Vera v City of New York
2021 NY Slip Op 34111(U)
March 25, 2021
Supreme Court, Bronx County
Docket Number: Index No. 28908/2017E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 3

---X

Alester Vera,

-against-

The City of NY, et. al.

---X

#001

Index №. 28908/17E

Hon. Mitchell J. Danziger

Justice Supreme Court

The following papers numbered 1 to ________ were read on this motion (Seq. No. ________)
for Dismiss/SJ noticed on ________________.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Motion is Respectfully Referred to Justice: ________
Dated: ________

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 3/25/21

Hon. ________________
Mitchell J. Danziger, JSC

1. CHECK ONE.................................... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS.................................... ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---x
ALESTER VERA,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.
---x

Index No.: 28908/2017E

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Notice of Motion to dismiss/summary judgment:	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibits..................	1
Affirmation in Opposition..	2
Affirmation in Reply...	3

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

Defendants, The City of New York ("City"), and Ruben Alvarez, Det. Of the Bronx Gang Squad, Shield #2506, Tax ID #929624 ("Det. Alvarez"), move pursuant to CPLR §§3211 and 3212 dismissing plaintiff's first (battery), second (assault), third (false arrest), fourth (false imprisonment), fifth (malicious prosecution), seventh and eighth (for negligent hiring, retention, training, supervision) causes of action and for dismissal of any 42 U.S.C. §§1983 claims as against the City and as against Det. Alvarez. Plaintiff does not oppose the portions of the City's motion which seeks to dismiss plaintiff's state law claims for assault, battery, false arrest, false imprisonment, and negligent hiring, retention, and supervision. Accordingly, the portion of defendants' motion as to plaintiff's state law claims for assault, battery, false arrest, false imprisonment, and negligent hiring, retention, and supervision is granted without opposition. Plaintiff opposes the City's motion as to plaintiff's federal law claims for false arrest, false imprisonment, malicious prosecution, excessive force as to Det. Alvarez, and *Monell* liability as against the City pursuant to 42 U.S.C. §1983.

This action arose from an interaction between the plaintiff, and the NYPD officers who

executed a search warrant at his cousin's home on October 31, 2014, at 6:05 A.M. During the course of the search of the apartment, narcotics and hand guns were recovered. Plaintiff was arrested and released on his own recognizance. Thereafter, plaintiff was indicted for firearms possession. Plaintiff remained out on bail until he was re-arrested for a second offense for which he was indicted. When plaintiff's cousin pled guilty, all charges against plaintiff were dismissed on May 23, 2017. According to plaintiff's notice of claim and plaintiff's summons and complaint, plaintiff was falsely arrested, falsely imprisoned, assaulted and battered, subjected to excessive force, and was deprived of his civil rights on October 31, 2014, at approximately 7:15 A.M., in the vicinity of 2663 Heath Avenue, Apt. 14K, Bronx, New York.

According to plaintiff, he was visiting his cousins' apartment that morning to pick up his mother. She was sleeping, so he was sitting on the couch waiting for her to wake up. Mr. Vera did not reside at the apartment and had never lived at that address. The apartment belonged to his cousins. At the time of the October 2014 search warrant execution, Mr. Vera was living at 316 West 95th Street, New York, NY. The police entered the apartment and his cousin ran to another room. Plaintiff was arrested and thrown to the ground sustaining a laceration to the inside of his mouth and a bruise to his cheek. Plaintiff was strip searched at the precinct. He did not see weapons or drugs recovered. As a result of the second arrest in December of 2015, plaintiff's bail status was changed and he was sent to Riker's where he remained for 10 months.

Pursuant to Det. Alvarez' testimony, he obtained the search warrant which was executed on October 31, 2014. Mr. Vera was arrested during the search warrant execution. No mail in the apartment demonstrated that Mr. Vera lived in the apartment. The NYCHA housing wheel did not indicate Mr. Vera lived in the apartment. Mr. Vera was not named on the lease to the apartment. However, Det. Alvarez testified that he looked for domestic incident reports for Mr. Vera prior to and the apartment was listed as his residence on those reports in 2010 and 2011. Drugs and handguns were recovered in the living room of the apartment, however, not in plain view. Inside of a large blue "Domino's Pizza", wrapped in a while towel, was two pistols. Narcotics were recovered inside of a broken television set.

According to the criminal court complaint submitted to the Court, plaintiff was sleeping on the couch in the living room, when the officers entered the apartment. On the floor of the

living room, in a large blue "Domino's Pizza" bag, wrapped inside of a towel, three guns and ammunition were recovered. On the floor of the livingroom, inside of a small broken television, sixty-four small plastic bags containing a white rock-like substance were recovered. Defendant Hasan Richburg, confirmed he lived in the apartment. The criminal court complaint is silent as to where plaintiff resided.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

The City argues that plaintiff's claims for false arrest, false imprisonment and malicious prosecution should be dismissed, as there was probable cause to arrest plaintiff based on the drugs and guns found in the room and that plaintiff's grand jury indictment creates a presumption of probable cause for his prosecution that plaintiff cannot rebut. The City argues that plaintiff's mere proximity to the drugs and weapons create the "room presumption" found in Penal Law §220.25(2), which states that the presence of a narcotic drug in open view in a room, other than a public place....is presumptive evidence of knowing possession by each and every person in close proximity. The plaintiff argues that here, no drugs or guns were found in plain view and therefore, plaintiff did not have constructive possession of the contraband. Further, plaintiff did not reside at the premises

and that was known to NYPD prior to the execution of the search warrant.

The Court finds that the defendants have not met their prima facie burden entitling them to summary judgment with regard to plaintiff's claims for false arrest and false imprisonment. There is a question of fact as to whether there was probable cause for plaintiff's arrest on October 31, 2014. Per Det. Alvarez's testimony, Mr. Vera was not on the lease to the apartment, the NYCHA housing wheel did not indicate that Mr. Vera lived at the address, there was no evidence of mail or clothing found for Mr. Vera at the subject location, and the only link that Mr. Vera had to the apartment was a few domestic reports from 2010 and 2011 which indicated that was his residence, three and four years prior to his arrest at the location. Additionally, the criminal court complaint indicated that Hasan Richburg attested to residing in the apartment, but no such attestation was noted for Mr. Vera. The criminal court complaint was silent as to Mr. Vera's residence.

Probable cause analysis must be based on the totality of circumstances. (*People v. Graham*, 211 A.D.2d 55 [1st Dept. 1995]). An individual's mere presence in an apartment where contraband is found does not give the police probable cause to arrest that individual for possessing contraband. (*Ybarra v. Illinois*, 444 U.S. 85 [1979]). Moreover, per the criminal court complaint and the testimony of Det. Alvarez, the contraband was not found in plain view, but rather wrapped in a towel inside of a pizza bag and hidden in small broken television. The items in plain view were a Domino's bag and a broken television. As such, the "room presumption," which applies when the contraband is in "open view in a room" does not apply here. Despite being sitting on the couch in the living room, there is no evidence that plaintiff had dominion and control over the contraband, or even knew of it's presence, as it was hidden inside the aforementioned items. (*United States v. Munoz*, 987 F. Supp.2d 438 [S.D.N.Y. Dec. 18, 2013], *United States v. Ortiz*, 943 F. Supp.2d 447 [S.D.N.Y. May 9, 2013]). A reasonable jury could find that plaintiff had no idea at all that there were guns in the pizza bag and crack cocaine in a broken television. Further, a reasonable jury could find that plaintiff did not reside at the address and was just there to pick up his mother, as he testified. 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 A.D.3d 468 [1st Dept. 2016]). Accordingly, questions of fact remain as to whether there was probable cause for plaintiff's arrest and the portion of defendants'

motion seeking to dismiss plaintiff's third and fourth causes of action for false arrest and false imprisonment, is denied.

The City argues that whether or not probable cause existed for plaintiff's arrest, the plaintiff cannot rebut the presumption of probable cause for plaintiff's prosecution created by the Grand Jury indictment. The argument that the police lacked of probable cause for the arrest is not enough, and 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. (*Colon v. City of New York*, 60 N.Y.2d 78 [1983]). Plaintiff argues that there are material issues of fact as to whether there was probable cause to prosecute plaintiff, which is a question for the jury, where the facts are disputed. Further, a jury may infer that the defendants acted with actual malice if it finds that the defendants arrested plaintiff without probable cause.

