SHORT FORM ORDER

INDEX NO.: 6155/2015

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY
PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

MARLENE D. PATRELLA,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, POLICE OFFICER MATTHEW DEMATTEO, POLICE OFFICER LANDROW, DETECTIVE WALTERS and POLICE OFFICER "JOHN DOE "1,"

Defendants.

ORIG. RETURN DATE: September 14, 2017
FINAL RETURN DATE: January 15, 2019
MOT. SEQ.#: 002 **MD; CASEDISP**

ORIG. RETURN DATE: November 19, 2017
FINAL RETURN DATE: January 15, 2019
MOT. SEQ.#: 003 **MotD**

ORIG. RETURN DATE: January 18, 2018
FINAL RETURN DATE: January 15, 2019
MOT. SEQ.#: 004 **MD**

PLAINTIFF'S ATTORNEY:
JOSEPH C. STROBLE, ESQ.
40 Main Street
P.O. Box 596
Sayville, New York 11782

DEFENDANTS' ATTORNEY:
SUFFOLK COUNTY ATTORNEY
100 Veteran's Memorial Highway
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Hauppauge, New York 11788-0099

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by plaintiff dated July 31, 2017 and supporting papers; (2) Notice of Motion by defendants dated November 1, 2017 and supporting papers; (3) Affirmation In Opposition by plaintiff dated January 15, 2018 and supporting papers; and (4) Notice of Motion by plaintiff dated January 7, 2018 and supporting papers it is

ORDERED that the motions sequenced as #002, #003 and #004 are consolidated for purposes of this determination; and it is further

ORDERED that so much of plaintiff's motion (seq.#002), pursuant to CPLR 3025, as seeks leave to amend the complaint is **DENIED**; and it is further

ORDERED that so much of plaintiff's motion (seq.#002), pursuant to CPLR 3124, as seeks to compel discovery or, alternatively, to strike defendants' answer for failure to comply with discovery is **DENIED**; and it is further

ORDERED that so much of defendants' motion (seq.#003), pursuant to CPLR 3211, as seeks to dismiss the complaint is **GRANTED**; and it is further

ORDERED that so much of defendants' motion (seq.#003), pursuant to CPLR 3025, as seeks to amend their answer to assert an affirmative defense of collateral estoppel is **DENIED** as moot; and it is further

ORDERED that so much of plaintiff's motion (seq.#004), pursuant to CPLR 3025, as seeks leave to file a second amended complaint and serve a supplemental summons is **DENIED**; and it is further

ORDERED that so much of plaintiff's motion (seq.#004) as seeks the transfer of the action under index number 21791/2012 to this court and the consolidation of that action with the current action is **DENIED.**

This action arises out of a complaint that plaintiff made to the Suffolk County Police Department (SCPD) on September 12, 2013, that she had observed hundreds of armor-piercing bullets laying on the floor near a boarded-up bay window of an abandoned building located across the street from plaintiff's home. Her summons with notice was served upon the defendants on April 1, 2015, and filed on April 9, 2015. Plaintiff served the complaint, in response to defendants' demand, on July 8, 2015, and defendants served their answer on August 5, 2015. In substance, plaintiff claims that she was damaged as a result of defendants' failure to take and properly investigate her complaint about the cache of bullets she had observed in the house across the street from hers and by the discriminatory treatment she alleges she received from the defendants because her speech is impaired.

Broadly, plaintiff alleges the following: she is a cancer survivor whose treatments left her with impaired verbal abilities. On September 12, 2013, she entered a house across the street from hers to give water to a worker there. The house had been boarded up and abandoned, and its bay window had been covered with cardboard. When plaintiff entered the house, she observed hundreds of five inch, military-style, armor-piercing unspent bullets lying on the floor near the bay window. Plaintiff gathered up some of the bullets, brought them to her home and called the SCPD's Fifth Precinct. She spoke with defendant Landrow and reported what she had observed at the abandoned house and also requested the central complaint number ("CC#") for a report she had previously made to the SCPD in 2009 or 2010. Landrow refused to provide the CC# over the phone, advising that if plaintiff came to the precinct, Landrow would "think about" providing the information. Plaintiff did not go to the precinct because she was fearful that she would be subjected to disparaging remarks directed at her verbal disability, as she alleges she had been on a prior visit to the Fifth Precinct. Plaintiff's neighbor called the Fifth Precinct the next day and was provided with the CC# that had been refused, over the phone and without resistance. Concerned that no action had been taken in response to her call to the Fifth Precinct, on September 19, 2013, plaintiff reported her observations

