To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ROBERT BYRD,

Plaintiff,

-against-

CITY OF MT. VERNON AND MT. VERNON POLICE DEPARTMENT,

Defendants.

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DECISION & ORDER
Index No. 55859/2011
Sequence No. 1

WOOD, J.

The following documents numbered 1-13 were read in connection with defendants' motion for summary judgment:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits.	1-10
Plaintiff's Counsel's Affirmation in Opposition, Exhibits.	11-12
Defendants' Counsel's Reply Affirmation.	13

Defendants bring this application to establish entitlement to summary judgment, pursuant to CPLR 3212, and to dismiss Plaintiff's complaint.

This action was commenced by the filing of a summons and verified complaint on or about September 22, 2011. A verified answer was served on behalf of defendants on or about November 10, 2011. Plaintiff filed the note of issue on or about October 11, 2013.

The underlying facts are that on October 21, 2010, Detectives Martin Bailey and Officer John Alarcon responded at approximately 11:25 p.m. to a call made by a robbery victim, Delfino Flores, in Mount Vernon. Police Officer Rosado helped translate, while the victim (who was observed to be spanish speaking) gave a statement to Detective Bailey. The victim stated that he was placed in

a chokehold from behind, while a second individual stole his money from his front right pocket and his cell phone from his hip area. The next day, on October 22, 2010, the victim viewed up to 894 pictures, and identified plaintiff and another person responsible for the robbery. Detective Bailey recognized Plaintiff's last name "Byrd", as a surname of a fellow officer in the Mount Vernon Police Department. Detective Bailey contacted Officer Byrd, who confirmed that plaintiff was indeed his nephew. Officer Byrd told Detective Bailey that he would help bring in his nephew voluntarily. Detective Bailey testified that he did not arrest plaintiff until November 14th out of respect for Officer Byrd, inasmuch as plaintiff did not voluntarily come to the police station. [1] On November 14, 2010, Detective Thompson and Detective Bailey went to an apartment where plaintiff was located, and informed plaintiff he was a suspect in an investigation concerning a robbery. The detectives asked plaintiff to accompany them to the police station, and thereafter, plaintiff was transported by the detectives to the police station. Upon arrival, Detective Bailey arrested plaintiff and issued him his Miranda rights. Bail was set at $5,000, and plaintiff's family made bail.

On February 9, 2011, a preliminary hearing was conducted, wherein the victim testified that he was unable to get a good look at the suspect that allegedly took his property and did not recognize that person in the courtroom. As a result, the judge found that there was no evidence of reasonable cause to believe that the plaintiff committed a felony. [2]

On February 10, 2011, plaintiff served a notice of claim against defendants for false arrest, wrongful imprisonment, and malicious prosecution. A 50-H hearing was conducted on July 7, 2011. All of the parties' depositions in this case have been conducted.

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[1] *See Defendants' Exh. G at 62.*

[2] *See Plaintiff's Exh. A at 28-29.*

NOW based upon the foregoing, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]).

Normally, an arrest based on a warrant carries with it the presumption that probable cause existed to prosecute plaintiff (Colon v. City of New York, 60 NY2d 78 [1983]). An arrest made extrajudicially (without a warrant as in this case) is presumptively unlawful, but the existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim (Broughton v. State, 37 NY2d 451 [1975]). Thus, a defendant may rebut this presumption by showing that the arrest was based on probable cause (Luppo v. Waldbaum, Inc., 131 AD2d 443, 446 [2d Dept 1987]). In determining whether the police possessed probable cause to arrest, a court examines whether an officer had knowledge of facts and circumstances sufficient to support a reasonable belief that an offense has been or is being committed (Colon v. City of New York, 60

NY2d 78,82 [1983]). However, failure to make further inquiry when a reasonable person would have, is evidence of lack of probable cause. Further, the determination of probable cause is based upon the circumstances known to the police officers at the time that they arrested the plaintiff (Mercado v. City of New York, 269 AD2d 576 [2d Dept 2000]). Probable cause to believe that a person committed a crime is a complete defense to claims of false arrest and malicious prosecution (MacDonald v. Town of Greenburgh, 112 AD3d 586 [2d Dept 2013]); Rodgers v. City of New York, 106 AD3d 1068 [2d Dept 2013]). Generally, information provided by an identified citizen accusing another of the commission of a specific crime is sufficient to provide the police with probable cause to arrest (Minnott v. City of New York, 203 AD2d 265, 267 [2d Dept 1994]); Catanzaro v. City of Middletown Police Dept, 233 AD2d 415 [2d Dept 1996]). This is true even if the citizen's reliability has not been previously established or his or her information corroborated (People v. Hayes, 191 AD2d 644 [2d Dept 1993]). "The reliability and veracity of an identified citizen is presumed, particularly in light of the criminal sanctions attendant upon falsely reporting ...information to the authorities" (People v. Chipp, 75 NY2d 327,340 [1990]). A witness's identification of the suspect at a photographic array furnishes probable cause for an arrest (People v. Ballinger, 62 AD3d 895 [2d Dept 2009]). Further, "probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn therefrom" (Diederich v. Nyack Hosp., 49 AD3d 491,493 [2d Dept 2008]).

First Cause of Action: False Arrest and False Imprisonment

To prevail in an action for false arrest and false imprisonment, plaintiff must establish that (1) the defendant intended to confine him (2) the plaintiff was conscious of the confinement (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged

(Broughton v. State, 37 NY2d 451,456 [1975]). Notably, the common law tort of false arrest is a species of false imprisonment (Singer v. Tulton County Sheriff, 63 F.3d 110, 118(2d Dir. 1995).

Here, it is clear that the first three elements have been established, the only issue to be discussed is whether the confinement of plaintiff was privileged. Under the facts and circumstances of this case, the court finds that defendants met their initial burden by demonstrating prima facie that they had probable cause to arrest plaintiff. On the day of the incident, the victim told the police that he can make facial identification of the suspects. The next day, the victim identified plaintiff as a suspect based on a photo array. This identification by the victim, as well as the police records memorializing the identifications is sufficient to establish that plaintiff's arrest was supported by probable cause (Luna v. City of New York, 95 AD3d 413 [1st Dept 2012]). The court finds that the accusations of the victim, while not proving plaintiff's guilt, provided the officers with probable cause to arrest plaintiff. Moreover, the victim's description of the perpetrators of the crime to the police, and his identification of the plaintiff's photo from 894 photographs provided police with probable cause to arrest plaintiff, inasmuch as the police had no reason to question the reliability and veracity of the victim's account of the crime.

However, in opposition, plaintiff argues that the police failed to conduct a further inquiry when a reasonable person would have done so, which evidences a lack of probable cause citing (Muradyan v. Wallance, 26 Misc3d 1238(A), 2010 NY Slip Op 50463(U) [Sup Ct.Queens County 2010] (complainants recognized plaintiff as a teacher at their school, the act occurred while complainants were on a moving bus, the alleged perpetrator was in a moving vehicle and the lineup was performed a month after the alleged incident). The facts here are quite different than in the cases that plaintiff cites, as the victim was not familiar with plaintiff prior to the robbery, and the victim

saw the suspects indoors at a close proximity. In addition, plaintiff argues the existence of probable cause becomes a question for the jury, inasmuch as reasonable persons might also differ as to the reasonableness of the officers' reliance upon the victim's identification. Plaintiff further asserts that the victim gave conflicting statements concerning the robbery. In one account, the victim stated that he was approached by five unidentified males in his lobby, and in another statement the victim stated that there were three men responsible for the robbery. Plaintiff describes himself as 5'9, medium complexion, and 27 years old at the time of the alleged robbery, and the victim described the suspect as a tall, black, and dark complexioned male between the ages of 20-25 . In addition, the victim described the suspect as wearing a grey sweater at the time of the robbery, and the victim's supporting deposition, the suspect was described as wearing a red hoodie. Due to these alleged discrepancies, plaintiff contends that a further investigation should have been conducted including a lineup. However, Detective Bailey testified that conducting a lineup is dependent on the facts of each individual case, the district attorney's position (there is no absolute rule), but he has never conducted a lineup in a robbery case.[3]

Based upon the foregoing, plaintiff is grasping at straws here, as the fact remains that the victim positively identified plaintiff as the suspect prior to the police arresting plaintiff, and the minor discrepancies did not rise to the level where the police had a duty to conduct a further investigation. Moreover, the victim's inability to identify plaintiff at the pre conference hearing, which took place about three and one half months after the robbery does not in itself defeat probable cause. At the time of the arrest, the identification of the accused was not at issue (Mercado v. City of New York, 269 AD2d 576 [2d Dept 2000]).

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[3]*See Defendants' Exh. G at 31.*

Based upon the record, plaintiff has failed to raise any triable fact whether probable cause existed for his arrest. The court finds that there is no real dispute as to the facts or inferences to be drawn from the surrounding circumstances. The credible evidence presented demonstrates that the police acted reasonably considering the circumstances known to them at the time of plaintiff's arrest. Accordingly, as a matter of law, plaintiff was properly arrested and detained based on probable cause, and thus, defendants' motion to dismiss the causes of action for false arrest and imprisonment is granted.

