

Dawoodi v City of New York
2022 NY Slip Op 35038(U)
March 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 503750/2015
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

Index No. 503750/2015

ALI DAWOODI,

Plaintiff(s),

DECISION

-against-

Present:

Hon. Judge Bernard J. Graham

Supreme Court Justice

THE CITY OF NEW YORK, THOMAS VARGHESE
SHEILD #2277, KINGS COUNTY DISTRICT
ATTORNEY OFFICE, DOES 1-10,

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion :
Defendant's Motion Pursuant to CPLR §4401 to Dismiss Plaintiff's Complaint:

Papers	Numbered
Defendants' Memorandum of Law in Support of Motion for a Directed Verdict.....	1 _____
Plaintiff's Opposition to Motion for a Directed Verdict.....	2 _____
Other: _____	_____

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Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Decision:

A jury trial was conducted of the captioned case in Part 36 of this Court before the undersigned, Justice Bernard J. Graham. The trial was conducted between January 24, 2022 to January 26, 2022. After a reasonable time for deliberation by the jurors in the trial, and the jurors informing the Court that a verdict could not be agreed to, the Court declared a mistrial.

The instant motion for a directed verdict had been made by counsel for defendants during the trial (the motion was made prior to the close of plaintiff's direct case). The Court conducted no argument or proceedings on the motion until after the declaration of mistrial when argument was heard (see discussion below).

The defendants' motion for a directed verdict pursuant to CPLR §4401 ("the CPLR 4401 Motion") seeks, inter alia, dismissal of the plaintiff's complaint as being time-barred; as failing to comply with General Municipal Law §50-E; that plaintiff's false arrest claim and malicious prosecution claim must be dismissed; that no evidence supports plaintiff's claims for assault and battery, intentional infliction of emotional distress, negligence or negligent hiring by the defendant City of New York.

Plaintiff opposes the motion for a directed verdict arguing, inter alia, that the motion is facially deficient and untimely and in addition, that the underlying claims are supported by the facts in this case.

Factual Background

The undisputed facts in this case show that the defendant Detective Thomas Varghese ("Detective Varghese") is employed as a New York City Police Officer and was assigned to a reported burglary case on or about April 24, 2012. As part of his investigation of the complaint he obtained surveillance video which was recorded at the location of the alleged burglary in Brooklyn. Detective Varghese testified at trial that he retrieved the surveillance video and showed the video to the resident of the apartment which had been burglarized. (The surveillance video was admitted into evidence as defendants' Ex. "A"). According to the testimony of Detective Varghese, the resident of the subject apartment, Johnny St. Victor, recognized the man shown in the video as someone "just hanging out in the hallway of his apartment building". (See Trial Tran. Pg. 76, Ln 6-14).

On April 29, 2012 at approximately 10:00 pm, Mr. St. Victor contacted Detective Varghese claiming the alleged burglar was present on the street near his home. A description of a man with a doo rag, blue jacket and thin build was given to Detective Varghese by Mr. St. Victor who informed the Detective that the suspect was on the street in the vicinity of 526 East 26th Street in Brooklyn. The plaintiff, Mr. Dawoodi, was then arrested by Detective Varghese, who testified that he arrested the plaintiff as he matched the description given by Mr. St. Victor. Mr. St. Victor purportedly identified Mr. Dawoodi at the scene when he drove past in a car.

Mr. Dawoodi was searched at the time of the arrest and eight (8) glassine envelopes were found in his jacket. The defendant's counsel produced evidence that one envelope was lab tested and marijuana was found to be in the envelope. (See Plaintiff's Ex. "13" in evidence).

Mr. Dawoodi was indicted by a Grand Jury on or about May 17, 2012, on the

following charges: Burglary 2d Degree; Burglary 3d Degree; Criminal Trespass; Petit Larceny; and unlawful possession of Marijuana.

Mr. Dawoodi testified that he was unable to post bail in this case and was remanded to Rikers Island and the Brooklyn House of Detention for a period of approximately four (4) months while his case was pending. Mr. Dawoodi was released from custody on September 18, 2012, when he was able to post bail as a condition of his release.

The record indicates that Mr. Dawoodi accepted a plea agreement on February 4, 2013 which was allocuted before Hon. Justice William Miller. Mr. Dawoodi pled guilty to unlawful possession of marijuana which was specifically stated to be a "violation" pursuant to CPL 221.05 and "in full satisfaction of the indictment". (See Plea Allocution Transcript pg 3, ln 3-7).

This action was commenced by service of a summons and complaint upon the defendants on December 18, 2014. Plaintiff's counsel has offered proof of a filing of a Notice of Claim against the City of New York as required by General Municipal Law §50-e (the instant motion had incorrectly alleged that the Notice of Claim had not been filed. That portion of the motion is deemed moot).

Discussion

In the CPLR 4401 motion brought by defendants' counsel the Court is required to address several issues which are raised by plaintiff's lawsuit. Defendants have moved to dismiss the action as the claims are argued to be time barred by the applicable statute of limitations. The defendants also assert that the existence of certain facts in this case require the Court to dismiss the plaintiff's action. Specifically, the defendants argue that the grand jury indictment of the plaintiff establishes a rebuttable presumption of probable cause for plaintiff's arrest; and plaintiff's guilty plea on February 4, 2013, to a reduced charge of marijuana possession (PL §221.05) makes the plaintiff's lawsuit untenable.

The plaintiff, by his attorneys, responds to the arguments raised in the defendants' CPLR 4401 motion by referring to a recent change in New York State law regarding marijuana convictions. The plaintiff's counsel has submitted proof that Mr. Dawoodi has obtained a Certificate of Disposition Dismissal which serves to vacate his guilty plea (to the possession of marijuana) and that as a result of the change in legislation (CPL 160.6) "the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status occupied before the arrest and prosecution." (See Certificate of Disposition Dismissal annexed to the Plaintiff's Opposition to the CPLR 4401 Motion as Ex. "3" and "4").

It is plaintiff's contention, inter alia, that the legislative change amending the criminal procedure law to allow an expungement of marijuana convictions constitutes a "favorable termination" of plaintiff's criminal conviction and, consequently, permits a lawsuit to be maintained for false arrest and malicious prosecution as well as a federal claim for being denied certain constitutional protections. Plaintiff also argues that the expungement of the marijuana possession guilty plea effectively changes the date on which his claims accrued to August 28, 2019, when the conviction was vacated. Under this reasoning, the plaintiff's counsel concludes that each of the plaintiffs state law claims is not barred by the one year and 90 day statute of limitations set forth in CPLR §217-a.

It is also plaintiff's contention that the issue of probable cause must be determined by the jury as it is a fact question in this case. (See *Hernandez v Pappco Holding Co., Ltd*, 136 AD3d 981[2d Dept. 2016]). Plaintiff contends that when there is "conflicting evidence from which different persons might draw different inferences, the question is for the trier of fact". (See Plaintiff's Opposition to the CPLR 4401 Motion, pg 6). As to the guilty plea entered by the plaintiff, it is counsel's position that the guilty plea does not constitute probable cause as plaintiff never pled guilty to the burglary charge. (See Plaintiff's Opp. pg 6).

Timeliness of the CPLR 4401 Motion

It is the general rule that a motion for a directed verdict must not be determined until the party opposing the motion has completed the presentation of their case. (*Cromedy v City of New York*, 176 AD3d 545 [1st Dept. 2019], see also *Griffin v Clinton Green South, LLC*, 98 AD3d 41 [1st Dept. 2012]). In this case, defendants' counsel had made the motion prior to the conclusion of plaintiff counsel's direct case during the trial. The Court allowed the motion to be submitted to the Court but ruled that any decision would be reserved. Only after the declaration of the mistrial by this Court and a scheduled argument on the CPLR 4401 Motion set for February 16, 2022, at which time opposition to the motion was submitted and argument was heard by the respective parties, did the Court deem the motion to be made. Accordingly, there was no consideration of the motion to dismiss until a sufficient time after plaintiff's counsel had completed his direct case. Under these circumstances there should be no reason to consider the CPLR 4401 Motion defective.

Statute of Limitations

It is the defendants' position that plaintiff's state law claims are barred by the applicable statute of limitations. CPLR §217-a requires a claim for false arrest and malicious prosecution to be brought within one year and ninety days. Plaintiff was arrested on April

29, 2012 and released from custody on September 18, 2012. The time begins to run for a false arrest claim when the plaintiff is released from confinement. (See *Whitmore v City of New York*, 80 AD2d 638 [2d Dept. 1981]. The instant lawsuit was not filed until December 18, 2014 which is approximately one year beyond the statute of limitations for a state law claim for false arrest.

The time begins to accrue for a malicious prosecution claim when the proceedings against the plaintiff have terminated in the plaintiff's favor. (See *Heck v Humphry*, 512 US 477 [1994]; see also *Guzman v City of New York*, 236 AD2d 444 [2d Dept. 1997]). The date of the plea agreement (which ended the prosecution) was February 4, 2013, therefore, the claim of malicious prosecution was also untimely as the case was initiated beyond the one year and ninety day statute of limitations. In addition, defendants' counsel asserts that the claim for malicious prosecution must be dismissed as there was never a favorable termination of the claim. (See *Smith-Hunter v Harvey*, 95 NY2d 191 [2000]; see discussion below).

It is plaintiff's position that the change in the marijuana law, as discussed above, allows the time to bring a claim based on the later date when the plaintiff's conviction (for marijuana possession) was expunged. However, there is no language in the legislation to allow for a suspension or tolling of the statute of limitations and plaintiff's argument must fail.

False Arrest / Probable Cause

The elements of a false arrest claim are: "(1) that 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." *Broughton v State of New York*, 37 NY2d 451, 456 (1975).

Defendant's counsel argues that the plaintiff's claim for false arrest must be dismissed as there was probable cause for the arrest. (See Defendants' CPLR 4401 Motion, par. 7) and a finding of probable cause bars a claim for false arrest. (See *Minott v City of New York*, 203 AD2d 265 [2d Dept. 1994]); *Broughton v State of New York*, supra at 458). The evidence in this case is conclusive that Detective Varghese "had probable cause to believe that a person committed a crime which is a complete defense to a cause of action alleging false arrest and malicious prosecution" *Braxton v City of New York*, 178 AD3d 1000 [2d Dept. 2019].

As a factual matter, the trial of this case involved the testimony of Detective Varghese and the testimony of plaintiff, Mr. Dawoodi. In addition, the surveillance video depicting

the burglary of the subject apartment together with photographs of Mr. Dawoodi at the time of his arrest were all put into evidence. The testimony by Detective Varghese credibly showed that Mr. Dawoodi was identified by the resident of the apartment, Mr. St. Victor, and it was Mr. St. Victor who identified Mr. Dawoodi when he was apprehended. On these facts, which were not successfully challenged at trial, the Court can conclude that the probable cause existed for the arrest of Mr. Dawoodi. (See *Ali v City of New York*, 145 AD3d 838 [2d Dept. 2016]; *Batten v City of New York*, 133 AD3d 803 [2d Dept. 2015]).

In this case, there are no facts introduced into evidence which would raise a triable issue as to the existence of probable cause and warrant a re-trial. Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff is guilty. (See *Batten v City of New York*, supra at 803). “The existence or absence of probable cause becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest”. *Braxton v City of New York*, 178 AD3d 1000 [2d Dept. 2019]. Furthermore, as discussed below, the plaintiff, Mr. Dawoodie, pled guilty to a reduced charge of possession of marijuana. The consequence of the guilty plea is that the plea constitutes probable cause for his arrest and this provides defendant an affirmative defense to plaintiff’s false arrest claim.” *Calastri v Overlock*, 125 AD3d 554 [1st Dept. 2015].

Having concluded that Detective Varghese had sufficient information to warrant probable cause for the arrest of Mr. Dawoodi, “the existence of probable cause is a complete defense to causes of action alleging false arrest and malicious prosecution”. *Braxton v City of New York*, 178 AD3d 1000 [2d Dept. 2019]; (see also *Sinclair v City of New York*, 153 AD3d 877 [2d Dept. 2017]).

Defendants’ counsel finds additional support for the dismissal motion in that Mr. Dawoodi was indicted by a grand jury. Mr. Dawoodi was indicted by the grand jury on charges of burglary in the 2d degree (PL 140.25); burglary in the 3rd degree (PL 140.10); criminal trespass in the 2d degree (PL 140.15); criminal trespass in the 3rd degree (PL 140.10) petit larceny (PL 155.25) ; and unlawful possession of marijuana (PL 221.05).

The indictment by the grand jury raises a rebuttable presumption of probable cause. (See *Batten v City of New York*, 133 AD3d 803 [2d Dept. 2015]). The rule is founded upon the premise “that the grand jury acts judicially and it may be presumed that it has acted regularly”. *Colon v City of New York*, 60 NY2d 78, 82 [1983]. If the plaintiff is to succeed in pursuing a case of false arrest or malicious prosecution, after an indictment “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*, id at 83.

This Court is in agreement with defendants’ contention that there was no proof submitted during the trial that the indictment was produced by fraud, perjury or the suppression of evidence. As such, the grand jury indictment should be presumed to constitute probable cause for the arrest. (See *Batten v City of New York*, 133 AD3d 803 [2d Dept. 2015]).

Based on each of elements discussed above, it is readily apparent that probable cause existed for the arrest of Mr. Dawoodi.

Malicious Prosecution

A claim for malicious prosecution requires that a plaintiff must establish (1) the initiation of a proceeding; (2) its termination favorably to plaintiff; (3) lack of probable cause; and (4) actual malice. (See *Batten v City of New York*, 133 AD3d 803 [2d Dept. 2015]; *Johnson v Kings County Dist. Attorney’s Off.*, 308 AD2d 278 [2d Dept. 2003]; *Heck v Humphry*, 512 US 477 [1994]).

In the instant case, the claim for malicious prosecution must fail as a matter of law, as the required elements can not be proven. Specifically, the plaintiff has not offered evidence that the termination of the criminal proceedings can be considered a “favorable termination”. In this case, plaintiff was charged with burglary, trespass and petit larceny as well as possession of marijuana. As stated above, plaintiff pled guilty on or about February 4, 2013, to the reduced charge of marijuana possession but such plea was a compromise arrived at through a plea negotiation. The plaintiff has not obtained a “favorable termination” by accepting the guilty plea as “the outcome is inconsistent with the innocence of the accused”. *Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]. In addressing this issue, the Court of Appeals has ruled that “a charge which is withdrawn or the prosecution is abandoned pursuant to a compromise with the accused there is no favorable termination.” *Smith -Hunter v Harvey*, 95 NY2d 191, 196 [2000] citing *Burt v Smith*, 181 NY 1, 5 [1905]; *Martinez v City of Schenectady*, supra at 85.

Neither has the requirement of malice been proven in this case. No evidence was produced at trial to support acts by any parties involved in the prosecution which could be construed as “a deliberate act punctuated with awareness of conscious falsity”. *Hendrickson-Brown v City of White Plains*, 92 AD3d 638 [2d Dept. 2012]. Neither were

any acts of Detective Varghese or the District Attorney's Office of a character that could be considered "wanton, reckless or grossly negligent and in disregard of the plaintiff's rights inconsistent with good faith". *Biener v City of New York*, 47 AD2d 520 [2d Dept. 1975]).

As mentioned above, this Court has found that sufficient probable cause existed for the arrest of Mr. Dawoodi based on the surveillance video and the identification of Mr. Dawoodi by the apartment resident, Mr. St. Victor. (See Det. Varghese Trial Trans. Pg. 82-95). By establishing probable cause, the action for malicious prosecution must be dismissed. (See *Batten v City of New York*, 133 AD3d 803 [2d Dept. 2015]).

42 USC §1983 Claim

The plaintiff has pled a cause of action for violation of federally protected rights pursuant to 42 USC §1983 ("1983 claim"). In plaintiff's complaint it is alleged that plaintiff has been denied Constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments of the Constitution. In the plaintiff's complaint the two causes of action which are based on §1983 claims are the First Cause of Action and The Second Cause of Action. The First Cause of Action alleges that plaintiff was wrongfully detained and imprisoned (false arrest). The Second Cause of Action claims that plaintiff was subject to malicious prosecution. Each of the two causes of action do not contain any facts or specific allegations to support the false arrest or malicious prosecution claims. The portion of the Complaint entitled "Factual Allegations Common To All Causes of Action", states the following: "The defendants fabricated evidence, thus denying plaintiff and (sp) fair trial in violation of his fifth amendment rights." (See Complaint, pg. 3, par. 7.). The Court notes that there are no specific facts alleged in the complaint to support the claim of "fabrication of evidence" and there is no showing that plaintiff was (or would be) denied a fair trial.

The §1983 claim must be dismissed as a matter of law. As the Court has stated above, the allegations of false arrest and malicious prosecution are not legally sustainable given the lack of evidence to support those claims and the estoppel effect of plaintiff's plea agreement. As to the vague claim of "fabrication of evidence", the testimony produced at trial, from Detective Varghese as well as the plaintiff, Mr. Dawoodi, did not offer any suggestion let alone proof that evidence was fabricated. Furthermore, there was no testimony or other evidence to indicate that there was perjury committed by any defendant in this case.

"Qualified immunity protects public officials from civil liability only if (a) the defendant's action did not violate clearly established law, or (b) it was objectively

reasonable for the defendant to believe that his action did not violate such law.” *Coggins v Buonora*, 776 F3d 108 [2d Cir. 2015].

In this case, had there been evidence that Detective Varghese created false information to support the prosecution and forwarded that information to the District Attorney he would rightfully be accused of having violated Mr. Dawoodi’s right to a fair trial and be permitted to bring an action for damages. (See *Riccinuti v NYC Transit Auth.*, 124 F.3d 123 [2d Cir. 1997]). Here there is no evidence that Detective Varghese created false information and he would, therefore, be entitled to qualified immunity from plaintiff’s claims.

