Castro v City of New York
2013 NY Slip Op 31875(U)
August 9, 2013
Sup Ct, New York County
Docket Number: 117907/2009
Judge: Kathryn E. Freed
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[* 1] SCANNED ON 8/13/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED, JUSTICE OF SUPREME COURT
Justice

PART J

Index Number : 117907/2009
CASTRO, JOSE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS Cal. # 20

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

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
AUG 13 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-9-13
AUG 09 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

---X

JOSE CASTRO,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT and POLICE OFFICERS "JOHN/JANE DOES whose identities are not known to plaintiff at this time but being the police officers, detectives, sergeants, and/or lieutenants who arrested Jose Castro and violated his civil rights,

Defendants.

---X

DECISION/ORDER
Index No. 117907/2009
Seq. No. 001

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

FILED
AUG 13 2013
COUNTY CLERK'S OFFICE
NEW YORK

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..................	......1-2..........
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED...........	....
ANSWERING AFFIDAVITS..	.........3...........
REPLYING AFFIDAVITS..	.........4...........
EXHIBITS..	....
OTHER..	....

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

Defendants move for an Order pursuant to CPLR§ 3211, dismissing the Complaint and/or pursuant to CPLR§3212 for summary judgment. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court denies the motion for summary judgment.

Factual and procedural background:

This is an action wherein plaintiff seeks to recover monetary compensation for damages he allegedly sustained on June 6, 2008, as a result of his wrongful arrest and detention by members of the New York City Police Department ("NYPD"). On that day, plaintiff was at the 9th Precinct located at 321 East 5 Street in New York County, for the purpose of speaking with a detective who had been previously inquiring about him at a local shelter. Once at the precinct, however, plaintiff was arrested for the theft of a laptop computer, and charged with Grand Larceny based on the accusation of a Pastor. As a result, he was incarcerated at Riker's Island for approximately one week, prior to being released. On December 22, 2008, the charges pending against him were subsequently dismissed, because it was discovered that the complainant had actually been impersonating a Pastor, and that the charges were unfounded.

Thereafter, plaintiff filed a Notice of Claim on March 23, 2009, alleging only state law causes of action of false arrest, false imprisonment, and negligence, all emanating from his arrest on June 16, 2008. He subsequently appeared at a General Municipal Law § 50-h hearing on August 27, 2009. It should be noted that at said hearing, he testified that he was arrested on June 6, 2008. Plaintiff then commenced the instant action via service of Summons and Complaint on December 22, 2009, which alleges that his arrest occurred on June 6, 2008. However, his Bill of Particulars also indicates his arrest date to be June 16, 2008. Issue was joined via the service of the City's Answer on February 9, 2010.

Positions of the parties:

Defendants argue that plaintiff's First, Second, Fourth, Fifth and Sixth Causes of Action warrant dismissal for failure to comply with the requirements of GML § 50-e and §50-i. Specifically,

they argue that plaintiff served an untimely Notice of Claim in this matter on March 23, 2009, alleging only state law causes of action for false arrest, false imprisonment and negligence emanating from his arrest on June 16, 2008. They assert that a cause of action for false arrest and/or false imprisonment accrues once an individual is released from custody. Thus, since plaintiff was released from custody on June 23, 2008, plaintiff should have filed a Notice of Claim by September 22, 2008. However, he filed a late Notice of Claim on March 23, 2009, without leave of court, thus deeming it a nullity.

Additionally, defendants argue that plaintiff's claim of assault in his First Cause of Action is also time barred. Since a cause of action for assault accrues on the date of the alleged wrongful conduct, the expiration of the statute of limitations for the assault claim occurred on June 16, 2009. Defendants further argue that this claim is time also barred because no Notice of Claim was ever served alleging same, and separately, because the Complaint alleging assault was not filed within the one year and ninety days of the alleged assault pursuant to GML§ 50-e and GML§50-i.

Defendants assert that plaintiff was released on June 23, 2008. Therefore, calculating from June 23, 2008, plaintiff had until September 21, 2009 to commence an action against the City. However, he actually commenced the action on December 22, 2009, as indicated by the date stamped on his Summons and Complaint. Thus, since said Summons and Complaint was actually filed nearly three months after the expiration of the statute of limitations, all state causes of action necessitate dismissal.

