

**Semmig v Charlack**

2014 NY Slip Op 30301(U)

January 16, 2014

Sup Ct, Suffolk County

Docket Number: 28313/2004

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI  
Justice

Heidelind M. Semmig

Index No.: 28313/2004

Plaintiff,

Attorneys [See Rider Annexed]

-against-

Motion Sequence No.: 006; MOT.D

Motion Date: 2/4/13

Submitted: 8/14/13

Sandy Charlack, Louis Charlack,  
Sgt. "John" Lipsky, P.O. James F. Dolan,

Defendants.

Motion Sequence No.: 007; MD

Motion Date: 2/4/13

Submitted: 8/14/13

Motion Sequence No.: 008; XMD

Motion Date: 4/17/13

Submitted: 8/14/13

Upon the following papers numbered 1 to 47 read upon these motions and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; 16 - 36; Notice of Cross Motion and supporting papers, 37 - 42; Answering Affidavits and supporting papers, 43 - 44; 45 - 47; it is

**ORDERED** that the motion (006) by defendants James Dolan and the County of Suffolk, the motion (007) by defendant Fred Lipsky, and the cross motion (008 ) by plaintiff Heidelind Semmig are consolidated for the purposes of this determination; and it is

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**ORDERED** that the motion by defendants James Dolan and the County of Suffolk for summary judgment dismissing the complaint against them is granted to the extent indicated herein, and is otherwise denied; and it is

**ORDERED** that the motion by defendant Fred Lipsky for summary judgment dismissing the complaint against him is denied; and it is

**ORDERED** that the cross motion by plaintiff Heidelind Semmig for partial summary judgment in her favor on the issue of liability is denied.

On the evening of December 9, 2003, plaintiff Heidelind Semmig was arrested and charged with obstruction and resisting arrest when she allegedly refused to permit police officers to conduct a search of her home or to disclose the whereabouts of her son following a police complaint made against him by her next door neighbors, defendants Sandy Lipsky-Charlack and Louis Charlack. The Charlack defendants allegedly told police operators that plaintiff's son threatened to retrieve guns from his home and shoot their entire family after Louis Charlack demanded that he and his friends cease riding a noisy all-terrain vehicle (ATV) on the street in front of the Charlacks' home. Following an attempt by the responding police officers, including defendant John Lipsky, to persuade plaintiff to let them conduct a search of her home, the police officers forcibly entered the premises when they allegedly observed someone moving across the top of the stairway inside the home. Plaintiff, who was standing at her front door, allegedly placed her arms across the doorway, pushed defendant Lipsky, and then attempted to block the path toward the top of the home's interior stairway.

By order dated June 2, 2004, the District Court, Suffolk County (Toomey, J.), granted a motion by plaintiff seeking dismissal of the criminal charges against her. Shortly thereafter, plaintiff commenced the instant action asserting claims against defendants for, among other things, malicious prosecution, false imprisonment, assault and battery, false arrest, civil conspiracy, intentional infliction of emotional distress, defamation, and slander per se. Following plaintiff's commencement of a separate action against defendants in the United States District Court for the Eastern District of New York, the parties entered a stipulation withdrawing the federal action and permitting plaintiff leave to serve an amended complaint which added a claim under 42 USC §1893 for violation of her civil rights. Defendants joined issue denying plaintiff's claims and asserting cross claims for contribution and/or indemnification.

Suffolk County and Dolan now move for summary judgment dismissing the complaint against them on the ground they are entitled to qualified immunity, arguing plaintiff's arrest was a discretionary act and supported by probable cause. They further argue that plaintiff's 42 USC §1893 claim against the County should be dismissed, as there is no evidence attributing the alleged violation of her civil rights to any official policy or custom practiced by the County. Defendant Lipsky moves for summary judgment dismissing the complaint against him on similar grounds. Specifically, Lipsky asserts that existing allegations that guns were inside plaintiff's home, together

with plaintiff's aggressive and obstructive behavior, provided the exigent circumstances required to conduct a warrantless search of her home. Lipsky further contends that the criminal proceeding against plaintiff was not decided on the merits, and that her claims against him based on civil conspiracy, respondent superior, and the intentional infliction of emotional distress are without merit.

Plaintiff opposes both motions and cross-moves for summary judgment on her claims, arguing, inter alia, that no exigent circumstances or probable cause existed at the time of the incident. Plaintiff asserts that the conduct of the police officers, including Lipsky and Dolan, was unreasonable, as they were aware that the threat against the Charlacks was made by a friend of plaintiff's son who had left her home prior to their arrival. Plaintiff further avers that Lipsky, who is the brother of Sandy Lipsy-Charlack, acted improperly, as his conduct, including instructions he gave to fellow officers on the night of the incident, were guided by personal animus rather than probable cause or exigent circumstances.

At her examination before trial, plaintiff testified that she observed the police officers go over to the Charlacks' residence before coming to her home, and that, upon their arrival on her premises, one of the police officers shouted at her in an aggressive manner. Plaintiff testified that she inquired why the police officers were treating her harshly and asked about the nature of their investigation. Plaintiff testified the police officers barely explained themselves and insisted that they be allowed to search her home. Plaintiff testified she informed the police officers that she was an attorney, and that she requested they obtain a warrant before entering her home because she feared for her son's safety. She further testified that a male companion visiting her home on the night of the incident identified himself as her attorney and demanded the police officers obtain a search warrant before entering her home. Plaintiff testified Lipsky responded that police officers "can go anywhere [they] want so [they] don't need a warrant," and that moments later he shouted "we're going in," ignoring her pleas that a warrantless search was illegal. Plaintiff testified the police officers pushed her back into the house as they rushed upstairs with their guns drawn. She testified that she held on to the banister near her staircase and screamed her son's name until the police officer forced her to ground and handcuffed her. She further testified that she was placed under arrest, and that she observed the police officers leading her son out of their home in his underwear.

At her examination before trial, defendant Sandy Lipsky-Charlack testified that plaintiff's son and a male friend were riding an ATV in plaintiff's front yard on the night of the incident. She testified that the men operating the ATV ignored her husband's requests that they cease riding the vehicles because it was disturbing their children. Lipsky-Charlack testified that she called the police and yelled for her husband to come inside when she overheard one of the men say that they had guns inside plaintiff's home and would shoot her husband and his family if he did not get back inside his home. She testified she reported the threat to the police operator and informed her that that her brother, Fred Lipsky, was a Suffolk County police officer. Lipsky-Charlack testified that she could not tell which one of the boys had threatened her husband, and that officers interviewed her husband shortly after they arrived at their home. She testified that she could not overhear what her husband said to the police officers, and that she did not observe her brother speaking with her husband prior

to plaintiff's arrest. She testified that she saw some type of altercation while the police were standing before plaintiff's home, and that she later observed the police officers, who had rifles in their possession, escorting plaintiff toward the police cruiser. She testified that she did not see any weapons prior to the police carrying them out of plaintiff's home. Lipsky-Charlack further testified that she observed one of the men running away when the police officers arrived, and that she could not tell which one of them went inside plaintiff's home.

At his examination before trial, Louis Charlack testified that he recognized the male riding the ATV to be plaintiff's son, and that he later learned the other man there that night was Jason Durandi. Charlack testified that the men had been riding the ATV since 9:30 p.m. that evening, and that he waited until 10:00 p.m. before he went outside to ask them to stop. He testified that Jason Durandi responded very aggressively, and warned that they had guns inside plaintiff's home and would shoot his family if he did not go back inside his home. Charlack testified that he stood his ground and said "let's see your guns," before his wife shouted for him to come back inside because she had called the police. He testified that he overheard his wife telling the police operator that the neighbors were threatening to kill them with guns, and that he could not recall whether his wife informed the operator that her brother was a Suffolk County police officer. Charlack testified that the police officers questioned him when they arrived, and that he informed them the male who made the threat had left plaintiff's residence thirty seconds before they arrived. He testified that he informed the police officers that he did not see any weapons prior to their arrival, and that the men had ceased riding the ATV and made no further threats against him. Charlack testified that he did not see or speak with Lipsky until after plaintiff had been arrested, and that he did not make any personal phone calls to Lipsky as a result of the threats made by the men. He testified that he observed the police officers talking with plaintiff from his doorway, and that plaintiff appeared agitated and combative toward the police, though he did not observe her make any physical contact with them.

At his examination before trial, James Dolan testified that he was the first police officer to arrive at the Charlacks' residence on the night of the incident after a radio dispatch stating a neighbor had threatened to shoot them with a gun. Dolan testified that he interviewed Louis Charlack, who stated that two young men threatened to shoot him and his family after he requested that they cease riding an ATV over his front lawn. He further testified that Charlack did not appear injured, and that he could not recall if there was damage to his property or mud on his face or clothes. Dolan testified that he and fellow officers explained the nature of the call to plaintiff, who was standing on the stairway before her house when they arrived at her home. He testified that plaintiff, who was uncooperative and combative, told them that no one was inside the home, and requested that they leave after they described the nature of their investigation. Dolan testified that he could not recall whether plaintiff mentioned she was an attorney, but that he did recall she was accompanied by a male companion who also was standing at the front of the home. Dolan testified that Lipsky gave the order to enter plaintiff's residence without first obtaining a warrant, because he observed movement at the top of the staircase inside her home. He testified that plaintiff was arrested for resisting arrest and obstructing government administration, because she was uncooperative and

attempted to obstruct their entry into the home. Dolan testified that they recovered guns during a search of plaintiff's home, and that her son was inside the house. He further testified that plaintiff's son was not arrested in relation to the incident, and that it was Lipsky's decision not to place him under arrest.

At his examination before trial, Lipsky testified that he responded to a "gun call" broadcasted on his radio on the night of the incident. He testified that the call on the radio indicated that there was a dispute between neighbors where one neighbor allegedly threatened the other with a gun. He testified that in addition to hearing the call over the police radio, he received a personal phone call from Louis Charlack who complained that his neighbor threatened him with a shotgun. Lipsky testified that he did not usually take personal phone calls in reference to his duties as a police officer, but that he would have still responded to the scene because it was broadcasted by the police dispatcher. He testified that he spoke with Louis Charlack before his home within seconds of arriving there, and that he learned from other responding police officers that two men from the neighboring property had threatened to shoot Louis Charlack and his family with a shotgun. Lipsky testified that neither he nor the other police officers observed the men who allegedly made the threat when they arrived at the Charlacks' residence, and that he later learned that the threat was made by a friend of plaintiff's son, who had left prior to the arrival of the police. He testified that plaintiff was arrested because she was uncooperative, interfered with their investigation, and pushed him when he tried to enter her home. Lipsky testified that he did not need a search warrant because he believed that exigent circumstances existed at the time of the incident. He explained that his belief that exigent circumstances existed was based on reports he received that someone at the location had a gun in their possession, and his observation of an unidentified person standing at the top of the stairs inside plaintiff's home. Lipsky testified, however, that he could not see whether the unidentified person had a gun in their possession, and that upon his entry into plaintiff's home he found her son inside a bathroom near the top of the stairs with the shower running. Lipsky testified that plaintiff did not identify herself as an attorney, and that he did not recall whether she asked if the police officers had obtained a warrant before they entered her home. He further testified that he recovered a number of guns from plaintiff's basement, but he did not find any ammunition inside the premises because he "did not look hard enough." He testified that the police officers were unable to locate Durandi on the night of the incident, and that no arrest was made because the Charlacks were unable to identify him during a line-up held almost one year after the incident.

Initially, the Court notes that plaintiff's 42 USC §1983 claim against the County is dismissed, as a matter of law. A municipality may not be held liable under 42 USC §1983 for an injury inflicted solely by its employees or agents (*see Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 703, 912 NYS2d 623 [2d Dept 2010]; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003]), or on the basis of "the doctrine of respondeat superior or vicarious liability" (*Lopez v Shaughnessy*, 260 AD2d 551, 552, 688 NYS2d 614 [2d Dept 1999]; *see Eckardt v City of White Plains*, 87 AD3d 1049, 930 NYS2d 22 [2d Dept 2011]; *Alex LL. v Department of Social Servs. of Albany County*, 60 AD3d 199, 205, 872 NYS2d 569 [3d Dept 2009]). A section 1983 claim against a municipality will only lie where the municipality itself

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caused the alleged constitutional violation through its implementation of an official policy or custom adopted by its legislature (see *Hudson Val. Mar., Inc. v Town of Cortlandt, supra*; *Johnson v Kings County Dist. Attorney's Off., supra*). Plaintiff's 42 USC §1983 claim against the County based on negligent hiring and training of its officers also is dismissed, as plaintiff failed to show the County's alleged failure to adequately train its officers evinced a deliberate indifference to the rights of its inhabitants (see *Ellison v City of New Rochelle*, 62 AD3d 830, 879 NYS2d 200 [2d Dept 2009]; *Vargas v 1387 Grand Concourse Realty Corp.*, 288 AD2d 24, 732 NYS2d 6 [1st Dept 2001]; *Graham v City of New York*, 279 AD2d 435, 720 NYS2d 452 [1st Dept 2001]). Additionally, plaintiff's claim against the County based on the intentional infliction of emotional distress is dismissed, as public policy bars such claims against governmental entities (see *Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]; *Lauer v City of New York*, 240 AD2d 543, 659 NYS2d 57 [2d Dept 1997]). Moreover, claims for false arrest and false imprisonment are two names for the same tort (see *Lee v City of New York*, 272 AD2d 586, 709 NYS2d 102 [2d Dept 2000]; *Jackson v Police Dept. of City of N.Y.*, 86 AD2d 860, 860-861, 447 NYS2d 320 [2d Dept 1982]). Therefore, plaintiff's claim for false imprisonment is dismissed. However, the claim for false arrest is continued against the defendants.

As to plaintiff's common law claims for false arrest, assault and battery, and civil conspiracy, unlike claims made pursuant to 42 USC § 1983, a municipality may be held vicariously liable for torts committed by its employees while acting within the scope of their employment (see *Jones v State*, 33 NY2d 275, 352 NYS2d 169 [1973]; *Eckardt v City of White Plains*, 87 AD3d 1049, 1051, 930 NYS2d 22 [2d Dept 2011]; *Ashley v City of New York*, 7 AD3d 742, 743, 779 NYS2d 502 [2d Dept 2004]). Although municipalities still enjoy limited sovereign immunity for the discretionary acts of their employees (see *Tango v Tulevech*, 61 NY2d 34, 471 NYS2d 73 [1983]), to establish this defense a municipality must do much more than merely allege that its employees were engaged in activities involving the exercise of discretion (see *Valdez v City of New York*, 18 NY3d 69, 75-76, 936 NYS2d 587 [2011]). Such immunity is only available where the municipality demonstrates that the action taken by its employee actually resulted from discretionary decision making or the exercise of reasoned judgment that could have produce different acceptable results (see *Valdez v City of New York, supra*; *Tango v Tulevech, supra*; *Murchison v New York*, 97 AD3d 1014, 949 NYS2d 789 [3d Dept 2012]). Indeed, qualified immunity does not shield the County from liability where its employee acted in bad faith or without a reasonable basis (see *Della Pietra v State*, 71 NY2d 792, 530 NYS2d 510 [1988]; *Arteaga v State of New York*, 72 NY2d 212, 532 NYS2d 57 [1988]; *Kirchner v County of Niagara*, 107 AD3d 1620, 969 NYS2d 277 [4th Dept 2013]).

Additionally, the existence of probable cause to make an arrest or conduct a warrantless search becomes a question of law to be decided by the court only where there is no real dispute as to the facts or inferences to be drawn from the surrounding circumstances (see *MacDonald v Town of Greenburgh*, \_\_ AD3d \_\_, 2013 NY Slip Op 08054 [2d Dept 2013]; *Wyllie v District Attorney of County of Kings, supra*; *Orminski v Village of Lake Placid*, 268 AD2d 780, 702 NYS2d 181 [3d Dept 2003]). Where an arrest is made without a warrant, "a presumption arises that it was unlawful, and the burden of proving that the arrest was otherwise privileged is cast upon the defendant"

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(*Tsachalis v City of Mount Vernon*, 293 AD2d 525, 525, 739 NYS2d 849 [2002]; see *Broughton v State of New York*, 37 NY2d 451, 373 NYS2d 87 [1975]). Furthermore, a defendant may not establish the defense of exigent circumstances for a warrantless search of a private residence without demonstrating that probable cause existed at the time of such search (see *Kirk v Louisiana*, 536 US 635, 122 S. Ct. 2548 [2002]; *People v McBride*, 14 NY3d 440, 902 NYS2d 830 [2010]).

Here, the County failed to establish its prima facie entitlement to summary judgment dismissing the complaint, as triable issues exist as to whether the arrest and warrantless search of plaintiff's home were the result of reasoned discretionary decision-making by the police officers, or whether their conduct was motivated by bad faith related to the police officers reaction to threats made against the family of Lipsky's sister (see *Valdez v City of New York*, *supra*; *MacDonald v Town of Greenburgh*, *supra*; *Della Pietra v State*, *supra*; *Murchison v New York*, *supra*; *Kirchner v County of Niagara*, *supra*). Where, as here, there are sharp disputes as to the circumstances leading to plaintiff's arrest and the subsequent search of her home, the existence of probable cause for such conduct is for the trier of fact (see *MacDonald v Town of Greenburgh*, *supra*; *Lundgren v Margini*, 30 AD3d 476, 817 NYS2d 349 [2d Dept 2006]; *Wyllie v District Attorney of County of Kings*, *supra*; *Orminski v Village of Lake Placid*, *supra*). The existence of such issues also precludes a finding that exigent circumstances existed justifying the warrantless search of plaintiff's home (see *Kirk v Louisiana*, *supra*; *People v McBride*, *supra*), as well as the summary dismissal of her claims for false arrest, malicious prosecution and defamation (see *Colon v City of New York*, 60 NY2d 78, 82, 468 NYS2d 453 [1983]; *Lundgren v Margini*, 30 AD3d 476, 477, 817 NYS2d 349 [2d Dept 2006]; *Morel v Crimaldi*, 256 AD2d 188, 683 NYS2d 22 [2d Dept 1998]). Therefore, the branch of the motion by Dolan and the County for summary judgment dismissing plaintiff's common law claims against them is denied.

Inasmuch as numerous triable issues exist as to the circumstances surrounding plaintiff's arrest and the warrantless search of her home, the motion by defendant Lipsky for dismissal of the complaint and the cross motion by plaintiff for summary judgment in her favor on the issue of liability are likewise denied (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]).

Dated: 1/16/2014

  
HON. WILLIAM B. REBOLINI, J.S.C.

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FINAL DISPOSITION   X   NON-FINAL DISPOSITION

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