Jallah v City of New York
2020 NY Slip Op 34462(U)
December 23, 2020
Supreme Court, Richmond County
Docket Number: 153491/2018
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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EMMANUEL JALLAH,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, JOHN DOES NOS. 1-20, agents of the defendants, names being fictitious, as their true identities are unknown at this time,

Defendants.

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Present:

Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 153491/2018

Motion No. 001

The following papers numbered 1 to 3 were marked fully submitted on September 16, 2020

	Papers Numbered
Plaintiff's Notice of Motion, Affirmation in Support and Exhibits (dated February 6, 2020).....	1
Affirmation in Opposition, with Exhibits (dated July 29, 2020).....	2
Reply Affirmation (dated August 30, 2020).....	3

Plaintiff Emmanuel Jallah ("Plaintiff") brings a Motion for an Order granting him leave to amend the caption and summons and complaint and serve the same on Detective Steven Lutz ("Detective Lutz"), Detective 2nd Grade Glenn Mauro ("Detective Mauro") and P.O. Michael Fraumeni ("P.O. Fraumeni") (collectively "Discovered Defendants"). The Court hereby grants

Plaintiff's Motion to the extent that Plaintiff (1) may amend the Caption to include the names of Detective Steven Lutz, Detective 2nd Grade Glenn Mauro and P.O. Michael Fraumeni and (2) may amend the Complaint to bring the following causes of action as against Detective Steven Lutz, Detective 2nd Grade Glenn Mauro and P.O. Michael Fraumeni: (1) Monell causes of action under 42 U.S.C. §1981, 1983, 1985 and 1986; (2) negligent infliction of emotional distress.

The Court hereby denies the remainder of Plaintiff's Motion.

FACTS

Plaintiff commenced this Action on December 14, 2018 against Defendants the City of New York (the "City"), the New York City Police Department ("NYPD") and John Does Nos. 1-20, agents of the defendants ("John Does") (collectively "Defendants") to recover damages for alleged civil rights violations. Plaintiff served his Summons and Complaint upon Defendants on December 20, 2018 ("Complaint"). In his Complaint, Plaintiff alleges that Defendants falsely arrested him and maliciously prosecuted him based on an incident that took place on March 12, 2018. On the date of the incident, Plaintiff states that he was standing with his friend Kyle Beaton and a group of other friends in the lobby of 55 Boeing Street, Staten Island NY. Plaintiff's friend named "Tone" ordered a LYFT car to take Plaintiff to physical therapy, but later recognized the driver as someone he previously had an issue with. After Tone was unable to cancel the ride, Plaintiff entered the car while Beaton requested that the driver cancel the ride. After the driver refused, Beaton took the driver's phone out of a holder and stepped outside the car to cancel the ride through the driver's phone. After Plaintiff exited the car and Beaton returned the phone to the driver, the driver recognized Tone and allegedly started yelling "police", "help, gun," while making racial slurs to Plaintiff and Beaton. Plaintiff, Beaton and his friends left the area after the

driver called 911. Plaintiff states in his Complaint that the entire incident was captured on building surveillance video, which was "readily available and/or viewed by the police and defendants."

A warrant was placed for Plaintiff's arrest and he was charged with Robbery in the First, Second and Third Degree, grand larceny and petit larceny in connection with his alleged theft of the driver's phone. Plaintiff represents that he surrendered himself to police on April 27, 2018 at 10 AM and was processed by 10:30 AM. Plaintiff states that instead of bringing him to court for arraignment, the detectives told him they wanted to speak to him. The Plaintiff alleges that after he stated he wished to speak to an attorney, the detectives and other NYPD and city agents continued to speak with him, ask questions and "threatened" that he would be "sleeping" at the precinct if he did not waive his right to counsel.

Plaintiff maintains the corrections department transported him to the courthouse at approximately 10:30 AM on April 28, 2018. Plaintiff states in his Complaint that he gave testimony to the grand jury and that Defendants showed the grand jury a video of the alleged incident. According to Plaintiff, the grand jury refused to indict him based on his testimony and the video that Defendants presented. Plaintiff further asserts that prior to his surrender, Defendants provided inaccurate and defamatory information about him and posted such information on social media. Plaintiff argues that based on the security video in their possession, the Defendants were "fully aware" that he did not commit any crimes when they arrested, detained him, and prosecuted him.

Plaintiff brings twelve causes of action against the Defendants. The first cause of action asserts Defendants falsely arrested him. Plaintiff states that Defendants used excessive force against him and that the defendant officers arrested him without probable cause while acting within the scope of their employment with the NYPD. Plaintiff brings a second cause of action for

negligent hiring, training, supervision and retention under New York State law, arguing that the NYPD was careless and reckless in their training and supervision of the John Doe officers who were performing actions to further the NYPD's interests. Under his third cause of action, Plaintiff asserts that the NYPD is liable under 42 U.S.C. §1981, 1983, 1985 and 1986 and the theory of respondeat superior for making policies that authorized the officers' acts and for failing to adequately train such officers. Plaintiff also brings a cause of action against the Defendants for "municipal and/or governmental liability" for the failure of the NYPD and its employees/agents to prevent the incident at the center of this Action. Plaintiff also brings causes of action for excessive force, malicious prosecution, abuse of process, infliction of emotional distress, defamation per se, internet defamation, defamation and negligence.

Defendant the City joined issue by service of a Verified Municipal Answer on or about January 7, 2019. Defendants maintain that the Court held a preliminary conference ("PC") on March 5, 2019. Defendants represent that they served their Response to the PC Order on May 16, 2019 ("Response"). Plaintiff testified at an Examination Before Trial ("EBT") on July 18, 2019 and Defendants served their Supplemental Response to the PC Order on July 31, 2019 ("First Supplemental Response"). Defendant's witness Detective Lutz was deposed on August 5, 2019 and Defendants served their Second Supplemental Response to the PC Order on November 11, 2018 ("Second Supplemental Response"). Defendants also represent that they served their Third Supplemental Response to the PC Order on July 10, 2020 ("Third Supplemental Response").

Plaintiff's Motion to Amend

Plaintiff now seeks to amend the caption, summons and complaint and serve the same on the Discovered Defendants. Plaintiff states that he learned the names of at least three of the John Does after discovery commenced and wishes to add the "newly" Discovered Defendants to this

Action instead of commencing a new Action against them. Plaintiff's papers in support of his motion fail to provide any details regarding when or how Plaintiff became aware of the Discovered Defendants' identities. Defendants oppose Plaintiff's Motion, arguing that the Court should deny it to the extent that it asserts state law causes of action against the Discovered Defendants as such were time-barred when Plaintiff filed the instant Motion on February 6, 2020. Defendants argue that Plaintiff's causes of action for negligence, infliction of emotional distress, defamation, false arrest and false imprisonment all expired well before Plaintiff filed the instant Motion. Defendants argue that the proposed amendment is patently devoid of merit since the state law claims are time-barred.

Defendants further oppose Plaintiff's Motion, arguing that Plaintiff failed to provide any explanation for why he failed to amend the Complaint in a timely manner. According to Defendants, Plaintiff filed his Motion more than thirteen months after commencing the Action without demonstrating that he made any diligent inquiries to determine the names of the John Does before the statute of limitations expired. Defendants note that Plaintiff did not try to learn this information by making a FOIL request, obtaining documents from his criminal attorney or procuring information from the criminal court. Defendants further maintain that the parties conducted discovery revealing the names of several involved officers before the expiration of the statute of limitations. Plaintiff, however, failed to take any action to amend the Complaint until this late date. Defendants note that they provided Plaintiff with the names of the Discovered Defendants through their responses to the PC Order. Specifically, the Response to the PC Order identified Detective Lutz as the arresting officer and the Complaint Report identified P.O. Fraumeni as the reporting officer. The Defendants listed Detective Lutz as a witness in their Supplemental Response and the Complaint Follow Up Number 1 indicates that Detective Mauro

reported to the scene of the alleged robbery with Detective Lutz and P.O. Fraumeni. The Court notes that Defendants included such documents in exhibits to their Opposition papers. Finally, Defendants argue that Plaintiff's negligence cause of action is invalid because New York courts do not permit a plaintiff seeking damages for an unlawful arrest to recover under broad general principles of negligence. Defendants note that they do not oppose Plaintiff's Motion insofar as it seeks to assert federal claims against the Discovered Defendants.

In his Reply papers, Plaintiff argues that he does not wish to bring his second cause of action for negligent hiring, training, supervision and retention against the Discovered Defendants, as he pled this only against the NYPD and the City. Plaintiff notes that he simply wants to amend that portion of the Complaint to hold the NYPD and City liable for their training and supervision of the Discovered Defendants in particular (instead of the "defendant officers" who were John Does at the time). Plaintiff similarly notes that his fourth cause of action for municipal and/or governmental liability remains as against the City and NYPD, not the Discovered Defendants. Plaintiff further points out that Defendants do not oppose adding the Discovered Defendants with respect to the federal causes of action, stating that the three-year statute of limitations governing such causes of action has not expired. Plaintiff also states in his Reply papers that he voluntarily withdraws his negligence cause of action.

