Ahmemulic v City of New York
2016 NY Slip Op 32419(U)
November 9, 2016
Supreme Court, Bronx County
Docket Number: 302427/2015
Judge: Ben R. Barbato
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

 FILED Nov 17 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 12

----------X

FARIZ AHMEMULIC,

Index No.: 302427/2015

Plaintiff,

-against-

Decision & Order

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, BRONX COUNTY DISTRICT ATTORNEY'S OFFICE, and POLICE OFFICERS JOHN DOE 1-3,

Defendants.

----------X

HON. BEN BARBATO:

The following papers were considered on the motion to dismiss and the cross-motion for leave to amend the Notice of Claim:

PAPERS	**NUMBERED**
Motion to Dismiss and annexed Exhibits and Affidavits	**1**
Opposition and Cross-Motion to Amend and annexed Exhibits and Affidavits	**2**
Reply Affirmation and Opposition to Cross-Motion to Amend	**3**

Based on the foregoing papers, the defendants' motion for an order dismissing the complaint is granted, in part. The plaintiff's cross-motion for leave to amend the Notice of Claim is granted.

On December 20, 2011, a City of New York Parks Department ("Parks Department") employee noticed a black baby doll hanging from a metal chain inside of the Parks Department office located at One Bronx River Parkway, Bronx, New York. The chain was tied around the neck of the doll in such a manner so as to mimic a noose, which police perceived as conduct intended to offend or shock black employees of the Parks Department. On January 11, 2012, three police officers arrested the plaintiff on charges stemming from the December 20, 2011 incident. The criminal case against the plaintiff remained open until the charges were dismissed on March 13, 2014.

The plaintiff now seeks to recover damages for injuries he purportedly sustained due to the defendants' actions, which he alleges were in violation of his civil and constitutional rights. The defendants now move for an order dismissing the plaintiff's complaint save his state cause of action for malicious prosecution. The plaintiff cross-moves for leave to amend the Notice of Claim so as to include the Bronx District Attorney's Office, instead of the New York County District Attorney's Office, as a defendant to this action.

Cross-Motion to Amend Notice of Claim

Counsel for the plaintiff states that the New York County District Attorney's Office was mistakenly included as a defendant to this action and seeks an order permitting the plaintiff to correct its notice of claim to instead name the Bronx County District Attorney's Office as a defendant herein. General Municipal Law ("GML") 50-e(6) permits "a mistake, omission, irregularity or defect made in good faith in the notice of claim...[to] be corrected, supplied or disregarded...in the discretion of the court provided it shall appear that the other party was not prejudiced thereby" at any time after said notice of claim has been served and at any stage of the action.

Where the circumstances evince that the mistake in question was not made in bad faith or with the intent to deceive the municipality, nor caused it any prejudice or harm, a plaintiff should be permitted to correct a mistake in a notice of claim (Green v City of New York, 106 AD3d 453 [1st Dept. 2013]). Here, the plaintiff's notice of claim identified two individual Assistant District Attorneys from the Bronx District Attorney's Office and provided the proper date and location of the allegedly improper arrest, which serve as a strong indication of the absence of any wrongful intent in naming the incorrect office. The facts herein are more akin to those presented in *Lomax v New York City Health and Hospitals Corp.*, (262 AD2d 2 [1st Dept. 1999]) and *Rodriguez v New York City Hous. Auth.*, (179 AD2d 560 [1st Dept. 1992]) than those in the cases cited by the defendants. As in *Rodriguez*, based upon the facts contained in the plaintiff's notice of claim – to wit, the arrest location and the individually-named Assistant District Attorneys – the defendants should have known that the Bronx District Attorney's Office was the intended defendant to this action. Furthermore, similar to *Lomax*, the GML 50-h hearing was held shortly after the Notice of Claim was filed (within approximately four months), and the defendants were "timely apprised of the relevant facts at the 50-h hearing" (*Lomax*, 262 AD2d at 5). Given the absence of any specified prejudice that the defendants may have incurred due to the incorrect Notice of Claim, the balancing of interests compels this court to grant leave to amend the Notice of Claim to name the Bronx District Attorney's Office – and not the New York County District Attorney's Office – as a defendant to this proceeding.

State Claims

The plaintiff's complaint enumerates several causes of action arising under state law which defendants contend must be dismissed, pursuant to CPLR 3211(a)(5), because they fail to comply with the mandates of GML 50-i and, therefore, are untimely as a matter of law - namely, false arrest; and negligent hiring, retention, training and supervision.

GML 50-i requires any claim asserted against a municipality, or any of its employees acting within the scope of their employment duties, to be commenced within one year and ninety days after the occurrence of the event upon which the claim is predicated. With respect to the plaintiff's causes of action for false arrest and false imprisonment, the date of accrual for statute of limitations purposes is January 12, 2012, the date when he was released from custody (*Palmer v City of New York*, 226 AD2d 149 [1st Dept. 1996]).[1] The plaintiff's complaint was filed on

[1] The defendants are technically correct in stating that the date of accrual was January 11, 2012, as the tort first accrues at the moment of the supposedly unlawful restraint. However, the courts have deemed false arrest and false imprisonment as "continuing" torts which "become complete at the end of restraint, such as on release from

June 3, 2015, significantly later than the date on which the one year and ninety-day statutory period afforded by GML 50-i expired (April 12, 2013). Consequently, the plaintiff's claims for false arrest and false imprisonment are hereby dismissed.

The issue pertaining to the plaintiff's claims against defendant City for negligent hiring, retention, training and supervision of its police officers cannot be as readily resolved. Although defendant City's motion papers do not explicitly state why it believes these claims are untimely, it appears as though its assertions rely upon the premise that January 12, 2012 is the operative date of accrual for the negligent retention and related claims. At this stage of the proceedings, it is impossible for the court to ascertain the factors underlying the decision to initiate and continue the prosecution of the plaintiff; should the facts reveal at a later juncture that the cause of action was the purportedly impermissible actions taken by the police officer defendants, then the proper date of accrual for these claims would be April 12, 2013, the date when the criminal case was dismissed (*see generally Torres v Jones*, 26 NY3d 742 [2016], holding that, where an officer provides false information to a prosecutor that significantly advances the prosecution of the criminal action, such conduct may be treated as commencing or continuing of the prosecution for purposes of a malicious prosecution cause of action). Thus, because the defendants seek relief solely on the basis that these claims are time-barred, this court is constrained to deny that aspect of the defendants' motion seeking dismissal of the plaintiff's causes of action against defendant City for negligent hiring, retention, training and supervision.

However, the plaintiff's claims sounding in general negligence must be dismissed as a plaintiff may only recover damages for injuries caused by a wrongful arrest and detention under the traditional remedies of false arrest and imprisonment causes of action and "may not recover under broad principles of negligence" (*Antonious v Muhammed*, 250 AD2d 559, 559-560 [2d Dept. 1998] [internal citations omitted]). Additionally, the plaintiff's claims against the New York City Police Department must be dismissed as a matter of law as it is not an entity amenable to lawsuit pursuant to the New York City Charter, Chapter 17, § 396 (*Jenkins v City of New York*, 478 F.3d 76 [2d Cir. 2007]).

Federal § 1983 Claims

The defendants also contend that all of the plaintiff's federal claims, with the exception of that for malicious prosecution, are similarly time-barred. The applicable statute of limitations for 42 USC § 1983 claims ("§ 1983 claims") is the particular state's general personal injury statute of limitations (*Owens v Okure*, 488 US 235 [1989]).[2] New York's general personal injury statute of limitations, CPLR 214[5], provides for a three-year statute of limitations period. Here, the plaintiff filed his summons and complaint on June 2, 2015, more than three years after his cause of action for false arrest arose. Consequently, because the statute of limitations had already tolled at the time plaintiff commenced this action, the plaintiff's 1983 false arrest claim is dismissed pursuant to CPLR 3211(a)(5). However, for similar reasons as stated above, this

---

custody," with the latter date triggering the run of the statute of limitations period (*Karen v State*, 111 Misc.2d 396, 398 [Ct of Claims 1981]); *see also Nunez v City of New York*, 307 AD2d 218 [1st Dept. 2003]).

