

**Mendez v City of New York**

2015 NY Slip Op 30822(U)

April 7, 2015

Supreme Court, Bronx County

Docket Number: 304213-10

Judge: Fernando Tapia

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**SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY: Part 13**

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**HECTOR MÉNDEZ**

**Plaintiff,**

v.

**Index No. 304213-10**

**THE CITY OF NEW YORK, PO BRIAN SHEA, SHIELD  
#13360, LT. PATRICK DAVIS, TAX REG #917878, ALL  
OF THE 46TH PRECINCT AND DETECTIVE MICHAEL  
MORENO OF THE 46TH PRECINCT DETECTIVE  
SQUAD, TAX REG #927230,**

**Defendants.**

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**DECISION**

This is, inter alia, a false arrest and false imprisonment action in which Plaintiff-Hector Méndez was unlawfully arrested on May 26, 2009, approximately 11:45 p.m.

Movants-Defendants filed their Motion for Summary Judgment to Dismiss under CPLR 3211(a)(7) and 3212, stating that they had probable cause, that Plaintiff failed to properly plead a valid 42 USC § 1983 claim, and that Plaintiff's excessive force claim was unfounded.

After careful review of the motion papers, this Court **DENIES** Defendants' motion because the motion papers have conflicting, specific factual references which raise material issues of fact, thus depriving Defendants entitlement to summary judgment.<sup>1</sup> More specifically, triable issues exist regarding whether Defendants had probable cause, based on credibility issues.

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<sup>1</sup> All parties acknowledge that Plaintiff withdrew his Sixth and Seventh Causes of Action: negligent hiring and retention, as well as his *Monell* claim. See Reply at ¶ 4.

**Factual Background**

On May 26, 2009, approximately 12:58 a.m., Mr. Méndez was en route to a Memorial Day BBQ at Mount Hope Place and Morris Avenue. See Nguyen Aff. at Exh. C. He was going to meet a blond-haired woman at the BBQ. While walking, he stopped a man to ask if he saw the woman at the BBQ. See Méndez Tr. at p. 26, lines 20-25. The man said that she was around the corner. Id. Plainclothes police officers who were on tour in an Impala drove up besides Mr. Méndez and told him to "hold it right there." Id. at p. 35, lines 19-24; p. 59, lines 9-21. Mr. Méndez was arrested and searched, along with the man who was later identified as Mr. Jamal Joseph. See Davis Tr. at p. 41.

Later, Mr. Méndez was at the 46 Precinct where he found out that he was being charged with a loaded gun.<sup>2</sup> He attested that he was never in possession of the gun. Id. at p. 47, lines 6-15. According to the arresting officers, Mr. Méndez dropped an object onto a pile of garbage bags at the time the officers approached him. See Moreno Tr. at p. 776, lines 2-15. After the arrest, Mr. Méndez was in a cell at Central Booking for four to five hours. Id. at p. 49, lines 15-18. He was transferred to Vernon C. Bain Center [VCBC], the barge docked at Rikers Island. Id. at p. 54, lines 12-19. There, he was stripped-search naked. Id. at p. 55, lines 12-20. Mr. Méndez was in police custody for about two hundred forty-seven [247] days. See Nguyen Aff. at Exh. A. During that time, he was diagnosed with clinical depression. Id. at p. 66, lines 11-14.

After a six-day jury trial in criminal court that ended on January 28, 2010, the jury acquitted Mr. Méndez on both counts of Criminal possession of a weapon in the second and fourth degrees. See Nguyen Aff. at Exh. C. He was released on January 29, 2010. Id. at p. 63,

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<sup>2</sup> The subject weapon was a Bryco 9mm. The charges were the following: P.L. § 265.03(3), Criminal possession of a weapon in the second degree; P.L. § 265.01(1), Criminal possession of a weapon in the fourth degree; and NYC Code 10-131(i)(3).

lines 3-9. Prior to the gun charges, Mr. Méndez was never convicted of anything. See Soffer Opp. at ¶ 7. Post-release, he sought treatment for alcoholism and depression at Arms and Acres. See Méndez Tr. at p. 68, lines 15-24. Mr. Méndez also attested that along with depression and drinking, he no longer visits his children on a daily basis because the children's mothers now distrust him. Id. at p. 77, lines 10-20.

Mr. Méndez currently works in Lincoln Hospital and lives in Bronx, NY.

**Where Is The Probable Cause?**

A police officer may arrest someone for a crime when she has reasonable cause to believe that such person has committed an offense, whether in his/her presence. See Criminal Procedure Law § 140.10(1)(a) ["Arrest without a warrant"]. The "reasonable cause" standard is equivalent to the federal "probable cause" one.<sup>3</sup> *People v. Johnson*, 66 NY2d 398, 402, n.2 (App Ct 1985).

The existence of probable cause is a complete defense to a plaintiff's claims of false arrest, false imprisonment, and malicious prosecution. *Garcia v. City of New York*, 115 AD3d 447-48 (App Div, 1st Dept 2014); *Drayton v. City of New York*, 292 AD2d 182, 183 (App Div, 1st Dept 2001). Lack of probable cause, therefore, is the failure of the arresting officer to make further inquiry when a reasonable person would have done so. *Ramos v. City of New York*, 285 AD2d 284, 297-98 (App Div, 1st Dept 2001); *Sital v. City of New York*, 60 AD3d 465, 466 (App Div, 1st Dept 2009).

Here, Plaintiff rebutted the probable cause presumption by way of his affidavit and disposition on the criminal trial in which he was acquitted. Based on the various affidavits of Defendants, compared to Mr. Méndez's affidavit, whether or not there was reasonable cause is a

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<sup>3</sup> "Probable cause" is defined as facts and circumstances that would lead a reasonably prudent person in like circumstances to believe the plaintiff to be guilty. *Colon v. City of New York*, 60 NY2d 78, 82 (App Ct 1983).

triable question of fact. This was a warrantless arrest in which Plaintiff asserts that Defendants did not act reasonably under the circumstances. See May 5, 2014 Aff. at ¶ 54.

This Court agrees with Plaintiff that the factual circumstances that gave way to reasonable cause are in dispute; although Defendants argued that there was reasonable basis and probable cause for the arrest, see Nguyen Aff. at ¶ 90, Defendants' claim that the police had probable cause to arrest Plaintiff as a matter of law is meritless, especially since there was no arrest or search warrant. See May 5, 2014 Opp. at ¶ 50; see also Davis Tr. at p. 78, line 14-21

Defendants' reliance on *People v. Spillman*, 309 NY 295, 300 (App Ct 1955) to support its stance that close proximity to the Bryco 9mm gives enough probable cause is misplaced because in *Spillman*, the defendant-husband certainly had immediate access and possession of the gun which was in the glove compartment of his wife's car, especially since he is the registered owner. In Mr. Méndez's case, he never possessed the Bryco 9mm. As such, proximity alone does not link him to the charges brought against him. See *People v. Bellamy*, 118 AD3d 1113, 1114 (App Div, 3d Dept 2014) (constructive possession can be established by evidence that the defendant had dominion and control over the weapon or area in which it was found).

Thus, to support a charge that a defendant was in constructive possession of property, the People must show that the defendant exercised "dominion and control" over the property by a sufficient level of control over the subject area. *People v. Manini*, 79 NY2d 561, 573 (App Ct 1992). This was underscored by Mr. Méndez, through counsel, who affirmed that Mr. Méndez "[w]as merely walking down a public sidewalk and had no connection whatsoever with the large pile of garbage bags lying near the curb." See Soffer Opp. at ¶ 46.

On the contrary, Detective Moreno attested that he saw Mr. Méndez drop an object on top of the garbage bags that he was standing next to. See Moreno Tr. at p. 689, lines 4-7; p. 693,

lines 12-19. These two competing observations alone defeat Defendants' summary judgment motion. Whether there was probable cause is an issue for the fact-finder, especially since Officer Brian Shea attested that there was nothing drawing his attention to Mr. Méndez other than Detective Moreno talking to him,<sup>4</sup> and since Officer Shea also attested that he did not see Mr. Méndez with a gun in his hand.<sup>5</sup> Moreover, Lieutenant Patrick Davis attested that the arrest report did not state that Mr. Méndez handled the Bryco 9mm in any way. See Davis Tr. at pp. 76-77. Material issues must be reconciled at trial.

**Malicious Prosecution: Another Contested Issue**

To get recovery for malicious prosecution, a plaintiff must show that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice. *Broughton v. State of New York*, 37 NY2d 451, 457 (App Ct 1975); *Maxwell v. City of New York*, 156 AD2d 28, 33 (App Div, 1st Dept 1990); *Martínez v. City of Schenectady*, 97 NY2d 78 (App Ct 2001).

Furthermore, in order to show that there was malice, the plaintiff does not have to show the defendant's intent to do personal harm, but rather show a reckless or grossly negligent disregard for his/her rights. *Ramos v. City of New York*, AD2d 284, 300 (App Div, 1st Dept 2001). The burden of proof of probable cause in a malicious prosecution matter falls on the plaintiff [unlike in a false imprisonment action, where the burden is on the defendant]. *Broughton*, 37 NY2d at 457; *Present v. Avon Products, Inc.*, 253 AD2d 183, 188 (App Div, 1st Dept 1999).

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<sup>4</sup> See Shea Tr. at p. 856, lines 3-16.

<sup>5</sup> Id. at p. 888, lines 14-25.

Here, Plaintiff's attorney posits that Defendants acknowledged their failure to document any critical observations of Detective Moreno. See Soffer Opp. at ¶ 65. Plaintiff's attorney also affirmed that Defendants committed perjury by testifying falsely before the grand jury and signing false accusatory instruments. Id. at ¶ 55. In addition, Mr. Méndez missed over eight months' worth of work at Lincoln Hospital, a job that he has been at for eight years prior to his acquittal. See Méndez Tr. at p. 9, lines 16-18; p. 63, lines 3-9.

Being indicted not only made Mr. Méndez depressed and forced him to stop working, but Defendants' gross conduct towards Mr. Méndez are circumstantial evidence of actual malice that Defendants caused upon Mr. Méndez. He therefore met his burden of proof. As Defendants contend, Mr. Méndez's malicious prosecution claim fails because he cannot prove that the prosecution was done other than to see the ends of justice served. See Nguyen Aff. at ¶ 110.

The "ends of justice" were not apparent here because Defendants gave inconsistent statements during various stages of the criminal and civil cases, even after acknowledging that the DNA test came back negative. See Moreno Tr. at p. 101, line 10-22. Where there is evidence that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney . . . that they have withheld evidence or otherwise acted in bad faith . . . it can no longer be held as a matter of law that defendant prosecuted plaintiff with probable cause and without malice. *Maxwell*, 156 Ad2d at 34. Issues therefore exist regarding the extent of malicious prosecution that Mr. Méndez suffered.

#### **42 USC § 1983 Liability Against the City of New York**

Under 42 USC § 1983 ["civil action for deprivation of rights"], every person who, under color of any statute, ordinance, regulation, custom, or usage subjects, or causes to be subjected,

any U.S. Citizen to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the injured party.

Has Mr. Méndez suffered a constitutionally cognizable injury? This Court finds that he did, regarding lack of probable cause. As he asserted, the issue of Defendants' immunity is a triable fact.<sup>6</sup> To prevail under § 1983, the plaintiff must show that any custom or policy of the City of New York caused the claimed violation of the plaintiff's constitutional rights. *Delgado v. City of New York*, 86 AD3d 502, 511 (App Div, 1st Dept 2011).

Here, Mr. Méndez asserts that there was no probable cause to arrest him for possession of a loaded gun. Excessive force<sup>7</sup> is disputed [and therefore raises material facts]; additionally, Lieutenant Davis, as the arresting supervisor, attested that the arrest report did not note that Mr. Méndez threw or dropped the Bryco 9mm. See Davis Tr. at p. 76, lines 19-25. Such discrepancies from the arrest report compared to attestations from Defendants defeat a dismissal of Mr. Méndez's § 1983 claims because custom or policy as to how arrest reports are written and approved is now in question.

Mr. Méndez's § 1983 claim is therefore valid, and Defendants' motion to dismiss is denied, as material issues regarding the extent of the City of New York's § 1983 violation exist.

**Conclusion**

In sum, Defendants failed to prove its prima facie case that it is entitled to summary judgment and dismissal as a matter of law. There are credibility issues of Defendants, as well as factual issues that conflict, when comparing Plaintiff's attestations to Defendants'.

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<sup>6</sup> Mr. Mendez's attorney respectfully asks this Court to construe Defendants' motion as seeking dismissal as to his § 1983 claim against Defendant-City of New York only, and not as to the individual Defendants. See Soffer Opp. at ¶ 74. In addition, Mr. Mendez withdraws his *Monell* claim against Defendant-City of New York. Id. at ¶ 77.

<sup>7</sup> A complaint alleging excessive force by a police officer states a cause of action under the statute against that officer. *Delgado*, 86 AD3d at 511; *Hodges v. Stanley*, 712 F2d 34, 35 (2d Cir 1983).

**WHEREFORE**, this Court **DENIES** Defendants' Motion for Dismissal and for Summary Judgment in its entirety.

This constitutes the Decision and Order of this Court.

Dated: April 7, 2015  
Bronx, NY

  
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**Hon. Fernando Tapia, J.S.C.**