Boyd v City of New York
2015 NY Slip Op 30573(U)
March 17, 2015
Sup Ct, Bronx County
Docket Number: 302353/2013
Judge: Mary Ann Brigantti
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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ANGELA BOYD,

Plaintiff,

-against-

DECISION / ORDER

THE CITY OF NEW YORK, et als., Index No. 302353/2013

Defendants

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The following papers numbered 1 to 6 read on the below motion noticed on November 13, 2014 and duly submitted on the Part IA15 Motion calendar of **December 15, 2014**:

Papers Submitted	Numbered
City's Notice of Motion, Exhibits	1,2
Pls.' Cross-Motion., Exhibits	3,4
City's Aff. In Reply, Exhibits	5,6

Upon the foregoing papers, the defendants the City of New York ("City") and Detective Alfred Santersiro Shield #005194 ("Santersiro")(collectively, "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Angela M. Boyd ("Plaintiff") against these defendants, pursuant to CPLR 3212, or in the alternative, granting Santersiro qualified immunity and dismissing Plaintiff's claims under 42 U.S.C. §1983 against that officer. Plaintiff opposes the motion and cross-moves for an Order granting her partial summary judgment on her claims for false arrest and false imprisonment. The Defendants oppose the cross-motion.

I. Background

This matter arises out of an incident that occurred on May 12, 2012, when Plaintiff was arrested inside of her residence, 1037 College Avenue, Apartment 1, in the Bronx, New York. She was arraigned and released on May 12, 2012, and the Criminal Court dismissed all charges against Plaintiff on May 24, 2012.

In the months leading up to this incident, detectives and police officers from the New York Police Department ("NYPD") had been investigating whether this location, 1037 College

Avenue, Apartment 1 (the "Premises"), was being used for the sale of illegal drugs. The NYPD conducted three "controlled buys" at the Premises, where a confidential informant successfully purchased marijuana from an individual who answered the front door to the subject apartment. On May 9, 2012, the Defendants obtained a search warrant, authorizing the NYPD to search the Premises. On May 12, 2012, defendant Santersiro and other members of the NYPD executed the search warrant. According to affidavits and other records submitted with the motion, as a result of the search, the NYPD recovered from the Premises small zip-lock bags of marijuana, a grinder with marijuana-like residue, a scale with marijuana-like residue, and a bag with a "white powdery substance" that appeared to be cocaine. Defendants also contend that they encountered two individuals inside of the apartment - Plaintiff, and Merick Mahoney, who were both handcuffed and arrested.

Plaintiff was thereafter charged with Criminal Possession of a Controlled Substance in the 7th Degree, Criminal Possession of Marijuana in the 5th Degree, and other charges. Santersiro later signed a criminal complaint stating, among other things, that he observed Plaintiff to have in her custody and control one bag of marijuana, one grinder with marijuana residue on top of a dresser in a bedroom, and one scale containing marijuana residue in the kitchen, a bag with cocaine residue in the hallway, all within the subject location. Defendants allege that when police first encountered Plaintiff inside of the apartment, she stated "I live here. You have the wrong apartment. The people who use to live here used to sell drugs." According to a title search, Plaintiff owned the Premises at relevant times as a joint tenant with non-party James Russell. On May 24, 2012, Plaintiff and the District Attorney's Office reached an agreement where Plaintiff accepted an Adjournment in Contemplation of Dismissal, and the Court thereafter dismissed the criminal matter against Plaintiff.

On December 11, 2012, the City initiated a nuisance abatement action against the Plaintiff alleging that, as a result of the drugs and drug paraphernalia seized from her apartment, she should be enjoined from continuing to possess drugs within her apartment or sell drugs at that location. On December 13, 2012, the City discontinued the nuisance action when Plaintiff signed a stipulation to, among other things, be enjoined from selling or possessing drugs in the apartment.

In 2013, Plaintiff brought this action against the Defendants asserting causes of action for, *inter alia*, false arrest, wrongful imprisonment, malicious prosecution, and negligent hiring and retention.

The Defendants now move for summary judgment, dismissing the complaint. First, Defendants argue that the causes of action for negligence, and negligent hiring against the City must be dismissed because the City concedes that all police officers were acting within the scope of their employment at the time of this incident. Plaintiff's State and Federal claims for false arrest and unlawful imprisonment must fail because probable cause existed for Plaintiff's arrest as a matter of law. Defendants contend that the Premises was searched pursuant to a valid search warrant, various contraband was found inside, along with Plaintiff, who was a record owner of the property. Defendants also argue that numerous controlled buys were performed prior to the search, and the drugs recovered were in "plain view." Defendants claim that Plaintiff "admitted" that she was engaging in behavior that constituted a nuisance when she agreed to cease the sale of drugs inside of her home.

Defendants next claim that even if probable cause did not exist, the individual officers named in the complaint and subject to dismissal because they are entitled to "qualified immunity." Plaintiff's cause of action under 42 U.S.C. §1983 must be dismissed, moreover, because Defendants had probable cause to arrest Plaintiff, and effectuated minimal force in doing so. Following that argument, Defendants contend that Plaintiff cannot sustain her claims for assault, battery, and excessive force under Federal or State Law, because there is no evidence that the officers used anything except the minimum amount of force necessary to place Plaintiff under arrest. Again, even if there were an issue of fact with respect to excessive force, Defendants argue that the individual officers are entitled to qualified immunity. Defendants argue that Plaintiff's acceptance of an Adjournment in Contemplation of Dismissal does not constitute a "favorable termination" of the criminal complaint, and therefore her claim of malicious prosecution is barred. Even if Plaintiff had obtained a favorable termination, Defendants again assert that the individual officers are immune from suit.

Finally, Defendants argue that Plaintiff's causes of action for "defamation" and "injurious falsehood" must be dismissed. After Plaintiff was arrested, the New York State Department of

Health sent a letter to the Plaintiff's employer, a nursing home, indicating that Plaintiff was charged with criminal possession of marijuana and a controlled substance. Plaintiff states in her bill of particulars that, as a result of this letter, she was suspended from employment. Defendants argue that these claims must be dismissed because, among other reasons, the statements contained in the letter were privileged as being true.

Plaintiff opposes the motion, and cross-moves for summary judgment with respect to her State and Federal causes of action sounding in false arrest and false imprisonment. Plaintiff argues that she is entitled to judgment as a matter of law, because the police lacked probable cause to arrest her for constructive possession of contraband. Any drugs or drug paraphernalia was found inside a basement apartment occupied by tenant Merick Mahoney. This basement apartment was separate and apart from "Apartment #1," occupied by Plaintiff. When police executed the search warrant, Plaintiff was found in her own apartment, and not the basement. Plaintiff states in an affidavit that it is "obvious" to anyone that this basement apartment constituted a separate living quarters. The basement has a separate entrance accessible from the outside. While the basement is also accessible from Plaintiff's apartment, she notes that the door leading to the basement has a lock on it. It is true that one does not need a key to unlock the door from Apartment 1 and access the basement, however Plaintiff states that she always keeps that door locked because she does not want the basement tenant to gain entry to her apartment. Plaintiff states she only moved into the apartment less than a month before the police arrested her, and she was unaware of any drug activity, and had nothing to do with any sale of drugs on the premises. Plaintiff also submits an affidavit from her daughter, who states that she never participated in the sale of drugs, and was not involved in any of the "controlled buys" performed at the Premises. The criminal complaint acknowledges that the contraband was found in a "lower level" of the apartment. Plaintiff contends that the responding officers' failed to differentiate or even acknowledge the separation between the two apartments, and therefore lacked probable cause to effectuate their arrest of Plaintiff. It is settled that an individual's "mere presence" in an apartment where contraband is found does not give the police probable cause to arrest that individual for possession. Plaintiff's status as a landowner, moreover, does not confer probable cause under these circumstances.

Should this Court not grant Plaintiff's cross-motion, she argues that the Defendants' motion must be denied, as there is an issue of fact as to whether the officers here had probable cause. Plaintiff contests the validity of the search warrant, as the Defendants have not provided the affidavit that was submitted to secure the warrant. With respect to negligent hiring, Plaintiff argues that no depositions have taken place, and there is evidence that the officers lacked training adequate to inform them of the significance of separate living quarters when executing the search warrant. The individual defendants' "qualified immunity" argument must be rejected since there is an issue of fact as to whether their conduct was objectively reasonable. Finally, Plaintiff argues that the claims of injurious falsehood and defamation should not be dismissed.

In reply and in opposition to the cross-motion, Defendants argue, *inter alia*, that probable cause has been established, that the search warrant was facially valid, and Plaintiff has failed to raise an issue of fact so as to warrant denial of Defendants' motion.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also 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]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can

reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Negligence / Negligent Training

Plaintiff's causes of action against the City sounding in negligence, negligent hiring, and negligent supervision or retention must be dismissed. The City has conceded that the officer defendants were acting within the scope of their employment duties at the time of this incident. Under these circumstances, generally, an employer can be held liable under a theory of *respondeat superior* and the plaintiff may not proceed with a cause of action to recover damages for negligent hiring or retention (*see Ashley v. City of New York*, 7 A.D.3d 742 [1st Dept. 2004]). New York, moreover, does not recognize general "negligence" claims against a municipality under these facts (*see Johnson v. Kings County Distr. Attorney's Office*, 308 A.D.2d 278 [2nd Dept. 2003], citing *Antonious v. Muhammad*, 250 A.D.2d 559 [2nd Dept. 1998]["[a] plaintiff seeking damages for an injury resulting from wrongful arrest and detention 'may not recover under broad principles of negligence ... but may proceed by way of traditional remedies of false arrest and imprisonment." [internal quotations omitted]). In opposition, Plaintiff has failed to raise a triable issue of fact, and has failed to present a non-speculative basis for her argument that further discovery would lead to relevant evidence on this issue (CPLR 3212[f]; *Jefferies v. N.Y. City Hous. Auth*, 8 A.D.3d 178 [1st Dept. 2004]).

False Arrest / False Imprisonment Claims / 42 U.S.C. §1983 vs all Defendants

A plaintiff asserting common-law claims for false arrest and false imprisonment must demonstrate that: the defendant intended to confine the plaintiff; the plaintiff was conscious of the confinement; the plaintiff did not consent to the confinement; and the confinement was not otherwise privileged (*see Martinez v. City of Schenectady*, 97 N.Y.2d 78, 85 [2001]). The existence of probable cause is a legal justification for the arrest, and a complete defense to the claim of false arrest and false imprisonment (*see Gisondi v. Town of Harrison*, 72 N.Y.2d 280

[1988]; *Broughton v. State of New York*, 37 N.Y.2d 451, 458 [1975]). To establish probable cause for an arrest, proof beyond a reasonable doubt is not required, "but merely information sufficient to support a reasonable belief that an offense has been ... committed" (*see Marrero v. City of New York*, 33 A.D.3d 556 [1st Dept. 2006], quoting *People v. Bigelow*, 66 N.Y.2d 417, 423 [1985]). In determining whether a police officer had probable cause to effect an arrest, a court must consider "all of the facts and circumstances together" (*Id.* [internal citations omitted]). Probable cause may be decided as a matter of law where there is "no real dispute as to the facts or the proper inferences to be drawn from such facts" (*see Parkin v. Cornell Univ., Inc.*, 78 N.Y.2d 523 [1991]).

The officers here entered Plaintiff's home pursuant to a search warrant. Plaintiff contests the validity of this warrant, and argues that the Defendants failed to submit the affidavit in support of the warrant and have, therefore, failed to carry their initial burden of proving its facial validity. Where a court issues a search warrant, however, there is a presumption of probable cause (*see Broughton v. State, supra*). This presumption may be rebutted with evidence that the officer procured the warrant based upon his or her own false unsubstantiated statements (*see Lee v. City of New York*, 272 A.D.2d 586 [2nd Dept. 2000]). In this case, as in *Lee*, the confidential information testified before the Justice (as indicated on the warrant), and Plaintiff has produced no evidence of any false statements made by the requesting officer, or that the confidential informant was unreliable (*see Morant v. City of New York*, 95 A.D.3d 612 [1st Dept. 2012]).

In this case, the Defendants have submitted evidence that they conducted successful "controlled buys" at the Premises, Apartment 1, on April 7 and April 17, 2012. Plaintiff testified that she moved into the apartment on April 21, 2012. Defendants have produced evidence that they successfully made another "controlled buy" at the Premises on May 8, 2012. According to an affidavit from the supervising officer, on that date, the confidential informant made a purchase of marijuana from an unidentified female inside of the first floor of the apartment. The informant asked for a "dime bag of marijuana." The female then went into "a room in the apartment, came back, and exchanged the bag of marijuana with the informant for $10." Defendants thereafter obtained a search warrant for "Apartment 1" of the Premises from Justice William McGuire. Upon execution of the search warrant, the officers encountered Plaintiff and a

male individual. They recovered, among other things, a ziplock bag believed to contain marijuana "on top of a dresser in a bedroom inside of the apartment," and another ziplock bag believed to be marijuana "on the floor of a bedroom inside of the apartment." They also observed a scale allegedly containing marijuana residue "inside of the kitchen of the apartment." The officers also recovered "one bag of white powdery residue" that was located "on the floor of a hallway of the apartment." The signed criminal complaint against Plaintiff confirms that the alleged marijuana, along with a grinder with marijuana residue, was recovered from a bedroom in the "lower level" of the apartment. The scale was found in the "kitchen" of the location, and the white powdery substance was found on the ground in the "hallway" of the location.

In any affidavit, Plaintiff states that her apartment is separate and apart from the "basement apartment" that was occupied by Merick Mahoney. The basement had a separate entrance from the outside, and was also accessible from Plaintiff's apartment, through a doorway. Plaintiff states that this door had a lock on it, though one does not need a key to open the door from her apartment to access the basement. Plaintiff, however, always kept the door locked so as to prevent Mr. Mahoney from accessing her apartment. Plaintiff states that the "lower level" referred to in the criminal complaint describes the basement apartment, that had its own bedroom, kitchen, and hallway. She is "confident" that the locations described in the complaint all refer to the separate basement apartment. Plaintiff contends that she had no custody or control of whatever was in the basement. She was arrested in her own apartment, and not the basement. She denies having anything to do with drug sales on the premises, and her settlement of the nuisance abatement action brought by the City was not an admission of guilt. In an affidavit, the Plaintiff's daughter, Twila Boyd, affirms that she had nothing to do with any drug sales on the premises.

This Court finds that the Defendants have carried their initial burden of establishing that they had probable cause to arrest the Plaintiff. The detectives and other police officers conducted an investigation that revealed the Premises to be a drug distribution point, up to and including the time when the Plaintiff was admittedly living in the apartment. All of the successful controlled buys occurred within the doorway of the apartment's first floor. Plaintiff, the owner of the Premises, was found inside that very apartment, and a search revealed that the basement below,

separated by a door that required no key to unlock, contained various drugs and drug paraphernalia. Upon her arrest, Plaintiff admitted that she lived at apartment #1, told the police they had the "wrong apartment" and that "the people who used to live here used to sell drugs." The totality of the circumstances as described herein satisfies the Defendants' burden of proving probable cause, and therefore a legal justification, for this arrest[1] (*See Mendoza v. City of New York*, 90 A.D.3d 453 [1st Dept. 2011][arrest and prosecution supported by probable cause where the plaintiff was found in a state of undress inside of a premises identified in a valid search warrant as a drug distribution point]; *see also Martinez v. City of Schenectady*, 97 N.Y.2d 78]).

In opposition, the Plaintiff has failed to raise a material issue of fact. Plaintiff contends that there was no probable cause for her arrest because all of the contraband was found in the basement apartment, not the first floor apartment. Plaintiff argues that she exercises no dominion or control over the basement, which is separated by a door that has a lock on it. Although Plaintiff can access the basement without the need of a key, she keeps the door locked so that the basement occupant cannot access her apartment.

An individual may be convicted of "constructive possession" of contraband where she exercised "dominion and control" over the property by a sufficient level of control over the area in which the contraband was found (*see People v. Manini*, 79 N.Y.2d 561, 573 [1992]). "The location of [contraband] on premises subject to a defendant's control raises the inference of his possession and control of the contraband" (*see People v. Martinez*, 207 A.D.2d 695 [1st Dept. 1994], citing *People v. Reisman*, 29 N.Y.2d 278, 286-87 [1971], *cert. den.*, 405 U.S. 1041 [1972]). It is true that an individual's "mere presence," for example, in an apartment where drugs are found, is insufficient to constitute constructive possession. However, "mere presence" means just that – the only link between the defendant and the premises is his or her presence, nothing more (*see, e.g., People v. Edwards*, 206 A.D.2d 597 [3rd Dept. 1994]).

Here, there is a stronger link between the Plaintiff and the location of the contraband. Plaintiff was the owner of this multi-family building, and occupied the first floor apartment. That first floor apartment was the subject of several successful "controlled buys" – one of which

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[1]This Court rejects Defendants' argument that Plaintiff's settlement of the nuisance abatement action constituted an admission that she knew drugs were being sold on the Premises.

occurred after Plaintiff admittedly moved into the apartment. Each of these controlled buys occurred at the front door of the Plaintiff's apartment. In her affidavit, Plaintiff vaguely states that she was "not present" in the apartment at "any relevant time" but makes no mention of whether she ever had access to the apartment in the weeks since she moved in. Moreover, in executing the search warrant, the officers' search of the basement – which they described as a "lower level" – was valid, since there is no admissible evidence that the officers knew that the basement apartment was a separate living quarters from "apartment 1" when they applied for the search warrant (*see, e.g., People v. Mabrouk*, 290 A.D.2d 235 [1st Dept. 2002][*People v. Otero*, 177 A.D.2d 284 [1st Dept. 1991]; *Maryland v. Garrison*, 480 U.S. 79 [1987]). Plaintiff's conclusory allegation that it is "obvious" that the basement constitutes a separate apartment is unavailing. Before the search, the NYPD learned from the public utility provider to the Premises that there were only three units in the building, and that there were no separate apartments on the first floor. The Court is also mindful that it is not evaluating whether there was proof of constructive possession "beyond a reasonable doubt," but merely whether there was probable cause to arrest Plaintiff, taking into account all of the attendant facts and circumstances. Any alleged conflicting evidence provided by Plaintiff regarding the separate basement apartment would go to the issue of guilt beyond a reasonable doubt, and not the initial determination of the existence of probable cause (*see Agront v. City of New York*, 294 A.D.2d 189 [1st Dept. 2002]).

In concluding that probable cause did exist, Defendants are entitled to dismissal of the Plaintiff's Federal and State causes of action for false arrest and unlawful imprisonment. Further, the plaintiff cannot sustain her 42 U.S.C. §1983 claim, because she has no underlying constitutional violation. Any purported civil rights violation is defeated by the existence of probable cause for the search, arrest, and subsequent prosecution of Plaintiff (*see Garcia v. City of New York*, 115 A.D.3d 447 [1st Dept. 2014]). In light of the foregoing, this Court need not reach the issue of whether the individual defendants are entitled to "qualified immunity."

Malicious Prosecution

Plaintiff cannot maintain her cause of action for malicious prosecution, because she accepted an Adjournment in Contemplation of Dismissal ("ACD"), and this disposition was not a

"favorable termination" of her criminal proceedings (*see Eke v. City of New York*, 116 A.D.3d 403 [1st Dept. 2014], citing *Hollender v. Trump Vil. Coop.*, 58 N.Y.2d 420, 423 [1983]). In any event, the existence of probable cause for the arrest establishes a complete defense to this cause of action (*see Leftenant v. City of New York*, 70 A.D.3d 596 [1st Dept. 2010]).

Assault and Battery, Excessive Force

Plaintiff has not opposed that branch of the motion seeking dismissal of her claims of assault and battery and excessive force. Defendants are entitled to summary judgment on these claims, since Defendants had probable cause to effectuate the arrest, and the record is devoid of any evidence that excessive force was used (*see Marrero v. City of New York*, 33 A.D.3d at 557-58).

Injurious Falsehood / Defamation

Plaintiff's fourth and fifth causes of action assert claims of injurious falsehood and defamation. According to Plaintiff's Bill of Particulars, the New York State Department of Health wrote a letter to her employer, Morningside House Nursing Home Co., Inc. The letter indicates that the Division of Criminal Justice Service reported a criminal history of the Plaintiff to the Department of Health. Plaintiff alleges that as a result of this letter, she was suspended from her employment for approximately two weeks. Defendants now argue that, even if the letter can be attributed to the City, the statement was privileged as being true, because Plaintiff was actually arrested and charged with the charges listed in the letter. In opposition to the motion, Plaintiff states that these causes of action should not be dismissed since Defendants' actions "reflect reckless disregard."

This Court finds that the Defendants are entitled to dismissal of these claims because the statements contained in the letter were true, and truth provides a complete defense to defamation claims (*see Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]). Plaintiff's claim of "injurious falsehood" is dismissed as duplicative of her defamation claim, as it alleges no new facts and seeks no distinct damages from the defamation claim (*see Perez v. Violence Intervention Program*, 116 A.D.3d 601 [1st Dept. 2014]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment, dismissing Plaintiff's complaint is granted, and the complaint against the moving Defendants is dismissed with prejudice, and it is further,

ORDERED, that Plaintiff's cross-motion is denied.

This constitutes the Decision and Order of this Court.

Dated: 3/17, 2015

Hon. Mary Ann Brigantti, J.S.C.