

Roseborough v City of New York
2022 NY Slip Op 32550(U)
July 28, 2022
Supreme Court, New York County
Docket Number: Index No. 153252/2018
Judge: J. Mabelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----X
DARIUS ROSEBOROUGH,

Plaintiff,

-against-

THE CITY OF NEW YORK,
NYPD DETECTIVE WILFREDO ACEVEDO and
NYPD DETECTIVE JORGE MORBAN,

Defendants.
-----X

Index No.: 153252/2018

DECISION AND ORDER

Motion Sequence No. 001

HON. J. MACHELLE SWEETING, J.S.C.:

In this action for false arrest and malicious prosecution, defendants The City of New York (“the City”), Detective Wilfredo Acevedo (“Acevedo”) and Detective Jorge Morban (“Morban”) move, pursuant to Civil Practice Law and Rules (“CPLR”) Sections 3211 and 3212, for dismissal and/or summary judgment dismissing the complaint.

BACKGROUND

Plaintiff Darius Roseborough (“Roseborough”) was arrested on September 4, 2015, at 271 West 150th Street. On that date, an individual (the “complainant”) was shot in the abdomen inside Bill Bojangles Playground at 210 West 150th Street. At around 3:20 pm on that date, the police were called. After “canvassing” the scene, the police spoke with a 911 caller who, according to police, stated that they had witnessed the shooting, recognized the shooter, and that the shooter ran into 271 West 150th Street, apartment 5B. At approximately 4:30 pm on that date, Morban contacted the super of 271 West 150th Street to inquire about the tenants in apartment 5B. The super obtained the information and informed Morban that the tenants in that apartment were Roseborough and his mother. He stated that these were the only two names on the lease. At

approximately 4:46 pm on that day, the police sent a photo of Roseborough to the 911 caller and the 911 caller positively identified Roseborough as the shooter. Thereafter the police went to Roseborough's apartment and arrested him. At approximately 5:25 pm, the police sent a text message to the 911 caller, when plaintiff was brought out of the building, inquiring whether the man she identified was coming out of the building. She answered in the affirmative.

On September 5, 2015, at approximately 1:00 am, Acevedo, along with Morban, Detective Howell, Sergeant Connelly, and Detectives from the Manhattan North Homicide Squad executed a search warrant for 271 West 150 Street Apt 5B. At around 1:15 a.m., Acevedo found a revolver in Roseborough's room. The revolver was in a hidden structure media panel inside of the closet in the room. The police noted that the pistol was broken down and was missing the cylinder. At around 1:21 a.m., Morban found the cylinder in another room. The cylinder and two rounds were found inside of a shoe box.

On that same date, at approximately 2:20 p.m., Acevedo, along with Morban, interviewed the complainant at Harlem Hospital. The complainant's mother was present during the interview. He was in pain and had trouble speaking, but the complainant was able to speak and stated that he was on his bike at the Playground next to 271 West 150 street. While sitting on his bike, he was approached by a male known to him as Darius Roseborough. He stated that he knew Roseborough because of prior disputes between his sister and Roseborough's cousin. According to the complainant, Roseborough took a gun out and pointed it at the complainant. The complainant said: "Are you really gonna do this," and then Roseborough shot him. The complainant then ran towards Seventh Avenue. The police showed the complainant an array of photos from which the complainant identified Roseborough as the shooter. Specifically, according to the relevant police report, the complainant "pointed to slot #5" and stated that was Darius Roseborough. In the report,

Acevedo states: “I did [sic] the c/v’s mother [cross out] to sign for her son, because he was unable to write. [Cross out] did sign her name under the person the c/v picked out” (Nzekwu aff, exhibit E at 34).

According to the complaint, “on September 4, 2015, officers with the NYPD, including but not limited to, Acevedo and Morban, (hereinafter referred to collectively as "the officers"), forcibly entered plaintiff’s residence without a warrant, without justification, without consent, and without probable cause to believe that plaintiff committed or was about to commit any crime” (complaint, para. 10).

On September 22, 2016, the criminal case was dismissed against Roseborough pursuant to Criminal Procedure Law (“CPL”) Section 30.30. The People conceded this 30.30 dismissal since the complainant was completely uncooperative, and it was over 181 days of chargeable time to the People.

Plaintiff’s Deposition

During his deposition, plaintiff testified that, just prior to his arrest on September 4, 2015, he was sleeping in his home at 271 West 150th Street. According to his testimony, he was home on that day with his brother and his brother’s significant other, Joviane Tisdale (“Tisdale”), and he had not left home at all that day. He testified that he did not shoot anyone. He testified that he was awakened by the police knocking on his apartment door at around 2 or 3 in the afternoon. He stated that after he opened the door:

A: They didn’t ask me no questions. They turn me around, rough me up and put me in handcuffs.

Q: When you say turned you around and roughed you up, what do you mean?

A: Excessive force.

Q: What do you mean?

A: Grab me, pulled me out of my house, throw me into the hall, turn me around, bend my arms behind my back and put me in handcuffs

(Nzekwu Aff, Exhibit I at 38 [Docket No.:5]).

Plaintiff testified that he was grabbed by his arms and torso and handcuffed by police. He does not know which police officer grabbed him or handcuffed him. He testified that he was not injured after being thrown against the wall and after his arms were bent behind him (*id.* at 45). Plaintiff testified that the officers lied about him shooting someone and about him possessing a firearm (*id.* at 70-71). Tisdale, plaintiff's brother's boyfriend, was arrested along with plaintiff on that day. Plaintiff is not making any claim for physical injuries, just for mental and emotional damages (e.g., depression and anxiety). Plaintiff did not offer any records from a mental health provider.

Deposition of Detective Wilfredo Acevedo

Acevedo testified that on September 4, 2015, he learned that a man had been shot in the playground across from 271 West 150th Street. He was assigned as lead detective on the case. The steps he took to investigate this shooting, included "video canvases, interviews and conferrals" (Nzekwu Aff, Exhibit J at 26). He did not find any video cameras at the scene of the shooting. He interviewed the complainant, the complainant's mother, the DA handling the case, ADA Doherty, the plaintiff, and the plaintiff's brother's boyfriend, Tisdale. Other than the complainant, he did not speak to any witnesses to the shooting. He was part of a team of detectives at the 32nd Precinct investigating the shooting. This team included Detective Hull and Morban. There was also

personnel from Manhattan North Homicide who assisted with the investigation. Detective Hull spoke with the 911 caller, Mary King.

Acevedo went to the hospital on the afternoon of September 5, 2015, to speak to the shooting victim, Ronnie Lounllen. Lounllen was in visible pain and lying on the hospital bed, with his mother at his side. Acevedo testified that Lounllen told him that plaintiff was the shooter. Although Acevedo knew that another witness had identified plaintiff as the shooter Acevedo did not reveal this to Lounllen. Specifically, Acevedo testified as follows:

A: After I arrived at the scene -- arrived at the hospital, I introduced myself to his mother. I introduced myself to Ronnie Lounllen as well. I explained to him I was the case detective. Then I asked him what happened, what occurred. He gives me his story about what happened, what occurred. Then I conducted a photo array with him.

Q: What was the story he gave You?

MS. NZEKWA: Objection. You may answer.

A: He said he was sitting in the park when Darius approached him. He was by -- he had his bike, when Darius approached him, and there was some words exchanged, and then Darius shot him.

Q: Did he say anything else?

A: He said there was -- he knows Darius from prior disputes between family members

(Nzekwu Aff, Exhibit J at 52).

Acevedo could not recall whether Lounllen actually said plaintiff's name, and could not recall how he knew that Lounllen was referring specifically to plaintiff. Acevedo additionally showed Lounllen a photo array and asked Lounllen to state whether he recognized anyone in the photo array and how he recognized that person:

A: So I asked Mr. Lounllen did he recognize anyone in the photo array. His response was yes. Then I asked him what number is the person that. he recognized. He said #5. Then I asked where do you recognize this -- who did you recognize the person to be. He said "he shot me".

Q: Those were his exact records?

A: His exact words were "he shot me.

Q: Was there any hesitation at all on the victim's part in identifying Mr. Roseborough?

A: I don't remember

(Nzekwu Aff, Exhibit J at 63).

After referring to his notes, Acevedo recalled that Lounllen physically could not sign under plaintiff's photograph:

A: That he recognized Mr. Roseborough -- he recognized Darius, and he was placed in Slot #5. His response was Darius Roseborough, he knows him as Darius Roseborough, and that he could not sign. His mother signed for him

(Nzekwu Aff, Exhibit J at 66).

Acevedo further testified that he arrested plaintiff based upon the identification made by the 911 caller:

Q: So you say you also spoke to Mr. Roseborough, correct?

A: Yes.

Q: Were you present when he was arrested?

A: Yes.

Q: Why did you arrest Mr. Roseborough?

A: For shooting Mr. Lounilen.

Q: What was the basis of your belief prior to arresting Mr. Roseborough that he had shot Mr. Lounilen?

A: He was identified as the person who shot Mr. Lounilen.

Q: Identified by the 911 caller?

A: That is correct

(Nzekwu Aff, Exhibit J at 76-77).

Q: Is there anything that Mr. Roseborough said or did during your interrogation that in your mind supported the conclusion that he was the shooter?

MS. NZEKWA: Objection. You may answer.

A: All I can remember is his body language. It was indicative of someone who was sorry for like something that he did. That's all I can remember.

Q: What type of body language are you referring to?

A: He was down, he was nervous, and his eyes were watery, that I remember.

Q: Did you attribute that body language to guilt?

MS. NZEKWA: Objection. You may answer

A Yes

(Nzekwu Aff, Exhibit J at 103).

Deposition of Detective Jorge Morban

Morban learned that someone got shot in the playground at 7th Avenue and 150th Street on September 4, 2015, when the patrol supervisor called and asked him and his colleagues to respond to that location. They were told that the individual who was “responsible for the shooting had gone into a certain building, into a certain apartment” (Nzekwu Aff, Exhibit K at 16). He then spoke to the super of the building and got information about who occupied that apartment. Morban further testified that on the day of the shooting Detective Daniel Hull (“Hull”) informed him that a witness to the shooting observed the shooter going into the building located at 271 West 150th Street. The witness had said she was across the street from the park at the time she made that observation. The witness further “mentioned that she had known [the shooter] for a while and that she knows his family also” (Nzekwu Aff, Exhibit K at 24-25).

Morban acquired this information from speaking with Hull. The witness said the shooter was wearing a “red top and white shorts.” Further, Morban testified about what he did when he himself entered the building:

I went into the building, I was in communication with Det. Hull stating that the subject lived in Apt. 5B. I looked through the super's information that I saw in the vestibule, called the super, he put me on a brief hold, he answered. I explained to him the situation. I asked for the tenants who reside in Apt. 5B. He put me on a short brief hold. He came back and he gave me two names and it ended

(Nzekwu Aff, Exhibit K at 27).

He stated that the two names he was given were of Darius Roseborough and his mother. At that point, the police conducted a “DAS check” on plaintiff and were able to obtain a photograph of him from a previous arrest (Nzekwu Aff, Exhibit K at 28-29). They then went upstairs to the fifth floor to make the arrest. As the police were taking plaintiff out of the building, the “witness identified him as he was walking out . . .” (Nzekwu Aff, Exhibit K at 46). The police executed a search warrant at plaintiff’s apartment and recovered a revolver and bullets from the apartment. On September 10, 2015, plaintiff was indicted by a grand jury.

Deposition Testimony of Detective Daniel Hull

Hull testified that on September 4, 2015, he learned that an had been shot at Bojangles Playground (Nzekwu Aff, Exhibit L at 10). Hull assisted Acevedo in the investigation (*id.*). He generated police reports on the day of the shooting by inputting information into the computer concerning at least four conversations he had with the 911 caller that day (*id.* at 13). Before he contacted the 911 caller, Hull viewed an “NYPD Sprint” on a department cellphone that provided him with the information about the 911 caller’s communication to 911, and from that, he was able to get the contact information of the 911 caller (*id.* at 18-19). He spoke with the 911 caller on the day of the shooting (*id.* at 18). He did not know the 911 caller before speaking to her on the phone on the day of the shooting (*id.* at 20). She told him that she witnessed someone with a firearm (*id.* at 19-20). Hull testified that he texted a photo of plaintiff to the 911 caller, and she was able to confirm that plaintiff was the shooter (*id.* at 22-23). Hull testified that the 911 caller also identified plaintiff as the shooter when plaintiff was escorted out of his apartment. (*id.* at 23- 27). The confirmation was done via text message.

Hull additionally testified that it is police procedure to turn the police reports (also referred to as DD5's) over to the Assistant District Attorney if there will be a prosecution:

Q. Now, based upon your understanding of police procedure, after the DD-5s are generated, are they then turned over to the assistant district attorney in the event of a prosecution?

MS. NZEKWU: Objection. You may answer.

A. That's correct

(id. at 52).

After the detectives forwarded to prosecutors all the purported evidence, prosecutors requested bail at \$100,000. Plaintiff was unable to make bail, and was remanded to Riker's Island, where he remained for over a year before all charges against him were dismissed.

The defendants move to dismiss and for summary judgment in this action.

DISCUSSION

As a preliminary matter, plaintiff argues that the defendants' motion should be denied as defendants have failed to comply with Uniform Civil Rule Section 202.8-g. Specifically, plaintiff argues that the defendants' motion papers do not include a statement of facts in proper form:

(a) Upon any motion for summary judgment . . . there shall be annexed to the notice of motion a separate, short concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried . . .

(d) Each statement of material fact . . . pursuant to subdivision (a) . . . must be followed by citation to evidence submitted in support of or in opposition to the motion

(22 NYCRR Sec. 202.8-g).

It is plaintiff's contention that the defendants' statement is insufficient, as it contains only four sentences, that assert in conclusory form that there was probable cause for plaintiff's arrest. In response, defendants argue that the rule does not specify a particular length for the statement and that the defendants' statement is sufficiently supported by evidence as it refers to the officer's DD5's. Both the defendants' statements in their statement of facts and the accompanying

documentation from the police department, including the DD5's, offer the facts that purportedly support plaintiff's arrest. The statement of facts recounts the basis for the arrest:

After canvassing the scene, the police spoke with a 911 caller who identified plaintiff as the shooter.¹ Plaintiff was taken into custody after police located him at his apartment.² As plaintiff was being transported out of his apartment building, the 911 caller confirmed that plaintiff was the shooter

(City's affirmation in support at 2).

PO Hull's DD5 supports this statement with additional detail:

On September 4, 2015, at approximately 1615 hours I called (redacted) which is the phone number that called 911. Caller informed me that she was looking out of her window when she saw a male she knows from the block walk into the basketball court, display a firearm and shoot a boy on the court. Caller further states that she saw the victim run from the court east towards 7 avenue with the shooter running behind him. Caller further states that she saw the shooter shoot at the male one more time as he neared the corner and that the shooter then walked back to 271 west 150 street and enter the location. Caller informed me that the shooter was known to her and that she did recognize him. Caller states that the shooter was new to the neighborhood and had been living in 271 for approximately 3 months time. Caller states that she would see the shooter every day and that she knows that he has a brother and that the brother has a boyfriend that frequents the neighborhood. Caller also identified the shooter's brother as a male who had left the building while the police were [sic] in the street and was wearing what appeared to be short underwear of boxer type shorts

At 1646 hours the 911 caller was once again contacted by the undersigned and was asked again how she knew the shooter. Caller provided the same information above and was asked if a confirmatory photo could be sent to her phone via text message. Caller did agree and a photo was obtained from Detective Acevedo. This photo was sent to the caller and she responded "That look like him but he more slim now." At 1725 hours the Caller was sent another text message that stated "hey do you see him coming out" Caller responded "that him" and then responded "orange" I then sent back a message stating "Orange Shirt" and the caller replied "Yes" At 1817 hours I had a phone conversation with the caller. Caller informed me that the person she saw wearing the orange shirt was in fact the shooter. Caller states that Suspect had changed what he was wearing from when she saw him do the shooting

(City affirmation, exhibit E at 20).

This court finds that the defendants' statement of facts is satisfactory under the statutory requirements. Importantly, it offers the material facts as well as the corresponding documents from where the facts were taken.

Probable Cause to Arrest Plaintiff Based on Eyewitness's Identification

In support of its motion, the City argues that plaintiff's arrest was justified by probable cause since both the 911 caller and the complainant identified plaintiff as the assailant. Specifically, the defendants argue: "Probable cause existed from the 911 caller's statements. It was then strengthened by the recovery of a revolver and ammunition from plaintiff's apartment. Probable cause existed from plaintiff's identification by the complaining victim" (aff in reply at 8). The City states that on September 4, 2015, (the date of the shooting), the police communicated with the 911 caller and, based upon the 911 caller's detailed statements, and positive identification of plaintiff, there was probable cause to arrest plaintiff. The 911 caller provided "specifics of where plaintiff lived, who he lived with, and how she knew him" (aff in reply at 8). According to the police SPRINT reports, the 911 caller stated that after the shooting, plaintiff ran into 271 West 150th Street, apartment 5B, which is where the police found and arrested plaintiff that day. During his deposition, Acevedo identified Mary King as the 911 caller (Nzekwu Affirmation, Exhibit J at 31-32).

In opposition, plaintiff argues that the police did not have probable cause to make the arrest. First, plaintiff argues that the DD5 created by Acevedo the day after plaintiff's arrest reveals that his investigation into the 911 caller's background showed she "has eight prior arrests. . . . Most recent arrest is for attempted murder in 2002" (aff in opp at 6). Plaintiff argues that Mary Kings' previous criminal record should have raised doubts about her credibility.

Plaintiff further argues that he requested the texts from Mary King, in which she identified plaintiff as the shooter at the point where he was standing in handcuffs outside the building, but those texts were not provided by the City. Plaintiff argues that this failure to preserve evidence

“entitles this Court to draw an adverse inference against defendants on the issue of King’s purported identification of plaintiff” (aff in opp at 19).

Plaintiff additionally argues that there is evidence that Detective Acevedo coerced Joviane Tisdale (“Tisdale”) into signing a false written statement that plaintiff confessed to the shooting in front of Tisdale and plaintiff’s brother. On the day of the shooting, Tisdale, plaintiff’s brother’s boyfriend, was present in plaintiff’s apartment. Plaintiff and Tisdale were taken into custody simultaneously from that same apartment on the day of the shooting. According to police department records, produced by the City, Tisdale signed a statement while in the precinct that read, in part:

On Sept 4 at approximately 3:30 PM I was sleeping in 271 W 150 St. Apt 5B. I woke up and saw my boyfriend looking out the apartment window. A minute of two later Darius enters the living room and my Boyfriend says “what happened there.” Darius tells him “I just shot a boy” and my boyfriend starts to yell at him about that. Darius was sweaty and had no shirt on at this time. My boyfriend asked him why he shot the boy and he did not answer him

(Sivin Aff, Exhibit 1 at 1).

Annexed to plaintiff’s opposition papers is an affidavit from Tisdale in which Tisdale states that he was coerced by the police into making the statement, which Tisdale states is false. In his affidavit, Tisdale avers that, although he signed the statement, he did not write out the statement, he may not have read the entire statement before signing it, and that there are things in the statement that are untrue and that he never told the officers. Tisdale states that the police told him that he was in legal trouble and could go to jail since he was in the same apartment with plaintiff after the shooting. For this reason, out of fear of going to jail, he signed the statement that was presented to him at the precinct. In his affidavit, however, he states:

Darius never told me or anyone in my presence that he shot anyone, and I never told the detectives that Darius said that he shot anyone. . . and I never told the police that my boyfriend asked Darius why he shot the boy

(Tisdale affidavit, para. 4).

According to his deposition testimony, it was Detective Hull, who wrote out the statement for Tisdale:

Q. Why did you write out the statement as oppose [sic] to having Mr. Tisdale write out the statement?

A. It was my practice to ask everybody, uh, who was interviewed if they were more comfortable writing the statement or if they chose for me to write it and then they would read it. Uh, based on my handwriting being on this, it is only my assumption that Mr. Tisdale chose -- asked for me to write it

(Nzekwu Aff, Exhibit L at 40).

Plaintiff contends that Tisdale's coerced and false statement that plaintiff confessed that he shot the boy, calls into question Acevedo's credibility and the integrity of the entire underlying investigation. Likewise, it is plaintiff's position that defendants' failure to preserve the text messages wherein the 911 caller identified plaintiff permits a negative inference against the defendants' credibility. Finally, plaintiff takes issue with the victim's in-hospital purported identification of plaintiff as the assailant. According to plaintiff, Acevedo was unable to explain during his deposition how, if the victim allegedly was sitting up and was able to raise his hand and point out plaintiff in the photo array, he was not able to sign the array.

To plead a valid claim for false arrest, a plaintiff must establish: (1) the defendant intended to confine the plaintiff; (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. (*see Marrero v City of New York*, 33 AD3d 556, 556-557 [1st Dept 2006]). Where, as here, an arrest is made without a warrant, "a presumption arises that it was unlawful, and [defendants have] the burden of proving that ... the arrest was based on probable cause" (*Medina v City of New York*, 102 AD3d 101, 103 [1st Dept 2012] [internal citation omitted]). The existence of probable cause to arrest, which is the dispositive issue in this matter, "constitutes a complete defense to the claims of false arrest and unlawful imprisonment" (*id.*, *Marrero*, 33 AD3d at 557).

In order to establish probable cause for an arrest, “proof beyond a reasonable doubt is not required ‘but merely information sufficient to support a reasonable belief that an offense has been ... committed’” (*Roberts v City of New York*, 171 AD3d 139, 146 [1st Dept 2019] quoting *People v. Bigelow*, 66 NY2d 417 [1985]). Dismissal of a claim for false arrest is required when “‘the facts leading up to the arrest, and the inferences to be drawn therefrom, [are] not in dispute’” (*id.*, quoting *Agront v City of New York*, 294 AD2d 189, 189[1st Dept 2002]). “A party may act with probable cause even though mistaken, for a mistake of fact as to the identity of a criminal may be consistent with probable cause if the party acted reasonably under the circumstances in good faith” (*Colon v City of New York*, 60 NY2d 78, 82 [1983][internal citations omitted]).

Generally, “information provided by an identified citizen accusing another individual of a specified crime is legally sufficient to provide the police with probable cause to arrest” (*Iorio v City of New York*, 19 AD3d 452 [2d Dept 2005][internal quotation marks and citation omitted]). A police officer has probable cause to arrest a person when an eyewitness, including a victim, positively identifies the person from a photo array and it appears reasonable to believe that person. (*see also Sital v City of New York*, 60 AD3d 465, 466 [1st Dept 2009][“a reasonable, rational jury could have found that there was no probable cause for plaintiff’s arrest because the accusation from an identified citizen, which was the sole basis for the arrest, was not sufficiently reliable, given that the investigating officer had doubts about the witness’s credibility”]. On additional grounds, the Court held that “a rational jury could have determined that the officer’s failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances, and evidenced a lack of probable cause”:

The identification of plaintiff was also arguably contradicted by physical evidence from the crime scene that was consistent with a conflicting statement of an independent eyewitness, and the jury heard testimony showing that the investigating officer recognized plaintiff based on a prior arrest, at which time he had referred to plaintiff as ‘an animal’

(*id.*).

“Where there is conflicting evidence concerning the existence of probable cause to arrest the plaintiff, from which reasonable persons might draw different inferences, the question is one for the jury” (*Mendez v City of New York*, 137 AD3d 468, 470 [1st Dept 2016]). In *Mendez*, the plaintiff was charged with a possession of a weapon, where a weapon was found near his person outside and the police believed he placed it there. However, the Court noted that there were facts in dispute that undermined a finding of probable cause as a matter of law:

crucial facts preceding plaintiff’s arrest are in dispute, including whether he dropped an object onto the pile of garbage bags. Officer Shea did not observe plaintiff drop a gun or any other object onto the garbage, even though at the time his partner was engaged with plaintiff he was in close proximity, less than 10 feet away. Shea testified at trial that at no time did he observe an object in plaintiff’s hand, even in the moments their unmarked vehicle approached the men, coming within 10 to 15 feet of them. Plaintiff denies discarding any object; [Officer] Moreno maintains that he did, though his observations are recorded nowhere in the relevant paperwork, as defendants concede

(*id.*, 470-471).

This court finds that defendants have met their initial burden on their motion. Although plaintiff is able to establish the first three elements of a false arrest claim, plaintiff is not able to establish that the arrest was not otherwise privileged. By submitting the DD5’s, police reports, and the testimony of the officers and plaintiff, defendants have established probable cause for plaintiff’s arrest based upon the information provided by the 911 caller. According to this submission, defendants established that they had information sufficient to support a reasonable belief that an offense had been committed. In other words, based upon the statements of the 911 caller, the police had probable cause to arrest plaintiff for the shooting.

Pursuant to Acevedo's testimony, the police knew that a shooting had taken place in the playground on September 4, 2015. He testified that based on the 911 caller's statements, alone, there was probable cause for the arrest:

Q. What was the basis of your belief prior to arresting Mr. Roseborough that he had shot Mr. Lounllen?

A. He was identified as the person who shot Mr. Lounllen.

Q. Identified by the 911 caller?

A. That is correct.

Q. Mary King?

MS . NZEKWA: Objection. You may answer.

A: I don't remember her name exactly, but Miss King, I do remember the last name King.

Q. Other than his being allegedly identified by Miss King, was there any other basis upon which you believed that Mr. Roseborough had shot Mr. Lounllen?

A. No

(Nzekwu Aff, Exhibit J at 76-77).

The DD5 generated by Hull reveals that a 911 caller reported to police that she witnessed the crime, and saw the shooter, who she identified as someone who returned to apartment 5B after the shooting:

On September 4, 2015, at approximately 1615 hours I called ---- which is the phone number that called 911. Caller informed me that she was looking out of her window when she saw a male she knows from the block walk into the basketball court, display a firearm and shoot a boy on the court. Caller further states that she saw the victim run from the court east towards 7 avenue with the shooter running behind him. Caller further states that she saw the shooter shoot at the male one more time as he neared the corner and that the shooter than [sic] walked back to 271 west 150 street and enter the location

(Nzekwu Aff, Exhibit E).

The 911 caller offered detailed information to the police about the shooter and his presence in the building. She described for the police what the shooter was wearing and where he returned to after the shooting took place. She spoke of the shooter's brother and the

brother's boyfriend, which are details that were revealed to be accurate. According to the DD5, prior to plaintiff's arrest, the police sent a photograph of plaintiff to the 911 caller, who positively identified plaintiff as the shooter. It was reasonable for the police to rely on the 911 caller's statements and cases in this state have held that the police are entitled to rely on statements made by identified citizens where it appears reasonable to believe that individual. There is no indication on this record that at the time the statements were made, they were coerced or motivated by anything other than the interest in reporting a crime. The record is devoid of any evidence that objectively undermines the credibility of this witness's statements. For these reasons, defendants have established, as a matter of law, that there was probable cause for plaintiff's arrest. Accordingly, this court dismisses plaintiff's third cause of action for false arrest.

Probable Cause to Arrest Based Upon Grand Jury Indictment

Defendants argue that based upon the grand jury indictment, there is an inference of probable cause that undermines plaintiff's claim for malicious prosecution. In opposition, plaintiff argues that Officer Acevedo's role in Tisdale's statement and in the presentation and creation of this allegedly false evidence creates a question of fact concerning probable cause and the malicious prosecution claim.

To establish a valid claim for malicious prosecution, a plaintiff must prove 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 v State of New York*, 37 NY2d 451, 457 [1975]). In the context of a malicious prosecution action, probable cause

“consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty” (*Ramos v City of New York*, 285 AD2d 284, 299 [1st Dept 2001])[internal citations and quotation marks omitted]). The element of actual malice “means that the defendant must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served” (*Nardelli v Stamberg*, 44 NY2d 500, 502-503 [1978]). Lack of probable cause for the arrest satisfies the actual malice element.

Defendants argue that plaintiff’s indictment by a Grand Jury on September 10, 2015, for attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree, and reckless endangerment in the first degree establishes a presumption of probable cause.

In opposition, plaintiff argues that Acevedo’s attempt to coerce Tisdale into falsely implicating the plaintiff necessarily calls into question the integrity of the entire underlying investigation, and requires defendants’ motion to be denied, regardless of the existence of other identification evidence. Additionally, plaintiff argues that there are questions of fact with respect to the 911 caller’s identification of plaintiff, the identification of plaintiff from the photo array, the City’s failure to produce the text messages between the 911 caller and the police, and the revolver recovered inside plaintiff’s apartment. Plaintiff contends that these facts undermine the presumption created by the indictment.

In opposition, plaintiff refers to the following part of Tisdale’s statement:

On Sept 4 at approximately 3:30 PM I was sleeping in 271 W 150 St Apt. 5B. I woke up and saw my boyfriend looking out the apartment window. A minute or two later Darrius enter the living room and my Boyfriend says “what happened there.” Darrius tell him “I just shot a boy” and my boyfriend starts to yell at him about that. Darrius was sweaty and had no shirt on at this time. My boyfriend asked him why he shot the boy and he did not answer him

(Plaintiff Aff in opp, Exhibit 1).

Plaintiff notes in his deposition that, Acevedo “could not recall anything about that interview” with Tisdale (Plaintiff aff in opp at 4). Plaintiff also argues that Acevedo testified that he always has the witness write out the statement, 100% of the time, and that he is permitted to lie to a witness that he is interrogating but does not recall doing so with Tisdale. During his deposition, Hull testified that he wrote out the statement for Tisdale to sign. (Nzekwu affirmation, Exhibit L at 29-31). Neither Acevedo nor Hull recalled interrogating or seeing Tisdale on the date in question. In his affidavit, Tisdale states that the police coerced the statement from him by threatening incarceration:

The detectives then told me to sign a statement that one of them wrote out for me, and that if I signed the statement they would release me and I would not go to jail. I agreed to sign the statement, and after I did so, I was released from the police precinct. I do not recall I even read the statement before I signed it. . . . Also, there are things in that statement [that] are untrue and that I never said to the detectives or to anyone else. Darius never told me or anyone in my presence that he shot anyone

(Plaintiff aff in opp at 6).

In their motion, defendants argue that plaintiff failed to plead sufficient facts to establish that there was any fraud, perjury, suppression of evidence or that any officer acted in bad faith. It is defendants’ position that with or without Tisdale’s statements, the police had probable cause for the criminal proceeding, and that plaintiff has offered only conclusory allegations that false testimony was provided at the Grand Jury hearing without further facts or evidence, and that this is insufficient to overcome the presumption created by the indictment. Defendants argue that this court should not consider Tisdale’s affidavit, which was provided approximately six years after the underlying arrest of plaintiff, as it is self-serving and not credible. According to defendants, “at no point in the six years after plaintiff’s arrest did Mr. Tisdale withdraw or recant his prior statement or make a complaint about this alleged coercion to anyone. The first time he alleged

coercion is in opposition to the City's summary judgment motion" (aff in reply at 7). Thus, defendants argue, it is well within this Court's discretion to reject Mr. Tisdale's affidavit.

