04 CV 2944 (BSJ)(HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD BAERGAS, on Behalf of Himself and Others Similarly Situated,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, FEDERATED LOGISTICS, FEDERATED DEPARTMENT STORES, INC., MACY'S EAST, THE FRICK COMPANY, and SCOTT CHESTER, CHRIS DE SANTIS, MICHAEL GREEN, JOHN DOES 1-5, Individually,

Defendants.

DEFENDANTS CITY OF NEW YORK AND NEW YORK CITY POLICE DEPARTMENT'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HAROLD BAERGAS, on Behalf of Himself and Others Similarly Situated,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, FEDERATED LOGISTICS, FEDERATED DEPARTMENT STORES, INC., MACY'S EAST, THE FRICK COMPANY, and SCOTT CHESTER, CHRIS DE SANTIS, MICHAEL GREEN, JOHN DOES 1-5, Individually,

Defendants.

04 CV 2944 (BSJ)(HBP)

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DEFENDANTS CITY OF NEW YORK AND NEW YORK CITY POLICE DEPARTMENT'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff Harold Baergas brings this Section 1983 action against the City of New York and New York City Police Department (hereinafter "City defendants"), alleging that New York City police officers unlawfully arrested him and he was maliciously prosecuted.

City defendants now move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in their favor and dismissing the complaint against it on the grounds that: (1) the NYPD is not a suable entity; and (2) plaintiff failed to meet his burden to establish liability against the City of New York. As such, City defendants respectfully submit that summary judgment is appropriate in this action.

STATEMENT OF THE FACTS

For a statement of relevant facts, the Court is respectfully referred to Defendants City of New York and New York City Police Department's Local Civil Rule 56.1 Statement of Undisputed Facts, dated April 1, 2005 and submitted concurrently herewith.

STANDARD OF REVIEW

Summary judgment is designed to expedite civil cases by eliminating from the trial calendar those claims that can properly be resolved as a matter of law. Under Rule 56(c), summary judgment is warranted when, viewing the evidence in a light most favorable to the non-movant, the Court determines that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56; Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 457 (1992).

A motion for summary judgment requires the party with the burden of proof at trial to come forward with proper evidence and "make a showing sufficient to establish the existence of [each] element to that party's case . . . since a complete failure of proof concerning an essential element of . . . [the] case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Second Circuit stated:

> [T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.

Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted). The non-moving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); see Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998) (citations omitted); Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983). "The mere existence of some alleged factual dispute

between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1996).

For the reasons set forth herein, summary judgment should be granted in favor of the City defendants.

ARGUMENT

POINT I

THE NYPD IS NOT A SUABLE ENTITY.

Plaintiff brings claims against the New York City Police Department. However, it is well established under the Charter of the City of New York, the NYPD can only be sued in the name of the City of New York. Gonzalez v. City of New York, 98 Civ. 6081 (MBM), 2002 U.S. Dist. LEXIS 2749 (S.D.N.Y. Feb. 21, 2002). To name only the New York City Police Department as a defendant in a federal claim is fatal to those claims against the NYPD. Id.

Accordingly, all of plaintiff's claims against defendant NYPD must be dismissed.

POINT II

THE CLAIMS AGAINST THE CITY OF NEW YORK SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO ESTABLISH *MONELL* LIABILITY.

Plaintiff has failed to establish Monell liability and, therefore, the claims against the City of New York must be dismissed.

In this regard, in order to prevail on a §1983 claim against the City of New York, plaintiff must show that a municipal policy or custom caused the deprivation of his constitutional rights. Monell v. Department of Social Services, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2036 (1978); Sarus v. Rotundo, 831 F.2d 397, 400 (2d Cir. 1987); City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989). Under §1983, a municipality may not be held liable solely on the basis of *respondeat superior*. Monell, 436 U.S. at 694-95; Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 122 (2d Cir. 1991). Rather, a plaintiff must show "a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton, 489 U.S.

at 385. In Batista v. Rodriguez the Court stated, "to hold a city liable under §1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983).

A. There was Probable Cause for Plaintiff's Arrest.

At the outset, plaintiff must prove that he was denied a constitutional right. Probable cause to arrest is a complete defense to actions for false arrest and false imprisonment, whether the action is brought under state law or Section 1983. Singer v. Fulton County Sheriff, et al., 63 F.3d 110, 118 (2d Cir. 1995); Bernard v. United States, 25 F.3d 98, 102-104 (2d Cir. 1994); Mistretta v. Prokesch, 5 F. Supp. 2d 128, 133 (E.D.N.Y. 1998). Probable cause exists when the police officer has "knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that (1) an offense has been or is being committed (2) by the person to be arrested." U.S. v. Ceballos, 812 F.2d 42, 50 (2d Cir. 1987) (quoting U.S. v. Fisher, 702 F.2d 372, 375 (2d Cir. 1983)).

In evaluating probable cause, the Court should consider the facts available to the officer at the time of arrest. Ricciuti v. New York City Transit Authority, 124 F.3d 123, 128 (2d Cir. 1997) (account of complaining witness and officers' personal observations sufficient to establish probable cause); Velaire v. City of Schenectady, 862 F. Supp. 774 (N.D.N.Y. 1994) (account of nursing assistant that plaintiff was observed choking her mother, a patient in bed at the hospital, as well as officers' observation of red marks on patient's neck, sufficient to establish probable cause). The standard of evaluating the existence of probable cause is an objective one. Lindsey v. Loughlin, 616 F. Supp. 449, 451 (E.D.N.Y. 1985). The factors to be considered are factual and practical ones of everyday life on which reasonable and prudent

persons, not legal technicians, act. U.S. v. Tarango-Hinojos, 791 F.2d 1174 (5th Cir. 1986). The crucial issue, therefore, is whether the facts in the possession of the officers at the time plaintiff was arrested were sufficient to establish probable cause for the arrest.

Plaintiff alleges that his arrest was the result of unconstitutional acts of the police officers. However, officers have probable cause to arrest if they receive "information from some person -- normally the putative victim or eyewitness -- who it seems reasonable to believe is telling the truth." Daniels v. United States, 393 F.2d 359, 361 (D.C. Cir. 1968). Even if the information provided later turns out to have been false, the test is whether the arresting officers were reasonable in relying upon the information at the time of the arrest. See Bernard, 25 F.3d at 103.

The police responded to a complaint that was lodged by Macy's. See City Defendants' 56.1 Statement, ¶¶9, 12. Macy's security verbally informed the police that plaintiff had unlawfully taken unpaid merchandise from Macy's and was in possession of marijuana. See City Defendants' 56.1 Statement, ¶¶13, 14. Furthermore, Macy's provided the police with the results of their investigation that included a "Report of Investigation" setting forth Macy's allegations against plaintiff and signed by Macy's personnel, an Associate Data Sheet, a written statement by Michael Green, and a Property Clerk's Invoice drafted by Macy's detailing what items were alleged to have been stolen by plaintiff. See City Defendants' 56.1 Statement, ¶16. Based on the foregoing, the officer certainly had sufficient facts to establish the requisite probable cause needed to effect plaintiff's arrest for grand larceny and criminal possession of stolen property.

In light of the undisputed facts and circumstances confronting the police officers, plaintiff's claims should be dismissed as a matter of law.

B. Plaintiff Fails to State a Claim for Malicious Prosecution

Again, plaintiff cannot prove that he was denied a constitutional right. In order to state a claim for malicious prosecution, a plaintiff must show "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." Russell v. Smith, 68 F.3d 33, 36 (2d Cir. 1995); see Broughton v. State, 37 N.Y.2d 451, 458, cert. denied, 423 U.S. 929 (1975). Therefore, it is plaintiff's burden to prove all four essential elements of a malicious prosecution claim.

Here, plaintiff fails to state a claim for malicious prosecution as he cannot satisfy each and every element under Russell. In this regard, the existence of probable cause is a complete defense against plaintiff's malicious prosecution claim. See, e.g., Bernard v. United States, 25 F.3d 98, 104 (2d Cir. 1994); Dukes v. The City of New York, 879 F. Supp. 335, 341-342 (S.D.N.Y. 1995). As discussed *supra* at Point II (A), there is sufficient evidence to show that the officers had probable cause to arrest plaintiff.

Moreover, a grand jury indictment creates a "strong presumption of probable cause that defeats a claim for malicious prosecution pursuant to § 1983." Cunny v. City of New York, 99-CV-4634 (VM), 2001 U.S. Dist. LEXIS 10806, at *14 (S.D.N.Y. July 31, 2001). This presumption "may be overcome only by showing 'that the indictment was produced by fraud, perjury, the suppression of evidence, or other police conduct undertaken in bad faith.'" Bernard, 25 F.3d at 104 (quoting Colon v. New York, 60 N.Y.2d 78, 83 (1983))(emphasis added); see also Brogdon v. City of New Rochelle, 200 F. Supp. 2d 411, 421 (S.D.N.Y. 2002). This misconduct must occur in the Grand Jury proceedings. Rothstein v. Carriere, 373 F.3d 275 (2d Cir. 2004). The mere fact that the charges were dismissed against plaintiff is insufficient to rebut the presumption of probable cause created by the grand jury indictment. See Colon v. City of New York, 60

N.Y.2d 78, 83 (1983). The plaintiff bears the burden of proof in rebutting the presumption of probable cause that arises from an indictment. Savino v. City of New York, 331 F.3d 63, 73 (2d Cir. 2003).

