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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Index Number : 109385/2010
WILLIAMS, EARL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT CAL. #126

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/9/12 JAN 09 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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EARL WILLIAMS,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 109385/10

Motion Date: 10/25/11
Motion Seq. No.: 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For City:
Suzanne K. Colt, ACC
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By notice of motion dated July 18, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment on his complaint. Defendant City opposes and, by notice of cross motion dated August 31, 2011, moves pursuant to CPLR 3211 and/or 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the cross motion.

By affidavit dated June 8, 2009, New York City Police Department (NYPD) Police Officer Antonio Edwards obtained a search warrant to search the Brite Lite Barber Shop located at 157 Lenox Avenue in Manhattan (the premises) and a person named "Harold" based on reasonable cause to believe that evidence of the sale and possession of crack/cocaine and conspiracy to commit those crimes would be found inside the premises. (Affirmation of Robert G. Spevack, Esq., dated July 18, 2011, Exh. A).

According to plaintiff, on June 12, 2009, he was inside the premises getting a haircut,

when NYPD officers entered and ordered everyone inside not to move. An officer approached him, placed him on the floor, handcuffed his hands behind his back, and reached into and emptied his pockets, thereby discovering cash and a small bag of marijuana. Plaintiff was arrested for possession of drugs with intent to sell and possession of marijuana. All of the charges against him were dismissed at his arraignment in Criminal Court. (Affidavit of Earl Williams, dated July 13, 2011).

On May 13, 2011, Edwards testified at an examination before trial, as pertinent here, that he had received information that narcotics were being sold at the premises, that the search warrant authorized the NYPD to search the premises and people inside, and that to ensure security during the execution of search warrants, officers are authorized to secure the premises and people inside by handcuffing and patting them down for weapons. Edwards neither arrested plaintiff nor patted him down and did not know what the police did with plaintiff during the execution of the warrant. (Affirmation of Suzanne K. Colt, ACC, dated Aug. 31, 2011, Exh. E).

The elements of a cause of action for false arrest and/or false imprisonment are: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]).

A warrantless arrest gives rise to a presumption that the arrest was not privileged, and thus the plaintiff establishes, *prima facie*, a claim of false arrest upon proof that her arrest was made without a warrant, absent any issue as to confinement. (59 NY Jur 2d, False Imprisonment § 32 [2010]).

In order to avoid liability for false arrest, the defendant must establish that the arrest was

privileged or legally justified based on proof that at the time of the arrest, the arresting officer had probable cause to believe that the plaintiff had committed a crime. (*Id.*). Probable cause exists when the arresting officer has reasonable 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. (*Id.* § 33). Dismissal of the criminal charge is some evidence of a lack of probable cause, but is not dispositive. (59 NY Jur 2d, False Imprisonment § 34).

"The issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts . . . where there is 'conflicting evidence, from which reasonable persons might draw different inferences * * * the question [is] for the jury.'" (*Parkin v Cornell Univ., Inc.*, 78 NY2d 523 [1991], *quoting Veras v Truth Verification Corp.*, 87 AD2d 381 [1st Dept 1982], *affd* 57 NY2d 947).

As it undisputed that plaintiff's arrest was not made pursuant to a warrant, he has established, *prima facie*, a claim for false arrest. City argues that even absent probable cause for the search, there was probable cause for the arrest once the marijuana was discovered in plaintiff's possession, relying on *Martinez v City of Schenectady*, 97 NY2d 78, 85 (2001) and *Townes v City of New York*, 176 F3d 138, 149 (2d Cir 1999), *cert denied* 528 US 964.

In the criminal case giving rise to *Martinez*, the plaintiff's conviction was reversed on the ground that the search warrant was defective, and the evidence obtained as a result of the search was suppressed. (*People v Martinez*, 80 NY2d 549 [1992]). However, in the subsequent civil action, the plaintiff's false arrest/imprisonment claims were dismissed on the ground that the

evidence obtained before the search, along with the evidence illegally or improperly obtained during the search, provided probable cause for the arrest. The Court observed that in determining the sufficiency of the plaintiff's false arrest and malicious prosecution claims, the issue of whether there was probable cause for the search itself is separate from whether there was probable cause for the arrest. (97 NY2d at 85).