Pursuant to the law of this State, the presumption of probable cause attaches upon an accused's arraignment or indictment and may be overcome by evidence that "the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or [that they have] otherwise acted in bad faith" (*Mendez*, 137 AD3d at 471 [internal quotation marks and citation omitted]) "Since the police paperwork admittedly omitted mention of Detective Moreno's observations, there is a question as to whether Shea's testimony before the grand jury was a full and complete statement of the facts" (*id.*). Speculating that the police or the prosecution "could have done more or could have disclosed more," however, is not enough to rebut the presumption (*Gisondi v Town of Harrison*, 72 NY2d 280, 285 [1988]). "What is required is proof that the police conduct deviated egregiously from statutory requirements or accepted practices applicable in criminal cases" (*id.*).

In this State, the trial court may not weigh the evidence upon which the police acted or which was before the Grand Jury after the indictment has issued. If plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith

(*Colon v City of New York*, 60 NY2d 78, 83 [1983]).

Based upon the statements of the 911 caller, and the indictment, the defendants are entitled to a presumption of probable cause. However, for a claim of malicious prosecution, this presumption may be overcome if "the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or [that they have]

otherwise acted in bad faith” (*id.* at 82-83). Additionally, where it can be shown that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures, the presumption of probable cause may be overcome (*Hernandez v State of New York*, 228 AD2d 902, 904 [3d Dept 1996] citing *Lee v City of Mount Vernon*, 49 N.Y.2d 1041, 1043 [1980]).

“In the absence of some indication that the authorities became aware of exculpatory evidence between the time of the arrest and the subsequent prosecution that would undermine the probable cause which supported the arrest, no claim for malicious prosecution may lie” (*Jackson v Nassau Cty*, 552 F Supp3d 350, 371 [EDNY 2021][internal quotation marks and citation omitted]). “Information obtained ‘after the arrest, but before the commencement of proceedings, is relevant to the determination of probable cause’ for a malicious prosecution claim.” (*id.* [internal quotation marks and citation omitted]).

Plaintiff offers the sworn affidavit of Tisdale to establish that the police, including Acevedo, were allegedly fabricating evidence, after plaintiff’s arrest. Tisdale states that the police created a false statement and he felt coerced to sign it. Plaintiff argues that Tisdale’s statements overcome the probable cause created by the indictment. This court agrees.

“No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice” (*Ricciuti v N.Y.C. Transit Authority*, 124 F3d 123, 130 [2d Cir 1997]). Thus, despite probable cause for plaintiff’s arrest, a jury could find, based upon Tisdale’s sworn testimony, that both Hull and Acevedo were involved in

detaining plaintiff on a falsified statement that the police fabricated. A reasonable jury may additionally find that the police forwarded this false statement, which implicated plaintiff, to prosecutors. These facts raise questions about whether the police had probable cause to support a criminal proceeding and raise further questions about whether there was malice involved in the police conduct regarding plaintiff.

Further, this court does not find that the timing of Tisdale's affidavit undermines its content in creating a question of fact relating to the police conduct. Although the defendants presumably had an opportunity to depose Tisdale, this was not done. There are no other sworn statements by Tisdale on this record that contradict the statements set forth in his affidavit. The police themselves have no recollection of questioning Tisdale and offer no statements that make Tisdale's statements implausible as a matter of law. Since Acevedo was involved in the questioning of Tisdale, there are questions of fact about his participation in the alleged fabrication of evidence:

Acevedo interviewed Tisdale while he was at the precinct:

Q Now, you also indicated that you interviewed Mr. Roseborough's brother's boyfriend, Joviane Tisdale. When did that interview take Place?

A The day of the incident, after I spoke to Mr. Roseborough.

Q Did it also happen at the 32 Precinct?

A Yes.

Additionally, Acevedo spoke to the Assistant District Attorney about this case. As a result, the court denies defendants' motion for summary judgment as to the fourth cause of action for malicious prosecution to the extent it pertains to Acevedo. As there are no allegations implicating Morban in this claim, the court grants the motion for summary judgment as to Morban on this claim for malicious prosecution.

Plaintiff's claims for Failure to Intervene and Denial of a Fair Right to Trial

The defendants argue that plaintiff has failed to offer any evidentiary support for the alleged claims of failure to intervene and for the denial of his right to a fair trial. Defendants contend that plaintiff asserts these claims only in a conclusory fashion. In opposition, plaintiff argues that defendants have failed to meet their summary judgment burden, as defendants themselves have argued in a conclusory fashion that the claims must be dismissed.

In his complaint, plaintiff alleges that “Acevedo and Morban observed and/or had knowledge of the illegal and unconstitutional conduct of their fellow officers, had reasonable opportunities to intervene to prevent and/or stop that conduct, but deliberately failed to intervene” (Complaint, para. 41).

On a claim for failure to intervene, a plaintiff must allege “evidence that the reliance of one police officer upon the information provided by another officer violated the plaintiff's statutory or constitutional rights” (*see Braxton v City of New York*, 178 AD3d 1000, 1002 [2d Dept 2019]). “A non-intervening police officer becomes liable when ‘such failure permitted fellow officers to violate ... clearly established statutory or constitutional rights of which a reasonable person would have known’” (*Berg v Kelly*, 897 F3d 99, 113 [2d Cir 2018])[internal citations omitted]). A police officer “‘has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers’” (*Ricciuti v NYC Transit Authority*, 124 F3d at 129 [internal citation omitted]).

With respect to the denial of a fair right to trial claim (hereinafter referred to as “DOFRT”), plaintiff argues that without Tisdale's statement that plaintiff confessed to the shooting, “bail might not have been set—or may not have been set as high—and the DA even

may not have proceeded with the prosecution” (aff in opp at 17). Thus, according to plaintiff, there are questions of fact concerning whether defendants’ action constituted a DOFRT claim.

On their motion for summary judgment, defendants argue that plaintiff has provided no proof, only conclusory statements to support this claim. In *Ricciuti*, the Court restricted fair trial claims based on fabrication of information in cases where: (1) investigating official (2) fabricates information, (3) that is likely to influence a jury's verdict, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of life, liberty, or property as a result” (*see Ricciuti*, 124 F3d at 130). “When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial” (*Shabazz v Kailer*, 201 F Supp3d 386, 396 [SD NY 2016][internal quotation marks and citations omitted]) Even where the arrest and prosecution are supported by probable cause, thus defeating any claim for false arrest or malicious prosecution, “a plaintiff can still prevail on a fair trial claim if fabricated evidence causes some ‘further deprivation’ ” of the plaintiff's liberty (*see id.* at 396).

Probable cause is not a defense to a DOFRT claim (*Garnett v Undercover Officer 30039*, 838 F3d 265, 278 [2d Cir 2016]). “[U]sing probable cause as a shield would unduly limit an arrestee's right to relief when a police officer fabricates evidence. Because probable cause is no defense to a denial of the right to a fair trial claim, fair trial claims cover kinds of police misconduct not addressed by false arrest or malicious prosecution claims”(see *id.* at 278; *Ricciuti*, 124 F3d at 130 (“[A] police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable corruption of the truth-seeking function of the trial process.” [internal quotation marks and citations omitted])).

This court finds that defendants have met their burden, as a matter of law, with respect to plaintiff's DOFRT claim, but plaintiff has established, through Tisdale's affidavit, a question of fact pertaining to this claim. Although defendants argue that plaintiff has not offered specifics on this claim, this court finds otherwise. Tisdale's affidavit, a sworn statement based upon detailed facts, raises questions of fact about whether the police, specifically Acevedo and Hull, who is not a defendant in this action, fabricated false evidence and turned it over to the District Attorney. The court finds unavailing defendants' arguments that this affidavit, provided "approximately six years" after plaintiff's arrest, should be rejected as self-serving or as elicited solely to oppose summary judgment. Since the day of plaintiff's arrest, the defendants were aware of Tisdale's role in plaintiff's arrest and prosecution and had every opportunity to depose him, or seek a statement from him, as a non-party witness to this matter. The fact that this was not done does not make the affidavit self-serving or less credible.

The substance of Tisdale's statement, that plaintiff allegedly confessed to the shooting in Tisdale's presence, bears directly on plaintiff's guilt or innocence of the crimes charged. The defendants do not deny that Tisdale's statement was turned over and made a part of the District Attorney's file. The fact that defendants do not rely upon Tisdale's statement in their motion does not weaken plaintiff's position that this affidavit raises questions of material fact about the actions of the police. Although it cannot be determined on this record, whether the District Attorney considered Tisdale's statements in prosecuting plaintiff or in requesting bail, this does not undermine plaintiff's claim, as the allegations give rise to a reasonable inference that a jury could be influenced by the allegedly fabricated evidence.

Based upon Tisdale's affidavit, a jury could find that an investigating official fabricated information, which is likely to influence a jury's verdict and that was forwarded to prosecutors, which led to a deprivation of plaintiff's liberty. However, there are no allegations in this claim implicating the conduct of Morban. The court, therefore, denies defendants' motion only insofar as it pertains to Acevedo's conduct as to plaintiff's fifth cause of action for denial of a fair trial, and grants the motion on behalf of Morban.

Excessive Force Claim

With regard to this claim, defendants argue that the amount of force used in plaintiff's arrest was objectively reasonable under the circumstances of the arrest, and that plaintiff's concession that the arrest caused no physical pain or injury undermines plaintiff's claim of excessive force. In opposition, plaintiff argues that in circumstances such as this one, involving an arrest without probable cause, any use of force can be deemed excessive.

One who exercises reasonable force in the discharge of an official duty is not liable for an assault or battery (see *Biggs v City of New York*, 2010 WL 4628360, *8, 2010 US Dist LEXIS 121332, *31 [SD NY 2010] citing *Lippert v State*, 207 Misc 632 [Ct Cl 1955]). Under Sec. 1983 and state law, excessive force claims incorporate the Fourth Amendment's test of objective reasonableness (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844 [2d Dept 2011][internal quotation marks and citations omitted]). Under federal law, a plaintiff must show that the amount of force used was objectively unreasonable based upon the perspective of the officer at the time of the arrest (*id.*[internal quotation marks and citations omitted]). Moreover, if the plaintiff concedes that the force used caused no pain or injury, a claim of excessive force is not actionable (see *Boyd v City of New York*, 149 AD3d 683, 685 [2d Dept 2017][“Emotional pain and suffering cannot

form the basis of an excessive force claim”). Otherwise, any contact by an arresting officer with an arrested person—and some contact is always required—would be actionable.

Here, plaintiff testified that when he was arrested the police turned him around and “roughed” him up. Plaintiff went on to say that the police grabbed him, pulled him out into the hall, turned him around, bent his arm and put him in handcuffs. Plaintiff testified that he did not suffer any physical injuries as a result of his arrest and did not seek medical attention:

Q. You mentioned the term “excessive force” before, what did you mean by that?

A. They bent my arms, they threw me against the wall. They never gave me a chance to turn around and put my arms behind my back.

Q. Were you injured after being thrown against the wall?

A. No.

Q. Were you injured after having your arms bent behind you?

A. No.

Q. Did you ever complain to the officers about your arms being bent behind you?

A. No.

Q: Did you ever complain to the officers about being thrown against the wall?

A. No.

Q. Did you ever request medical attention?

A. No.

(Nzekwu aff, Exhibit I at 45).

Plaintiff further testified that he is not claiming physical injuries, but psychological injuries:

Q. Are you claiming any psychological injuries as a result of your arrest and incarceration?

A. Depression, anxiety, emotional distress.

Q. Other than mental and emotional distress were you claiming any physical parts of your body were injured?

A. No

(Nzekwu aff, Exhibit I at 80).

Additionally, plaintiff did not complain about the handcuffs (*id.* at 43).

As there is no claimed physical injury, plaintiff's excessive force claim must be dismissed. "The excessive force claim was also properly dismissed since plaintiff claims no physical injury" (*Suero v City of New York*, 180 AD3d 597, 597-598 [1st Dept 2020] (*see Davidson v City of New York*, 155 AD3d 544 [1st Dept 2017]). [T]he") "While plaintiff alleges that he was pulled from his bed, dragged down the stairs and pinned to the floor of the patrol car, he sought no medical treatment and only claims that he suffered 'red marks' on his back and neck. In light of defendants' belief that plaintiff was dangerous and given the absence of visible injuries, we concur with Supreme Court's finding that plaintiff's excessive force claim lacks merit" (*Higgins v City of Oneonta*, 208 AD2d 1067, 1070-1071 [3d Dept 1994] *see Harvey v Brandt*, 254 AD2d 718, 719 [4th Dept 1998][the Court denied summary judgment on excessive force claim where, "according to plaintiff, [the officer] handcuffed her by forcibly jerking her hand behind her back and pushing her forward, causing neck and back injuries that required medical treatment"].

Here, plaintiff does not allege any physical injuries and he did not seek medical attention. As the police were arresting plaintiff for an alleged shooting, they were not, as plaintiff suggests, required to give plaintiff a chance to turn around and put his arms behind his back. Plaintiff's claim for excessive force is, therefore, dismissed.

