[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES E. d'AUGUSTE **PART** 62

Justice

Index Number : 103586/2008
SCHUMACHER, MARKUS
vs
ANTIQUORUM USA
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 5 **, were read on this motion to/for** Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Affirmation, memo. of law **No(s).** 1-3

Answering Affidavits — Exhibits Affirmation **No(s).** 4

Replying Affidavits Affirmation **No(s).** 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
MAR 24 2016
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
MAR 23 2016
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAR 16 2016

_____, J.S.C.
HON. JAMES E. d'AUGUSTE

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

At an I.A.S. Part 62 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 16th day of MARCH 2016

PRESENT:

HON. JAMES E. D'AUGUSTE, A.J.S.C.

MARKUS SCHUMACHER,	MOTION SEQ.
Plaintiff,	NOS. 3, 4 & 5
-against-	
ANTIQUORUM USA, INC., et al,	INDEX NO.:
Defendants.	103586/2008

Hon. James E. d'Auguste, A.J.S.C.

Defendants Paul Ware, Jr. ("Ware") and William C. Clifford ("Clifford") (collectively, "W&C") move this Court for an order granting them summary judgment and dismissing the first, second, third, and fourth causes of action of plaintiff Markus Schumacher's complaint (motion seq. no. 3); defendants Antiquorum USA, Inc. ("AUSA") and Evan Zimmerman ("Zimmerman") (collectively, "Antiquorum") move this Court for an order granting them summary judgment, dismissing plaintiff's fifth, sixth, and seventh causes of action and on their cross-claims for contractual and common law indemnification against W&C (motion seq. no. 4); defendants W&C cross-move for summary judgment on their cross claim for indemnification against AUSA (also motion seq. no. 4); and defendant City of New York (the "City") moves for summary judgment, dismissing the ninth and tenth causes of action asserted against it in plaintiff's complaint (motion seq. no. 5).

BACKGROUND

Plaintiff Markus Schumacher was employed with defendant AUSA as its Chief Operating Officer until August 2, 2007, wherein the Board of Directors (the "Board") of Antiquorum, S.A. (AUSA's parent company, "ASA") held a meeting and passed one of several resolutions that suspended plaintiff's employment. The resolution was effective immediately and barred plaintiff from performing

any functions or duties at the AUSA offices located at 595 Madison Avenue in New York, New York (the "Office"). In furtherance of the resolution, AUSA determined that plaintiff should be denied access to the Office and contracted with Andrews International ("AI"), a security company, to engage two of its employees, who ended up being defendants Ware and Clifford, to be present at the Office and encourage plaintiff to leave without incident. Specifically, the following e-mail from AI to Linda Gould at AUSA set forth the scope of the services to be rendered:

> **Linda**, As discussed, Dennis Fagan our Area Manager will be calling you tomorrow to schedule a walk through. He will coordinate any future coverages that we agree upon.
>
> **Thursday: Employee Discharge**
>
> We would require a 2-man team with 4-hour minimums per team member. These officers will be there as observers, whose presence would encourage the discharged employee to leave without incident. If there were a refusal to leave, they would call the police and wait their response. They would not be there for the purpose of removing or laying hands on said employee. They would however provide an appropriate response in the event that this discharged employee was to pose a danger to them or others. Charges for this service would be at our standard rate as indicated in our Pricing Schedule ($65.00 per hour per officer). **Dennis**. Rossillo Aff., Ex. M.

On the morning of August 2, 2007 in New York, plaintiff came to the Office, expecting to go to work and encountered W&C in the hallway in front of the Office doors. W&C advised plaintiff that he was not allowed to enter the premises, and gave him a copy of the minutes from the Board's meeting. Plaintiff took exception to the denial of access, claiming he had a power of attorney from Mr. Oswaldo Patrizzi, affiliated with ASA. Plaintiff then attempted to bypass W&C numerous times, and an altercation ensued,[1] to the point where W&C called the New York City Police Department ("NYPD"). As a result, eight police officers ended up at the scene, and plaintiff was later arrested. The entire incident between plaintiff, W&C, and the police officers, was captured on video surveillance footage,

[1] W&C also allege that defendant Clifford sustained a serious orthopaedic injury to his right shoulder during the incident.

a copy of which was provided to the Court (the "video"). The parties do not dispute its authenticity or admissibility as evidence in these motions for summary judgment.

ANALYSIS

W&C DEFENDANTS

Plaintiff's complaint asserts four causes of action against the W&C defendants: (1) assault; (2) battery; (3) false arrest/imprisonment; and (4) intentional infliction of emotional distress.

"To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact." *Holtz v. Wildenstein & Co.*, 261 A.D.2d 336 (1st Dep't 1999). The "proof of physical conduct," if any existed, would be demonstrated in the video. However, it is clear from the video footage that neither Ware nor Clifford made any sort of gesture that would have given rise to imminent apprehension of harmful contact. In opposition, plaintiff claims that the defendants "raise[d] their hands in order to make contact with [plaintiff]"; though such a claim is belied by the video, showing no such raising or other "type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct needed to state an actionable claim of assault." *Okoli v. Paul Hastings LLP*, 117 A.D.3d 539, 540 (1st Dep't 2014).

"To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature." *Cotter v. Summit Sec. Servs., Inc.*, 14 A.D.3d 475, 475 (2d Dep't 2005). "In the instant case, there is no question that there was bodily contact and that defendant[s] intended to make the contact. The only issue is whether the contact was 'offensive' in nature." *Zgraggen v. Wilsey*, 200 A.D.2d 818, 819 (3d Dep't 1994). Here, it cannot be said that the "intended contact was itself 'offensive,' i.e., wrongful under all the circumstances," given the fact that W&C's conduct was solely to thwart plaintiff's repeated attempts to get through or bypass W&C, by physically placing himself between or around them. *Id.*; *see also Higgins v. Hamilton*, 18 A.D.3d 436 (2d Dep't 2005).

Because the requisite elements of assault and battery are not demonstrated based upon the record before it, the Court need not reach any determination regarding justification. *See Merzon v. County of Suffolk*, 767 F. Supp. 432, 448 (E.D.N.Y. 1991) (if there is a prima facie case of assault and battery, the presumption of no justification is rebuttable, and "if the defendant presents proof of justification, the ultimate burden of proving the absence of justification rests with the plaintiff").

Plaintiff's claims for false arrest/imprisonment appear to be two-fold in that defendants W&C allegedly intended to unlawfully confine plaintiff, and induced and encouraged the NYPD to arrest him. However, there is no evidence to show that defendants intended to confine plaintiff, nor that defendants did anything to make plaintiff believe that he could not leave the premises. *See Arrington v. Liz Claiborne, Inc.*, 260 A.D.2d 267 (1st Dep't 1999); *Petty v. North Gen. Hosp.*, 1 A.D.3d 288, 288–89 (1st Dep't 2003); *see also Cecora v. De La Hoya*, 106 A.D.3d 565, 565–67 (1st Dep't 2013). Indeed, W&C's entire goal was for plaintiff to leave, yet plaintiff refused. While plaintiff argues that the W&C defendants told him to "stay down" and "not get up," such allegations by way of an affirmation of counsel is not based upon first-hand knowledge. In this regard, the Court notes that the failure to include an affidavit from plaintiff, submit other admissible evidence, or even attempt to support his allegations with citations to evidence already in the record, all serve to create a near insurmountable barrier to defeating defendants' motion for summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Moreover, the affirmation in opposition fails to allege or cite to any evidence that the W&C defendants "took an active role in the prosecution of the plaintiff, such as giving advice and encouragement or importuning the authorities to act, and that the defendant intended to confine the plaintiff." *Celnick v. Freitag*, 242 A.D.2d 436, 437 (1st Dep't 1997). Though W&C called the police,

allegedly after plaintiff injured Clifford, they "merely supplied information to the police, who [later] determined that an arrest was appropriate." *Cotter*, 14 A.D.3d at 475.[2]

