

Rodas v City of New York
2015 NY Slip Op 30570(U)
March 4, 2015
Sup Ct, Bronx County
Docket Number: 301747-2012
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. **301747 - 2012**
Motion Calendar No. 15
Motion Date: 12/15/14

ROSALINA RODAS,

Plaintiff,

-against-

THE CITY OF NEW YORK,

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>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1
Affirmation in Opposition of Motion and Exhibits thereto.....	2
Reply Affirmation	3

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

Defendant moves pursuant to C.P.L.R. 3211(a)(7) for an Order dismissing the plaintiff's complaint. Plaintiff opposes the motion.¹

Plaintiff filed a complaint seeking damages for personal injuries allegedly sustained as the result of false arrest, false imprisonment and malicious prosecution which occurred on January 19, 2011 when the plaintiff was arrested for allegedly trespassing in the property located at 76 Timpson Place, apt. 4F. The City of New York asserts that the police officers acted on probable cause to arrest based upon a January 12, 2011 letter which was sent "to whom it may concern" and signed by Kalman Tabak, General Partner of Timpson Place Associates which informed of trespassers in the subject apartment as the tenant Fernando Quinones had moved out on January 6, 2011.

Investigator Michael Dye testified that he was given the information in the aforementioned

¹ During oral argument, the plaintiff withdrew its cause of action for Negligent Supervision.

letter from his commanding officer, Sargeant Tavares. This letter made no reference to drug activity. The investigation concerned trespassing. Detectective Dye did not have a search warrant or Notice of Eviction. Upon arriving at the location, the door was closed but not locked. Detective Dye did not recall if anyone knocked on the door prior to opening the door. He did not hear any noise or smell anything prior to turning the doorknob. After turning the knob, he observed a dresser blocking the door. The officers then pushed into the apartment. Upon entering, he went on to secure the apartment. Upon entering the apartment, he observed clothes and electronics on the floor. He did not recall whether He also observed people in the apartment. He did not recall asking anyone in the apartment for documentation concerning the apartment or whether they had keys to the apartment. Upon searching the apartment, he found drugs in the freezer which were removed and vouchered.

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 (1st 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).

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 (1st 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 (1st Dept. 2012) (internal quotations omitted). See also, Grimes v. City of New York, 106 A.D3d 441 (1st Dept. 2013).

In opposition, the affidavit of Samantha Gonzalez indicates that she had lived in the apartment for over a year with her uncle Fernando Quinones. She was in the process of moving her clothes and furniture which were still present in the apartment when the police officers forced their way into the apartment. The criminal case against Ms. Gonzalez was dismissed.

Plaintiff alleges that she was in the apartment with Ms. Gonzalez helping her pack. There was furniture in the bedrooms. She testified that she heard a boom and then saw the officers in front of her with guns drawn. Plaintiff further testified that the officers made her take her clothes off to search her.

Viewing the four corners of the complaint in the light most favorable to the plaintiff, this Court denies the defendant’s motion to dismiss. The owner of the property, who incidentally did not provide any testimony herein, had remedies under RPAPL 713 for those tenants who fail to exit premises after the expiry of a lease. There has been no testimony provided by defendant to indicate that any meaningful investigation or inquiry was made prior to the arrest of plaintiff. This Court notes that within the 10 days subsequent to receiving the letter, which in of itself is questionable, the defendant did not seek a search warrant. Singara v. City of. New York, 38 Misc. 3d 284 (Kings Cty. 2012). Nor did the police officers have in their possession or have knowledge of any warrant of

eviction. Young v. City of New York, 72 A.D3d 415 (1st Dept. 2010). Furthermore, based upon the testimony of Officer Dye, no inquiry was made as to the status of the persons occupying the subject apartment at the time of the arrest. This Court would also note the disparity in Officer Dye's testimony in which he could not recall if there was furniture in the apartment, but testified that he observed a dresser blocking the door. As such, the facts and circumstances known to the officers at the time of the arrest/imprisonment did not give rise to probable cause. See generally, Cheeks v. City of New York, 123 A.D3d 523 (1st Dept. 2014).

To recover on a cause of action for malicious prosecution, the plaintiff must show that a criminal proceeding was commenced, that it was terminated in her favor, that it lacked probable cause and that the proceeding was brought out of actual malice. Rivera v. City of New York, 40 A.D3d 334 (1st Dept. 2007); Canatalino v. Danner, 96, N.Y.2d 391 (2001). Herein, the plaintiff was arrested on January 19, 2011 and criminal proceeding commenced. The record herein indicates that on September 15, 2011, plaintiff's criminal action was dismissed and the record sealed without compromising the innocence of plaintiff. Cantalino, supra. As such, reading the four corners of the complaint, in a light most favorable to the plaintiff, based upon the foregoing and the issues with probable cause herein, the plaintiff is able to maintain a cause of action for malicious prosecution.

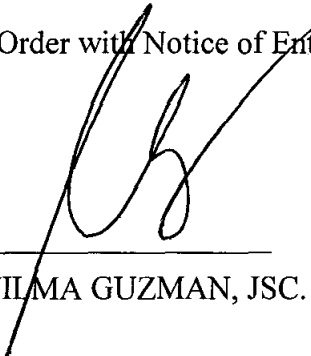
Accordingly, it is

ORDERED that defendant's motion to dismiss pursuant to C.P.L.R. 3211(a)(7) is hereby denied. It is further

ORDERED that 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 3/4/15



HON. WILMA GUZMAN, JSC.