

Bansey v City of New York

2025 NY Slip Op 32668(U)

April 22, 2025

Supreme Court, Bronx County

Docket Number: Index No. 25562-2018E

Judge: Myrna Socorro

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#6

**Supreme Court of the State of New York
County of Bronx: Part IA-33**

-----x
Zaire Bansey

Plaintiff

**Index No. 25562-2018E
Motion seq #6**

-against-

**DECISION & ORDER
Hon. Myrna Socorro, J.S.C.**

**The City of New York, New York City
Police Department, Sergio Lovera,
Defendants**
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The following e-filed documents, listed by NYSCEF document number (motion seq #6, No. 150-193)¹ Upon the foregoing documents, defendant City of New York's ("City") motion for summary judgment and plaintiff's cross motion to amend the Complaint is decided as follows:

Plaintiff filed this action on May 11, 2018, to recover for injuries he allegedly claims of being falsely arrested, imprisoned and prosecuted by the City. It appears that on October 5, 2014, at approximately 3:45 a.m., a large melee erupted out of Xtreme Lounge, located at 2510 Valentine Avenue in the Bronx. The melee was interrupted by gunshots fired, which resulted in the deaths of Dennis Rodriguez and Armani Gonzalez. On November 3, 2014, Plaintiff Zaire Bansey and another individual Peter Hajdari (Index #25561-2018E) were arrested for the double homicide.

Plaintiff's prior counsel moved for an order, pursuant CPLR §3025, to amend the caption to add Detective Lovera, and to amend the summons and complaint to reflect the same. Hon. Mitchell Danzinger, J.S.C., granted the motion to an extent per Decision and Order in motion seq #4 (NYSCEF Doc. #103). There the Court found that the claim for false arrest, wrongful imprisonment, negligent and malicious prosecution, and all state law claims expired based on the statute of limitations as to Detective Lovera. The Court found the only claim permitted against Detective Lovera was federal malicious prosecution and that plaintiff's *Monell* claims were dismissed without opposition.

However, it appears that plaintiff had obtained new counsel and new counsel filed a different amended complaint, and in doing so failed to plead a federal cause of action for malicious prosecution. Accordingly, in Decision and Order on motion to dismiss (seq #5) dated July 1, 2021

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The Court notes that despite filing this motion on behalf of plaintiff Bansey, plaintiff's counsel repeatedly references Mr. Bansey as Mr. Hajdari, which the city did not raise in their argument. However, the Court will interpret these references to mean Plaintiff Bansey.

(NYSCEF Doc. #137), Justice Danzinger dismissed plaintiff's first, second, third, and fourth causes of action in plaintiff's amended complaint as untimely as to Detective Lovera.

The surviving claims to be decided on this motion for summary judgment are plaintiff's miscellaneous state law negligence claims as to the city, plaintiff's cross motion to amend the complaint, and plaintiff's claims for false arrest and malicious prosecution.

Plaintiff's Negligence Claims for Denial of Medical Care, Failure to Supervise Plaintiff, Breach of Special Duty as to Defendant City of New York, Negligent Hiring/Retention/Supervision, and Negligent Infliction of Emotional Distress

Defendant first notes their position as to plaintiff's negligence claims is that these claims have been previously dismissed as untimely by Judge Danziger's July 1, 2021, Decision and Order (NYSCEF Doc. 137). However, it appears that ambiguity may exist as to whether these miscellaneous negligent claims were dismissed as to defendant the City of New York. Accordingly, Defendant argues these claims should be dismissed in their entirety, based on the foregoing arguments.

Defendant argues that the Notice of Claim filed by the plaintiff did not appraise the City of these claims as there are no specific facts alleged as to dates of occurrences, parties involved, injuries sustained, or the locations of these events. Defendant continues there are no details in the Notice of Claim pertaining to a "special duty" existing between itself and the plaintiff. Defendant argues these negligence theories must be dismissed as they are not mentioned in the Notice of Claim.

Plaintiff argues the Defendant was aware of the claim because of the information gathered during plaintiff's 50-h Hearing. He continues that given the questioning of the Plaintiff during the hearing; Defendants cannot claim they were unaware of plaintiff's claims.

General Municipal Law §50-e(2) provides: "The notice shall be in writing...and shall set forth..."(2) the nature of the claim; (3) the time when, the place where, and the manner in which the claim arose." The purpose of the notice of claim is to "assure the city an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available." *Teresta v City of New York*, 304 N.Y. 440, 443 (1952). Moreover, when a cause of action necessitates a notice of claim to be filed and are not listed in the plaintiff's original notice of claim, said claims may not be interposed. *Scott v City of New York*, 40 A.D.3d 408, 409 (1st Dept. 2007)

Upon review of plaintiff's Notice of Claim, plaintiff lists a single date as to the occurrence of these causes of action, June 29, 2017. Under the description of where the time and place of the claim arose, plaintiff sets forth facts pertaining to his malicious prosecution claim and claims for false arrest. However, there are no further details pertaining to claims of denial of medical care, failure to supervise, negligent/hiring/retention, failure to train, and negligent infliction of emotional distress. The Court finds the Notice of Claim did not contain sufficient information to notice the City to causes of action as to these miscellaneous negligence claims. GML § 50-e(2); *Teresta*, 304 N.Y. at 443. Accordingly, defendant's motion is **granted** and plaintiff's claims of Denial of Medical Care, Failure to Supervise Plaintiff, and Breach of Special duty are **dismissed**.

False Arrest

City argues that the arrest of plaintiff was supported by probable cause, as it was the result of a month-long investigation conducted by the New York City Police Department ("NYPD"). They continue the probable cause is evinced by surveillance footage reviewed and the approximately thirty interviews conducted during the investigation. The City argues that two of individuals interviewed were physically present with plaintiff and Peter Hajdari on the night of the incident, and their statements were part of the evidence used to support probable cause for the arrest.

The two witnesses present on the night of the incident are Nya Santiago and Xena Rosa. Each witness gave multiple statements to the NYPD during their investigation, completed an interview with the Bronx District Attorney's office, and testified at the criminal trial of the plaintiff. During the investigation, Ms. Rosa signed a written statement which stated she was present in the vehicle with plaintiff and Peter Hajdari when they passed the large melee, the car stopped, and plaintiff ran out to "help" their friends who were fighting. She continues that after hearing several gunshots, plaintiff and Peter Hajdari ran back to the car where she states she saw Plaintiff had a gun. Ms. Santiago and Rosa subsequently asked to be let out of the car and were picked up by a cab and driven home.

Ms. Santiago's written statement depicts a similar version of events. She stated the vehicle with the four occupants pulled over after seeing a large fight outside of Xtreme, and that the two men exited the vehicle to "help" their friends. She states that she exited the car and subsequently heard gun shots, before plaintiff and Peter Hajdari ran back to the car.

Defendant continues that the surveillance footage that was reviewed, attached as Exhibit "R", shows the two men running out of a white Impala located at the corner of Fordham Road and Grand

Concourse, towards the large melee and ran back to the vehicle. . The City continues that 9mm shell casings were found from that same location. Both plaintiff and Peter Hajdari have admitted they were the two men seen in the video.

In further support, City argues that Fordham University Guard Lamont Gholson's interview with police supports that there was probable cause to arrest plaintiff. Gholson stated he witnessed the vehicle in which plaintiff was in (white Impala) stop by a fire hydrant, witnessed plaintiff and Peter Hajdari exit their vehicle and "the man with the bun" extend his arm, and "fidget back and forth". Gholson heard three quick gun shots, and then witnessed both plaintiff and Peter Hajdari quickly run back to the car before speeding off.

It is the City's position that given the witness statements, as well as the independent evidence collected during the NYPD's investigation, there was probable cause at the time of the arrest.

Plaintiff responds that there is a question of fact as to whether there was probable cause for the arrest and defendant's motion should be denied. Specifically, plaintiff contests that at the time the initial statements were given by Santiago and Rosa, Detective Lovera had considered them perpetrators and/or accomplices, and therefore their statements should be deemed unreliable. Moreover, plaintiff continues that Gholson, the only eyewitness, never saw a weapon in the hands of either of the plaintiff or Peter Hajdari on the night of the incident. It is also the plaintiff's position that Lovera fabricated portions of his statements and the statements of both Santiago and Rosa, given the discrepancies in the DD5s and the written statements the witnesses gave in the precinct. Plaintiff argues that a jury could infer that Rosa and Santiago would have said or written anything to avoid murder charges.

Plaintiff continues there are several witnesses interviewed in the month leading up to the arrest that there was contradictory evidence to any statements given by Rosa, Santiago, or Gholson, that should have given the NYPD notice to continue the investigation of the double homicide. Specifically, plaintiff argues that the deposition of Det. Lovera contains admissions that he failed to notify the District Attorney that there was another potential suspect, that there was no video showing plaintiff or Peter Hajdari committing the shootings, there was no DNA or fingerprint evidence connecting either men to the shootings, and that there was no ballistics evidence that matched the bullets that were recovered at the corner of East Fordham Road and Grand Concourse. Based on the foregoing, plaintiff argues an issue of fact as to probable cause for the arrest of plaintiff.

When analyzing §1983 claims for false arrests, Courts generally apply the law of the state in which the arrest occurred. *Davis v Rodriguez*, 364 F3d 424 [2d Cir 2004]. In New York State, to establish

a claim for false arrest and false imprisonment, a plaintiff must establish: (1) he was intentionally confined by the defendant; (2) plaintiff was aware of the confinement; (3) plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *Broughton v. State of New York*, 37 NY 2d 451, 456 (1975). Further, probable cause is an absolute defense to a false arrest claim. *Jagely v. Couch*, 439 F3d 149 [2d Cir 2006].

Probable cause is “not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction, but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed” by the person to be arrested. *People v. McRay*, 51 N.Y.2d 593 [1980]. Courts look to the information available to the officer at the time of the arrest, and the totality of the circumstances, when determining whether an officer had probable cause. *Bernard v. United States*, 25 F.3d 98 [2d Cir. 1994]. The existence of probable cause is an issue of law for the court to decide when the facts leading up to an arrest are undisputed. *Parkin v. Cornell University, Inc.*, 78 N.Y.2d 529 [1991].

Probable cause for an arrest and prosecution may be established through witness statements identifying the perpetrator of a crime. *Grant v. Barnes & Noble Inc.*, 284 A.D.2d 238, 239 [1st Dept. 2001], citing, *People v. Morro*, 165 A.D.2d 719, [1st Dept. 1990]. Moreover, any conflicting evidence uncovered during the course of a police investigation is relevant to proving guilty beyond a reasonable doubt at trial, “not to the initial determination of the existence of probable cause.” *Argont v. City of New York*, 294 A.D.2d 189, 190 [1st Dept. 2002].

Upon review and due deliberation of the motion papers and Exhibits, the Court finds that there was probable cause to arrest plaintiff. The NYPD conducted an investigation which spanned approximately one month and included reviewing surveillance footage and witness statements. The evidence in possession of the police at the time of the arrest, including the witness statements, corroborated that plaintiff and Peter Hajdari quickly approached a large melee, immediately prior to several shots being fired, and then quickly ran from the scene. Despite the plaintiff’s contentions, this Court is not seeking proof beyond a reasonable doubt sufficient to warrant a conviction, rather the inquiry is whether a reasonable officer with the same information could conclude that a crime was committed by the arrestees. *Argont*, 294 A.D.2d at 190. Based on the evidence presented, the Court finds that there was probable cause for the arrest.

The Court notes that the criminal trial testimony reveals that Bronx Assistant District Attorney Goodwin had an opportunity to interview both Santiago and Rosa after their interviews with the police and neither of the witnesses complained of the treatment of the officers when they gave their initial statements.

As probable cause is a complete defense to a claim for false arrest, Defendant's motion for summary judgment on plaintiff's claims for false arrest is **GRANTED**.

Malicious Prosecution

In support of the branch of its motion, the City argues there is a presumption of probable cause for plaintiff's prosecution which stems from the indictments issued by Bronx County Grand Jury. Further, the City argues that the required element of actual malice is missing from plaintiff's malicious prosecution claim. City continues that the prosecution of plaintiff was not baseless, rather it was supported by the investigation of the NYPD and the Grand Jury Indictments.

Plaintiff argues in this matter there is both absence of probable cause for his prosecution and the prosecution was conducted with actual malice. With regard to actual malice, plaintiff argues the NYPD falsified and suppressed evidence. Specifically, plaintiff argues Detective Lovera fabricated the portion of Santiago's statement where she stated that plaintiff fired a gun because it is absent from Santiago's written statement. Further, plaintiff argues the testimony that Lovera gave to the Grand Jury regarding his state of mind and character was fabricated and devoid of factual support. Finally, plaintiff argues that the NYPD withheld information from the District Attorney when submitting the case for approval of the plaintiff's arrest. Plaintiff submits that the foregoing establishes actual malice of the prosecution.

To recover for the tort of malicious prosecution, a plaintiff must establish: (1) that the City commenced a criminal proceeding; "[2] that it was terminated in favor of the accused; [3] that it lacked probable cause; and [4] that the proceeding was brought out of actual malice." *Cantalino v. Danner*, 96 N.Y.2d 391, 394 [2001]. Further, to establish a federal claim for malicious prosecution under §1983, the plaintiff must establish the foregoing four elements, and an additional element that there was a sufficient post-arraignment liberty restraint to implicate plaintiff's Fourth Amendment rights. *Rohman v. New York City Transit Auth.*, 215 F.3d 208, 215 (2d. Cir. 2000).

An indictment by a Grand Jury creates a presumption of probable cause for the prosecution. *Colon v. City of New York*, 60 N.Y.2d 78, 82 [1983]. The presumption may only be overcome by evidence which established police witnesses may not have made, "a complete and full statement of facts to either the Grand Jury or 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 83.

To establish actual malice, a plaintiff must show the defendant commenced the criminal proceeding due to a wrong or improper motive, or "something other than a desire to see the ends of justice

served.” *Nardelli v. Stamberg*, 44 N.Y.2d. 500, 502-503 [1978].

Upon a review of the record, the Court finds plaintiff’s contentions to be unsubstantiated. Despite plaintiff’s attempt to argue the evidence which supported the Grand Jury indictment was falsified, a review of Exhibit “X” of defendant’s motion, shows that Honorable Steven Barrett held the evidence presented before the Grand Jury was legally sufficient in all respects to establish each count charged to plaintiff.

Moreover, Detective Lovera testified at his deposition that he handed over the entire investigatory file in his possession to the Bronx DA, who subsequently approved the arrest of plaintiff. Based on the foregoing, the Court does not find that plaintiff has set forth evidence sufficient to rebut the presumption of probable cause established by the indictment of the Grand Jury.

Assuming *arguendo* that plaintiff has submitted sufficient evidence to rebut the presumption of probable cause for the arrest, plaintiff’s claim for malicious prosecution still fails because he has failed to establish the proceeding was brought out of actual malice. For the foregoing reasoning, the evidence amassed during the NYPD’s investigation and the decision of Justice Barrett negates the argument that the criminal proceeding totally baseless or was brought out of a wrong or improper motive. *Nardelli*, 44 N.Y.2d at 502-503.

Accordingly, Defendant’s motion for summary judgment as to plaintiff’s claim for malicious prosecution is hereby **GRANTED**.

Plaintiff’s Cross Motion to Amend the Complaint

Plaintiff filed a cross-motion seeking to amend the first amended complaint to conform to the evidence presented on defendant’s motion for summary judgment, pursuant to CPLR §3025(b) and [c]. In the alternative, plaintiff seeks an Order permitting him to file a second amended complaint pursuant to the same.

In response to plaintiff’s cross-motion, City argues that granting leave to allow plaintiff to amend his complaint to include his construction of Detective Lovera’s witness statements would be prejudicial to the City. City continues that plaintiff’s argument that the instant summary judgment motion should be denied because it is based on the previous complaint, is hypocritical and prejudicial.

CPLR §3025(b) states:

“[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplemental pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

Additionally, CPLR §3025[c] states:

“[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence.”

Courts have consistently held that permission to amend pleadings should be freely given, so long as the moving party can show the proffered amendment is not palpably insufficient or clearly devoid of merit, and the nonmoving party will not suffer prejudice or surprise resulting from the delay in seeking leave (*see generally, Greene v. Esplanade Venture P'ship*, 36 N.Y.3d 513, 168 N.E.3d 827 [2021], *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 [1st Dept. 2010], *Miah v. Pipe Dreams Realty V Corp.*, 214 A.D.3d 575, 576-577 [1st Dept. 2023]).

Applications to amend under CPLR §3025[c] are “addressed to the sound discretion of the trial court and should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to subdivision (b).” *Murray v. New York*, 43 N.Y.2d 400, 405 (1977). Further, when a difference develops between the original pleadings and evidence that is subsequently presented and accepted, the nonmoving party may not argue surprise or prejudice as a result of the variance, and the motion to conform should be granted. *Id.*

Here, plaintiff seeks to amend his first amended complaint to conform to the evidence presented on defendant’s summary judgment motion. Despite plaintiff’s request, he has articulated no difference between his pleadings and the evidence currently being presented by the City on their motion. Rather, plaintiff simply states: “it is respectfully requested that the Court deem the First Amended Complaint amended to conform to the evidence presented on Defendant’s motion for summary judgment.” The Court additionally notes that plaintiff continues to dispute the evidence that the City has set forth in their motion, the same evidence he seeks to conform his complaint to.

Moreover, the second proposed amended complaint fails to clearly show the changes or additions being made to the pleading, as is required CPLR §3025(b).

Therefore, plaintiff's cross-motion to amend his complaint pursuant to CPLR §3025(b) and §3025[c] is **DENIED**.

It is hereby,

ORDERED that defendant's motion is **GRANTED**; and it is further

ORDERED, that plaintiff's cross-motion to amend is **DENIED**; and it is further

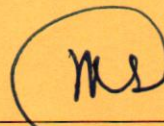
ORDERED, that plaintiff's complaint is hereby dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that defendant shall serve and file a Notice of Entry of this Decision and Order within twenty (20) days from the date herein.

This constitutes the Decision and Order of the Court.

Dated: April 22, 2025



HON. MYRNA SOCORRO, J.S.C.