In the case at hand, a Grand Jury in the Supreme Court of the State of New York, County of New York indicted plaintiff on two counts, namely grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree. See City Defendants' 56.1 Statement, ¶20. Plaintiff has not submitted any evidence to rebut the presumption of probable cause that arises from the indictment. Plaintiff merely makes broad, conclusory assertions of misconduct, which are insufficient as a matter of law and must fail. Walker v. New York City Police Dep't, No. 94 CV 3608 (SJ), 1996 U.S. Dist. LEXIS 22608, at *11-12 (E.D.N.Y. July 12, 1996); Jenkins v. City of New York, No. 98 CV 7170 (JGK), No. 98 CV 7338 (JGK), 1999 U.S. Dist. LEXIS 15353, at *24-25 (S.N.D.Y. Sept. 29, 1999). Indeed, as well, plaintiff has not and cannot adduce any evidence that the City defendants acted in bad faith or with malice. Thus, plaintiff's claim for malicious prosecution must be dismissed because plaintiff cannot overcome the presumption of probable cause created by the grand jury indictment, let alone satisfy every element of a malicious prosecution claim.

C. Plaintiff has Failed to Establish a Policy or Practice of the City of New York.

Even if, *arguendo,* plaintiff had sufficiently asserted a violation of his constitutional rights, proof of a single incident of unconstitutional activity would not be not sufficient to impose liability under Monell, unless proof of the incident included proof that it was caused by an existing, unconstitutional municipal policy. Where a purported policy itself is not unconstitutional, more proof than a single incident will be necessary to establish municipal liability. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436 (1985). see also Sarus v. Rotundo, 831 F.2d at 402 (2d Cir. 1987) ("a policy may not ordinarily be inferred from a single incident of illegality").

Accordingly, all federal claims against the City of New York must be dismissed for plaintiff's failure to establish a constitutional violation or in the alternative, for failure to prove an unconstitutional policy.

POINT III

PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED.

All of plaintiff's state law claims must be dismissed for plaintiff's failure to file a timely notice of claim. See City Defendants' 56.1 Statement, ¶6. Under New York law, a notice of claim is a condition precedent to bringing a tort action against a municipality or any of its officers, agents or employees. N.Y. Gen. Mun. Law §§50-e and 50-i. Moreover, Gen. Mun. Law §50-e requires that a notice of claim be filed within ninety days of the accrual of the cause of action. These provisions have been strictly construed by both state and federal courts. Baez v. New York City Health and Hosp. Corp., 80 N.Y.2d 571, 576; 592 N.Y.S. 2d 640 (1992); Shakur v. McGrath, 517 F.2d 983, 985 (2d. Cir. 1975). A plaintiff's failure to timely file a notice of claim requires dismissal of pendent state tort claims against the City or its employees in a federal civil rights action. Robinson v. Matos, 97 CV 7144 (TPG), 1999 U.S. Dist. LEXIS 5447 (S.D.N.Y. Apr. 16, 1999) (citing Felder v. Casey, 487 U.S. 131, 151 (1988)). Specifically, failure to comply with these requirements requires a dismissal for failure to state a cause of action. Brown v. Metropolitan Transportation Authority, 717 F. Supp. 257, 259 (S.D.N.Y. 1989). Since plaintiff has not filed a notice of claim in this case, let alone a timely notice of claim, his state law claims should be dismissed as against the City defendants.

CONCLUSION

For the foregoing reasons, City defendants' motion for summary judgment must be granted and plaintiff's complaint dismissed as against it and other such relief as the Court may deem appropriate.

Dated: April 1, 2005
New York, New York

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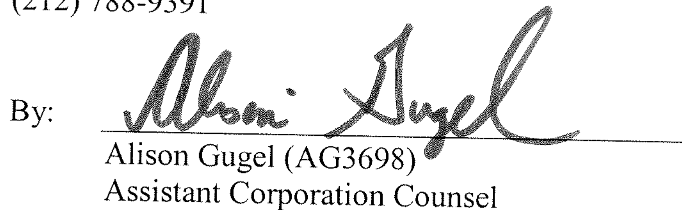
By: 
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