

Felder v City of New York

2013 NY Slip Op 31852(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 114742/07

Judge: Kathryn E. Freed

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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 : 114742/2007
FELDER, KENNETH
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
DISMISS *CAL #34*

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

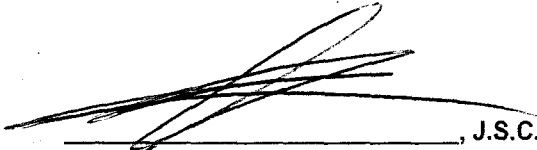
FILED

AUG 12 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-8-13
AUG 08 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

-----X
KENNETH FELDER,

Plaintiff,

-against-

THE CITY OF NEW YORK, DETECTIVE STEFANO BRACCINI AND DETECTIVE PETER NUGNES, individually and in their official capacities, and "JOHN DOES", employees of Defendants City of New York and New York City Police Department, in their individual and official capacities,

Index No.:114742/07
Seq. No.: 004

FILED

AUG 12 2013

Defendants.

-----X
HON. KATHRYN E. FREED:

COUNTY CLERK'S OFFICE
NEW YORK

Defendants, The City of New York, Detective Stefano Braccini, and Detective Peter Nugnes, move, pursuant to CPLR§ 3211 (a) (5), CPLR §3211 (a) (7), and General Municipal Law §§ 50-e and 50-i, to dismiss plaintiff Kenneth Felder's complaint. Defendants argue that plaintiff's complaint necessitates dismissal because plaintiff failed to comply with requirements necessary to file a notice of claim, because the principles of res judicata and collateral estoppel bar the due process claim from proceeding, and because the complaint fails to state a cause of action.

Factual and procedural history:

On May 31, 1994, while in custody for an unrelated robbery, plaintiff was interviewed concerning the robbery and murder of Dario Estrella ("Estrella"), which occurred in Manhattan on February 26, 1994. Based upon information which he provided, plaintiff was not arrested, indicted, or charged in connection with said robbery or murder. In 1998, the Cold Case Squad of the New York City Police Department, which investigates unsolved criminal investigations, reopened the

investigation, and assigning detectives Peter Nugnes and Stefano Braccini. The detectives determined that plaintiff should be questioned regarding the Estrella murder, and located him in a Georgia prison, where he was serving time for Aggravated Assault.

On March 1, 1999, the detectives traveled to the prison in Georgia in order to interview plaintiff. During the course of the interview, which was held without the presence of counsel, plaintiff allegedly made statements regarding the Estrella homicide. On January 5, 2000, the police again interviewed plaintiff without counsel, and plaintiff made additional statements regarding the homicide. On January 10, 2000, plaintiff was indicted by a grand jury on charges of second degree murder and first degree robbery in connection with the homicide. A warrant was issued and plaintiff was arrested on January 11, 2000. He was subsequently extradited to New York.

At hearings which were subsequently held on December 13 and 15, 2000, in the Supreme Court, New York County, Criminal Term, plaintiff sought to suppress his incriminatory statements, alleging that the statements were taken in violation of his right to counsel. The court granted plaintiff's application to suppress the statements made during the 1999 and 2000 interviews. The Appellate Division, First Department, affirmed the court's decision. On January 31, 2003, the charges against plaintiff were dismissed, and he was released from custody.

On April 16, 2003, plaintiff served a notice of claim, alleging, among other things, that his constitutional rights had been violated. On April 2, 2004, plaintiff filed an action in the United State District Court for the Southern District of New York against defendants, and asserted claims including false arrest; malicious prosecution; denial of his rights to counsel; and violations of his due process and equal protection rights.

Defendants moved for summary judgment to dismiss the federal action. Plaintiff also moved for summary judgment. In an order dated August 7, 2007, Judge Alvin Hellerstein of the United States District Court for the Southern District of New York, dismissed the counts of the complaint which alleged abuse of process; defamation; infliction of emotional distress; negligence, prima facie tort; vicarious liability; and negligent hiring and retention. On August 13, 2007, by summary order, Judge Hellerstein vacated the August 7, 2007 order, denied plaintiff's motion, and granted the City's motion for summary judgment as to the federal claims and the claims for false arrest and malicious prosecution. The court declined to exercise supplemental jurisdiction over the remaining state claims.

Following the dismissal of the federal complaint on November 2, 2007, plaintiff filed a Summons and Complaint in the Supreme Court, New York County, against defendants. The Complaint alleges causes of action for violations of Article 1, 6, and 11, of the New York State Constitution; assault and battery; false arrest ; false imprisonment; malicious prosecution; abuse of process; defamation; intentional infliction of emotional distress; negligence; prima facie tort; vicarious liability; and negligent hiring and retention.

The City moved, pursuant to CPLR§ 3212, for an order granting summary judgment and to dismiss the case. The City also moved separately, pursuant to CPLR§ 3211, to dismiss plaintiff's causes of action for assault and battery, and the state constitutional violations. On September 13, 2011, Justice Barbara Jaffe issued a joint opinion for both motions, dismissing the claims of false arrest and imprisonment; malicious prosecution; assault and battery; equal protection and right to counsel under New York States Constitution; abuse of process; vicarious liability; defamation; intentional infliction of emotional distress; negligence; and prima facie tort. Plaintiff and the

defendants filed an appeal of the September 13, 2011 order. However, defendants maintain that the appeal was withdrawn.

On February 15, 2012, defendants moved, via order to show cause, for the court to modify Judge Jaffe's September 13, 2011 decision to clarify whether the court dismissed the due process claim, as well as all of the other causes of action. Defendants also moved to stay the trial, which was scheduled for March 19, 2012, pending the determination of plaintiff's appeal. On October 18, 2012, Justice Jaffe issued an Amended Order which clarified that plaintiff's claim for violation of due process under the New York State Constitution was not dismissed. Judge Jaffe did not address defendants' request to stay the trial.

Defendants now move for dismissal of the alleged due process violation because the Notice of Claim was inadequate, as the claim is barred due to collateral estoppel and res judicata, and because the complaint fails to state a cause of action upon which relief can be granted.

Conclusions of law:

The court will first address the arguments presented by both plaintiff and defendants regarding whether this motion should be transferred to Judge Jaffe. Plaintiff argues that, pursuant to CPLR§ 2221 (a) and CPLR§ 2217 (a), this motion should be referred to Judge Jaffe as she has previously handled several decisions in this case.

CPLR§ 2221 (a) provides that a motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order "shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it" CPLR§ 2217 (a) provides that "[a]ny motion may be referred to a judge who decided a prior motion in the action."

The court notes that despite the reference to CPLR§ 2221 (a), defendants' motion seeks to dismiss plaintiff's complaint, and is not presented as a motion to renew, reargue, vacate, or modify. Plaintiff fails to demonstrate that this court can not adequately make determinations in this case. While this court understands that some of the previous orders regarding this case were drafted by Judge Jaffe, Judge Jaffe's former inventory of cases are now being handled by this Part. Therefore, plaintiff's application to transfer this case pursuant to CPLR§ 2221 (a) and CPLR§ 2217 (a) is denied.

After reviewing the exhibits which plaintiff and defendants submit, as well as the past orders issued by Justice Jaffe, it is evident that defendants have previously raised the same arguments by motion regarding dismissing the cause of action for due process, collateral estoppel and res judicata. For example, in their summary judgment motion dated September 16, 2010, defendants argued that "plaintiff has alleged no facts to show that he was deprived of any rights without due process" and that "the officers did not violate plaintiff's constitutional rights" Rooney Aff. ex. 8. Similarly, in the order to show cause dated February 13, 2011, defendants argued that the "due process claim against the City of New York must be dismissed because plaintiff has not established any pattern or practice of the City resulting in the alleged violation of his rights under the State Constitution." Defendants further argued that "no claims alleging violations of plaintiff's due process rights remain." *Id.*, ex.10.

The October 4, 2012 amended order of Justice Jaffe, which modified the previous decision and order dated September 13, 2011, refused to dismiss the cause of action alleging a violation of plaintiff's due process under the New York State Constitution. The order states in pertinent part that, "[d]efendants' motion to modify the decision and order dated September 13, 2011 is granted to the extent of clarifying that plaintiff's claim for a violation of his right to due process under the New

York State Constitution was not dismissed in that order." *Id.*, ex.11.

Defendants also contend that principles of res judicata and collateral estoppel bar this action from proceeding, as the constitutional issues which plaintiff alleges in his notice of claim were addressed in the federal proceedings. However, defendants previously presented the same argument in their motion for summary judgement dated September 17, 2010. There, defendants argued that the City was entitled to rely on the doctrines of res judicata and collateral estoppel, because the issues regarding defendants constitutional rights were previously litigated in federal court. In her September 13, 2011 decision, Justice Jaffe noted that "defendants cite no authority for the proposition that the dismissal of claims alleging violations of plaintiff's right to due process and against self-incrimination under the federal constitution mandates dismissal of these claims under the New York State Constitution, which provides greater protection for those rights than the federal constitution." *Gallay Aff.*, ex H.

As defendants are proffering arguments that were addressed, and disposed of in prior motions, they are, in actuality, bringing a meritless motion to reargue, requiring the denial of same. Furthermore, the doctrine of the "law of the case" applies, also requiring the denial of the motion. The Appellate Division, First Department, has held that "[t]he doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision." *Baldasano v Bank of New York*, 199 A.D.2d 184, 185 [1st Dept. 1993] (citations omitted); *see also State Higher Educ. Services Corp. v Starr*, 158 A.D.2d 771, 772 [2d Dept. 1990] (holding that the doctrine of law of the case applies "exclusively to questions of law, makes a legal determination in a given case binding not only on the parties, but on all other Judges of coordinate jurisdiction.").

In the case at bar, because Justice Jaffe has heard arguments, reviewed submissions, and drafted opinions regarding dismissing the cause of action for due process, and for res judicata and collateral estoppel, her prior determinations are deemed the "law of the case." Therefore, since legal determinations have been made, this court refuses to revisit or disturb the same arguments which Justice Jaffe has previously decided. While defendants discuss potential damages, because Justice Jaffe had indicated in her September 13, 2011 Order that a factual question exists with regard to plaintiff's claim for punitive damages, the type and amount of applicable damages, if any, will be determined at trial.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants The City of New York, Detective Stefano Braccini, and Detective Peter Nunges' motion to dismiss plaintiff Kenneth Felder's complaint is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

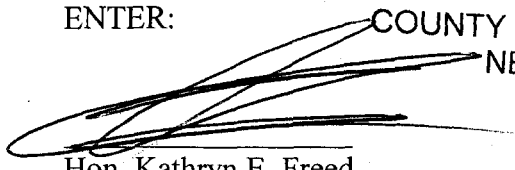
ORDERED that this constitutes the decision and order of the Court.

FILED
AUG 12 2013

Dated: August 8, 2013

AUG 08 2013

ENTER:

 COUNTY CLERK'S OFFICE
NEW YORK

Hon. Kathryn E. Freed
J.S.C.
**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**