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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 116188/2010
COLEMAN, UNIQUE
vs.
CITY OF NEW YORK CAL #20
SEQUENCE NUMBER : 004
AMEND SUPPLEMENT PLEADINGS

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

FILED
JUL 09 2013
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 7-2-13
JUL 02 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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 5

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UNIQUE COLEMAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, P.O. LYNN RUGER SHIELD #26344, INDIVIDUALLY AND AS A POLICE OFFICER, P.O. ANDREW BURRAFATO SHIEDL # 21393, INDIVIDUALLY AND AS A POLICE OFFICER, AND POLICE OFFICER JOHN DOE, INDIVIDUALLY AND AS A POLICE OFFICER,

Defendants.

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DECISION/ORDER
Index No.: 116188/2010
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	
REPLYING AFFIDAVITS	5
EXHIBITS	6-10
STIPULATIONS	
OTHER (X-Motion)	4

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR§ 3025 and FRCP Rule 15, to amend and to supplement the pleadings in her Fifth Cause of Action. Defendants cross-move for an Order pursuant to CPLR§ 3211(a)(7) dismissing plaintiff's Fifth Cause of Action alleging a *Monell* claim

against the municipal defendants; or in the alternative, for an Order pursuant to CPLR§ 603 and §4011, bifurcating plaintiff's Fifth Cause of Action for discovery and trial purposes until plaintiff succeeds in establishing civil rights violations on the part of the individual defendants; and for an Order pursuant to CPLR§3211(a)(7) dismissing plaintiff's Fourth Cause of Action alleging negligent retention and supervision against the City and Sixth Cause of Action alleging intentional infliction of emotional distress.

Factual and procedural background:

The instant action is for personal injuries allegedly sustained by plaintiff during a street encounter with several police officers. According to plaintiff, on January 16, 2010 at approximately 1:00 am, she was walking in the vicinity of Lexington Avenue and 118th Street in New York, with her brother and some friends. Without any provocation or apparent reason, her brother was stopped by defendant police officers, and frisked. When plaintiff pleaded with the officers to release her brother, and attempted to report the incident via phone, she was assaulted and battered by said officers. Plaintiff was subsequently arrested by P.O. Lynn Ruger and charged with Assault in the Third Degree, Obstruction of Governmental Administration in the Second Degree, Resisting Arrest, and Unlawful Possession of Marijuana. She was then taken to the 25th precinct to be processed. Once there, she requested medical attention and was transported via ambulance to Bellevue Hospital, where she was treated and released. She was then taken to Manhattan Central Booking.

Plaintiff alleges that she was arraigned and released sometime in the afternoon on Saturday, January 16, 2010, within 24 hours of her arrest. She also alleges that she was compelled to appear at approximately seven court appearances in Criminal Court, until the case against her was finally dismissed on September 8, 2010.

Subsequently, plaintiff served a Notice of Claim on the City on January 27, 2010 and a Supplemental Notice of Claim on October 26, 2010. Plaintiff commenced the instant action on December 15, 2010. She served her Summons with Verified Complaint on December 29, 2010 and the City served its Answer on January 10, 2011. Plaintiff then served an Amended Summons and Complaint on September 23, 2011. Additionally, after Corporation Counsel's assumption of the legal representation of Police Officers' Rutger and Burrafato, an amended Answer was served on December 28, 2011. Plaintiff's EBT was conducted on May 17, 2012.

Positions of the parties:

Plaintiff seeks to amend and supplement the pleadings in her Fifth Cause of Action which is a federal 1983 Civil Rights cause of action. Plaintiff argues that the purpose of CPLR§ 15(a)(2), is to afford the parties the opportunity to amend a claim that was previously filed when significant facts were still unknown, so the controversy could be decided on the merits. She also argues that the proposed amendment would clearly satisfy the pleading objections raised by defendants and that it would not cause defendants any prejudice because discovery is incomplete, and her motion to compel discovery remains pending.

A review of plaintiff's Amended Complaint reveals both State and Federal claims against the individual officers, P.O. Ruger, P.O. Burrafato, P.O. John Doe, and the City of New York. Specifically, plaintiff asserts claims sounding in assault, battery, false arrest, false imprisonment, malicious prosecution, negligent hiring and retention and the intentional infliction of emotional distress against the defendants based on the theory of respondeat superior. Additionally, plaintiff's Seventh Cause of Action alleges civil rights violations pursuant to 42 U.S.C.§ 1983, attributed to the individual defendants, wherein she contends that each of these violations occurred as a result of a

pre-existing policy or custom which was created or followed by defendants.

