Persaud v City of New York
2015 NY Slip Op 31552(U)
July 13, 2015
Supreme Court, Bronx County
Docket Number: 303266/10
Judge: Mitchell J. Danziger
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 FILED Jul 24 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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SARABJEET PERSAUD,

Plaintiff(s),

- against -

THE CITY OF NEW YORK: COMMISSIONER RAYMOND W. KELLY; P.O. ROBYN KREPPEL SHIELD #05420; P.O. VINCENT TROZZI; P.O. JOHN DOES #1-20; THE INDIVIDUAL DEFENDANTS SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Defendant(s).

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DECISION AND ORDER

Index No: 303266/10

In this action for, *inter alia*, false arrest, false imprisonment, excessive force, malicious prosecution, and intentional infliction of emotional distress[1], defendant[2] THE CITY

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[1] Plaintiff also initially pleaded causes of actions pursuant to violations of 42 USC §§ 1983, 1985, and 1986. However, this Court, by order dated September 30, 2014, dismissed all of the foregoing claims against all parties, as well as all claims - state and federal - asserted against the individually named defendants. While plaintiff subsequently moved for an order seeking reargument of the foregoing order to the extent of restoring all the state law claims against one of the individually named defendants and all of the federal claims premised on violations of 42 USC § 1983 against both individually named defendants, that motion will be decided separately.

[2] By virtue of this Court's order dated September 30, 2014, the only remaining defendant is the City against whom a direct claim for negligent hiring and retention remains as well as claims for vicarious liability for the acts of its police officers in, *inter alia*, falsely arresting and imprisoning plaintiff. To the extent that the Court does in fact grant plaintiff's subsequent motion for reargument, in part, such

OF NEW YORK (the City) moves seeking an order[3] (1) pursuant to CPLR § 3025, granting it leave to amend the caption to reflect the Court's prior granting a motion by the City and other defendants, which dismissed the claims against all parties but the City; (2) pursuant to CPLR § 3025, granting it leave to amend its answer to assert that at all relevant times alleged its police officers were acting within the scope their employment with the City on grounds that the failure to admit the same was oversight; (3) pursuant to 3211(a)(7) dismissing plaintiff's negligent hiring and retention claim on grounds that the City admits that any of the officers alleged to have wronged plaintiff were acting within the scope of their employment with the City such that the complaint fails to state a cause of action; (4) pursuant to CPLR § 3211(a)(7) dismissing plaintiff's claim for intentional infliction of emotional distress, negligence, and gross negligence inasmuch as such causes of action either are not cognizable under the facts pled or cannot be asserted against the City as a matter of law; and (5) pursuant to CPLR § 2221 granting renewal of this Court's order dated September 30, 2014 because to the extent that the Court

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decision has no bearing on this one.

[3] While the City also moved seeking an order granting it summary judgment with respect to plaintiff's causes of action for false arrest, false imprisonment, malicious prosecution, and abuse of process, insofar as plaintiff within his affirmation, by counsel, consenting to dismissal of those claims, other than noting their dismissal, the Court shall not endeavor to substantively discuss this portion of the City's motion.

ordered that the City produce personnel/disciplinary records for an *in-camera* review such disclosure is palpably irrelevant if the Court dismisses plaintiff's negligent hiring and retention claim.

Plaintiff opposes the City's motion to the extent it seeks leave to amend the caption, averring, *inter alia*, that the City's proposed caption fails to reflect the parties which he now seeks to add to this action as well as at least two original defendants - Robyn Kreppel (Kreppel) and Vincent Trozzi (Trozzi) - against whom, by way of his separate to motion reargue, he seeks restoration of certain claims. Plaintiff also opposes the City's motion to amend its answer, averring that the City fails to demonstrate that the proposed amendment has merit. To that end, plaintiff opposes the City's motion to dismiss his negligent hiring and retention claim insofar as dismissal of the same hinges on the grant of the City's motion to amend. Similarly, plaintiff opposes the City's motion for renewal on grounds that absent the dismissal of the negligent hiring and retention claim, such records are discoverable. Lastly, plaintiff opposes the City's motion seeking dismissal of his claims for intentional infliction of emotional distress, negligence and gross negligence, averring that while the former cause of action is barred against the City it is not similarly barred against individual defendants because some of these claims remain actionable by virtue of his consent to dismissal of his causes of action for false arrest, false imprisonment, and malicious

prosecution.

Plaintiff also cross-moves seeking an order pursuant to CPLR § 3025 granting him leave to amend his complaint to add five new defendants, all of whom are police officers allegedly involved in plaintiff's arrest, and to assert a cause of action pursuant to 42 USC § 1983 against them and the City. Plaintiff asserts that leave to amend is warranted because any delay in seeking to amend was precipitated by the City's failure to provide discovery identifying the proposed additional defendants. The City opposes plaintiff's cross-motion on grounds that the claims against all of the proposed defendants are barred by the applicable three-year statute of limitations and plaintiff fails to establish that the relation back doctrine applies. Moreover, the proposed claim against the City pursuant to 42 USC § 1983 is so bereft of the requsite specificity that it also fails to state a cause of action.

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

This is an action for alleged personal injuries stemming from plaintiff's false arrest, false imprisonment, excessive force, malicious prosecution, and violations of multiple federal statutes. Within his complaint, plaintiff alleges that on February 14, 2009, while in the vicinity of 167th Street and Morris Avenue, Bronx, NY, he was falsely arrested, falsely imprisoned, assaulted and, thereafter, maliciously prosecuted by defendants. Plaintiff's

first eight causes of action - as initially pleaded - are premised on state law and with the exception of the negligent hiring and retention claim, which is solely asserted against the City, all claims are asserted against all defendants. Plaintiff's last two causes of action are for violations of his rights under the United States Constitution. More specifically, plaintiff alleges that defendants violated 42 USC §§ 1983, 1985(3), 1986, and 1988.

By way of history, on September 30, 2014, this Court granted a motion by the City and then defendants Trozzi and Kreppel, thereby, dismissing all claims against Trozzi and Kreppel and dismissing all claims premised on federal law as asserted against the City. Within the same order, the Court also denied plaintiff's cross-motion seeking leave to amend his complaint to assert and/or amplify his claims premised on federal law.

The City's Motion Seeking Leave to Amend the Caption and its Answer

Generally, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc. v New York City Health & Hosps. Corp*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). Delay, however, in seeking leave to amend a pleading is not in it of itself a barrier to judicial leave to amend, instead, "[i]t must be lateness coupled with significant prejudice to the other side, the

very elements of the laches doctrine" (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]. A failure to adequately explain the delay in seeking to amend the pleadings, if coupled with prejudice, will generally warrant denial of a motion to amend a pleading.

Even if there is no prejudice resulting from the proposed amendment, however, before leave is granted, it must be demonstrated that the proposed amendment has merit (*Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989]["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore, properly denied."]; *Herrick v Second Cuthouse, Ltd.*, 64 NY2d 692, 693 [1984][Court concluded that defendant could amend its answer when the amendment would not prejudice plaintiff and where the amendment was found to have merit]; *Mansell v City of New York*, 304 AD2d 381, 381-382 [1st Dept 2003]). Thus, when seeking to amend a complaint the plaintiff must proffer evidence establishing that the proposed amendment has merit (*Curran v Auto Lab Serv. Ctr.*, 280 AD2d 636, 637 [2d Dept 2001]; *Heckler Elec. Co. v Matrix Exhibits-N.Y.*, 278 AD2d 279, 279 [2d Dept 2000]) and the motion to amend should be granted "unless the insufficiency or lack of merit is clear and free from doubt" (*Noanjo Clothing v L&M Kids Fashion*, 207 AD2d 436, 437 [2d Dept 1994]; *Weider v Skala*, 168 AD2d 355, 355

[1st Dept. 1990) [Court held that plaintiff's proposed amendment to include a tortious interference claim was legally insufficient and was not meritorious. Consequently, the motion seeking leave to amend the complaint to assert that cause of action was denied]).

Moreover, leave to amend a complaint will not be granted unless the proposed amendment, as pled, establishes a cause of action (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Davis & Davis v Morson*, 286 AD2d 585, 585 [1st Dept 2001]).

Since the court must examine the proposed pleading for patent sufficiency, it is axiomatic that the proposed pleading must be provided with a motion seeking leave to amend the same and that a failure to do so warrants denial of the motion (*Loehner v Simons*, 224 AD2d 591, 591 [2d Dept 1996]; *Branch v Abraham and Strauss Department Store*, 220 A.D.2d 474, 476 [2d Dept 1995]; *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639, 640 [2d Dept 1960]).

Like a motion seeking leave to amend a complaint, a motion to amend a caption ought to be granted

> [i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit

(*Clarke v Laidlaw Transit, Inc.*, 125 AD3d 920, 922 [2d Dept 2015]).

The City's motion seeking leave to amend the caption is

denied. Here, the City seeks leave to amend the caption to omit Trozzi and Kreppel as defendants on grounds that this Court dismissed the complaint in its entirety against them. However, for reasons that are more fully discussed in a separate decision dated the same date as this one, in which the Court partially granted plaintiff's motion to reargue, the state law claim for excessive force against Kreppel and a portion of the claim pursuant to 42 USC § 1983 against both Kreppel and Trozzi have been restored. Thus, Trozzi and Kreppel remain defendants in this action and, therefore, the amendment sought by the City - the omission of Trozzi and Kreppel from the caption - is bereft of merit (*see Loehner* at 591; *Branch* at 476; *Goldner Trucking Corp.* at 640).

The City's motion seeking leave to amend its answer to admit that at all times alleged the police officers alleged to have injured plaintiff were acting within the scope of their employment with the City is hereby granted. As noted above, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc* at 757; *Fahey* at 935), assuming, of course, that the proposed pleading is annexed to the motion seeking such leave (*Loehner* at 591; *Branch* at 476; *Goldner Trucking Corp.* at 640), and that the same has merit (*Thomas Crimmins Contracting Co.* at 170; *Herrick* at 693; *Mansell* at 381-382).

Here, the Court need look no further than plaintiff's original complaint to determine that the City's proposed amendment has merit and that plaintiff cannot be prejudiced by the delay in seeking leave to amend the complaint to admit that the police officers who purportedly wronged the plaintiff were, at all times, acting within the scope of their employment with the City. Indeed, plaintiff's complaint is replete with allegations that the police officers with whom he came into contact, which contact gives rise to the instant action, were acting in their official capacities as police officers. Thus, not only is this evidence of the merit of the City's proposed amendment but it belies any claim of prejudice. Similarly, insofar as the Court previously denied the City's application to dismiss the negligent hiring and retention claim asserted by plaintiff - which relief was sought on grounds that the City purportedly admitted that the foregoing officers were acting within the scope of their employment with the City - plaintiff cannot credibly claim surprise by the instant application to amend the City's answer. Thus, leave to amend the City's answer is hereby granted and the City's third proposed answer is deemed served and accepted.

The City's Motion Seeking Dismissal for Failure to State a Cause of Action

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 (*Cron* at 366. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]).

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]).

The City's motion seeking dismissal of plaintiff's negligent hiring and retention claim is hereby granted insofar as such claim is barred when, as here, the City admits that all of its employees sued by plaintiff and/or whose conduct is alleged to have injured him, were, at all times, acting within the scope of their employment with the City.

An employer is liable under a claim that he negligently hired and/or retained and employee if the employer places the employee

> in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee

(*Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]; *Detone v Bullit Courier Service, Inc.*, 140 AD2d 278, 279 [1st Dept 1988]).

Thus, a cause of action for negligent hiring and retention requires proof that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury alleged (*Sheila C.* at 129; *Gomez v City of New York*, 304 AD2d 374, 374-375 [1st Dept 2003] *Bellere v Gerics*, 304 AD2d 687, 688 [2d Dept 2003]). However, "[g]enerally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention" (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; *Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]).

Here, while the complaint pleads all the requisite elements of a negligent hiring and retention claim, because this Court has, as noted above, granted the City leave to amend its answer to admit that all of the police officers which plaintiff alleges wronged him`were acting within the scope of the City's employment, the complaint fails to state a cause of action as to the foregoing claim.

The City's motion seeking dismissal of plaintiff's claim for the intentional infliction of emotional distress is granted insofar as this cause of action is insufficiently pleaded and because such a cause of action is bared against the City, municipality.

To establish a cause of action for intentional infliction of emotional distress, it must be proven that (1) defendant committed extreme and outrageous conduct; (2) with the intent to cause, or the disregard of a substantial probability of causing, severe emotional distress; (3) that defendant's conduct caused the injury claimed; and (4) that plaintiff suffered severe emotional distress (*Howell v New York Post Company, Inc.*, 81 NY2d 115, 121 [1993]). Similarly, a cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, "generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]; *E.B. v Liberation Publications, Inc.*, 7 AD3d 566, 567 [2d Dept 2004]). Generally, whether the cause of action is one for intentional or negligent infliction of emotional distress, courts look at whether the conduct alleged is outrageous enough to warrant a finding that plaintiff has an actionable claim as a matter of law (*Sheila C.* at 130-131 ["Moreover, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (internal quotation marks

omitted)]; *Howell* at 121 ["The first element--outrageous conduct--serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that Tomlinson's claim of severe emotional distress is genuine."]; *Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]). Conduct is extreme and outrageous when it is "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell* at 122; *Sheila C.* at 130-131). Thus, the majority of claims fail because the behavior alleged is almost never sufficiently outrageous (Howell at 122 ["Indeed, of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous."]; *Sheila C.* at 131 ["In this matter, plaintiff's allegations that defendants suggested she act provocatively, and allowed her to be introduced to a purported rapist, with whom she had a later, voluntary meeting, well after she was no longer in the physical custody of defendants, simply does not rise to the level of conduct necessary to sustain either cause of action."]; *Dillon* at 41 ["Moreover, the alleged disparagement of plaintiffs' characters in this case simply does not rise to that standard."]). To survive dismissal, in any action alleging intentional or negligent infliction of emotional distress, the conduct alleged must be pleaded and must, on its face

be sufficiently outrageous (*Sheila C.* at 131; *Dillon* at 41).

When the allegations comprising the claim for intentional infliction of emotional distress fall within the ambit of another cognizable cause of action, a cause of action for intentional infliction of emotional distress will not lie (*Fischer v Maloney*, 43 NY2d 553, 558 [1978] ["Indeed, it may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process."]; *Sweeney v Prisoners' Legal Services of New York, Inc.*, 146 AD2d 1, 7 [3d Dept 1989] ["Moreover, a cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." (internal quotation marks omitted); *Afifi v City of New York*, 104 AD3d 712, 713 [2d Dept 2013]; *Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]).

It is well settled that "public policy bars claims alleging intentional infliction of emotional distress against governmental entities." (*Afifi* at 713; *Eckardt v City of White Plains*, 87 AD3d 1049, 1051 [2d Dept 2011]; *Ellison v City of New Rochelle*, 62 AD3d 830, 833 [2d Dept 2009]; *Lillian C. v Administration for Children's Services*, 48 AD3d 316, 317 [1st Dept 2008]; *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]).

Here, plaintiff's complaint fails to plead a cause of action for the intentional infliction of emotional distress for several reasons. First, to the extent that the acts comprising the claim are merely plaintiff's false arrest, false imprisonment, malicious prosecution and excessive force, the claim fails as a matter of law. As noted, above, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (*Sheila C.* at 130-131). Here, the acts alleged are not sufficiently outrageous to satisfy the legal threshold. Second, insofar as the instant claim was premised on other separate and distinct causes of action, such as false arrest, the instant claim fails because it falls within the ambit of those other causes of action (*Fischer* at 558). That plaintiff concedes to dismissal of the foregoing claims does not avail him. Lastly, the instant claim must be dismissed because no such claim lies against the City, a municipality (*Afifi* at 713).

The City's motion seeking dismissal of plaintiff's negligence and gross negligence claims is granted insofar as the instant claims cannot stand where, as here, they fall within the ambit of other causes of action, which plaintiff also a pleads.

It is well settled that in this State, in cases alleging

police misconduct, the law does not recognize a cause of action for negligence (*Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 284-285 [2d Dept. 2003]). Accordingly,

> a plaintiff seeking damages for an injury resulting from a wrongful arrest and detention may not recover under broad general principles of negligence ... but must proceed by way of the traditional remedies of false arrest and imprisonment

(*Antonious v Muhammad*, 250 AD2d 559, 559-560 [2d Dept 1998] [internal quotation marks omitted]; *Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007]). Accordingly, a cause of action sounding in false arrest, imprisonment or malicious prosecution must be pled as such and the failure to do so warrants dismissal (*Medina* at 108 ["The cause of action alleging negligence, including negligent hiring, retention, and training, must be dismissed because no cause of action for negligent investigation lies in New York."]; *Johnson* at 285 [Court dismissed plaintiff's claim for negligent investigation on grounds that no such claim was cognizable under New York State law.])

As noted above, while plaintiff consents to dismissal of many his causes of action, such as his claim for false arrest, his claims for negligence are nevertheless barred because they fall within the ambit of those causes of action.

As discussed above, the Court need not substantively address the City's motion seeking summary judgment as to plaintiff's causes

of action for false arrest, false imprisonment, malicious prosecution and abuse of process inasmuch as plaintiff concedes that those causes of action ought to be dismissed.

The City's Motion for Renewal

The City's motion seeking renewal of the portion of this Court's order dated September 30, 2014 which ordered that it produce personnel records and disciplinary histories for any officers alleged to have been involved in the instant incident for an *in-camera* inspection, is granted and upon renewal a protective order for those records is issued on grounds that such records are palpably irrelevant.

It is well settled that a motion to renew

> shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion(CPLR § 2221[e][2], [3]).

Thus,

> [a]n application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the Court. Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application

(*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]; *see also*

Healthworld Corporation v. Gottlieb, 12 AD3d 278, 279 [1st Dept 2004]; *Walmart Stores, Inc. v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept 2004]; *Linden v Moskowitz*, 294 AD2d 114, 116 [1st Dept 2002]; *Basset v Bando Sangsa Co.*, 103 AD2d 728, 728 [1st Dept. 1984]. Renewal is a remedy to be used sparingly and granted only when there exists a valid excuse for failing to submit the newly proffered facts on the original application (*Beiny v. Wynyard*, 132 AD2d 190, 210 [1st Dept 1987]). In fact, renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (*Burgos v City of New York*, 294 AD2d 177, 178 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1st Dept 2001]), and "the remedy [is unavailable] where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application" (*Foley* at 568).

Notwithstanding the foregoing, courts have nevertheless carved an exception to the general rule and a motions to renew will be granted even when all requirements for renewal are not met (*Bank One v Mui*, 38 AD3d 809, 811 [2d Dept 2007], *abrogated on other grounds by* 95 A.D.3d 1147 [2d Dept 2012]; *Strong v Brookhaven Memorial Hospital Medical Center*, 240 AD2d 726, 726 [2d Dept

