

Perez v New York City
2014 NY Slip Op 30828(U)
March 28, 2014
Supreme Court, New York County
Docket Number: 103726/2011
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
HON. MARGARET A. CHAN

Index Number : 103726/2011

PEREZ, MARIA

vs

NEW YORK CITY

Sequence Number : 001

DISMISS

PART 52

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for dismiss summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____
Answering Affidavits — Exhibits + MEMO _____ | No(s) 2, 3
Replying Affidavits + in camera submission _____ | No(s) 4, 5

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

**MOTION DETERMINED PURSUANT TO
ANNEXED DECISION AND ORDER**

FILED

APR 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3.28.14

 _____, J.S.C.

HON. MARGARET A. CHAN

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 103726/2011
DECISION AND ORDER

MARIA PEREZ, MARGARITA PEREZ,
AND MARIA PEREZ ON BEHALF OF
KIANO BRITO

Plaintiffs,

- v -

FILED

NEW YORK CITY, DETECTIVE JAMES SOUTH,
AND POLICE SERGEANT KEVIN JUDGE,
INDIVIDUALLY, AND IN THEIR CAPACITIES
AS MEMBERS OF THE
NEW YORK CITY POLICE DEPARTMENT,

APR 03 2014

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

In this action for alleged negligence and civil rights violations stemming from the execution of a no-knock search warrant defendants New York City (the City), Detective James South and Sergeant Kevin Judge (the individual police officers), jointly moved to dismiss the complaint pursuant to CPLR § 3211(a)(7) and/or for summary judgment pursuant to CPLR § 3212. Plaintiff submitted opposition to which the defendants submitted reply. The decision and order on the motion is as follows:

On March 10, 2010, the individual police officers along with other employees of the New York City Police Department arrived at plaintiff Margarita Perez's home, located at 504 West 139th Street, Apartment 7, in the City and State of New York (the subject apartment), to execute a no-knock search warrant. Det. South received information from a Confidential Informant (CI) who told him that JD Carmelo was selling marijuana from the subject apartment. Det. South claimed that information obtained during a criminal investigation that lasted approximately 3 to 4 months led to his request for a search warrant (*see* City Reply, Exh A, p 3). The warrant was issued on March 5, 2010, by a Criminal Court Judge upon Det. South's affidavit and testimony before that Judge. The affidavit and testimony indicated there was reason to believe that a man identified as John Doe Carmelo (JD Carmelo) was selling marijuana from the subject apartment. JD Carmelo was identified as being a Male Hispanic and approximately 65 years old (*see* City Reply, Exh C).

At the time of execution, plaintiff Margarita Perez was hosting her daughter, plaintiff Maria Perez, and granddaughter, plaintiff Kiano Brito, as overnight guests in the subject apartment. Plaintiffs alleged that on March 10, 2010, at approximately 6 o'clock in the morning, the police forcefully entered the subject apartment without knocking. Margarita Perez testified at her deposition that the police officers did not make any physical contact with her, but that she went to the hospital via ambulance after the search (*see* City Mot, Exh J).

Maria Perez testified that she was in a bedroom with her daughter, Kiano Brito, when awoken by police officers with guns drawn. Maria Perez indicated that she was speaking to the officers when she was told to “shut the fuck up” and “get on your knees” whereupon she was handcuffed and brought into the living room (City Mot, Exh H, p 14). Maria Perez testified that she was screaming for help and informed police officers that her mother, Margarita Perez, was disabled and had diabetes and a heart condition (*see* City Mot, Exh H). Maria Perez stated that she was terrified of the police officers who were pointing guns at her and who had threatened to take her daughter away (*see* City Mot, Exh H, p 16). After an hour of searching, at one point with a police dog, Maria Perez stated that the police officers showed her a photograph of JD Carmelo whom she did not immediately identify, but her daughter recognized him as Romero Maximo who lived in the same building in another apartment one floor above the subject apartment (*see* City Mot, Exh H, pp 18-19). During the search, Maria Perez made a written statement that indicated Romero Maximo lived in Apartment 11 and has escorted his mother on visits to the subject apartment (*see* City Mot, Exh O). Maria Perez indicated that either the police officers or a neighbor during the search called an ambulance to aid her mother, Margarita Perez, who appeared ill (*see* City Mot, Exh H, pp 25 - 26). None of the plaintiffs reported having any physical injury as a result of the search (*see* City Mot, Exh H, pp 30-31).

Kiano Brito similarly reported the events of the search and testified that she identified the photograph of JD Carmelo as someone named Maximo Romero¹ who lived in Apartment 11 (*see* City Mot, Exh F, p 18). She knew him as a man who would often escort an elderly lady to the subject apartment because that lady and her grandmother, Margarita Perez, were good friends (*see* City Mot, Exh F, pp 19-20). Plaintiff Kiano Brito indicated that as a result of the incident she developed nightmares, but was not otherwise injured (*see* City Mot, Exh F, pp 26-28). Upon learning of JD Carmelo’s location from plaintiffs, police entered Apartment 11, apprehended JD Carmelo and recovered two (2) pounds of marijuana from that apartment.

The instant summons and complaint alleged three causes of action titled by plaintiffs as: (1) “Negligence – Improper Issue and Execution of Search Warrant”; (2) “42 USC 1983- False Arrest”; and (3) as only to plaintiff Maria Perez, “42 USC 1983: Excessive Force” (City Motion, Exh B, pp 7-8). The defendants argued all of the causes of action must be dismissed. As to the negligence claim, defendants argued that negligence cannot be the basis of a constitutional violation pursuant to 42 USC § 1983. Plaintiff countered that the first cause of action is actually a claim in New York state law alleging negligence in improperly obtaining the search warrant (*see* Pltf’s Opp, pp 7-8). As to the false arrest claim, defendants argued that the issuance of the search warrant created a presumption of probable cause that was not rebutted by plaintiff. Defendants also asserted that the facts do not support a claim of excessive force used against plaintiff Maria Perez.

¹ Maria Perez and Kiana Brito identified JD Carmelo as Romero Maximo and Maximo Romero, respectively.

The defendants' motion argued that no cause of action against the City lies from negligence in the investigation of a crime. Plaintiffs, in essence, argued that the warrant was issued without probable cause as the information provided by the CI was not credible and not supported by knowledge (*see* Pltf's Opp, p 8). Plaintiffs argued that the defendants negligently went into the wrong apartment because JD Carmelo was apprehended from Apartment 11. This argument does not controvert the statements made by the CI who indicated that drugs were being sold from Apartment 7. Plaintiff did not supply evidence to suggest that information was incorrect.

Plaintiff cited to *Delgado v City of New York*, 86 AD3d 502 (1st Dept 2011), an Appellate Division case that concluded that the information furnished by the CI in that case did not meet the two-prong *Aguilar-Spinelli* test for hearsay credibility on which a no-knock warrant was issued (*see Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]). "The application for a search warrant must demonstrate to the issuing magistrate both (1) the veracity or reliability of the informant, and (2) the basis of the informant's knowledge." (*Delgado, supra* at 507). As to the reliability prong, there must be a showing that the informant is credible (*id., citing People v DiFalco*, 80 NY2d 693, 696-697 [1993]). One of the factors a court may use in evaluating credibility is whether the CI has provided accurate information in the past (*id., citing People v Calise*, 256 AD2d 64, 65 [1998]; *People v Johnson*, 66 NY2d 398, 403 [1983]; *People v Hanlon*, 36 NY2d 549, 557 [1975]). As to the knowledge prong, the CI's information must be "corroborated or confirmed through details sufficient in number and suggestive of, or directly related to, the criminal activity informed about" (*Delgado, supra* at 507 - 508, *citing People v Elwell*, 50 NY2d 231, 234 [1980]).

