

<b>Williams v County of Suffolk</b>
2019 NY Slip Op 32890(U)
October 1, 2019
Supreme Court, Suffolk County
Docket Number: 10-4173
Judge: David T. Reilly
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INDEX No. 10-4173  
CAL. No. 18-01379OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 30 - SUFFOLK COUNTY

**PRESENT:**

Hon. DAVID T. REILLY  
Justice of the Supreme Court

MOTION DATE 12-24-18 (002)  
MOTION DATE 04-17-19 (003)  
ADJ. DATE 05-29-19  
Mot. Seq. # 002 - MD  
# 003 - MD

-----X  
JAMES WILLIAMS,  
  
Plaintiff,  
  
- against -  
  
THE COUNTY OF SUFFOLK, THE  
SUFFOLK COUNTY POLICE  
DEPARTMENT, EVERETT P. WEHR, JR., in  
his representative capacity as a Police Officer in  
the Suffolk County Police Department, "JOHN  
DOE", a Person or Firm whose name is  
currently unknown and LISA MOLINELLI,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 83 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers 25 - 44; Answering Affidavits and supporting papers 45 - 60; 61 - 69; Replying Affidavits and supporting papers 70 - 74; 75 - 76; 77 - 81; Other memorandum of law, 82; 83; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendants County of Suffolk, the Suffolk County Police Department and Everett P. Wehr for summary judgment dismissing the complaint against them is denied; and it is further

**ORDERED** that the cross motion by Frank Molinelli and Lisa Molinelli is denied.

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On December 15, 2008, plaintiff James Williams was arrested by defendant Everett Wehr, a police officer with the Suffolk County Police Department, and charged with assault in the second degree in violation of Penal Law § 120.05. The assault charge arises out of an incident that allegedly occurred outside of the home of defendant Lisa Molinelli and Frank Mollinelli in Port Jefferson Station, New York on October 31, 2008. The criminal charge was later dismissed on June 16, 2009. In February 2010, plaintiff commenced this action against defendants County of Suffolk, the Suffolk County Police Department, and Officer Wehr for false arrest, malicious prosecution and for civil rights violations pursuant to 42 USC § 1983. The complaint also asserts a claim for malicious prosecution against defendant Lisa Molinelli for falsely accusing plaintiff of assault and making false statements to the police.

Defendants County of Suffolk, the Suffolk County Police Department, and Everett Wehr (hereinafter referred to collectively as the Suffolk defendants) now move for summary judgment in their favor, arguing that probable cause existed for plaintiff's arrest, barring his claims for malicious prosecution and false arrest. In support of their motion, they submit, among other things, copies of the pleadings, the transcript of the testimony of plaintiff at a General Municipal Law § 50-h hearing, transcripts of the parties' deposition testimony, and an incident report. Plaintiff opposes the motion, arguing that a triable issue of fact exists as to whether there was probable cause to arrest him. In opposition, plaintiff submits, among other things, copies of the pleadings, transcripts of the deposition testimony of David Fruehauf, Officer Wehr, Plaintiff, Thomas Lamarco, Lisa Molinelli, an incident report dated November 2, 2008, affidavits of Ellen West and Nick Leo, a statement of Lisa Molinelli, and a copy of the Suffolk County Police Department Police Manual.

Frank Molinelli and Lisa Molinelli submit a cross motion for summary judgment in a related action with index number 20412/2010, entitled *Frank Molinelli and Lisa Molinelli, plaintiffs against James Williams, Thomas J. Lamarco and David Fruehauf, defendants*. These papers cannot be considered, as a request for relief must be made by motion in the appropriate action. This action and the related action were joined for trial, not consolidated. Whereas consolidation gives rise to a new action that displaces the actions affected thereby (*Pigott v Field*, 10 AD2d 99, 101, 197 AD2d 648 [1st Dept 1960]), a joint trial preserves that separate character of each action (*see Import Alley of Mid-Is. v Mid-Island Shopping Plaza*, 103 AD2d 797, 477 NYS2d 675 [2d Dept 1984]). Accordingly, this motion is denied, as improperly made in this action. In any event, the motion is untimely (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

At her examination before trial, defendant Lisa Molinelli testified that on the evening of Halloween in 2008 at about 10:00 p.m., she heard screaming outside her house. She testified that she went out onto her porch and, thinking that someone yelled something to her, said "What?" She testified that there were four or five people walking near her property and that from her peripheral vision, she saw someone walk towards her. She testified that he grabbed her collar, twisting it, and that she called for her husband. She testified that her husband grabbed the person and dragged him to the sidewalk, and that she observed a "mob of people" there. She testified that after her husband let go of the person and told him to "go home," that person punched him in the mouth. She further testified that when her husband punched him back in the face, he was "jumped" by a group of people and that one of them

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struck him in the head with a beer can. She testified during the incident, her daughter came outside and was punched, and that a neighbor also was attacked. She testified that when the police arrived, the mob of people dispersed. She testified that the police officer refused to allow her to press charges, but that a few days later, she contacted the precinct desk sergeant and insisted that she make a statement as her husband was hospitalized. She testified that her daughter was able to identify one of the attackers as she attends the same school and recognized some of the people involved in the incident. Molinelli further testified that she looked through a school year book and was able to identify other people involved in the attack. She specifically stated that she identified plaintiff from the school year book, that she informed Officer Wehr, and that a photographic array was conducted at the police station.

Defendant Wehr testified that he is employed as a police officer by the Suffolk County Police Department and that he was assigned the case involving the subject incident on November 5, 2008. He testified that he had multiple conversations with Lisa Molinelli, who gave him an account of what happened the night of the incident. He stated that during one of the conversations, she was able to give him names of some of the suspects, which she learned from someone who was present during the incident but was afraid to get involved in the matter. He testified that he prepared photographic arrays for the suspects that were named, and that Lisa and Frank Molinelli came to the police station on November 15, 2008 to look at them. He testified that Lisa Molinelli gave him plaintiff's name and said that she found his picture in a school yearbook. He testified that she identified plaintiff as the person who struck her husband with a beer can and said that she was positive it was him. He testified that on December 13, he arrested David Fruehauf, who was the suspect that Lisa Molinelli identified as the one who her husband dragged to the sidewalk. Officer Wehr testified that Fruehauf waived his Miranda rights and was questioned at the police station. He testified that Fruehauf named others who were present during the subject incident, including plaintiff, and signed a statement as to what occurred. Officer Wehr testified that on December 12, Lisa Molinelli made a second statement and a second photographic array was conducted wherein she identified plaintiff.

Fruehauf testified that at the time of the subject incident, there were about 30 people walking from one house to another house and that Lisa Molinelli grabbed him, called for her husband, who "knocked" him out. He testified that he was arrested as a result of the incident and questioned by Officer Wehr. He testified that he did not recall seeing plaintiff on the day of the incident, and that Officer Wehr told him that plaintiff was present. Fruehauf testified that Officer Wehr did not believe the statement he made, and "started writing his own" statement. He testified that he was informed that he would be released after making a statement, and that he signed the statement written by Officer Wehr without reading it. Fruehauf further testified that the statement that he signed which states that he saw plaintiff at the location of the incident is not accurate.

Plaintiff testified at the General Municipal Law § 50-h hearing that on Halloween night at the time of the subject incident, he was at a bar with some of his friends. He testified that he was at the bar until 2:00 a.m., and that he stayed over at one of his friend's house afterwards. He testified that police officers went to his parents' house and informed them that he would be arrested. He testified that on December 15, 2008, he surrendered himself at the police station, that he was put in a holding cell for a few hours, and that he was arraigned. He testified that the charges were dropped in June 2009.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prevail on a cause of action alleging false arrest or false imprisonment, "a plaintiff must prove (1) intentional confinement by the defendant, (2) of which the plaintiff was aware, (3) to which the plaintiff did not consent, and (4) which was not otherwise privileged" (*Nolasco v City of New York*, 131 AD3d 683, 684, 15 NYS3d 449 [2d Dept 2015]). "For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause" (*De Lourdes Torres v Jones*, 26 NY3d 742, 759, 27 NYS3d 468 [2016]). The elements of the tort of 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 accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*De Lourdes Torres v Jones*, *supra* at 760, quoting *Broughton v State*, 37 NY2d 451, 457, 373 NYS2d 87 [1975]).

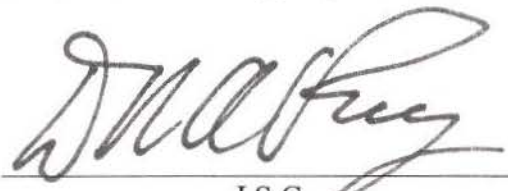
The existence of probable cause constitutes a complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution (*see Sinclair v City of New York*, 153 AD3d 877, 878, 60 NYS3d 348 [2d Dept 2017]). Probable cause "does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been committed or is being committed by the suspected individual, and probable cause must be judged under the totality of the circumstances" (*Shaw v City of New York*, 139 AD3d 698, 699, 31 NYS3d 155 [2d Dept 2016][internal quotations and citations omitted]). The existence or absence of probable cause "becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest" (*Liotta v County of Suffolk*, 157 AD3d 781, 781, 66 NYS3d 899 [2d Dept 2018]).

Here, the Suffolk defendants failed to establish prima facie that there was probable cause to arrest plaintiff for the crime of assault. As a general rule, information provided by an identified citizen accusing another person of the commission of a specific crime is sufficient to provide police with probable cause to make an arrest (*see Carlton v County of Nassau*, 306 AD2d 365, 761 NYS2d 98 [2d Dept 2003]; *Minott v City of New York*, 203 AD2d 265, 267, 609 NYS2d 334 [2d Dept], *lv dismissed* 83 NY2d 1000, 616 NYS2d 480 [1994]). However, the failure to make further inquiry when a reasonable person would have done so may be evidence of lack of probable cause (*see Silverstein v New York City Police Dept.*, 167 AD3d 961, 90 NYS3d 230 [2d Dept 2018]; *Carlton v County of Nassau*, *supra*). While Lisa Molinelli identified plaintiff from a photographic array as the person who assaulted

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her husband, and signed a sworn police statement as to the events, a triable issue of fact exists as to whether a further inquiry was necessary. In the deposition testimony of Fruehauf, he testified that he signed a statement saying that plaintiff was present at the subject location. However, he also testified that plaintiff was not present at the incident, that Officer Wehr told him plaintiff was present and typed the statement, informing him that he would not be released unless he signed the statement. Conversely, Officer Wehr testified at his deposition that Fruehauf named plaintiff as a person who was at the subject location. Thus, the conflicting deposition testimony as to what statements were made during Fruehauf's arrest relating to the incident raises issues of credibility which may not be resolved on a summary judgment motion (*see Ahr v Karolewski*, 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; *Gordan v Honig*, 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]). Furthermore, the Suffolk defendants contend that they did not rely on the Fruehauf statement and that Lisa Molinelli's statement is sufficient to establish probable cause. However, accepting the testimony of Fruehauf as true, Mollinelli's statement alone would be insufficient and Officer Wehr would be required to conduct further inquiry before arresting plaintiff. Accordingly, the motion by the Suffolk defendants for summary judgment is denied.

Dated: Oct. 4, 2019

  
J.S.C.  
HON. DAVID T. REILLY

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION