

**Crockett v City of New York**

2022 NY Slip Op 30959(U)

March 24, 2022

Supreme Court, New York County

Docket Number: Index No. 161857/2013

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** **11**

*Justice*

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GREGORY CROCKETT,

Plaintiff,

- v -

THE CITY OF NEW YORK, ANTHONY DESPOSITO

Defendant.

-----X

**INDEX NO.** 161857/2013

**MOTION DATE** 02/14/2020

**MOTION SEQ. NO.** 009

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 205, 207, 208, 210, 211, 212, 213,

were read on this motion to/for DISMISSAL.

Upon the foregoing cited papers, the Decision/Order of this Court is as follows<sup>1</sup>:

In this action for, *inter alia*, alleged false arrest, false imprisonment, and malicious prosecution, defendants, The City of New York and NYPD Detective Anthony Desposito, move pursuant to CPLR § 3212, for (1) dismissal of plaintiff's 42 U.S.C. § 1983 claims against NYPD Detective Anthony Desposito false arrest and false imprisonment; (2) dismissal of plaintiff's claim of malicious prosecution against The City of New York and NYPD Detective Anthony Desposito under New York State Law; (3) dismissal of plaintiff's claim of malicious prosecution against NYPD Detective Anthony Desposito under 42 U.S.C. § 1983; and (4) dismissal of plaintiff's 42 U.S.C. § 1983 claim against NYPD Detective Anthony Desposito for denial of the

<sup>1</sup> The Court would like to thank Alyson Bass Esq., for assisting in this matter.

right to a fair trial. Plaintiff opposes the motion and cross-moves for default judgment as defendants have failed to answer the amended complaint.<sup>2</sup>

**Undisputed Facts**

On November 29, 2011, members of the New York City Police Department (NYPD) executed a search warrant at 133 Grafton Street, Brooklyn, New York. As a result of the search, several persons were arrested and narcotic drugs, paraphernalia, and multiple firearms were seized. At the time of the execution of the search warrant plaintiff, Gregory Crockett, Sr., owner of the property, was not present. On December 9, 2011, plaintiff appeared at a surety hearing to post bail for two of his adult children who were arrested during the search. Defendant, Detective Anthony Desposito, was present at the surety hearing. At the hearing, plaintiff produced documentation to establish his ownership in the subject residence, which he intended to use as collateral for bail.

On December 14, 2011, plaintiff was arrested and charged with Penal Law ("hereinafter "PL") 220.16 (1): Criminal possession of a narcotic drug in the third degree; PL 265.03 1(b) : Criminal possession of a loaded firearm in the second degree; PL 265.02 01: Criminal possession of a weapon in the third degree; PL 265.02 05(i): Criminal possession of a weapon in the third degree, with such person possessing three or more firearms; PL 105.10 01: Conspiracy in the fourth degree; PL220.03: Criminal possession of a controlled substance in the seventh degree; and PL 22I.10 02: Criminal possession of marihuana in the fifth degree. Plaintiff was indicted by a grand jury and incarcerated for 22 days. On February 7, 2013, criminal charges against the plaintiff were dismissed.

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<sup>2</sup> The Court declines to review NYSCEF documents 215, 216 , 217 and 218. These documents were submitted months after the motion and cross-motion were fully submitted. The Court finds that to review these documents would be prejudicial to the plaintiff and thus declines to do so.

### **Summary Judgment Standard**

It is conventional practice that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.* 153 AD2d 520 [1st Dept 1989]. Further, summary judgment should not be granted where there is any doubt as to the existence of material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 [1980]. 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]. Courts have also recognized that 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 the non-moving party. *Assaf v Ropog Cab Corp.* 153 AD2d 520 [1st Dept 1989].

### **Applicable Law**

Constructive possession may be established when a suspect is present in an area where contraband is found in plain view (*United States v Heath*, 455 F.3d 52, 57 [2d Cir. 2006]; *United States v Holder*, 301 U.S. App. D.C. 57, 990 F.2d 1327, 1329 [D.C. Cir. 1993] (holding that keeping narcotics "openly on display" in a private residence was indicative that the residence's owner considered a visitor "sufficiently complicit to allow him a full view"); *Hollyfield v United States*, 407 F.2d 1326, 1326 [9th Cir. 1969] (holding that undercover agent's observation of cocaine and marijuana in plain view throughout an apartment containing six men provided probable cause to arrest all six occupants). Constructive possession requires a showing that the plaintiff exercised a knowing dominion and control over the property, by a sufficient level or

control over the area in which the contraband was found (*People v Manini*, 79 NY2d 561, 573 [1992]; *People v Diaz*, 68 AD3d 642, 643 [1st Dept 2009]).

It is well settled law that “[t]he existence or absence of probable cause is only to be decided by the Court where there ‘is no real dispute as to the facts and the proper inferences to be drawn therefrom’” *Vizcaino v City of New York*, 157 NYS3d 370 [1st Dept 2022] (citations omitted).

### **Discussion**

Preliminarily, the Court addresses plaintiff’s cross-motion and defendants’ response. The Court denies plaintiff’s cross-motion for default, as it is clear in the record that defendants previously appeared and continued to defend the matter and appear for depositions. Plaintiff has failed to establish that it would be prejudiced by the acceptance of defendants second answer to the amended complaint. Accordingly, plaintiff’s cross-motion is denied.

The crux of defendants’ arguments in support of its motion for summary judgment, is that probable cause existed to arrest the plaintiff, on the theory of constructive possession, thus all claims in the complaint must fail. The Court does not agree and finds that there is a question of fact as to the existence of probable cause.

While defendants cite many criminal cases where defendants, in those actions, are found to have “dominion and control” over the area where the contraband was seized, those cases are silent as to the defendant’s location at the time of the seizure of the contraband. It is this Court’s finding that instances of constructive possession are based on an individual’s proximity to the illegal items, whether it be drugs, drug paraphernalia, or weapons, and not an individual’s relationship to the premises where the items were seized. This Court is unaware, nor have defendants cited to any precedent where the theory of constructive possession extends to an

individual who is not present at the time a search warrant is executed, the contraband is seized and based solely on an individual’s ownership of the residence.

As to plaintiff’s allegations of denial of a fair trial and fabrication, defendants contend that the constructive possession charge was not dependent on whether plaintiff slept at the location and any discrepancy between the grand jury testimony and the affidavit underlying the search warrant harmless and not fabrication. This argument however is flawed. A finder of fact could determine that testimony as to the time spent at the subject location was used to bolster plaintiff’s relationship with the location and establish probable cause for an arrest where there otherwise may not be. As such, there is a question of fact as to these claims.

As to defendants qualified immunity argument, defendants contend that “arguable probable cause” rather than actual probable cause is required. The Court reiterates that a question of fact exists as to the existence of arguable probable cause. Even assuming the facts as defendants recite them, which is not the standard on a motion for summary judgment, the Court still cannot find that arguable probable cause exists as a matter of law.

Accordingly, it is hereby

ORDERED that defendants’ second answer to the amended complaint be deemed served timely *nunc pro tunc*; and it is further

ADJUDGED that defendants’ motion for summary judgment is denied in its entirety.

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3/24/2022  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: