

Davis v City of New York
2011 NY Slip Op 31567(U)
May 5, 2011
Sup Ct, Queens County
Docket Number: 23822/10
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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William Davis,

Plaintiff,

- against -

The City of New York,

Defendant.

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Index
Number: 23822/10

Motion
Date: 4/26/11

Motion
Cal. Number: 5

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by plaintiff for partial summary judgment; and cross motion by defendant to dismiss.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross Motion-Affirmation-Exhibit.....	5-8
Reply.....	9-10

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by plaintiff for partial summary judgment on the issue of liability as to plaintiff's first cause of action alleging false arrest and imprisonment is granted. Cross-motion by the City to dismiss the complaint is granted solely to the extent that plaintiff's second cause of action alleging malicious prosecution is dismissed. In all other respects, the cross-motion is denied.

The essential facts of this matter are not in dispute. Two police officers in an unmarked police vehicle observed plaintiff engaging in the sale of what they believed was marijuana on the front steps of his residence at 105-11 Sutphin Boulevard in Queens County on May 29, 2004. After completing the transaction, plaintiff left his knapsack on the steps and walked to the curb to speak to the driver of a parked vehicle. The officers thereupon detained plaintiff at the curb and walked over to the knapsack, searched it

and found marijuana and a loaded gun inside. Plaintiff was arrested for drug and weapons possession. Plaintiff moved to suppress the gun and the marijuana, which motion was denied. Plaintiff was tried, convicted and sentenced as a persistent felony offender. On appeal, the Appellate Division, Second Department reversed the order of the trial court and ordered a new trial (see People v Davis, 69 AD 3d 647 [2nd Dept 2010]). The Appellate Division held that the People failed to demonstrate that plaintiff abandoned his knapsack, which had simply been put down on the front stoop of his residence which was fenced-in. Therefore, held the Appellate Division, plaintiff did not relinquish his expectation of privacy so as to allow for the warrantless search of his knapsack. In addition, the Appellate Division found that the defense of exigent circumstances was waived in the suppression court and therefore could not be raised on appeal. Plaintiff was released from incarceration on February 25, 2010 and all charges were dismissed on March 31, 2010.

An arrest made pursuant to a search without a warrant is presumptively unlawful (see Broughton v State of New York, 37 NY 2d 451 [1975]). Thus, in order to defeat plaintiff's motion for partial summary judgment on the issue of liability for false arrest and imprisonment, it was the burden of the City to demonstrate that there is a question of fact as to whether there was probable cause for plaintiff's arrest (see id.; Ostrover v City of New York, 192 AD 2d 115 [1st Dept 1993]).

The sole predicate for plaintiff's arrest, and his subsequent prosecution and conviction, was the fruit of the illegal search of his knapsack. "The fruit of an illegal search cannot give rise, in a juristic sense, to probable cause to arrest, and the conceded illegality of the search and seizure is thus conclusive against the defendant on the issue of privilege" (id. at 118). Therefore, since it has been judicially determined that there was no probable cause for his arrest, plaintiff is entitled to summary judgment on the issue of liability for false arrest and imprisonment, as a matter of law.

Contrary to the argument of counsel for the City, the holding in Ostrover was not overruled by the Court of Appeals in Martinez v City of Schenectady (97 NY 2d 78 [2001]). In Martinez, the plaintiff was arrested for drug possession after the police, pursuant to a search warrant, found cocaine in the plaintiff's residence. The plaintiff's conviction was reversed by the Court of Appeals, granting the plaintiff's motion to suppress the physical evidence upon the ground that the warrant application did not provide sufficient detail to enable the court that issued it to determine the reliability of an undisclosed informant. The

plaintiff was thereafter released from prison after serving four years. She thereupon commenced an action against the municipality asserting, inter alia, a cause of action for false arrest and imprisonment. The trial court granted the municipality's motion for summary judgment dismissing the complaint, finding, with respect to the cause of action for false arrest and imprisonment, that the municipality demonstrated the existence of probable cause for the arrest. The Appellate Division, Third Department, affirmed and the Court of Appeals likewise affirmed the granting of summary judgment to the municipality.

