Perkins v City of New York
2018 NY Slip Op 33475(U)
December 10, 2018
Supreme Court, Bronx County
Docket Number: 304104/2013
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

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PAUL PERKINS,

Index No.: 304104/2013

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

Plaintiff(s),

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, DETECTIVE MARK O'CONNELL, Shield No.: 005367,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment/Dismissal and Motion for Default Judgment	Papers Numbered
Notice of Motion (Summary Judgment/Dismissal), Affirmation in Support with Exhibits	1
Affirmation in Opposition to Motion with Exhibits	2
Reply affirmation in support of Motion	3
Notion of Motion for Default Judgment	4
Affirmation in Opposition with Exhibits	5
Reply Affirmation in Support	6

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants move for an order dismissing certain causes of action asserted in the complaint pursuant to CPLR §3211 and granting summary judgment dismissing the remaining causes of action pursuant to CPLR §3212. Plaintiff moves, by separate notice of motion, for a default judgment against defendant, DETECTIVE MARK O'CONNELL ("O'Connell"), or in the alternative requests that the Court extend the time for plaintiff to serve said defendant with the summons and complaint. After numerous adjournments on both motions, each was marked submitted on October 4, 2018. For purposes of judicial economy, both motions are resolved pursuant to this single decision and order.

Plaintiff's complaint asserts that on October 1, 2013, plaintiff was falsely arrested for allegedly engaging in a drug sale. The complaint indicates that O'Connell used excessive force when arresting plaintiff, and that plaintiff was held in custody for approximately 36 hours until he was

released on his own recognizance. Subsequently, all charges were dismissed against plaintiff on September 6, 2014. The complaint sets forth the following causes of action: federal cause of action for false arrest and malicious prosecution against all defendants pursuant to 42 U.S.C. §1983; Excessive Force pursuant to §1983; Assault; Negligent Hiring and Supervision; "Egregious Conduct"; "Failure to intervene to prevent the violation of plaintiff's civil rights"; Intentional Infliction of Emotional Distress; and a cause of action for Punitive Damages.

Initially, plaintiff's motion for default judgment against O'Connell is denied as plaintiff has failed to submit sufficient proof to establish that the complaint was properly served upon said defendant. Plaintiff fails to submit an affidavit of service showing how that summons and complaint was served. Instead, plaintiff submits a document entitled "Acknowledgment of Receipt of Summons and Complaint or Summons with Notice or Notice of Petition and Petition" (referred to hereinafter as "Acknowledgment") (Exhibit "B" to plaintiff's motion for default). Plaintiff's counsel contends that the Acknowledgment establishes that a "Cynthia Burby" accepted service on behalf of O'Connell at One Police Plaza on October 22, 2015. However, the signature line on the Acknowledgment is blank. The Acknowledgment is not affirmed or notarized. Moreover, it appears that certain information on the Acknowledgment is photocopied and other information on said document is original. In light of the aforementioned deficiencies, the Court finds that the Acknowledgment is not sufficient "proof of service" as set forth CPLR §306.

Based on the foregoing, the Court finds that plaintiff has failed to establish that O'Connell was properly served with the complaint and therefore, the portion of the motion seeking a default judgment against O'Connell is denied. However, the portion of plaintiff's application seeking an extension of time to serve the summons and complaint is granted. CPLR §306-b provides as that a summons and complaint must be served within 120 days after the commencement of the action but that the court may extend the time for service, "upon good cause shown or in the interest of justice." Under the interest of justice standard, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant. Indeed, the statute, "empowers a court faced with the dismissal of a viable claim to consider any factor relevant

to the exercise of its discretion. No one factor is determinative—the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served" (*Id.* at 106) see also; *Matthews v St Vincent's Hospital Hosp. & Med. Ctr.of New York* , 303 A.D.2d 327 [1st Dep't., 2003]). Further, the "interest of justice" standard is intended to be an additional and broader standard to accommodate late service that might be due to mistake, confusion or oversight (*Wideman v Barbel Trucking, Inc.*, 300 AD2d 184, 185 [1st Dept 2002]).

Here, the Court finds that an extension of time to serve O'Connell is warranted under the interest of judgment standard and grants that portion of plaintiff's application. Therefore, plaintiff's time to serve O'Connell with the Summons and Complaint is extended to 20 days from the service of this order with notice of entry. O'Connell may interpose any affirmative defenses available to him, including statute of limitations.

The Court now addresses defendants' motion to dismiss and for summary judgment. Initially, the portion of the motion seeking dismissal of the complaint as against O'Connell for lack of personal jurisdiction, or in the alternative, for dismissal in light of plaintiff's failure to move for default judgment within one year of O'Connell's default, is denied as moot. As described above, plaintiff has failed to submit adequate proof to establish that O'Connell was served. If O'Connell was never served, then he never defaulted, and the time to move for a default judgment never commenced. Moreover, this Court has granted plaintiff an extension of time to serve the complaint upon O'Connell in the interest of justice, rendering defendants' application based upon a lack personal jurisdiction as moot at this time.

Notwithstanding the above, the portion of the motion seeking to dismiss the complaint as against the New York City Police Department is granted. Section 396 of the New York City Charter reads, "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law" *(Davis v. City of New York,* 2000 WL 1877045, n 1 [SDNY 2000]; *Jenkins v. City of New York,* 478 F3d 76, n 19 [2d Cir2006]). Here, even deeming all allegations against the NYPD as true, the complaint nevertheless fails to state a cause of action because as a non-suable entity, the NYPD cannot be sued. Based on the foregoing, the complaint is hereby

dismissed in its entirety as against defendant NEW YORK CITY POLICE DEPARTMENT.

Moreover, to the extent that plaintiff asserts any state law claims in his complaint, said claims are hereby dismissed as plaintiff failed to serve a notice of claim. Plaintiff does not contend that he served a notice of claim but asserts that a notice of claim is not required for federal causes of action. Plaintiff's counsel, in his opposition to the motion to dismiss, does not indicate that he is asserting any State law claims. However, the complaint is ambiguous on this issue. While some causes of action are specifically referred to as federal claims, or reference §1983, others do not, such as intentional infliction of emotional distress. Therefore, any state law claims in the complaint, whether they be by design or not, are hereby dismissed for failure to serve a notice of claim as required by GML §50-e.

Additionally, to the extent that the complaint asserts causes of action against defendant, CITY OF NEW YORK, pursuant to 42 U.S.C. 1983, the same are hereby dismissed as improperly pled. A municipality may not be held liable under 42 U.S.C. §1983 for alleged unconstitutional actions by its employees below the policy-making level solely upon the basis of *respondeat superior* (*Monell v. Dep't. of Soc. Servs. of City of New York* , 46 U.S. 658 [1978]). The only way for a plaintiff to prevail against a municipality under §1983 is for plaintiff to plead an prove and official policy or custom that caused plaintiff to be subjected to a denial of constitutional rights (*Ashcroft v. Iqbal*, 556 U.S. 662 [2009]). Here, plaintiff's complaint fails to make any allegations as to a policy or custom by the City of New York and therefore, plaintiff fails to state any cause of action against the CITY OF NEW YORK under §1983. Therefore, said claims are hereby dismissed as against THE CITY OF NEW YORK.

The remainder of the motion by defendants is denied without prejudice to renew after O'Connell is served with the summons and complaint, or after the time to serve O'Connell with the summons and complaint as described hereinabove, expires.

Defendants are directed to serve a copy of this order upon plaintiff, with notice of entry, within 30 days of the entry date herein. The above constitutes the decision and order of the Court.

Dated: 12/10/18
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.