Graham v City of New York
2015 NY Slip Op 31753(U)
August 10, 2015
Supreme Court, Bronx County
Docket Number: 022726/12
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ISLEEN GRAHAM,

DECISION AND ORDER

Plaintiff(s), Index No: 022726/12

- against -

THE CITY OF NEW YORK, P.O. "JOHN" HOYT, (SHIELD #21987), (AT PREENT FIRST NAME FICTITIOUS AND UNKNOWN), AND P.O. "JOHN DOE" (SAID NAME BEING FICTITIOUS AND PRESENTLY UNKNOWN),

Defendant(s).

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In this action for, *inter alia*, false arrest, false imprisonment, excessive force, malicious prosecution, and violations of 42 USC §§ 1983, 1985, 1986, and 1988 defendant THE CITY OF NEW YORK (the City) moves seeking an order pursuant to CPLR § 3211(a)(7) (1) dismissing plaintiff's first, third, fourth, fifth, sixth, ninth, tenth, thirteenth, fourteenth, sixteenth, and seventeenth causes of action[1] insofar as premised on violations of 42 USC § 1983 on grounds that as against the City those claims are devoid of the required specificity such that they fail to state a

[1] Essentially, the City moves to dismiss every cause of action except the second and eleventh. That said, the City fails to make any arguments in support of dismissing the thirteenth and seventeenth causes of action; an apparent oversight. Nevertheless the Court endeavors to discuss the relevant law related to those causes of action, denying dismissal of the former and partially dismissing the latter.

cause of action; (2) dismissing the foregoing causes of action to the extent premised on violations of 42 USC § 1985, 1986, and 1988 on grounds that plaintiff fails to plead facts sufficient to state a cause of action thereunder (3) dismissing plaintiff's state law claim for malicious prosecution on grounds that by failing to plead a favorable disposition of the underlying criminal proceeding, she fails to state a cause of action; (4) dismissing plaintiff's claim for abuse of process because, failing to plead that the City in arresting her used regularly issued process for a collateral advantage, plaintiff fails to state a cause of action; and (5) dismissing plaintiff's claim for intentional infliction of emotional distress insofar as the complaint, failing to plead the elements essential to such claim, fails to state a cause of action. Alternatively, the City seeks dismissal of the complaint insofar as it fails to comply with CPLR § 3014 or bifurcation of all causes of action premised on federal law. With respect to the latter, the City avers that bifurcation serves judicial economy and avoids prejudice.

Plaintiff opposes the foregoing motion averring that (1) with respect to his claim pursuant to 42 USC § 1983 against the City he sufficiently pleads the existence of a custom and practice by the City which led to the violation of her constitutional rights;(2) she sufficiently states a cause of action for punitive damages against the City and such action is not barred as a matter of

law;(3) she adequately pleaded a cause of action for malicious prosecution insofar as she pleads that all charges which underlie this action were dismissed; (4) that paragraph 99 of her complaint satisfies the requisite pleading standard for purposes of stating a claim for abuse of process; (5) the claim for negligent investigation is not duplicative of the claims for false arrest and false imprisonment; and (6) that bifurcation is not appropriate because the City could be liable irrespective of the liability of the other defendants such that bifurcation does not promote judicial economy. Alternatively, in the event that the Court is inclined to grant the City's motion for dismissal, plaintiff cross-moves for leave to amend his complaint. The City opposes plaintiff's cross-motion on grounds that he fails to attach a copy of his proposed pleading, such failure being fatal.

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. According to plaintiff's complaint, on August 11, 2011, plaintiff was assaulted, battered, and arrested, while within premises - a Rite Aid - located on West 231st Street and White Plains Road, Bronx, NY. Specifically, plaintiff alleges that she was subjected to the foregoing by defendants P.O. "JOHN" HOYT, (SHIELD #21987)

(Hoyt), and P.O. "JOHN DOE" (Doe), both of whom were police officers employed by the City and at all times acting within the scope of their employment with the City. Plaintiff asserts 17 causes of action. Within her first cause of action, plaintiff asserts that defendants in the course of effectuating her arrest, assaulted and battered her, thus, employing excessive force, violating his civil rights, and causing her injuries. Within her second cause of action, plaintiff alleges that defendants falsely arrested and imprisoned her without just provocation. Within her third and fourth causes of action, plaintiff similarly alleges that she was falsely arrested, but adds that such arrest violated her civil rights under 42 USC § 1983. Plaintiff's fifth cause of action alleges that defendants colluded and conspired in order to bring charges against her and/or to cover-up the alleged assault. Within her sixth, fourteenth and sixteenth causes of action plaintiff alleges that as part of custom and practice, the City targeted her via racial profiling, such acts constituting discrimination, thereby violating her federal civil rights. Plaintiff's seventh and fifteenth causes of action are for malicious prosecution, wherein she alleges that defendants falsely and maliciously prosecuted her and that all charges brought against her were dismissed. Plaintiff's eighth and twelfth causes of action are for abuse of process, wherein she alleges that defendants acted with malicious disregard of her life. Per the

ninth cause of action in the complaint, plaintiff alleges that defendants' assault constitutes intentional infliction of emotional distress. Plaintiff's tenth cause of action asserts that her assault, arrest, imprisonment, and subsequent prosecution violated her rights under First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, such that defendants violated 42 USC §§ 1983, 1985, 1986, and 1988. Plaintiff's eleventh cause of action asserts a negligent hiring and retention claim against the City wherein she claims that the City employed and retained Hoyt and Doe despite knowledge that they were unsuitable and unstable. Plaintiff's thirteenth cause of action alleges that defendants failed to provide for her safety and security. Within his seventeenth[2] cause of action, plaintiff alleges that as a result of the foregoing, she is entitled to punitive damages.

The City's Motion to Dismiss

The City's motion seeking to dismiss plaintiff's causes of action premised on violations of federal law, namely 42 USC §§ 1983, 1985, 1986, and 1988 is granted insofar as plaintiff fails to plead facts sufficient to state a cause of action thereunder against the City and any individually named defendants.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7)

[2] Although the complaint has 17 causes of action, the last two are both denominated as the sixteenth and as such, hereinafter the Court refers to the last cause of action as the seventeenth.

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]).

Plaintiff fails to sufficiently plead a cause of action pursuant to 42 USC § 1983 against the City.

While it is often argued that in cases alleging violations of 42 USC § 1983 any motion to dismiss should be decided under the federal pleading standards, particularly those promulgated by *Ashcroft v Iqbal* (556 US 662, 678 [2009]), it is well settled that even after the decision in *Ashcroft*, this State's courts 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]).

Pursuant to 42 USC § 1983

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Thus, a person has a private right of action under 42 USC § 1983 against an individual who, acting under color of law, violates 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 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."]). However, when plaintiff asserts a cause of action against an individual defendant

pursuant 42 USC § 1983 alleging that he was acting in his official capacity, plaintiff must then establish more than a violation of a constitutional right, he must also establish the existence of (1) an official policy or custom that (2) caused him to be subjected to (3) a denial of that constitutional right (*Linen v County of Rensselaer*, 274 AD2d 911, 913 [3d Dept 2000]; *Howe v Village of Trumansburg*, 199 AD2d 749, 751 [3d Dept 1993). Stated differently, "where claims are asserted against individual municipal employees in their official capacities, there must be proof of a municipal custom or policy in order to permit recovery, since such claims [those against the individual defendant] are tantamount to claims against the municipality itself" (*Vargas v City of New York*, 105 AD3d 834, 837 [2d Dept 2013]; *see Rosen & Bardunias v County of Westchester*, 228 AD2d 487, 488 [2d Dept 1996] ["An action against a government official in his official capacity is functionally equivalent to an action against the municipality."])

Similarly, 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"]).

Preliminarily, here, it bears mention that the complaint in this action is inartfully drafted and, thus, quite confusing.

Despite the fact that the City asserts the foregoing in its moving papers, plaintiff does nothing in her opposition to diminish the confusion. Nevertheless, the Court will endeavor to analyze the complaint as drafted.

With respect to plaintiff's claims against the City pursuant to 42 USC § 1983 - namely the sixth, fourteenth and sixteenth causes of action, wherein she alleges that as part of custom and practice, the City targeted her by racially profiling her, such acts constituting discrimination, thereby violating her federal civil rights - she fails state a cause of action since while she asserts a custom and practice which purportedly caused her incident, she completely fails to plead specific instances of that custom and practice.

As noted above, a municipality bears liability under 42 USC § 1983 only where it implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers (*Monell* at 690), and not merely because the municipality employs a tortfeasor who perpetrated a constitutional tort (*id.* at 691). Any cause of action under 42 USC § 1983 must be pleaded with specific allegations of fact (*Leung* at 11), and 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.*). A motion to dismiss for failure to state a cause of action under 42 USC § 1983 should,

therefore, be granted where the complaint fails to plead the existence of an official policy or custom which deprived the plaintiff of a constitutional right in violation of 42 USC § 1983 (*Liu* at 68), 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* at 1147; *R.A.C. Group, Inc.* at 490; *Bryant* at 446).

Contrary to plaintiff's assertion, the fact that she pleaded the existence of a municipal custom which led to her purported arrest, assault, imprisonment, and subsequent prosecution, is nevertheless insufficient- by itself - to state a cause of action against the City pursuant to 42 USC § 1983. Much of the allegations made by plaintiff about the existence of a municipal custom and practice are vague and conclusory, which are insufficient as a matter of law (*Leung* at 11). Moreover, and fatally, the only factual predicate pleaded by plaintiff in support of the alleged municipal custom and practice is this incident. Thus, she fails to specify any prior instances of the custom and practice alleged. *Johnson v Wigger* (2009 WL 2424186 [NDNY 2009]) is particularly instructive. In that case, the court dismissed plaintiff's *Monell* claim against the County of Albany because other than the alleged incident giving rise to that lawsuit, plaintiff failed to plead specific prior instances of the custom and practice

alleged (*id.* at *6 ["Here, other than alleging the single incident in which Plaintiff was beaten by correction officers, the complaint does not contain any facts plausibly suggesting that the County of Albany has a custom or practice of permitting and tolerating the use of excessive force by correction officers. Therefore, I recommend that the Court dismiss the claim against the County of Albany."]; *see Triano v Town of Harrison, NY*, 895 FSupp2d 526, 535 [SDNY 2012] ["Thus, to survive a motion to dismiss, Plaintiff cannot merely allege the existence of a municipal policy or custom, but must allege facts tending to support, at least circumstantially, an inference that such a municipal policy or custom exists. Put another way, mere allegations of a municipal custom or practice of tolerating official misconduct are insufficient to demonstrate the existence of such a custom unless supported by factual details" (internal citations and quotation marks omitted).]).

Based on the foregoing - the absence of properly pled *Monell* claim - the Court, *sua sponte*, dismisses any claims pursuant to 42 USC § 1983 asserted against the individual defendants insofar as it is well settled when plaintiff asserts a cause of action against an individual defendant pursuant 42 USC § 1983 alleging that he was acting in his official capacity, plaintiff must then establish more than a violation of a constitutional right, he must also establish the existence of (1) an official policy or custom that (2) caused

him to be subjected to (3) a denial of that constitutional right (*Linen* at 913; *Howe* at 751). Here, because plaintiff fails to sufficiently plead a municipal policy, custom, and practice sufficient to state a *Monell* claim, any claims against individual defendants pursuant to 42 USC § 1983 also fail (*Vargas* at 837; *Rosen & Bardunias* at 488). Thus, the third, fourth, sixth, fourteenth and sixteenth causes of action are dismissed.

The City's motion seeking dismissal of plaintiff's fifth cause of action - wherein she asserts that the defendants conspired to bring false charges against her, and her tenth cause of action - wherein she asserts that her assault, arrest, imprisonment, and subsequent prosecution violated her rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, such that defendants violated 42 USC §§ 1985, 1986, and 1988 - is hereby granted inasmuch as the complaint fails to state a cause of action thereunder.

In order to state a cause of action under 42 USC §1985(3), the complaint must allege that defendants (1) conspired or did go in disguise on the highway or on the premises of another; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) that one or more of the conspirators did, or caused to be done, any act in furtherance of the object of the conspiracy; (4) whereby another was; (5)

injured in his person or property or; (6) deprived of having and exercising any right or privilege of a citizen of the United States (*Griffin v. Breckenridge*, 403 US 88, 102-103 [1971]). More succinctly,

> [a] valid claim of conspiracy under § 1983 to violate a complainant's constitutional rights must contain allegations of (1) a conspiracy itself, plus (2) actual deprivation of constitutional rights. A violated constitutional right is a natural prerequisite to a claim of conspiracy to violate such right

Romer v Morgenthau, 119 FSupp2d 346, 363 [SDNY 2000]).

When the allegations forming the basis of a claim pursuant to 42 USC 1985(3) are vague, conclusory and fail to offer sufficient detail about the agreement between the alleged conspirators, dismissal is warranted (*Nocro, Ltd. v Russell*, 94 AD3d 894, 895 [2d Dept 2012] ["Finally, the Supreme Court properly concluded that the appellant failed to state a cause of action under the fourteenth cause of action alleging conspiracy, in effect, pursuant to 42 USC § 1985(3). The appellants' contentions regarding conspiracy are vague and conclusory, and fail to offer sufficient factual details regarding an agreement among the respondents/defendants to deprive the appellant of property in the absence of due process of law, the equal protection of the laws, or privileges and immunities secured to the appellant by the laws and the Constitution of the United States."]; *Landmark West! v Tierney*, 25 AD3d 319, 320 [1st Dept

2006] ["Petitioner's conspiracy and 42 USC § 1983 claims lack allegations sufficient to show a scheme to undermine its First Amendment right to petition the Commission."]; *Scarfone v Village of Ossining*, 23 AD3d 540, 541 [2d Dept 2005] ["The plaintiff's speculative and conclusory allegations that Civil Service Employees Association (hereinafter CSEA) and Michael J. Duffy acted in concert with the Village and its agents to deprive the plaintiff of her constitutional rights, and that they conspired with the Village to deprive her of her constitutional rights, without factual allegations or other support, were insufficient to state causes of action pursuant to 42 USC § 1983."]; *Ford v Snashall*, 285 AD2d 881, 882 [3d Dept 2001] ["[a] claim for conspiracy to violate civil rights requires a detailed fact pleading and a complaint containing only conclusory, vague and general allegations of a conspiracy to deprive a person of constitutional rights cannot withstand a dismissal motion. Since plaintiff failed to substantiate his fourth and fifth causes of action with detailed factual information concerning the alleged conspiracy, these claims were properly dismissed" (internal citations and quotation marks omitted)]; *Romer* at 363 ["To withstand a motion to dismiss, the conspiracy claim must contain more than conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights. Specifically, plaintiff must provide some factual basis supporting a meeting of the minds, such as that defendants entered into an

agreement, express or tacit, to achieve the unlawful end; plaintiff must also provide some details of time and place and the alleged effects of the conspiracy (internal citations and quotation marks omitted)]).

Reading the complaint liberally, it appears that while plaintiff expressly alleges a violation of 42 USC § 1985 within her tenth cause of action, she nevertheless also implies such a cause of action within her fifth. Here, plaintiff's complaint is bereft of any allegations sufficient to plead a violation of 42 USC § 1985 either in her fifth or her tenth causes of action. Indeed, plaintiff fails to plead any facts which underlie the vague allegation of a conspiracy in her fifth cause of action and beyond alleging a violation of 42 USC § 1985 in her tenth offers no legally sufficient facts. Therefore, she fails to plead a cause of action thereunder (*Romer* at 363).

Defendants' motion to dismiss plaintiff's cause of action pursuant to 42 USC § 1986, as asserted in her tenth cause of action is hereby granted inasmuch as having failed to state a cause of action under 42 USC § 1985, that cause of action fails.

42 USC § 1986 provides a cause of action against anyone who "having knowledge that any of the wrongs conspired to be done and mentioned in section [42 USC §] 1985 are about to be committed and having power to prevent or aid, neglects to do so" (*Mian v Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F3d 1085, 1088 [2d

Cir 1993]). Accordingly, a § 1986 claim must be predicated upon a valid § 1985 claim (*id.* at 1088; *JPMorgan Chase Bank, N.A. v Hunter Group, Inc.*, 124 AD3d 727, 727 [2d Dept 2015]; *Brown v City of Oneonta, New York*, 221 F3d 329, 341 [2d Cir 2000]).

Here, because plaintiff fails to adequately plead a cause of action pursuant to 42 USC § 1985, her cause of action pursuant to 42 USC § 1986 must be dismissed.

Defendants' motion to dismiss plaintiff's tenth cause of action to the extent premised on a violation of 42 USC § 1988 is also granted insofar as she fails to state a cause of action thereunder.

42 USC §1988 provides for awards of attorney fees to a prevailing party in any action "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title" (42 USC § 1988[b]). However,

> attorney's fees [cannot] fairly be characterized as an element of relief indistinguishable from other elements . . . [because] [u]nlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial

(*White v New Hampshire Dept. of Employment Sec.*, 455 US 445, 451-452 [1982]). Here, having dismissed all of plaintiff's federal claims, dismissal of any claim pursuant to 42 USC § 1988 is warranted for this reason alone. Additionally, however,

plaintiff's claim under 42 USC § 1988 is only incident to her federal claims - provided she prevails at trial - and thus, not, in it of itself, a separate cause of action. Thus, dismissal is warranted for this additional reason.

The City's motion seeking dismissal of plaintiff's claim for abuse of process, as asserted in the eighth and twelfth causes of action, is hereby granted insofar as she fails to state a cause of action.

The gravamen of an abuse of process claim is the perversion of process, lawfully issued, to accomplish a purpose not consonant with the nature of the process employed (*Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Association, Inc.*, 38 NY2d 397, 400 [1975]). To the extent that public policy mandates open access to the courts for the redress of wrongs while concomitantly penalizing those who manipulate proper legal process to achieve a collateral advantage, a cause of action for abuse of process lies not for the commencement of an action -*i.e.*, malicious prosecution - but for the perversion of the process after it is commenced (*id.* at 400; *Pagliarulo v Pagliarulo*, 30 AD2d 840, 840 [2d Dept 1968]).

In order to prevail on a cause of action for abuse of process it must be demonstrated that defendant (1) caused the issuance of regularly issued process either criminal or civil; (2) with the intent to do harm without excuse or justification; and (3) that the

process was perverted to obtain a collateral advantage (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *Board of Education of Farmingdale Union Free School District* at 403; *Panish v Steinberg*, 32 AD3d 383, 383 [2d Dept 2006]. In addition, it must also be demonstrated that the process unlawfully interfered with plaintiff's person or property (*Curiano* at 116; *Williams v Williams*, 23 NY2d 592, 596 [1969]; *Walentas v Johnes*, 257 AD2d 352, 354 [1st Dept 1999]). Actions generally giving rise to an abuse of process claim, by virtue of their interference with person and property, are actions for attachment, execution, garnishment, sequestration, arrest, criminal prosecution, and the issuance of a subpoena (*Williams*, 23 NY2d 592, 596 n 1; *Hauser v Bartow*, 273 NY 370, 378 [1937]).

Here, contrary to plaintiff's assertion, beyond merely asserting that defendants abused the process - presumably the criminal justice system - in connection with the events described, she fails to plead that her arrest, her imprisonment, and subsequent prosecution - while clearly regularly issued processes - were perversions of such processes to obtain a collateral advantage.

The City's motion seeking dismissal of plaintiff's sixteenth cause of action to the extent it asserts a claim for negligent investigation is denied as moot because that cause of action has been dismissed on separate grounds - namely that it was improperly pleaded as a violation of 42 USC § 1983. Assuming, *arguendo*, that

this cause of action had not been dismissed based on the foregoing, such cause of action would have nevertheless been dismissed because as asserted by the City, it is well settled that in this State, in cases alleging police misconduct, the law does not recognize a cause of action for general negligence or negligent investigation (*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.]).

The City's motion seeking dismissal of plaintiff's ninth cause of action, wherein she alleges that defendants' assault constitutes

intentional infliction of emotional distress is hereby granted inasmuch as that claim is barred, where as here, plaintiff has asserted causes of action for false arrest, false imprisonment, and malicious prosecution, she makes said claim against the City, and the acts alleged are insufficient as a matter of law.

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 (*id.* 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 premises her cause of action for intentional and negligent infliction of emotional distress by incorporating by reference the portions of her complaint which assert that she was falsely arrested, falsely imprisoned, assaulted, battered, and maliciously prosecuted. These vague allegations certainly do not establish that defendants' conduct was "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 121). Accordingly, dismissal is warranted for this reason alone. Dismissal is further warranted as against the City insofar as public policy bars claims alleging intentional infliction of emotional distress against governmental entities. Lastly, plaintiff's cause of action for intentional infliction of emotional distress must also be dismissed insofar as her cause of action for intentional infliction of emotional distress falls within the ambit of her causes of action for false arrest, false imprisonment, assault, battery, and malicious prosecution.

The City's motion seeking dismissal of plaintiff's seventeenth

cause of action for punitive damages is granted to the extent of dismissing this cause of action against the City. No such cause of action lies against the City and thus to the extent plaintiff so asserts, it must be dismissed.

When the actions of an alleged tortfeasor constitute gross recklessness or intentional, wanton, or malicious conduct aimed at the public, or when actions are activated by evil or other reprehensible motives, a party is entitled to punitive damages (*Boykin v Mora*, 274 AD2d 441, 442 [2d Dept 2000] ["While the defendant's flight from the scene of the accident might be considered reprehensible, such conduct did not proximately cause any of the plaintiffs injuries."]; *Nooger v Jay-Dee Fast Delivery*, 251 AD2d 307, 307 [2d Dept 1998]; *Zabas v Kard*, 194 AD2d 784, 784 [2d Dept 1993]; *Gravitt v Newman*, 114 AD2d 1000, 1002 [2d Dept 1985 ["Plaintiff has made no allegations beyond those of ordinary negligence or malpractice as would constitute the basis for an award of punitive damages."]). Punitive damages are also appropriate when a defendant's conduct is so flagrant that it transcends mere carelessness (*Zabas* at 784), or when it contains elements of spite or malice (*Wilson v The City of New York*, 7 AD3d 266, 267 [1st Dept 2004]). Lastly, punitive damages are also warranted when the conduct alleged involves "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton

disregard of another's rights" (*Uilico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 13 [1st Dept 2008]). In *Williams v Halpern* (25 AD3d 467 [1st Dept 2006]), the court sustained a claim for punitive damages, finding that the evidence was sufficient "permit a jury to find that defendant's conduct demonstrated a gross indifference to patient care and a danger to the public" (*id.* at 467). Conversely, in *Charell v Gonzalez* (251 AD2d 72 [1st Dept 1998]), the court vacated an award for punitive damages after finding that the defendant's conduct was neither grossly dishonest or indifferent to patient care.

Punitive damages are not recoverable against a state, political subdivision, or a municipality (*Dorian v City of New York*, 129 AD3d 445, 445 [1st Dept 2015]). This is because, as the court in *Sharapata v Town of Islip* (56 NY2d 332 [1982]), the payment of such sums constitutes an unwarranted invasion of the public purse (*id.* at 338). Indeed as the court in *Sharapata* noted,

> the twin justifications for punitive damages—punishment and deterrence—are hardly advanced when applied to a governmental unit. . . [because] it would be anomalous to have the persons who bear the burden of punishment, i.e., the taxpayers and citizens, constitute the self-same group who are expected to benefit from the public example which the granting of such damages supposedly makes of the wrongdoer

(*id.* at 338-339 [internal quotation marks omitted]).

Here, while the City offers absolutely no argument in support

of its motion seeking dismissal of the seventeenth cause of action for punitive damages, since it is well settled that no such action lies against a municipality, the same, as asserted against the City must be dismissed.

The City's motion seeking dismissal of plaintiff's causes of action for malicious prosecution is hereby denied insofar as the complaint states such a cause of action. Within her seventh and fifteenth causes of action, she sufficiently alleges that defendants falsely and maliciously prosecuted her and that all charges brought against her were dismissed.

The tort of malicious prosecution provides protection from and provides redress for the initiation of unjustifiable litigation (*Broughton* at 457). However, since public policy favors bringing criminals to justice, the system must afford accusers room for benign misjudgments (*Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). This, of course, fosters the long standing belief that the court system is open to all without fear of reprisal through the use of retaliatory lawsuits (*Curiano v Suozzi*, 63 NY2d 113, 119 [1984]). Thus, a plaintiff asserting a cause of action for malicious prosecution must satisfy a heavy burden (*Smith-Hunter* at 195).

The essence of a cause of action for malicious prosecution is the perversion of proper legal procedures (*Broughton* at 457; *Boose v City of Rochester*, 71 AD2d 59, 65 [4th Dept 1979]). As such, a

prior judicial proceeding is the *sine qua non*, of such cause of action (*id.* at 65). Simply stated, then, a cause of action for malicious prosecution is one where it is alleged that a legal proceeding was maliciously initiated "without probable cause for doing so which finally ends in failure" (*Curiano* at 118). The elements of the cause of action for malicious prosecution stemming from a prior criminal proceeding, all of which are required for recovery, are (1) the commencement or continuation of a prior criminal proceeding by the defendant; (2) the termination of the prior proceeding in favor of the plaintiff; (3) the absence of probable cause for the initiation of the prior criminal proceeding; and (4) actual malice (*Cantalino v Danner*, 96 NY2d 391, 394 [2001]; *Smith-Hunter* at 195; *Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Martin v City of Albany*, 42 NY2d 13, 16 [1977]; *Broughton* at 457; *Heany v Purdy*, 29 NY2d 157, 159-160 [1971]).

Here, read together, her seventh and fifteenth causes of action allege that defendants "maliciously and falsely prosecuted" her, causing her to appear in court, "without any just rights or grounds therefor," and that the criminal charges were dismissed. That the Bill of Particulars - to the extent that it pleads an ongoing criminal proceeding as opposed to one that concluded favorably to plaintiff - is at variance with the foregoing, is not grounds for dismissing this cause of action.

The City also argues that the causes of action for malicious

prosecution are barred because while asserted in plaintiff's amended notice of claim, such action did not accrue until the criminal action against plaintiff was dismissed; after which plaintiff did not file a new notice of claim for such claim. Whether or not this argument has merit, insofar as it was proffered by the City in its reply, the Court cannot consider the same.

Because the purpose of reply papers is to address the arguments raised by an opponent in response to a motion (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1992]), arguments proffered for the first time within reply papers shall generally not be considered by the court (*Wal-Mart Stores, Inc., v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [2004]; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546, 546 [2001]). This is especially true where the reply papers seek to introduce new evidence to cure deficiencies in the moving papers (*Migdol v City of New York*, 291 AD2d 201, 201 [2002]); *Lumbermens Mutual Casualty Company v Morse Shoe Company*, 218 AD2d 624, 625 [1995]).

Here, in its moving papers, the City's only ground for dismissal of plaintiff's claim for malicious prosecution is the discrepancy between her complaint and her bill of particulars. Only on reply did the City assert dismissal due to plaintiff's failure to comply with GML § 50-e. Thus, this argument will not be considered.

The City's motion to dismiss plaintiff's first cause of action

on grounds that the same fails to state a cause of action under 42 USC § 1983 is denied. Despite asserting that this action is for violations of federal law, the first cause of action does not necessarily plead a cause of action for violations of federal law. Instead, read liberally, the first cause of action is for battery, assault, and excessive force. To that end, plaintiff sufficiently pleads that cause of action and the City fails to assert arguments to the contrary.

It is well settled that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment" (*Graham v Connor*, 490 US 386, 396 [1989]). Thus, whether the force used in effectuating an arrest is excessive, must be analyzed under the Fourth Amendment and its standard of objective reasonableness (*Rivera v City of New York*, 40 AD3d 334, 341 [1st Dept 2007]; *Ostrander v State of New York*, 289 AD2d 463, 464 [2d Dept 2001]), and the reasonableness of an officer's use of force must be, therefore, be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (Rivera at 341; *Graham* at 396; *Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007]). Thus, determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the

suspect was actively resisting arrest (*Koeiman* at 453; *Vizzari v Hernandez*, 1 AD3d 431, 432 [2d Dept 2003]). Moreover when force is used, any unlawful touching of a person by the police, which is not pursuant to a lawful arrest is a battery the elements of which are intentional and offensive bodily contact to which the plaintiff did not consent (*Johnson v Suffolk County Police Dept.*, 245 AD2d 340, 341 [2d Dept 1987).

Here, insofar as plaintiff, within her first cause of action alleges that defendants brutally and wrongfully battered her without cause nor provocation, using brutal and excessive force, she states a cause of action for battery and excessive force.

The City's motion seeking dismissal of plaintiff's thirteenth cause of action, which sounds in a failure to provide safety and protection claim, is hereby denied insofar as she pleads the requisite elements of that claim, thereby, stating a cause of action.

The 14th Amendment's right to due process, has been held to include, in some instances, the right to ensure a person's right to reasonable safety while in the custody of the State (*DeShaney v Winnebago County Dept. of Social Services*, 489 US 189, 199-200 [1989] ["when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"]).

Here, to the extent that plaintiff premises this claim upon allegations of false arrest, excessive force, and false imprisonment; further alleging that in allowing her to be battered while in police custody, the City failed to provide for his safety, plaintiff states a cause of action.

Based on the foregoing, the City's motion for bifurcation of all federal claims against the City and seeking to stay discovery is denied as moot.

Plaintiff's Cross-Motion to Amend Her Complaint

Plaintiff's cross-motion seeking leave to interpose an amended complaint is denied insofar as she fails to annex a copy of her proposed pleading and because she fails to specify the amendments sought, and, therefor, the merits of the same.

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]).

Here, plaintiff not only fails to annex a copy of her proposed pleading, but beyond requesting leave to amend the complaint if the Court grants the City's motion, she utterly fails to articulate the nature of her proposed pleadings. By itself, the former shortcoming is fatal. Moreover, here, the failure to annex the proposed pleading further dooms plaintiff's application because in failing to do so and failing to highlight what she proposes to assert if leave is granted, she fails to establish that any proposed claims have merit. Accordingly, plaintiff's cross-motion must be denied. It is hereby

ORDERED that plaintiff's federal law claims be dismissed, more specifically, the third, fourth, fifth, sixth, tenth, fourteenth, and sixteenth causes of action. It is further

ORDERED that plaintiff's eighth, ninth, and twelfth causes of action be dismissed. It is further

ORDERED that plaintiff's seventeenth cause of action for punitive damages be dismissed against the City. 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 : August 10, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.