

**Alvarez v City of New York**

2014 NY Slip Op 32536(U)

September 9, 2014

Supreme Court, Bronx County

Docket Number: 304809/2009

Judge: Wilma Guzman

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This opinion is uncorrected and not selected for official publication.

**PART 03**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed   
Settle Order   
Schedule Appearance

-----X  
**ALVAREZ,CARLOS ROVERTO**

Index No. **0304809/2009**

-against-

Hon. LARRY S. SCHACHNER

**THE CITY OF NEW YORK**  
-----X

Justice.


The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **DISMISSAL**  
Noticed on **May 09 2013** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *Motion* is decided in accordance with  
*the attached decision and order.*

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: **SEP 09 2014**

  
Hon. \_\_\_\_\_  
**LARRY S. SCHACHNER, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
IAS PART 7

Index No. 304809/2009  
Motion Calendar No. 1  
Motion Date: 7/14/14

CARLOS ROVERTO ALVAREZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT, P.O. "JOHN DOE" 1-10,

Defendant,

**DECISION/ ORDER**

**Present:**  
**Hon. Wilma Guzman**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion, Affirmation in Support, and Exhibits thereto.....</b>	<b>1</b>
<b>Cross-Motion, Affirmation in Support, and Exhibits thereto.....</b>	<b>2</b>
<b>Affirmation in Opposition of Motion and Exhibits thereto.....</b>	<b>3</b>

*Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion and cross motion is as follows:*

Defendants move this Court for an Order pursuant to C.P.L.R. 3211(a)(7) and 3212, dismissing the plaintiff's complaint. Plaintiff cross-moves for summary judgment on the issue of false arrest.

C.P.L.R. § 3211(e) requires a motion to dismiss be made before service of the responsive pleadings. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such a motion or in the responsive pleading. However, "a motion based upon a ground specified in paragraphs two, seven or ten or subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted." C.P.L.R. §3211(a)(7) allows a party to move to dismiss a cause of action asserted against him on the ground that . . . the pleading fails to state a cause of action.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view

the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction ( *see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where “the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1<sup>st</sup> Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., *supra*, citing Kliebert v. McKoan, 228 A.D.2d 232, *lv denied*, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

It has long been held that summary judgment is a drastic remedy, the procedural of a trial which should only be granted when the evidence presented leaves no material issue of fact unresolved. *see* Andre v. Pomeroy, 35 N.Y.2d 361 (1974). Consequently, it has also been long settled that the court’s function on such a motion is issue finding rather than issue determination Sillman v Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986). Once the initial burden has been satisfied, the burden then shifts to the party opposing the motion to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. Zuckerman v City of New York, 49 N.Y.2d 557 (1980).

A claim of false arrest and false imprisonment will not stand where it is shown that the police department and the arresting officer had probable cause to arrest. Kramer v. City of New York, 173 A.D.2d 155 (1<sup>st</sup> Dept. 1991). Generally, probable cause will exist where there is information from an identified citizen, who is presumed reliable. However, this reliability is rebuttable and will only

support the probable cause to arrest absent any “materially impeaching circumstances or grounds for questioning the complainants credibility.” Medina v City of New York, 102 A.d3d 1010 (1<sup>st</sup> Dept. 2012) (internal quotations omitted). See also, Grimes v. City of New York, 106 A.D3d 441 (1<sup>st</sup> Dept. 2013).

The plaintiff was arrested on March 15, 2008 when the vehicle in which the plaintiff was a passenger was identified as stolen by the Arresting Officer Brendon Sullivan’s vehicle License Plate Reader “LPR.” Sullivan testified that the police vehicle equipment then displays the registered owners address and date of birth. The registered owner was Dawn Brantley with an address in New Jersey. At the time the officers approached the vehicle, the plaintiff was outside of the vehicle. When Sullivan inquired of the driver of the vehicle, whose vehicle it was, the driver provided a name other than the registered owner. Sullivan did not recall the name provided, however indicating that it was a male’s name. Both the driver and the plaintiff were then arrested. Sullivan testified that while at the precinct, the plaintiff made a phone call to a woman who identified herself to Sullivan as Dawn Brantley but provided the wrong date of birth and wrong address. This person indicated they would come to the precinct but did not show up. While in the complaint room, Sullivan spoke with Dawn Brantley who indicated she had not given permission to either the driver or plaintiff to drive the vehicle and that she wanted to press charges against the two people arrested. Dawn Brantley then faxed over the title to the vehicle. Dawn Brantley also provided a notarized letter dated February 11, 2008 which indicated that she had given Darwin Aquino permission to operate her vehicle. Based upon the LPR printout, the vehicle was reported stolen on February 17, 2008.

Based upon the record provided, which indicates that the plaintiff was a passenger in a vehicle that had been reported stolen, this Court grants the defendants motion to dismiss and denies the plaintiff’s motion for summary judgment. At the time of the plaintiff’s arrest, the vehicle in which he was the passenger was reported stolen and neither the driver nor the plaintiff could give the name of the registered owner. As such, probable cause existed to arrest the plaintiff for possession of stolen property. People v. Roby, 39 N.Y.2d 69(1<sup>st</sup> Dept. 1979); People v. Chavous, 204 A.D2d 475 (2<sup>nd</sup> Dept. 1994); People v. Boomer, 187 A.D. 2d 659 (2<sup>nd</sup> Dept. 1992).

That the complaining witness later recanted her statement or that the charges were later

dismissed, does not remove the probable cause which existed at the time of the plaintiff's arrest. The existence of probable cause is a complete defense to the claims of false arrest and false imprisonment. Marrero v. City of New York, 33 A.D.3d 556 (1<sup>st</sup> Dept. 2006); and malicious prosecution. Garcia v. City of New York, 115 A.D.3d 447 (1<sup>st</sup> Dept. 2014); *citing* Lawson v. City of New York, 83 A.D.3d 609 (1<sup>st</sup> Dept. 2011). Plaintiff has not alleged nor provided evidence to support any claim of physical force, to wit assault and battery and the use of excessive force. Consequently, the plaintiff's complaint is hereby dismissed in its entirety. Medina v. City of New York, 102 A.D.3d 101, 108.

Accordingly, it is

**ORDERED** that the defendant's motion to dismiss the plaintiff's complaint pursuant to C.P.L.R. 3211(a)(7) and C.P.L.R. 3212 is granted; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment pursuant to C.P.L.R. 3212 is denied as moot. It is further

The defendant shall serve a copy of this Order with Notice of Entry upon plaintiffs within thirty (30) days of entry of the Order.

This constitutes the decision and order of this Court.

DATE

SEP 09 2014

  
\_\_\_\_\_  
HON. WILMA GUZMAN, JSC.