

Ali v City of New York
2012 NY Slip Op 33740(U)
December 20, 2012
Supreme Court, Kings County
Docket Number: 24516/07
Judge: Ellen M. Spodek
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**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS**

Index No. 24516/07

ALI SALEH MOSHAD ALI and LESLIE PAGAN ALI,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

DECISION/ORDER

Present:

Hon. Ellen M. Spodek

Justice, Supreme Court

Papers	Numbered
Notice of Motion/Cross Motion and Affidavits.....	<u>1</u>
Order to Show Cause and Affidavits Annexed.....	<u>2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits/ Sur-Reply.....	<u>5</u>
Exhibits	<u>5</u>
Other:	<u>5</u>

Defendant The City of New York moves pursuant to CPLR §4404(a), for the Court to either (1) set aside the verdict for plaintiff as the plaintiff failed to prove a prima facie case and for a new trial to be ordered on the issue of excessive force only; or (2) set aside the verdict for plaintiff and for a new trial to be ordered on all issues as the jury's liability verdict is contrary to the weight of the evidence. In the alternative, defendant moves to set aside the damages verdict for the plaintiff and for the Court to order a new trial on damages as the jury award was excessive and contrary to the weight of the evidence. Plaintiffs Ali Saleh Moshad Ali and Leslie Pagan Ali oppose the motion.

On May 9, 2007, members of the New York City Police Department ("NYPD") conducted a search of the plaintiffs' premises located at 1641 65th Street - Apt. A8, Brooklyn, New York. It is undisputed that a "Confidential Informant" provided the alleged requisite probable cause in order for the NYPD to obtain and then subsequently execute the search warrant. Plaintiff Ali Saleh Moshad Ali claims that one of the officers pointed a gun to his head, one handcuffed him and then he was taken into the hallway of his apartment building for approximately twenty to twenty-five

minutes. The NYPD did not find anything in plaintiffs' home and no criminal charges were brought against either plaintiff. Plaintiffs sued the NYPD alleging: false imprisonment, larceny for the alleged theft of two thousand dollars (\$2,000.00) from the home, destruction of property, false arrest and assault and battery.

Prior to trial, plaintiffs' counsel made an *in-limine* application to the Court to have it conduct the Aguilar-Spinelli¹ test in accordance with the decision rendered by the Appellate Division in *Delgado v. City of New York*, 86 A.D.3d 502 (1st Dep't 2011). Defendant argues that the Aguilar-Spinelli test is a matter of law and the Court erred when it 1) conducted its own pre-trial Aguilar-Spinelli test; and 2) allowed the jury to determine the validity of a search warrant issued by a Criminal Court Judge. Defendant states that where a search warrant is issued by a Criminal Court Judge there is a presumption of probable cause for detention. Defendant further contends that plaintiff failed to rebut the presumption because there was no information or evidence that the warrant was based upon false or unsubstantiated statements of a police officer. The City states that probable cause becomes a question of law to be decided by the court where there is no real dispute as to the facts or the proper inferences to be drawn therefrom. In this case, defendant claims that it is undisputed that a Confidential Informant provided the information that was used to obtain the search warrant. As such, the issue of probable cause should have been determined as a matter of law. Defendant bases its argument on the Second Department Appellate Division decision in *Lee v. City of New York*, 272 A.D.2d 586, 709 N.Y.S.2d 102 (2d Dep't 2000) to establish that, "detention during the execution of a facially-valid search warrant is constitutionally permissible."

As it pertains to the confidential informant, defendant believes that the Court erroneously found the Confidential Informant unreliable. Based on the reliability and knowledge prongs of the Aguilar-Spinelli test, defendant asserts that they satisfied both prong requirements because the

¹See *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969)

Confidential Informant was registered and the police had conducted surveillance of the plaintiffs' apartment building and successfully conducted two controlled buys from the apartment which yielded narcotics.

Defendant further claims that the first question submitted to the jury on the verdict sheet was improper as a matter of law. Defendant contends that where there is a facially valid warrant, issues regarding the propriety of the evidence submitted as part of the search warrant application must be decided by an appellate court, not a jury. In this case, the first question on the verdict sheet erroneously required the jury to make a determination regarding whether probable cause for the search existed.

If the Court determines that the liability verdict should not be set aside, defendant argues that the five hundred eight thousand two hundred and fifty dollars (\$508,250.00) awarded by the jury was excessive and deviates materially from what would be reasonable compensation. Defendant contends that the evidence regarding the severity of the plaintiff Ali Saleh Moshad Ali's condition does not support the jury's assessment of damages. Defendant alleges that plaintiff was detained for only twenty to twenty-five minutes and it is undisputed that plaintiff suffered no physical injuries. Moreover, the expert testimony offered by Dr. Cynthia Mozlin did not state that plaintiff actually could not work

Plaintiff argues that defendant's contentions are unfounded and contradictory to the decision rendered in *Delgado v. City of New York*, 928 N.Y.S.2d 487 (1st Dep't 2011). Plaintiff asserts that the issue of probable cause is a matter of fact for the jury and not a matter of law. Plaintiff contends that the evidence presented at trial established that Detective Charles DeRosalia was a "rogue" police officer who did not do a thorough and precise investigation prior to securing the "no-knock" search warrant. As it pertains to the excessive award, plaintiff believes that the award amount comports with the actual damage sustained by the plaintiff.

Pursuant to CPLR §4404(a), a jury verdict may be set aside as a matter of law for insufficient evidence when the trial court finds that no valid line of reasoning and permissible inferences could possibly lead a rational person to the conclusion reached by the jury. In this case, defendant argues that the Court erred by allowing the jury to determine the validity of a search warrant issued by a Criminal Court Judge. Specifically, defendant disagrees with the first question on the Court's verdict sheet, "*Did the police secure sufficient independent corroboration or confirmation of the details of the information provided by the confidential informant before seeking the no-knock warrant to enter plaintiff's apartment*", as this question is a matter of law regarding probable cause. The Court disagrees.

It has been held in the Second Department, that where a search warrant authorizing a plaintiff's limited detention, is issued by a Magistrate, a presumption of probable cause for the detention exists. See *Lee v. City of New York*, 272 A.D.2d 586, 709 N.Y.S.2d 102 (2nd Dep't 2000). However, in that case, the confidential informant personally testified before the magistrate prior to the issuance of the search warrant. The Court finds that the facts in this case are similar to the facts in *Delgado v. City of New York*, 928 N.Y.S.2d 487 (1st Dep't 2011). Although it is a First Department case, the Court finds that the decision in *Delgado* sets a significant precedent by requiring investigating officers to adequately secure sufficient information prior to obtaining a search warrant. More importantly, the decision established that determining whether the information secured was sufficient or insufficient is a question of fact and not a question of law.

The Aguilar-Spinelli test requires the police to inform a magistrate that the confidential informant has some basis for the knowledge he or she is providing and that he or she is reliable. Secondly, the magistrate must be informed of some of the underlying circumstances relied on by the officer providing the information. These requirements can be satisfied by either the officer's personal observation or by police investigation of the subject premises. In this case, defendant

argues that they met the criteria for the both prongs of the test because the informant was registered and had provided reliable information on two prior occasions and then corroborated her accounts by testing the substances she came back with. Additionally, the police conducted surveillance of the plaintiffs' apartment building and successfully conducted two controlled buys from the apartment which yielded narcotics. The Court finds that the defendant's contentions regarding their actions in obtaining the search warrant, does not, as a matter of law, meet the criteria established by the test. As such, both prongs of the test are to be determined by a jury. It is not a foregone conclusion that an informant is considered reliable after only providing information on two prior occasions, especially where the officer conducting the buys has a questionable reputation, nor does the Court agree with the notion that the police observing an informant entering into an apartment building is sufficient surveillance as to a specific apartment. Based on the facts of this case, the apartment layout was not in conformity to the drawing allegedly created by the confidential informant, the description of the suspect in question was different from the plaintiff and instead of the alleged drugs being kept inside of stereo speakers, the police encountered no speakers upon entering the apartment.

Moreover, it doesn't appear as though a thorough independent verification was conducted to identify the occupants of the apartment. The investigating officer, Detective DeRosalia is no longer employed by the Police Department, therefore he never testified as to the reliability of the informant, his personal knowledge of the investigation or if any background information was ascertained as to the occupants of the apartment prior to the issuance of the search warrant. All of the information provided in this case was provided by Lt. Andrew Hillery who admitted that only Detective DeRosalia dealt with the confidential informant on the previous buys, as well as being the one who investigated the occupants of the apartment. Lastly, Lt. Hillery did not conduct the search of plaintiffs' apartment only Detective DeRosalia completed the search. Upon investigation, it appears as though plaintiffs signed a lease for the apartment on January 30, 2007 and the electricity

was in both of their names.

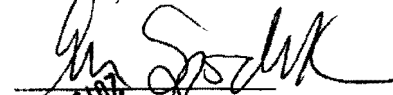
The Court finds that the decision in *Delgado* was established as a protective measure against improper abuse of authority by investigating officers procuring a search warrant. Prior to this decision, there was no accountability for police officers as to what constituted sufficient independent corroboration of information before seeking a warrant. In the past, a magistrate relied solely on the information provided by the requesting officer when making a decision, however there was no recourse offered to an individual who may be subjected to an unwarranted search based on an inefficient investigation, solely on the basis that a magistrate signed the search warrant. The Court finds that probable cause in these situations should be categorized as a question of fact. As such, the Court finds that the jury's verdict could have been reached upon a fair interpretation of the evidence and that it would be impermissibly interfering with the jury's resolution of the issues in this case as it pertains to the reliability of the informant, the knowledge of the investigating officer and the underlying investigation of the premise performed by the defendant.

In addressing the defendant's contention that the jury award was excessive, the Court looks to comparable cases to determine if the award was contrary to the weight of the evidence. Although, plaintiff argues that the award is commensurate with the actual injuries suffered by the plaintiff, the Court disagrees. The Court finds that based on the testimony and the evidence presented, the jury award may have been excessive.

Based on the foregoing papers, defendant's motion to set aside the liability verdict is denied. However, the Court directs a new trial based solely on the issue of damages.

Dated: December 20, 2012

ENTER,


Honorable Ellen M. Spodek
J.S.C.
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FILED
COUNTY CLERK