

<b>Gann v City of New York</b>
2020 NY Slip Op 30730(U)
March 5, 2020
Supreme Court, New York County
Docket Number: 151816/2014
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52**

*Justice*

-----X INDEX NO. 151816/2014

MICHAEL GANN, MOTION DATE 03/04/2020

Plaintiff, MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT **DECISION + ORDER ON MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 34, 35, 37, 38, 39

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of the alleged unlawful arrest and prosecution of plaintiff, Michael Gann, on November 9, 2011 on Church St., in New York, New York. Defendants move for summary judgment on the grounds that probable cause existed for the arrest and subsequent prosecution of the plaintiff. Plaintiff opposes the instant motion on the ground that issues of fact exist with respect to the existence of probable cause. Based on the reasons set forth below, defendants' motion is granted.

**Facts**

On November 9, 2011, Officers Michael Corradengo and Giocardo Bernabe were waived down by pedestrians as they were patrolling. The officers were informed, by unidentified complainants, that Mr. Gann was threatening them with a knife. Upon approaching Mr. Gann, the officers knocked the object he was holding out of his hand and discovered that it was a pair of pliers. Mr. Gann was placed in handcuffs and placed in the rear of the police vehicle, when Mr. Scott Hopper approached the officers. Mr. Hopper informed the officers that he observed

the plaintiff's threatening behavior. Mr. Gann was subsequently arrested and charged with menacing in the second degree. At some point the officers performed a search and found that Mr. Gann had two open warrants. On August 28, 2013, Mr. Gann was acquitted of all criminal charges.

### **Summary Judgment Standard**

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). A mere shadowy semblance of an issue of fact or bald, conclusory allegations will not suffice to defeat a motion for summary judgment. *Mallad Construction Corp. v County Federal Savings & Loan Assoc.*, 32 NY2d 285, 290 [1973]; *Morowitz v Naughton*, 150 AD2d 536 [2d Dept 1989]. It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v Da Ecib USA*, 259

AD2d 258 [1st Dept 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

**False Arrest/Imprisonment and Malicious Prosecution**

With respect to the allegations of false arrest, false imprisonment and malicious prosecution, the Court finds that the arrest and subsequent prosecution of the plaintiff was supported by probable cause as a matter of law. There is no genuine issue of material fact as to the existence of probable cause.

Proof of probable cause to arrest as a matter of law constitutes a complete defense to the claims of false arrest and unlawful imprisonment, *Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006], as well as to claims of malicious prosecution, assuming the initial probable cause is still present at the commencement of the prosecution. *Brown v Sears Roebuck & Co.*, 297 AD2d 205, 211 [1st Dept 2002]. Proof of probable cause is not the equivalent of 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, 190 [1st Dept 2002].

To succeed on a claim for false arrest and false imprisonment, a plaintiff must show that: (1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and, (4) the confinement was not otherwise privileged (*Broughton v State of New York*, 37 NY2d 451, 456 [1975]). The defendants can prevail if they prove that the arrest and imprisonment were effectuated with probable cause (*Id.*; *Rivera v City of New York*, 40 AD3d 334, 337 [1st Dept 2007]).

An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense (*Ricciuti v. N.Y.C. Transit Auth.*, 124 F 3d 123, 128 [2d Cir. 1997]; see also *People v Oden*, 36 NY2d 382,

384 [1975]). When the facts resulting in an arrest are undisputed, the existence of probable cause is an issue of law for the court to decide (*Parkin v Cornell University, Inc.*, 78 NY2d 523, 528 [1991]).

Where “information given to an officer by an identified citizen, accusing plaintiffs of a specific crime, [it is] legally sufficient to provide the officer with probable cause to arrest.” *Kramer v City of New York*, 173 AD2d 155 [1st Dept 1991] citing, *People v Nichols* 156 AD2d 129, app. Denied, 76 NY2d 740; *People v Gonzalez*, 138 AD2d 622, app. denied, 71 NY2d 1027; *Jackson v. County of Nassau*, 123 AD2d 834, app. denied, 69 NY2d 608; *People v Phillips*, 120 Ad2d 621.

To prevail on a claim of malicious prosecution, a plaintiff has the burden to plead and prove the following four elements: (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. *Broughton* 37 NY2d 451, 457 (1975). While plaintiff must establish all four elements listed above to prevail, defendant must only prove lack of any one of the elements to establish its prima facie entitlement to judgment.

### **Discussion**

In the light most favorable to the plaintiff, this Court determines that there existed probable cause for the plaintiff to be arrested in the instant matter. According to the undisputed facts, two people approached police officers to tell them that the plaintiff had threatened them with a knife. In addition, an identified eyewitness came forward to say he observed this occurring as well. Upon being apprehended by the police officers, the plaintiff was found to have pliers in his possession. In sum, it is this Court’s position that it was reasonable for the

officers to believe that the crime of menacing and possession of a weapon had occurred and thus probable cause was established in this case.

The Court has reviewed plaintiff's remaining contentions and finds them unavailing.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/5/2020

DATE

LYLE E. FRANK J.S.C.

**HON. LYLE E. FRANK  
J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE