).

A person's right not to be subjected to an unlawful stop, search, or arrest is clearly established. (*See Oliveira v Mayer,* 23 F3d 642, 648 [2d Cir 1994]). Therefore, Monell and Carrasco are entitled to qualified immunity only if it was objectively reasonable for them to believe that there was reasonable suspicion to stop and search plaintiff and probable cause to arrest him.

Here, Monell and Carrasco stopped and frisked plaintiff after observing what they considered suspicious behavior in a high-crime area, and they arrested plaintiff for criminal possession of a weapon after Carrasco discovered a handgun in his pants pocket. Material issues of fact exist as to the events preceding and occurring during the stop and frisk, as Carrasco and plaintiff disagree as to whether plaintiff and his friend ever separated and provide different accounts of their verbal and physical interactions.

However, it is undisputed that Carrasco discovered a gun upon frisking plaintiff. As

possession of a gun constitutes a crime (Penal Law 265.02[1]), the officers had an objectively reasonable belief that there existed probable cause to arrest plaintiff, and they are entitled to qualified immunity on this ground.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted as to plaintiff's common law claims for false arrest, false imprisonment, and malicious prosecution, and it is further

ORDERED, that defendants' motion for summary judgment is granted as to plaintiff's federal claims for false arrest, false imprisonment, and malicious prosecution, and it is further

ORDERED, that defendants' motion for summary judgment is denied as to plaintiff's federal claims related to his stop and frisk, and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 31, 2011
New York, New York

MAY 31 2011

FILED

JUN 06 2011

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