Plaintiff argues that a motion to amend a pleading should not be denied unless there is substantial reason to do so. She refers to and relies on the factors enunciated in *Macias v. Jaramillo*, 129 N.M. 578 (Ct. App. 2000) , which she contends should be considered by a court faced with the decision of whether to permit the amendment of a pleading. These factors include undue delay, bad faith, surprise, dilatory motives or a repeated failure to cure deficiencies. She argues that since none of these factors exist in the instant case, the Court must permit the amendment. Plaintiff further argues that a prospective amendment would also comply with the three year statute of limitations set forth by §1983.

In reviewing a motion to dismiss pursuant to CPLR§3211, "the court must afford the pleading a liberal construction, accept all the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see also Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]; *Thomas v. Thomas*, 70 A.D.3d 588 [1st Dept. 2010]).

In addressing the City's motion to dismiss plaintiff's Fifth Cause of Action, or her *Monell* claims, the Court turns to the allegations contained in her proposed amended complaint. Her Fifth Cause of Action is entitled "AS AND FOR A FIFTH CAUSE OF ACTION FOR VIOLATION OF PERSONAL CONSTITUTION RIGHTS UNDER 42 U.S.C. 1983 AGAINST THE CITY OF NEW YORK," and it states in pertinent part:

"That the defendant City caused or created a policy and/or custom, and acted with deliberate indifference to patterns and/or police practices which included illegal seizures; excessive or arbitrary

use of force; illegal use of police equipment; destruction of evidence; intimidation of witnesses; illegal arrests; failing to follow police guidelines; failing to monitor or discipline police misconduct; failing to gather evidence when allegations of police misconduct are involved; condoning a code of silence within the police department regarding misconduct; failing to take police reports of illegal conduct; failing to properly supervise, train, investigate or discipline its officers; any and/all of the above contributing to plaintiff's false arrest, and prosecution, and injuries."

Defendants argue that plaintiff's purported *Monell* claim asserted in her Fifth Cause of Action alleging various civil rights violations, warrants dismissal pursuant to CPLR§ 3211(a)(7), for failure to state a claim.

In order to assert a claim against a municipality based on the alleged tortious actions of its employees, the plaintiff must allege and plead that the alleged actions resulted from an official policy or custom (*Monell v. Dept. of Social Servs. of City of New York*, 436 U.S.658 [1978]; *Leftenant v. City of New York,* 70 A.D.3d 596 [1st Dept. 2010]; *Leung v. City of New York*, 216 A.D.2d 10 [1st Dept. 1995]). It is well settled that a plaintiff may not hold a municipality liable pursuant to §1983, under a theory of respondeat superior (*see Monell v. New York City Dept. Of Social Servs.,* 436 U.S. at 694). Rather, to hold a municipality liable under 42 USC§ 1983 for the unconstitutional actions of its employees, a plaintiff must plead and prove (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right (see *Canton v. Harris*, 489 U.S. 378, 385 [1989]; *Monell v. New York City Dept. of Social Servs., supra; Wilner v. Village of Roslyn, 99 A.D.3d 702 [2d Dept. 2012]; Batista v. Rodriguez, 702 F.2d 393*[2d Cir. 1983]).

However, since the Court is not convinced that granting plaintiff leave to amend her Fifth Cause of Action, will result in any substantial prejudice or surprise to defendants, (see CPLR

§3025[b]; *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 [1983]) or that the proposed amendment is "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499 [1st Dept. 2010]), it will grant plaintiff leave to amend it.

Defendants also seek dismissal of plaintiff's Fourth Cause of Action alleging negligence, negligent training, negligent hiring, and negligent retention. The Fourth Cause of Action states in pertinent part:

"That the defendant 'City' was negligent, careless and reckless in hiring, retaining, supervising and promoting as and for its employees, 'the officers' herein, in that said officers, as employees of the City of New York, were not qualified to be hired or retained or promoted as police officers, lacked the experience, deportment, skill, training and ability to be employed by the defendant 'City'; to be retained by defendant, 'City'; and to be utilized in a manner that each was employed on the day in question."

"That the defendant, 'City', failed to exercise due care and caution in its hiring, retaining and/or promoting practices; in that the defendant 'City' failed to adequately investigate said officers' backgrounds; adequately screen and test officers; failed to adequately monitor officers; failed to properly discipline officers who violate Patrol Guidelines; failed to properly train and retrain officers; and in that the defendant 'City', its' agents, servants and/or employees, were otherwise careless, negligent and reckless....."

In the instant case, the City "is not disputing that the police officers who were involved in effectuating the Plaintiff's arrest were acting within the scope of employment, which thereby renders the City responsible for any damages caused by their actions (Knight Aff. ¶45). Despite this

concession, the City still disavows responsibility, arguing that they still cannot be held liable for any damages caused by an employee's negligence under a respondeat superior theory

As a general proposition, causes of action based upon the City's own negligence in hiring, retention, training, or supervision are viable with proof that negligence was the proximate cause of the injury alleged (*see Saarinen v. Kerr*, 94 N.Y.2d 494, 504 [1994]; *Barr v. County of Albany*, 50 N.Y.2d 247, 257-58 [1980]). To prevail on a negligent hiring and supervision claim, a plaintiff must show that an employer knew or should have known of the employee's propensity for the particular behavior that caused the plaintiff's injuries (*see Taylor v. United Parcel Serv., Inc.*, 72 A.D. 3d 573, 574 [1st Dept. 2010]).

It is well established that a claim for negligent hiring, training and supervision must be dismissed when an employer has conceded that its employees were acting within the scope of their employment when the alleged tort was committed (*see Delgado v. City of New York*, 86 A.D.3d 502 [1st Dept. 2010]; *Griffin v. City of New York*, 67 A.D.3d 550 [1st Dept. 2009]; *Karoon v. New York City Tr. Auth.*, 241 A.D.2d 323 [1st Dept. 1997]). In the instant case, since the City has clearly conceded that the officers were acting within the scope of their employment at the time of the alleged incident, it is entitled to dismissal of plaintiff's Fourth Cause of Action (*see Butler v. City of New York*, 15 Misc.3d 1134(A), 2007 N.Y. Slip Op. 50974(U) [Sup. Ct, Kings County, 2007] [as City's Answer denied allegation as to officer's scope of employment, plaintiff was deemed entitled to information related to the negligent hiring and training claim]).

Finally, defendants seek dismissal of plaintiff's Sixth Cause of Action alleging intentional infliction of emotional distress. Said Sixth Cause of Action states in pertinent part:

"That 'the officers', at the aforementioned date, time and location, acting in the scope of their employment, acted in a manner that exceeded all reasonable bounds of decency with an intent to inflict emotional distress upon plaintiff. That the plaintiff did sustain emotional distress as a result of the defendant officers' conduct and the City, under the doctrine of respondeat superior. That by reason of the aforesaid, the plaintiff has been damaged in a sum exceeding the jurisdictional limits of the lower court."

Plaintiff's Sixth Cause of Action necessitates dismissal because there is no evidence of conduct on defendants' part that meets the threshold of outrageousness required to support such a claim (see *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 303 [1983]). More importantly, it is well settled that this claim is not available against governmental entities (see *Pezhman v. City of New York*, 47 A.D. 3d 493 [1st Dept. 2008]; *Ellison v. City of New Rochelle*, 62 A.D.3d 830 [2d Dept. 2004],quoting *Liranzo v. N.Y. City Health & Hosps. Corp.*, 300 A.D.2d 548 [2d Dept. 2002]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for leave to amend and supplement the pleadings in her Fifth Cause of Action is granted; and it is further

ORDERED that defendants' cross-motion is granted to the extent that plaintiff's Fourth Cause of Action is dismissed as against all defendants with the exception of Police Officer "John Doe;" and defendants' Sixth Cause of Action is dismissed as against all named defendants; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 103, 80 Centre Street, on July 30, 2013 at 2:00 PM; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 2, 2013

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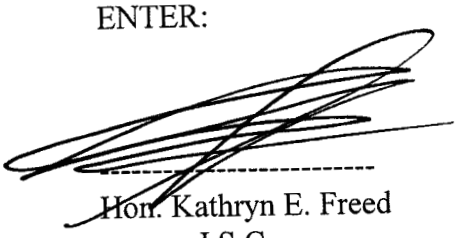

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

JUL 09 2013

COUNTY CLERK'S OFFICE
NEW YORK