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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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LENIN GARCIA,

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendant

DECISION / ORDER
Index No. 24824/2016E

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The following papers numbered 1 to 6 read on the below motion noticed on August 18, 2017 and duly submitted on the Part IA15 Motion calendar of **December 8, 2017**:

Papers Submitted	Numbered
City's Notice of Motion, Exhibits	1,2
Pls.' Cross-Motion., Exhibits	3,4
City's Aff. In Reply, Exhibits	5,6
Pl.s' Aff. In reply	7

Upon the foregoing papers, the defendant The City of New York ("Defendant") moves for an order (1) pursuant to CPLR 3211(a)(5) and 214(5), dismissing all state law claims including false arrest, false imprisonment, and negligent hiring, training, and supervision, for failure to comply with General Municipal Law ("GML") §50-I as plaintiff filed his complaint beyond the one year and ninety day statute of limitations; and (2) pursuant to CPLR 3211(a)(7) and/or 3212, dismissing all of the plaintiff's federal claims brought under 42 U.S.C. §1983, as against the City of New York for failure to state a cause of action as these claims are insufficiently pled. The plaintiff Lenin Garcia ("Plaintiff") opposes the motion and cross-moves for an order pursuant to CPLR 3025(b), granting him leave to amend his complaint to add a cause of action for malicious prosecution. Defendant opposes the cross-motion.

Defendant's Motion

Under General Municipal Law §50-i(1)(c), an action against the City of New York shall be commenced within one year and ninety days after the happening of the event upon which the claim is based. In this case, Plaintiff's state law false arrest, false imprisonment, negligent

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hiring, retention, supervision, and training claims arose out of an event that occurred on November 7, 2013. Plaintiff's summons and complaint was not filed until July 19, 2016, more than one year and ninety days later. Plaintiff's opposition papers do not substantively address the timeliness of his state law claims. Accordingly, those claims are dismissed.

Defendant also moves to dismiss Plaintiff's 42 U.S.C. §1983 claims predicated upon an alleged deprivation of civil rights. A municipality is not liable under 42 U.S.C. §1983 under a theory of *respondeat superior* or vicarious liability (*see Ramos v. City of New York*, 285 A.D.2d 284, 302 [1st Dept. 2001], citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 [1989]; *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91 [1978]). However, a municipality may be exposed to §1983 liability "when a municipal employee acts in violation of a person's Federal civil rights pursuant to a municipal policy or custom" (*id.*). In order to sufficiently set forth a cause of action under §1983 against a municipality itself for the acts of its employees, a plaintiff must allege "two basic elements: (1) the existence of a municipal policy or custom that caused his injuries beyond merely employing the misbehaving officers, and (2) a causal connection - an affirmative link - between the policy and the deprivation of his constitutional rights. (*Harper v. City of New York*, 424 Fed. Appx. 36, 38 [2nd Cir. 2011]). The existence of a "policy" may be established by pointing to "written rules and regulations", the decisions of a government's lawmakers and acts of its policymaking officials, or practices so persistent and widespread as to practically have the force of law (*Connick v. Thompson*, 131 S.Ct. 1350, 1359 [2011]). A plaintiff may also predicate a 42 U.S.C. §1983 claim upon a municipality's failure to train its employees. To adequately assert such a claim, however, a plaintiff "plead and prove that the municipality's failure to train its [employees] in a relevant respect evidences a deliberate indifference to the rights of its inhabitants" (*Eckhardt v. City of White Plains*, 87 A.D.3d 1049, 1052 [2nd Dept. 2011], quoting *Jackson v. Police Dept. of City of New York*, 192 A.D.2d 641, 642 [2nd Dept. 1993], *lv. den.*, 82 N.Y.2d 658 [1993], *cert. den.*, 511 U.S. 1004 [1994]).

In this matter, Plaintiff's complaint and the proposed amended complaint fail to allege the existence of any municipal custom or policy that caused his injuries (*see Cruz v. City of New York*, 148 A.D.3d 617, 617 [1st Dept. 2017]). While Plaintiff generally alleged that Defendant

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failed to properly train its employees (Complaint and Amended Complaint at Par. 11), the claims lack sufficient factual detail and fail to allege that the City's failures constituted a "deliberate indifference" to the federal constitutional rights of persons with whom the employees interact (*compare Ramos v. City of New York*, 285 A.D.2d 284, 304 [1st Dept. 2001]; *see Sadin v. Negron*, 136 A.D.3d 458, 459 [1st Dept. 2016]). Furthermore, Plaintiff only alleges "a single instance of wrongful conduct" by municipal employees "without authority to make decisions regarding official policy" (*Saidin v. Negron*, 136 A.D.3d at 459). Plaintiff cites to *Bunbury v. City of New York* (62 A.D.3d 621 [1st Dept. 2009]) in his papers but he makes no showing that the factual allegations contained in that complaint were the same or similar to those asserted in this action. Accordingly, while Plaintiff's claims against Defendant predicated upon alleged violations of 42 U.S.C. §1983 are timely, they must be dismissed pursuant to CPLR 3211(a)(7). Notably, these claims are only asserted against Defendant-municipality and Plaintiff has not named any of the municipality's employees as individual defendants.

Plaintiff's Cross-Motion

Plaintiff cross-moves for leave to serve an amended complaint asserting a cause of action for malicious prosecution. It is "fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502 [1st Dept 2011] *citing* CPLR 3025[b]). In this matter, Plaintiff's proposed malicious prosecution claim accrued on October 27, 2015, the date that the charges against him were dismissed (*see, e.g., Bumbury v. City of New York*, 62 A.D.3d 621 [1st Dept. 2009]). Plaintiff's complaint was filed within one year and ninety days of this date, however he did not assert a cause of action for malicious prosecution, and the instant cross-motion was made outside of the applicable limitations period. Nevertheless, the relation-back doctrine codified in CPLR 203(f) provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." When deciding whether to grant a motion for leave to amend a pleading invoking the "relation back" doctrine,

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"the salient inquiry is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences...to be proved pursuant to the amended pleading'" (*O'Halloran v. Metropolitan Transp. Auth.*, 154 A.D.3d 83, 86 [1st Dept. 2017], quoting *Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 548 [1st Dept. 2013]). Here, Defendant had notice of both the proposed claim as well as the operative facts. The Notice of Claim, filed within 90 days after his proposed cause of action accrued, provided City with actual notice of a potential malicious prosecution claim. Contrary to Defendant's contentions, the proposed malicious prosecution claim is based on the same transactions and occurrences described in Plaintiff's original pleading, which outlined the pertinent facts including the October 27, 2015 date that the charges against Plaintiff were terminated. Plaintiff has thus demonstrated his entitlement to leave to serve an amended complaint asserting a common law cause of action for malicious prosecution.

Plaintiff, however, is not permitted leave to amend his complaint to assert causes of action predicated upon a generalized deprivation of civil rights in violation of 42 U.S.C. §1983, as the complaint and amended complaint fail to adequately state a cause of action for vicarious liability on the part of Defendant- municipality.

Conclusion

Accordingly, it is hereby

ORDERED, that City's motion to dismiss Plaintiff's state law causes of action for false arrest, false imprisonment, and negligent hiring, retention, supervision, and training claims are dismissed, pursuant to CPLR 3211(a)(5), and it is further,

ORDERED, that City's motion to dismiss Plaintiff's claims predicated upon a violation of 42 U.S.C. §1983 is granted, and those claims are dismissed pursuant to CPLR 3211(a)(7), and it is further,

ORDERED, that Plaintiff's cross-motion is granted to the extent that Plaintiff is granted leave to serve an amended complaint asserting a common law cause of action for malicious prosecution, and it is further,

ORDERED, that Plaintiff's cross-motion is otherwise denied, and it is further,

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ORDERED, that Plaintiff shall file and serve an amended complaint in accordance with this Decision and Order and the applicable sections of the CPLR within thirty (30) days after service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of this Court.

Dated: April 19, 2018

Hon. Mary Ann Brigantti, J.S.C.