While Plaintiff does not dispute Defendants' arguments that his state law causes of action are untimely, Plaintiff maintains that a delay of five or six months is not substantial. Plaintiff notes that unlike some of the cases cited by Defendants, discovery is not complete in this Action, a note of issue has not been filed, and the parties are not at the eve of trial. Plaintiff represents that he is not required to set forth a reasonable excuse for his delay. Since the proposed amendments have merit, Defendants must prove the existence of surprise or prejudice if the Court grants the Motion.

Plaintiff further argues that the Court should grant the Motion since he has met the requirements of the relation back doctrine.

DISCUSSION

It is well established that "in the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications for leave to amend a pleading are to be freely granted 'unless the proposed amendment is palpably insufficient or patently devoid of merit.'" *Myung Hwa Jang v Mang*, 164 AD3d 803, 804 [2d Dept 2018] (*See Siragusa v Conair Corp.*, 153 AD3d 1376, 1376 [2d Dept 2017]; *CPLR 3025; Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]. In *Lucindo v. Mancuso,* the Second Department held that the pleader need not establish the merit of the proposed amendment, but rather "the court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied." *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008].

Here, the Defendants argue that Plaintiff's proposed amendments are patently without merit since the state law causes of action that he seeks to bring against the Discovered Defendants are time-barred. The Court notes that according to Plaintiff's Arrest Report, included as Exhibit D to Defendants' Opposition papers, Plaintiff was arrested on April 16, 2018. However, for the purposes of this Motion, the Court will take the dates set forth by Plaintiff in his Complaint as true.

The Court finds that Plaintiff's cause of action for false arrest is untimely. The statute of limitations expires one year after the date of Plaintiff's release from custody (*See Williams v. CVS Pharm., Inc.,* 126 AD3d 890, 891 [2d Dept 2015]; *Bellissimo v. Mitchell*, 122 AD3d 560, 560 [2d

Dept 2014]; CPLR 215[3]). Here, Plaintiff asserts that his release took place on April 28, 2018 and he sought to add this cause of action against the Discovered Defendants on February 6, 2020. Therefore, such cause of action against the Discovered Defendants is untimely.

Plaintiff's state law causes of action for malicious prosecution and abuse of process against the Discovered Defendants accrued on the date the criminal court dismissed the charges against him. (*See Williams v. CVS Pharm., Inc.*, 126 AD3d 890, 891 [2d Dept 2015]; *Roman v. Comp USA, Inc.*, 38 AD3d 751, 752 [2d Dept 2007]; CPLR 215[3]). While Plaintiff does not provide this date in his Complaint or his Reply papers, Defendants note that the Certificate of Disposition for Plaintiff's criminal charges, included in an exhibit to their Opposition, indicate that the Criminal Court dismissed the charged against Plaintiff on May 21, 2018. Since Plaintiff did not dispute this date in his Reply papers, the Court will recognize this as the date upon which the Criminal Court dismissed the charges against him for the purposes of determining the timeliness of his Motion. Therefore, the one-year statute of limitations for Plaintiff's causes of action for malicious prosecution and abuse of process accrued on May 21, 2018, at the latest, and expired on approximately May 21, 2019.

With respect to the causes of action for defamation, the Court notes that Plaintiff does not specify the date upon which Defendants allegedly published their defamatory statements, but only states that they posted such prior to his surrender. Since Plaintiff alleges that he surrendered on April 27, 2018, his causes of action for defamation expired one year after that date. (*See Arvanitakis v. Lester*, 145 AD3d 650, 650 [2d Dept., 2016]; CPLR 215(3)). Therefore, Defendants established that Plaintiff's causes of action against the Discovered Defendants for defamation are untimely.

The Court finds that since Plaintiff's cause of action for infliction of emotional distress is based on his arrest and Defendants' treatment of him while he was in custody, such cause of action accrued, at the latest, on the date of his release. Therefore, the Court finds that the one-year statute of limitations for intentional infliction of emotional distress against the Discovered Defendants expired on April 28, 2019. However, the Court finds that Plaintiff's cause of action for negligent infliction of emotional distress is timely, as the three-year statute of limitations did not expire on the date of Plaintiff's Motion.

The Court will not address the statute of limitations for Plaintiff's negligence cause of action because he voluntarily withdrew that cause of action. Similarly, it will not discuss the federal statute of limitations, because Defendants do not oppose Plaintiff's amendments to the federal law causes of action. The Court will also not examine Plaintiff's third and fourth causes of action for negligent hiring, training and supervision and for governmental and municipal liability, as Plaintiff concedes that he is only bringing such causes of action against the City and NYPD Defendants.

Therefore, based on the analysis above, the Court finds that Plaintiff's causes of action against the Discovered Defendants for false arrest, defamation, intentional infliction of emotional distress, malicious prosecution and abuse of process are time-barred. The Court has considered Plaintiff's arguments under the relation back doctrine and CPLR §1024 and will discuss them below.

Plaintiff claims that he can bring the untimely state law causes of action under the relation-back doctrine. In *Bumpus v. New York City Transit* Authority, the Appellate Division, Second Department held that

> When an originally-named defendant and an unknown "Jane Doe" party are united in interest, i.e. employer and employee, the later-identified party may, in some instances,

> be added to the suit after the statute of limitations has expired pursuant to the "relation-back" doctrine of CPLR 203(f), based upon post-limitations disclosure of the unknown party's identity. The relation-back doctrine allows a party to be added to an action after the expiration of the statute of limitations, and the claim is deemed timely interposed, if (1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well.
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> *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 34-35 [2d Dept 2009].

The Court found that a failure to exercise due diligence to ascertain the 'Jane Doe's' name subjects the complaint to dismissal as to that party. *Id.*

In the Appellate Division, Second Department decision of *Holmes v. City of New York*, the Court examined a similar action in which the plaintiff moved pursuant to CPLR §1024 and §3025(b) for leave to amend the complaint to substitute three named police officers as party defendants in place of John Does 1-3 after the one year and ninety day statute of limitations expired. The Appellate Division held that

> In order to employ the procedural "Jane Doe" or "John Doe" mechanism made available by CPLR 1024, a plaintiff must show that he or she made timely efforts to identify the correct party before the statute of limitations expired. . . The moving party seeking to apply the relation-back doctrine to a later-identified "Jane Doe" or "John Doe" defendant has the burden, inter alia, of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations.
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> *Holmes v City of New York*, 132 AD3d 952, 953-54 [2d Dept 2015] (internal citations omitted).

The Second Department found that the plaintiffs failed to establish that they exercised due diligence to discover the identity of the John Doe defendants prior to the date the statute of limitations expired. Specifically, there was "no indication that the plaintiff engaged in any pre-action disclosure or made any Freedom of Information Law Requests" or "sought assistance from either the Criminal Court or the Supreme Court to learn the identities of the individual officers

before the statute of limitations had run." *Id.* at 954. In *Burbano v. New York City,* the Appellate Division, First Department found that a plaintiff could not rely on CPLR §1024 to bring an untimely cause of action against correction officers since the plaintiff failed to demonstrate diligence in seeking to identify the officers prior to the expiration of the statute of limitations. (*See Burbano v. New York City*, 172 AD3d 575, 576 [1st Dept 2019]. *See also generally Tucker v. Lorieo*, 291 AD2d 261, 261 [1st Dept 2002]).

Here, the Court finds that Plaintiff failed to demonstrate that he made diligent efforts to ascertain the identities of the Discovered Defendants as required under CPLR §1024. As Defendants correctly argue, Plaintiff did not submit any FOIL requests or any other documentation showing his efforts to obtain the names of the Discovered Defendants from the Criminal Court or any criminal attorney Plaintiff might have retained. Plaintiff also failed to detail any diligent efforts in an affidavit or in his reply papers underlying this Motion. Furthermore, the documentation submitted by Defendants demonstrates that they disclosed the names of the Discovered Defendants in their Response and subsequent Supplemental Responses to the PC Order. At no point in his reply papers does Plaintiff dispute Defendants' assertion that they provided Plaintiff with such disclosure. Plaintiff also fails to detail any efforts he made to ascertain the identities of the Discovered Defendants. Therefore, Plaintiff cannot use the relation-back doctrine or CPLR §1024 to bring the untimely state causes of actions against the Discovered Defendants.

The Court need not consider whether Defendants proved prejudice or surprise, since the contested proposed amendments are meritless.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion to amend is granted to the extent that: 1) the caption shall be amended to include Detective Steven Lutz, Detective 2nd Grade Glenn Mauro, and P.O. Michael Fraumeni; and 2) Plaintiff may add the following causes of action as against the newly added defendants: Monell causes of action under 42 U.S.C. §1981, 1983, 1985 and 1986, and negligent infliction of emotional distress: it is further

ORDERED that the caption shall be amended as follows:

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EMMANUEL JALLAH,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, DETECTIVE STEVEN LUTZ, DETECTIVE 2nd GRADE GLENN MAURO, P.O. MICHAEL FRAUMENI and JOHN DOES NOS. 1-20, agents of the defendants, names being fictitious, as their true identities are unknown at this time,

Defendants.

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it is further

ORDERED that the Motion is denied in all other respects; it is further

ORDERED that Plaintiff must file and serve the Amended Summons and Complaint forthwith; and it is

ORDERED that the Clerk shall mark his records accordingly;

Dated: December 23, 2020

Hon. Thomas P. Aliotta, J.S.C.