Lastly, it is clear that the intentional infliction of emotional distress claims against W&C must be dismissed. "Such an action requires conduct 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community.'" *Arrington*, 260 A.D.2d at 268, quoting Restatement (Second) of Torts § 46. Here, plaintiff failed to allege anything beyond the allegations which make up the other claims against W&C — which the Court essentially boils down to advising plaintiff he was not allowed to go into the Office, thwarting and subduing plaintiff's physical attacks, and calling the police because of his conduct. *See id.*; *Cecora*, 106 A.D.3d at 566.[3]

Accordingly, because the Court finds W&C established entitlement to summary judgment, and plaintiff failed to raise an issue of fact in opposition, W&C's motion is granted.

ANTIQUORUM DEFENDANTS

Plaintiff's Claims Against Zimmerman

The complaint alleges that Zimmerman was the "Managing Director and legal counsel of AUSA" (compl., ¶ 3), and asserts false arrest/imprisonment and intentional infliction of emotional distress claims against him as and for the seventh and eighth causes of action, respectively.

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[2] W&C argue that plaintiff's arrest was not even based upon any information supplied by W&C, but independently premised on the allegation that plaintiff placed his hands on Officer McLoughlin. However, even if this is not accurate, and plaintiff was arrested for assaulting Clifford, the City demonstrated that the NYPD had probable cause to arrest to arrest for that as well, as discussed *infra*.

[3] Though no argument was ever advanced by plaintiff and because plaintiff's opposition failed to articulate his claimed distress, the Court would likely find that any alleged distress could not be causally related to defendants' conduct (*see Cecora*, 106 A.D.3d at 566), particularly stemming from the arrest, the grounds of which are arguably independent from either Ware's or Clifford's actions. *See Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205, 212 (1st Dep't 2002).

The false arrest/imprisonment claim against Zimmerman fails because he was not at the Office and could not have physically restrained plaintiff. Any argument that he intended to confine plaintiff must also be rejected, as the only relevant testimony demonstrates that Zimmerman never gave any unlawful directives, let alone any directives, specifically, other than to hand plaintiff a copy of the Board meeting minutes and resolution, and advise plaintiff he was not allowed into the Office. *See Petty*, 1 A.D.3d at 288–89. Additionally, Zimmerman could not be responsible for the later arrest, as Zimmerman had no communication and/or interaction with the NYPD. *See Celnick*, 242 A.D.2d at 437. Thus, plaintiff's seventh cause of action is dismissed, unopposed.

The eighth cause of action for intentional infliction of emotional distress is also dismissed in light of the testimony submitted showing that all Zimmerman could have done was assist AUSA in retaining a professional security company to ensure that plaintiff was not permitted access to the Office in accordance with the Board's resolution. Such conduct fails to meet the standard required to sustain this claim. *See Arrington*, 260 A.D.2d at 268 (requiring conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community" [internal quotations omitted]). Plaintiff's arguments in opposition will not be considered by the Court to the extent that it relies on the purported conduct of ASA or AUSA to support its claim, as intentional infliction of emotional distress was not asserted against either corporate entity. Moreover, the idea that, e.g., the Antiquorum defendants were without authority to make the decision to suspend plaintiff's employment, or had other, less-embarrassing means to communicate the news to plaintiff instead of hiring professional security, etc., are not proper issues before the Court. While the Court is sympathetic to plaintiff's plight, the Court finds the arguments to be without merit as they also do not demonstrate that such conduct goes "beyond all possible bounds of decency." *See id.*

Plaintiff's Claims Against AUSA

Plaintiff's fifth and sixth causes of action are asserted against AUSA, which include negligent hiring, retention and supervision, and vicarious liability for the acts of Ware and Clifford, as well as Zimmerman.

That branch of plaintiff's claim seeking to hold AUSA liable for Zimmerman's acts is dismissed as the Court found Zimmerman cannot be found liable. *See Karoon v. New York City Tr. Auth.*, 241 A.D.2d 323, 324 (1st Dep't 1997) ("if the employee was not negligent, there is no basis for imposing liability on the employer").