Defendants also argue that plaintiff's malicious prosecution claim warrants dismissal because plaintiff failed to allege it in the Notice of Claim, and therefore, was barred from alleging it in his Complaint. They argue that plaintiff cannot now assert new theories of liability by amendment of

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the Notice of Claim or by seeking leave to serve a late Notice of Claim inasmuch as the one year and ninety day statute of limitations for such action has expired. Moreover, a plaintiff may not amend his Notice of Claim to add new theories of liability that are time barred at the time of application. Defendants further argue that permitting plaintiff to pursue a claim for malicious prosecution, although not articulated in the Notice of Claim, would also substantially alter his claim arising from his allegedly wrongful arrest and detention.

Defendants further argue that plaintiff's state claims of negligence/negligent hiring, assault and violations of the New York State Constitution also warrant dismissal because they were not included in his Notice of Claim and are also time barred. Defendants also argue that the Notice of Claim does not contain an allegation for intentional infliction of emotional distress while the Complaint alleges conduct "so outrageous as to shock the conscience of the Court," in the Fifth Cause of Action. Therefore, the Fifth Cause of Action must also be dismissed.

Finally, defendants argue that plaintiff fails to state a valid cause of action under federal law. His Third Cause of Action alleged in the Complaint alleges that the instant matter arises under the "Fourth, Sixth and Fourteenth Amendment to the Constitution of the United States, and under Federal Law, particularly Title 42 of the United States Code, Section 1983." (Exhibit "B," ¶ 39). Defendants argue that even if plaintiff's allegations under the Third Cause of Action raise an actual claim under §1983, he still has failed to allege a municipal pattern of practice or conduct or an official policy of defendants which are responsible for any violation of his constitutional rights.

Plaintiff argues that "[w]hile the defendants are correct that no cause of action pursuant to 42 U.S.C.§ 1983 against these institutional defendants, '42 U.S.C.§ 1982 creates a private cause of action for damages against individual police officers for conduct that violates the Constitution' "

(See Aff. in Opp. ¶ 7). Plaintiff contends that the individual police officers and the arresting detective were acting under color of legal authority and within the scope of their employment when they violated his rights. As such, they can be held liable pursuant to 42 U.S.C.§ 1983. He argues that the fact that at the time of his §50-h hearing, he was unaware of the defendants' identities is not a valid basis for either dismissal of his Complaint or the granting of summary judgment. Plaintiff argues that if he does not know who the responsible individuals are, he is permitted to plead that "John/Jane Does," deprived him of his civil rights, so as to trigger 42 U.S.C.§1983, until he can ascertain such information through discovery, which has not yet commenced.

Plaintiff further argues while papers opposing a motion for summary judgment must submit facts necessary to create a material question of fact, an exception exists when the facts necessary to oppose the motion are based exclusively within the knowledge of the moving party. He refers to and relies on CPLR§3212(f) as support for his argument. This section provides:

> Facts unavailable to the opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Plaintiff asserts that the discovery process is "crucial" for him to ascertain the true identities of the individual officers and detectives who violated his civil rights. As such, once he is afforded the opportunity to depose the City and the NYPD to obtain said identities, he will be able to amend the caption in his Complaint to substitute defendants' proper names. Plaintiff argues that the City and the NYPD will not suffer any undue prejudice by the denial of their motion at this juncture, since upon completion of all discovery, they will be afforded an opportunity to renew it.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

In the case at bar, plaintiff filed a notice of claim on March 23, 2009, asserting false arrest, false imprisonment. It is well settled that the filing of a Notice of Claim within ninety days is a condition precedent to bringing a suit against a municipality (see *Brown v. City of New York*, 95 N.Y.2d 389 [2000]). As a threshold matter, the Court finds that plaintiff's First and Second Causes of Action alleging false arrest and false imprisonment necessitate dismissal based on the fact that his notice of claim was not filed within the statutorily mandated 90 days. A notice of claim must be served within 90 days after the claim arises (see GML§ 50-e[1][a]), though a court may grant the claimant leave to serve a late notice of claim if leave is sought within one year and 90 days of accrual (see GML§ 50-e[5]). Plaintiff served a Notice of Claim on the City on March 23, 2009, asserting

three identifiable claims: false arrest; false imprisonment and negligence arising from his arrest occurring on June 16, 2008.

It is well settled that a cause of action for false arrest and/or false imprisonment accrues once an individual is released from confinement or custody (see *Palmer v. City of New York*, 226 A.D.2d 149 [1st Dept. 1996]; *Nunez v. City of New York,* 307 A.D.2d 218, 219 [1st Dept. 2003]; *Bumbury v. City of New York*, 62 A.D.3d 621[1st Dept. 2009]). Since plaintiff was released on June 23, 2008, the Court agrees that he was required to file a Notice of Claim by September 22, 2008, which he failed to do.

Moreover, the Court finds plaintiff's assault cause of action to also be time barred. It is well settled that a cause of action for assault accrues on the date of the alleged wrongful conduct (see *Komar v. City of New York*, 24 A.D.2d 941 [1st Dept. 1965], *appeal denied* 17 N.Y.2d 424 [1966]; *McElveen v. Police Dept. of City of New York*, 70 A.D.2d 858 [1st Dept. 1979]; *Wilkerson v. 134 Kitty's Corp.*, 49 A.D.3d 718 [2d Dept. 2008]). Therefore, since plaintiff alleges that the assault occurred during his arrest on June 16, 2008, this claim is time barred because the complaint alleging assault was not filed within the statutorily mandated one year and ninety days pursuant to GML§ 50-e.

Plaintiff's malicious prosecution claim also warrants dismissal. A cause of action for malicious prosecution accrues when the criminal proceeding terminates favorably to the plaintiff (see *Boose v. City of New Rochester*, 71 A.D.2d 59, 65 [4th Dept. 1979]). "The addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs' claims" (*Id.* at 358; see also *DeMorcy v. City of New York*, 137 A.D.2d 650, 651 [2d Dept. 1998]; *Mojica v. New York City Tr. Auth.*, 117

A.D.2d 722, 233 [2d Dept. 1986]).

As such defendants' dispute centers on the adequacy of his Third Cause of Action, as this is the only allegation sounding in municipal liability pursuant to 42 U.S.C.§1983 Plaintiff's alleged 42 U.S.C.§ 1983 action alleges in pertinent part that:

> "[A]cts....were done by the defendants, each of them, not as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of New York and the County of New York, and under the authority of their office as police officers for such city and county.
>
> 40. The acts and conduct described above deprived Plaintiff of his rights:
>
> a. To freedom of speech and association;
>
> b. To be free from false arrest and imprisonment without probable cause by police by police officers acting under color of law;
>
> c. To be free from malicious prosecution by police officers acting under color of law;
>
> d. To be free from form abuse of process by police officers acting under color of law;
>
> e. To be entitled to the free exercise of due process without wrongful restraint by police officers acting under color of law;
>
> f. To be free of unreasonable seizure by police officers acting under color of law;
>
> g. To not have excessive force used against him by police officers acting under color of law;
>
> h. To not have summary punishment imposed upon him by police officers acting under color of law; all in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983;

While a municipality cannot be held liable under 1983 on the theory of *respondeat superior*, it can be held responsible for a deprivation of constitutional rights cause by its own official policy or custom (see *Monell v. Dept. of Social Servs. of City of New York*, 436 U.S.658, 690-694 [1978];

Ramos v. City of New York, 285 A.D.2d 284, 302 [2001]; *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]). To hold a municipality liable under 42 U.S.§ 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 at 385; *Monell v. Department of Social Services*, 436 U.S. 658 at 691; *Wilner v. Village of Roslyn*, 99 A.D.3d 702 [2d Dept. 2012]).

In the case at bar, the Court finds the instant motion to be premature at this juncture, when additional discovery is necessary to determine the names of the police officers herein, in addition to and more about any official policy or custom which may have deprived defendant of his constitutional rights.

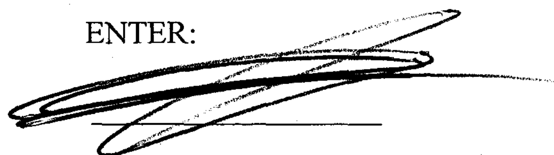
Therefore, in accordance with the foregoing, defendant City's motion for summary judgment is hereby denied; and it is further

ORDERED that the parties are to appear for a compliance conference on September 17, 2013 at 2:00 p.m. in Room 103 at 80 Centre Street; and it is further

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

DATED: August 9, 2013

ENTER:



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

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