Delanuez v City of New York
2015 NY Slip Op 32523(U)
December 21, 2015
Supreme Court, Kings County
Docket Number: 503696/13
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on December 21, 2015.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

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ROBERTO DELANUEZ,

Index No.: 503696/13

Plaintiff,

- against -

DECISION AND ORDER

THE CITY OF NEW YORK, DET. WILLIAM WALDRON, SGT. ANTHONY LONGOBARDI, P.O. TOMAS REYES, LT. MICHAEL CULKIN, OFFICE OF THE DISTRICT ATTORNEY OF KINGS COUNTY, DISTRICT ATTORNEY CHARLES J. HYNES, ASSISTANT DISTRICT ATTORNEY LECIA GRIEPP, ASSISTANT DISTRICT ATTORNEY LEILA ROSINI, ASSISTANT DISTRICT ATTORNEY LINDSEY LIEBERMAN and ASSISTANT DISTRICT ATTORNEY ERNEST CHEM,

Defendant(s).

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Defendants City of New York ("City"), Detective William Waldron ("Waldron"), Sergeant Anthony Longobardi ("Longobardi"), Police Officer Tomas Reyes ("Reyes"), Lieutenant Michael Culkin ("Culkin"), Office of the District Attorney of Kings County ("Office of DA" or "DA"), District Attorney Charles J. Hynes ("DA Hynes"), Assistant District Attorney Lecia Griepp ("ADA Griepp"), Assistant District Attorney Leila Rosini ("ADA Rosini"), Assistant District Attorney Lindsey Lieberman ("ADA Lieberman") and Assistant District Attorney Ernest Chem's ("ADA Chem") Notice of Motion, dated May 22, 2014 for relief for the Defendants as follows:

Office of the District Attorney of Kings County ("DA"or "Office of DA"):
I) For an Order pursuant to *CPLR 3211(a)(7)* in favor of the Office of the District Attorney of Kings County:
a) Dismissing Plaintiff's Complaint on the Grounds of Absolute Immunity Because the DA's Actions Were Prosecutorial and the Office of DA Is a Non-Suable Entity;
b) Dismissing Plaintiff's Fourth Cause of Action As Insufficiently Pleaded Predicated upon Improper Training and Supervision;
c) Dismissing Plaintiff's Fifth, Sixth, Seventh and Eighth Causes of Action Due to Failure to Comply with *General Municipal Law Section 50-e;*
d) Dismissing Plaintiff's Seventh Cause of Action for Intentional Infliction of Emotional Distress as a Matter of Law; and
e) Dismissing Plaintiff's Request for Punitive Damages As Against Public Policy;

District Attorney Charles Hynes ("DA Hynes"):
II) For an Order pursuant to *CPLR 3211(a)(7)* in favor of District Attorney Hynes:
a) Dismissing Plaintiff's Complaint on the Grounds of Absolute Immunity Because His Actions Were Prosecutorial and DA Hynes Cannot Be Held Liable Under Respondeat Superior for the Actions of the Individual Assistant District Attorneys ("ADAs");
b) Dismissing Plaintiff's Second and Third Causes of Action Because DA Hynes Is a State-Actor, Not Subject to Liability pursuant to *42 USC Section 1983;* and
c) Dismissing Plaintiff's Fifth, Sixth and Seventh Causes of Action for Failure to Comply with *General Municipal Law Section 50-e;*

Assistant District Attorneys Lecia Griepp, Leila Rosini, Lindsey Lieberman and Ernest Chem ("ADAs"):
III) For an Order pursuant to *CPLR 3211(a)(7)* in favor of the Individual ADAs:
a) Dismissing Plaintiff's Complaint on the Grounds of Absolute Immunity Because Their Actions Were Prosecutorial; and
b) Dismissing Plaintiff's Fifth, Sixth and Seventh Causes of Action for Failure to Comply with *General Municipal Law Section 50-e;*

The City of New York ("City"):
IV) For an Order pursuant to *CPLR 3211(a)(7)* in favor of the City:
a) Dismissing Plaintiff's Fourth Cause of Action Due to Insufficient Pleading Predicated upon Improper Training and Supervision;
b) Dismissing Plaintiff's Seventh and Eighth Causes of Action for Failure to Comply with *General Municipal Law Section 50-e*;
c) Dismissing Intentional Infliction of Emotional Distress As a Matter of Law; and
d) Dismissing Plaintiff's Request for Punitive Damages as Against Public Policy;

Detective William Waldron, Sergeant Anthony Longobardi, Police Officer Tomas Reyes, Lieutenant Michael Culkin (collectively "Individual Police Officers"):
V) For an Order pursuant to *CPLR 3211(a)(7)* in favor of the Individual Police Officers, Dismissing Plaintiff's Fifth, Sixth and Seventh Causes of Action for Failure to Comply with *General Municipal Law Section 50-e;*

In the Alternative:
VI) for an Order pursuant to *CPLR 603* and *4011*, Bifurcating Plaintiff's Fourth Cause of Action and Staying Any and All Related Discovery and Trial for Efficiency and to Avoid Prejudice to the Individual Police Officers and ADAs; and For Such Other and Further Relief As this Court Deems Just and Proper;

2) Plaintiff Roberto Delanuez's ("Delanuez") Notice of Cross Motion, dated April 17, 2015 for:
a) an Order Pursuant to *CPLR Section 3126,* Striking Defendants' Answer Because of Failure to Appear for Court Ordered Depositions and Provide Court Ordered Discovery and
b) in the Alternative, for an Order, pursuant to *CPLR Section 3124,* Compelling Defendants
I) to Appear for Court Ordered Depositions,
ii) to Provide an Un-Redacted Copy of the DA's File and a Complete Copy of the Grand Jury Minutes As Well As
iii) Directing Them to Comply with All Outstanding Court Orders Together with
iv) Such Other Further and Different Relief as May Be Deemed Just and Proper;

3) Defendants' Reply Affirmation and Opposition to Plaintiff's Cross Motion, dated April 23, 2015, all of which

submitted April 24, 2015.

