

**Morales v City of New York**

2017 NY Slip Op 30305(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 155438/15

Judge: James E. d'Auguste

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.

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

-----X  
JOSE MORALES,

Plaintiff,

-against-

THE CITY OF NEW YORK, and  
C.O. "JOHN" AMBROSE, the first name being  
fictitious and intended to represent a Manhattan  
Detention Complex corrections officer,

Defendants.  
-----X

**DECISION AND ORDER**

Index No. 155438/15

Mot. Seq. No. 001

**Hon. James E. d'Auguste**

The motion by plaintiff Jose Morales seeking an order, pursuant to CPLR 305(c) and 3025(b), for leave to file an amended summons and verified complaint substituting C.O. Stanley Ambrose ("C.O. Ambrose") in place of defendant C.O. "John" Ambrose is granted.

The facts, as relevant to this motion, are as follows: On March 15, 2014, plaintiff allegedly suffered personal injuries while he was incarcerated at the Manhattan Detention Complex ("MDC"). On May 1, 2014, plaintiff served a notice of claim on defendant The City of New York ("City") alleging, *inter alia*, negligence, deliberate indifference, and negligent hiring. The notice of claim also named C.O. "John" Ambrose as a corrections officer whose first name and correct spelling was at the time unknown. On June 1, 2014, plaintiff filed a summons and verified complaint against the City and C.O. "John" Ambrose, the first name being fictitious and intended to represent an MDC corrections officer. The instant motion seeking leave to amend the complaint was filed on October 19, 2015. The City opposes this motion solely on the ground that plaintiff failed to comply with the requirements stated in General Municipal Law Section 50-i for commencing an action against C.O. Ambrose and that plaintiff failed to exercise due diligence in order to obtain the complete and correct spelling of C.O. Ambrose's name prior to the expiration of the statute of limitations for his state law claims.

Leave to amend a pleading shall be freely given absent prejudice or surprise resulting directly from the delay. CPLR 3025(b); *McCaskey, Davies & Assoc. v. New York City Health & Hosp. Corp.*, 59 N.Y.2d 755, 757 (2013). Additionally, CPLR 1024 permits the substitution of a “John Doe” defendant after the expiration of the statute of limitations, provided that the plaintiff exercised due diligence in attempting to ascertain that defendant’s identity prior to the running of the statute of limitations. *Tucker v. Lorieo*, 291 A.D.2d 261, 261-62 (1st Dep’t 2002); *Temple v. N.Y. Cmty. Hosp.*, 89 A.D.3d 926, 927 (2d Dep’t 2011). When the “John Doe” is a public employee, the plaintiff may meet the due diligence standard of CPLR 1024 by making a timely Freedom of Information Law (“FOIL”) request with the appropriate government agency. *Temple*, 89 A.D.3d at 928; *Bumpus v. New York City Transit Auth.*, 66 A.D.3d 26, 33-34 (2d Dep’t 2009). Further, “when an originally-named defendant and an unknown [‘John Doe’] party are united in interest, i.e. employer and employee, the later-identified party may, in some instances, be added to the suit after the statute of limitations has expired pursuant to the ‘relation-back’ doctrine of CPLR 203(f), based upon post-limitations disclosure of the unknown party’s identity.” *Bumpus*, 66 A.D.3d at 34-35.

On September 23, 2014, approximately six months after the alleged incident and nine months before the statute of limitations expired, plaintiff’s attorney submitted a FOIL request to the New York City Department of Correction (“DOC”). The request sought all documents, photos, and videos pertaining to plaintiff’s alleged incident, including “any and all reports regarding the use of force on Jose Morales.” *Sivin Reply Aff. Ex. 1*. By letter dated September 29, 2014, the DOC’s Senior Counsel Laura S. Mello informed plaintiff’s attorney that a decision whether to respond to the FOIL request would be made within twenty business days of the date of said letter. However, plaintiff’s counsel received no response from the DOC. Plaintiff’s counsel affirms that his legal assistant, Laura Kaplan, made multiple phone calls to the DOC inquiring into the status of plaintiff’s FOIL request without any response. On June 2, 2015, after receiving DOC documents in response to a FOIL request on another case, Ms. Kaplan sent a follow-up email was sent to the DOC’s Senior Counsel, which similarly

received no response. Ms. Kaplan made additional inquiries regarding plaintiff's FOIL request via telephone. Sivin Aff. Ex. 2 (DOC correspondence). On January 26, 2016, more than a year after the date of plaintiff's FOIL request, and four months after the statute of limitations period had expired, the DOC made a partial disclosure of records pertaining to the incident. As part of its partial disclosure, the DOC provided plaintiff with a "UOF Package Accountability Sheet" identifying, for the first time, the full name and correct spelling of C.O. Ambroise. *Id.* at 1.

Despite the City's opposition to the timeliness and diligence of inquiry pertaining to plaintiff's FOIL request, the Court finds that plaintiff's September 23, 2015 FOIL request and repeated subsequent inquiries demonstrate that plaintiff exercised due diligence in attempting to ascertain the identity of C.O. Ambroise prior to the expiration of the statute of limitations. *Bumpus*, 66 A.D.3d at 33. *But see Holmes v. City of New York*, 132 A.D.3d 952, 954 (2d Dep't 2015) (denying substitution where "the plaintiffs failed to establish that they exercised due diligence to discover the identity of the John Doe defendants prior to the expiration of the statute of limitations" and "[t]here [was] no indication in the record that the plaintiffs engaged in any pre-action disclosure or made any Freedom of Information Law requests").

Further, any amendment of the complaint to include C.O. Ambroise's full name with correct spelling does not prejudice or surprise the City. Having named C.O. Ambroise by means of using a fictitious first name and missing only one letter from his last name, the notice of claim and complaint sufficiently describe C.O. Ambroise in such a manner that the City could understand that he is the intended defendant by a reading of the papers. *Bumpus*, 66 A.D.3d at 29. The records that eventually provided the first name and correct spelling of C.O. Ambroise were equally accessible to the City if it had made its own inquiry into the identity of C.O. "John" Ambrose as named in the notice of claim and summons and complaint.

The City further argues in opposition to the instant motion that plaintiff did not make any pre-action discovery demands, however, a reading of the case law indicates that a showing of due diligence does not require plaintiff to make both a FOIL request and pre-action discovery demands. The City's

assertion that plaintiff should have made pre-action discovery demands further supports the assumption that the City was either in possession of records bearing C.O. Ambroise’s full name or could have easily accessed such records. Additionally, as plaintiff was incarcerated for some period of time during the statute of limitations period, during that time period, by stipulation dated April 9, 2015, the parties agreed that plaintiff “shall make no discovery demands, issue shall not be joined, and the defendant(s) time to serve an answer shall extend until 30 days after proper notification has been made . . . that the examination(s) pursuant to 50-h is/are completed.” Manakhimova Aff. Ex. B. The 50-h hearing was not conducted until January 27, 2016, well after the statute of limitations period had already expired. *Id.* Ex. C.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for leave to file an amended complaint substituting C.O. Stanley Ambroise in place of defendant C.O. “John” Ambrose is granted; and it is further

ORDERED that this action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 62  
 -----X  
 JOSE MORALES,

Plaintiff,

Index No. 155438/15

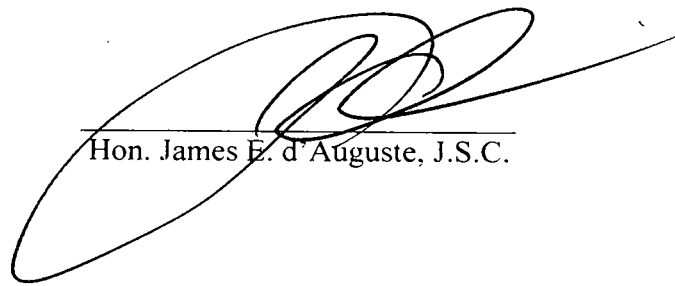
-against-

THE CITY OF NEW YORK and  
 C.O. STANLEY AMBROISE,

Defendants.  
 -----X

This constitutes the decision and order of this Court.

Dated: February 14, 2017



Hon. James E. d'Auguste, J.S.C.