at the abandoned building to the federal Bureau of Alcohol, Tobacco and Firearms ("ATF"). The ATF suggested that plaintiff call the police, and when she told them that she had already done so without result, the ATF called the police on plaintiff's behalf. Thereafter, defendant DeMatteo appeared at the abandoned house, and plaintiff spoke with him and described what she had found at the house. DeMatteo responded that it was "no big deal." DeMatteo acceded to plaintiff's request to escort her to her home, where she handed him a bag containing the bullets that she had recovered from the abandoned house. DeMatteo gave her a receipt for the bullets, but neither he nor anyone from the SCPD secured the abandoned house, called Emergency Services, or made any effort to remove the bullets that remained there. On May 19, 2013, plaintiff again called the Fifth Precinct, this time regarding a complaint she had made there in 2006. She spoke with defendant Walters, asking him to help her to decipher the name of the supervisor whose signature appeared on the written complaint report, which she had in her possession. Walters identified the supervisor as possibly "Roe," and asked plaintiff why she needed the information. Immediately after her conversation with Walters concluded, she received a call from Charles Roe. Plaintiff immediately hung up. Plaintiff claims that Roe knew that his call would intimidate her and cause her severe anxiety, and she alleges that his call was made as part of a discriminatory conspiracy against her by the SCPD aimed at harassing and frightening her into not making complaints to them. She further claims that defendants' reckless, negligent and grossly negligent failure to take and properly investigate her September 12, 2013 complaint inflicted emotional distress upon her and that the discriminatory treatment to which they subjected her violated the Americans with Disabilities Act of 1990 and violated her rights under 42 USC § 1983 and under the United States and New York State constitutions.

Plaintiff alleges that after she commenced this action, additional facts, relevant to her claims, came to light. In an affidavit proffered in support of her motion to amend her complaint (seq.#002), she states that on June 15, 2015, Sgt. Robert Lehmann sent a letter to plaintiff's attorney acknowledging receipt of plaintiff's summons and complaint and requesting that plaintiff complete HIPAA authorization letters for investigative purposes. Neither plaintiff nor her attorney responded to Sgt. Lehman's letter, believing that it was sent for purposes of further intimidating plaintiff. She further states that six months later, and for purposes of causing her further emotional distress, Sgt. Lehman called her, represented to her that her lawyer was dead and told her that she was now allowed to speak with Sgt. Lehman. In an affidavit proffered in support of her motion for leave to file a second amended complaint and supplemental summons (seq.#004), plaintiff avers that her attorney, after a 50-h hearing conducted in 2012, had been provided with a copy of an October 2006 complaint report made by the SCPD, which had been redacted. Plaintiff alleges that a friend recently obtained an un-redacted copy of the 2006 report, which she claims had been deliberately concealed from her and which asserted that she had "psych issues." Plaintiff alleges that she had made several appearances before the Suffolk County Legislature between December 11, 2011 and April 20, 2017 to complain about her discriminatory treatment by the SCPD and their refusal to allow her to file complaints with them because they think that she is "crazy."

Plaintiff now moves for leave to amend her complaint pursuant to CPLR 3025 (seq.#002 and #004) to add Sgt. Robert Lehmann as a party-defendant and to add to her complaint the subsequent acts described in her affidavits. She also moves pursuant to CPLR 3124 for an order striking defendants' answer or, in the alternative, compelling them to provide discovery she has requested (seq.#002).

Both in support of her motions and in opposition to defendants' motion (*see infra*) plaintiff proffers, *inter alia*, her own affidavits, the pleadings, the proposed amended complaints and the supplemental summons, the redacted and un-redacted 2006 complaint reports, FOIL requests to the SCPD and receipts for same, photographs, a preliminary conference order, a Notice of Motion to renew in the case of *Patrella v. County of Suffolk*, index number 21791/2012, a transcript of a phone call between plaintiff and defendant Walters on May 19, 2013, and a transcript of a phone call between plaintiff and Lt. Dougherty of the SCPD on May 6, 2014.

Defendants oppose plaintiff's motions to amend the complaint on the grounds that the original complaint does not give notice of the claim she seeks to assert in her proposed amended complaints and fails to state a cause of action, and they cross-move to dismiss the plaintiff's original complaint on that and several other grounds, including that the first through the fourth causes of action were brought beyond the time permitted by the applicable statutes of limitation and that the complaint as a whole is without merit. Defendants also contend that the current action is precluded by the determination of an action plaintiff brought in 2012 based upon claims similar to those asserted in the current action (*Patrella v. County of Suffolk, Index Number 21791/2012*), which resulted in a grant of summary judgment in favor of the defendants (Rouse, J., May 1, 2015), which was affirmed by the Appellate Division[1]; in the alternative, defendants request leave to amend their answer to assert the affirmative defense of collateral estoppel. Finally, defendants oppose plaintiff's CPLR 3124 motion on the grounds that it is moot, as they provided plaintiff with the requested discovery on November 1, 2017.

In support of their motion, and in opposition to plaintiff's motions, defendants proffer, *inter alia*, the pleadings in the current action, copies of the pleadings and referenced decisions in the 2012 action, and copies of the discovery responses they provided to plaintiff in the current action on November 1, 2017 pursuant to the preliminary conference order.

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1 It should be noted that plaintiff does not dispute that there is a relationship between her 2012 action and the current action. She has filed a notice of motion to renew the defendants' motion for summary judgment in that action, and she urges this court to have that matter transferred to this court's jurisdiction, that it decide the motion to renew and that the 2012 action be consolidated with the current action.

Statute of Limitations:

General Municipal Law § 50-i[1] provides, in pertinent part, as follows: "No action or special proceeding shall be prosecuted or maintained against a city, county, town, village . . . for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful action of such city, county, town, village . . . or any officer, agent or employee thereof . . . unless . . . (a) a notice of claim shall have been made and served upon the city, county, town [or] village . . . in compliance with section fifty-e of this chapter, *and . . . (c) the action or special proceeding shall have commenced within one year and ninety days after the happening of the event upon which the claim is based"*(*see* GML § 50-i[1])(emphasis supplied) . The requirement that the action or proceedings be commenced within one year and ninety days after the happening of the event constitutes a statute of limitations, and failure to comply with it in an action brought against a municipality or one or more of its officers, agents or employees acting in their official capacities requires dismissal of the action (*see* ***Campbell v City of New York***, 4 NY3d 200, 203 [2005]; ***Baez v New York City Health and Hosps. Corp.***, 80 NY2d 571, 576 [1992]; ***Cohen v. Pearl Riv. Union Free School Dist.***, 51 NY2d 256, 434 NYS2d 138 [1980]; ***Pierson v. City of New York***, 56 NY2d 950, 453 NYS2d 615 [1982]; ***Campbell v. City of New York***, 4 NY3d 200, 791 NYS2d 880 [2005]; ***Bonnano v. City of Rye***, 280 AD2d 630, 721 NYS2d 98 [2d Dept 2001]; ***Barnes v. County of Onondaga***, 103 AD2d 624, 481 NYS2d 539 [4th Dept 1984]). Here, as to the first through fourth causes of action in the complaint, the condition precedent of the service upon the county of a notice of claim has not been met. Further, those causes of action are governed by the one-year-and-ninety day commencement time limit of GML § 50-i[1][c] and are time-barred, as the events complained of in plaintiff's complaint are alleged to have occurred in May and September 2013, and this action was not commenced until April 2015 (CPLR 203). Accordingly, so much of defendants' motion as seeks dismissal of the first through fourth causes of action of the complaint for plaintiff's failure to comply with the notice of claim requirement of GML §§ 50-e and 50-i[1][a] and as time barred pursuant to GML § 50-i[1][c] is granted. As such, it is unnecessary to consider defendants' further contention, that plaintiff has failed to state causes of action for intentional and/or negligent infliction of emotional distress[2] and that the determinations in her 2012 action forecloses her from prosecuting the claims she has asserted in this action.

