

Cooley v City of New York

2018 NY Slip Op 30328(U)

January 16, 2018

Supreme Court, Bronx County

Docket Number: 304486/13

Judge: Elizabeth A. Taylor

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
TAKWANA COOLEY and SHARIFF SANDERS,
Plaintiffs,

Index No. 304486/13

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

-against-

THE CITY OF NEW YORK, et al.,
Defendant(s).

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
	Answering Affidavit and Exhibits-----	3-4
	Replying Affidavit and Exhibits-----	5
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers, this motion has been referred to me for disposition by the Supreme Court Justice at I.A.S. Part 3, pursuant to the published rules of I.A.S. Part 3 and the Administrative Judge.

Motion pursuant to CPLR 3212 for an order dismissing the complaint, is granted.

Plaintiffs commenced this action on or about July 22, 2013, seeking damages for injuries allegedly sustained when they were arrested, criminally charged, and the charges were later dismissed.

On October 3, 2012, members of the New York Police Department ("NYPD") executed a search warrant, at plaintiff Shariff Sanders' apartment, for "cocaine, and evidence tending to demonstrate that the premises are utilized for the unlawful possession, packing, and sale of cocaine," as well as evidence establishing a connection between the apartment and the people found within it. The police officers seized, among other things, .25 grams of cocaine, 3.78 grams of oxycodone, two scales

with cocaine residue, five reptiles and two spiders. With the exception of at least one of toads found in the bedroom where the plaintiffs were sleeping, the seized items were recovered in Shariff Sanders' brother's bedroom and the third room. As a result, the three occupants of the apartment were handcuffed, brought to the police van, and transported to the 42nd Precinct. Plaintiffs were arrested and arraigned on charges of, among other things, criminal possession of a controlled substance in the seventh degree, criminal possession of a weapon in the fourth degree, and possession of ammunition. On January 7, 2013, the charges against plaintiffs were dismissed. It is noted that at the time of the arrests, there were two open warrants on plaintiff Shariff Sanders.

Defendants move to dismiss plaintiffs': 1) 42 U.S.C. § 1983 claims against defendants Commissioner Ray Kelly and Assistant Chief Anthony Izzo, as they were not personally involved in the transaction or occurrence; 2) 42 U.S.C. § 1983 claims of unlawful search and seizure, as the apartment was searched based upon a search warrant; 3) state and federal law claims of false arrest and false imprisonment, as there was probable cause to arrest and detain plaintiffs; 4) state and federal law claims of malicious prosecution, as there was probable cause to prosecute plaintiffs and as there is no evidence that their prosecution was conducted with actual malice; 5) state and federal law claims of excessive force and battery, as plaintiffs were merely handcuffed during the course of their lawful arrests; and 6) 42 U.S.C. § 1983 claims for municipal liability, as plaintiffs have failed to establish that they sustained any constitutional injury

and these claims are insufficiently pled.

Plaintiffs' 42 U.S.C. § 1983 claims against defendants Commissioner Ray Kelly and Assistant Chief Anthony Izzo are dismissed, without opposition and as plaintiffs have not established that either defendant was present or personally involved in the transaction or occurrence that gave rise to plaintiffs' claims (*see Farrell v Burke*, 449 F.3d 470, 484 [2d Cir. 2006]).

Here, the search warrant grew out of an investigation into suspected drug activity at plaintiff Sanders' apartment. At a minimum, there was probable cause to arrest plaintiffs for the toad found in the bedroom, pursuant to the New York City Health Code and New York Public Health Code. When there is an arrest, as a result of an executed search warrant, there is a presumption that the arrest is based upon probable cause. Plaintiffs do not argue that the evidence was unlawfully seized.

Probable cause does not require proof of guilt beyond a reasonable doubt, but merely that it was reasonable to believe that a crime had been committed (*Agront v City of New York*, 294 AD2d 189 [1st Dept 2002]). "When determining whether the police had probable cause to arrest, the 'inquiry is . . . to the sufficiency for arrest purposes of the grounds for the arresting officer's *belief* that [the defendant] was guilty'" (*People v Shulman*, 6 NY3d 1, 25-25 [2005], quoting *People v Coffey*, 12 NY2d 443, 452 [1963]).

The existence of probable cause does not bar a cause of action sounding in assault and battery based upon excessive force (*Bennett v New York City Housing*

Authority, 245 AD2d 254 [2d Dept 1997]). There is no evidence demonstrating that the force used by the officers, based on a reasonable officer at the scene, was excessive. Accordingly, the branch of defendants' motion to dismiss plaintiffs' claims for excessive force and battery, is granted.

The claims asserted against The City under 42 USC § 1983 must be dismissed for failure to demonstrate and or allege that the actions taken by its police officers resulted from official municipal policy or custom (*Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011]; *Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010], citing *Monel v Dept. of Social Serv. of City of N.Y.*, 436 U.S. 658, 690-691 [1978]).

The Clerk is directed to dismiss the instant action, accordingly.

The foregoing shall constitute the decision and order of this court.

Dated: JAN 16 2018



A.J.S.C.
Elizabeth A. Taylor