In *Townes*, the Court held that evidence constituting the fruit of an illegal arrest or search is no ground for an award of damages in a federal civil rights action. Rather, the fruit of the poisonous tree is suppressed only in criminal cases in order to safeguard the constitutional rights of an accused. (176 F3d at 145-147).

In contrast, in *Ostrover v City of New York*, the plaintiff was arrested after police officers conducted a concededly illegal search which produced a handgun. (192 AD2d 115 [1st Dept 1993]). The court held that there was no probable cause for the arrest, stating that:

> 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 . . . Were this not so, the police could subject a person to an egregiously unconstitutional search, and then use the fruits of that search to establish, in a civil suit for false imprisonment, that the arrest was privileged because it was based upon probable cause. The absurdity of such a principle is so patent as to require no further discussion.

The court thus granted the plaintiff summary judgment on her false arrest claim, relying in part on *Tetreault v State of New York*, 108 AD2d 1072 (3d Dept 1985), and *Casler v State of New York*, 33 AD2d 305 (4th Dept 1970). In *Tetreault*, the court found that as the police had no reasonable suspicion to stop the plaintiff's vehicle and their observation of drugs in the car was thus unlawful, the plaintiff's arrest was therefore made without probable cause. (108 AD2d at 1073-1074). In *Casler*, the police stopped the plaintiff's vehicle for a traffic violation and then

searched the inside of the glove compartment and found a gun. Finding that the police had no right to search the compartment, the court held that resulting arrest for gun possession was also unlawful. (33 AD2d at 307).

Therefore, in contrast to *Martinez*, where evidence linking the plaintiff to the evidence was obtained before the search and the search was illegal because the warrant was defective, in *Ostrover*, *Tetreault*, and *Casler*, the search, unsupported by probable cause, constituted the sole predicate for the plaintiff's arrest. Thus, contrary to City's contentions, evidence obtained from an illegal search may not provide the sole basis for probable cause to arrest. (*See also Levine v State*, 4 Misc 3d 1021[A], 2004 NY Slip Op 50989[U] [Ct Cl 2004] [plaintiff illegally arrested as officer lacked probable cause to order plaintiff to exit his vehicle, after which drugs were found]; *Blanchfield v State*, 104 Misc 2d 21 [Ct Cl 1980] ["probable cause to make an arrest cannot be based on the fruits of an illegal search or seizure"]).

Here, absent any evidence based on personal knowledge contradicting plaintiff's allegation that the arresting officer reached into his pocket rather than simply patting him down, or any testimony that the bag of marijuana could have been mistaken for a weapon, I find that the police lacked probable cause to search and/or reach into plaintiff's pocket. (*See Sibron v New York*, 392 US 40 [1968] ["In the case of the self-protective search for weapons, [a police officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous"]; *People v Heath*, 214 AD2d 519 [1st Dept 1995] [officer lacked probable cause to search defendant's pocket after he determined that bulge he felt in pocket was too small to be weapon]; *People v Setzer*, 199 AD2d 548 [2d Dept 1993] [once officer realized that bulge in defendant's pocket was not weapon, protective pat down search should have ended]; *Matter of*

James L., 133 AD2d 460 [2d Dept 1987] [finding search was unlawful where appellant was present during execution of search warrant for narcotics and officer had no reason to believe he was armed and dangerous and thus had no ground to search him for weapons, and in any event, officer's act of reaching into pocket and removing narcotics was not related to search for weapons]; *cf People v Holmes*, 36 AD3d 714 [2d Dept 2007], *lv denied* 9 NY3d 845 [while blanket search of all persons present in premises for narcotics not authorized, police were searching for armed robber and thus pat down was justified, and as officer could not determine whether hard bulge in defendant's sleeve was weapon, he was justified in removing object from sleeve]).

And, as the illegal search constitutes the sole ground for plaintiff's arrest, City has failed to show that plaintiff's arrest was supported by probable cause. (*See Davis v City of New York*, 2011 WL 2447596 [Sup Ct, Queens County 2011] [plaintiff granted summary judgment on liability on false arrest and imprisonment claim as search, which led to evidence underlying arrest, was illegal and there had been no probable cause for arrest]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted as to liability only; it is further

ORDERED, that an assessment of damages against defendant is directed; it is further

ORDERED, that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the

appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED, that defendant's cross motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: January 9, 2012
New York, New York

JAN 09 2012

FILED

JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE