

<b>Nelson v City of New York</b>
2012 NY Slip Op 33622(U)
May 15, 2012
Supreme Court, New York County
Docket Number: 115827/09
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Arthur F. Engoron  
*Justice*

PART 52

STEPHEN NELSON,

Plaintiff,

- v -

INDEX NO. 115827/09  
MOTION DATE 4/6/12  
MOTION SEQ. NO. 001

THE CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, "JOHN DOE" POLICE OFFICERS NOS.:  
1-3 and "JANE DOE" POLICE OFFICER, being Police  
Officers of the New York City Police Department, whose  
names are unknown to Plaintiff,

Defendants.

**FILED**

MAY 17 2012

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion to dismiss several causes of action and cross-motion to compel discovery and amend the complaint accordingly.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Notice of Cross-Motion— Affidavits — Exhibits ...

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

3

4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, defendants' motion to dismiss several causes of action is granted in part and denied in part and plaintiff's cross-motion to compel the names of the police officers allegedly involved in the subject incident and to amend the caption and complaint to include these officers by name is granted.

J.S.C.

Plaintiff claims that on or about October 31, 2008, he was falsely arrested and imprisoned, physically injured and mistreated while in custody. As here relevant, plaintiff has pleaded 1) negligent hiring and retention on the part of The City of New York and New York City Police Department (hereinafter "the municipal defendants"); 2) intentional infliction of emotional distress; 3) negligent infliction of emotional distress; 4) violations of plaintiff's civil rights under 42 U.S.C. § 1983 as well as the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution; and 5) punitive damages. The municipal defendants now move to dismiss these five causes of action, and plaintiff cross-moves to compel the disclosure of the four police officers whose alleged conduct is at the heart of plaintiff's claims, and to permit, thereafter, plaintiff to amend the action to include these police officers by name, individually.

Motion to Dismiss

Negligent Hiring and Retention and Punitive Damages

The municipal defendants move to dismiss plaintiff's cause of action for negligent hiring and retention, arguing that not only does the notice of claim not include such a claim, but the doctrine

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED:

of respondeat superior also precludes recovery therefor. In support of their position the municipal defendants cite to Urena v City of New York, 221 AD2d 429, 429 (2d Dept 1995), wherein the Appellate Division held that "the presence of the single word 'negligence' in the...notice of claim does not constitute a statement of 'the time when, the place where [or] the manner in which' the plaintiffs' claim based on negligent hiring arose (General Municipal Law § 50-e[2])." Additionally, as also argued by the municipal defendants, an action for negligent hiring and retention cannot be sustained where the persons were acting within the scope of their employment, based on respondeat superior. Where, as here, the alleged perpetrators were police officers who arrested plaintiff, their employer, the municipal defendants herein, would be liable for any acts of negligence, and thus there is no basis for a separate claim based on negligent hiring and retention. As stated by the Court in Karoon v New York City Trans. Auth., 241 AD2d 323 (1<sup>st</sup> Dept 1997), the only exception to the above is where the individuals have acted with gross negligence and the claim is for punitive damages. However, such a claim for punitive damages cannot be sustained against municipal defendants. Id., at 324. While plaintiff seeks to distinguish the Urena and Karoon cases, the alleged factual differences are of no moment here and the fifth cause of action for negligent hiring and retention is dismissed in its entirety, and, likewise, any claims for punitive damages against the municipal defendants, only, are dismissed.

#### Emotional Distress

All parties are in agreement that plaintiff's claim for intentional infliction of emotional distress cannot be sustained and therefore plaintiff's sixth cause of action is dismissed in its entirety. As for the seventh cause of action for negligent infliction of emotional distress, same is also dismissed as against the municipal defendants only. Defendants point out that the notice of claim fails to properly place the municipal defendants on notice of plaintiff's intention to plead this cause of action. A review of the notice of claim, even in the light most favorable to plaintiff, does not convince this Court that a claim for negligent infliction of emotional distress is spelled out therein. As the Appellate Division noted in Urena, supra, the mere presence of the word "negligence" in a notice of claim is not sufficient. Likewise, the fact that plaintiff listed emotional distress as one of his damages in the notice of claim is not enough to support a cause of action against the municipal defendants for the supposed negligent infliction of that emotional distress without specifically saying so. However, as against the police officer defendants, plaintiff's claim for negligent infliction of emotional distress does not depend upon what appears or does not appear in the notice of claim, and, thus, plaintiff's seventh cause of action for negligent infliction of emotional distress is not dismissed as against the police officer defendants individually.

#### Civil Rights Claims

In Monell v Dept. of Soc. Svcs., 436 US 658 (1978), the Supreme Court stated that municipal defendants were not intended to be held liable for violation of a party's civil rights "unless action pursuant to official municipal policy of some nature caused a constitutional tort." Id., at 691. Thus, as the Second Circuit held in Sorlucco v New York City Police Dept., 971 F2d 864 (2d Cir 1992), the alleged policy or practice of discrimination, whether official or unofficial, "must be so

persistent or widespread as to constitute a custom or usage with the force of law..." and so "manifest as to imply the constructive acquiescence of senior policy-making officials." *Id.*, at 870-871. Plaintiff argues that it is premature to dismiss the 42 USC § 1983 claims because further discovery may elicit the existence of such a policy. However, in the absence of even an iota of evidence of such policy, and where its possible existence is merely speculation, plaintiff's claim for violation of his civil rights pursuant to CPLR 42 USC § 1983 is dismissed. Plaintiff's remaining civil rights claims, for alleged violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights, which movants do not address, may proceed as against the municipal defendants.

In addition, while plaintiff seems not to make a distinction between the actions of the municipal defendants and those of the individual police officers, this Court does see a difference. While defendants are correct in their contention that the Supreme Court in *Iqbal v Ashcroft*, 556 US 662 (2009), made it clear that more is needed to sustain a claim for civil rights violations than a simple statement that the defendants acted improperly, this Court finds that the complaint claims that plaintiff was subjected to the alleged ill-treatment and particularly singled out based on his sexual preference and/or his gender, same is sufficient to support a cause of action for the individual police officers' alleged violation of his 42 USC § 1983 rights. As such, all of plaintiff's civil rights claims may proceed against the officers.

#### Cross-Motion

Plaintiff cross-moves to compel production of the names of the police officers whose actions allegedly gave rise to plaintiff's claims and, upon ascertaining the names of these officers, that plaintiff be allowed to amend his complaint to plead against these officers individually.

#### Service

In opposition to the cross-motion, the municipal defendants argue that as the police officers were never properly served with the action at the precinct, their actual place of business, prior to the expiration of the Statute of Limitations, plaintiff cannot substitute the actual officers for the "John" and "Jane Doe police officers" named in the complaint. However, as per the affidavit of Derick Kuan (Reply Papers), plaintiff attempted to serve the summons and complaint at the correct precinct but was turned away therefrom and directed to One Police Plaza, where the papers were served and accepted. As such, this Court finds that plaintiff timely acquired personal jurisdiction over the individual police officers.

#### Relation-Back Doctrine

The municipal defendants also argue that plaintiff has not performed due diligence to ascertain the police officers names, and therefore he should not be provided with the names of the officers or allowed to proceed at this late date against them. While the issue is somewhat close (surely had plaintiff provided the requested authorizations to unseal the criminal file in this matter the officers' names would have been apparent to all), it seems inconceivable that the municipal defendants had no other way of ascertaining what police officers were on duty in the location of

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the occurrence, or whom had responded to any such call on the night in question, that they could not have provided the officers' names without full access to the criminal file. At the same time, since the best source of information would be the criminal file, plaintiff is directed to provide, within 30 days of the date of this order, the necessary authorizations to unseal the criminal file on this matter and allow defendants access thereto. Additionally, within 30 days of the unsealing of the criminal file, the municipal defendants shall provide plaintiff with the names of the police officers involved in the subject incident and arrest, including any officers present in the transfer of plaintiff from the location of the arrest to the precinct. Thereafter, plaintiff has 30 days to serve and file his amended summons and complaint. Service upon the police officers shall be considered complete and correct upon service of the papers at either the police precinct where the officers are employed or at One Police Plaza. The parties' time to answer the amended complaint shall follow the CPLR.

### Conclusion

Based on the foregoing, the motion to dismiss several of plaintiff's causes of action is granted to the extent of dismissing the causes of action for negligent hiring and retention and intentional infliction of emotional distress in their entirety, and dismissing plaintiff's causes of action for negligent infliction of emotional distress and punitive damages against the municipal defendants only. As for plaintiff's cause of action for violation of his civil rights, same is dismissed as regards the 42 USC § 1983 claims against the municipal defendants, only, and may proceed against all the defendants as to all other alleged violations.

Dated: May 15, 2012



Arthur F. Engoron, J.S.C.

**FILED**

**MAY 17 2012**

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