

<b>Phin v City of New York</b>
2016 NY Slip Op 30929(U)
April 7, 2016
Supreme Court, Bronx County
Docket Number: 301299-13E
Judge: Fernando Tapia
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**SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY: Part 13**

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**OLYN PHIN**

**Plaintiff,**

v.

**Index No. 301299-13E**

**THE CITY OF NEW YORK, COMMISSIONER RAYMOND  
KELLY IN HIS OFFICIAL CAPACITY, DEPUTY  
INSPECTOR STEVEN ORTIZ AS THE COMMANDING  
OFFICER OF THE 42ND PCT, P.O. ROBERT COLLAZO  
OF THE 42ND PCT, TAX #915469 and P.O. ADRIAN  
URUCI OF THE 42ND PCT, TAX #921827,**

**Defendants.**

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**DECISION**

On May 17, 2012, approximately 2 p.m., Plaintiff, Ms. Olyn Phin, sustained personal injuries and seeks redress from civil rights violations from Defendants [collectively "CONY"], when she was allegedly arrested without cause in Apartment 6B of 1020 Trinity Avenue, Bronx, NY.

After careful review of the motion papers, this Court hereby **DENIES** Defendants' motion, as genuine issues of fact exist.

The purpose of the motion court is issue-finding, and not issue-determination. *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996). In addition, a party can prove prima facie entitlement to summary judgment through an attorney affirmation based upon documentary evidence. *Prudential Securities Inc. v. Rovello*, 262 AD2d 172 (App Div, 1st Dept 1999). In turn, the opposing motion must lay bare proof to show that genuine issues of fact exist and that the issue must be shown to be real, because a frivolous issue will preclude summary relief. *Kornfeld v. NRX Technologies, Inc.*, 93 AD2d 772, 773 (App Div, 1st Dept 1983).

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>1</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 her attestations during her 50-h hearing.<sup>2</sup> Such occurrences show that material issues of fact exist and as such, Defendants' motion must be denied in its entirety.

This Court agrees with Plaintiff that the factual circumstances that gave way to reasonable cause are in dispute. Plaintiff attested that P.O. Uruci and P.O. Collazo were in plainclothes and that P.O. Uruci kept telling her, "I'm tired of your mouth." See Phin Tr. at p. 22, lines 2-3; p. 25, lines 3-8. Furthermore, Plaintiff claims that she did not know that there were guns in a shoebox found on the subject premises. Id. at p. 48, lines 13-15; see also Braverman Opp. at ¶¶ 29 & 31.

Although Defendants argued that there was reasonable basis and probable cause for the arrest, at P.O. Uruci attested that no one told him about observing Ms. Phin possessing a firearm. See Uruci Tr. at p. 27, lines 24-25 & p. 28, line 1. A logical conclusion could therefore be reached that probable cause was ill-gotten. See Braverman Opp. at ¶¶ 16 & 32. Defendants' claim that the police had probable cause to arrest Plaintiff as a matter of law is therefore meritless, based on conflicting attestations. A fact-finder must decide as to which party prevails.

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<sup>1</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).

<sup>2</sup> Ms. Phin was charged with the following: § 220.03 [Criminal possession of a controlled substance in the seventh degree]; § 220.50(3) [Criminally using drug paraphernalia second degree]; §265.01(1) [Criminal possession of a weapon fourth degree]; and § 221.05 [Criminal possession of marihuana].

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).

Regarding search warrants, officers executing a search warrant for contraband have the authority to detain the occupants of the premises while a proper search is conducted. *Muehler v. Mena*, 544 U.S. 93, 98 (2005); *Agostinelli v. CONY*, 49 Misc3d 1214(A) at \*3. Moreover, where a search warrant has been issued after the court had a chance to review the basis for the issuance [i.e. personal exam of the informant], such warrant is presumed valid. *People v. Castillo*, 80 NY2d 578, 585 (1992); *Agostinelli*, 49 Misc3d at \*4.

Here, issues exist regarding the extent of malicious prosecution that Plaintiff suffered. Plaintiff attested at her EBT that the plainclothes NYPD did not tell her why they were arresting Mr. Morris Barton.<sup>3</sup> See Phin Tr. at p. 52, lines 11-16. This behavior amounts to a fact-finder determining the degree of reckless disregard for Plaintiff's rights.

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

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<sup>3</sup> Mr. Barton is the father of Ms. Phin's three minor children.

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

The issue of Defendants' immunity is a triable fact. 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).

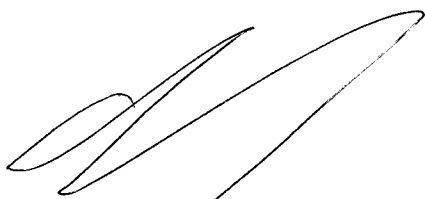
Here, Plaintiff has a viable § 1983 claim, as a question of fact exists as to whether NYPD exceeded the scope of the search warrant.

In sum, Defendants failed to prove its prima facie case that it is entitled to summary judgment 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'.

In sum, Defendants' motion is **DENIED**. The parties are **ORDERED** to appear before the Hon. Mitchell Danziger in Bronx Supreme Court, Room 707, on **April 15, 2016, at 9:30 a.m.**

This constitutes the Decision and Order of this Court.

Dated: April 7, 2016  
Bronx, NY

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Hon. Fernando Tapia, J.S.C