

<b>Onilude v City of New York</b>
2016 NY Slip Op 31374(U)
June 6, 2016
Supreme Court, Bronx County
Docket Number: 309622/09
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
IAS PART 7**

Index No. 309622/09  
Motion Calendar No.12  
Motion Date: 4/18/16

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TOKUNBO ONILUDE,

Plaintiff,

-against-

THE CITY OF NEW YORK, GEORGE CHICO,  
KEITH KUCERAK and GREGORY HERNANDEZ

Defendant,

**DECISION/ ORDER**

**Present:**

**Hon. Wilma Guzman**

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion, Affirmation in Support, and Exhibits thereto.....</b>	<b>1</b>
<b>Affirmation in Opposition of Motion and Exhibits thereto.....</b>	<b>2</b>
<b>Reply Affirmation .....</b>	<b>3</b>

*Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion and cross motion is as follows:*

Defendants move this Court for an Order seeking reargument this Court's October 8, 2015 Decision and Order which decided defendants underlying motion for summary judgment seeking (1) dismissing all state claims against Det. Chico, P.O. Keith Kucerak and P.O. Gregory Hernandez for the failure to comply with General Municipal Law 50-e; For an Order (2) dismissing all state claims against defendants P.O. Keith Kucerak and P.O. Gregory Hernandez under Index No. 308177/2011; (3) granting summary judgment pursuant to C.P.L.R. 3212 on the basis that there was probable cause to arrest the plaintiff; (4) dismissing the malicious prosecution claim for failure to file a timely Notice of Claim; (5) dismissing pursuant to C.P.L.R. 3211(a)(7) and/or C.P.L.R. 3212 all of the plaintiff's civil rights claims for the failure to plead the federal claim with factual specificity and/or allege a municipal pattern and practice pursuant to which plaintiff's alleged constitutional rights were allegedly violated; and (6) pursuant to C.P.L.R. 3211(a)(7) and/or C.P.L.R. 3212 dismissing the plaintiff's negligent hiring, training and retention claims with prejudice

based upon the doctrine of *Respondeat Superior*. The Court's October 8, 2015 Decision and Order also denied the plaintiff's cross-motion for summary judgment.

A combined motion for leave to reargue shall identify separately and support each item of relief sought. C.P.L.R. § 2221. A motion for leave to reargue under C.P.L.R. § 2221(d) shall be identified specifically as such and shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. A motion for leave to renew under C.P.L.R. § 2221 shall be identified specifically as such and shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion.

A motion seeking leave to reargue is addressed to the court's sound discretion and can be granted only if it is shown that the court overlooked or misapprehended the facts or the law or was otherwise mistaken in its earlier decision; the motion does not allow reargument of issues previously decided or consideration of arguments different from those originally entertained. *See*, Rule 2221 of the C.P.L.R. and William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 588 N.Y.S.2d 8, (1<sup>st</sup> Dept. 1992), leave to appeal dismissed in part and denied in part, 80 N.Y.2d 1005, 592 N.Y.S.2d 665, 607 N.E.2d 812, reargument denied, 81 N.Y.2d 782, 594 N.Y.S.2d 714, 610 N.E.2d 387. It is also clear that re-argument is not permitted simply to afford the unsuccessful party a second opportunity to restate the issues previously decided or to present different arguments from those originally asserted. Foley v. Roach, 68 A.D.2d 558(1st Dept. 1979).

Based upon further review and in light of the Court of Appeals decision in *Torres v. Jones*, 26 N.Y.3d 742 (2016). This Court grants plaintiff's motion to reargue and decides the defendant's motion for summary judgment and the plaintiff's cross motion for summary judgment on the issues of false arrest and false imprisonment, whether there was probable cause to arrest the plaintiff and any claim of malicious prosecution as follow:

A claim of false arrest and false imprisonment will not stand where it is shown that the police department and the arresting officer had probable cause to arrest. Kramer v. City of New York, 173 A.D.2d 155 (1<sup>st</sup> Dept. 1991). Generally, probable cause will exist where there is information from an identified citizen, who is presumed reliable. However, this reliability is rebuttable and will only

support the probable cause to arrest absent any “materially impeaching circumstances or grounds for questioning the complainants credibility.” Medina v City of New York, 102 A.d3d 1010 (1<sup>st</sup> Dept. 2012) (internal quotations omitted). See also, Grimes v. City of New York, 106 A.D3d 441 (1<sup>st</sup> Dept. 2013). The existence of probable cause is a complete defense to the claims of false arrest and false imprisonment. Marrero v. City of New York, 33 A.D.3d 556 (1<sup>st</sup> Dept. 2006); and malicious prosecution. Garcia v. City of New York, 115 A.D3d 447 (1<sup>st</sup> Dept. 2014); *citing* Lawson v. City of New York, 83 A.D3d 609 (1<sup>st</sup> Dept. 2011). While the cause of action of malicious prosecution cannot stand against a police officer if the decision to initiate prosecution was made by a prosecutor independent of the police officer, where questions of fact surround the actions a police officer is of such a nature that through his actions he encouraged or importuned the prosecutor to act, or where it is shown that the failure to disclose or the misrepresentation of information leads to a prosecution, denial of summary judgement is warranted. Ragland v. City of New York, 45 Misc. 3d 1218(A).

A review of the record herein, including the memo book of Det. Chico<sup>1</sup> and the testimony as provided. Detective Chico testified in sum and substance and as reflected in a DD5 that an eyewitnesses stated that two male blacks were seen exiting the victim’s vehicle but he was unaware of the source of this information. Detective Chico further testified that September 16, 2008, after plaintiff was arrested and questioned at the precinct, he prepared a photo array and went to Jacobi Hospital to show the photo array to the plaintiff. Detective Chico testified that the plaintiff was in the Intensive Care Unit). (Chico EBT. pg 32, ln 16- pg 33, ln 4). Upon showing him the photo array, Detective Chico testified that the victim identified the individual in photo #2 [plaintiff] however he was unable to sign the back of the photo because his hands were bandaged. (Chico EBT pg. 46, ln. 16-20). Detective Chico testified that when he first encountered plaintiff at the precinct, he got his pedigree information and then read him his Miranda rights to which the plaintiff refused to talk and requested an attorney. Detective Chico then went and ran a background check on plaintiff and returned with the purpose of interrogating him and obtaining a confession. (Chico EBT pg 23,

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<sup>1</sup> Both plaintiff and defendants having a full opportunity to be heard and submit papers on this issue, this Court finds no wilful or contumacious conduct so as to warrant preclusion of the memobook of Det. Chico or the striking of the defendants Answer for disclosure violations. See generally, Hernandez v. City of New York, 100 A.D.3d 433 (1<sup>st</sup> Dept. 20102).

In. 6-10). Detective Chicio testified that he did not know where the information contained in the DD5 that an eyewitness saw two male blacks running from the car came from. He was with the victim for approximately 45 minutes. Detective Chico further testified that he did not follow-up on the elimination prints comparison.

Detective Hernandez testified in sum and substance, that On September 16, 2008, Detective Hernandez was on the corner of Yates and Burke when he and Detective Kucerek's vehicle was approached by a female who indicated she was an eyewitness to a previous crime and that she observed one of the persons that was involved. She gave a brief description and pointed out an individual that was walking down Burke Avenue that just turned into Hering (Hernandez EBT pg. 18, In. 20- 25). He testified that he relayed this information to who believed to be Detective William Fisher at the precinct and was instructed to bring the person in. Detective Hernandez testified that he wrote down the description of an article clothing as a grey hoodie or a dark blue hoodie. When he looked in the direction in which the witness pointed, he observed a male black wearing a dark hoodie. He then proceeded in that direction around the corner and encountered plaintiff who was then arrested.

Plaintiff testified that on September 16, 2008 he was walking to his apartment located at 1160 Burke Avenue. He had just gotten out of his vehicle and was walking to his home when he was stopped by two police officers. These officers asked a few questions about a stabbing and then got out of their vehicle and grabbed him. The officers told him they needed him for two hours and then would let him go. (Onilude EBT pg 15, In. 11-18). As they grabbed him, he was thrown to the ground. The officers kept yelling that he wasn't under arrest. He was handcuffed and placed in a police vehicle and taken to the police precinct. Plaintiff was then placed in a room until Detective Chico turned up. Plaintiff testified that Detective Chico questioned the plaintiff as to his whereabouts on September 7, 2008 and plaintiff informed him that he was with his girlfriend. He was not read his Miranda rights. Plaintiff testified that Detective Chico then informed him that he was going to take plaintiff to the hospital and if he was ID'd by the victim in a picture line-up, he would go to jail. (Onilude EBT pg 34-35). Plaintiff testified that Detective Chico told him to tell him who did it or give him somebody or he'll pin it on the case on [him]. (Onilude EBT pg. 62, In. 1-5). When Detective Chico returned from hospital, he informed plaintiff that he had been identified

and showed him a six photo array, with the second photo, which was plaintiff, circled. (Olunde EBT pg. 37, ln. 2-22). Plaintiff was brought to central booking and then to an arraignment. This took approximately two days. Plaintiff was placed on \$250,000 bail which he was unable to make and spend 10 to 12 days at the "boat" in Hunts Point. The last time he went to court, he was released and the case dismissed.

The April 20, 2009 Grand Jury Disposition Sheet indicates in sum and substance that the plaintiff's criminal case was dismissed [C.P.L.]30.30. Also indicated therein that the complainant stated that he was under sedation when he identified the defendant as his assailant and would need to see the defendant again to be sure he was the correct individual. After a line-up was arranged, the complainant failed to appear and then later indicated he would not appear because he did not observe his assailants face. No further contact was made with the complainant and dismissal was recommended.

Other documents submitted in support of the underlying motion, included the photo array which indicates that on September 16, 2008, the victim made an identification but was unable to sign due to hand injuries; the criminal court complaint; the DD's which indicate that the detectives were unable to interview the plaintiff from the date of incident through September 8, 2008 due to his condition. A September 8, 2008 DD-5 as reported by Detective Chico indicates in sum and substance, that Andrea Lounds was interviewed as a witness who informed that she observed two black males that she recognized from the neighborhood. running from the direction of the crashed vehicle. A September 9, 2008 criminal complaint follow-up as reported by Detective Chico indicates in sum and substance that Andrea Lounds was unable to identify any individual after viewing approximately 1000 photos. A February 7, 2010 complaint follow-up indicates in sum and substance that Detective Chico was unable to meet with the complainant on September 13, 2008 as the victim was not allowed any visitors. A February 5, 2010 complaint follow up as reported by Detective Chico indicates in sum and substance that on September 16, 2008, he was informed that one of the perpetrators wanted in his investigation was apprehended. He proceeded to the area and encountered Officers Kucerak and Hernandez who informed him that a female who identified herself as Andrea Lounds informed them that the two men wanted for the cabbie stabbing were around the corner on Hering Avenue and provided them with the description of black male, with grey hooded sweatshirts.

The two officers then drove around the corner and stopped a black male [plaintiff] in front of 3420 Hering Avenue who was wearing a grey hooded sweatshirt, walking alone. The officers attempted to find Andrea Lounds but she was no longer in the area. The officers then took plaintiff to the precinct. The February 7, 2010 complaint follow-up as reported by Detective Chico, he went to Jacobi Hospital on September 16, 2008 at approximately 1745 hours and was able to interview the complainant who verbally positively identified the plaintiff stating "he's the one that stabbed me." Complainant was unable to sign the photo array due to his bandaged hands. A February 7, 2010 complaint follow up as reported by Detective Chico indicates that at approximately, 2115 hours he met with Andrea Lounds and showed her a single photo of plaintiff to which Mrs. Lounds confirmed that he was the individual she observed walking down the street when she flagged down the officers and who she also observed running from the scene with another black male on the date of the incident.

In Torres v. Jones, 47 N.E.3d 747 (2016), the Court of Appeals found that questions of fact existed as to whether detectives unlawfully arrested the plaintiff therein without probable cause and falsified a confession which was then provided to the District Attorney's Office for use in prosecution. The Court reasoned that the presumption of probable cause may be overcome by a showing of malice or bad faith. Therein, the lack of evidence known to the detectives prior to the arrest of plaintiff Torres which did not conclusively demonstrate probable cause, coupled to the questionable tactics in obtaining a "sham confession" raised issues of fact precluding summary judgment on issues of fact best left for the jury. It is well settled that on a motion for summary judgment the court may not weigh the credibility of witnesses. Mendoza v. Fordham-Bedford Housing Corp., et al., 2016 WL 2976621 (1<sup>st</sup> Dept.); See also, Glick v. Dolleck v. Tri-Pack Export Corp., 22 N.Y.2d 439 (1968); Perez v. Bronx Park South Associates, 285 A.D.2d 402 (1<sup>st</sup> Dept. 2001). The court in the case of Quinn v. Krumland, 179 A.D.2d 448 (1<sup>st</sup> Dept. 1992) stated: "The function of a court on a motion for summary judgment is not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of a material issue of fact."

Viewing the evidence presented herein, in light of Torres v. Jones, *supra*, Plaintiff has submitted sufficient proof to raise a triable issue of fact. As such the motion for summary judgment

and the plaintiff's cross-motion for summary judgment are both denied. In the underlying motion the plaintiff submitted a transcript of a September 26, 2008 Court appearance in front of the Honorable John Byrne wherein the Assistant District Attorney requested a good cause adjournment for grand jury presentation, as September 26, 2008 it would be the first day the complainant would receive visitors. This raises issues of fact as to Detective Chico's testimony and the identification of the plaintiff by the complainant on September 16, 2008. Contra, People v. Radcliffe, 28 A.D3d 301 (1<sup>st</sup> Dept. 2005). This Court notes that the photo array in which Detective Chico testified that the complainant identified plaintiff Onilude was not circled or signed by the complainant.

Furthermore, the September 16, 2008 memobook entry of Detective Hernandez, raises issues of fact as to his testimony that upon his encounter with the witness, that she pointed out the individual who was a suspect in the underlying crime, at which time he was able to observe said individual. The memobook entry indicates that the witness informed him that said person was around the corner and that he then drove around the corner encountering the plaintiff. Also of note, is the fact that the plaintiff, upon being apprehended by Officers Hernandez and Kucerak, the plaintiff was not confirmed by the eyewitness, Mrs. Lounds prior to being brought to the precinct. Contra, People v. Marsh, 157 A.D2d 536 (1<sup>st</sup> Dept. 1990) DC ex rel Coxum v. City of New York, 46 Misc. 3d 1227(A)(2015).

Accordingly, it is

ORDERED that plaintiffs motion to reargue this Court's Order dated October 8, 2015 is granted. It is further

ORDERED that defendants motion for summary judgment is hereby decided as follows:

ORDERED that defendants motion for summary judgment dismissing all state claims against Det. Chico, P.O. Keith Kucerak and P.O. Gregory Hernandez for the failure to comply with General Municipal Law 50-e is hereby denied. It is further

ORDERED that defendants motion for summary judgment dismissing all state claims against defendants P.O. Keith Kucerak and P.O. Gregory Hernandez under Index No. 308177/2011 is hereby granted as decided in this Court's October 8, 2015 Decision and Order. It is further

ORDERED that defendants motion for summary judgment pursuant to C.P.L.R. 3212 on the basis that there was probable cause to arrest the plaintiff is hereby denied. It is further

ORDERED that defendants motion dismissing the malicious prosecution claim for failure to file a timely Notice of Claim is hereby denied. It is further

ORDERED that defendants motion to dismiss pursuant to C.P.L.R. 3211(a)(7) and/or C.P.L.R. 3212 all of the plaintiff's civil rights claims for the failure to plead the federal claim with factual specificity and/or allege a municipal pattern and practice pursuant to which plaintiff's alleged constitutional rights were allegedly violated is hereby granted as decided in the this Court's October 8, 2015 Decision and Order. It is further

ORDERED that Defendants motion pursuant to C.P.L.R. 3211(a)(7) and/or C.P.L.R. 3212 dismissing the plaintiff's negligent hiring, training and retention claims with prejudice based upon the doctrine of *Respondeat Superior* is hereby granted as decided in the this Court's October 8, 2015 Decision and Order. It is further

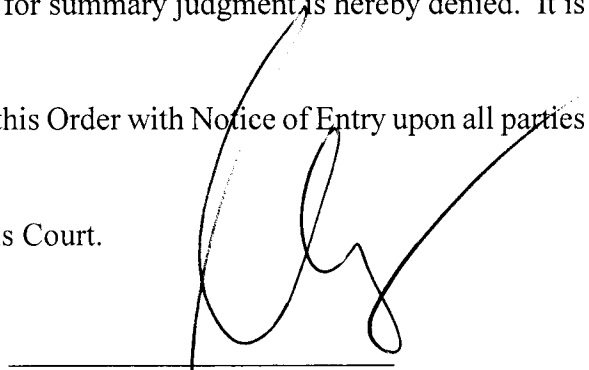
ORDERED that the plaintiff's cross-motion for summary judgment is hereby denied. It is further

ORDERED that the plaintiff serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of the Order.

This constitutes the decision and order of this Court.

DATE

6/6/16



HON. WILMA GUZMAN, JSC.