

**Gerrald v City of New York**

2016 NY Slip Op 31359(U)

June 16, 2016

Supreme Court, Bronx County

Docket Number: 301608/2013

Judge: Julia I. Rodriguez

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

-----X **Index No. 301608/2013**

Jashmal Gerrald, Keith Gerrald and  
Kenny Guzman,  
Plaintiffs,

-against-

**DECISION and ORDER**

The City of New York and Police Officer  
John Doe,  
Defendant.

Present:  
  
Hon. Julia I. Rodriguez  
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant The City of New York's motion for summary judgment.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

The instant action arises from the May 16, 2009 arrest of plaintiffs on charges including Criminal Mischief in the Third Degree, Penal Law §145.05, a class E felony. The case was prosecuted by the office of the Bronx County District Attorney and was ultimately dismissed on January 25, 2012. By stipulation dated June 3, 2013, all claims against the defendants, with the exception of malicious prosecution, were discontinued with prejudice. Defendant The City of New York ("the City") now moves for summary judgment, dismissing plaintiff's cause of action for malicious prosecution and the complaint, on the grounds that: (1) there was probable cause to prosecute plaintiffs based on a complaining witness's identification of them as perpetrators of a crime, (2) probable cause did not dissipate and (3) plaintiff cannot demonstrate malice.

In support of summary judgment, the City submitted, *inter alia*, the deposition testimony of each plaintiff, the deposition testimony of Police Officers Hector Gallardo and Ely Gonzalez, a Sprint report, arrest reports, criminal court complaint with supporting depositions, orders of protection, certificates of disposition, police memobook entries and several photos. The Sprint report memorializes the content of a phone call made on May 16, 2009, at approximately 3:48

a.m., to a 911 operator by the complaining witness LJ. According to the report, LJ told a 911 operator the following: She was viewing an ongoing incident from her fifth floor apartment window. Four individuals, on the street in the vicinity of Jesup Avenue, Macombs Road and Featherbed Lane, were throwing rocks at, kicking and breaking the windows of a parked vehicle. The individuals were screaming "Fuck the cops" as they continued to damage the vehicle. She described the four individuals as follows: one male black with a white and black hoodie with a do-rag and jeans, a second male black with a ponytail wearing black, a third male heavysset with a black hoodie and black jeans, and a fourth male black wearing a baseball hat and all black. This information was transmitted to Police Officers Gallardo and Gonzalez while LJ remained on the phone with the 911 operator.

At his deposition, Officer Gallardo testified that at approximately 3:54 a.m., he and Officer Gonzalez arrived on the scene. Upon their arrival, Officer Gallardo observed a group of three to four males at the corner of Jesup Avenue and Featherbed Lane and one individual standing up the block, on the opposite side of the street in front of a supermarket. The individuals on Jesup and Featherbed were standing in front of a vehicle with broken windows. The officers stopped two of the plaintiffs at the corner of Jesup and Featherbed. At that time, LJ informed the 911 operator that the police had apprehended two of the perpetrators. LJ also told the 911 operator that one of the perpetrators had walked away from the scene and was in front of a supermarket. At his deposition, Officer Gonzalez testified that the individuals on Jesup and Featherbed were standing in front of a vehicle with broken windows. Both officers Gallardo and Gonzalez testified that when they approached plaintiffs, the radio dispatcher was on the phone with LJ who confirmed that the plaintiffs were the same individuals that damaged the vehicle. Officer Gonzalez testified that, at some point, he and Officer Gallardo brought the individual who had walked across the street by the supermarket to the location where the other plaintiffs were being held at the corner of Jesup and Featherbed. At their respective depositions, plaintiffs Keith Gerrald ("Keith") and Kenny Guzman ("Kenny") each testified that they first encountered police in the vicinity of Jesup Avenue and Featherbed Lane near a Rite Aid. At his deposition, plaintiff Jashmal Gerrald ("Jashmal") testified that when he first encountered the police he was

in the vicinity of Featherbed Lane and Macombs Road, and that the officers had to cross the street to get to him. Jashmal also testified that the officers brought him to Jesup Avenue and Featherbed Lane where he was told to stand against the wall of a Rite Aid with Kenny and Keith. Officers Gallardo and Guzman testified that, at approximately 4:20 a.m., the officers placed four individuals, including plaintiffs,<sup>1</sup> under arrest and transported them to the precinct. Officer Gallardo testified that, at approximately 5:18 a.m., the officers went back to the location of the arrest to speak with the eyewitness and they were let into LJ's fifth floor apartment where they were able to look out the window that overlooks Jesup Avenue. Officer Gallardo testified that, from the window, he had a clear and unobstructed view of Jesup Avenue and Featherbed Lane where LJ had observed the plaintiffs with the police officers, and of the damaged vehicle.

On May 17, 2009, plaintiffs were arraigned and the judge set bail and issued orders of protection with respect to each plaintiff on behalf of LJ and the owner of the damaged vehicle.

In opposition to summary judgment, plaintiffs contend that issues of fact exist as to whether probable cause existed to arrest plaintiffs for criminal mischief. Through counsel, plaintiffs "adopt the facts" put forth by the City and also reference the following "additional facts:" At his deposition, Officer Gonzalez testified that, when he arrived on the scene, he observed plaintiffs "just standing on the corner" and could not recall seeing anything in their hands. At his deposition, Jashmal testified that he had been "hanging out talking" with his girlfriend outside her building on Macombs Road for three or four hours prior to being arrested and that she was with him at the time of his arrest. The Sprint report makes no mention of a female being present at the scene of the alleged activity. Jashmal's arrest report indicates that he is a black male weighing 250 pounds and was wearing blue jeans, a blue sweater or vest and blue sneakers at the time of his arrest. The Sprint report describes a "heavyset male" with a black hoodie, black jeans and with no race specified. Keith's arrest report indicates that he is a black male with braided hair who was wearing a black baseball hat, black sandals, a black t-shirt and

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<sup>1</sup>On November 2, 2009, the fourth individual, Juan Hernandez, pled guilty to Criminal Mischief in the Fourth Degree under Penal Law §145.00 (01) and was sentenced to 60 days imprisonment and 3 years' probation.

black jeans at the time of his arrest. The Sprint report describes a black male “WRNG BLK BB AND ALL BLK.” Kenny’s arrest report indicates that he is a white Hispanic male of average weight who was wearing brown boots, brown jeans, a white shirt and white “headgear” at the time of his arrest. The Sprint report describes a black male with a white and black hoodie and white do-rag and jeans. At his deposition, Officer Gonzalez testified that, at the time of Kenny Guzman’s arrest, his white “headgear” consisted of a baseball cap. At his deposition, Kenny testified that, at the time of plaintiffs’ arrest, there was a large party going on nearby where a “big fight” broke out with over 200 people in the streets. According to Kenny, police were “all over the street” and plaintiffs “just ended up getting grabbed up.” At his deposition, Keith testified that “like about eight” people were up against the Rite Aid wall, including himself, Kenny and Jashmal.

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As an initial matter, plaintiffs contend that the City’s summary judgment motion is untimely because it was filed without leave of the Court after the expiration of the 120-day period set forth in the CPLR. However, the Court notes that the City initially served its notice of motion and motion on April 14, 2015, the day before the expiration of the 120-day period but the notice of motion was rejected by the clerk’s office for an incorrect return date. The amended notice of motion and motion were served on April 16, 2015, just one day late. Given the brief delay in re-noticing the motion and the fact that the original notice of motion and motion were timely filed but rejected by the clerk’s office due to a ministerial error, the Court finds that the motion is timely. *See Esdaille v. Whitehall Realty Co.*, 61 A.D.3d 435, 878 N.Y.S.2d 3 (1<sup>st</sup> Dept. 2009).

The elements of 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 plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice. *See Broughton v. State of New York*, 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87 (1975). Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty. *See Colon v. City of*

*New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453 (1983). Arraignment or indictment generates a presumption of probable cause, rebuttable only by proof of fraud, perjury or misrepresentation or falsification of evidence. See *Broughton, supra*, at 455-456; *Mendez v. City of New York*, 137 A.D.3d 468, 471, 27 N.Y.S.3d 8 (1<sup>st</sup> Dept. 2016). A jury may infer that a defendant acted with actual malice from the fact that there was no probable cause to arrest the plaintiff. See *Martin v. City of Albany*, 42 N.Y.2d 13, 17, 396 N.Y.S.2d 612 (1977).

Here, notwithstanding plaintiffs' contentions, the minor discrepancies between the description of the plaintiffs in the Sprint report vis-a-vis the arrest reports and plaintiffs' self-serving deposition testimony as to the circumstances surrounding the arrest are insufficient to overcome the presumption of probable cause. Plaintiffs do not dispute that when the police officers arrived at the scene, Keith and Kenny were standing in front of the damaged vehicle, and Jashmal was across the street in front of a supermarket as reported by the eyewitness. After the police officers arrived, the eyewitness identified plaintiffs to the 911 operator from her window as the perpetrators, which information was conveyed to the officers by the 911 operator. The officers questioned the eyewitness at her apartment after the arrest and confirmed that the eyewitness had a clear view of the perpetrators from her window. And, the description of the plaintiffs given to the 911 operator by the eyewitness is consistent in all material respects with the information contained in their arrest reports. Nor is there any evidence or claim that any information/evidence was obtained after the arrests and/or during the prosecution of the case which would vitiate probable cause. Nor do plaintiffs contend that either the police officers or the prosecutor(s) acted with actual malice.

Given the Court's finding that probable cause existed for the arrest and prosecution of plaintiffs and the absence of actual malice, plaintiffs cannot maintain a cause of action for malicious prosecution against the City. Accordingly, the City's motion for summary judgment, dismissing the complaint, is **granted**, and the complaint is hereby dismissed as against the City.

Dated: Bronx, New York  
June 16, 2016

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Hon. Julia I. Rodriguez, J.S.C.