1997]). As such, motions to renew can be granted even when the newly offered evidence was in fact known and available to the movant but never provided to the Court (*Tishman Construction Corporation of New York v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]; *Trinidad v Lantigua*, 2 AD3d 163, 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *U.S. Reinsurance Corporation v Humphreys*, 205 AD2d 187, 192 [1st Dept 1994]; *J.D. Structures, Inc. v Waldbum*, 282 AD2d 434, 436 [2d Dept 2001]; *Sorto v South Nasaau Community Hospital*, 273 AD2d 373, 373-374 [2d Dept 2000]; *Cronwall Equities v International Links Development Corp.*, 255 AD2d 354, 355 [2d Dept 1998]; *Goyzueta v Urban Health Plan, Inc.*, 256 AD2d 307, 307 [2d Dept 1998]; *Liberty Mutual Insurance Company v Allstate Insurance Company*, 237 AD2d 260, 262 [2d Dept 1997]). Renewal with new evidence previously known and available to movant - a departure from precedential case law and the statute - is, thus, warranted if the interest of justice and substantial substantive fairness so dictate (*Trinidad* at 163; *Mejia* at 871; *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996]; *Scott v Brickhouse*, 251 AD2d 397, 397 [2d Dept 1998]; *Strong* at 726; *Goyzueta* at 307). Stated differently, a motion to renew can be granted, in the exercise of the court's discretion, even when the new evidence proffered was readily available to the moving party, such that all requirements necessary for renewal have not been met - including the failure to proffer an excuse for failing

to provide previously available and known evidence with the previous motion - if considering the new evidence changes the outcome of the Court's prior decision (*Trinidad* at 163; *J.D. Structures, Inc.* at 436).

In *J.D. Structures, Inc.*, the court granted a renewal of its prior when renewal after considering previously available evidence, but which while known to the movant, it did not submit on the original motion (*id.* at 435-436). The court had initially denied plaintiff's motion seeking summary judgment on grounds of an agreement according said relief because plaintiff failed to include evidence relative to the debt owed, such evidence dispositive on the motion (*id).* On renewal, plaintiff tendered evidence of the debt owed averring that the failure to provide the same on the prior motion was the mistaken belief that the motion would be decided favorably without such evidence (*id.*). The court granted renewal despite plaintiff's failure to submit previously available evidence, which was known to plaintiff on grounds that an excuse had been proffered for the failure to submit the same and because the new evidence, warranted judgment in plaintiff's favor (*id.*). Simiarly, in *Trinidad*, the court granted renewal when the same was premised upon the submission of a previously known and available expert affidavit despite the fact that no excuse was proffered for the failure to previously submit the same (*id.* at 163).

Here, renewal is warranted because the City demonstrates that

new facts - not previously available - exist, which would change the outcome of the prior motion. Specifically, the only reason the Court previously ordered production of the instant records was because they were relevant to plaintiff's claim for negligent hiring and retention against the City, which on the prior motion, the Court refused to dismiss. Having now dismissed that claim, the foregoing records are irrelevant to plaintiff's remaining claims. Specifically, the only claims that remain are the claims for excessive force, *respondeat superior*, and punitive damages against the City and as noted in this Court's decision granting plaintiff's motion for reargument, the same claims against Kreppel and a claim pursuant to 42 USC § 1983 against Trozzi and Kreppel, limited to any acts perpetrated in their individual capacity. Thus, any discovery with respect to Trozzi and Kreppel's prior conduct would, at this point, only impermissibly bear on their propensity to commit the acts alleged (*McKane v Howard*, 202 NY 181, 185 [1911] ["While it may reasonably be argued that testimony as to the reputation of plaintiff might be a ground for an inference as to whether or not she did the acts charged, the law has been from the earliest period that such testimony was inadmissible for that purpose."]).

Plaintiff's Motion for Leave to Amend His Complaint

Plaintiff's motion seeking an order granting him leave to amend his complaint to add five new defendants against whom he

seeks to assert a cause of action pursuant to 42 USC § 1983 and to re-plead the previously dismissed cause of action against the City for violation of 42 USC § 1983 is hereby denied. With respect to the proposed additional defendants the action against them is barred by the applicable three-year statute of limitations. As against the City, the proposed amended complaint fails to state a cause of action pursuant to 42 USC § 1983.

As noted above, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc* at 757; *Fahey* at 935), assuming, of course, that the proposed pleading is annexed to the motion seeking such leave (*Loehner* at 591; *Branch* at 476; *Goldner Trucking Corp.* at 640), and that the same has merit (*Thomas Crimmins Contracting Co.* at 170; *Herrick* at 693; *Mansell* at 381-382).

It is well settled that a claim for violation of 42 USC § 1983, requires no notice of claim (*Burton v Matteliano*, 81 AD3d 1272, 1275 [4th Dept 2011]), is governed by a three-year statute of limitations (*Mulcahy v New York City Dept. of Educ.*, 99 AD3d 535, 536 [1st Dept 2012]; *Clairol Development, LLC v Village of Spencerport*, 100 AD3d 1546, 1547 [4th Dept 2012]; *Rimany v Town of Dover*, 72 AD3d 918, 921 [2d Dept 2010]), and accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his or her action" (*Rimany* at 921 [internal quotation

marks omitted]; *Palmer v State of New York*, 57 AD3d 364, 364 [1st Dept 2008]).

It is also well setlled that while generally, an action cannot be commenced after the expiration of the applicable statute of limitations (*Marino v Proch*, 258 AD2d 628 628 [2d Dept 1999]), pursuant to CPLR § 203(c), "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced." In fact, pursuant to the foregoing, our courts have promulgated the "relation back doctrine," which "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are united in interest" (*Buran v Coupal*, 87 NY2d 173, 177 [1995] [internal quotation marks omitted]). However, the relation back doctrine only allows an otherwise untimely claim against a party who was not timely sued to survive if it is established that (1) both claims - meaning, the one timely interposed and the untimely claim which plaintiff seeks to assert arose out of same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and; (3) the new party knew or should have known that, but for a mistake by plaintiff as to the

identity of the proper parties, the action would have been brought against him as well (*id.* at 178).

Generally, parties are united in interest when a "judgment against one will similarly affect the other" (*27th Street Block Ass'n. v Dormitory Authority of State of New York*, 302 AD2d 155, 164 [1st Dept 2002]). Unity of interest, under the second prong of the test, will be found where there is some relationship between the defendants "giving rise to the vicarious liability of one for the conduct of the other (*Vanderburg v Brodman*, 231 AD2d 146, 147-148 [1st Dept 1997]; *Teer v Queens-Long Island Medical Group, P.C.*, 303 AD2d 488, 489 [2nd Dept 2003]). Vicarious liability often hinges on control, meaning that it will be found when the person in a position to exercise authority or control over the wrongdoer can and must do so or bear the consequences (*Kavanaugh v Nussbaum*, 71 NY2d 535, 546 [1988]; *Vanderburg* at 148). Parties are said to be united in interest when "the interest of the parties in the subject-matter is such that they [the parties] stand or fall together and that judgment against one will similarly affect the other" (*Vanderburg* at 148).

Here, insofar as the acts on which plaintiff premises the claims in his proposed complaint occurred on February 14, 2009, it is clear that any action against the proposed defendants and pursuant to 42 USC § 1983, should have been commenced no later than February 14, 2012 and that the failure to do so now bars any claims

thereunder against the proposed defendants. While plaintiff seeks to avail himself of the benefit accorded by the relation back doctrine as promulgated by CPLR § 203(c)[4] and the relevant case law, he fails to establish entitlement to such relief.

Specifically, plaintiff fails to establish that with respect to the proposed defendants, they are united in interest with the City and/or Trozzi and Kreppel. Such failure is fatal. Other than making an unsupported averment, plaintiff fails to actually establish that the proposed defendants are united in interest with respect to the already sued defendants because he submits nothing demonstrating that a judgment against any of the parties already sued will similarly - under our law - affect the proposed defendants. Notably, with respect to plaintiff's cause of action for violations of 42 US § 1983, where plaintiff must establish that the individual police officers acting under color of law, violated federal constitutional or statutory rights (*Delgado v City of New York*, 86 AD3d 502, 511 [1st Dept 2011] ["A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute (42 USC § 1983) against that officer."]; *Morgan v City of New York*, 32 AD3d 912, 914-915 [2d

[4] Plaintiff erroneously relies on CPLR § 203(f) in seeking leave to add five new defendants. However, 203(f) and the factors giving rise to its applicability governs the interposition of new claims against the same party such that otherwise time barred claims could be deemed timely when they relate back to already timely asserted claims.

Dept 2006] ["The complaint states a cause of action for violation of the decedent's Fourth Amendment rights pursuant to 42 USC § 1983, alleging both an unreasonable seizure and confinement of the person in the absence of probable cause."]), it could be claimed that none of the proposed defendants had control over the acts of the other already named defendants thereby obviating vicarious liability against the proposed defendants for the acts of the named defendants.

Plaintiff's motion seeking to re-plead his claim pursuant to 42 USC § 1983 against the City is denied insofar as even assuming that all the allegations in the complaint are true, they nonetheless fail to state a cause of action.

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, thus, no municipal liability will lie under 42 USC § 1983 solely on a theory of *respondeat superior* (*id.*). Moreover, since

> [a] cause of action under 42 USC § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom, and must be pleaded with specific allegations of fact

Pang Hung Leung v City of New York, 216 AD2d 10, 11 [1st Dept 1995 (internal citations omitted)]), broad and conclusory statements, and the wholesale failure to allege facts of the offending conduct alleged, are insufficient to state a claim under section 1983 (*id.*). Accordingly, a motion to dismiss for failure to state a cause of action under 42 USC § 1983 should be granted where the complaint fails to plead the existence of an official policy or custom which deprived him of a constitutional right in violation of 42 USC § 1983 (*Liu v New York City Police Dept.*, 216 AD2d 67, 68 [1st Dept 1995]), or when 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."]; *Bryant v City of New York*, 188 AD2d 445, 446 [2d Dept 1992] ["Given the complete absence of any factual allegations in the complaint regarding the alleged "policies" of the municipal defendants which led to the officers' conduct, or evidencing their approval or "ratification" of this conduct, the plaintiffs' causes of action against these defendants pursuant to 42 USC § 1983 were properly dismissed"]).

Here, much like the last time plaintiff moved for identical relief, his complaint is defective with respect to his cause of action pursuant to 42 USC § 1983 against the City. Specifically, plaintiff fails to plead the specific facts establishing that his arrest, assault, imprisonment, and prosecution were the result of a municipal custom or practice so as to state a cause of action

pursuant to 42 USC § 1983. The fact that plaintiff alleges, that the New York City Police department is permeated with a custom and practice of "covering up" police misconduct, or that the City "has maintained no system or an inadequate system of review of officers who withhold knowledge or give false information," is not tantamount to the identification or specification of the practice, which caused plaintiff's injury (*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.]; *Bryant* at 446 ["Given the complete absence of any factual allegations in the complaint regarding the alleged "policies" of the municipal defendants which led to the officers' conduct, or evidencing their approval or "ratification" of this conduct, the plaintiffs' causes of action against these defendants pursuant to 42 USC § 1983 were properly dismissed"]). It is hereby

ORDERED that plaintiff's state law claims, except the ones for excessive force, *respondeat superior*, and punitive damages be dismissed with prejudice. It is further

ORDERED the City is granted a protective order with respect the personnel/disciplinary records requested within plaintiff's discovery demand dated January 18, 2013 such that it need not

produce those records.

ORDERED that the an *in-camera* review scheduled for September 11, 2015, be hereby cancelled. It is further

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

This constitutes this Court's decision and Order.

Dated : July 13, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.