Plaintiff's claim for assault and battery, however, is determined using a different analysis. "To recover damages for battery founded on bodily contact, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended

to make the contact without the plaintiff's consent" (*Johnson v Suffolk County Police Dept*, 245 AD2d 340, 341 [2d Dept 1997][internal quotation marks and citations omitted]). "As the arrest of the plaintiff by the defendant police officer Stephen E. Brussell was unlawful, Brussell committed a battery when he touched the plaintiff during that arrest" (*id.*).

Here, because the police had probable cause for plaintiff's arrest, an assault and battery claim cannot lie from the bodily contact that occurred during the arrest. The court dismisses plaintiff's first cause of action for excessive force.

Plaintiff's Claim for Deprivation of Civil Rights

In the eighth cause of action, plaintiff alleges, pursuant to *Monell v Department of Social Services*, 436 US 658 [1977], that the City was deliberately indifferent to the alleged pattern of abuse by Morban and Acevedo.

Plaintiff does not oppose municipal defendants' motion on this ground. In his opposition, he states: "[p]laintiff does not oppose defendants' motion to the extent it seeks to dismiss plaintiff's *Monell* Claim" (aff in opp at 2).

"To hold a municipality liable under Section 1983 . . . a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy (*Vargas v City of New York*, 105 AD3d 834, 837 [2d Dept 2013], citing *Monell v New York City Dept. of Social Servs.*, 436 US 658 [1977]). As the plaintiff concedes this doctrine, there can be no liability for the City as to the Section 1983 claims. Further, because there is no notice of claim filed in this action, there are no viable state claims against the City.

The court, therefore, dismisses plaintiff's complaint against the City of New York.

Plaintiff's Allegations of Brady Violations

In the sixth cause of action, plaintiff alleges that Morban and Acevedo withheld exculpatory evidence and information from plaintiff, the District Attorney's office, and the Grand Jury in violation of plaintiff's rights under the Fourteenth Amendment. Specifically, plaintiff alleges:

That the withheld exculpatory evidence included, but was not limited to, evidence that the victim of the shooting was in the intensive care unit of a hospital and was unable to be interviewed, to have visitors, or to identify the perpetrator of the crime, evidence that no fingerprints or DNA matching that of plaintiff were recovered from the gun or portions of the gun that allegedly were recovered from plaintiff's residence, and other evidence that tended to exculpate plaintiff

(Nzekwu aff, Exhibit A, para. 20).

In their motion, defendants argue that plaintiff failed to plead this claim with sufficient particularity and, therefore, the court should dismiss this claim. In opposition, plaintiff contends that defendants have failed to meet their initial burden for summary judgment. Specifically, plaintiff argues: "Defendants cannot prevail on their summary judgment motion with respect to plaintiff's 'Denial of Fair Trial' and 'Brady' claims merely by alleging in conclusory fashion that there is no evidence in the record to support any such claim" (aff in opp at 12). Defendants further argue that "the documents exchanged in the DA file reflect that plaintiff was aware of the witnesses and the NYPD laboratory results" (aff in reply at 14).

A defendant has a constitutional right to be informed of exculpatory information known to the State (*see Brady v Maryland*, 373 US 83 [1963]). The suppression of evidence favorable to the accused is sufficient to amount to a denial of due process (*id.* at 1196). Such suppression denies the defendant due process when the nondisclosure of even unrequested exculpatory evidence is 'highly material' to the defense (*see People v Martin*, 240 Ad2d 5, 8 [1st Dept 1998]).

This court finds that the defendants have met their burden on this claim, in that this claim was alleged in a conclusory fashion with no factual detail as to what exculpatory information was withheld from plaintiff. Accordingly, the sixth cause of action for a Brady violation is dismissed.

Plaintiff's Claim for Illegal Search and Seizure

In the second cause of action, plaintiff alleges that his arrest and imprisonment support a claim for an illegal search and seizure by Acevedo and Morban in violation of the Fourth and Fourteenth Amendments. Specifically, plaintiff alleges: “officers forcibly enter[ed] plaintiff’s residence without a warrant and then forcibly search[ed] plaintiff and plaintiff’s residence” (exhibit A, para. 30). Defendants argue that the search did not violate plaintiff’s constitutional rights as there was probable cause for the arrest and the police properly obtained a search warrant prior to the search. Plaintiff does not offer any opposition to defendants’ motion on this ground. Accordingly, plaintiff’s second cause of action for illegal search and seizure is dismissed.

The Defendant Officers and Qualified Immunity

The individual defendant officers argue that they are entitled to qualified immunity from civil suit as there exists probable cause to arrest in this matter.

“The qualified immunity doctrine protects government officials from suits seeking to impose personal liability for money damages based on unsettled rights or on conduct that was not objectively reasonable” (*Rohman v New York City Transit Authority* (NYCTA), 215 F3d 208, 216 [2d Cir 2000]). “A government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known . . .” (*Kravitz v Police Dept. of City of Hudson*, 285 AD2d 716, 717 [3d Dept 2001][internal quotation marks and citations omitted]). “The defendant must establish that he [or she] had an objectively reasonable belief that his [or her] act violated no clearly established rights . . .” (*Cavanaugh v Doherty*, 243 AD2d 92, 97 [3d Dept 1998][quotation marks and citations omitted]).

This court finds that Morban is entitled to qualified immunity, as neither the complaint, nor any of the evidence presented to the court sustains an allegation that Morban violated plaintiff’s constitutional or statutory rights. However, the allegations against Acevedo impugn his conduct and raise questions about whether he had an objectively reasonable belief that his conduct violated plaintiff’s established rights, Acevedo is not protected from suit and entitled to a finding of qualified immunity.

CONCLUSION

In accordance with all of the reasons set forth herein, it is hereby:

ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212, and defendants' motion to dismiss, pursuant to CPLR 3211, (Motion Sequence 001) is granted to the extent that the complaint against defendants the City of New York and Detective Jorge Morban is dismissed; and it is further

ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212 and defendants' motion to dismiss, pursuant to CPLR 3211, (Motion Sequence 001), is denied as to Detective Wilfredo Acevedo on the fourth and fifth causes of action for malicious prosecution and denial of fair trial only, and the remaining causes of action are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 28, 2022
New York, New York

ENTER:



HON. J. MACHELLE SWEETING, J.S.C.