Papers	Numbered
Notice of Motion and Affidavits Annexed	Defendants 1 [Exh. A-C]
Notice of Cross-Motion and Affidavits Annexed	Plaintiff 2 [Exh. A-C].
Order to Show Cause and Affidavits	
Answering Affidavits	
Replying Affidavit	Defendants 3 [Exh. A-O]
Supplemental Affidavits	
Exhibits	
Other [Memoranda of Law]	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: Defendants City, Detective Waldron, Sergeant Longobardi, Police Officer Reyes, Lieutenant Culkin, Office of the District Attorney of Kings County, District Attorney Hynes, ADA Griepp, ADA Rosini, ADA Lieberman and ADA Chem's motion is granted to the extent that the State law claims against the City and the individual Defendants are dismissed except those claims for false arrest and malicious prosecution against the City. All *Morell* claims are dismissed. Federal false arrest and malicious prosecution claims against the individual police officers remain [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff's cross motion is denied in its entirety [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

PROCEDURAL HISTORY AND BACKGROUND

Plaintiff Delanuez alleges that he was falsely arrested on June 3, 2011 in connection with an attempted robbery at the MetroPCS Phone Store at 1232 Broadway in Brooklyn which occurred on May 27, 2011. According to Plaintiff, he was identified as the perpetrator by the complaining witness in a line-up. Plaintiff alleges that Defendants possessed a surveillance video from the check cashing store at 1234 Broadway in Brooklyn that showed he was not the perpetrator. Although Defendants allegedly possessed this video, Plaintiff claims that he was charged with attempted robbery in the first degree, attempted robbery in the third degree, attempted petit larceny and criminal possession of a weapon in the fourth degrees. Plaintiff alleges that Defendants failed to disclose the existence of the surveillance video in violation of Defendants' obligation pursuant to *Brady v. Maryland*, 83 S.Ct. 1194 (1963). Plaintiff alleges that he remained incarcerated until January 17, 2013 when he was released on his own recognizance and that all the charges against him were dismissed on February 4, 2013 [Defendant 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendant 3, Exh. A-O].

Plaintiff filed a Notice of Claim with the City on February 12, 2013 in which he alleged that he was falsely arrested on June 3, 2011; that NYPD Detective "Frank Waldron" suppressed exculpatory evidence and subjected Plaintiff to an unduly suggestive line-up; and that he was released from jail on January 17, 2013 and all charges against him were subsequently dismissed on February 4, 2013. Plaintiff asserted claims for false arrest, malicious prosecution, assault, battery and federal civil rights violations. He contended that he suffered unspecified psychological injuries [Defendant 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendant 3, Exh. A-O].

Plaintiff commenced this action by filing a Summons and Verified Complaint with the Kings County Clerk on July 2, 2013. In his Complaint, Plaintiff alleged substantially the same facts as found in his Notice of

Claim. However, Plaintiff's Complaint added as Defendants the Individual Police Officers, District Attorney's Office, the District Attorney and the Individual ADAs. His Complaint adds claims for negligent and intentional infliction of emotional distress as well as negligent training, supervision and retention[1] [Defendant 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendant 3, Exh. A-O].

Defendants joined issue by serving their Answer on September 23, 2013 [Defendant 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendant 3, Exh. A-O].

Pursuant to the Preliminary Conference Order, dated March 31, 2014, Defendants were directed to provide the detective's, District Attorney's and criminal case files within 45 days after Plaintiff's provision of an authorization unsealing these records. Plaintiff provided such authorization on April 3, 2014. Plaintiff was directed to respond to Defendants' demand for discovery and inspection [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

In their motion to dismiss, dated May 22, 2014, Defendants make several arguments. They contend that the District Attorney's Office, District Attorney Hynes as well as the Individual ADAs are entitled to dismissal of Plaintiff's complaint on the grounds of absolute prosecutorial immunity since their actions are prosecutorial. See *Imbler v. Pachtman*, 424 U.S. 409 (1989); *Hirshfield v. City of New York*, 253 AD2d 53 (1st Dept., 1999); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Lawson v. City of New York*, (S.D.N.Y. June 13, 2002); *Burns v. Reed*, 500 U.S. 478 (1991); *Johnson v. Kings County District Attorney's Office*, 308 AD2d 278 (2nd Dept., 2003); *Barrett v. United States*, 798 F.2d 565 (2nd Circuit, 1988); *Hartman v. Moore*, 547 U.S. 250 (2006); *Warner v. Monroe County*, 587 F3d 113 (2nd Circuit 2009); *Whitmore v. City of New York*, 80 AD2d 638 (2nd Dept., 1981), lv.dism. 54 NY2d 753 (1981) [Defendant 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendant

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[1] In his Complaint, Plaintiff claims: 1) First Cause of Action: violation of his civil rights under the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution based upon false arrest and imprisonment by the City of New York and the Individual Police Officers; 2) Second Cause of Action: violation of his civil rights under the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution based upon the malicious prosecution and initiation of the criminal prosecution without probable cause by the City of New York, Individual Police Officers, Office of the District Attorney of Kings County, DA Charles Hynes and the Individual ADAs; 3) Third Cause of Action: violations of his civil rights under the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution based upon malicious prosecution and continuation of the criminal prosecution without probable cause by the City of New York, the Individual Police Officers, Office of the District Attorney of Kings County, DA Charles Hynes and the Individual ADAs; 4) Fourth Cause of Action: violation of his civil right to be free from unreasonable searches and prosecution without probable or reasonable cause under the Fourth and Fourteenth Amendments to the U.S. Constitution based upon Defendants' customs, policies and patterns (*Monell*) by the City of New York and the Office of District Attorney of Kings County; 5) Fifth Cause of Action: false arrest and imprisonment by the Defendants 6) Sixth Cause of Action: malicious prosecution by members of the New York City Police Department and members of the Kings County District Attorney's Office; 7) Seventh Cause of Action: negligent and intentional infliction of emotional harm by the Individual Police Officers, Office of the District Attorney of Kings County, DA Charles Hynes, and the Individual ADAs; and 8) Eighth Cause of Action: negligent training, supervision and retention by the City of New York regarding the hiring of Police Officers and Assistant District Attorneys [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

3, Exh. A-O].

Because he is not liable under respondeat superior for the actions of the Individual ADA's, District Attorney Hynes is entitled to dismissal of the complaint. See *New York County Law Section 54; New York County Law Section 941; New York Public Officer Law Section 2; Crawford v. New York County District Attorney*, 99 AD3d 600 (1st Dept., 2012). Due to the fact that he is a state actor, not subject to liability under *42 USC Section 1983*, DA Hynes argues that he is entitled to dismissal of Plaintiff's Second and Third Causes of Action. See *Gan v. City of New York*, 996 F2d 522 (2nd Circuit 1993); *Baez v. Hennessy*, 853 F2d 73 (2nd Circuit 1988); *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Arizoans for Official English v. Arizona*, 520 U.S. 43 (1997) [Defendant 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendant 3, Exh. A-O].

Because the District Attorney's Office is a non-suable entity, it claims entitlement to dismissal. See *Guentangue v. City of New York*, 2010 WL 2612323 (S.D.N.Y. July 1, 2010) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The City and the District Attorney's Office argue for dismissal of Plaintiff's Fourth Cause of Action for *42 USC Section 1983* violations because Plaintiff failed to sufficiently plead a *Monell* claim. A municipality may only be liable for claims brought under *42 USC Section 1983* when it causes the constitutional violation. Such an action did not occur in the present case. See *City of Canton v. Harris*, 489 U.S. 378 (1989); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Green v. City of New York*, 465 F3d 65 (2nd Circuit, 2006), *Connick v. Thompson*, 131 S.Ct.1350; *Dwares v. New York*, 985 F2d 94 (2nd Circuit, 1993); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Cozzani v. County of Suffolk*, 84 AD3d 1147 (2nd Dept., 2011). Plaintiff's Fourth Cause of Action is also improperly predicated upon allegations of improper training and supervision at the DA's Office. See *Van Kamp v. Goldstein*, 555 U.S. 335 (2009). In the alternative, if the *Monell* claims are not dismissed, the Court should bifurcate Plaintiff's Fourth Cause of Action against the City and the DA's Office in addition to staying any related discovery and trial for efficiency to avoid prejudice to the Individual Police Officers as well as ADAs. See *CPLR 4011; CPLR 603; FRCP 42(b); Elie v. City of New York*, 92 AD3d 716 (2nd Dept., 2012) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The Individual Police Officers, DA's Office, and Individual ADAs argue for dismissal of Plaintiff's Fifth, Sixth and Seventh Causes of Action because they are not named in Plaintiff's Notice of Claim. See *Moore v. Melesky*, 14 AD3d 757 (3rd Dept., 2005); *Simmons v. Board of Education*, 169 AD2d 727 (2nd Dept., 1991); *Ratner v. Planning Commission of Village of Pleasantville*, 156 AD2d 521 (2nd Dept., 1989) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The City and DA's Office maintain that Plaintiff's Seventh and Eighth Causes of Action for negligent and intentional infliction of emotional harm as well as negligent training, supervision and retention should be dismissed because they were not set forth in Plaintiff's Notice of Claim. See *Teresta v. City of New York*, 304 NY 440 (1952); *Altmayer v. City of New York*, 149 AD2d 638 (2nd Dept., 1989); *Bonilla v. City of New York*, 232 AD2d 597 (2nd Dept., 1996); *Bairon v. City of New York*, 5 AD3d 708 (2nd Dept., 2004) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The City and the DA's Office argue for dismissal of Plaintiff's Seventh Cause of Action for intentional infliction of emotional distress because public policy does not allow such a claim against government bodies. See *Wylie v. District Attorney of Kings County*, 2 AD3d 714 (2nd Dept., 2003); *Lauer v. City of New York*, 95 NY2d 95 (2000); *Dillon v. City of New York*, 261 AD2d 34 (1st Dept., 1999); *Shapiro v. County of Nassau*, 202

AD2d 358 (1st Dept., 1994) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Because the Individual Police Officers acted in the scope of their employment, the City contends that Plaintiff's Eighth Cause of Action should be dismissed since there is no viable negligent training, supervision, and retention claim. See *Karoon v. New York City Transit Authority*, 241 AD2d 323 (1st Dept., 1997); *Neiger v. The City of New York*, 72 AD3d 663 (2nd Dept., 2010) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The City claims that Plaintiff's Eighth Cause of Action should be dismissed against it because the DA's Office is a separate and distinct entity from the City. See *Brown v. City of New York*, 60 NY2d 897 (1983); *Williams v. City of New York*, 114 AD3d 852 (2nd Dept., 2014); *Narvaez v. City of New York*, 83 AD3d 516 (1st Dept., 2011); *Leftenant v. City of New York*, 70 AD3d 596 (1st Dept., 2010); *Warner v. City of New York*, 57 AD3d 767 (2nd Dept., 2008) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The City and the DA's Office argue for dismissal of Plaintiff's request for punitive damages because such a claim is against public policy with regard to government entities. See *Krohn v. NY City Police Department*, 2 NY3d 329 (2004); *Sharapata v. Town of Islip*, 56 NY2d 332 (1982); *Dean v. Westchester County DA's Office*, 119 FSupp2d 424 (SDNY 2000) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The Court adjourned Defendants' motion to dismiss from June 30, 2014 to September 26, 2014. The motion was further adjourned on September 26, 2014 to November 21, 2014, again on November 21, 2014 to February 13, 2015 and once again finally on February 13, 2015 to April 24, 2015 [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

While Defendants' motion was pending, discovery continued as the case procedurally moved along. Plaintiff appeared for an Examination Before Trial ("EBT") on June 11, 2014. Defendants provided their response to the June 18, 2014 Preliminary Conference Order, including the Complaint Follow-Up Reports ("DD-5") prepared in the course of the investigation of the attempted robbery. In particular, the possible existence of a surveillance camera at an adjacent store (1234 Broadway) was noted on DD-5 number 6. The Court adjourned the Compliance Conference from August 5, 2014 to September 16, 2014. At the September 16, 2014 compliance conference, the Court directed Defendants to produce the DA Office's file. Although the EBT's of Defendants were scheduled, the Court determined that the specific dates for the EBT's of the District Attorney as well as the Individual ADA's would be decided after the resolution of Defendants' motion. Plaintiff was directed to produce documentation in support of his claim that he was present at the MetroPCS store prior to the date of the attempted robbery [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

When Defendant Detective Waldron appeared for an EBT on September 8, 2014, he was questioned by Plaintiff's counsel about the possible surveillance video from 1234 Broadway. Defendant Detective Reyes appeared for an EBT on September 16, 2014. Defendant Detective David Paray appeared for an EBT on October 7, 2014. Defendant Lieutenant Longobardi appeared for an EBT on October 22, 2014. Defendant Lieutenant Culkin appeared for an EBT on October 29, 2014 [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants provided Plaintiff with the Evidence Collection Team file on October 29, 2014 [Defendants

1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

At the December 9, 2014 compliance conference, the Court directed Defendants to produce the DA Office's file. It ordered Plaintiff to provide any records in his possession, showing the time of his appearance at the MetroPCS store. In the alternative, he was to provide an affidavit stating that no such records were in his possession. A compliance conference was scheduled for March 3, 2015. On February 23, 2015, Defendants supplied Plaintiff with a portion of the DA Office's file pursuant to the Compliance Conference Order dated December 9, 2014 [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Before the adjournment of the March 3, 2015 compliance conference to May 12, 2015, Defendants provided Plaintiff with a copy of the DA Office's Dismissal Memorandum. On March 10, 2015, Defendants provided Plaintiff with copies of two surveillance videos obtained during the investigation. On March 30, 2015, Defendants provided Plaintiff with a supplemental response to the December 9, 2014 Compliance Conference Order by supplying the remaining unprivileged portion of the DA Office's file [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

In his cross motion, dated April 17, 2015, Plaintiff maintains that Defendants' Answer should be stricken pursuant to *CPLR Section 3126* because of Defendants' failure to appear for Court-ordered EBT's as well as non-provision of Court-ordered discovery. See *CPLR Section 3212(f), Flynn v. City of New York,* 101 AD3d 803, 955 NYS2d 637 (2nd Dept., 2012); *Byam v. City of New York,* 68 AD3d 798, 890 NYS2d 612 (2nd Dept., 2009); *Cavota v. Perini Corp.,* 31 AD3d 362, 817 NYS2d 646 (2nd Dept., 2006); *Conch Associates, Inc. v. PMCC Mortgage Corp.,* 303 AD2d 538, 756 NYS2d 456 (2nd Dept., 2003); *Patterson v. Greater New York Corporation of Seventh Day Adventists,* 284 AD2d 382, 726 NYS2d 278 (2nd Dept., 2001); *Zletz v. Wetanson,* 67 NY2d 711, 490 NE2d 852 (1986); *Mei Yan Zhang v. Santana,* 52 AD3d 484, 860 NYS2d 129 (2nd Dept., 2008); *Maiorino v. City of New York,* 39 AD3d 601, 834 NYS2d 272 (2nd Dept., 2007); *Valentino v. Romero,* 256 AD2d 505, 680 NYS2d 176 (2nd Dept., 1998); *Cavallino v. Sonsky,* 251 AD2d 361, 672 NYS2d 812 (2nd Dept., 1998); *Boera v. Barz,* 236 AD2d 349, 654 NYS2d 323 (2nd Dept., 1997); *Silverio v. Arvelo,* 103 AD3d 401, 959 NYS2d 175 (1st Dept., 2013). In the alternative, he requests that the Court issue an Order, pursuant to *CPLR Section 3124,* compelling Defendants : 1) to appear for Court-ordered EBT's 2) to provide an un-redacted copy of the DA's file 3) to provide a complete copy of the Grand Jury minutes and 4) to comply with all outstanding Court orders. See *Caracci v. McChesney,* 196 AD2d 522, 601 NYS2d 169 (2nd Dept., 1993); *CPLR 3212(f); Williams v. City of New York,* 40 AD3d 847, 835 NYS2d 717 (2nd Dept., 2007) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Due to incomplete discovery, Plaintiff claims an inability to properly oppose Defendants' motion because of their non-appearance at court-ordered depositions. Since he needs the opportunity to question Defendants about the circumstances leading to Plaintiff's arrest, it is incumbent that he have the entire crucial DA file and Grand Jury minutes. His rights have been frustrated because of Defendants' repeated failures to comply with Court orders. Consequently, Defendants' motion to dismiss must be denied and their Answer stricken. See *CPLR Section 3212(f)* and *CPLR Section 3101(a).* In the alternative, he maintains that the Court should direct Defendants to comply with all outstanding discovery, including appearing for depositions. See *Caracci v. McChesney,* 196 AD2d 522, 601 NYS2d 169 (2nd Dept., 1993); *CPLR 3212(f); Williams v. City of New York,* 40 AD3d 847, 835 NYS2d 717 (2nd Dept., 2007) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff disagrees about absolute immunity for the DA Defendants on the basis of their administrative or investigatory activities concerning Plaintiff's prosecution. He argues that absolute immunity is fact-based,

dependant upon the prosecutor's actions. Thus, there should be an analysis of the prosecutor's role pertaining to whether the prosecutor appears as a lawyer for the State in a probable cause hearing to obtain a warrant or if he/she provides legal advice to the police. Because he argues that the Individual ADAs advised the police on the permissibility of the investigatory method, he claims there is no entitlement to absolute immunity. See *Buckley v. Fitzsimmons,* 509 US 259 (1993); *Pinaud v. County of Suffolk,* 52 F3d 1139; *Burns v. Reed,* 500 US 478 (1991); *Stump v. Sparkman,* 435 US 349 (1978); *Imbler v. Pachtman,* 424 US 409 (1976); *42 USC Section 1983; Kalina v. Fletcher,* 522 US 118 (1997); *Ramos v. City of New York,* 285 AD2d 284, 729 NYS2d 728 (1st Dept., 2001). See also *CPLR Section 3212(f).* Moreover, because they have never appeared for depositions, the causes of action against the DA's Office, ADAs Griepp, Rosini, Lieberman and Chem are not subject to dismissal at this time pursuant to *CPLR Section 3211.* Therefore, the complaint against the DA Defendants must not be dismissed [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff contends that his Fourth Cause of Action for *Monell* claims against the City should not be dismissed pursuant to *42 USC Section 1983* because the pleadings are to be liberally construed. He maintains that his claims were properly pleaded since his complaint sufficiently indicated the material elements of his civil rights cause of action against the City. As a result, the City had fair notice of a custom or policy which would establish municipal liability under *42 USC Section 1983* because his complaint alleged gross negligence in the failure to properly train, supervise and discipline its employees which resulted in injury to Plaintiff. See *Monell v. Dept. of Social Services of the City of New York,* 436 US 658 (1977); *Walker v. City of New York,* 974 F2d 293 (2nd Circuit, 1992); *Sulehria v. City of New York,* 670 F.Supp2d 288 (SDNY 2009); *Davis v. Lynbrook Police Dept.,* 224 F.Supp2d 463 (EDNY 2002); *Amnesty America v. Town of West Hartford,* 361 F3d 113 (2004); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 US 163 (1993); *CPLR 3013; Gentile v. County of Suffolk,* 926 F2d 142 (2nd Circuit 1991); *FRCP Rule 8(a); Pendleton v. City of New York,* 44 AD3d 733, 843 NYS2d 648 (2nd Dept., 2007); *Bumbury v. City of New York,* 62 AD3d 621, 880 NYS2d 44 (1st Dept., 2009); *Elie v. St. Barnabas Hospital,* 283 AD2d 364, 724 NYS2d 749 (1st Dept., 2001); *CPLR 3026* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff objects to Defendants' argument about the requirement of naming the Individual Defendants in his Notice of Claim. Pursuant to *General Municipal Law 50-e(b),* he argues no need to serve his Notice of Claim upon the Individual Defendants as a condition precedent because the statute does not require that the names of the employees against whom claims are asserted be either named or identified. Although his Notice of Claim fails to include the names of all the Individual Police Detectives as well as Individual ADA's, the State law claims should not be dismissed against Defendants DA office, ADAs Griepp, Rosini, Lieberman and Chem, City of New York, Detective Waldron, Sergeant Longobardi, Police Officer Reyes and Lieutenant Culkin simply because they were not identified in his Notice of Claim. See *General Municipal Law 50-e(b).* See also *Rodriguez v. New York City Transit Authority,* 90 AD3d 552, 934 NYS2d 418 (1st Dept., 2011); *Schiavone v. County of Nassau,* 51 AD2d at 981, 380 NYS2d 711 (2nd Dept., 1976) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

In their Reply Affirmation and Opposition to the Cross Motion, dated April 23, 2015, Defendants submit that the State law claims against the City and the individually named Defendants should be dismissed except for the claims alleging false arrest and malicious prosecution against the City. Only Plaintiff's federal false arrest and malicious prosecution claims should remain against the Individual Police Officers. Alternatively, if the *Monell* claims remain, the City submits that the *Monell* claims should be bifurcated to assist in the expeditious resolution of this matter. Moreover, there is no basis to strike Defendants' Answer because they have substantially complied with all Court orders, showing that any discovery delays were not

attributable to wilful or contumacious conduct [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants point out that Plaintiff does not oppose dismissal of his claims against the Office of the District Attorney of Kings County and District Attorney Charles Hynes. He does not oppose the dismissal of his claims for intentional and negligent infliction of emotional distress as well as negligent training, supervision and retention. He does not oppose the dismissal of Plaintiff's claim for punitive damages against the City. He does not oppose the bifurcation of his *Monell* claims against the City if the Court does not dismiss it. Consequently, Defendants argue that those aspects of their motion should be granted [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants reiterate that the actions against the Individual ADAs must be dismissed on the grounds that the ADAs decisions in presenting the case to the Grand Jury and withholding the videotapes or other evidence from the Grand Jury are protected by absolute immunity from civil liability in connection with Plaintiff's prosecution. See *Imbler v. Pachtman*, 424 US 409 (1986); *Van de Kamp v. Goldstein*, 555 US 335 (2009); *Buckley v. Fitzsimmons*, 509 US 259 (1993); *Hill v. City of New York*, 45 F3d 653 (2nd Cir. 1995); *Warney v. Monroe*, 587 F3d 113 (2nd Cir. 2009); *Giraldo v. Kessler*, 694 F3d 161 (2nd Cir. 2012); *Collins v. City of New York*, 923 F.Supp2d 462 (EDNY 2013); *Green v. Montgomery*, 219 F3d 52 (2nd Cir. 2000) [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The *Monell* claim against the City must be dismissed because it is improperly pleaded. The complaint contains nothing but boilerplate allegations without documenting specific instances of other misconduct to show an actual unconstitutional policy or custom as required. Despite these broad brush assertions of a custom or policy, Plaintiff fails to set forth any allegations supporting them. Because Plaintiff presents only legal conclusions without supporting facts, he has failed to set forth a plausible claim. See *Cozzani v. County of Suffolk*, 84 AD3d 1147 (2nd Dept., 2011); *Iqbal v. Ashcroft*, 556 US 662 (2009). See also *Dwares v. New York*, 985 F2d 94 (2nd Cir. 1993); *Leung v. City of New York*, 216 AD2d 10 (1st Dept., 1995); *CPLR 3013; Oklahoma City v. Tuttle*, 471 US 808 (1985); *Reynolds v. Guiliani*, 586 F3d 183 (2nd Cir. 2007); *Ricciuti v. New York City Transit Authority*, 941 F2d 119 (2nd Cir. 1991); *Battista v. Rodriguez*, 702 F2d 393 (2nd Cir. 1983); *Connick v. Thompson*, 131 S.Ct. 1350 (2011)[Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants underscore Plaintiff's failure to name the Individual Police Officers or ADAs or even at a minimum describe any misconduct by the ADAs in his Notice of Claim. Case law requires that in order to institute a viable action against a City employee, he/she must be individually named in the Notice of Claim as required by the Second Department, Appellate Division. If they are not named, the Appellate Division has mandated the dismissal of Plaintiff's State law claims. See *General Municipal Law Section 50-k(3); Rattner v. Planning Commission of Village of Pleasantville*, 156 AD2d 521 (2nd Dept., 1989); *Zwecker v. Clinch*, 279 AD2d 572 (2nd Dept., 2001); *Smith v. Scott*, 294 AD2d 11 (2nd Dept., 2002); *Santoro v. Town of Smithtown*, 40 AD3d 736 (2nd Dept., 2007); *Gabriel v. City of New York*, 89 AD3d 982 (2nd Dept., 2011); *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663 (2nd Dept., 1984)[Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants claim that Plaintiff failed to submit a proper Affirmation of Good Faith in his Cross Motion to strike Defendants' Answer and/or compel discovery. Thus, the cross motion should be denied. See *22 NYCRR Section 202.7(a) (c); Natoli v. Milazzo*, 65 AD3d 1309 (2nd Dept., 2009); *Perla v. Daytree Custom*

