

**Clayton v City of New York**

2014 NY Slip Op 32640(U)

September 11, 2014

Supreme Court, Bronx County

Docket Number: 303924/13

Judge: Wilma Guzman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX  
IAS PART 7

Index No. 303924/13  
303926/13  
Motion Calendar No.8, 9  
Motion Date: 6/2/13

BRANDON LEE CLAYTON ,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE CITY OF NEW  
YORK POLICE DEPARTMENT,

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>1,2</b>
<b>Affirmation in Opposition of Motion and ExhibIts thereto.....</b>	<b>3, 4</b>
<b>Reply Affirmation .....</b>	<b>5,6</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 complaints under Index No. 303924/13 (Claim #1) and Index No. 303926/13 (Claim #2), respectively. Defendants further move under C.P.L.R. 3211(a)(7-8) dismissing the plaintiffs complaint against the New York City Police Department because the NYPD is a non-suable entity. Plaintiff opposes the motion . For purpose of disposition, both motions are consolidated and decided as follows:

At the outset, this Court grants that portion of the defendants motion which seeks to dismiss the plaintiff's complaints as it applies to the NYPD as the NYPD is a non-suable entity. Davis v. City of New York, 2000 W.L. 1877045 (S.D.N.Y); Jenkins v. City of New York, 478 F.3d 76 (2<sup>nd</sup> Cir. 2007).

Under Claim Number 1, plaintiff alleges false arrest, false imprisonment and malicious prosecution, negligent hiring, training, supervision and retention, stemming from a September 30,

2012 arrest of the plaintiff on charges of menacing. Plaintiff was arrested following a 911 call by his child's mother ("the complaining witness") allegedly reporting that plaintiff had threatened her with a knife. The Sprint report reflects that incident occurred at 1405 Rowland Avenue and the description of the suspect was that of a MB wearing a white t-shirt with black pants and in possession of a knife. Upon arriving at the subject location, the plaintiff herein was stopped by police officers as he exited the building. Annexed reports generated by the NYPD indicate that the plaintiff was subsequently positively identified by the complaining witness and a knife recovered from his person. Plaintiff was arrested. However, on March 27, 2013, the charges against the plaintiff were dismissed and the record sealed.

Under Claim #2 plaintiff alleges false arrest, false imprisonment and malicious prosecution, negligent hiring, training, supervision and retention stemming from a October 31, 2012 arrest on a charge of Criminal Possession of a Weapon. Plaintiff was arrested after a consent search in his apartment whereupon a stun gun was found on the plaintiff's living room floor. Defendants allege that a 911 call reported a shooting the previous night at 1405 Rowland Avenue and that bullet holes were in the ceiling. Plaintiff alleges that Agustin Sanchez, his brother also lived in the living room of the apartment, which had been converted into a bedroom for Mr. Sanchez. The taser was located in this "bedroom area." Plaintiff further alleges that three other friends (Tooley, Sandford and Best) had also stayed in the apartment. Plaintiff testified that he was not aware of any gunshot in the apartment as he had gone to sleep early and first found out about the bullet hole in the ceiling from the super who informed that the plaintiff's downstairs neighbor had allegedly complained about a bullet hole in his ceiling. Plaintiff testified that Tooley had given plaintiff his I.D. to inform the police that he was responsible for the gunshot but Tooley left the apartment prior to the arrival of the police. Plaintiff, Best and Sandford remained in the apartment. Plaintiff further testified that he did not know the taser was in the apartment and that Sandford, who was present at the time the police arrived, informed the police that the taser was his. Sandford later pled guilty to the charges stemming from this incident and charges against the plaintiff were dismissed.

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.D2d 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).

This Court first addresses Claim #1. A review of the documents herein, including the confirmed identification by the complaining witness of the plaintiff as the person who threatened and assaulted her, and her identification of the gravity knife used in said incident was sufficient to give rise to the probable cause to arrest the plaintiff. 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.D3d 447 (1<sup>st</sup> Dept. 2014); *citing* Lawson v. City of New York, 83 A.D3d 609 (1<sup>st</sup> Dept. 2011). Consequently, the plaintiff’s complaint under Index No. 303924/13 is hereby dismissed in its entirety. Medina v. City of New York, 102 A.d3d 101, 108.

Under Claim #2, Defendants went to the plaintiff’s apartment to investigate a 911 phone call from neighbor which alleged a bullet hole in his ceiling. Upon arrival to the plaintiff’s apartment, the plaintiff consented to the search of the premises. Plaintiff was subsequently arrested for the “constructive possession” of a “stun gun” which was found in his apartment. P.L. 10.00(8) is defined as “having physical possession or [to] otherwise exercise dominion or control over tangible property,” to wit, the stun gun.

Upon arriving to investigate the neighbors complaint of a bullet hole in his ceiling, Medina v City of New York, *supra*, the plaintiff consented to the search of his apartment, written proof of

which was submitted as part of the defendants motion. Voluntary consent to a warrantless search is presumed valid and obviates the need for probable cause. *See also, Schenkencloth v. Bustamante*, 412 U.S. 218 (1973); *People v. Boyd*, 188 A.D2d 239 (1<sup>st</sup> Dept. 1993). Admittedly, the apartment in which the stun gun was found was the plaintiff's apartment over which he exercised dominion and control. Albeit, that plaintiff alleges the area in which the stun gun was found , the living room area which had been converted to a bedroom area for Mr. Sanchez and thus out of his dominion and control; is insufficient for the purpose of probable cause at the time of the arrest. *People v. Tirado*, 38 N.Y. 2d 955 (1976). 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.D3d 447 (1<sup>st</sup> Dept. 2014); *citing Lawson v. City of New York*, 83 A.D3d 609 (1<sup>st</sup> Dept. 2011). Consequently, the plaintiff's complaint under Index No. 303926/13 is hereby dismissed in its entirety. *Medina v. City of New York*, 102 A.d3d 101, 108.

Accordingly, it is


**ORDERED** that the defendants motion to dismiss the plaintiff's complaint under Index number 303924/13 pursuant to C.P.L.R. 3211(a)(7) is granted; and it is further

**ORDERED** that the defendants motion to dismiss the plaintiff's complaint under Index number 303926/13 pursuant to C.P.L.R. 3211(a)(7) is granted; and it is further

The defendants 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 11 2014**

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