In *Mendez v. City of New York*, 137 A.D.3d 468 (1st Dept. 2016), the police officers that arrested plaintiff Mendez did not include the officer's observations regarding a firearm in their paperwork. The officer's paperwork only indicated that plaintiff had in his custody and control a semiautomatic firearm, not that the officer observed plaintiff discarding a firearm onto a pile of garbage. Thereafter, plaintiff was charged with possession of a loaded firearm and arraigned on charges of gun possession. With regard to plaintiff's claim for malicious prosecution, the Court found that actual malice can be inferred from the lack of probable cause in arresting plaintiff. Further, "the presumption of probable cause attaching upon an accused's arraignment or indictment 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.'" (*Id.*). While the City avers that plaintiff cannot prove actual malice because he was in a room with 64 bags of crack cocaine and three loaded weapons, it fails to mention that all of said contraband was hidden, was not in open sight or plain view, and besides plaintiff sitting on the couch in the same room, there has been no evidence presented that he had dominion and control over the contraband. Further, the criminal court complaint is silent as to his residence address and the police lacked proof that he resided at the location. As such, the court finds that a reasonable jury could infer actual malice and therefore, a question of fact exists. The portion of the City's motion seeking to dismiss plaintiff's

malicious prosecution claim, is denied. Accordingly, the issue of fact as to probable cause precludes summary dismissal of plaintiff's 42 U.S.C. §1983 claims against defendant Alvarez for false arrest, false imprisonment, and malicious prosecution as well. The Court finds that the issues of fact as to probable cause also precludes a finding that Det. Alvarez is entitled to qualified immunity.

With respect to plaintiff's federal excessive force claim, plaintiff alleges that he was thrown the ground and his head was pushed down during his handcuffing. Plaintiff does not indicate that Det. Alvarez was the officer who physically touched him, or handcuffed him, and he could not remember what the officers who threw him to the ground looked like. Plaintiff testified he sustained a cut in his mouth and a bruise on his cheek, but his bill of particulars indicated that he only suffered tight handcuffs and emotional distress. Plaintiff alleges he was strip searched at the police station, however, there is no indication that Det. Alvarez performed the strip search of plaintiff. Accordingly, plaintiff has failed to show personal involvement on the part of Det. Alvarez with regard to his excessive force claims. Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under §1983. (*Hernandez v. Keane*, 341 F.3d 137 [2d Cir. 2003]). Here, there are no allegations that Det. Alvarez was personally involved in any alleged force used. As such, plaintiff's claims for excessive force are dismissed.

With respect to Plaintiff's *Monell* claims as against the City, a plaintiff must show "a direct causal link between a municipal policy or custom, and allege the constitutional deprivation" (*City of Canton v. Harris*, 489 U.S. 378, 385 [1989]). "It is only when the execution of the government's policy or custom...inflicts the injury that the municipality may be held liable under §1983" (id.). The element of causation has two components. The plaintiff must first prove the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries beyond merely employing the misbehaving officer. Second, the plaintiff must establish a causal connection, also described as an "affirmative link" between the policy and the deprivation of his constitutional rights. (*Vippolis v. Haverstraw*, 768 F.2d 40, 44 [2d Cir. 1985] citing *Oklahoma City v. Tuttle*, 471 U.S. 808 [1985]).

Here, plaintiff's complaint alleges that "the foregoing acts, omissions, and systematic failures are customs and policies of the City of New York...", however, the complaint is wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the

conduct purportedly advanced." (*Martin v City of New York*, 153 AD3d 693, 694 [2d Dept 2017]; see also, *Ashcroft v. Iqbal*, 566 U.S.662 [2009]). "Plaintiff's broad and conclusory statements, coupled with his failure to allege facts of the alleged offending conduct, are insufficient to state a claim under §1983."(*Leung v City of New York*, 216 AD2d 10, 11 [1st Dept 1995]). Accordingly, plaintiff's *Monell* claim as against the City is dismissed.

Plaintiff is directed to serve a copy of this order with notice of its entry, upon the defendants within thirty (30) days of the entry date.

The above constitutes the decision and judgment of the Court.

Dated: 3/25/21
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.