Pidvirny v Metropolitan Transp. Auth.
2017 NY Slip Op 31039(U)
May 16, 2017
Supreme Court, New York County
Docket Number: 151758/2015
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

MARIAN PIDVIRNY and GALINA PIDVIRNA,
Plaintiffs,
-against-

THE METROPOLITAN TRANSPORTATION AUTHORITY, THE MTA POLICE, THE MTA LONG ISLAND RAILROAD, and POLICE OFFICER MICHAEL ARCATI,
Defendants.

INDEX NO. 151758/2015
MOTION DATE 04/12/17
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for leave to renew and reargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion to renew and reargue pursuant to CPLR §2221 is granted to the extent provided herein.

Plaintiffs commenced this action for personal injuries, based on allegations of false arrest, false imprisonment, malicious prosecution, assault and battery, and a violation of the First and Fourth Amendments of the U.S. Constitution, and other civil rights pursuant to 42 U.S.C. §1983. Plaintiff Marian Pidvirny, a classical violinist authorized to perform by Defendant The Metropolitan Transportation Authority (herein the "MTA"), was allegedly illegally arrested, handcuffed, and jailed by Defendant Police Officer Michael Arcati (herein "Arcati") on March 12, April 10 and July 4 of 2014.

In an Order dated October 7, 2016 this court partially granted Defendants' motion by dismissing the causes of action related to the alleged July 4, 2014 incident, and also granted Plaintiffs' cross-motion to amend the Complaint and implead Police Officer Arcati as a party Defendant. (Moving Papers Ex. A). Defendants now move for leave to renew and reargue this court's October 7, 2016 Order that denied Defendants motion to dismiss the Complaint in its' entirety against all Defendants.

Defendants contend the court overlooked matters of law and incorrectly applied General Municipal Law §50[h] to Defendants Public Authority Law examination request. Defendants contend GML §50[h] only applies to a "city, county, town, village, fire district,

ambulance district or school district" and its ninety (90) day notice requirement should not have applied (GML §50[h]).

Next, Defendants contend the court misapprehended relevant facts and the Complaint against Defendant Police Officer Arcati should have been dismissed as he is entitled to qualified immunity.

Defendants also contend Plaintiffs' Complaint against The MTA Long Island Railroad (herein "LIRR") should have been dismissed as Police Officer Arcati was an employee of the MTA, not LIRR.

CPLR §2221[d] states that a motion for leave to reargue (1) shall be identified specifically as such, (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (3) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

The court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law "(Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010] citing to Foley v Roche, 68 AD2d 558, 418 NYS2d 588 [1st Dept. 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. The movant cannot merely restate previous arguments (Kent, supra and Ul Haque v Daddazio, 84 AD3d 940, 922 NYS2d 548 [2nd Dept. 2011]).

GML §50[h] grants the entity (a city, county, town, village, fire district, ambulance district or school district) against which a notice of claim is filed "...the right to demand an exmination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, which examination shall be upon oral questions unless the parties otherwise stipulate and may include a physical examination of the claimant by a duly qualified physician..." However, GML §50[h][2] states "[n]o demand for examination shall be effective against the claimant for any purpose unless it shall be served as provided in this subdivision within ninety days from the date of filing of the notice of claim..."

A hearing pursuant to PAL §1212[5] is not always mandatory. Once a Defendant chooses to exercise its right to conduct an oral examination of the Plaintiff, the Plaintiff cannot successfully prosecute his claim until the examination is completed (Herrera v N.Y.C. Transit Auth., 234 AD2d 207, 651 NYS2d 50 [1st Dept. 1996]). In Herrera the court recognized that although PAL §1212 does not expressly incorporate GML §50[h] in the statute, the interest of justice induced the court nonetheless to apply GML §50[h] to the PAL hearing and toll the Statutes of Limitations to commence the action (id). Furthermore, courts have regularly subjected public corporations of the city such as the MTA to GML §50[h] (Id, see also Bennet v N.Y. Transit Auth., 4AD3d 265, 772 NYS2d 320 [1st Dept.

2004]); Concepcion v N.Y. City Hous. Auth., 8 Misc. 3d 1008[A], 801 NYS2d 777 [Sup. Ct. 2005] citing to Hill v New York City Transit Authority, 206 AD2d 969, 614 NYS2d 824 [4th Dept. 1994]).

This court did not incorrectly apply GML §50[h]. Defendants demands for examination, that were served on the Plaintiffs attorney on October 27, 2014 and February 4, 2015, were not effective as they were well past the ninety (90) day time-limit. Plaintiffs were not required to appear for Defendants examination as the notifications were not timely noticed (GML §50[h][2]).

This court was correct in not dismissing the Complaint against Defendant Police Officer Arcati. In an action for false arrest under New York common law, the existence or absence of probable cause is a question of fact precluding dismissal of the case against the individual officer based on qualified immunity (Holland v City of Poughkeepsie, 90 AD3d 841, 935 NYS2d 583 [2nd Dept. 2011]). Defendants failed to demonstrate any relevant facts the court overlooked in finding a question of fact as to whether Police Officer Arcati had probable cause or even "arguable probable cause" to arrest Plaintiff Marian Pidvirny.

This court erred in not dismissing Defendant LIRR from the Complaint. Police Officer Arcati is an employee of the MTA, not an employee of the LIRR. The LIRR is a distinct entity, a subsidiary of the MTA and is subject to suit on an individual basis. The Complaint should be dismissed against the LIRR (Noonan v Long Island Railroad, 158 AD2d 392, 551 NYS2d 232 [1st Dept. 1990]; Cusick v Lutheran Med. Ctr., 105 AD2d 681, 481 NYS2d 122 [2nd Dept. 1984]). Therefore, upon reargument, the October 7, 2016 Order is amended to reflect that Plaintiffs' Complaint against the LIRR is dismissed.

Accordingly, it is ORDERED, that Defendants' motion for leave to renew and reargue this court's October 7, 2016 decision and Order is granted to the extent of dismissing all causes of action in the Complaint asserted against Defendant THE MTA LONG ISLAND RAILROAD, and it is further,

ORDERED, that the causes of action in the Complaint asserted against THE MTA LONG ISLAND RAILROAD, are hereby severed and dismissed, and it is further,

ORDERED, that the remainder of the motion to renew and reargue is denied, and it is further,

ORDERED, that the causes of action in the Complaint asserted against THE METROPOLITAN TRANSPORTATION AUTHORITY, THE MTA POLICE and POLICE OFFICER MICHAEL ARCATI, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

MARIAN PIDVIRNY and GALINA PIDVIRNA,
Plaintiffs,

-against-

THE METROPOLITAN TRANSPORTATION AUTHORITY,
THE MTA POLICE and POLICE OFFICER MICHAEL ARCATI,
Defendants.

and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order THE MTA LONG ISLAND RAILROAD shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within thirty (30) days from the date of entry of this Order,THE MTA LONG ISLAND RAILROAD shall also serve a copy of this Order with Notice of Entry upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B), who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: May 16, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE