O'Farrel v City of New York
2016 NY Slip Op 30242(U)
January 12, 2016
Supreme Court, Bronx County
Docket Number: 302915/10
Judge: Eddie J. McShan
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 FILED Jan 25 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

FROILAN O'FARREL,

Plaintiff,

-against-

THE CITY OF NEW YORK, P.O. OSCAR CARRANZA, SHIELD #10824 OF THE 40TH PRECINCT, P.O. GRANTLY BOVELL, SHIELD #17433 OF THE 40TH PRECINCT AND OTHER CITY OF NEW YORK POLICE OFFICERS S/H/A JOHN/JANE DOE I-IV,

Defendants.

DECISION AND ORDER

Index No. 302915/10

Present:
HON. EDDIE J. MCSHAN

The following papers numbered 1 to 24 were read on this motion for dismissal and cross-motion for leave to amend.

No on Calendar of	PAPERS NUMBERED
Notice of Motion- Order to Show Cause - Exhibits and Affirmation Annexed----------	1 - 11
Affirmation in Opposition and Cross Motion ----------	12 - 23
Replying Affirmation ----------	24
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Before this Court is defendants' application to dismiss all of Plaintiff's federal claims brought pursuant to 42 U.S.C. § 1983 against the individual named officers for a failure to state a cause of action. Defendants also moved to dismiss Plaintiff's first, third, fourth, fifth, and sixth causes of action against all defendants for failure to state claims upon which relief can be granted. Defendants further moved pursuant to CPLR § 3103, for a protective order modifying or limiting the directives contained in an Order dated May 9, 2013. Plaintiff opposed the defendants applications and cross-moved for leave to amend his complaint in the event it is determined that the complaint is insufficiently pled.

Motion to Dismiss

Plaintiff commenced the instant action to recover damages for personal injuries and constitutional violations allegedly sustained on February 5, 2009 in the vicinity of 510 Willis Avenue

in Bronx, New York. Defendants argue that the Plaintiff's conviction by a jury of two counts of assault in the second degree and two counts of assault in the third degree nearly four years after he commenced the instant proceeding serves as a complete defense to the Plaintiff's First Cause of Action alleging battery, and Third Cause of Action alleging false arrest and unlawful imprisonment. Defendants contend that given that Plaintiff's fifth cause of action alleging negligent training rests on improper training regarding his arrest, said action is moot in light of the conviction establishing the police officers' probable cause to effectuate his arrest. Defendants acknowledge that the police officers were acting within the scope of their employment at the time of Plaintiff's arrest and, as such, contend that both the fifth and sixth causes of action alleging negligent supervision, hiring, retention, and training against the employer cannot be maintained. Defendants insist that no claim for punitive damages can be maintained against a municipality.

Defendants further argue that the fourth cause of action alleging Plaintiff's constitutional rights violations pursuant to 42 U.S.C. § 1983 must be dismissed because the complaint fails to identify any official policy or custom of the City of New York (City) denying Plaintiff his constitutional rights. Defendants insist that Plaintiff's complaint contains boilerplate language which is legally insufficient for purposes of 42 U.S.C. § 1983. Defendants contend that even if Plaintiff overcame his failure to identify a pattern or practice in his complaint, a single incident allegedly caused by actors below the policy-making level does not suffice to show municipal pattern or policy. Defendants note that although the action was commenced against two police officers, the complaint does not identify a person as the proximate cause of the Plaintiff's alleged deprivation of federally protected rights as required under 42 U.S.C. § 1983. Defendants argue that even if the complaint is found to properly plead 42 U.S.C. § 1983 claims against the Defendants, three out of the five identified federal claims – freedom from battery, illegal search and seizure, and false arrest – are moot as a result of Plaintiff's subsequent assault convictions.

Plaintiff argues that, contrary to Defendants' contentions, his claims for battery, false arrest and malicious prosecution must stand because the arresting police officers had no probable cause to arrest him. Plaintiff states that he was attacked without warning by the defendant officers as he was using the ATM machine at a deli on February 5, 2009. He alleges that he was punched on the left side of his head and eye before he was slammed to the floor by two males whom he subsequently learned to be the police officers sued herein. Plaintiff stated that he was punched and kicked on the head and body before being placed under arrest, with both his hands and feet shackled. Plaintiff contends that as a result of the injuries sustained from the attack, EMS was summoned to the scene and he was taken to Lincoln Hospital where he was admitted for three days.

Plaintiff insists that the arresting police officers had absolutely no probable cause to arrest or assault him. Plaintiff notes that Police Officer Bovell's criminal trial testimony provides that he knew within three seconds he would arrest Plaintiff because of the way Plaintiff "suddenly turned around" in response to Bovell reaching out to him and pushing him against the ATM machine. Plaintiff emphasizes that he was acquitted of all counts related to the charges involving the NYPD and the initial arrest. He states that he was only convicted of the assault of the EMS technicians who responded well after the police had approached, attacked, assaulted, battered and arrested him. Plaintiff emphasizes that the Defendants failed to mention or establish what probable cause the police officers had to approach and arrest him.

Plaintiff asserts that he is claiming punitive damages as a result of the police officers' misconduct and the City's negligence in the retention and training of the officers. Plaintiff insists that defendants cannot challenge his ability to prove the negligent hiring and retention claims because they have willfully failed to comply with the court ordered discovery directives. He indicated that the defendants failed to submit the police officers' personnel files for an *in camera* review as previously ordered by the Honorable Schachner. Plaintiff contends that a simple internet

search revealed several incidents of misconduct involving the arresting police officers and civil lawsuits for excessive force and violation of civil rights. Plaintiff argues that these claims would be contained in the personnel files which the defendants refuse to submit despite the outstanding court order. Plaintiff contends that these incidents indicate that the City had actual notice that the arresting police officers may be unfit and unsuitable to remain employed in their capacities. Plaintiff further notes that Defendants' reliance on Plaintiff's conviction is misplaced where he was completely acquitted of all charges related to the NYPD encounter.

Plaintiff further argues that his complaint properly pleads a 42 U.S.C. § 1983 claim against the City. Plaintiff contends that paragraph 14 and 25 of the complaint adequately allege a pattern of conduct or custom which led to the deprivation of his constitutional rights. Relying on *Canton v Harris* (489 US 378, 109 S Ct 1197 [1988]), Plaintiff argues that paragraph 22 of the complaint sufficiently alleges the City's failure to adequately train. Plaintiff insists that the Defendants' liability under 42 U.S.C. § 1983 is not based on a single constitutional act. Plaintiff cites to NYCLU analysis revealing that approximately nine out of 10 of the three million New Yorkers subjected to police stops and street interrogations between 2004 and 2010 were innocent. Plaintiff contends that the NYPD's policies coupled with their failure to train rose to the level of deliberate indifference to the rights of others resulting in Plaintiff's wrongful arrest, assault, imprisonment and prosecution. Plaintiff further notes that both police officers have been identified in the complaint and specifically referred to in the 42 U.S.C. § 1983 cause of action. Plaintiff emphasizes that Defendants have failed to cite a single case where reference to identified police officers as defendants warrants dismissal of a 42 U.S.C. § 1983 cause of action.

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and

determine only whether the facts as alleged fit within any cognizable legal theory (*Breytman v Olinville Realty, LLC,* 54 AD 3d 703 [2d Dept 2008]). Where a defendant has submitted evidentiary material in support of the motion to dismiss pursuant to CPLR § 3211(a)(7), and the motion has not been converted to one for summary judgment pursuant to CPLR § 3211(c), the criterion is whether the plaintiff has a cause of action, not whether it has stated one. (*Xia-Ping Wang v Diamond Hill Realty, LLC,* 116 AD 3d 767 [2d Dept 2014]). The court is required to resolve all inferences in favor of the plaintiff regardless of whether the plaintiff will prevail on the issue when deciding a motion to dismiss pursuant to CPLR § 3211(a)(7). (*344 E. 72 Ltd. Partnership v Dragatt,* 188 AD 2d 324 [1st Dept 1992]).

Initially, the Court finds that the Defendants' contentions that the Plaintiff's First Cause of Action alleging battery and, Third Cause of Action alleging false arrest and unlawful imprisonment are barred by the Plaintiff's subsequent assault conviction without merit. Whenever an arrest and imprisonment arise without a warrant, the presumption is that such arrest and imprisonment were unlawful (*Smith v County of Nassau*, 34 NY2d 18, 23 [1974]). The defendant can nevertheless prevail if he proves legal justification for the arrest and imprisonment, which "may be established by showing that the arrest was based on probable cause" (*Broughton v State,* 37 NY 2d 451, 458 [1975]). It is well established that evidence of a subsequent arraignment or indictment is admissible as some proof of the presence of probable cause. Moreover, a conviction which survives appeal would also be conclusive evidence of probable cause [*Id.*].

In the instant case, the Court finds that the defendants failed to proffer any argument or evidence that the police officers had probable cause to effectuate Plaintiff's arrest prior to the assault of the EMS personnel. Defendants improperly rely on Plaintiff's convictions for the assault of the EMS personnel, an incident which occurred after Plaintiff had already been arrested. Defendants do not dispute that Plaintiff was acquitted of all counts related to the charges involving the NYPD

and the initial arrest. Questions of fact regarding the officers probable cause to effectuate the initial arrest before the assault of the EMS personnel continue to exist. Based on the findings herein, the Court finds the Defendants' contention that Plaintiff's 42 U.S.C. § 1983 claim against the Defendants for freedom from battery, illegal search and seizure, and false arrest are moot as a result of Plaintiff's subsequent assault convictions to be equally unavailing.

The Court does find that the Defendants are entitled to dismissal of Plaintiff's Fifth Cause of Action and Sixth Cause of Action alleging negligent supervision, hiring, retention, and training against the employer, the City of New York. Caselaw has clearly established that "where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention" (*Karoon v New York City Transit Authority,* 241 AD 2d 323 [1997] *citing Eifert v Bush,* 27 AD 2d 950 [1967], *affd.* 22 NY2d 681 [1968]). This is because even if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training (*Id.*). Defendants acknowledge on this record that officers Carranza and Bovell were acting within the scope of their employment at the time of Plaintiff's arrest. Claims for negligent hiring, retention, and training must be dismissed where a police officer was acting within the scope of his employment at the time of the incident (*See for example Medina v City of New York*, 102 AD 3d 101 [1st Dept 2012]).

Moreover, Plaintiff conclusory claim that the "City of New York grossly failed to train and adequately supervise its police officers . . ." does not entitle him to an award of punitive damages. Caselaw continues to demonstrate that an award of punitive damages cannot be recovered against a municipality for negligent supervision, hiring, retention and training because the purpose of punitive damages, namely punishment and deterrence, is not advanced when

applied to a governmental unit since it is the taxpayers who are ultimately penalized (*Sharapata v Town of Islip,* 56 NY 2d 332 [1982]). Although there has been some precedent that allowed an award of punitive damages against a municipality (*See for example Bevilacqua v City of Niagra Falls,* 66 AD 2d 988 [4th Dept 1978]), the trend in New York State clearly indicates that punitive damages cannot be recovered (*Sharapata,* 56 NY 2d 332; *Krohn v New York City Police Department et al.,* 2 NY 3d 329[2004]).

Upon review of the Plaintiff *Monell* claim alleged in his Fourth Cause of Action, the Court finds that the Plaintiff has not pled, with enough specificity to establish a plausible claim under 42 U.S.C. § 1983 (*See for example Ashcroft v Iqbal,* 556 US 662 [2009]; *Walker v City of New York*, 974 F 2d 293 [2nd Cir 1992]). First, in asserting a claim against a municipality based on the alleged tortious actions of its employees, the plaintiff must allege and plead that the alleged actions resulted from an official municipality policy or custom (*Monell v Dept. of Social Servs. of City of New York,* 436 US 658 [1978]). This, however, does not mean that plaintiff must show that the municipality had an explicitly stated rule or regulation [*Villante v Dept. of Corrections,* 786 F2d 516 [2d Cir 1986]).

In the instant matter, Plaintiff's 42 U.S.C. § 1983 claim alleges in part that " . . . said officer was acting under color of law, to wit: the statutes, ordinances, regulations, policies and customs and usage of the State of New York/or City of New York." The Court finds that the conclusory language does not establish the City's official policy or custom with the required specificity that denied him his constitutional rights (*See for example Ashcroft v Iqbal,* 556 US 662 [2009]; *Walker v City of New York*, 974 F 2d 293 [2nd Cir 1992]). Plaintiff's reliance on his negligence training and supervision causes of action to support his constitutional claim is insufficient to establish the plausibility of his constitutional claim. Plaintiff must provide some

details as to how the City's official policy, custom, indifference and/or negligence contribute to violation of his civil rights.

In addition, he must plead with some specificity in his 42 U.S.C. § 1983 claim that the defendants conduct is not based upon a single or isolated incident (*See Ricciuti v N.Y.C. Transit Authority, et al.*, 941 F 2d 119 [2nd Cir 1991]). Caselaw has determined that "a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy (*Ricciuti, et al.*, 941 F 2d 119). Plaintiff complaint does not allege or provide allegations of a policy or custom that the defendants have a pattern of the behavior that allegedly causes his injuries.

Protective Order

Defendants lastly argue that since Plaintiff's abovementioned claims warrant dismissal, the *in camera* inspection Order of the Honorable Judge Schachner dated May 9, 2013 ("Order") should be modified. Defendants note that the Preliminary Conference Order dated June 19, 2012 directed Defendants to supply "IAB, CCRB, and personnel files of PO Carranza and PO Bovell for 10 years prior to date of incident for instances of excessive force and abuse of authority . . ." Defendants allege that on May 9, 2013, they fully complied with said order but for the inadvertently redacted version of PO Bovell's CCRB resume, which were allegedly not pertinent or responsive to the parameters of the *in camera* inspection. Defendants contend that the June 19, 2012 order did not request the production of CCRB or IAB resumes. Defendants insist that despite this harmless error, the court sanctioned them and required them to turn over all the documents submitted for the *in camera* inspection. Defendants argue that in so doing, the court's order constitutes an abuse of discretion in the supervision of discovery.

Plaintiff argues that Defendants' motion for protective order is improper. Plaintiff suggests that the proper remedy would have been to either make a motion to reargue or timely file a notice of appeal. He insists that the discovery he seeks is not palpably improper

Here, the Court agrees with the Plaintiff in that the defendants' application for a protective order is improper. Defendants did not seek leave to reargue or renew Judge Schachner's Order. Moreover, the *in camera* inspection has yet to be conducted and the discovery Order does nothing more than deter determination of the discovery motion until after the inspection. (*see for example Marriott Intern, Inc. v Lonny's Hacking Corp.*, 262 AD 2d 10 [1st Dept 1999]). The potential discovery is not moot because the Plaintiff's false arrest, unlawful imprisonment and battery claims have survived this application for dismissal.

Amend Pleading

Plaintiff's cross-motion to amend his pleading is hereby denied without prejudice. Generally, an application to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD 3d 82 [1st Dept 2007]). CPLR § 3025(b) provides in part that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Plaintiff did not provide a copy of his proposed pleading in support of his application. This Court is unable to determine whether the Plaintiff's proposed amendments or supplements have merit without a copy of the proposed pleading (*Peach Parking Corp.*, 42 AD 3d 82).

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that the Defendants' application to dismiss Plaintiff's First Cause of Action, and Third Cause of Action is hereby denied; and it is further

ORDERED AND ADJUDGED that the defendants' application to dismiss the Plaintiff's Fourth Cause of Action is hereby granted; and it is further

ORDERED AND ADJUDGED that the defendants' application to dismiss Plaintiff's Fifth Cause of Action and Sixth Cause of Action is hereby granted; and it is further

ORDERED AND ADJUDGED that the defendants' application for a protective order is denied; and it is further

ORDERED AND ADJUDGED that the Plaintiff's cross-motion for leave to amend his complaint is denied without prejudice to renew on proper papers. Plaintiff shall have 30 days from the entry of this Decision/Order to renew its application to amend his pleading; and it is further

ORDERED AND ADJUDGED that the defendants shall serve a copy of this Decision/Order on the Plaintiff with Notice of Entry within 30 days.

The foregoing shall constitute the decision and order of this Court.

Dated: January 12, 2016

A.J.S.C.