Builders, Inc., 119 AD3d 758 (2nd Dept., 2014); *Matter of Greenfield*, 106 AD3d 908 (2nd Dept., 2013); *Deutsch v. Grunwald*, 110 AD3d 949 (2nd Dept., 2013)[Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Addressing the scheduling of the EBT's for the Individual ADA's, Defendants point out that their motion to dismiss pursuant to *CPLR 3211(a)(7)* was filed and served on May 29, 2014. The Individual ADA's were not ordered to appear for EBT's in two subsequent compliance conference orders. In fact, Plaintiff agreed to hold the EBT's of the Individual ADA's in abeyance until Defendants' motion to dismiss was resolved. Since this agreement was incorporated into a Court Order, the Individual ADA's were under no obligation to appear for EBT's prior to the resolution of Defendants' motion. See *CPLR 3214(b); Shields v. Carbonne*, 78 AD3d 1440 (3rd Dept., 2010); *Decision/Order of the Honorable Dawn Jimenez-Salta, Kings County Supreme Justice*, dated September 16, 2014 [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants refute Plaintiff's argument pursuant to *CPLR 3211(d)* that there may be facts essential to justify opposition to their motion but those facts are not available. Defendants contend that mere speculation that some piece of information may be uncovered through discovery is insufficient to postpone consideration of a dispositive motion. See *Yorktown Square Associates v. Union Dime Savings Bank*, 79 AD3d 1040 (2nd Dept., 1981); *Marshall v. Colvin Motor Parts, Inc.*, 140 AD2d 673 (2nd Dept., 1988); *Cassidy v. County of Nassau*, 146 AD2d 595 (2nd Dept., 1989). Plaintiff has not demonstrated that additional discovery will yield the facts necessary to oppose their motion to dismiss. Defendants have provided Plaintiff with all non-privileged portions of the DA Office's file with redactions of personal information, including the dismissal memorandum which details the actions the DA's Office took during the course of the criminal proceeding. Plaintiff fails to demonstrate how EBT's of the Individual ADA's or an un-redacted copy of the District Attorney's file will uncover additional information not contained in the DA Office file and dismissal memorandum already in Plaintiff's possession [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants insist that their Answer should not be stricken because Plaintiff has failed to demonstrate any sufficient conduct by them to warrant striking it. See *Roug Kang Wang v. Chien-Tsang Lin*, 94 AD3d 850 (2nd Dept., 2012); *CPLR 3126; Mylonas v. Town of Brookhaven*, 305 AD3d 561 (2nd Dept., 2003); *Colucci v. Jennifer Convertibles*, 283 AD2d 224 (1st Dept., 2001); *Joseph v. Roller Castle Ltd.*, 100 AD2d 839 (2nd Dept., 1984). They provided Plaintiff with all records from the New York City Police Department (the detective's file in addition to the Evidence Collection Team file) as well as all non-privileged portions of the DA's file. Any delay in its provision was neither wilful nor contumacious. The Individual Police Officers as well as an additional police officer have all appeared for Court-ordered EBT's. With Plaintiff's consent, the Court ordered in abeyance the EBT's of the Individual ADA's until resolution of Defendants' motion. Thus, Defendants have not violated any Court orders pertaining to EBT's of Individual ADA's. Moreover, Plaintiff was well aware of the existence of both surveillance videos during the EBT of Detective Waldron on September 8, 2014 when his attorney questioned him about the surveillance videos from 1234 Broadway [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Defendants have never been ordered to provide the Grand Jury minutes to Plaintiff. Moreover, Plaintiff has not moved to unseal the minutes. Pursuant to *Criminal Procedure Law Section 190.25(4)*, Grand Jury minutes can only be unsealed by Court order at the Court's discretion. See *People of the State of New York v. Di Napoli*, 27 NY2d 229 (1970). The usual practice is to make a motion to unseal the Grand Jury minutes on notice to the moving party's adversary and the District Attorney's Office. In order to obtain disclosure of the Grand Jury minutes, the moving party must show a compelling and particularized need. See *Nelson v. Mollen*, 175 AD2d 518 (3rd Dept., 1991); *In re District Attorney of Suffolk County*, 58 NY2d 436 (1983). A showing of

mere relevance is insufficient. Since Plaintiff has not moved to unseal the Grand Jury minutes, his cross motion must be denied [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

COURT RULINGS

This Court grants Defendants City, Detective Waldron, Sergeant Longobardi, Police Officer Reyes, Lieutenant Culkin, Office of the District Attorney of Kings County, District Attorney Hynes, ADAs Griepp, Rosini, Lieberman and Chem's motion to the extent that the State law claims against the City and the individual Defendants are dismissed except for those claims for false arrest and malicious prosecution against the City. All *Morrell* claims are dismissed. Federal false arrest and malicious prosecution claims against the Individual Police Officers remain [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff's cross motion for an order pursuant to *CPLR 3126* to strike Defendants' answer for failure to provide Court ordered discovery, or in the alternative, for an order pursuant to *CPLR 3124* compelling Defendants to appear for Court ordered depositions and to provide an un-redacted copy of the DA's file as well as a complete copy of the Grand Jury minutes is denied in its entirety [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

The Office of the District Attorney of Kings County, District Attorney Hynes and the Individual ADAs are entitled to absolute immunity because their actions were prosecutorial and the Office of the District Attorney is a non-suable entity. Thus, their actions in presenting the case to the Grand Jury and withholding the videotapes and other evidence from the Grand Jury are protected by absolute immunity from civil liability in connection with Plaintiff's prosecution. See *Imbler v. Pachtman, supra; Hirshfield v. City of New York, supra; Buckley v. Fitzsimmons, supra; Lawson v. City of New York, supra; Barrett v. United States, supra; Harman v. Moore, supra, Warney v. Monroe County, supra; Whitmore v. City of New York, supra; Guentange v. City of New York, supra.* Moreover, District Attorney Hynes is not liable under respondeat superior for the actions of the Individual ADAs. See *New York County Law Section 54; New York County Law Section 941; New York Public Officer Law Section 2; Crawford v. New York County District Attorney, supra.* In addition, District Attorney Hynes is a state actor, not subject to liability under *42 USC Section 1983.* See *Gan v. City of New York, supra; Baez v. Hennessy, supra; Will v. Michigan Department of State Police, supra; Arizoans for Official English v. Arizona, supra.* The claims against the City are dismissed because the DA's Office is a separate and distinct entity from the City. See *Brown v. City of New York, supra; Williams v. City of New York, supra; Narvaez v. City of New York, supra; Leftenant v. City of New York, supra; Warner v. City of New York, supra* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff has failed to plead a *Monell* claim under *42 USC Section 1983.* Plaintiff's complaint fails to document specific instances of misconduct to show an actual unconstitutional policy or custom. There are only legal conclusions without supporting facts. See *City of Canton v. Harris, supra; Monell v. Department of Social Services, supra; Green v. City of New York, supra; Dwares v. New York, supra; Ashcroft v. Iqbal, supra; Cozzani v. County of Suffolk, supra; Leung v. City of New York, supra; Oklahoma City v. Tuttle, supra; Reynolds v. Giuliani, supra; Ricciuti v. New York Transit Authority, supra; Battista v. Rodgriguez, supra; Connick v. Thompson, supra* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

This Court finds that there is no basis for any claims predicated upon improper and/or negligent training, supervision and retention since the Defendants were acting within the scope of their employment. See *Van Kamp v. Goldstein, supra; Karoon v. New York City Transit Authority, supra; Neiger v. The City of New*

York, supra [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff failed to name the Individual Police Officers, DA's Office and the Individual ADAs in his Notice of Claim pursuant to *Municipal Law Section 50-k(3)*, thus impeding any investigation by Defendants. See *Moore v. Melesky, supra; Simmons v. Board of Education, supra; Rattner v. Planning Commission of Village of Pleasantville, supra; Zwecker v. Clinch, supra; Smith v. Scott, supra; Santoro v. Town of Smithtown, supra; Gabriel v. City of New York, supra; Mountain View Coach Lines, Inc. v. Storms, supra.* In addition, he did not set forth his allegations of negligent and intentional infliction of emotional harm as well as negligent training, supervision and retention in his Notice of Claim. See *Teresta v. City of New York, supra; Altmayer v. City of New York, supra; Bonilla v. City of New York, supra; Bairon v. City of New York, supra.* Moreover, it is against public policy to bring an action for intentional infliction of emotional distress as well as punitive damages against government bodies. See *Wylie v. District Attorney of Kings County, supra; Lauer v. City of New York, supra; Dillon v. City of New York, supra; Shapiro v. County of Nassau, supra; Krohn v. NY City Police Department, supra; Sharapata v. Town of Islip, supra; Dean v. Westchester County DA's Office, supra* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

This Court finds no basis to strike Defendants' Answer. Plaintiff has failed to demonstrate any conduct by Defendants to warrant such a striking. Defendants provided Plaintiff with all records from the New York City Police Department (the detective's file in addition to the Evidence Collection Team file) as well as non-privileged portions of the DA's file. Any delay was not wilful or contumacious. See *Roug Kang Wang v. Chien-Tsang Lin, supra; Mylonas v. Town of Brookhaven, supra; Colucci v. Jennifer Convertibles, supra; Joseph v. Roller Castle Ltd., supra* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff's argument pursuant to *CPLR 3211(d)* that further discovery may yield facts essential to justify opposition to Defendants' motion is unavailing. The mere speculation that some piece of information may be uncovered through discovery is insufficient to postpone consideration of a dispositive motion because Plaintiff has failed to demonstrate that additional discovery will yield the facts necessary to oppose the motion to dismiss. Defendants have provided Plaintiff with all non-privileged portions of the DA Office's file with redactions of personal information, including the dismissal memorandum which details the actions the DA's Office took during the course of the criminal proceeding. Plaintiff fails to demonstrate how EBT's of the Individual ADA's or an un-redacted copy of the District Attorney's file will uncover additional information not contained in the DA Office file and dismissal memorandum already in Plaintiff's possession. Moreover, the Individual ADA's EBT's were held in abeyance until resolution of this motion pursuant to this Court's Decision/Order. See *Yorktown Square Associates v. Union Dime Savings Bank, supra; Marshall v. Colvin Motor Parts, Inc., supra; Cassidy v. County of Nassau, supra; Shields v. Carbonne, supra; Decision/Order of the Honorable Dawn Jimenez-Salta, Kings County Supreme Court Justice, dated September 16, 2014* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

This Court notes that Defendants have never been ordered to provide the Grand Jury minutes to Plaintiff. In fact, Plaintiff neglected to move to unseal the minutes. According to *Criminal Procedure Law Section 190.25(4)*, Grand Jury minutes can only be unsealed by Court order at the Court's discretion. See *People of the State of New York v. Di Napoli, supra.* As Defendants point out, the usual practice is to make a motion to unseal the Grand Jury minutes on notice to the moving party's adversary and the District Attorney's Office. In order to obtain disclosure of the Grand Jury minutes, the moving party must show a compelling and particularized need. A showing of mere relevance is insufficient. Not only has Plaintiff failed to file a motion on notice to unseal the Grand Jury minutes, but he has also not demonstrated a compelling and particularized

need to do so. See *Nelson v. Mollen, supra; In re District Attorney of Suffolk County, supra* [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Based on the foregoing, it is hereby ORDERED as follows:

Defendants City, Detective Waldron, Sergeant Longobardi, Police Officer Reyes, Lieutenant Culkin, Office of the District Attorney of Kings County, District Attorney Hynes, ADAs Griepp, Rosini, Lieberman and Chem's motion is GRANTED to the extent that the State law claims against the City and the individual Defendants are DISMISSED except for those claims for false arrest and malicious prosecution against the City. All *Morrell* claims are DISMISSED. Federal false arrest and malicious prosecution claims against the Individual Police Officers remain [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

Plaintiff's cross motion is DENIED in its entirety [Defendants 1, Exh. A-C; Plaintiff 2, Exh. A-C; Defendants 3, Exh. A-O].

This constitutes the Decision and Order of the Court.

Date: December 21, 2015
Delanuez v. The City of New York et al
(#503696/13)

DAWN JIMENEZ-SALTA
J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court