SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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HARRY CABRERA,

DECISION AND ORDER

Plaintiff(s), Index No: 302832/13

- against -

THE CITY OF NEW YORK, EMILIO ESTEVEZ, LAWRENCE SANCHEZ, AND CHRIS HERNANDEZ,

Defendant(s).

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In this action for alleged personal injuries arising from, *inter alia*, plaintiff's false arrest, malicious prosecution, and violations of 42 USC § 1983, defendants move[1] seeking an order pursuant to CPLR § 3211(a)(7), *inter alia*, dismissing plaintiff's sixth cause of action for for violations of 42 USC § 1983 by

[1] Defendants also move for an order (1) dismissing the complaint in its entirety as against defendant CHRIS HERNANDEZ (Hernandez) on grounds that he did not arrest plaintiff; (2) precluding disclosure of Hernandez' disciplinary records as mandated by this Court's Preliminary Conference Order dated September 3, 2013; and (3) dismissing plaintiff's negligent hiring and retention claim. However, inasmuch as plaintiff, in his papers, did not oppose dismissal of the action as against Hernandez nor defendants' application to preclude disclosure of Hernandez' disciplinary records, the Court will grant these portions of defendants' motion with no further discussion. Similarly, because defendants, within their papers, withdrew the portion of their motion seeking dismissal of plaintiff's negligent hiring and retention claim, the Court will deny that portion defendants' application absent further discussion and will, as discussed in footnote #2, grant the portion of plaintiff's cross-motion seeking leave to amend his complaint to amplify his claim for negligent hiring and retention.

defendant THE CITY OF NEW YORK (the City). Defendants aver that this claim was not pled with the requisite specificity required by federal law and that, therefore, the complaint fails to state this cause of action. Plaintiff opposes defendants' application, arguing that the pleading requirements for his sixth cause of action asserting a claim pursuant to 42 USC § 1983 are governed by state case law, and that thereunder, the complaint states a cause of action. Erring on the side of caution, plaintiff cross-moves seeking an order pursuant to CPLR § 3025 granting him leave to, *inter alia*, amend the complaint[2] to amplify his cause of action against the City pursuant to 42 USC § 1983.

For the reasons that follow hereinafter, defendants' motion is granted in part and plaintiff's cross-motion is also granted in part.

Within his complaint, to the extent relevant, plaintiff alleges that on May 16, 2012, without probable cause, he was forcibly seized, handcuffed, searched and detained by Hernandez, and defendants EMILIO ESTEVEZ (Estevez) and LAWRENCE SANCHEZ (Sanchez), all of whom were employed by the City. It is further alleged that, thereafter, on May 17, 2012, defendants initiated a criminal prosecution against plaintiff, which prosecution was

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[2] Plaintiff also seeks leave to amend his complaint to amplify his negligent hiring and retention claim. However, insofar as defendants' did not oppose this portion of plaintiff's cross-motion, the Court will grant the same absent further discussion.

malicious and with knowledge that plaintiff was innocent. The sixth cause of action within the complaint against the City is titled "'Monell' Claim," and alleges that the actions by Estevez, Sanchez, and Hernandez were

> consistent with and in compliance with an authorized pattern and practice of the NYPD whereby persons would be stopped, questioned, frisked, detained, arrested, and prosecuted by the NYPD without probable cause, without reasonable suspicion, and without justification.

In New York State, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*id.*). CPLR § 3013, states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d

688 (2nd Dept. 2006); *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

Similarly, federal jurisprudence does not "require heightened fact pleading of specifics [within a complaint], but only enough facts to state a claim to relief that is plausible on its face" (*Bell Atlantic Corp. v Twombly*, 550 US 544, 750 [2007]). Moreover, as is the law in this State, on a motion to dismiss in Federal Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, the court must accept "as true the factual allegations in the complaint [,] drawing all inferences in the plaintiff's favor" (*Allaire Corp v. Okumus*, 433 F3d 248, 249-250 [2d Cir 2006] [internal quotation marks and citation omitted]), and "[a] complaint may not be dismissed under the Rule "unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief" (*id.*). Lastly, as is the law in New York, a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure will be granted when the allegations in the complaint are conclusory (*Ashcroft v*

Iqbal, 556 US 662, 678 [2009] [a complaint need not have detailed factual allegations, "but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. . . [thus] [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully"]).

Whether this Court is bound to apply Federal law on the instant motion - as argued by defendants - or State law - as argued by plaintiff - is not dispositive, because, here, the standards imposed with respect to a motion pursuant to CPLR § 3211(a)(7) and FRCP § 12(b)(6) are nearly identical. However, it bears noting that contrary to defendants' assertion, New York State courts, even after the decision in *Ashcroft*, have consistently applied the standards promulgated by New York State case law when confronted with a motion seeking to dismiss a cause of action pursuant to 42 USC 1983, on grounds that the complaint fails to state a cause of action (*Vargas v City of New York*, 105 AD3d 834, 834-837 [2d Dept.

2013] [In granting defendants' motion seeking to dismiss plaintiff's claim pursuant to 42 USC § 1983 for failure to state a cause of action, the court applied the standards promulgated by CPLR § 3211(a)(7) and the case law interpreting it.]; *Nasca v Sgro*, 101 AD3d 963, 963-965 [2d Dept 2012] [same]).

Accordingly, applying State law, this Court's inquiry is whether, here, the complaint has pled sufficient essential facts to state a cause of action pursuant to 42 USC § 1983 against the City. As established by *Monell v Department of Social Services of City of New York* (436 US 658 [1977]), a municipality bears liability under 42 USC § 1983 only where the action by its agent "is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" (*Monell* at 690).

> Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 person, by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision making channels

(*id.* [internal quotation marks omitted]). Accordingly, municipal liability under 42 USC § 1983 only lies if the municipal policy or custom actually caused the constitutional tort and not merely

because the municipality employs a tortfeasor who perpetrated a constitutional tort (*id.* at 691). In other words, causation is an essential element to municipal liability and that is why no municipal liability will lie under 42 USC § 1983 solely on a theory of *respondeat superior* (*id.*).

Based on the foregoing, a motion to dismiss for failure to state a cause of action under 42 USC § 1983 should be granted where the complaint the complaint fails to allege any facts from which it could be reasonably inferred that the defendants had a policy or custom of which caused the constitutional tort alleged (*Vargas* at 837; *Cozzani v County of Suffolk*, 84 AD3d 1147, 1147 (2d Dept 2011] ["Although the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced.]; *R.A.C. Group, Inc. v Board of Educ. of City of New York*, 295 AD2d 489, 490 [2d Dept 2002] ["because the plaintiffs failed to plead the existence of a specific policy or custom which deprived them of a constitutional right in violation of 42 USC § 1983, that cause of action must be dismissed as well."])

Here, defendants' motion seeking to dismissal of plaintiff's sixth cause of action must be denied. Plaintiff not only alleges

that "that the actions by Estevez, Sanchez, and Hernandez were consistent with and in compliance with an authorized pattern and practice of the NYPD," but he further particularizes the custom, practice and/or policy he alleges was caused by the NYPD (the City), namely, that "persons would be stopped, questioned, frisked, detained, arrested, and prosecuted by the NYPD without probable cause, without reasonable suspicion, and without justification." Accordingly, here, plaintiff has pled his *Monell* claim with the requisite specificity and, therefore, defendants' motion seeking dismissal of the same must be denied (*cf Cozzani* at 1147 ["Although the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced.]; *R.A.C. Group, Inc.* at 490 ["because the plaintiffs failed to plead the existence of a specific policy or custom which deprived them of a constitutional right in violation of 42 USC § 1983, that cause of action must be dismissed as well."]).

Because this court has denied the portion of defendants' motion seeking to dismiss plaintiff's sixth cause of action, it must deny as moot, the portion of plaintiff's cross-motion seeking leave to amend his complaint to amplify this cause of action. It is hereby

ORDERED that this action against Hernandez be dismissed without prejudice. It is further

ORDERED that the portion of this Court's Preliminary Conference Order dated September 3, 2013, mandating disclosure of Hernandez' disciplinary records be vacated. It is further

ORDERED that plaintiff is granted leave to amend his complaint to amplify his negligent hiring and retention claim, provided he serve the same upon defendants within thirty (30) days hereof. It is further

ORDERED that the City serve a copy of this Decision and Order with Notice of Entry upon all plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : January 30, 2014
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.