

**Salcedo v City of New York**

2020 NY Slip Op 31969(U)

May 18, 2020

Supreme Court, Bronx County

Docket Number: 303627/2014

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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SANTOS MARTE SALCEDO and ANDREA  
SALCE DEMARTE,

Index No.: 303627/2014

**DECISION/ORDER**  
**Present:**  
**HON. MITCHELL J. DANZIGER**

-against-

THE CITY OF NEW YORK, DETECTIVE LUIS  
RAMOS, SHIELD #4528, DETECTIVE JEFFERY  
CARROLL, TAX NO.: 923888, DETECTIVE  
BRIAN FLEMING, TAX NO.: 916492, AND OFFICERS  
WHOSE NAMES ARE YET UNKNOWN,

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Recitation as Required by CPLR §2219(a): The following papers  
were read on this Notice of Motion to dismiss/summary judgment:

Papers Numbered

Notice of Motion, Affirmation in Support with Exhibits.....	<u>1</u>
Affirmation in Opposition, Memorandum of Law and Exhibits.....	<u>2</u>
Affirmation in Reply.....	<u>3</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

The City of New York, (hereinafter “City”), moves to dismiss plaintiff’s claims pursuant to CPLR §3211(a)(7) for failure to state a claim, pursuant to CPLR §§3125(c), 1024 and 306(b) to dismiss the “John/Jane Does”, and pursuant to CPLR §3212 for summary judgment in favor of the City. Plaintiff partially opposes the City’s motion. Per plaintiff’s memorandum of law, plaintiff does not oppose the dismissal of plaintiff’s assault, battery, excessive force, negligent hiring, and retention, *Monell*, conversion, theft, and loss of property, and the John/Jane Doe officers. As such, those claims are dismissed from the action. The remaining causes of action are left are: (1) false arrest and false imprisonment; and (2) malicious prosecution.

This action arose from an interaction between the plaintiffs, and the NYPD officers who executed a search warrant at plaintiff’s residence on September 20, 2013. According to plaintiffs notice of claim (Def. Ex. A), and plaintiffs summons and complaint (Def. Ex. B), plaintiffs were falsely arrested, falsely imprisoned, maliciously prosecuted, assaulted and battered, subjected to excessive force, and deprived of their civil rights on September 20, 2013, when NYPD officers

unlawfully searched their home and they were unlawfully seized based upon a search warrant obtained because of false and perjured information which they should have known was stale and false. Further, plaintiffs allege that the weapon and narcotics recovered from the search was found in a basement apartment where plaintiffs did not reside and had no access to.

#### **Plaintiff Salcedo's Testimony**

Mr. Salcedo and his family lived on the 1<sup>st</sup> floor of 2162 Story Avenue, Bronx, New York, pursuant to a lease agreement. (City Ex. B, Pl. Ex. 11). There is only one apartment on the 1<sup>st</sup> floor. The subject location was divided into three (3) separate units, with three different tenants. The basement apartment remained locked, and neither Mr. Salcedo nor his wife had a key, as the basement was not their apartment. Mr. Salcedo was told he was under arrest for possession because they found guns in the basement. Mr. Salcedo informed the officers that he did not live in the basement, but rather on the first floor of the house. Mr. Salcedo testified that the officer called someone and said, "oh chief, we have a problem over here." (City Ex. K, Pl. Ex. 12). The officers told him they found a gun and drugs in his bedroom and a gun downstairs in the basement. Mr. Salcedo testified he was told to sign a confession regarding guns recovered in the basement apartment. He refused and was threatened with the arrest of his wife. Thereafter, the officers changed the location of the guns and drugs from the basement to Mr. Salcedo's bedroom. Mr. Salcedo maintains he did not own a gun, nor was he a drug dealer.

#### **Plaintiff Demarte's Testimony**

Ms. Demarte testified she never saw any weapons or drugs in the house. (City Ex. B, Pl. Ex. 13). The police told her they found a gun in the bureau of her bedroom and they found drugs in her home. Ms. Demarte told the officers she had never seen drugs. She was handcuffed and brought to the precinct with her husband. In order to enter her apartment, you enter through the first floor, door on the right. In order to enter the basement, you enter the door to the left. The basement door is kept locked. The police broke that door down to enter it.

#### **Detective Luis Ramos- Def. Ex. L**

Detective Ramos does not believe any doors were broken down to get access to the apartments, nor does he remember keys being used. He went down into the basement apartment with Detective Dominguez, Detective Fleming, Detective Carroll, and Detective Diaz. He conducted the search of the basement. He and his fellow officers found two handguns and drug paraphernalia. There were no people downstairs when they were searching. They secured the

weapons and went upstairs to the first-floor apartment. Detective Ramos searched the first-floor apartment. In the bedroom, inside an armoire, there was a loaded revolver, cocaine, and some money. There were people in the first-floor apartment, Andrea Salce Demarte and her two children. He asked if either Ms. Demarte or Mr. Salcedo wanted to claim the weapon and the drugs found in the apartment and neither wanted to claim them.

