

Onilude v City of New York

2022 NY Slip Op 34724(U)

August 18, 2022

Supreme Court, Bronx County

Docket Number: Index No. 309622/2009E

Judge: Paul L. Alpert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

-----X
TOKUNBO ONILUDE

Index No.: 309622/2009E

Plaintiff,

-against-

DECISION/ORDER

THE CITY OF NEW YORK, JORGE CHICO,
KEITH KUCERAK, and GREGORY HERNANDEZ

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the order to show cause as indicated below:

Papers	Numbered
Plaintiff's Post Trial Motion & Affirmation in Support & Exhibits	1
Defendant's Post Trial Motion in Opposition & Exhibits.....	2
Defendant's Memorandum of Law in Support.....	3
Affirmation in Opposition to Defendant's Post -Trial Motion.....	4
Plaintiff's Memorandum of Law in Opposition to Defendant's Post - Trial Motion.....	5
Defendant's Memorandum of Law in Reply.....	6

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action seeking damages for false arrest, malicious prosecution and a violation of his rights pursuant to 42 USC § 1983. After trial the jury rendered a verdict finding the defendants liable for falsely arresting the plaintiff and awarded the plaintiff \$25,000.00 for pain and suffering. In addition, they also awarded the plaintiff \$75,000.00 in punitive damages for defendant Jorge Chico's egregious actions. The plaintiff now moves under

CPLR § 4404(a) and 5501(c) for a new trial on the issue of compensatory damages for false arrest, unless defendants stipulate to a significant additur of the award. The defendants oppose the plaintiff's post-trial motion and move pursuant to CPLR § 4404 to set aside the verdict. The plaintiff opposes.

The court will address the defendants' post-trial motion first. The defendants contend that they are entitled to a judgment to set aside the verdict because there is undisputable trial evidence that proves there was probable cause for the plaintiff's arrest as a matter of law. They also claim that they are entitled to qualified immunity. The City of New York argues that the plaintiff has no viable claim for common law or federal false arrest.

The defendants maintain that the alleged eye witness to the crime, Andrea Lounds, testified that she observed the plaintiff before and after a livery cab driver was stabbed on September 7, 2008. She reported her observations to the police on September 8, 2008. She identified the plaintiff as one of the perpetrators of the crime about eight days after she reported her observations to the police and gave a description and location of where she saw him. She also signed a photograph of plaintiff that she was shown in a photo array after his arrest. The defendants argue that this testimony proves that there was probable cause to arrest the plaintiff and therefore the verdict should be set aside.

The plaintiff opposes the cross-motion and argues that the defendants did not prove that probable cause existed for the plaintiff's arrest. He argues that a generalized description of a person's race and common clothing does not provide police with the even lenient standard of reasonable suspicion required to stop and frisk a man of the same race and clothing (see *People*

v. Dubinsky, 289 AD2d 415 [2nd Dept 2001]). He also argues that while an identified citizen’s accusation of a specific crime against another individual known to them is generally sufficient to establish probable cause to arrest, such an accusation “does not necessarily establish [probable cause]” (see *Medina v. City of New York*, 102 Ad3d 101 [1st Dept 2012]).

In order to prevail on a post-trial motion pursuant to CPLR § 4404, the moving party must demonstrate that “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Parkin v. Cornell University, Inc.*, 78 NY2d 523 [1991]).

Courts have held that information provided by an identified citizen accusing another individual of a specific crime is legally sufficient to provide the police with probable cause to arrest (see, *People v. Cruz*, 139 AD2d 581 [2nd Dept 1988]; *People v. Phillips*, 120 AD2d 621 [2nd Dept 1986]; *Medina v. City of New York*, 102 AD3d 101[1st Dept. 2012]). However, an exception exists if there are materially impeaching circumstances or grounds for questioning the complainant’s credibility (see *Medina* at 104; *Roberts v. City of New York*, 171 AD3d 139 [1st Dept. 2019]). The existence of probable cause constitutes a “complete defense” to the claims of false arrest and malicious prosecution (*Cintron v. City of New York*, 180 AD3d 602 [1st Dept 2020]).

In the instant matter, Andrea Lounds testified that she observed the victim’s livery cab move down Hering Avenue while she was at her window washing dishes. She also stated that she recognized two passengers in the cab because she saw them on a regular basis in her neighborhood for more than a year, but did not know their names. She testified that on

September 8, 2008, she told Detective Chico that she recognized the two men that ran out of the livery cab because they live on Hering (see transcript pg. 496 lines 7 - 18). She also testified that Detective Chico asked her “if you see these guys would you turn them in?” and her response was “yes” (see transcript pg. 494 line 22 - 24). On September 16, 2008 she was on her way to work and recognized one of the two men from the livery cab attack sitting on the stoops (see transcript pg. 500 lines 10 - 12). She called the precinct and told them she recognized the man on the stoops as one of the perpetrators. She told them she saw a police car on Yates Avenue and she testified that the person on the phone told her to tell the officers in the patrol car what she just observed. Mrs. Lounds approached the police car while she still had the precinct on the line on her phone. Officers Hernandez and Kucerak were in the patrol car. She told the officers that she observed one of the perpetrators in the livery cab attack and that the person was on Hering Avenue. She described him as short with a dark complexion. She testified that she told the officers that he wore a gray or blue hoody. She testified that on September 16, 2008, Detective Chico showed her a photograph, she recognized the plaintiff in the photograph and signed her name under the photo.

Detective Hernandez testified in sum and substance that Andrea Lounds approached the police vehicle and asked if they were aware of the livery cab driver stabbing. He replied that he and his partner were aware of the attack. He remembered hearing about the crime during roll call from his sergeant (see Hernandez transcript pg. 907 lines 21- 24). He testified that Mrs. Lounds told him that she saw one of the individuals involved in the livery cab driver attack. She gave them a description of the alleged perpetrator wearing a gray or black hoody (see

Hernandez transcript pg. 880 lines 11- 17). Hernandez looked down Burke Avenue and saw an individual wearing a gray hoody walking down the street (see Hernandez transcript pg. 913 lines 6-9). He then called the detective squad and informed them that a female by the name of Andrea Lounds told them that she may have seen a person involved with the stabbing incident. The detective responded to Hernandez that they know Mrs. Lounds and that she is a witness in the case. He also testified that the detective told him to place the person Mrs. Lounds described to the officer under arrest and bring him into the precinct (see Hernandez transcript pg. 905 lines 4 – 12.) Mr. Hernandez said he did not take down Mrs. Lounds information because the 49th squad had her information already (see Hernandez transcript pg. 888 lines 20-25).

The plaintiff argues that the defendants should have questioned Mrs. Lounds credibility. He argues that Mrs. Lounds affirmed that she could not physically see the person she described to officers Kucerak and Hernandez. He claims that Lounds' testimony is questionable since she testified that she was on Yates Avenue speaking with the officers at the time the plaintiff she allegedly saw was on Hering Avenue. The plaintiff also argues that Lounds failed to verify that the person the officers arrested was the one she pointed out.

The testimony by Mrs. Lounds, Detective Hernandez demonstrate that Officers Hernandez and Kucerak had probable cause to arrest the plaintiff. Prior to the plaintiff's arrest Mrs. Lounds told Detective Chico that she observed and recognized the men running from the cab because they live on Hering Avenue. Mrs. Lounds also testified that she told officers Hernandez and Kucerak that she saw the alleged perpetrator on Hering Avenue and described him with a dark complexion wearing a gray or black hoody. Officers Hernandez and Kucerak

already were informed about the livery cab attack from a prior roll call. Detective Hernandez was told by a detective in the detective squad to arrest the person that Mrs. Lounds described to him since she already was known to the detective squad as a witness to the crime. She described the alleged perpetrator's hoody which matched the hoody that the plaintiff was wearing on Hering Avenue as observed by Detective Hernandez.

The plaintiff argues that Mrs. Lounds' generalized description was too general to give rise to probable cause. However, the decision to arrest the plaintiff was not based solely on Mrs. Lounds' description of the plaintiff. The defendants' decision to arrest the plaintiff was based on her description of the plaintiff to the patrol officers and the fact that Mrs. Lounds was an eyewitness to the crime who previously notified the defendants that she recognized the men fleeing from the livery cab.

The plaintiff also states that Mrs. Lounds' stated several times on direct examination that she did not physically see the person at the time she was describing him to officers Hernandez and Kucerak. This argument is unavailing. Mrs. Lounds saw the person she was describing as she testified she walked past him (see Lounds transcript pg. 502 lines 1- 14). She clearly saw the person as she walked past hhm. She no longer had the person in her line of vision when she alerted officers Hernandez and Kucerak because their patrol car was on Yates Avenue not Burke Avenue.

The plaintiff attempts to demonstrate that there was exculpatory evidence which the defendants should not have ignored. He argues that Andrea Lounds and another witness Ryien Barber testified that they were unable to identify anyone when Detective Chico showed them the photo array. However, this is information that was not available to the arresting officers at the

time that they arrested the plaintiff.

Probable cause is “merely information sufficient to support a reasonable belief that an offense has been or is being committed by the suspected individual” (*De Lourdes Torres v. Jones*, 26 NY3d 529 [1st Dept 2021]). Generally, “an eyewitness-victim of a crime can provide probable cause for the arrest of his assailant despite the fact that his reliability has not been previously established or his information corroborated” (*Jones v. City of New York*, 206 AD3d 635 [2022]; *Medina Supra* 103). Probable cause is established “absent materially impeaching circumstances” where the victim of an offense communicates to the arresting officer information affording a credible ground for believing the offense was committed and identifies the accused as the perpetrator.” (*Medina Supra* 104).

In *Jones v. City of New York, supra*, a case involving a similar set of facts to those here, the Appellate Court reversed a jury finding of false arrest finding, inter alia, that “discrepancies and omissions in various police reports as well as the arresting officer’s memo book did not present materially impeaching circumstances that a jury could reasonably interpret as discrediting the officer’s testimony that the victim identified the plaintiff as the shooter or the identification procedure generally.” Here, although Detective Chico’s investigation of the incident seemed to have been flawed and incomplete, this fact did not present materially impeaching evidence regarding Mrs. Lound’s identification of the plaintiff as the perpetrator of the crime to officers Hernandez and Kucerak. Officers Hernandez and Kucerak had no reason to doubt or question the information that Mrs. Lounds gave them. Although officers Hernandez and Kucerak did not establish her reliability or corroborate her information, as an eyewitness to the crime, the information she gave the officers at the time provided credible grounds for believing a crime was committed and that the plaintiff was one of the perpetrators.

The defendants demonstrated at trial that probable cause existed to arrest the plaintiff as a

matter of law. The plaintiff did not demonstrate that there were materially impeaching circumstances or grounds for questioning Mrs. Lounds credibility at the time of the plaintiff's arrest. The defendants' post-trial motion to set aside the verdict pursuant to CPLR § 4404 is therefore granted and the plaintiff's post-trial motion is denied.

Based on the foregoing, it is hereby;

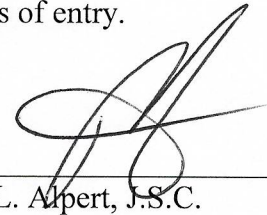
ORDERED AND ADJUDGED, that the defendant's post-trial motion to set aside the verdict is granted, and it is further,

ORDERED AND ADJUDGED, that the plaintiff's post-trial motion is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants shall serve a copy of this decision and order upon the plaintiff with notice of entry within twenty (20) days of entry.

This constitutes the decision and order of the court.

Dated: August 18, 2022



Hon. Paul L. Alpert, J.S.C.