He v City of New York
2013 NY Slip Op 33340(U)
April 1, 2013
Sup Ct, Queens County
Docket Number: 700008/2012
Judge: Kevin J. Kerrigan

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

Xiaoning He,

Plaintiff,

- against -

The City of New York, Detective William Martino(Tax #932969), Detective Jonathan Benedict(Shield #7783), Undercover Detective CO 167, Undercover Detective CO140, Seargeant William Prokesch (Tax #902228), Police Officers "John Does 1-10"(names being fictitious and presently unknown, intended to be the police officers involved in the pursuit, assault, battery and arrest of plaintiff on or about January 18, 2011, and her subsequent imprisonment and prosecution), and Tomilu Corp.,

Defendants.

Index Number: 700008/12

Motion Date: 3/25/13

Motion Cal. Number: 43

Motion Seq. No.: 2

The following papers numbered 1 to 13 read on this motion by defendants, The City of New York, Detective William Martino, Detective Jonathan Benedict, Undercover Detective CO 167, Undercover Detective CO140, and Sergeant William Prokesch, to dismiss, to amend the complaint and, in the alternative, to bifurcate plaintiff's §1983 claims; and cross-motion by plaintiff for leave to serve a supplemental summons and second amended complaint adding party defendants, striking defendants' answer for failing to comply with discovery, and for an extension of time to file the note of issue.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits	5-8
Affirmation in Opposition & Reply-Exhibit	9-11
Reply	12-13

Upon the foregoing papers it is ordered that the motion and

cross-motion are decided as follows:

That branch of the motion by defendants for leave to amend their answer to allege that the individual defendant police officers were acting within the scope and course of their employment with the City at the time of the alleged incident is granted. The amended answer to first amended verified complaint annexed to the moving papers as Exhibit "G" is deemed served and filed.

That branch of the motion to dismiss plaintiff's ninth cause of action for negligent hiring, retention and supervision is granted.

That branch of the motion to dismiss plaintiff's tenth cause of action against the City under 42 U.S.C. §1983 is granted.

That branch of the motion to dismiss plaintiff's twentieth cause of action for defamation is granted.

That branch of the motion to dismiss plaintiff's twenty-first cause of action for malicious prosecution and twenty-second cause of action for constitutional violations under 42 U.S.C. §1983 based upon malicious prosecution is granted.

That branch of the motion for an order bifurcating plaintiff's §1983 claim is denied as moot.

That branch of the cross-motion for leave to serve and file a supplemental summons and amended complaint with amended caption adding Sergeant Benson, Detective Raheem, Detective Rodriguez, Detective Giarmoleo, Detective Adaszewski, Undercover 142 and Undercover 162 in place and stead of the John Doe defendants, pursuant to CPLR 3025(b) and 1003, is granted. Plaintiff is given leave to serve and file a supplemental summons and amended complaint in the form annexed to the cross-motion within twenty (20) days of entry of this order.

That branch of the cross-motion for an order striking defendants' answer for failing to comply with discovery, or, in the alternative, for an extension of time to file the note of issue and to complete discovery and for leave to conduct further depositions is denied without prejudice and with leave to move for said relief before the presiding Justice of the Compliance Conference Part at the time of the compliance conference.

This action arises out of the arrest and prosecution of plaintiff on January 18, 2011 for prostitution. Undercover 140 and

Undercover 167 allegedly conducted a buy-and-bust operation at 135-19 Roosevelt Avenue in Queens County on said date wherein they agreed with certain individuals, including plaintiff, to engage in sexual activity for money. Said undercover officers thereupon notified officers of the Queens Vice Squad to enter the premises. Plaintiff allegedly attempted to avoid arrest by fleeing to the roof of the building and attempting to jump to the roof of an adjoining building. Defendants allege that she did not make it across and fell. Plaintiff alleges she was pushed off the roof by a police officer.

The City moves for summary judgment dismissing plaintiff's ninth cause of action for negligent hiring, retention and supervision upon the ground that no such cause of action may be asserted where the employees were acting within the scope and course of their employment, her tenth cause of action against the City alleging violation of her constitutional rights under 42 U.S.C. §1983 upon the ground that plaintiff has failed to plead sufficient facts to establish an official custom or policy of the City intended to deprive plaintiff of her constitutional rights, her twentieth cause of action for defamation upon the ground of absolute privilege, and her twenty-first and twenty-second causes of action for malicious prosecution upon the ground that the criminal proceedings against her did not terminate in her favor.

It is a well-established principle that no action for negligent hiring, training or supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent hiring, training and supervision would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324).

This principle applies to the instant matter, even as to plaintiff's claims alleging assault. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 AD 2d 777 [2nd Dept 1990]). An assault by a police officer who is engaged in police business may be found to be within the scope of his employment (see generally Garcia v. City of New York, 104 AD 2d 438 [2nd Dept 1984]).

Where the employer concedes that its employee was acting within the scope of his employment in the commission of the allegedly tortious act, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]).

Here, the City does not dispute, but concedes that all the individual defendants were acting within the scope and course of their employment during the incident in question. Therefore, the City is entitled dismissal of plaintiff's ninth cause of action against the City for negligent hiring, training and supervision.

Plaintiff alleges a tenth cause of action against the City for violation of her constitutional rights pursuant to 42 U.S.C. §1983 upon the ground that the City's failure to properly hire, train and supervise its officers constituted an institutionalized practice of the City. The City moves to dismiss plaintiff's tenth of action under 42 U.S.C. §1983 upon the ground that plaintiff has failed to plead and set forth any official policy or custom to support a claim under §1983.

The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]).

However, a municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). Plaintiff's tenth cause of action in her complaint fails to set forth, and plaintiff fails to show facts to support her allegation of an official policy or custom that caused her to be deprived of her constitutional rights. Plaintiff's counsel's summary contention that there was a municipal practice of condoning improper hiring, training and supervision of its police officers without setting forth facts ostensibly showing that the City purposefully adopted a policy or a pattern of conduct fails to raise an issue of fact. Since there is no showing, on this record, of any official policy, custom, practice or pattern of behavior so as to support a §1983 cause of action, plaintiff's tenth cause of action must be dismissed, as a matter of law. In any event, since plaintiff's §1983 claim against the City is premised upon claims of negligent hiring, training and supervision, her §1983 claim against the City set forth in her tenth cause of action must be dismissed as a matter of law for this additional reason

(see Ashley v. City of New York, 7 AD 3d 742, supra).

Plaintiff's twentieth cause of action alleges defamation against the City and the individual defendants. Plaintiff alleges that the defamation consisted of publishing and filing public documents stating that plaintiff committed acts of prostitution, which facts were not true and were published in a grossly irresponsible manner. Since the offensive statements regarding plaintiff's alleged acts of prostitution were made by police officers in the course of their official duties and within the context of a criminal prosecution and judicial proceeding, they are absolutely privileged, even if made with malice (see generally Sexter & Warmflash, P.C. v Margrabe, 38 AD 3d 163 [1st Dept 2007]; see e.g., Rabiea v Stein, 69 AD 3d 700 [2nd Dept 2010]). Therefore, plaintiff's twentieth cause of action alleging defamation must be dismissed as a matter of law.

Finally plaintiff's twenty-first cause of action alleging malicious prosecution, and her twenty-second cause of action alleging violation of her constitutional rights under 42 U.S.C. §1983 based upon malicious prosecution fail to state a cause of action. Defendants have shown proof, and plaintiff does not dispute, that her criminal proceeding ended in an adjournment in contemplation of dismissal (ACD). Claims for malicious prosecution are precluded when an accused accepts an ACD (see Gaylord v. Fiorilla, 28 AD 3d 713 [2nd Dept 2006]). Therefore, plaintiff's twenty-first cause of action for malicious prosecution and twenty-second cause of action premised upon malicious prosecution must be dismissed.

Accordingly, the motion and cross-motion are granted solely to the extent hereinabove set forth.

Serve a copy of this order with notice of entry upon Sergeant Benson, Detective Raheem, Detective Rodriguez, Detective Giarmoleo, Detective Adaszewski, Undercover 142 and Undercover 162 and upon the attorneys for the present defendants without undue delay.

Dated: April 1, 2013

KEVIN J. KERRIGAN, J.S.C.