As to W&C, it is undisputed that they are not employees of AUSA; thus, the claim of negligent hiring, retention, and supervision fails in the traditional sense. However, as the parties correctly argued, certain exceptions exist to the general rule that "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273 (1993). These "exceptions," mostly "derived from public policy concerns, 'fall roughly' into three basic categories: where the employer is negligent in selecting, instructing or supervising the independent contractor; where the independent contractor is hired to do work which is 'inherently dangerous'; and where the employer bears a specific, nondelegable duty." *Saini v. Tonju Assoc.*, 299 A.D.2d 244, 245–46 (1st Dep't 2002), citing *Kleeman*, 81 N.Y.2d at 274. As an initial matter, having granted them summary judgment, the Court already found that W&C cannot be held liable for their alleged negligence as a matter of law. However, for the purposes of finality, the Court briefly addresses each category to explain how AUSA could not be held liable for W&C's acts, even if the Court had not already ruled on their liability.

An employer "is not bound to anticipate misconduct on the contractor's part . . . unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that

the contractor was not properly qualified to undertake the work." *Maristany v. Patient Support Servs.*, 264 A.D.2d 302, 303 (1st Dep't 1999); *see also Sheila C. v. Povich*, 11 A.D.3d 120, 129–30 (1st Dep't 2004) ("An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury."). There is simply no evidence before the Court that could infer AUSA was in any way negligent for hiring AI and its employees, and there aren't any known propensities that would cause injury. *See Del Signore v. Pyramid Sec. Servs.*, 147 A.D.2d 759, 760–61 (3d Dep't 1989) (any prior incidents of the security guards failed to establish any connection with, and failed to give notice to, the employer). Further, there is no evidence that AUSA was negligent in instructing and/or supervising AI and its employees. The e-mail setting forth the scope of services, as well as the actual sequence of events that occurred on the day of the subject incident, adequately demonstrates an absence of any issues of fact as to the degree of supervision or control AUSA had over AI's employees. *Del Signore*, 147 A.D.2d at 761 ("The fact that SPAC participated in determining how many security guards would be needed at a particular concert and pursued a no-reentry policy at this concert may indicate control over the results to be achieved, but does not establish active participation in the manner of performance"); *see also Saini*, 299 A.D.2d at 245.

The Court also is not persuaded by plaintiff's argument that hiring a professional security company is inherently dangerous. "This exception applies when it appears both that 'the work involves a risk of harm inherent in the nature of the work itself [and] that the employer recognizes, or should recognize, that risk in advance of the contract.'" *Chainani v. Board of Educ. of City of N.Y.*, 87 N.Y.2d 370, 381 (1995), quoting *Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 669 (1992). Considering the examples of this category cited by the Court of Appeals, such as "blasting, certain types of construction, and working with high tension wires" (*Saini*, 299 A.D.2d at 246), this Court does not

find that the scope of the work set forth in the e-mail is inherently dangerous. Nor does the Court find that professional security services, generally, are inherently dangerous, and many courts agree. *See, e.g., Del Signore*, 147 A.D.2d at 761; *Sage Enterprises, Inc. v. Wells Fargo Alarm Servs., Inc.*, No. 94-CV-2100 (JG), 1996 WL 1057144, *7 (E.D.N.Y. June 20, 1996); *see generally Schreiber v. Camm*, 848 F. Supp. 1170, 1177–78 (D.N.J. 1994) (discussing the issue under Florida, New York, and New Jersey case law).

"[W]hether a particular duty is properly categorized as 'nondelegable' necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations." *Kleeman*, 81 N.Y.2d at 275. "The most often cited formulation is that a duty will be deemed nondelegable when "'the responsibility is so important to the community that the employer should not be permitted to transfer it to another.'" *Id.*, quoting *Feliberty v. Damon*, 72 N.Y.2d 112, 119 (1988) (additional internal quotations omitted). The Court does not find that the task of discharging an employee falls into this exception, and plaintiff fails to cite any cases to support that contention. Though the exception is often invoked where the duty is imposed by regulation or statute (*see Kleeman*, 81 N.Y.2d at 274–75), it is possible that a duty arises out of a contract. *See, e.g., Brothers v. New York State Elec. & Gas Corp.*, 11 N.Y.3d 251, 259 (2008). To the extent that plaintiff argues as such (e.g., a contract between AUSA and plaintiff), no such contract is provided, and would, in any event, be unlikely to change the Court's determination.

Because plaintiff fails to establish any issue of fact as to whether the exceptions apply, the claims against AUSA are dismissed. *See, e.g., Hesch v. Seavey*, 188 A.D.2d 808, 810 (3d Dep't 1992). Additionally, plaintiff's claim for punitive damages against AUSA is also dismissed as unopposed.

Cross-Claims By and Against W&C

Antiquorum also seeks summary judgment on its cross claims against W&C for contractual and

common-law indemnity and defense costs. W&C cross moves for summary judgment on its cross claim for contractual indemnification from AUSA. Initially, the Court notes that the motions are denied as moot to the extent that they seek indemnification on liability, based under both the common law and pursuant to the contract, as the Court finds both movants to be free of negligence and the complaint will be dismissed against them.

With respect to that part of Antiquorum's motion seeking defense costs, the Court denies that branch as Antiquorum failed to cite any language in the contract between AUSA and AI requiring AI, or its employees (W&C), to reimburse AUSA's defense costs. Rather, the contract language quoted in W&C's cross-moving papers demonstrates that the relevant provisions of the contract states the opposite — i.e., that AUSA would "indemnify, defend and hold AI harmless against any claims by third parties." Jacobs Cross-Motion Aff., ¶ 4. Thus, that part of Antiquorum's summary judgment motion is denied.

Though not specifically identified in the notice of cross-motion, W&C appears to be seeking defense costs as well. See Jacobs Cross-Motion Aff., ¶ 8. Antiquorum's argument in opposition that the contract provision is unenforceable is unpersuasive, and the Court does not find General Obligations Law § 5-322.1 applicable. However, Antiquorum correctly points out that the contract, which is between AUSA and AI, only requires AUSA to defend third-party claims against AI — not AI's employees. The relevant provisions of the contract states as follows:

> AI Services shall not give rise to or confer any rights on any third party and CLIENT agrees to indemnify, defend and hold AI harmless against any claims by third parties. CLIENT therefore agrees that AI shall be liable only for such loss, damage, or injury arising out of the sole negligence of AI, or its employees, while acting within the scope of its, or their employ, and in furtherance of the duties specifically stated as per Authorization. Jacobs Cross-Motion Aff., ¶ 4; *id.*, Ex. B.

In the first sentence, AUSA only agrees to indemnify and defend AI, and notably omits any reference

to AI's employees — which is starkly different from the following sentence. Thus, under a strict construction of the contract, AUSA is not required to provide defense costs to W&C, as employees of AI. *See Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 211 (1971). In light of the foregoing, as well as W&C's failure to address the above argument, and upon the Court's own observation that the cross-claim W&C rely upon (Jacobs Cross-Motion Aff., ¶ 3) does not mention that it is based upon any contract or agreement (see *id.*, Ex. A at ¶¶ 50–51), that part of W&C's cross-motion is also denied.

DEFENDANT CITY OF NEW YORK

As and for his ninth and tenth causes of action, plaintiff's complaint asserts two claims against the City: false arrest/imprisonment and intentional infliction of emotional distress. Initially, the Court dismisses the intentional infliction of emotional distress claim as unopposed, and because such cause of action "against government bodies [is] barred as a matter of public policy." *Dillon v. City of New York*, 261 A.D.2d 34, 41 (1st Dep't 1999).

As to the false arrest/imprisonment claim, the essential inquiry is whether there was probable cause to arrest plaintiff. *Drayton v. City of New York*, 292 A.D.2d 182, 183 (1st Dep't 2002); *Medina v. City of New York*, 102 A.D.3d 101, 103 (1st Dep't 2012), quoting *Williams v. Moore*, 197 A.D.2d 511, 513 (2d Dep't 1993) ("Where, as at bar, an arrest is made without a warrant, a presumption arises that it was unlawful, and the burden of proving that the arrest was otherwise privileged is case upon the defendant."); *Kramer v. City of New York*, 173 A.D.2d 155, 156 (1st Dep't 1991) ("It is well-established that a warrantless arrest is presumptively unlawful and that defendant has the burden of proving legal justification as an affirmative defense by showing that probable cause existed at the time of the arrest."), citing *Broughton v. State*, 37 N.Y.2d 451, 458 (1975).

"Probable cause exists if the facts and circumstances known to the arresting officer warrant a prudent person in believing that the offense has been committed." *People v. Baker*, 20 N.Y.3d 354, 359

(2013); *see also* N.Y. C.P.L. § 140.10(1).[4] Additionally, probable cause "does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed." *People v. Bigelow,* 66 N.Y.2d 417, 423 (1985). "[W]here the facts giving rise to the arrest are undisputed, whether or not the arrest was based on probable cause is for the court to decide as a matter of law." *Kramer*, 173 A.D.2d at 156. Here, the ample amount of evidence submitted by the City in support of its motion, including the video, as well as deposition testimony from the parties and many police officers, demonstrates its entitlement to summary judgment. The evidence shows that the officers responded to an assault in progress; upon arriving off the elevators in front of the Office doors, either Ware or Clifford showed them a document indicating that plaintiff was not allowed to enter the premises, and they were informed that Clifford was assaulted and could observe Clifford in pain. Thus, even at this juncture, probable cause existed to arrest plaintiff for trespassing and assault. The subsequent sequence of events provided further cause to arrest and were based upon the officers' own first-hand observations — i.e., that plaintiff failed to comply with the officers' requests, assaulted a police officer, and resisted arrest.

In opposition, plaintiff fails to raise an issue of fact. First, although plaintiff primarily relies on the video, the Court notes that the attorney's affirmation in opposition is not competent evidence based on first-hand knowledge. *See Zuckerman, supra*, 49 N.Y.2d at 562. Second, the argument that Clifford may not have been assaulted because he was swinging around his arm without injury is pure conjecture and unsupported by any evidence to the contrary, and/or absent any evidence that the NYPD should have doubted the eyewitnesses' (W&C's) credibility. *See Medina*, 102 A.D.3d at 103–04; *see also*

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[4] New York Criminal Procedure Law § 140.10 (1) provides that "a police officer may arrest a person for: (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence; and (b) A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise."

Kramer, 173 A.D.2d at 156. The argument that plaintiff was not trespassing because he had a power of attorney, and the officers failed to consider that, is also insufficient to raise an issue of fact as to probable cause. *Cheeks v. City of New York*, 123 A.D.3d 532, 545–46 (1st Dep't 2014) ("conflicting evidence as to guilt or innocence, and discrepancies in the case being built against the arrested person, while relevant to the prosecution's ability to prove guilt beyond a reasonable doubt at trial, are not relevant to the determination of whether there was probable cause for an arrest"). Finally, the fact that the criminal charges against plaintiff were ultimately dismissed do not serve to negate the validity of the officers' probable cause to arrest. *See Mendez v. City of New York*, — A.D.3d —, 2016 NY Slip Op 870115, *5 (1st Dep't Mar. 8, 2016) (Andrias, J., dissenting); *Jenkins v. City of New York*, 2 A.D.3d 291, 292 (1st Dep't 2003). Accordingly, the City's motion is granted.

CONCLUSION

For the foregoing reasons, the motions by defendants W&C and the City are granted in their entirety (motion seq. nos. 3 and 5). Antiquorum's motion for summary judgment (motion seq. no. 4) is granted in part, and plaintiff's complaint is dismissed against AUSA and Zimmerman; that part of the motion seeking summary judgment on cross claims against W&C is denied, as is W&C's cross-motion for summary judgment on its cross claim against Antiquorum.

This constitutes the decision and order of the Court.

ENTER,

HON. JAMES E. D'AUGUSTE
A.J.S.C.