Old School 4 Reel Prod. v City of New Yorkl
2012 NY Slip Op 33644(U)
August 22, 2012
Sup Ct, New York County
Docket Number: 106584/11
Judge: Arthur F. Engoron

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Arthur F. Engoron PART 52
Justice

OLD SCHOOL 4 REEL PRODUCTIONS, ROVONDIS C. COOPER, Jr. (a/k/a LAHEEN ALLAH),

Plaintiff,

- v -

THE CITY OF NEW YORK, et al.,

Defendants.

INDEX NO. 106584/11
MOTION DATE 5/11/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to dismiss and/or for summary judgment.

	PAPERS NUMBERED
Moving Papers	1
Opposing Papers	2
Replying Papers	3

Upon the foregoing papers, the motion by defendant The City of New York ("the City) to dismiss the majority of plaintiff's causes of action and/or for summary judgment on those causes of action is granted.

Background

Plaintiff Rovondis C. Cooper, owner of Old School 4Reel Productions, calls himself a "First Amendment Vendor" and sells merchandise on the streets of New York City. On May 1, 2009, plaintiff was arrested by members of the New York City Police Department ("NYPD") and members of the Recording Industry Association of America ("RIAA") for allegedly selling "bootleg" CDs (hereinafter "first arrest"). Plaintiff was charged with Failure to Disclose the Origin of a Recording in the Second Degree, a misdemeanor in violation of New York State Penal Law ("NYPL") § 275.35. On May 2, 2009, plaintiff was released from custody and on January, 28, 2010, he was given an adjournment in contemplation of dismissal ("ACD"). The NYPD arrested plaintiff for a second time, on December 2, 2009 (hereinafter "second arrest"), and again charged him with the same offense. On April 29, 2010, police arrested plaintiff for a third time and once again charged him with the same offense.

On June 7, 2010, plaintiff filed a Notice of Claim, based solely on the second arrest, alleging false arrest, false imprisonment, malicious prosecution, assault, intentional infliction of emotional distress, "loss of property," and constitutional violations of 42 USC § 1983. On October 27, 2010, plaintiff filed a second Notice of Claim, with regard to his first, second, and third arrests, alleging false arrest, false imprisonment, malicious prosecution, assault, intentional infliction of emotional distress, and violations of 42 USC § 1983.

On June 6, 2011, plaintiff initiated the instant case, asserting the following causes of action: (1) "unconstitutional municipal custom or practice" in violation of 42 USC § 1983, (2) false arrest

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: J.S.C.

Check one: [X] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

and false imprisonment, (3) malicious prosecution, (4) abuse of process, (5) "refusing or neglecting to prevent further injury," and (6) "harassment and discrimination." Plaintiff seeks compensatory and punitive damages.

Defendant The City of New York ("the City") joined issue on or about July 15, 2011. On April 12, 2012, defendant moved, pursuant to CPLR 3211(a)(7), to dismiss all claims contained in plaintiff's complaint, except the claims for malicious prosecution stemming from the second and third arrests (on 12/02/09 and 04/29/10, respectively), for failure to state a cause of action; or, alternatively, for summary judgment pursuant to CPLR 3212, on all claims, again with the exception of the malicious prosecution claims stemming from the second and third arrests.

Discussion

To succeed on a 42 USC § 1983 claim against a municipality a plaintiff must allege an official policy or custom that denies him or her a constitutional right. See Monell v Dept of Social Servs, 436 US 658, 691-92 (1978). Likewise, liability under § 1983 cannot be predicated on respondeat superior. See City of Canton v Harris, 489 US 378, 385 (1989). It is not enough that a plaintiff, as in this case, simply alleges that he or she was denied a constitutional right by individual police officers; instead he or she must point to an official government policy that inflicts the injury. Monell, 436 US 658 at 691. Plaintiff's complaint fails to point to any specific official policy on behalf of the City that deprived him of his constitutional rights and plaintiff's opposition papers equally lack such evidence. Thus, the City's motion to dismiss is granted as to plaintiff's 42 USC §1983 claims. Alternatively, the City is granted summary judgment on these claim.

The City's motion to dismiss as regards plaintiff's second cause of action, for false arrest and false imprisonment, is also granted. General Municipal Law § 50-e(1)(a) mandates that a Notice of Claim be filed within ninety days of the date on which the claim arose. A cause of action for false arrest and/or false imprisonment accrues once an individual is released from physical custody or confinement. See Palmer v City of New York, 226 AD2d 149, 149 (1st Dept 1996). On June 7, 2010, plaintiff filed the initial Notice of Claim stemming from his second arrest. This Notice of Claim, filed approximately three months after the March 2, 2010 (90-day) deadline, was untimely as to his false arrest and false imprisonment claims. Likewise, plaintiff's second Notice of Claim, filed on October 27, 2010, stemming from plaintiff's first, second, and third arrests, is also untimely. Plaintiff was released from physical custody on May 2, 2009 (first arrest), December 2, 2009 (second arrest), and April 29, 2010 (third arrest). Therefore, this Notice of Claim, not filed within 90 days of any of plaintiff's release dates, is untimely as to his false arrest and false imprisonment claims and defendant's motion for dismissal of these arrest claims is granted.

Plaintiff's claim for malicious prosecution regarding his first arrest is also time-barred. A cause of action for malicious prosecution begins to accrue when the charges are dismissed on the merits or a verdict is entered in plaintiff's favor. Vitale v Hagan, 132 AD2d 468, 469 (1st Dept 1987). Even if this Court were to consider the ACD a verdict on the merits or a verdict in plaintiff's

favor, the malicious prosecution cause of action for the first arrest accrued on January 28, 2010, and the Notice of Claim for that arrest would had to have been filed no later than April 28, 2010. As plaintiff filed the Notice of Claim regarding his first arrest on October 27, 2010, plaintiff's claim for malicious prosecution from his first arrest, based on an untimely Notice of Claim, cannot be maintained and is hereby dismissed. This Court notes, however, that the City docs not seek to dismiss plaintiff's malicious prosecution claims for the second and third arrests and therefore this Court assumes that for these claims a timely Notice of Claim exists.

Plaintiff's fourth cause of action, for abuse of process, cannot be maintained because plaintiff failed to include it in either Notice of Claim. All theories of liability must be alleged in a Notice of Claim and thc failure to include a theory of liability in the Notice of Claim precludes any liability under that theory. See Gonzalez v New York City Hous. Auth., 181 AD2d 440, 441 (1st Dept 1992). Further, plaintiff's cause of action for abuse of process cannot be simply inferred from his claim for malicious prosecution. See Garcia v O'Keefe, 34 AD3d 334, 334 (1st Dept 2006). Plaintiff did not articulate a claim for abuse of process in either his first or second Notice of Claim; thus plaintiff's fourth cause of action is hereby dismissed.

Plaintiff's fifth and sixth causes of action are dismissed because there is no cause of action for "refusing or neglecting to prevent further injury" or for "harassment", and because there are no facts to substantiate plaintiff's claim of "discrimination." Plaintiff's unnumbered claims for assault, intentional infliction of emotional distress, and "loss of property" are also dismissed. First, plaintiff's claim of intentional infliction of emotional distress against the City must be dismissed as a matter of law. "It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity." Lauer v City of New York, 240 AD2d 543, 544 (App Div, 2d Dept 1997). Additionally, plaintiff's claims alleging assault and conversion stemming from the second arrest are time-barred. Plaintiff was required to file the Notice of Claim for these claims by March 2, 1010, within 90 days of the alleged assault and conversion of plaintiff's property. However, plaintiff served the initial Notice of Claim on the City on June 7, 2010, approximately three months late, thus these claims cannot be maintained. Equally untimely are plaintiff's claims for assault and conversion alluded to in the second Notice of Claim. These claims accrued no later than when the police released plaintiff from custody on May 2 (first arrest), December 2, 2009 (second arrest) and April 29, 2010 (third arrest). This Notice of Claim, filed on October 27, 2010, was not filed within 90 days of any of plaintiff's arrests, and thus cannot support any of plaintiff's assault or conversion claims

The Court further notes that plaintiff's time to move to amend or move for permission to file a late Notice of Claim has also expired. GML §50e-i mandates that a plaintiff has one year and ninety days from the date a cause of action accrues to move for permission to file a late Notice of Claim. Furthermore, a plaintiff may not amend his or her Notice of Claim to add new theories of liability that are time-barred at the time of application. See Semprini v Village of Southampton, 48 AD3d 543, 544 (2d Dept 2008).

Lastly, to the extent that plaintiff seeks punitive damages against the City same cannot be maintained because punitive damages are not recoverable against a municipality. Sharapata v Town of Islip, 56 NY2d 332, 334 (1982).

Conclusion

For the reasons stated herein, the City's motion to dismiss is hereby granted, and the clerk of the Court is directed to enter judgment in favor of The City of New York dismissing all plaintiff's claims except for the malicious prosecution claims stemming from the second and third arrests.

Dated: August 22, 2012

Arthur F. Engoron, *J.S.C.*