In their reply papers, defendants provided the examination testimony of Det. South by the Criminal Court Judge that issued the search warrant (*see* City Reply, Exh A) and the supporting affidavit by Det. South (*see* City Reply, Exh C). The supporting search warrant affidavit that was submitted as Exhibit C to the City's Reply was redacted and an unredacted search warrant affidavit was provided *in camera*. At the Criminal Court hearing, Det. South testified that the CI gave him accurate information in other matters in the more than fifteen (15) years that he has been a CI (*see* City Reply, Exh A, p 4). In the redacted portions of the supporting search warrant affidavit, Det. South confirmed the CI provided information for search warrants that led to the seizure of drugs and drug paraphernalia on other occasions in his history working with police officers. Det. South also testified at his deposition that the CI was prompted to go to that location from others who had purchased marijuana from the subject premises (*see* City Mot, Exh M, p 60-65). The redacted search warrant affidavit provided additional details corroborative of the CI's data "to indicate that he knew whereof he spoke" and the criminal activity taking place there (*People v Elwell* 50 NY2d 231, 237 [1980]). On the facts provided by Det. South, the two-prong *Aguilar-Spinelli* test is satisfied.

Plaintiffs' attempt to liken the instant facts to those in *Delgado* where the Appellate Division discredited the information provided by the CI, and affirmed that the search warrant was invalid (*see Delgado, supra*). The facts here are easily distinguishable. In *Delgado*, the CI had never before provided information leading to an arrest, whereas, here, the CI has worked in this capacity for over fifteen (15) years and provided information leading to the seizure of drugs and drug paraphernalia on several occasions (*see Delgado, supra*). The record in *Delgado* also demonstrated that the police officers failed to conduct an investigation into the information provided by the CI. Here, there was an independent investigation by Det. South at the subject premises – the details of which were provided *in camera*. Therefore, the search warrant here was properly obtained and valid. Plaintiffs failed to support its claim that the search warrant was invalid or issued due to the negligence of the individual police officers or the City. Thus, plaintiffs' first cause of action is dismissed.

As to the second cause of action for false arrest pursuant to 42 USC 1983, plaintiffs argued that because there was no probable cause for the search warrant there could not have been a properly effectuated arrest. However, this argument fails. To be clear, plaintiff was imprisoned and confined but not actually arrested. The elements of a claim of false imprisonment under § 1983 are “substantially the same” as the elements of a false imprisonment claim under New York law (*Posr v Doherty*, 944 F2d 91, 96 [2d Cir 1991], quoting *Raysor v Port Auth.*, 768 F2d 34, 39–40 [2d Cir 1985] [internal citations omitted]). “A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged.” (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]). The imprisonment is justified where probable cause is found to exist (*id.* at 85; *Broughton v State of New York*, 37 NY2d 451, 458 [1975]).

As discussed above, the instant search warrant was issued after judicial consideration and thus, there is a presumption of probable cause of criminal activity that was not rebutted by plaintiffs. “[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted”, and therefore, the detention of plaintiffs here is “constitutionally permissible” (*Michigan v Summers*, 452 US 692, 703-705 [1981]). As the limited detention of plaintiffs for the purposes of execution of the search warrant was lawful here, plaintiffs' claim for false arrest must be dismissed.

As to the third cause of action for plaintiff Maria Perez's allegation of excessive force, this court finds the force used was reasonable under the circumstances. “To prevail on an excessive force claim, a plaintiff must show that law enforcement personnel exceeded the standard of objective reasonableness under the Fourth Amendment” (*Pacheco v City of New York*, 104 AD3d 548, 549 [1st Dept 2013], citing *Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007]). “[T]he question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation” (*Graham v Connor*, 490 US 386, 397 [1989], citing *Scott v United States*, 436 US 128, 137–139 [1978])[internal quotations

omitted]). To substantiate an excessive force claim all of the facts underlying the arrest, including the nature of the crime alleged shall be considered (*see Koeiman v City of New York*, 36 AD3d 451).


The officers here acted with the reasonable force necessary to effectuate the search warrant. The officers pointed weapons at plaintiff Maria Perez, handcuffed and detained her in the living room of her home, and used a police dog to search for illegal substances in her apartment. Plaintiff Maria Perez did not allege that the handcuffs were tight nor did she claim that they caused her any physical injury. Police quickly released Maria Perez upon apprehension of JD Carmelo. As a matter of law, the force used here was not unreasonable (*see Michigan v Summers, supra* at 702). Therefore, the third cause of action is dismissed.

Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted in its entirety. The Clerk of the Court is instructed to enter judgment as such.

The unredacted material submitted *in camera* to chambers in connection with this motion shall be returned to defendants.

This constitutes the decision and order of the court.

Dated: March 28, 2014



Margaret A. Chan, J.S.C.

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