Lee v City of New York
2021 NY Slip Op 31926(U)
February 10, 2021
Supreme Court, Queens County
Docket Number: 707014/19
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Steven Lee,

Plaintiff,

- against -

The City of New York, New York City Police Department, Former New York City Police Commissioner William Bratton, Current New York City Police Commissioner James O'Neill, New York City Internal Affairs Bureau, New York City Police Deputy Commissioner Joseph Reznick, Deputy Inspector Caroline Roe, Deputy Inspector Bienvenido Martinez, Assistant Chief Diana L. Pizzuti and Detective Robert Young,

Defendants.

----------X

Index Number: 707014/19

Motion Date: 12/7/20

Motion Seq. No.: 3

The following papers numbered E28-E37 read on this motion by defendants, The City of New York, New York City Police Department, Former New York City Police Commissioner William Bratton, Current New York City Police Commissioner James O'Neill, New York City Internal Affairs Bureau, New York City Police Deputy Commissioner Joseph Reznick, Deputy Inspector Caroline Roe and Deputy Inspector Bienvenido Martinez, to dismiss; and cross-motion by plaintiff for leave to amend the complaint.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law	E28-33
Notice of Cross-Motion-Affirmation-Exhibits	E34-36
Memorandum of Law in Reply	E37

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the above-captioned defendants to dismiss the complaint, pursuant to CPLR 3211(a)(5) and (a)(7), upon the ground that the causes of action are barred by the statute of limitations and/or fail to state a cause of action is granted. Cross-motion by plaintiff to amend the complaint to add the predicate allegation

required under General Municipal Law §50-i that 30 days has passed since the claim was presented to defendants for payment or adjustment is moot.

Plaintiff, an NYPD sergeant, was assigned to the 109th Police Precinct in Queens County and was tasked with supervising the Precinct's Conditions Unit, which was responsible for, inter alia, patrolling and monitoring businesses licensed to serve liquor such as bars, including karaoke bars and clubs. Plaintiff alleges that in July 2014 he became suspicious of the special treatment given to karaoke bars within the 109th Precinct's jurisdiction and suspected that these establishments were offering officers of the 109th a place to meet girls, but later discovered that police officers were getting paid off. Plaintiff further alleges that Lt. Sung and another officer, Yatyu Yam, provided karaoke bars in the 109th area protection from police scrutiny of their illegal activities, and that a retired NYPD employee by the name of William Wade paid bribes to Sung to retaliate against bars that refused to hire Wade's security company by subjecting them to increased police scrutiny. Plaintiff alleges that the new commanding officer of the 109th Precinct, Captain Thomas Conforti, had a reputation as being a "straight" (police slang for honest), police commander, and that Sung, believing that Conforti would not ignore these illegal activities, formulated a plan to engineer Conforti's removal as commanding officer of the 109th by framing him with a false accusation of rape that Sung, with the assistance of Yam, solicited prostitutes at the karaoke club to make against Conforti. Plaintiff alleges that Sung also asked him in August 2014 to assist in the plan of framing Conforti.

Plaintiff relates that he thereupon contacted IAB (Internal Affairs) and informed them of the plot against Conforti and that IAB requested that he go undercover to obtain evidence. Plaintiff agreed, and he was provided with a wire controlled by IAB. Plaintiff participated in the undercover investigation from August 2014 to December 2015 and was assigned IAB handlers by the names of Owens and Seeger. He also represents that his handlers directed him to spend extra time with Sung during his off-duty time, but not put in for overtime and was still required to request time off, in order to avoid suspicion. Plaintiff alleges that over this period he discovered a larger scheme of corruption involving a large network of protection to karaoke bars in exchange for free alcohol and prostitutes. Two of the karaoke bars, JJNY and CEO, were owned by one Li, who also paid high-ranking police personnel thousands of dollars per month to warn him of impending narcotics raids and DWI checkpoints and to arrange for special treatment of any customers or employees wh were arrested. Plaintiff also states that Sung and Yam directed plaintiff not to arrest three persons for drug possession and sale at one of the karaoke bars. Plaintiff alleges that he related this information to his handlers who directed plaintiff to stick to the rape frame-up plan and not get involved in anything else.

Plaintiff relates that in December 2014 he was informed by

defendant Det. Robert Young that he had learned from IAB Assistant Chief, defendant Diana Pizzuti, that an IAB investigation involving plaintiff had been commenced and warned that IAB was watching plaintiff. Conforti and IAB subsequently stopped updating Pizzuti on the Sung and Yam investigation. Plaintiff also alleges that IAB also did not pursue the investigation of an undisclosed Brooklyn Lieutenant linked to a club associated with drugs and prostitutes or investigate a directive of one Lt. Peter Sieh of the 109th to leave a bar called the China Bar alone.

The IAB investigation resulted in charges being brought against Sung for attempted official misconduct and against Yam for obstruction of governmental administration in the second degree, to which charges they plead guilty and received conditional discharges. IAB, accordingly, closed the investigation, but plaintiff would not let the matter rest but wanted to continue investigating.

