Wilson v City of New York
2015 NY Slip Op 32855(U)
October 7, 2015
Supreme Court, Bronx County
Docket Number: 304484/13
Judge: Ruben Franco
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 03

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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WILSON,ROBERT

-against-

THE CITY OF NEW YORK

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Index №. **0304484/2013**

Hon. Ruben Franco

Justice.

The following papers numbered 1 to ____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **January 09 2015** and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

The defendant's motion for summary judgment is granted to the extent

Plaintiff's cross-motion is denied

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 10/7/15

Hon. Ruben Franco

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART III

----------X Index No.: 304484/13

Robert Wilson and Vanessa Delgado,

Plaintiff,

-against- **DECISION/ORDER**

The City of New York, Commissioner Raymond Kelly in his official capacity, Assistant Chief Anthony Izzo as the commanding officer of NARCBBX, P.O. Terry Mill of NARBBX, P.O, shield 74210, P.O. Mill's partner under 2011BX067655 S/H/A John/Jane Doe I and the Tactical Team Sgt., under docket 2011BX067655 S/H/A John/Jane Doe II,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of the motion as indicated below:

Papers	**Numbered**
Notice of Motion, Affirmation in Support & Exhibits	**1, 2, 3**
Notice of Cross-Motion & Exhibits	**4, 5**
Affirmation in Opposition to Cross-Motion	**6**
Reply Affirmation	**7**

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

This is an action for, *inter alia*, false arrest, false imprisonment, malicious prosecution, and use of excessive force. The defendants move for summary judgment on the plaintiff's claims for federal false arrest and false imprisonment, federal and state malicious prosecution, federal excessive force, state false arrest, false imprisonment and excessive force, a 42 USC § 1983 claim, as well as all claims against Assistant Chief Anthony Izzo, all federal claims against Commissioner Raymond Kelly, and negligent training, hiring and retention.

At the outset it should be noted that the plaintiffs have withdrawn their claim under 42

USC § 1983 (Monell claim) against the City of New York, and claims for negligent hiring and retention, as well as their state claims for false arrest, false imprisonment and use of excessive force.

The elements of a false arrest and false imprisonment claim under 42 USC § 1983, are substantially the same as the elements under New York law, therefore, the analysis of the state and federal claims are identical (see Boyd v. City of New York, 336 F3d 72 [2d Cir 2003]). To succeed on claims for false arrest and false imprisonment, a plaintiff must show 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 (see Broughton v. State of New York, 37 NY2d 451, 335 NE2d 310, 373 NYS2d 87 [Ct App 1975]). The defendants can prevail if they prove that the imprisonment and arrest were effectuated with probable cause (Broughton at 458; Rivera v. City of New York, 40 AD3d 334, 836 NYS2d 108 [App Div 1st Dept 2007]).

It has been held that "An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense." (Ricciuti v. N.Y.C. Transit Auth., 124 F3d 123, 128 [2d cir 1997]; see also, People v. Oden, 36 NY2d 382, 329 NE2d 188, 368 NYS2d 508 [Ct App 1975]). When the facts resulting in an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide (Parkin v. Cornell University, Inc., 78 NY2d 523 [Ct App 1991]; Burns v. Eben, 40 NY 463 [Ct App 1869]; Brown v. City of New York, 92 AD2d 15, 459 NYS2d 589 [App Div 1st Dept 1983]; Veras v. Truth Verification Corp., 87 AD2d 381, 451 NYS2d 761 [App Div 1st Dept 1982]).

Here, the defendants argue that they entered the plaintiffs' apartment pursuant to a search warrant duly issued by a Justice of the Supreme Court, Bronx County, and that the plaintiffs constructively possessed contraband that was recovered from their bedroom. Constructive possession requires a showing that a knowing "dominion and control" was exercised over the property, by a sufficient level of control over the area in which the contraband was found, or over the person who actually possessed the property (see People v. Manini, 79 NY2d 561, 584 NYS2d 282 [Ct App 1992]; People v. Diaz, 68 AD3d 642, 894 NYS2d 1, [App Div 1st Dept 2009]). Constructive possession may also be established when a suspect is present in an area where contraband has been found in plain view (see Davis v. City of New York, 2007 WL 755190 [EDNY 2007]; United States v. Heath, 455 F3d 52, 57 [2nd Cir. 2006]). Detective Mill (hereinafter, "Mill") testified in his examination before trial (EBT) that he recovered drugs from the dresser in the bedroom where the plaintiffs had been sleeping. Although he did not recall where on the dresser they were recovered, his notes indicated "on the dresser", which he assumed means "on top of the dresser" (see Mill Tr. p. 71, lines 5-10). However, he did not recall if it was actually "on top of the dresser". The defendants argue that a reasonable person could conclude, that it is more likely than not, that the plaintiffs were engaged in criminal activity when they were found sleeping in a room where crack cocaine residue, and a marijuana cigarette, were discovered by the police, thus satisfying the probable cause standard. Mill also testified that a prior investigation which he conducted revealed that Wilson was previously arrested and gave the subject apartment as his home address (see Mill Tr. p. 72, lines 24-25, and p. 73, lines 1-7), thus, connecting him to the subject apartment.

The court finds that the defendants have met their prima facie burden entitling them to

judgment as a matter of law on the federal false arrest and false imprisonment claims, if the plaintiffs are unable to raise a triable issue of fact.

In opposition, and in its cross-motion for partial summary judgment on behalf of Delgado, the plaintiffs argue that the defendants did not have reasonable cause to believe that Delgado constructively possessed any contraband to justify her arrest. In People v. Sanchez, 276 AD2d 723, 724, 714 NYS2d 521 [App Div 2nd Dept 2000], the court stated that "...neither the mere presence of an individual at the scene of criminal activity nor an individual's flight, without any other indicia of criminal activity, establishes probable cause." More apropos here, in People v. Edwards, 206 AD2d 597, 614 NYS2d 469 [App Div 3rd Dept 1994], the Court declared that mere presence in an apartment or house where contraband is found does not constitute sufficient basis for a finding of constructive possession. Mill testified that Delgado was in the third bedroom where contraband was recovered. He stated that the only reason he arrested Delgado was his belief that she had custody and control of a controlled substance because of her mere presence in the bedroom where the narcotics were recovered (see Mill Tr. p. 70, lines 15-22). The plaintiffs submit an affidavit by Delgado in which she states that she went to the subject premises to visit her friend Wilson. She states that although she had an opportunity to see the living room when she entered the apartment, as well as after the officers entered the apartment and removed her to the living room, she did not see any drugs or drug paraphernalia in plain view in the living room at any time, nor did she see any in the bedroom where she slept. She also states that, in addition to informing the police officers that she did not live there, she was carrying identification demonstrating that she lived elsewhere.

The court finds that Delgado was arrested soley because she was present in the apartment

when the search warrant was executed. No evidence is presented tending to support the defendants' argument that she had dominion and control or constructive possession of any of the contraband recovered. Contraband was recovered from the living room, where one of the other individuals, not a party to this action, was arrested, and in bedroom number one, as well as inside of a stereo speaker inside of bedroom number two. The plaintiffs were in bedroom number three. Even if proof had been presented that the premises were used for drug dealing, it would have been insufficient to establish that Delgado possessed the contraband (see People v. Headley, 74 NY2d 858, 547 NE2d 82, 547 NYS2d 827 [Ct App 1989]). Mill testified that he was not certain if Delgado resided in the apartment, and that he was not aware of anything connecting her to the apartment, such as clothing in the closet, or mail addressed to her at the apartment (see Mill Tr. p. 71, lines 11-21; p. 75, lines 4-6).

This court finds that the plaintiffs have raised a triable issue of fact regarding whether the contraband recovered in the bedroom occupied by Delgado was in plain view. Mill testified that he was not certain regarding where on the dresser the contraband was recovered. In short, Mill did not testify unequivocally, that he recovered the contraband in the bedroom in plain view.

The plaintiffs also raise a material issue of fact regarding whether the officers had probable cause to arrest Wilson. They submit an affidavit from Wilson who states that his grandmother resides at the subject apartment, and that on the date of the arrest he was visiting. He also states, and it was uncontroverted, that he did not have a key to the apartment, does not receive mail, or have any clothes or personal belongings stored there. He further states that he did not see any drugs or drug paraphernalia at any time, in plain view in the living room or in the bedroom where he slept. He states that he possessed identification proving that he resided elsewhere, and

that he informed the officers that he did not live in the subject apartment. In his testimony regarding prior arrests that ostensibly connected Wilson to the apartment, Mill did not provide details regarding how current this information was.

The plaintiffs have raised a material issue of fact as to whether the contraband was found in plain view. Thus, the defendants' motion for summary judgment seeking dismissal of the plaintiffs' federal claims for false arrest and false imprisonment, is denied. The plaintiffs' cross-motion for summary judgment on behalf of Delgado is also denied for the same reason.

Claiming that he is entitled to qualified immunity, the defendants move to dismiss the false arrest and false imprisonment claims against Mill. The doctrine of qualified immunity shields police officers from personal liability when, engaged in official conduct, they do not violate clearly established rights of which a reasonable person would have known (see Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed 2d 396 [1982]). It must be objectively reasonable, even if mistakenly, that their conduct did not violate such rights (see Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed. 523 [1987]). To qualify for immunity the defendants must show "arguable probable cause" (see Caraballo v. City of New York, 526 FedAppx 129, 131 [2d Cir 2013]). Although the court finds the existence of a material question of fact regarding whether the officers had probable cause to arrest the plaintiffs, the court nonetheless concludes that, in the context of qualified immunity, the defendants have shown arguable probable cause inasmuch as Det. Mill was executing a duly issued search warrant in an apartment where drug activity may have been taking place, and upon gaining entry, he comes upon some contraband, and finds the plaintiffs occupying one of the bedrooms. Indeed, it has been held that dismissal is appropriate as long as "officers of reasonable competence could

disagree on the legality of the action at issue in its particular factual context." (Walcyzk v. Rio, 496 F 3d 139, 154 [2d Cir 2007], quoting Malley v. Briggs, 475 US 335, 341, 106 S Ct 1092, 89 L.Ed2d 271 [1986]). Moreover, as was stated in Anderson, at 635-636, the officers are permitted to be mistaken, so long as their belief that they were acting properly was "objectively reasonable."

The elements required to make out a claim for malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and, (4) actual malice (see Broughton v. State, 37 NY2d 451, 457 [Ct App 1975]). The plaintiffs' failure to establish even one element, defeats the entire claim (Brown v. Sears Roebuck and Co., 746 NYS2d 141, AD2d 205 [App Div 1st Dept 2002]; Hoyt v. City of New York, 727 NYS2d 317, AD2d 501 [App Div 2nd Dept 2001] citing Covert v. County of Westchester, 202 AD2d 384, 385 [App Div 2nd Dept 1994]). The issue of 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 from such facts (see Lundgren v. Margini, 30 AD3d 476, 817 NYS2d 349 [App Div 2nd Dept 2006]). Inasmuch as the court finds that under the facts and circumstances of the arrest of the plaintiffs, there exists a material issue of fact regarding the existence of probable cause for the arrests, the motion for summary judgment to dismiss the malicious prosecution claim is denied. If it is determined that the officers had no probable cause to arrest the plaintiffs, then " a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding" (Maskantz v. Hayes, 39 AD3d 211, 215, 832 NYS2d 566 [App Div 1st Dept 2007]). Here, it is possible that a jury might find that the contraband was not in plain view in the bedroom when it was recovered, which may

create an inference of malice.

The Supreme Court has held that "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the Fourth Amendment (see Graham v. Connor, 490 U.S. 386, 396 [1989]). A federal claim of excessive force occurring during an arrest is analyzed under the Fourth Amendment's reasonableness standard (Graham v. Connor, 490 U.S. 386, 396 [1989], quoting Johnson v. Glick, 481 F2d 1028, 1033 [2d Cir 1973]). Thus, whether the force used in effectuating an arrest is excessive must be analyzed under the Fourth Amendment's standard of objective reasonableness (Rivera v. City of New York, 40 AD3d 334, 341 [1st Dept 2007]); Ostrander v. State of New York, 289 AD2d 463, 735 NYS2d 163 [App Div 2d Dept 2001]). The reasonableness of an officer's use of force must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (Graham, at 396; Rivera, at 341; Koeiman v. City of New York, 36 AD3d 451, 453, 829 NYS2d 24 [App Div 1st Dept 2007]). The determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest (Koeiman, at 453).

To support Wilson's excessive force claim, the plaintiffs rely on his EBT testimony wherein he states that the had his face slammed into a shelf (see Wilson Tr. p. 44, line 7-13), resulting in a cut to his nose, and bleeding (see Wilson Tr. p. 45 lines 5-13). This injury was treated with alcohol and a gauze, and Wilson refused medical treatment (Wilson Tr. p. 45, line 18 p. 46, line 25). Moreover, Wilson could not identify which officer was responsible for his injury, and it appears as if it was caused while Wilson was engaged in resistence.

In determining whether the officers used excessive force in the use of handcuffs, the court must consider evidence that: (1) the handcuffs were unreasonably tight; (2) the defendants ignored the pleas that the handcuffs were too tight; and, (3) the degree of injury to the wrists (Lynch ex re. v. City of Mount Vernon, 567 F Supp 2d 459, 468 [SDNY 2008], (citing Esmont v. City of New York, 371 F Supp 2d 202, 215 [EDNY 2005]). The injury requirement is particularly important and is often dispositive (*Id.* at 468). The placement of tight handcuffs does not constitute excessive force unless it causes some injury beyond temporary discomfort (see Usavage v. Port Authority of New York and New Jersey, 932 F Supp 2d 575, 592 [SDNY 2013]). Wilson testified that he had bruising and swelling of the right wrist for which he did not seek medical treatment (see Wilson Tr. p. 56, line 3-6). He stated that his wrists were sore for about a week (Wilson Tr. p. 55 line 10-14). Delgado testified that the handcuffs were too tight and that there was bruising, but she did not seek any medical attention (Delgado Tr. p. 32, lines 2-3). She states that she saw a doctor in central booking but doesn't state that there were any injuries (see Delgado Tr. p. 33, line 19, p. 34 line 3).

The circumstances surrounding the plaintiffs' arrest, as well as the evidence proffered by the plaintiffs, does not support their claim of the use of unreasonable or excessive force, with the use of handcuffs, or otherwise.

The defendants move to dismiss all claims against former Assistant Chief Anthony Izzo (hereinafter, "Izzo"), claiming a lack of personal jurisdiction, and that the plaintiffs abandoned the action against him. The plaintiffs have submitted no opposition to this branch of the motion. There was no affidavit of service filed for service upon Izzo. However, even if Izzo was properly served, he did not answer and has defaulted, and plaintiffs never sought entry of a default

judgment. Civil Practice Law and Rules (CPLR) §3215 [c], provides that a court, on its own initiative or on motion, shall dismiss an action as abandoned if the plaintiff does not seek the entry of judgment within one year after the default, unless sufficient cause is shown why the action should not be dismissed. The court finds that the plaintiffs have abandoned their claims against former Assistant Chief Anthony Izzo.

The defendants move, unopposed, to dismiss the claims against Commissioner Raymond Kelly, arguing that he was sued in his official capacity and that the claims against him are duplicative of claims against the municipality. Government officials sued in their official capacities "generally represent only another way of pleading an action against an entity of which an officer is an agent." (Walton v. Safir, 122 F Supp2d 466, 477 [SDNY 2000], quoting Kentucky v. Graham, 473 US 159, 165, 105 Sct 3099, 87 LEd2d 114 [1985]). Since local governments can be sued directly in Section 1983 cases, there is no need to bring official-capacity suits against local government officials (see Geller, 1991 WL 99054, at *8). The branch of the defendants' motion seeking dismissal of the federal claims against Commissioner Raymond Kelly, is granted.

The seventh and fourteen causes of action are claims against Commissioner Raymond Kelly in his official capacity, which the plaintiffs characterized as a "Monell" claims. The plaintiffs have withdrawn their Monell claims, therefore, the branch of the defendants' motion seeking dismissal of the seventh and fourteenth causes of action against Commissioner Raymond Kelly, is denied as moot.

Accordingly, the defendant's motion for summary judgment is granted to the extent of dismissing the plaintiffs' federal claims for excessive force, as well as the claims for false arrest and false imprisonment against Det. Mill, and all claims against defendants Izzo, and

Commissioner Raymond Kelly.

The plaintiffs' cross-motion on behalf of plaintiff Vanessa Delgado is denied.

The defendants shall serve a copy of this decision with Notice of Entry, upon the plaintiffs within twenty (20) days of its entry, and file proof of such service with the court within 20 days thereafter.

This constitutes the Decision/Order of the court.

Dated: October 7, 2015

Ruben Franco, JCC

HON. R. FRANCO