[2] The notice of claim requirements of GML 50-e are inapplicable to § 1983 civil rights claims (279 AD2d 572 [1st Dept. 2001]).

court finds the defendants' argument that the remaining § 1983 claims are also time-barred to be unpersuasive at this time.

In the alternative, the defendants seek dismissal of the remainder of the plaintiff's § 1983 claims pursuant to CPLR 3211(a)(7).[3] In deciding a motion to dismiss for failure to state a cause of action, the court must "accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

It is axiomatic that liability may not be imputed to a local government for false arrest or malicious prosecution under 42 USC § 1983 unless the plaintiff demonstrates that his or her civil rights were violated as a result of an official government policy, custom or widespread practice (*Monell v New York City Dept. of Social Servs*, 436 US 658, 694 [1978]). Moreover, a plaintiff may establish that such a policy exists by submitting proof that the municipality exhibited a pervasive custom or practice indicative of a deliberate indifference to its citizens' civil or constitutional rights (*Connick v Thompson*, 563 US 51, 60-62 [2011]). The crux of this standard is that a municipality may only be held liable if the municipality itself caused the violation of the person's civil rights, not under the theory of respondeat superior or vicarious liability (*Liu v New York City Police Dept.*, 216 AD2d 67 [1st Dept. 1995]). In other words, the municipality will only be found liable for the unconstitutional conduct of its agent under circumstances evincing that the agent engaged in the proscribed behavior in furtherance of the official governmental policy or practice (*Monell*, 436 US at 690).

The complaint alleges that the defendants and their agents – specifically the three defendant police officers – have "subjected the plaintiff and other persons to a pattern of conduct consisting of illegal harassment, false imprisonments and arrests and malicious prosecution at the time...[which] consists of a large number of individual acts of violence, intimidation, false arrest and false imprisonment and malicious prosecution visited on plaintiff." These types of conclusory conclusions of law are insufficient to provide a factual basis from which this court could infer a causal relationship between a policy or practice and the alleged violation of the plaintiff's constitutional rights (*see McLoughlin v Sullivan* 18 AD3d 245 [1st Dept 2005]). Nor does the single incident involving the plaintiff herein, which "involved only actors below the policy-making level...suffice to show a municipal policy (*5 Borough Pawn, LLC v City of New York*, 640 F. Supp. 2d 268, 299-300 [S.D.N.Y. 2009]).

With respect to the defendants' motion to dismiss the claims asserted against the individual police officer defendants on the basis that the plaintiff has failed to identify said officers within the prescribed statutory period, the analysis above pertaining the running of the statute of limitations controls. The only timely claim remaining is that for malicious prosecution, for which the statute of limitations will expire on March 13, 2017. Because the plaintiff may still amend his complaint to name the individual defendants, that aspect of the defendants' motion

[3] The court notes that defendant City asserts two grounds upon which this court could dismiss the plaintiff's § 1983 claims: 1) on the basis that the City cannot be held liable under a theory of respondeat superior, and (2) for failure to state a cause of action on the grounds that the plaintiff has not demonstrated a sufficient *Monell* claim. However, those are essentially two components of the same principle, so this court addresses the two rationales as one.

seeking to dismiss the § 1983 claims against the "John Doe" officers is granted with the exception of the malicious prosecution cause of action.

Ad Damnum Clause

CPLR 3017(c) precludes a party from stating "the amount of damages to which the pleader deems himself entitled." Consequently, that aspect of the defendants' motion seeking to strike the ad damnum clause of the complaint specifying the monetary value of damages the plaintiff is seeking to recover is hereby granted.

Accordingly, defendants' motion is granted to the extent that the following claims are hereby dismissed: state law claim for false arrest; state law claim for general negligence; claims against the New York City Police Department; the false arrest, battery, assault and false imprisonment claims arising under 42 USC § 1983 against the individual John Doe police officers; and the claims against the municipal defendants arising under 42 USC § 1983. That aspect of the defendants' motion seeking to strike the ad damnum clause to the extent that it includes specified damages is also granted. The plaintiff's cross-motion for leave to amend the notice of claim is hereby granted.

The defendants are directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the order of this court.

Dated: November 9, 2016

ENTER:

J.S.C.