

<b>Hernandez v City of New York</b>
2015 NY Slip Op 32170(U)
October 16, 2015
Supreme Court, Bronx County
Docket Number: 20291/15
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

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AURA HERNANDEZ,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 20291/15

CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, DETECTIVE ARTHUR SMITH,  
POLICE OFFICER JOHN DOE and POLICE OFFICER  
JOHN ROE,

Defendants.

\_\_\_\_\_  
The following papers numbered 1 to 13 read on this Motion to Stay, Motion to Dismiss and Cross motion for Default Judgment noticed on May 5, 2015 and duly transferred on May 8, 2015.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Notice of Motion, Affirmation & Exhibits	4, 5, 6
Notice of Cross-Motion, Affirmation & Exhibits	7, 8, 9
Affirmation in Opposition & Exhibits	10, 11
Reply Affirmation & Exhibits	12, 13

The above motions have been consolidated for the purpose of this Decision and Order.

Upon the foregoing cited papers and after reassignment of this matter from Justice Mitchell J. Danziger on May 8, 2015, Defendant The City of New York seeks an Order pursuant to CPLR 2201 staying this action pending the resolution of the criminal prosecution against Plaintiff's co-arrestee Jonathan Nunez. Defendant The City of New York also seeks an Order pursuant to CPLR 3211(a)(5) dismissing the Plaintiff's state law claims except malicious prosecution because the Summons and Complaint was filed outside of the Statute of Limitations. By cross-motion, Plaintiff seeks an Order for Default Judgment against Defendant Detective Arthur Smith setting this matter down for an assessment of damages.

This is an action to recover damages for civil rights violations and personal injuries allegedly sustained by the Plaintiff, Aura Hernandez, when she was arrested on October 3, 2013 by members of the New York City Police Department at 1164 Sheridan Ave., County of Bronx, City and State of New York.

Defendant Detective, Arthur Smith, based the arrest of the Plaintiff, Aura Hernandez, on the belief that the Plaintiff, among other offenses, criminally possessed a Weapon. The involvement of all Defendants and all claims raised by the parties are determinative upon whether sufficient probable cause existed for the Detectives to conduct a warrantless arrest of Plaintiff. On December 10, 2014, the charges against Plaintiff Hernandez, as a result of the subject arrest, were ultimately dismissed.

The Court notes that a warrantless arrest is presumed unlawful. *Veras v. Truth Verification Corp.*, 87 A.D. 2d 381 (1<sup>st</sup> Dept. 1982). However, the existence of probable cause to arrest constitutes a complete defense to claims of false arrest. *Marrero v. City of New York*, 35 A.D. 3d 556 (1<sup>st</sup> Dept. 2006). Therefore, a question of fact as to whether Detective Smith had sufficient probable cause to arrest Plaintiff exists.

The Court notes that “[t]he existence of [probable] cause does not require certitude that a crime was, or was being, committed by the person arrested.” *People v. Cunningham*, 71 A.D. 2d 559 (1<sup>st</sup> Dept 1979), *aff’d*, 52 N.Y. 2d 927 (1981). Nor does its existence need to be strong enough to warrant a conviction, *People v. Miner*, 42 N.Y., 2d 937 (1977), “the issue of probable cause is a question of law to be decided by the court [only when] there is no real dispute as to the facts or the proper inferences to be drawn from such facts. Where there is conflicting evidence, from which reasonable persons might draw difference inferences, the question is for the jury” *Parkin v. Cornell Univ.*, 78 N.Y. 2d 523 (1991). Additionally, “[i]n determining whether a police

officer had probable cause to effect an arrest, the emphasis should not be narrowly focused, but rather should consider all of the facts and circumstances together.” *Marrero*, 33 A.D. 3d 556 (1<sup>st</sup> Dept. 2006).

The court has reviewed the exhibits, deposition testimony and arguments submitted by the parties. The Court finds that Defendant, The City of New York has failed to proffer evidence that Plaintiff Hernandez’ criminal matter, which was dismissed on December 10, 2014, is related to the criminal matter of Jonathan Nunez. In addition, Defendant The City of New York’s claim that Plaintiff’s Summons and Complaint was filed outside of the Statue of Limitations is unavailing as this action was commenced on January 16, 2015, a day after an application for a late notice of claim was granted by the Honorable Mitchell J. Danziger.

With respect to Plaintiff’s request on the cross-motion, the Court finds there is a reasonable excuse for the delay in answering. The Court further finds that Plaintiff demonstrated no prejudice as a result of the delay and that Defendants have demonstrated the existence of a potentially meritorious defenses. Furthermore, the First Department has emphasized the longstanding judicial policy favoring resolution of issues on the merits, See *Guzetti v. City of New York*, 32 A.D. 3d 234 (1<sup>st</sup> Dept. 2006).

Therefore it is

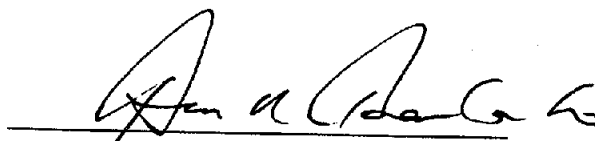
**ORDERED**, that Defendant The City of New York’s motion for an Order pursuant to CPLR 2201 staying this action pending the resolution of the criminal prosecution against Plaintiff’s co-arrestee Jonathan Nunez is **denied**; and it is further

**ORDERED**, that Defendant The City of New York’s motion pursuant to CPLR 3211(a)(5) dismissing the Plaintiff’s state law claims except malicious prosecution because the Summons and Complaint was filed outside the Statute of Limitations is **denied**; and it is further

**ORDERED**, that Plaintiff's cross-motion for an Order for Default Judgment against Defendant Detective Arthur Smith setting this matter down for an assessment of damages is likewise **denied**.

The above constitutes the Decision and Order of this Court.

Dated: October 16, 2015

  
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Hon. Ben R. Babato, A.J.S.C.