The plaintiff’s claims here fail in that plaintiff has not offered any factual allegations which “state a claim for relief that is plausible on its face which requires pleading facts that permit the court to infer more than the mere possibility of misconduct”. *Betts v Shearman*, 751 F. 3d 78 [USCA 2d Cir. 2014] quoting *Atlantic Corp. v Twombly*, 550 US 544, 550 [2007].

Miscellaneous Claims

At trial, the Court ruled that the plaintiff had not established a prima facie case for the plaintiff’s claims of assault and battery; negligence of the defendant City of New York; the claim for negligent hiring and retention; intentional infliction of emotional harm; and the claim of abuse of process against the Kings County District Attorney. Accordingly, such claims are deemed dismissed with prejudice.

Conclusion

The Court has conducted a thorough review of the evidence in this case which was produced at trial and the Court has considered the arguments raised by defendants in support of the defendants’ CPLR 4401 Motion, as well as the opposition to the motion submitted on behalf of the plaintiff. The motion to dismiss was not considered prior to the close of plaintiff’s case (see *Okunubi v City of New York*, 109 AD3d 888 [2d Dept. 2013]) and, accordingly, plaintiff has had “a fair opportunity to have his day in court”. *Griffin v Clinton Green South, LLC*, 98 AD3d 41 [1st Dept. 2012].

As required in a CPLR §4401 motion, the Court has considered the evidence in the

light most favorable to the plaintiff (See *Ali v City of New York*, 145 AD3d 838 [2d Dept. 2016]) and, notwithstanding the arguments raised by plaintiff's counsel, there is no rational basis by which the jury could find for the plaintiff against the moving defendants. See *Ali v City of New York*, id at 839; *Boriello v Loconte*, 181 AD3d 856 [2d Dept. 2020]).

The instant motion to dismiss essentially involves the actions of the defendant police officer, Detective Varghese, who acted on credible information supplied by the victim of a burglary, Mr. St. Victor, and the criminal case against the plaintiff was supported by the surveillance video which captured the image of a person bearing a remarkably close resemblance to the plaintiff, committing the crime of burglary. No evidence was submitted of any kind which would raise a question as to whether Mr. Dawoodi was the subject of malicious prosecution, ie. no evidence was introduced that raised the possibility of fabricated evidence or perjurious testimony during the prosecution of the case.

Plaintiff's counsel has put forth the novel argument that his client has received a "favorable termination" of his criminal charges by arguing that the marijuana reform statute (CPL §160.6) expunged his plea of guilty to marijuana possession and thereby constitutes a "favorable termination". Plaintiff's counsel is incorrect on the facts and the law in this case. Here, the plaintiff's guilty plea included the burglary and trespass charges and plaintiff can not claim that the expungement of the marijuana conviction resulted in a favorable termination of the other charges. (See *Calastri v Overlock*, 125 AD3d 554 [1st Dept. 2015]).

In addressing the plaintiff's federal claims under 42 USC §1983, plaintiff's claim has been found to be without merit as he has not been shown to have had his conviction declared invalid or expunged or called into question (See *Heck v Humphrey*, 512 US 477 [1994]). Equally relevant is the fact that plaintiff has not stated "a claim for relief that is plausible on its face with facts that were pled which permit the court to infer more than the mere possibility of misconduct." *Betts v Shearman*, 751 F3d 78 [2d Cir. 2014]. Instead, plaintiff's counsel merely infers wrongdoing without supporting evidence or facts, therefore, the §1983 claims must be dismissed.

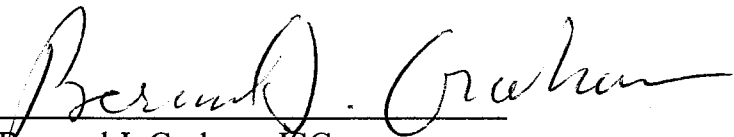
As mentioned above, no evidence was introduced at trial to support plaintiff's claims for assault and battery; negligence of the defendant City of New York; negligent hiring and retention by the City of New York; intentional infliction of emotional harm; and abuse of process against the Kings County District Attorney. These claims are dismissed with prejudice.

In accordance with the above, plaintiff's complaint is dismissed in its entirety.

This shall constitute the decision and order of this Court.

Dated: March 15, 2022

ENTER:


Bernard J. Graham, JSC

HON. BERNARD J. GRAHAM

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