

**Chevere v New York City Police Dept.**

2013 NY Slip Op 32650(U)

June 26, 2013

Sup Ct, NY County

Docket Number: 111368/10

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: GEOFFREY D.S. WRIGHT PART 62  
*Justice*

IVAN CHEVERE,

Plaintiff/Petitioner

- v -

NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY MOTION CAL. NO. \_\_\_\_\_  
DETECTIVE ROBERT NUMSSEN and THE CITY OF NEW YORK,

Defendant/Respondent(s)

INDEX NO. 111368/2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3 were read on this motion to/for dismiss the complaint

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>
<u>Other</u> _____	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion/petition by Defendants to dismiss the complaint is granted a/p/o.

This matter is to be referred to a non-City Part

**FILED**

JUL 03 2013

Dated: June 26, 2013

COUNTY CLERK'S OFFICE  
NEW YORK

GEOFFREY D. WRIGHT

*GC*  
AISC

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 62

-----X  
IVAN CHEVERE,

Plaintiff-Petitioner(s),

-against-

NEW YORK CITY POLICE DEPARTMENT,  
NEW YORK CITY DETECTIVE ROBERT NUMSSEN  
and THE CITY OF NEW YORK,

Defendant-Respondent(s),  
-----X

Index #111368/10  
Motion Cal. #  
Motion Seq. #  
**DECISION/ORDER**  
Pursuant To Present:  
Hon. Geoffrey Wright  
Judge, Supreme Court

**FILED**

JUL 03 2013

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint for failing to state a cause of action

COUNTY CLERK'S OFFICE  
COURT OF NEW YORK  
NEW YORK

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	3
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

On September 17, 2009, the Plaintiff was employed as a superintendent at 401 Washington Street. On that day Robert Numssen, a police detective, was acting under cover and posing as a Federal Express delivery person. The detective advised the Plaintiff that he was trying to deliver a package, previously determined by trained dogs to contain marijuana. Because of the occupancy of the building, or lack thereof, the detective became suspicious that the Plaintiff was complicit with the smuggling of the marijuana, and arrested him. The Plaintiff was later indicted and tried. He found not guilty by a jury on July 10, 2010.

The Plaintiff now sues to recover damages on six causes of action: (1) False arrest; (2) False imprisonment; (3) Malicious prosecution; (4) Assault; (5) Negligence and (6) Negligent infliction of emotional harm. The Defendants move to dismiss all claims.

Any claim for false arrest based on a warrant less arrest, is defeated by a subsequent

indictment. [*LAWSON v. CITY OF NEW YORK*, 83 A.D.3d 609, 922 N.Y.S.2d 54, 2011 N.Y. Slip Op. 03342, “the subsequent indictment of plaintiff raised a presumption of probable cause for purposes of plaintiff’s claims, and plaintiff failed to raise a triable issue of fact to rebut this presumption ( see *Colon v. New York*, 60 N.Y.2d 78, 82–83, 468 N.Y.S.2d 453, 455 N.E.2d 1248 [1983] )”]; *HERNANDEZ v. CITY OF NEW YORK*, 100 A.D.3d 433, 953 N.Y.S.2d 199, 2012 N.Y. Slip Op. 07414, “subsequent indictment raised a presumption of probable cause, even though the indictment was subsequently dismissed ( see *Lawson v. City of New York*, 83 A.D.3d 609, 922 N.Y.S.2d 54 [1st Dept.2011], lv. dismissed 19 N.Y.3d 952, 950 N.Y.S.2d 99, 973 N.E.2d 197 [2012]; *Arzeno v. Mack*, 39 A.D.3d 341, 833 N.Y.S.2d 480 [1st Dept.2007] ).” In response, the Plaintiff has not raised an issue capable of raising the issue of rebuttal. He has done no more than argue that the opportunity to rebut exists, but has not successfully done so. There is claim here, as there must be, that the indictment was procured by fraud, perjury or the suppression of evidence [*GRAHAM v. CITY OF NEW YORK*, 279 A.D.2d 435, 720 N.Y.S.2d 452, 2001 N.Y. Slip Op. 00770]. If the arrest is not unlawful, then the imprisonment cannot be unlawful. Therefore, the claims for false arrest and false imprisonment are dismissed.

Turning now to the claim for malicious prosecution, it is conceded by the Plaintiff, that his notice of claim asserting the cause was served prior to his eventual acquittal after a trial. The law on this point is clear, the premature service of a notice of claim for malicious prosecution is ineffective [*VITALE v. HAGAN*, 71 N.Y.2d 955, 524 N.E.2d 144, 528 N.Y.S.2d 823, *GUZMAN v. CITY OF NEW YORK*, 236 A.D.2d 444, 653 N.Y.S.2d 143, 1997 N.Y. Slip Op. 01362, “the cause of action to recover damages for malicious prosecution should have been dismissed by the trial court. A cause of action to recover damages for malicious prosecution arises only after, among other things, the plaintiff has been acquitted of the subject charges ( see, *Peresluha v. City of N.Y.*, 60 A.D.2d 226, 400 N.Y.S.2d 818). The plaintiff served a notice of claim in April of 1987, more than 6 months prior to the acquittal of the plaintiff on the original charges. The commencement of the action within the statutory time period to timely serve a notice of claim did not cure the defect of premature notice.”] This claim is therefor also dismissed.

The remaining claims are for assault, negligence and the negligent infliction of emotional harm. As I read the claims for assault and negligence, they are duplicative. [*LEONARD v. REINHARDT*, 20 A.D.3d 510, 799 N.Y.S.2d 118, 2005 N.Y. Slip Op. 06009]. If one falls, they both must fall. First, these claims are pled in conclusory language, as no facts are enunciated [*STEINER SPORTS MARKETING, INC. v. WEINREB*, 88 A.D.3d 482, 930 N.Y.S.2d 186, 2011 N.Y. Slip Op. 07130; *HOWELL v. NEW YORK POST CO.*, 81 N.Y.2d 115, 121–122, 596 N.Y.S.2d 350, 612 N.E.2d 699]. In addition, there is no recognized claim against a municipality for the negligent infliction of emotional harm [*WHEELER v. STATE OF NEW YORK*, 104 A.D.2d 496, 479 N.Y.S.2d 244; *DE LESLINE v. STATE OF NEW YORK*, 91 A.D.2d 785, 458 N.Y.S.2d 79, lv. denied 58 N.Y.2d 610, 462 N.Y.S.2d 1027, 449 N.E.2d 427].

The motion to dismiss the complaint is granted. This constitutes the decision and order



of the court.

Dated: June 26, 2013

  
GEOFFREY D. WRIGHT  
AJSC

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**FILED**  
JUL 08 2013  
COUNTY CLERK'S OFFICE  
NEW YORK