

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1559

CA 10-00910

PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ.

DAVID SCHERR, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF LACKAWANNA, DEFENDANT-RESPONDENT.

RICHARD J. SHERWOOD, LANCASTER, FOR PLAINTIFF-APPELLANT.

ANTONIO M. SAVAGLIO, LACKAWANNA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 17, 2009. The order granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order granting defendant's motion for summary judgment dismissing the complaint in this action for, inter alia, false arrest and malicious prosecution, plaintiff contends that his acceptance of an adjournment in contemplation of dismissal (ACD) with respect to the underlying charge of criminal possession of stolen property does not constitute a waiver of the right to contend herein that there was no probable cause to arrest him. We agree with plaintiff that, although his acceptance of an ACD bars his cause of action for malicious prosecution, it "does not interdict an action for false imprisonment" (*Hollender v Trump Vil. Coop.*, 58 NY2d 420, 423; cf. *Molina v City of New York*, 28 AD3d 372). Contrary to the further contention of plaintiff, however, the record establishes that there was probable cause for his arrest, and thus Supreme Court properly granted defendant's motion (see generally *Fortunato v City of New York*, 63 AD3d 880).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court