#### **Detective Jeffrey Carroll- Def. Ex. T**

Detective Carroll remembers Ms. Demarte and two small children being in the home. He recalls drugs being in the armoire next to a firearm. He believes that two additional firearms were recovered from the basement.

#### **Detective Brian Flemming- Def. Ex. U**

Detective Flemming did not make observations of guns or contraband in the basement. He does not recall entering a bedroom on the first floor. He does not have firsthand knowledge of where contraband and/or weapons were recovered.

#### **The Search Warrant**

On September 19, 2013, the Honorable E. Edwards, Judge of the Criminal Court in Bronx County, issued Search Warrant No. 1006-2013 after Detective Luis Ramos and a Confidential Informant (hereinafter "CI"), provided information regarding the need for a search. The search warrant authorized and directed any police officer of the New York City Police Department (hereinafter "NYPD"), to enter the premises located at 2162 Story Avenue, First Floor and Basement, Bronx, New York, for a complete search of the apartment and to search the person of Santos Marte. (Def. Ex. H). The search warrant targeted the presence of "cocaine, vials, caps, glassine envelopes, small Ziplock-style bags, and other evidence of proceeds from drug trafficking". The search warrant was to be executed between 6:00 a.m. and 9:00 p.m. and "without giving notice of authority or purpose."

#### **The CI**

The CI provided Detective, Luis Ramos, with information that controlled substances were being sold from the subject premises. The CI was involved in at least three (3) buys at the premises and indicated that Santos Marte (a/k/a Mr. Salcedo) was present and engaged in the sale. Per the CI, Santos Marte, and another individual would open the front door of the premises and bring the CI into the basement, where Santos Marte would retrieve a bag with a white powdery substance and a sale was made. This type of transaction occurred on three occasions.

Later, after plaintiff was indicted by a Grand Jury, it was determined that one piece of information given by the CI was false. The CI indicated that Santos Marte was present during one of the controlled buys and per plaintiff Salcedo's testimony, he was actually on vacation in the Dominican Republic at that time. Per the testimony of the officers, they were unaware of the CI's lie prior to obtaining the search warrant and only found out after being told by the District Attorney's Office. (Def. Ex. L at 21-23, Ex. T at 112, Ex U at 89-90).

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 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 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 in a light most favorable to non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1<sup>st</sup> 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 N.Y.2d 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 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1<sup>st</sup> Dept. 1999]). When the existence of an issue of fact is even debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

The City argues that plaintiffs state and federal causes of action for false arrest and false imprisonment should be dismissed as there was probable cause for the plaintiffs arrests. Further, plaintiffs were not maliciously prosecuted as there was probable cause for their arrests and plaintiffs cannot prove actual malice. Per the City, the arrests were made pursuant to a valid search warrant and the cocaine and one firearm was found in the armoire of the plaintiffs shared bedroom. The City has met its prima facie showing of entitlement to summary judgment. Plaintiffs attempt to create a question of fact by alleging that the officers lied about where the contraband and weapons were found. Plaintiff supports this argument with results from a lie detector test. However, this argument is unpersuasive. Per the results of plaintiff Salcedo's lie detector test on page 6 of the polygraph report, "polygraph results are based on the examiners


opinion...mechanical, digital, and human errors are possible...polygraph accuracy has been debated for decades...opinions can vary from examiner to examiner.” Polygraph tests have been determined to be unreliable and therefore is not considered for its truth. (*King Victor Taxi Corp. v. New York City Taxi & Limousine Comm’n*, 236 A.D.2d 325 [1<sup>st</sup> Dep’t 1997]).

The City submits a copy of the search warrant indicating that Judge E. Edwards specifically determined that adequate grounds existed to authorize the police to enter plaintiff’s premises and the basement apartment. Additionally, plaintiff Santos Marte was named in the search warrant. (Def. Ex. H). Moreover, the confidential informant appeared before Judge E. Edwards and he was able to independently evaluate the veracity and reliability of the information given by the CI. At that time, Detective Ramos was unaware of any false information given by the CI. Where a search warrant is issued after a court has had an opportunity to review the basis of its issuance, such as a personal examination of the informant providing the information, the warrant is presumed valid. (*Peo. v. Castillo*, 80 N.Y2d 578 [1982]; *Peo. v. Bradley*, 181 A.D.2d 316 [1<sup>st</sup> Dep’t 1992]). Further, plaintiff, Santos Marte Salcedo, was indicted by a Grand Jury and plaintiff has failed to establish that the police withheld or misrepresented evidence from the District Attorney’s Office, or the Grand Jury. Therefore, there was probable cause to prosecute plaintiffs. Plaintiffs submit no evidence to rebut the City’s argument that there was no actual malice in the initiation of the prosecution.

Based on the foregoing, the City’s motion is granted, and the complaint is dismissed in its entirety. Defendants are directed to serve a copy of this order with notice of its entry, upon the plaintiff within thirty (30) days of the entry date. The above constitutes the decision and judgment of the Court.

Dated:

5/18/12  
Bronx, New York

  
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HON. MITCHELL J. DANZIGER, J.S.C.