

Graham v City of New York

2015 NY Slip Op 32822(U)

July 28, 2015

Supreme Court, New York County

Docket Number: 108336/2011

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52**

**INDEX NO. 108336/2011
DECISION and ORDER**

**HODEAN GRAHAM, KADEAN GRAHAM,
FRANCLOT GRAHAM, and
TYRONE GRAHAM,**

Plaintiffs,

- v -

**THE CITY OF NEW YORK, THE NEW
YORK CITY POLICE DEPARTMENT, P.O.
JAMES DIAZ, SHIELD # 24459,
INDIVIDUALLY AND AS A POLICE
OFFICER, POLICE OFFICER TEDESHI,
SHIELD # 03421 INDIVIDUALLY AND
AS A POLICE OFFICER, SGT. KEVIN
O'DOHERTY, SHIELD # 032056,
INDIVIDUALLY AND AS A POLICE
OFFICER, P.O. PETR JANAK, SHIELD
29315, INDIVIDUALLY AND AS A
POLICE OFFICER, POLICE OFFICER
DONALD EGGLESTON, SHIELD #
13674, INDIVIDUALLY AND AS A
POLICE OFFICER, PROBATION OFFICER
GREGORY CLARK, SGT. MATHEW REID,
SHIELD # 03308, INDIVIDUALLY AND
AS A POLICE OFFICER, DEPUTY
INSPECTOR KEVIN CATTALINA, 32ND PCT.,
INDIVIDUALLY AND AS A POLICE
OFFICER, POLICE OFFICERS JOHN,
JOE AND JACK DOE, SUED HEREIN IN
FICTICIOUS CAPACITIES AS THEIR
IDENTITIES ARE PRESENTLY UNKNOWN,
EACH INDIVIDUALLY AND AS POLICE
OFFICERS, POLICE OFFICER JACKSON,
32ND PCT., INDIVIDUALLY AND AS A
POLICE OFFICER, POLICE OFFICER SOSA,
32ND PCT., INDIVIDUALLY AND AS A
POLICE OFFICER, POLICE OFFICER
HOUSE, 32ND PCT., INDIVIDUALLY AND AS
A POLICE OFFICER, AND THE NEW YORK
CITY DEPARTMENT OF CORRECTIONS,**

Defendants.

FILED

JUL 31 2015

**COUNTY CLERK'S OFFICE
NEW YORK**

Margaret A. Chan, J.:

Plaintiffs made the instant motion to compel discovery. Defendants (collectively, the City) cross-moved to dismiss various causes of action. In their opposition to the cross-motion, plaintiffs withdrew certain causes of action and submitted further support to compel discovery. The discovery sought by plaintiffs is personnel records for the named officers including disciplinary, Community Complaint Review Board (CCRB) and Internal Affairs Bureau (IAB) records. The motion to compel and the cross-motion to dismiss are decided as follows:

Plaintiffs brought suit for personal injuries stemming from two separate incidents involving police officers. On July 25, 2010, plaintiffs were arrested for obstruction of governmental administration, assaulting an officer, possession of marijuana and resisting arrest in the vicinity of their home at 69 W. 131st Street, in the County, City and State of New York (Cross-Mot, Exh G). On July 29, 2010, police officers returned to plaintiffs' home and arrested plaintiffs Hodean and Kadean Graham for possession of a shotgun shell (*id.*). All criminal claims were dismissed against plaintiffs.

Plaintiffs' opposition withdrew their causes of action against the municipality for intentional infliction of emotional distress (IIED) and for *Monell* claims. Plaintiffs also withdrew their demand for punitive damages as against the municipality. Therefore, the thirteenth through sixteenth, twenty-seventh and twenty-eighth (the IIED claims) and the thirtieth through thirty-third (the *Monell* claims) causes of action are withdrawn as well as plaintiffs' demand for punitive damages against the municipality.

Addressing the remainder of the City's cross-motion to dismiss, pursuant to CPLR § 3211(a)(7) the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory (*id.*).

The claims against the individual defendants for IIED are dismissed. Plaintiffs claimed police officers used deplorable racial slurs, taunted plaintiffs, used excessive force and battered plaintiffs while they were detained and, in the case of plaintiff Tyrone Graham, removed him from his home in such a way that caused him to be exposed from his waist to his knees. Defendants argued that IIED is not actionable against municipal employees engaged in official conduct. The City's fifth amended answer stated the named employees were acting "within the scope of their employment" (Mot, Exh C, ¶ 4). An employer is vicariously liable for the torts of its employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his or her employment (*see Riviello v Waldron*, 47 NY2d 297, 302 [1979]). Therefore, the IIED claims against the individual defendants are dismissed.

Plaintiffs' claims for negligent hiring, retention, and supervision are dismissed as well. "[W]here an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention." (*Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept, 1997] citing *Eifert v Bush*, 27 AD2d 950 [2d Dept 1967]; see *Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011]). Where, as here, the alleged perpetrators were municipal employees acting within the scope of their employment there is no basis for a claim based on negligent hiring, retention, and supervision. Thus, claims thirty-eight to forty-one are dismissed.

Returning to plaintiffs' motion to compel discovery, requests for discovery relating to plaintiffs' *Monell* claims are now moot. As to the non-*Monell* discovery for the individual employees, disciplinary records and complaints made against them are discoverable to the extent they contain information relevant to the plaintiffs' claims here (see *Chavez v City of New York*, 33 Misc3d 1214(A), *aff'd* 99 AD3d 614 [1st Dept 2012]). Similarly, where records exist of prior discipline or complaints made against the named defendants, those records may also be relevant (*id.* at pp 4- 5). Accordingly, defendants shall provide, *in camera*, any prior IAB investigations, CCRB records, and/or any other records of prior disciplinary actions taken against the individually named municipal employees in their possession.

Accordingly, plaintiffs' motion to compel and defendants' cross-motion to dismiss are each granted in part, as follows:

It is hereby ORDERED, the thirteenth through sixteenth, twenty-seventh, twenty-eighth, and the thirtieth through thirty-third causes of action shall be marked as withdrawn as against the municipal defendants; it is further

ORDERED, plaintiffs' demand for punitive damages against the municipal defendants shall be marked as withdrawn; it is further

ORDERED, the thirteenth through sixteenth, twenty-seventh and twenty-eighth causes of action against the individual defendants are dismissed; it is further

ORDERED, the thirty-eighth through forty-first causes of action are dismissed; it is further

ORDERED, the parties shall appear for a previously scheduled compliance conference on October 7, 2015 at 2:00 p.m. in the DCM part; and it is further

ORDERED, at or before that compliance conference the defendants shall provide for an *in camera* inspection a date-stamped copy of the documents specified above subject to redaction of any personal information such as telephone numbers, addresses, tax identification numbers, dates of birth, etc . . . ; and it is further

ORDERED, if defendants are not able to provide any of those records, they must provide an explanation by an affidavit from a person with knowledge within 30 days of entry of this order.

This constitutes the decision and order of the court.

Dated: July 28, 2015



Margaret A. Chan, *J.S.C.*

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JUL 31 2015
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NEW YORK