

**Fambro v City of New York**

2020 NY Slip Op 34157(U)

December 15, 2020

Supreme Court, New York County

Docket Number: 151804/2014

Judge: Dakota D. Ramseur

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR**

**PART 5**

*Justice*

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KASEEM FAMBRO, DARRELL GIBBS, PHILIP GAYNOR,  
Plaintiffs,

**INDEX NO.** 151804/2014

**MOTION DATE** 8/25/20

**MOTION SEQ. NO.** 009 010 011

- v -

THE CITY OF NEW YORK, COMMISSIONER RAYMOND  
KELLY IN HIS OFFICIAL CAPACITY, DEPUTY  
INSPECTOR TIMOTHY J. BEAUDETTE AS THE  
COMMANDING OFFICER OF THE MIDTOWN NORTH  
PRECINCT, POLICE OFFICERS JOHN DOES 1-4, LEWIS  
FOODS D/B/A MCDONALD'S CORPORATION, WSC  
INVESTIGATION AND SECURITY INC, AFFINITA  
SECURITY GROUP, INC.,

**DECISION + ORDER ON  
MOTIONS**

Defendants.

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The following e-filed documents, listed by NYSCEF document number, were considered on these motions: **sequence 009**: 146-162, 207, 208, 213, 218, 221, 223, 228-235, 242-250; **sequence 010**: 182-206, 209, 210, 214, 217, 220, 224, 236, 238, 240, 252; and **sequence 011**: 163-181, 211, 212, 215, 216, 219, 225, 237, 239, 241, 251.

Plaintiffs Kaseem Fambro, Darrell Gibbs, and Philip Gaynor commenced separate actions to recover damages stemming from a fight inside a McDonald's at 1560 Broadway, New York, New York ("the McDonald's") on March 9, 2013, which were eventually consolidated into a single action (*NYSCEF 198, 199*). Defendants Lewis Foods, Affinita Security Group ("Affinita") and Gregory Kearse, and the City of New York (the "City") and Inspector Timothy Beaudette now move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims (sequences 009, 010, and 011, respectively).<sup>1</sup> Plaintiffs oppose the three motions (*NYSCEF 207-212, 228-233, 238-241, 242-246*). Movants each filed a reply (*NYSCEF 247-252*). For the reasons below, Lewis Foods' motion (009) is granted in part, Affinita's motion (010) is granted in part, and the City's motion (011) is granted in full.

Defendant Lewis Food operated the subject McDonald's, where it contracted security to Affinita, who in turn employed Kearse as a security guard (*NYSCEF 159/Kearse Tr 12-18*). At approximately 4:00 a.m. on March 9, 2013, Plaintiffs, after celebrating Fambro's birthday at a night club/lounge next door to the McDonald's, entered the McDonald's and ordered food (*NYSCEF 153/Gibbs Tr 23-31*). After Gibbs received his order from a McDonald's employee, he

<sup>1</sup> At oral argument, Fambro's counsel made several concessions. First, Fambro conceded that WSC Investigation and Security Inc. ("WSC") was an improper party, which merits dismissal against WSC. Second, Fambro conceded that claims against Inspector Beaudette should be dismissed for failure to state a cause of action. Third, Fambro also consented to dismissal of the 1983 claims against the individual John Doe police officers. Finally, Commissioner Kelly was previously dismissed from the action. The caption shall be amended to reflect dismissal against those parties.

informed the employee that he had ordered Sprite, but instead received water (*Gibbs Tr* 55:3-11). “To avoid all the bickering back and forth,” Gibbs asked to speak with manager on duty (*Gibbs Tr* 55:14-16). The manager came over and, before Gibbs had the opportunity to ask Fambro for the receipt, the manager “motioned over to security ... just yelled over for the security guard to come over here and he gestured ... moved his hand forward coming towards him telling the security guard” (*Gibbs Tr* 56:16-58:6). The security guard arrived “a couple of seconds later” (*Gibbs Tr* 58:7-10). Gibbs “approached the security guard to explain to him what the problem was and before I could even get my sentence out, [he] was shoved to the floor ... by the security guard” (*Gibbs Tr* 59:10-19).

After Gibbs had fallen to the ground, another patron helped Gibbs back to his feet (*Gibbs Tr* 64:13-16). Gibbs, a “little dizzy” at that point, was “basically walking towards [Kearse] asking him ... what was the meaning of” Kearse having pushed him (*Gibbs Tr* 65:10-22). Kearse “didn’t say anything,” and instead “hit [Gibbs] in the face with a napkin dispenser” that had been sitting on the counter (*Gibbs Tr* 65:22-66:8). The dispenser hit Gibbs in the lip, requiring stitches (*Gibbs Tr* 33-34).

Police arrived at the scene, including Detective Brett Markgraf, who spoke with Kearse; Kearse identified Plaintiffs as assailants. Though Plaintiffs attempted to explain what had happened, police arrested and processed Plaintiffs, who spent time in jail. The charges were eventually dismissed (*Gibbs Tr* 102:19-21; *NYSCEF 204/Markgraf EBT* 102:6-15).

Gibbs, who originally sued Lewis Foods, Affinita, and Kearse, asserted five causes of action: (1) assault and battery against Lewis Foods, Affinita, and Kearse; (2) negligent hiring against Affinita and Lewis Foods; (3) false arrest and unlawful imprisonment against Lewis Foods, Affinita, and Kearse; (4) malicious prosecution against Lewis Foods, Affinita, and Kearse; (5) assault and battery against Kearse (*NYSCEF 149/“Gibbs Complaint”*).<sup>2</sup> Gaynor, who originally sued the City and Lewis Foods, initially alleged two causes of action against both: (1) false arrest; and (2) malicious prosecution (*NYSCEF 193*). On November 19, 2014, Gaynor sued Affinita separately, alleging, as later explained in a Bill of Particulars, claims for false arrest and malicious prosecution (*NYSCEF 195, 197*). Fambro, in an Amended Complaint, alleges five causes of action: (1) assault and battery against Lewis Foods, Affinita, and the City; (2) negligence against Lewis Foods; (3) negligent hiring and retention against Lewis Foods; (4) unlawful detention against Lewis Foods, Affinita, and the City; (5) malicious prosecution against Lewis Foods, Affinita, and the City; (6) federal § 1983 claims against individual officers for civil rights violations (assault, illegal search and seizure, false arrest, malicious prosecution, excessive force, and unlawful imprisonment); and (7) a *Monell* claim against the City (*NYSCEF 187*).

Lewis Foods argues, in support of its motion for summary judgment (sequence 009): (1) that it cannot be held vicariously liable, or liable for negligent hiring and retention, for Kearse’s actions because Kearse was not Lewis Foods’ employee; (2) that Lewis Foods cannot be held liable for common law false arrest, unlawful imprisonment, or malicious prosecution; and (3) that Lewis Foods was not negligent because it had no duty to Plaintiffs.

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<sup>2</sup> The fifth claim appears to duplicate the first. Additionally, as highlighted by the City, as part of the consolidation motion practice, Justice Kotler denied Gibbs’ request to assert claims against the City as part of consolidation because Gibbs did not file a timely notice of claim (*NYSCEF 164 ¶ 7*, citing *NYSCEF 170*).

Affinita and Kears argue, in support of their motion for summary judgment (sequence 010): (1) that Plaintiffs' malicious prosecution claims should be dismissed as neither Affinita nor Kears initiated a criminal proceeding or acted with actual malice in providing information to law enforcement; (2) that Plaintiffs' false arrest/unlawful imprisonment claim should be dismissed pursuant to the one-year statute of limitations, and/or because there is no evidence that Plaintiffs were detained or confined in the McDonald's; and (3) that Gibbs's claims against Kears for assault and battery should be dismissed because Kears was acting in self-defense, or in the alternative, that any negligent hiring and supervision against Affinita should be dismissed because Kears was not acting within the scope of his employment.

The City argues, in support of its motion for summary judgment (sequence 011): (1) that Gaynor's false arrest claim should be dismissed for failure to file a timely notice of claim<sup>3</sup>; (2) that all 1983 claims should be dismissed for failure to plead the allegations with specificity<sup>4</sup>; (3) that Fambro's state and federal false arrest and imprisonment/unlawful detention claims should be dismissed based on the existence of probable cause; and (4) that Gaynor and Fambro's malicious prosecution claims should be dismissed based on the existence of probable cause; and (5) that all claims against Inspector Beaudette should be dismissed for failure to state a cause of action.<sup>5</sup>

## DISCUSSION

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

### ***I. Affinita's motion for summary judgment (sequence 010)***

Fambro asserted claims for assault and battery, unlawful detention, and malicious prosecution against Affinita only; Gaynor asserted claims for false arrest and malicious prosecution against Affinita only; and Gibbs asserted claims for assault and battery, false arrest and unlawful imprisonment, malicious prosecution against Affinita and Kears, and negligent

<sup>3</sup> In its opposition and at oral argument, Gaynor's counsel conceded this point (*NYSCEF 211 ¶ 7*).

<sup>4</sup> As discussed in footnote 1, the only existing 1983 claims were voluntarily discontinued by Fambro.

<sup>5</sup> As discussed in footnote 1, Fambro discontinued his claims against Beaudette.

hiring against Affinita only. Affinita and Kears move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims.

#### **A. Assault and battery/negligent hiring and supervision**

As Affinita argues, “[a]n employer cannot be held vicariously liable for an alleged assault where the assault was not within the scope of the employee’s duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer” (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-205 [1st Dept 2001]; see also *N. X. v Cabrini Med. Ctr.*, 280 AD2d 34, 37-38 [1st Dept 2001] [“An employer may be held vicariously liable for the tortious acts of its employee only if those acts were committed in furtherance of the employer’s business and within the scope of employment”]). However, “[w]hen businesses hire security guards or bouncers to maintain order, the physical force used by those bouncers may be within the scope of their employment” (*Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 453 [1st Dept 2015]; *Jones v Hiro Cocktail Lounge*, 139 AD3d 608, 609 [1st Dept 2016] [“an attack on plaintiff by a security guard could be found to be within the scope of the guard’s employment”]). Accordingly, the negligent hiring and supervision claims cannot be dismissed as a matter of law.

Moreover, as to the assault and battery claims, as Plaintiffs argue in opposition, the record is, at best, ambiguous with respect to whether Kears escalated the incident and initiated the physical altercation by throwing the napkin dispenser at Gibbs (*NYSCEF 209 ¶ 34, et seq.*, citing *NYSCEF 205/Kears EBT 28, et seq.*).<sup>6</sup> Thus, Affinita’s argument that Kears was acting in self-defense is, speaking charitably, inconclusive (see *Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 453 [1st Dept 2015] [“Issues of fact are presented regarding whether Hill was justified in punching plaintiff in the face in view of what occurred immediately preceding the punch, and as to whether Hill’s response was excessive.”]). Accordingly, the branch of Affinita’s motion seeking to dismiss the assault and battery claims is also denied.

#### **B. False arrest/unlawful imprisonment and malicious prosecution**

As a threshold matter, Affinita is correct that Gaynor’s false arrest claim should be dismissed because it was filed in November 2013, over a year after the subject incident (CPLR 215[3]). In the absence of any opposition on this issue, Gaynor’s false arrest claim is dismissed.

Affinita also argues, in sum and substance, that Plaintiffs’ false arrest/unlawful imprisonment claims should be dismissed because Plaintiffs were not confined, and that Plaintiffs’ malicious prosecution claims must similarly be dismissed because Affinita did not “initiate a criminal proceeding, . . . and did not act with actual malice in providing information to law enforcement.”

A plaintiff seeking to establish a false arrest/unlawful imprisonment claim must establish 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 (*Hernandez v City of New York*, 100 AD3d 433 [1<sup>st</sup> Dept 2012]). “A

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<sup>6</sup> To the extent that the parties submitted a video depicting the incident (*NYSCEF 184*), the combination of the video quality and angle and lack of audio render it unhelpful, but the record establishes that

civilian complainant will generally not be liable for false arrest/false imprisonment merely for seeking the assistance of or furnishing information to law enforcement authorities, who are then free to exercise their own judgment concerning whether an arrest should be made and criminal charges filed (*Lowmack v Eckerd Corp.*, 303 AD2d 998, 999 [4th Dept 2003]). “Nor does identifying the plaintiff as the perpetrator of a crime necessarily give rise to tort liability” (*id.*). “To sustain a cause of action for false arrest and false imprisonment against a civilian complainant, a plaintiff must show that the defendant took an active role in the [arrest] of the plaintiff, such as giving advice and encouragement or importuning the authorities to act, and that the defendant intended to confine the plaintiff” (*id.*). “Thus, one who instigates, causes or directs an arrest without a warrant is liable if it results in false imprisonment because no crime has been committed or the person arrested is innocent” (*id.*).

“The elements of an action for malicious prosecution are (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice” (*Hernandez v City of NY*, 100 AD3d 433, 433 [1st Dept 2012]). “[W]hile false arrest and malicious prosecution are ‘kindred actions’ insofar as they often aim to provide recompense for illegal law enforcement activities, each action protects a different personal interest and is composed of different elements” (*De Lourdes Torres v Jones*, 26 NY3d 742, 760 [2016]). “[T]he unique elements of malicious prosecution typically present a greater obstacle to recovery than the elements of false arrest; ... The law places a heavy burden on malicious prosecution plaintiffs” (*id.*).

Contrary to Affinita’s argument, a “defendant commences the prosecution of the plaintiff,” and may therefore be liable for malicious prosecution, “if the defendant demands in bad faith that the public prosecutor initiate the criminal action or supplies the prosecutor with falsified evidence that the defendant knows or should know will cause the prosecutor to prosecute the plaintiff” (*De Lourdes Torres v Jones*, 26 NY3d 742, 760-761 [2016]). “Just as in the false arrest context, the plaintiff in a malicious prosecution action must also establish at trial the absence of probable cause to believe that he or she committed the charged crimes, but this element operates differently in the malicious prosecution context because once a suspect has been indicted, the law holds that the Grand Jury action creates a presumption of probable cause” (*id.* at 761).

Here, as Plaintiffs argue in opposition and contrary to Affinita’s argument, an issue of fact exists with respect to the version of events given by Kearsse to Police Officer Brett Markgraf, who responded to the altercation and arrested Plaintiffs with the information he deemed reliable at that time: the statement of Kearsse, who was bleeding from his head (*NYSCEF 204/Markgraf EBT*). Markgraf testified that Kearsse told him that “he was hit in the head by three men or by someone who threw something at him” in the process of “trying to remove” Plaintiffs from the McDonald’s (*Markgraf EBT* 141:2-18). Markgraf was told that a video of the incident likely existed, but testified that officers “weren’t able to access the cameras. Nobody could work them at the store (*Markgraf EBT* 66-67).

According to Markgraf, it was only about a week later, once he had retrieved the surveillance video and watched it with the Assistant District Attorney assigned to prosecute Plaintiffs that he learned that Kearsse had been the first to throw the napkin dispenser after he

viewed the surveillance video (*Markgraf EBT* 69-70, 92-07, 124-126). In Markgraf's words, this was "not necessarily a different story" than what Kearsé had told him, but a "new part of the story" (*Markgraf EBT* 125-126). Markgraf's testimony, though equivocal, is sufficient to highlight that an issue of fact exists as to Kearsé's (and therefore Affinita's) role in Plaintiff's arrest, detention, and prosecution, however brief. Thus, with the exception of Gaynor's claim for false arrest, the branch of Affinita's motion for summary judgment seeking dismissal of Plaintiff's false arrest and malicious prosecution claims is denied.

## ***II. Lewis Foods' motion for summary judgment (sequence 009)***

Against, Lewis Foods, Gibbs asserted assault and battery, negligent hiring, false arrest and unlawful imprisonment, and malicious prosecution; Gaynor asserted false arrest and malicious prosecution; and Fambro asserted assault and battery, negligence, negligent hiring and retention, unlawful detention, and malicious prosecution. Lewis Foods argues: (1) that it cannot be held vicariously liable, or liable for negligent hiring and retention, for Kearsé's actions because Kearsé was not Lewis Foods' employee; (2) that Lewis Foods cannot be held liable for common law false arrest, unlawful imprisonment, or malicious prosecution; and (3) that Lewis Foods was not negligent because it had no duty to Plaintiffs.

### ***A. Assault and battery/negligence/negligent hiring (Fambro and Gibbs)***

"An employer cannot be held vicariously liable for an alleged assault where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-205 [1st Dept 2001]; *see also N. X. v Cabrini Med. Ctr.*, 280 AD2d 34, 37-38 [1st Dept 2001] ["An employer may be held vicariously liable for the tortious acts of its employee only if those acts were committed in furtherance of the employer's business and within the scope of employment). However, "[w]hen businesses hire security guards or bouncers to maintain order, the physical force used by those bouncers may be within the scope of their employment" (*Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 453 [1st Dept 2015]; *Jones v Hiro Cocktail Lounge*, 139 AD3d 608, 609 [1st Dept 2016] ["an attack on plaintiff by a security guard could be found to be within the scope of the guard's employment"])).

That the security guard may be employed by another entity contracting with the business is not necessarily a shield against liability (*see Fauntleroy*, 133 AD3d at 453 [holding that deposition testimony that nightclub's managers "exerted 'full control' over the security guards creates an issue that must await trial, regarding whether [the nightclub] exercised the requisite degree of control over the security guards to be liable..."]). Here, as Plaintiffs argue in opposition, while it is undisputed that Kearsé was not a Lewis Foods employee, deposition testimony of multiple parties highlights issues of fact with respect to the authority and direction asserted by Lewis Foods, via the McDonald's manager, over Kearsé, particularly in the moments immediately preceding the altercation (*see NYSCEF* 207 ¶¶ 12-29). Accordingly, the branch of Lewis Foods' motion seeking dismissal of Plaintiffs' assault and battery, negligence, and negligent hiring and retention claims is denied (*see Fauntleroy*, 133 AD3d at 453 ["Determination of plaintiff's remaining claim for negligent training should similarly await the presentation of evidence at trial."])).

### ***B. Malicious prosecution/false arrest (Fambro, Gaynor, and Gibbs)***

As discussed above in examining Affinita's motion, contrary to Lewis Foods' argument that "malicious prosecution only applies against prosecutors because they are the only ones who can initiate a criminal proceeding," (*NYSCEF 147 ¶ 52*), "the defendant commences the prosecution of the plaintiff," and may therefore be liable for malicious prosecution, "if the defendant demands in bad faith that the public prosecutor initiate the criminal action or supplies the prosecutor with falsified evidence that the defendant knows or should know will cause the prosecutor to prosecute the plaintiff" (*De Lourdes Torres*, 26 NY3d at 760-761). "Just as in the false arrest context, the plaintiff in a malicious prosecution action must also establish at trial the absence of probable cause to believe that he or she committed the charged crimes, but this element operates differently in the malicious prosecution context because once a suspect has been indicted, the law holds that the Grand Jury action creates a presumption of probable cause" (*id.* at 761).

Nevertheless, unlike the physical contact sometimes required in security work, it cannot be said that the conduct alleged, and discussed above—Kearse's allegedly false statements to police—could fall within the scope of Kearse's duties. Plaintiffs' opposition is limited to attacking Lewis Foods' characterization of certain testimony, none of which is material to the narrow issue: whether the record reveals that the malicious conduct of a Lewis Foods employee, or an agent otherwise acting within the scope of employment, could have led to Plaintiffs' arrest and prosecution. Because the answer is no, Plaintiffs' malicious prosecution and false arrest claims against Lewis Foods are dismissed.

### ***III. The City's motion for summary judgment (sequence 011)***

Only Fambro and Gaynor asserted claims against the City; Fambro asserted various civil rights claims against individual officers which were voluntarily discontinued at oral argument, and a *Monell* claim against the City, and Gaynor alleged false arrest and malicious prosecution. After oral argument, the City's remaining arguments are: (1) that Gaynor's false arrest claim should be dismissed for failure to file a timely notice of claim; (2) that Plaintiffs' federal § 1983 claims against the City should be dismissed for failure to plead with sufficient specificity; and (3) that state and federal false arrest and malicious prosecution claims should be dismissed because detention and prosecution were justified by probable cause.

#### ***A. Timeliness of Gaynor's false arrest claim***

Gaynor's opposition focuses on the timeliness of the malicious prosecution claim, which is not challenged by the City. However, Gaynor concedes that "the notice of Claim with regard to Plaintiff's cause of action for false arrest was served outside the ninety-day [limitations period] ... without having secured permission to serve a late notice of claim..." (*NYSCEF 211/Gaynor Opp ¶ 7*). Accordingly, Gaynor's false arrest claim against the City is dismissed.

### **B. § 1983 claims**

The City argues that Plaintiffs' complaints do not sufficiently plead § 1983 claims, either as to the individual officers or the City. As the City highlights in reply, Plaintiffs' opposition contains only cursory opposition and a vague reference to the pleadings.

To survive a motion to dismiss, a complaint "does not need detailed factual allegations," but nevertheless" requires more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action" (*Triano v Town of Harrison*, 895 F Supp 2d 526, 529 [SDNY 2012], citing *Bell Atl. Corp. v Twombly*, 550 US 544, 555 [2007]). "Factual allegations must be enough to raise a right to relief above the speculative level," *id.*, and "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint" (*id.* at 563). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face" (*id.* at 570). If a plaintiff "ha[s] not nudged [his/her] claims across the line from conceivable to plausible, [his/her] complaint must be dismissed" (*id.*; see also *Ashcroft v Iqbal*, 556 US 662 [2009]; see *Cozzani v County of Suffolk*, 84 AD3d 1147, 1147 [2d Dept 2011] [utilizing federal standards to affirm that a complaint was "unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced"]).

Here, Fambro's Complaint pleads § 1983 violations by individual officers as a standalone tort without connecting the underlying events to any specific § 1983 violation or facts (*NYSCEF 166 ¶¶ 51-59*). Moreover, as the City argues, the bulk of the § 1983 claims appear to be *Monell* claims alleging the City's deprivation of Fambro's rights through official policy or custom, but the lengthy allegations relating to stop-and-frisk violations bear no relationship to the facts there (*NYSCEF 166 ¶¶ 67-137*). In the absence of any elaboration or substantive opposition, dismissal of the § 1983 claims is appropriate.

### **C. False arrest/malicious prosecution claims (probable cause)**

Finally, the City argues that the false arrest and malicious prosecution claims asserted by multiple Plaintiffs should be dismissed because probable cause justified both. In opposition, Plaintiffs argue that, at minimum, an issue of fact exists with respect to whether police officers had enough probable cause at the scene based on an unclear 911 call, incomplete description, and show-up identification by Kearse, who was bleeding at the scene from a head injury. Plaintiffs also argue that the officers should have more diligently pursued the video footage which, according to Plaintiffs, would have exonerated them.

Legal privilege or justification is established by showing that an officer had probable or reasonable cause to effectuate an arrest (*Broughton v State*, 37 NY2d 451, 458 [1975]). Criminal Procedure Law § 140.10(1)(b) provides that "a police officer may arrest a person for a crime when he has reasonable cause to believe that such a person has committed such crime, whether in his presence or otherwise." Reasonable cause, in turn, "exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it

is reasonably likely that such offense was committed and that such person committed it” (CPL § 70.10 [2] ). Reasonable cause can include hearsay (*id.*).

Under both New York and federal law, probable cause is an absolute defense to a false arrest claim (*Jaegly v Couch*, 439 F3d 149, 151 [2d Cir 2006]; *Morel v Crimaldo*, 683 NYS2d 22, 24 [1<sup>st</sup> Dept 1998]). Probable cause also constitutes a complete defense to a malicious prosecution claim, assuming the initial probable cause is still present at the commencement of the prosecution (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 211 [1<sup>st</sup> Dept 2002]). “[C]onflicting evidence uncovered in the course of the police investigation is relevant to the issue of whether guilt beyond a reasonable doubt could have been proven at a criminal trial, not to the initial determination of the existence of probable cause” (*Agront v City of NY*, 294 AD2d 189, 190 [1st Dept 2002]; *see also Drayton v City of NY*, 292 AD2d 182, 183 [1st Dept 2002] [probable cause existed “notwithstanding plaintiff’s exculpatory explanation to responding police”]).

Here, as discussed above and as the City argues in reply, Kearsa admitted at his deposition that he identified Plaintiffs as his assailants, and did not mention—as Plaintiffs argue—that Kearsa was the first to employ the napkin dispenser as a weapon. Thus, the record reflects that responding officers were confronted with an individual bleeding from the head, asserting that Plaintiffs had attacked him. Officers utilized their professional judgment to make a determination to arrest Plaintiffs which, under binding precedent, is all that they were required to do.

In opposition, Plaintiffs argue that the City’s failure to immediately obtain the video to corroborate Plaintiffs’ version of events “is tantamount to malice” (*NYSCEF 211 ¶ 55*). Plaintiffs cite no support for this contention, and in any event this argument effectively concedes that there was no *actual* malice. Accordingly, the false arrest and malicious prosecution claims merit dismissal. In the absence of any other claims against the City (or opposition to dismissing any cross-claims), all claims against the City are dismissed and the action shall be transferred to a non-City part.

### CONCLUSION/ORDER

For the reasons above, it is

**ORDERED** that Defendant Lewis Foods’ motion for summary judgment (009) is **GRANTED IN PART** to the extent that all of Plaintiffs’ false arrest and malicious prosecution claims against Lewis Foods are severed and dismissed; and it is further


**ORDERED** that Defendant Affinita’s motion for summary judgment (010) is **GRANTED IN PART** to the extent that Plaintiff Gaynor’s false arrest claim is severed and dismissed; and it is further

**ORDERED** that the City’s motion for summary judgment (011) is **GRANTED** in its entirety; and it is further

**ORDERED** that this action shall be transferred to a non-City part; and it is further

**ORDERED** that the City shall, within 30 days, e-file and serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.



12/15/2020  
New York, NY

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	