

<b>Rose v City of New York</b>
2019 NY Slip Op 33781(U)
December 27, 2019
Supreme Court, New York County
Docket Number: 160874/2017
Judge: Julio Rodriguez, III
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JULIO RODRIGUEZ, III **PART** **IAS MOTION 62EFM**

*Justice*

-----X

**INDEX NO.** 160874/2017

CHRISTOPHER ROSE,

**MOTION DATE** 09/05/2019

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

CITY OF NEW YORK, MARIA MENDEZ

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS

Plaintiff commenced this action seeking damages arising out of his alleged detention and arrest on February 26, 2016, at approximately 4:30 p.m. in the vicinity of 689 Lennox Avenue, New York, New York. Plaintiff was arrested for allegedly failing to pay cab fare, and criminal charges against plaintiff were dismissed on September 12, 2016. Plaintiff asserts state claims for false arrest; false imprisonment; malicious prosecution; negligence; assault; and battery. Plaintiff also asserts federal claims for false arrest; malicious prosecution; abuse of process; illegal search and seizure; assault; battery; and excessive force.

Defendants City of New York ("City") and Maria Mendez (collectively "City defendants") now move this court pursuant to CPLR § 3211 (a) (5) and (a) (7) and pursuant to CPLR § 3126 to dismiss the complaint in its entirety. City defendants move, alternatively, pursuant to CPLR § 3126 to preclude plaintiff from offering evidence on the issues of liability and damages at time of trial due to, what City defendants contend is, plaintiff's willful failure to provide an unsealing authorization pursuant to Criminal Procedure Law ("CPL") § 160.50 or, in the alternative, to compel plaintiff to provide such an authorization.

Oral Argument

Upon oral argument of this motion, plaintiff conceded that his notice of claim was not timely-filed to support state law claims for false arrest, false imprisonment, negligence (including in hiring, training, and supervision), assault, and battery, as plaintiff served his notice of claim on September 22, 2016, and deadline to do so was May 30, 2016 (see General Municipal Law ["GML"] 50-e). The plaintiff's state law claims for false arrest, false imprisonment, negligence, assault, and battery are therefore dismissed.

Additionally, plaintiff conceded that he did not oppose City defendants' motion with respect to his claims under federal law for assault and battery. Because plaintiff failed to oppose

this portion of City defendants' motion, these claims are duplicative of plaintiff's claim for excessive force under federal law, and there are no federal common law causes of action for assault and battery, the plaintiff's federal law claims for assault and battery are dismissed.

### Parties' Positions

In support of their motion, City defendants annexed as exhibits copies of the notice of claim, pleadings, and four letters, dated November 10, 2016, May 21, 2018, June 25, 2018, and September 19, 2018, providing notice of scheduled 50-h hearings. In consideration of the issues that were resolved upon oral argument, City defendants' remaining positions are 1) plaintiff's state law claim for malicious prosecution should be dismissed as a result of plaintiff's failure to appear for a 50-h hearing and 2) plaintiff's complaint should be stricken or, alternatively, plaintiff should be precluded from offering evidence on the issues of liability or damages for failure to provide requested discovery or, as a further alternative, plaintiff should be compelled to provide the requested unsealing authorization under CPL § 160.50.

In opposition to City defendants' motion, plaintiff annexed as exhibits copies of an affidavit from plaintiff Mr. Rose, the criminal court complaint, the certificate of disposition, an email to the City comptroller's office dated July 18, 2017, an email from the City comptroller's office dated July 18, 2017, and a discovery response letter. In consideration of the issues resolved upon oral argument, plaintiff's remaining positions in opposition are 1) plaintiff's failure to appear for a 50-h hearing is excusable, and, in any event, appearance at a 50-h hearing is not a condition precedent to suit and 2) plaintiff's exchanged discovery renders the unsealing authorization portion of City defendants' motion moot.

### Discussion

The sanction of striking a pleading or precluding evidence is ordinarily warranted only following non-compliance with court orders (*see e.g. Jones v Green*, 34 AD3d 260 [1st Dept 2006] [dismissing complaint due to plaintiff's pattern of noncompliance with court orders and discovery demands]; *see also Chowdhury v Hudson Valley Limousine Service, LLC*, 162 AD3d 845 [2d Dept 2018] [sanctions proper where conduct is shown to be willful and contumacious]). Here, there have been no prior court orders nor discovery conferences in this matter. Additionally, City defendants have failed to show that plaintiff's conduct was willful and contumacious. Accordingly, City defendants' motion is denied to the extent it requests striking plaintiff's complaint or preclusion pursuant to CPLR § 3126.

City defendants' also move pursuant to CPLR § 3124 to compel exchange of an unsealing authorization under CPL §§ 160.50 and 160.55. The court finds that City defendants demonstrated, through their annexed affirmation of good faith as well as through the annexed correspondence dated November 10, 2016, May 21, 2018, June 25, 2018, and September 19, 2018, that their counsel has attempted to resolve this issue in good faith but that plaintiff's outstanding discovery obligations remain. Therefore, to the extent City defendants' motion seeks an order compelling disclosure or exchange of documents pursuant to CPLR § 3124, including an unsealing authorization, City defendants' motion is granted. Plaintiff must provide a response to City defendants outstanding discovery demands and must provide the requested unsealing authorization

(see NYSCEF Doc No. 12, City defendants' exhibit E, at 3) within 45 days, to the extent not already provided.

The last remaining issue is the status of plaintiff's state law malicious prosecution claim in view of plaintiff's failure to appear at four scheduled 50-h hearings. Pursuant to GML 50-h (5), an action for which a notice of claim is filed and a demand for a hearing is made pursuant to GML § 50-h (2)

“may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, the city, county, town, village, fire district or school district shall reschedule the hearing for the earliest possible date available” (GML 50-h [5]).

Here, plaintiff's criminal charges were dismissed on September 12, 2016 (see NYSCEF Doc No. 23, plaintiff's exhibit 3). Plaintiff served his notice of claim upon defendant City of New York on September 22, 2016 (see NYSCEF Doc No. 8, City defendants' exhibit A). By notice dated November 10, 2016, a 50-h hearing was initially scheduled for December 19, 2016 (see NYSCEF Doc No. 9, City defendants' exhibit B). According to plaintiff's counsel's affirmation, “Plaintiff, through Counsel, approximately 7 days prior to December 19, 2016, requested that Plaintiff's hearing be adjourned until Plaintiff's release from incarceration” (Levy aff at ¶ 7). On July 18, 2017, plaintiff's counsel emailed the comptroller's office to reschedule the hearing (see NYSCEF Doc No. 24., plaintiff's exhibit 4). A response email sent by the comptroller's office on July 18, 2017, indicated in relevant part as follows: “A decision regarding your hearing, and a new date if applicable, will be sent back in approximately six weeks” (see NYSCEF Doc No. 25, plaintiff's exhibit 5). Plaintiff contends that the hearing was never rescheduled prior to his filing of the summons and complaint, and City defendants do not dispute this contention. Plaintiff filed his summons and complaint on December 8, 2017. City defendants note, however, that they rescheduled plaintiff's 50-h hearing on three separate occasions after the filing of the summons and complaint, June 19, 2018, July 10, 2018, and September 19, 2018. Plaintiff failed to appear on all three dates; additionally, plaintiff failed to provide any notice that he would not be appearing.

Because plaintiff requested an adjournment beyond the ninety-day period following defendant City's demand dated November 10, 2016, plaintiff was obligated to comply with defendant City's demand before commencing this action (GML 50-h [5] [“The action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period”]). However, as a result of plaintiff's requested adjournment, defendant City was required to “reschedule the hearing for the earliest possible date available” (*id.*).

Here, there is no evidence that defendant City fulfilled or attempted to fulfill its obligation under GML 50-h (5) to reschedule the hearing for the earliest possible date. Moreover, defendant City in fact rescheduled the 50-h hearing multiple times (June 19, 2018, July 10, 2018, and September 19, 2018) *after* plaintiff's filing of the summons and complaint on December 8, 2017. Accordingly, the court finds that defendant City waived its right to defend this action on the ground

that plaintiff failed to appear at a GML 50-h hearing before the action's commencement (*see Hoffman v New York City Housing Authority*, 187 AD2d 334, 338 [1st Dept 1992]; *cf. Best v City of New York*, 97 AD2d 389 [1st Dept 1983] [where City rescheduled hearing four times prior to filing of action and expiration of statute of limitations]).

However, defendant City's "right to hold [a 50-h] examination [is] 'separate and distinct from any rights to discovery under the CPLR'" (*Jacqueline G. v New York City Housing Authority*, 191 AD2d 405 [1st Dept 1993]). Therefore, to the extent defendant City at this time seeks plaintiff's appearance at such an examination, defendant City is directed to provide notice to plaintiff within 30 days of this order, and, if such notice is given, plaintiff is directed to appear for a 50-h examination within 90 days of this order.

Accordingly, it is ORDERED that defendants City of New York and Maria Mendez's motion is denied to the extent that it seeks to strike plaintiff's complaint or preclude plaintiff from offering evidence on the issues of liability and damages at time of trial; and it is further

ORDERED that defendants City of New York and Maria Mendez's motion is granted to the extent that plaintiff shall provide a response to defendants City of New York and Maria Mendez's outstanding discovery demands and must provide an unsealing authorization within 45 days, to the extent not already provided; and it is further

ORDERED that defendants City of New York and Maria Mendez's motion is denied to the extent that it seeks dismissal pursuant to CPLR 3211 (a) (7) of plaintiff's state law malicious prosecution claim; and it is further

ORDERED that defendants City of New York and Maria Mendez's motion to dismiss is granted to the extent that it seeks dismissal of plaintiff's state law claims for false arrest, false imprisonment, negligence, assault, and battery, as unopposed; and it is further

ORDERED that defendants City of New York and Maria Mendez's motion to dismiss is granted to the extent that it seeks dismissal of plaintiff's federal law claims for assault and battery, as unopposed; and it is further

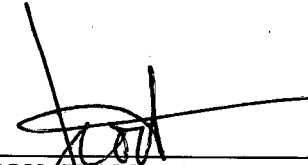
ORDERED that defendant City of New York may serve notice upon plaintiff within 30 days of its intention to hold a General Municipal Law 50-h examination and that, upon receipt of such notice, plaintiff is directed to appear for such examination within 90 days; and it is further

ORDERED that defendants City of New York and Maria Mendez are to serve a copy of this Order with Notice of Entry upon plaintiff and the General Clerk's Office within 30 days; and it is further

ORDERED that the parties shall appear for a preliminary conference at Room 106, 80 Center Street, New York, New York, on January 23, 2020, at 2:00 p.m.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

December 27, 2019

  
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HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: