

New York Law Journal

NEW YORK, WEDNESDAY, OCTOBER 27, 2010

Pawnbroker's False Arrest Claims Against Police Sergeant Go Forward

BY MARK HAMBLETT

QUALIFIED IMMUNITY will not shield a Queens police sergeant from suit by a pawn shop owner who claims he was arrested without cause, a federal judge has ruled.

Sergeant Ron Marti of the 102nd Precinct now will face trial for false arrest and false imprisonment in two separate arrests of Brian Cabrera, owner of 5 Borough Pawn LLC, on Jan. 23 and May 15, 2008.

In an opinion released Oct. 22, Southern District Judge Colleen McMahon said the second arrest, on May 15, 2008, is actionable and not shielded by qualified immunity, in part because of the way the arrest unfolded and how the sergeant explained it: Mr. Cabrera was arrested prior to the execution of a search warrant that was intended to discover "stolen" property sold to his shop by a confidential informant.

The judge had already ruled in 2009 that the claims based on the first arrest of Mr. Cabrera, on Jan. 23, 2008, could not be avoided by qualified immunity in *5 Borough Pawn v. Marti*, 08 cv 3837. The judge in 2009 had dismissed claims against the City of New York, the New York Police Department, and Police Commissioner Raymond Kelly, leaving only Sergeant Marti in the case.

The case turns on what is permissible under New York City Charter §436, which gives police powers of general supervision and inspection over all licensed and unlicensed pawnbrokers, including the right to inspect the books, business premises and articles of merchandise to help prevent trafficking in stolen goods.

Mr. Cabrera claims he has never denied police requests to examine his records. He alleged that Sergeant Marti demanded more than just a look at the books on Jan. 23, 2008, and claims he was arrested for refusing to give the officer access to restricted areas at the shop and refusing to open his safe.

In her 2009 opinion, Judge McMahon said there was not even arguable probable cause to arrest Mr. Cabrera for denying access to the safe in January 2008 and both state constitutional law and NYPD policy "expressly" bar Sergeant Marti from arresting Mr. Cabrera for keeping the sergeant away from the safe.

That police policy is embodied in the so-called Grasso Memo, which governs procedures for administrative searches of pawnshops and calls for pawnbrokers who do not consent to having their books inspected to be issued a summons returnable to Criminal Court.

The Grasso Memo also requires police to obtain a warrant before searching the premises to find evidence of criminal activity.

In advance of the second search, on May 15, 2008, Sergeant Marti and other officers arranged a "reverse sting" using a confidential informant and a plainclothes sergeant who allegedly sold "stolen" goods to the pawnshop.

On May 15, the confidential informant made a "confirmatory sale" of ostensibly stolen jewelry at 5 Borough. Fifteen minutes later, officers armed with a search warrant that authorized them to search for jewelry sold as part of the "reverse sting" entered the store.

Mr. Cabrera was placed under arrest, Judge McMahon said, "but he was arrested before the search was conducted."

"Were the facts fully developed and presented in proper evidentiary form, they may show that Marti had probable cause...to arrest Cabrera for receiving stolen property as soon as officers entered the premises..." she said. "The problem here is a lack of admissible evidence—in the form of sworn testimony, affidavits, and properly-attested documents—showing that Marti was provided with probable cause (or arguable probable cause) to make the arrest."

The sergeant had failed to provide an "adequate or admissible account" of what happened between the informant and Mr. Cabrera, she said, and there was nothing about the confirmatory sales that would allow the court to infer that "Marti's knowledge about that maneuver gave him probable cause to arrest Cabrera."

"The reason why this is so important," the judge said later, "is that Marti's testimony [in his deposition] about why he arrested Cabrera on May 15 is not helpful to his cause. He insists that the basis for the arrest was the search warrant. That is not what they teach at the police academy."

Judge McMahon went on to grant summary judgment on the malicious prosecution claim to Sergeant Marti on the second arrest, "because no criminal proceedings were ever initiated." But she denied him summary judgment on the malicious prosecution claim for the first arrest.

A state law claim for assault based on both arrests was allowed to stand, but the judge granted summary judgment for the sergeant on claims of intentional infliction of emotional distress brought by Mr. Cabrera and both of his parents.

That left Sergeant Marti facing false arrest and imprisonment claims for both arrests and a malicious prosecution claim for the first incident, along with the state law claim.

Paul J. Solda represents Mr. Cabrera.

Assistant Corporation Counsel Michael K. Gertzler represented Sergeant Marti.