General Municipal Law § 50-i[1] provides, in pertinent part, as follows: "No action or special proceeding shall be prosecuted or maintained against a city, county, town, village . . . for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful action of such city, county, town, village . . . or any officer,

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2 Nonetheless, it should be noted that in this State, public policy bars claims for intentional infliction of emotional distress against a governmental entity (*see* ***Liranzo v. New York City Health & Hosps. Corp.***, 300 AD2d 548, 752 NYS2d 568 [2d Dept 2002], *citing* ***Lauer v. City of New York***, 240 AD2d 543, 659 NYS2d 57 [2d Dept 1997]; ***Wheeler v. State of New York***, 104 AD2d 496, 479 NYS2d 244 [2d Dept 1984]).

agent or employee thereof . . . unless . . . (a) a notice of claim shall have been made and served upon the city, county, town [or] village . . . in compliance with section fifty-e of this chapter, *and . . . (c) the action or special proceeding shall have commenced within one year and ninety days after the happening of the event upon which the claim is based"*(*see* GML § 50-i[1])(emphasis supplied) . The requirement that the action or proceedings be commenced within one year and ninety days after the happening of the event constitutes a statute of limitations, and failure to comply with it in an action brought against a municipality or one or more of its officers, agents or employees acting in their official capacities requires dismissal of the action (*see* ***Campbell v City of New York***, 4 NY3d 200, 203 [2005]; ***Baez v New York City Health and Hosps. Corp.***, 80 NY2d 571, 576 [1992]; ***Cohen v. Pearl Riv. Union Free School Dist.***, 51 NY2d 256, 434 NYS2d 138 [1980]; ***Pierson v. City of New York***, 56 NY2d 950, 453 NYS2d 615 [1982]; ***Campbell v. City of New York***, 4 NY3d 200, 791 NYS2d 880 [2005]; ***Bonnano v. City of Rye***, 280 AD2d 630, 721 NYS2d 98 [2d Dept 2001]; ***Barnes v. County of Onondaga***, 103 AD2d 624, 481 NYS2d 539 [4th Dept 1984]). Here, as to the first through fourth causes of action in the complaint, the condition precedent of the service upon the county of a notice of claim has not been met. Further, those causes of action are governed by the one-year-and-ninety day commencement time limit of GML § 50-i[1][c] and are time-barred, as the events complained of in plaintiff's complaint are alleged to have occurred in May and September 2013, and this action was not commenced until April 2015 (CPLR 203). Accordingly, so much of defendants' motion as seeks dismissal of the first through fourth causes of action of the complaint for plaintiff's failure to comply with the notice of claim requirement of GML §§ 50-e and 50-i[1][a] and as time barred pursuant to GML § 50-i[1][c] is granted. As such, it is unnecessary to consider defendants' further contention, that plaintiff has failed to state causes of action for intentional and/or negligent infliction of emotional distress[3] and that the determinations in her 2012 action forecloses her from prosecuting the claims she has asserted in this action.

Liability for Alleged Constitutional Violations:

" [A] municipality may not be held liable for unconstitutional acts of its municipal employees on the basis of *respondeat superior"* (***Johnson v. Kings County District Attorney's Office***, 308 AD2d 278, 293, 763 NYS2d 635 [2d Dept 2003], *citing* ***City of Canton, Ohio v. Harris***, 489 US 378 [1989]); *see also* ***Hillary v. St. Lawrence County***, 2019 WL 977876 [NDNY 2019]; ***Ricciuti v. N.Y.C. Transit Authority***, 941 F2d 119, 122 [2d Cir. 1991]). In order for a municipality to be held liable, there must be some direct, affirmative culpability on the part of the municipality (***Johnson v.***

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3 Nonetheless, it should be noted that in this State, public policy bars claims for intentional infliction of emotional distress against a governmental entity (*see* ***Liranzo v. New York City Health & Hosps. Corp.***, 300 AD2d 548, 752 NYS2d 568 [2d Dept 2002], *citing* ***Lauer v. City of New York***, 240 AD2d 543, 659 NYS2d 57 [2d Dept 1997]; ***Wheeler v. State of New York***, 104 AD2d 496, 479 NYS2d 244 [2d Dept 1984]).

Kings County District Attorney's Office, *supra* at 293, *citing* ***Monell v. New York City Dept. of Social Servs.***, 436 US 658, 691, 98 SCt 2018, 2036 [1978]). To prevail on a cause of action to recover damages against a municipality, "the plaintiff must specifically plead and prove (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right" (***Jackson v. Police Dept. of City of N.Y.***, 192 AD2d 641, 642, 596 NYS2d 457 [2d Dept 1993]; *see* ***Monell v. New York City Dept. of Social Servs.***, 436 US 658, 98 SCt 2018 [1978]; ***Batista v. Rodriguez***, 702 F2d 393 [2d Cir. 1983]; ***Willinger v. Town of Greenburgh***, 169 AD2d 715, 716, 564 NYS2d 466 [2d Dept 1991]). Therefore, in order to maintain a cause of action against the Suffolk County Police Department or the County of Suffolk, the plaintiff must plead that "some affirmative policy or custom or other knowing act on the part of . . . the county has caused the alleged constitutional deprivation" (***Payne v. County of Sullivan***, 12 AD3d 807, 809, 784 NYS2d 251 [3d Dept 2004], *quoting* ***LaBelle v. County of St. Lawrence***, 85 AD2d 759, 760, 445 NYS2d 275 [3d Dept 1981]), that is, that the policy or custom at issue "caused or was the 'moving force' behind the violation" (***Dominguez v. Beame***, 603 F2d 337, 341 [2d Cir. 1979](internal citations omitted); *see also* ***Olori v. Village of Haverstraw***, 2002 WL 1997891 [SDNY 2002]; ***Sulkowska v. City of New York***, 129 FSupp2d 274, 297 [SDNY 2001]; ***Polk County v. Dodson***, 454 US 312, 326, 102 SCt 445 [1981]). The complaint is devoid of the requisite allegations, and plaintiff's claims against the County and the Suffolk County Police Department for alleged constitutional violations must, therefore, be dismissed.

As to plaintiff's claims for alleged constitutional violations against defendants DeMatteo, Landrow, Walters, and Police Officer "John Doe 1," a prerequisite to recovery under 42 USC § 1983 is that the plaintiff plead and prove that defendants deprived her of a right secured by the Constitution and the laws of the United States (*see* ***Martinez v. California***, 444 US 277, 284 [1980]). The courts have not recognized claims of inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved (***Gomez v. Whitney***, 757 F2d 1005 [9th Circuit 1985]; *see also* ***Stone v. Department of Investigation of City of N.Y.***, 1992 WL 25202, *2 (SDNY 1992]; ***Lewis v. Gallivan***, 315 FSupp2d 313, 316-17 [WDNY 2004]). Moreover, the actions allegedly taken by defendants Landrow and DeMatteo in allegedly failing properly to investigate plaintiff's complaints concerning the abandoned house across the street from her home were discretionary acts by them in their functions as police officers for which they are immune from liability (*see* ***Shahid v. City of New York***, 144 AD3d 1127, 1129, 43 NYS2d 88 [2d Dept 2016]; ***Wolfanger v. Town of West Sparta***, 245 AD2d 1071, 666 NYS2d 77 [4th Dept 1977]), and, in any event, there is no contention by plaintiff that she suffered injury as a result the alleged investigative failures by the defendant police officers. Thus, and notwithstanding plaintiff's allegations of conduct on the part of the defendants that, if true, was unseemly and demeaning, the plaintiff's claims against the defendants for alleged constitutional violations must be dismissed.

For all of these reasons, the complaint is dismissed in its entirety. As the proposed amendments do not cure, but suffer from, the same infirmities as the original pleadings, plaintiff's motions to amend the complaint must also be denied. In light of these determinations, plaintiff's

motion to compel discovery, plaintiff's motion to consolidate this action with her 2012 action and defendants' motion to amend their answer to assert the affirmative defense of collateral estoppel are denied.

The court has considered the remaining contentions of the parties and finds that they do not require additional discussion or alter the determination the above determinations.

The foregoing constitutes the decision and order of the court.

Dated: 12/11/2020
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

XX **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**