Second Cause of Action: Malicious Prosecution

In order to recover damages for malicious prosecution, a plaintiff must establish four elements: (1) that a criminal proceeding was commenced (2) that it was terminated in favor of the accused (3) that it lacked probable cause (4) that the proceeding was brought out of actual malice. (Broughton v. State of New York, 37 NY2d at 457; Tyrone Williams v. City of New York, ---NYS2d---,2014 NY Slip Op. 01165 [2d Dept February 19, 2014]). Malice may be shown by proof that probable cause was lacking or that the conduct was reckless or grossly negligent (Haynes v. City of New York, 29 AD3d 521 [2d Dept 2006]). Plaintiff alleges that defendants acted in bad faith and without justification, but the record is completely devoid of any evidence that the police acted with malice or any evidence that would challenge the police's reliance on the victim's identification of plaintiff as a suspect in the robbery. As with the false arrest cause of action, the presence or absence of probable cause for the criminal proceeding is crucial to this claim. As already discussed, this court found that the police possessed probable cause to arrest plaintiff. In opposition to defendants raising a prima facie showing of their entitlement to judgment as a matter of law, plaintiff failed to

raise a triable issue of fact. Therefore, for these reasons, the cause of action for malicious prosecution to recover damages is barred.

Third Cause of Action: Negligence

Initially, the court notes that the City cannot be held liable to plaintiff for common law negligence unless plaintiff shows that the municipality owed a specific duty to plaintiff or went beyond their governmental obligations (Lauer v. City of New York, 95 NY2d 95, 100-101 [2000]). Plaintiff has made no such showing, and cannot point to a duty owed to him by defendants, and thus, his negligence claim must fail.

Fourth Cause of Action: Unlawful detention and imprisonment under 42 USC §1983

A municipality may not be held liable under 42 USC §1983 for an injury inflicted solely by it employees or agents (Hudson Val. Mar., Inc. V. Town of Cortlandt, 79 AD3d 700,703 [2d Dept 2010]). A section 1983 claim against a municipality may only lie where the municipality itself caused the alleged constitutional violation through its implementation of an official policy or custom adopted by its legislature (Hudson Val. Mar., Inc. V. Town of Cortlandt, 79 AD3d at 703). Accordingly, the claims asserted against defendant City under 42 USC §1983 are dismissed for failure to demonstrate and/or allege that the actions taken by its police officers resulted from official municipal policy or custom. Plaintiff's conclusory, vague and general allegations were insufficient to support claims under 42 USC §§1983. Further, the court has found no impropriety in defendants' conduct, and plaintiff has failed to offer any credible evidence of an official policy or custom of the police department or City, which deprived plaintiff of any of his due process rights. Thus, plaintiff's causes of action for deprivation of their civil rights in violation of 42 USC §1983 must fail.

Fifth Cause of Action: Supervise and Train Employees

Plaintiff also alleges that defendants as a matter of policy, failed to properly supervise, train and retain employees. However, defendants represent that Mount Vernon police officers are trained by Westchester County. A municipality may be held liable under 42 USC §1983 for its failure to train or adequately supervise its employees "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact" (Rodgers v. City of New York,106 AD3d 1068,1072[2d Dept 2013]). In opposition, plaintiff failed to raise a triable issue of fact as to the existence of any such relevant policy, regulation, or custom, and of which training or supervision was deficient.

Sixth Cause of Action: Negligent Hiring and Retention

Additionally, plaintiff's claim against the city based on negligent hiring and training of its officers also is dismissed as plaintiff failed to show the City's alleged failure to adequately train its officers evidencing a deliberate indifference to the rights of its inhabitants (Ellison v. City of New Rochelle, , 62 AD3d 830,833 [2d Dept 2009]). Plaintiff failed to establish that defendants knew of the employees' propensity to commit the alleged acts or that defendants should have known of such propensity had they conducted an adequate hiring procedure (Mataxas v. North Shore Univ. Hosp, 211 AD2d 762 [2d Dept 1995]). Moreover, in opposition, plaintiff failed to raise a triable issue of fact or details to support the conclusory allegations of which training or supervision was deficient or lacking.

Seventh Cause of Action: Infliction of Emotional Distress

To recover for intentional infliction of emotional distress, defendants' conduct must be extreme in degree, as to go beyond all possible bounds of decency. Plaintiff has not provided any

evidence of such outrageous conduct. Therefore, defendants established their prima facie entitlement to judgment as a matter of law, which alleged intentional and negligent infliction of emotional distress, since the evidence submitted by defendants demonstrated that the occurrences surrounding plaintiff's arrest and detention did not rise to the level of extreme or outrageous conduct necessary to sustain such cause of action (Rodgers v. City of New York, 106 AD3d 1068 [2d Dept 2013]). Furthermore, public policy bars claims for intentional infliction of emotional distress against a governmental entity (Rodgers, *supra* at 1070). In opposition, plaintiff failed to raise a triable issue of fact.

Accordingly, defendants' motion for summary judgment is granted in its entirety, and the complaint is dismissed. All matters not herein decided are denied. This constitutes the decision and order of the court.

Dated: March 13, 2014
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: Mark Muccigrosso, Esq.
Talkin, Muccigrosso & Roberts, LLP
Attorneys for Plaintiff
40 Exchange Place, 18th Floor
New York, New York 10005

Nichelle A. Johnson, Esq.
Corporation Counsel, City of Mount Vernon
Attorney for Defendants
1 Roosevelt Square
Mount Vernon, New York 10550