Martinez is inapposite to the facts of the present matter. Our case involves a warrantless search that was judicially determined to be illegal, whereas the Martinez case involved a search that was conducted pursuant to a lawfully issued search warrant. In that case, a confidential informant apprised the police that she could obtain drugs from the plaintiff at a specific address. The police thereupon arranged for an uncontrolled buy in which the informant went to the plaintiff's residence and obtained drugs, which she then handed over to the police. The police then had the informant make a telephone call to the plaintiff, which was monitored by them, in which references suggestive of a drug transaction were made. Based upon this information, two affidavits from the informant and one affidavit from a police officer, the police obtained a warrant to search the plaintiff's residence. They executed the warrant and discovered cocaine in the plaintiff's residence as well as mail addressed to plaintiff at that address. The plaintiff also admitted to them that she lived at that address. She was thereupon arrested. The Appellate Division, Third Department, affirmed the trial court's denial of the plaintiff's motion to suppress, and the Court of Appeals reversed, finding that the warrant application was not sufficiently detailed and thus should not have been issued.

In affirming the granting of summary judgment to the municipality dismissing the plaintiff's subsequent action for, inter alia, false arrest, the Court of Appeals found that the above facts constituted sufficient probable cause to arrest. The Court of Appeals noted that the issue of whether there was sufficient probable cause for the Supreme Court to issue a search warrant was separate from the issue of whether there was probable cause for the police officers to arrest for purposes of determining a claim of false arrest and imprisonment. That the Supreme Court should not have issued a warrant because the warrant application, in the opinion of the Court of Appeals, contained insufficient information to assess the reliability of the undisclosed informant was, as the Court stated, a "technical error at the trial level" (97 NY 2d at 84). It did not bear upon the issue of whether the police had

probable cause to arrest based upon the facts underlying their application for a search warrant and the discovery of drugs in the premises in the course of executing the legally-obtained warrant.

Therefore, Martinez does not alter the rule expressed in Ostrover that an arrest predicated upon an illegal search and seizure conclusively establishes plaintiff's entitlement to summary judgment on the issue of liability as to a cause of action alleging false arrest and imprisonment.

However, the City is entitled to summary judgment dismissing plaintiff's second cause of action for malicious prosecution.

In order to establish a claim for malicious prosecution, a plaintiff must establish, "1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions" (Broughton v State, 37 NY 2d 451, 458 [1975], cert. denied, 423 U.S. 929 [1975]). Plaintiff has failed to establish the second and fourth requirements.

Although plaintiff's conviction was overturned and the charges against him were dismissed, such disposition was not the result of a finding of innocence. It was merely the result of the suppression of evidence obtained through an unlawful search. "A criminal defendant has not obtained a favorable termination of a criminal proceeding where the outcome is inconsistent with the innocence of the accused. While a plaintiff need not prove actual innocence in order to satisfy the favorable termination prong of a malicious prosecution action, the absence of a conviction is not itself a favorable termination. A termination is not favorable, for example, where ... [p]laintiff's felony conviction was reversed not because of [his] lack of culpability...but because the evidence that formed the basis for [his] conviction was obtained pursuant to a faulty search warrant" (Martinez, supra at 84-85). Although the underlying criminal conviction was vacated not because evidence was obtained pursuant to a mere faulty search warrant but because of an unlawful warrantless search, the fact remains that the dismissal of the criminal charges against plaintiff was not because of a finding that plaintiff was not guilty, but because the incriminating evidence against him was suppressed. The Court notes that plaintiff has not submitted an affidavit denying that he was in possession of marijuana and a loaded firearm.

In addition, the record on this motion and cross-motion fails to establish the fourth prong of a malicious prosecution cause of action, namely, that plaintiff's arrest was motivated by actual

malice (see Broughton v State, supra; Rush v County of Nassau, 51 AD 3d 762 [2nd Dept 2008]). Indeed, plaintiff does not oppose that branch of the City's cross-motion for dismissal of plaintiff's cause of action for malicious prosecution.

Accordingly, the motion is granted and the cross-motion is granted solely to the extent that plaintiff's second cause of action alleging malicious prosecution is dismissed.

Dated: May 5, 2011

KEVIN J. KERRIGAN, J.S.C.