

**Pugh v Police Dept. of the City of N.Y.**

2013 NY Slip Op 33379(U)

May 3, 2013

Sup Ct, Queens County

Docket Number: 618/12

Judge: Kevin J. 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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Terry Pugh,

Plaintiff,

- against -

Index  
Number: 618/12

Motion  
Date: 4/30/13

Police Department of The City of New York,  
Detective Michael Grasso Tax Reg #938608  
and The City of New York,

Defendants.

Motion  
Cal. Number: 165

Motion Seq. No.: 1

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The following papers numbered 1 to 8 read on this motion by defendants for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff commenced the present action alleging, as a first cause of action, false arrest; as a second cause of action, malicious prosecution; and, as a third cause of action, "constitutional violations" under the State and U.S. Constitutions for the unlawful stop, detention, search and seizure and arrest of plaintiff.

On May 26, 2011, members of the NYPD executed a "no-knock" search warrant at the premises 643 Beach 65<sup>th</sup> Street in Queens County based upon information by a confidential informant that marijuana was being sold from said premises. The informant had been sent to the premises to purchase marijuana on two occasions, and the informant returned from the controlled buy with marijuana,

which was vouchered, sent for chemical testing and confirmed to be marijuana. Based upon this information and the NYPD's investigation, a warrant application was made and a "no-knock" warrant was issued by Judge Mary O'Donoghue, Criminal Court, Queens County, on May 26, 2011. Defendant, Detective Grasso, along with other officers, thereupon executed the search warrant. They searched the first and second floors and the basement of the premises and found firearms, crack cocaine and marijuana. Plaintiff was in a room in the basement, a search of which yielded a ziplock bag of marijuana. No other contraband or firearms were found in this room. However, firearms, crack and marijuana were found in an adjoining room in the basement. Grasso testified in his deposition that since the home appeared to be a single-family residence and it was unclear to whom the firearms and drugs belonged, everyone in the premises, including plaintiff, was arrested and charged with the possession of all of those items.

Plaintiff was arraigned and incarcerated at Riker's Island. Plaintiff was released from custody on June 22, 2011 when the charges against him were adjourned in contemplation of dismissal and sealed pursuant to the order issued by Judge Dorothy K. Chin-Brandt.

A finding of probable cause operates as a complete defense to an action alleging false arrest and false imprisonment (see Carlton v. Nassau County Police Dept., 306 AD 2d 365 [2<sup>nd</sup> Dept 2003]). The issuance of the search warrant by Judge O'Donoghue created a presumption of probable cause which was the burden of plaintiff to rebut (see Lee v City of New York, 272 AD 2d 586 [2<sup>nd</sup> Dept 2000]). Plaintiff has failed to rebut the presumption of probable cause. The warrant application was made based upon a controlled drug buy by a confidential informant who furnished sufficient information to the police to justify the warrant application, and no evidence was presented that the warrant was procured upon false or unsubstantiated statements made by Det. Grasso in his affidavit in support of the warrant application.

The foregoing also precludes plaintiff's claims under the U.S. and State Constitutions.

In the first instance, the only vehicle for an individual to seek a civil remedy for violations of Constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1<sup>st</sup> Dept 1991]). The complaint herein does not include a cause of action under §1983 and, thus, plaintiff's claims for violation of his Constitutional rights fail to state a cause of action and must be dismissed on this ground alone.

Even if, *arguendo*, the Court were to deem the complaint as seeking damages under §1983, plaintiff fails to set forth specifically what substantive constitutional rights were violated. A claim under §1983 "by itself creates no independent, substantive constitutional right, but rather serves merely as a vehicle to enforce those rights" (Incorporated Village of Ocean Beach v. Maker Water Taxi, 201 AD 2d 704, 704 [2<sup>nd</sup> Dept 1994]). Since the complaint fails to specify the substantive constitutional rights upon which it is based, plaintiff has failed to state a cause of action under 42 U.S.C. §1983 (see id.; Pokoik v. Dept. of Health Service, County of Suffolk, 237 AD 2d 368 [2<sup>nd</sup> Dept 1997]).

Furthermore, a municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a Constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2<sup>nd</sup> Dept 2003], quoting Monell, supra, at 694) (emphasis in original). Plaintiff has neither shown nor alleged that plaintiff's arrest and prosecution was as a result of the implementation of an official policy or custom of the City.

In any event, the existence of probable cause for the arrest and detention of plaintiff immunizes defendants against a claim brought pursuant to §1983 (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]), even had plaintiff properly alleged a cause of action under §1983. Plaintiff's detention during the execution of the search warrant, which was facially valid, is constitutionally permissible (see Lee v City of New York, 272 AD 2d 586, supra). Moreover, as heretofore stated, there was a presumption of probable cause via the facially-valid search warrant, which presumption plaintiff failed to rebut (see id.). In this regard, the Court also notes that plaintiff's third cause of action for "Constitutional violations" is premised upon the erroneous allegation that plaintiff was detained, searched and arrested without a warrant.

Finally, plaintiff fails to state a cause of action for malicious prosecution, since defendants have shown proof, and plaintiff admits, that his criminal proceeding ended in an

adjournment in contemplation of dismissal (ACD). Claims for malicious prosecution are precluded when an accused accepts an ACD (see Gaylord v. Fiorilla, 28 AD 3d 713 [2<sup>nd</sup> Dept 2006]). Therefore, plaintiff's second cause of action for malicious prosecution must be dismissed.

Accordingly, the complaint is dismissed.

Dated: May 3, 2013

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KEVIN J. KERRIGAN, J.S.C.