

<b>Delgrosso v McCann</b>
2021 NY Slip Op 30430(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 156555/2014
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<b>PRESENT:</b> <u>HON. LYLE E. FRANK</u>	<b>PART</b>	<b>52</b>
	<i>Justice</i>	
-----X	<b>INDEX NO.</b>	<u>156555/2014</u>
JOSEPH DELGROSSO,	<b>MOTION DATE</b>	<u>N/A</u>
	<b>MOTION SEQ. NO.</b>	<u>005</u>
Plaintiff,		

- v -

SUSAN MCCANN, CITY OF NEW YORK, DETECTIVE  
DAVID BEUTEL, POLICE OFFICER EVELIO FERNANDEZ,  
DETECTIVE THOMAS MCLAUGHLIN

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for DISMISSAL.

Plaintiff brings the instant action alleging false arrest/imprisonment, assault and battery, malicious prosecution, and violation of civil rights under both state and federal law. Defendants, City of New York, Police Officer Evelio Fernandez, and Detective Thomas McLaughlin (hereinafter collectively referred to as "City"), move for summary judgment on the grounds that plaintiff's arrest and prosecution was supported by probable cause. Plaintiff opposes the motion. For the reasons set forth below the City's motion is granted and the complaint is dismissed as to these entities.

**Facts**

Plaintiff and defendant, Susan McCann<sup>1</sup>, were in a relationship and dated from approximately 2000-2008. During that time and for some time after the relationship ceased, plaintiff and Ms. McCann had a long history of domestic violence allegations, which include

<sup>1</sup> Plaintiff's motion for default judgment was granted as against Ms. McCann on May 20, 2015.

multiple arrests, prosecutions with a conviction for felony assault in 2011, and a resultant seven-year order of protection, in favor of Ms. McCann.

On March 22, 2012, officers from the 114th Precinct responded to a 911 call and were met by Ms. McCann who alleged that the night before the plaintiff threw a chemical liquid at her, and that she believed it to be acid. The responding officers did make a report of the incident and Ms. McCann later that day contacted the Domestic Violence Squad. Detective Fernandez responded to Ms. McCann's call and visited her apartment, along with Police Officer Reyes. Detective Fernandez returned to the apartment later that day, took photographs of Ms. McCann's injuries and had Ms. McCann fill out a Domestic Incident Report (DIR). Ms. McCann wrote out the details of the incident and swore to the allegations contained in the DIR.

On March 23, 2012, the plaintiff was arrested and on July 19, 2012 plaintiff was indicted by a Grand Jury. On July 24, 2013, plaintiff was acquitted of all charges after a jury trial.

### **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 A.2d 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 AD 2d 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 Imprisonment/False Arrest 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. Furthermore, a Grand Jury indictment also creates a

presumption of probable cause for a prosecution. *Colon v City of New York*, 60 N.Y.2d 78, 82-83 [1983].

### **Assault and Battery**

The City moves for dismissal of the assault and battery claims based on the plaintiff's failure to allege or testify to any excessive force and on the grounds that any force used to arrest plaintiff was privileged. During oral argument, plaintiff denied that he failed to oppose the dismissal of assault and battery claims and argued that such claims were viable because of a lack of probable cause. As discussed above, this Court finds that probable cause is not lacking, thus the mere placing of handcuffs on plaintiff is privileged and because plaintiff has not alleged any unlawful touching by defendants the assault and battery claims are dismissed.

### **Discussion**

The City has established its prima facie entitlement to judgment as a matter of law<sup>2</sup>. In opposition, plaintiff argues that Ms. McCann was unreliable and that, in essence, the City was negligent in its investigation into her complaint. To the extent plaintiff claims that the officers did not adequately investigate is irrelevant to the inquiry and is therefore insufficient to defeat defendants' prima facie showing. See *Agront*, 294 AD2d 189 [1st Dept 2002] ("The alleged conflicting 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.")

Ms. McCann's statements to police, memorialized in her sworn DIR, that the plaintiff threw acid on her, the visible injuries, and the valid order of protection in favor of Ms. McCann

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<sup>2</sup> As to plaintiff's *Monell* claims, this Court finds that plaintiff cannot sustain such claims as he has not suffered any civil rights violations based upon the existence of probable cause. The Court will not address the adequacy or inadequacy of plaintiff's pleadings.

and against plaintiff, gave the officers ample probable cause to arrest. Accordingly, plaintiff has failed to raise a triable issue of fact and it is hereby

ORDERED that the City’s motion is granted in its entirety and the complaint is dismissed as against the City of New York, Police Officer Evelio Fernandez, and Detective Thomas McLaughlin; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

  
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LYLE E. FRANK, J.S.C.

2/16/2021  
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DATE

CHECK ONE:

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APPLICATION:

CHECK IF APPROPRIATE: