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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDGE GEOFFREY D. WRIGHT _____ PART 62
Justice

Index Number : 108098/2011
BECKLES, BETTY
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for dismiss action

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed here to decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
NOV 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

GEOFFREY D. WRIGHT
AJSC

Dated: 11/7/12

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

----------x

BETTY BECKLES,

Plaintiff,

-against-

THE CITY OF NEW YORK, POLICE OFFICER JEAN VERDESOTO, P.O. JULIO GONZALEZ, P.O. RAFAEL SANCHEZ, P.O. SEUNGWOO SEO, P.O. FRANK AMILL, P.O. JESSICA CEBALLOS, P.O. THOMAS FABRIZI and P.O. NICOLE FEBUS,

Defendants.

Index No.: 108098/11

DECISION

Present:
Hon. Geoffrey D. Wright
----------x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	
Exhibits.....	
Other.....cross-motion.....	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant City of New York (City) moves, pursuant to CPLR 3211 (a) (5), to dismiss plaintiff's cause of action alleging a Civil Rights violation, pursuant to 42 USC § 1983 and, pursuant to CPLR 3211 (a) (5) and (7), to dismiss all of plaintiff's seven state law causes of

action: (1) negligent infliction of emotional distress; (2) violation of New York State Constitution Art. 1 § 12; (3) assault and battery; (4) false arrest and imprisonment; (5) intentional infliction of emotional distress; (6) negligent retention of employment services [negligent hiring]; and (7) negligence.

BACKGROUND

The underlying facts of this case involve an internecine altercation between plaintiff, her grandson and one of her grandson's friends. The facts have been recited in detail in a federal court's decision involving the same parties, attached as an exhibit to the instant motion (Motion, Ex. A), and will not be reiterated in detail herein.

Apparently, plaintiff had promised her grandson and his friend $200 each to move furniture in her apartment, pursuant to having the apartment painted, but when they came to get paid, plaintiff only gave them $100 each, claiming that they did not move the furniture back after the painting. When her grandson and his friend refused to leave without the additional payment, plaintiff called the police and, while waiting for their arrival, plaintiff, her grandson and his friend got into a physical altercation, allegedly including plaintiff threatening them with a knife. When the police arrived, they arrested plaintiff and her grandson. Plaintiff alleges that she was injured as a result of this arrest, which she maintains was unjustified.

Plaintiff was arrested on July 3, 2007, and she served a notice of claim on City on August 27, 2007. Motion, Ex. B.

City states that plaintiff previously filed a lawsuit against it and the individual police officers in federal court arising out of the same exact incident and it was dismissed as it pertained to plaintiff's federal claims (*Beckles v City of New York*, 2011 WL 722770, 2011 US Dist LEXIS

21059 [SD NY 2011], *affd* ____ Fed Appx _____, 2012 WL 3553838 [2d Cir 2012]). Motion, Ex. A. In reaching its decision to dismiss plaintiff's case, the federal court found that the police officers had probable cause to arrest plaintiff and that the force that they used was not excessive as a matter of law. *Id.*

In addition to its res judicata argument, City also maintains that plaintiff's claims must be dismissed because plaintiff failed to comply with General Municipal Law (GML) § 50 in failing to articulate the theories of liability which she now asserts in the instant complaint.

In opposition to the instant motion, plaintiff states that her claims for excessive force, false arrest and false imprisonment are not barred by application of the doctrine of collateral estoppel because the federal court declined to exercise jurisdiction over her state law claims when it dismissed all of her federal causes of action. Motion, Ex. A. Therefore, since the state claims were not decided and were dismissed by the federal court without prejudice, plaintiff contends that they may be asserted herein.

With respect to the notice of claim, plaintiff argues that it was sufficient to provide City with adequate notice of her theories of liability so as to allow her claims to go forward. Plaintiff says that City is not prejudiced by any failure to articulate specific theories in her notice of claim.

No reply was filed by City.

DISCUSSION

CPLR 3211 (a), governing motions to dismiss a cause of action, states that

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (5) the cause of action may not be maintained because of ... collateral estoppel .... res judicata ...; or

* * *

(7) the pleading fails to state a cause of action; ..."

On a motion to dismiss, pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 87-88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted]." *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

That portion of City's motion seeking to dismiss plaintiff's cause of action based on a violation of 42 USC § 1983 is granted.

> "[u]nder New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" [internal citations omitted]."

Richter v Sportsmans Properties, Inc., 82 AD3d 733, 735 [2d Dept 2011]); *see Matter of Hunter*, 4 NY3d 260, 269 (2005); *Panagiotou v Samaritan Village, Inc.*, 88 AD3d 779, 780 (2d Dept 2011).

The doctrine of res judicata operates to bar relitigation of the same issues, even if the first decision was not rendered in the same court. *See Lopez v Fenn*, 90 AD3d 569 (1st Dept 2011).

In the case at bar, plaintiff asserted the exact same cause of action, against the exact same defendants, based on the exact same set of facts, in the federal court that dismissed her claims.

As a consequence, plaintiff's cause of action based on a violation of 42 USC § 1983 is dismissed.

That branch of City's motion seeking to dismiss plaintiff's first cause of action for negligent infliction of emotional distress and her fifth cause of action for intentional infliction of emotional distress is granted and those claims are dismissed.

First and foremost, plaintiff failed to allege these theories in her notice of claim, which bars her raising them in the instant litigation. *See Gabriel v City of New York,* 89 AD3d 982 (2d Dept 2011). Although plaintiff cites to *Williams v City of New York* (229 AD2d 114 [1st Dept 1997]) for the proposition that it is within the discretion of the court to determine whether City was prejudiced by the omissions appearing in the notice of claim, that case concerned a party's ability to amend a notice of claim. In the case at bar, the notice of claim was filed in 2007, the federal decision was rendered in 2011, and plaintiff has never sought leave to amend her notice of claim. Hence, plaintiff's reliance on *Williams* is misplaced.

Secondly, the conduct complained of is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community [internal quotation marks and citations omitted]." *Berrios v Our Lady of Mercy Medical Center,* 20 AD3d 361, 362 (1st Dept 2005). Moreover, public policy bars claims for intentional and negligent infliction of emotional distress against governmental entities. *Lauer v City of New York,* 95 NY2d 95 (2000); *Wyllie v District Attorney of County of Kings,* 2 AD3d 714 (2d Dept 2003).

That branch of City's motion seeking to dismiss plaintiff's second cause of action for violation of New York State Constitution Art. 1 § 12 is granted.

As previously stated, since this theory of liability was not stated in plaintiff's notice of

claim, she is precluded from asserting it at this point. Moreover, since plaintiff alleges that she was detained and imprisoned without probable cause or reasonable suspicion, using excessive force, and assaulting her (Complaint) as the basis for this cause of action, and such underlying offenses have already been decided against her in the federal lawsuit, her allegations are insufficient to support this cause of action.

As a consequence, plaintiff's second cause of action is dismissed.

That branch of City's motion seeking to dismiss plaintiff's third and fourth causes of action, for assault and battery and false arrest and imprisonment respectively, is granted.

> "It is well established that the doctrine of collateral estoppel bars a litigant from disputing an issue in another proceeding when that issue was decided against the litigant in a proceeding in which he had a 'full and fair opportunity' to contest the matter."

Feinberg v Boros, ___ AD3d ___, 2012 WL 3930558, 2012 NY Slip Op 06114 *5 (1st Dept 2012).

In deciding whether or not a litigant has had a full and fair opportunity to be heard in the prior proceeding, the court must evaluate several factors, including, but not limited to, the forum of the prior litigation, the extent of the litigation, and the competence of counsel. *Schwartz v Public Administrator of County of Bronx,* 24 NY2d 65 (1969). The criterion for barring an action, pursuant to the doctrine of collateral estoppel, is not whether the issue was actually litigated, but whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the matter, whether or not she chose to do so. *Id.*

In the case at bar, the federal court found that the police officers had probable cause to arrest plaintiff and that the use of force was reasonable as a matter of law. Motion, Ex. A. Hence, plaintiff is precluded from raising these issues again in the present action. *City of New York v Welsbach Electric Corp.*, 9 NY3d 124 (2007).

Although plaintiff argues that the theories of recovery are different, she was afforded a full and fair opportunity to present those issues in the federal lawsuit. Therefore, she is precluded from presenting them in this forum.

Moreover, whereas a cause of action for battery may lie if incident to an unlawful arrest, it will not lie when the touching is incident to a lawful arrest, as the force applied has been found to be reasonable, as in the instant matter. *See generally Johnson v Suffolk County Police Department,* 245 AD2d 340 (2d Dept 1997).

That branch of City's motion seeking to dismiss plaintiff's sixth cause of action for negligent retention of employment services (negligent hiring) is granted.

City has stipulated that the individual defendant police officers were acting within the scope of their employment. "[W]here an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Quiroz v Zottola,* 96 AD3d 1035, 1037 (2d Dept 2012); *Karoon v New York City Transit Authority,* 241 AD2d 323 (1st Dept 1997). Although there is an exception if punitive damages are sought and the cause of action alleges gross negligence, such circumstances have not been alleged in the case at bar. *Id.*

In addition, plaintiff failed to allege this theory in her notice of claim, which also serves

to bar this cause of action. *Mahase v Manhattan & Bronx Surface Transit Operating Authority,* 3 AD3d 410 (1st Dept 2004).

As a consequence, plaintiff's sixth cause of action is dismissed.

That branch of City's motion seeking to dismiss plaintiff's seventh cause of action for negligence is similarly granted.

Plaintiff is seeking "damages for injuries resulting from false arrest and detention, and, therefore, [she] cannot recover under broad general principles of negligence ... ." *Santoro v Town of Smithtown,* 40 AD3d 736, 738 (2d Dept 2007); *Johnson v Kings County District Attorney's Office*, 308 AD2d 278 (2d Dept 2003).

The court has considered all of the other arguments proffered by plaintiff and has found them to be unpersuasive.

Accordingly, it is ORDERED that the City of New York's motion is granted and the complaint is dismissed in its entirety.

This constitutes the decision and order of the Court.

Dated: November 7, 2012

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court