Plaintiff alleges that he was then subjected to retaliatory actions which included being denied sick leave for a line of duty wrist injury suffered on June 23, 2012 and denied medical treatment for that injury in October 2017, was denied other sick leave on unspecified dates prior to September 2017 and that he was not fully compensated for overtime, leave time and reimbursement for disbursements that were deducted during his undercover investigation. He alleges that he was reassigned from the 109th Precinct to a position with IAB Group 52 in December 2015 when his participation in the undercover investigation ended and was not given a promotion or special assignment salary in September 2017 following the conclusion of the investigation. He further alleges that he was removed from a supervisory capacity in IAB Group 52 at some point between January 2016 and January 2018, but does not allege that his pay or benefits were reduced. He also alleges that unidentified individuals attempted to remove vacation days that he had accumulated and that defendant Roe tried to convince him to request to return to uniform patrol from IAB Group 52. He also believes that his performance rating while assigned to IAB Group 52 did not accurately reflect his investigative work during the Sung-Yam investigation, notwithstanding that said investigative work antedated his assignment to IAB Group 52.

Plaintiff further relates that he was scheduled to be questioned on December 28, 2017 concerning a domestic violence investigation but missed the meeting because he had been told by his supervisor, falsely, that the meeting had been cancelled, which resulted in his being disciplined for missing the meeting. He appeared for questioning in January 2018 and was questioned concerning unrelated matters, and thereafter he received a letter of reprimand as a result of the domestic violence investigation and was subsequently advised on October 24, 2018 that he would be

served with charges and specifications for failing to appear for questioning. He alleges that defendant Roe who, in January 2018, investigated plaintiff's domestic violence incident and his failure to appear for the initial meeting did not report the results of her investigation accurately but prompted unnamed individuals to make unspecified false statements. Plaintiff is currently assigned to the police academy and believes that individuals connected to his undercover investigation were assigned to the 109th Precinct and several IAB personnel were transferred to the police academy in January 2018.

Plaintiff filed a notice of claim electronically on January 24, 2018 and commenced the present action on April 20, 2019. Thereafter, he filed an amended complaint on June 30, 2020. The notice of claim recites most of the foregoing allegations, but not any allegations relating to anything after his 2016 annual performance evaluation. He also merely sets forth as his claim: "Claimant alleges the aforesaid actions continue causing him to experience emotional distress and loss of promotional opportunities such as Sergeant-Supervisor Detective Squad (SDS)."

The amended complaint alleges seven causes of action for retaliation and creation of a hostile work environment: a first cause of action for constitutional violations under 42 U.S.C. §§1981 and 1983 and "constitutional retaliation", a second cause of action under §§1981 and 1983 for conspiracy to violate the first, fourth, fifth and fourteenth amendments anc conspiracy to commit "constitutional retaliation", a third cause of action under §1983 for failure to intercede, a fourth cause of action under §1983 for "supervisory liability", a fifth cause of action asserting a Monell claim that the retaliatory actions taken against him and the hostile work environment created were done pursuant to an official custom, practice and pattern of defendants to deprive plaintiff of his constitutional rights, a sixth cause of action for negligent infliction of emotional distress and a seventh cause of action for negligent hiring, retention and supervision.

Plaintiff seeks back pay and overtime for the period of his undercover work for which he was required to take leave time, for back salary and overtime that he "lost out on" as a result of being denied promotion and special assignment salary after the undercover investigation ended, for line of duty authorization for medical treatment for his wrist injury and line of duty disability status, for pain and suffering as a result of the denial of authorization for medical treatment for his wrist, for damages for emotional distress, for constitutional rights violations and for punitive damages.

Pursuant to General Municipal Law §50-i, the statute of limitations for commencement of tort actions against a municipal

entity is one year and 90 days, and said statute of limitations also applies to actions against individual municipal employees, pursuant to General Municipal Law §50-k and 50-j. Since the action was commenced on April 20, 2019, any cause of action under State law that accrued prior to January 20, 2018 is barred by the statute of limitations. Also, the statute of limitations for claims brought pursuant to 42 U.S.C. §1983 is three years. Therefore, all federal constitutional claims accruing prior to April 20, 2016 are time-barred. The only State-law causes of action asserted in the complaint are included in the sixth and seventh cause of action for negligent infliction of emotional distress and the seventh cause of action for negligent hiring, retention and supervision. All other causes of action are claims for constitutional violations which are not subject to the notice of claim requirement and which are governed by the three-year statute of limitations.

Consequently, the only claims that are not barred by the applicable statute of limitations are the constitutional claims relating to the domestic violence investigation against plaintiff by Roe, including his failure to appear for questioning and his reprimand for failure to appear and his being informed that charges would be brought against him for failure to appear for questioning, and all other claims of retaliation and creation of a hostile work environment after he was assigned to IAB Group 52 in January 2016, inclusive of his denial of sick leave and medical authorization for his line of duty wrist injury and his removal from his supervisory position at IAB Group 52.

With respect to his State-law causes of action for negligent infliction of emotional distress and negligent hiring, retention and supervision, pursuant to General Municipal Law §50-e, plaintiff was required to serve a notice of claim within 90-days after these causes of action accrued (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). The notice of claim does not include a claim for negligent hiring, retention and supervision, but only a claim for negligent infliction of emotional distress. As to this claim, the notice of claim filed on January 24, 2018 is late with respect to any claim of emotional harm inflicted prior to October 26, 2017. Moreover, the notice of claim fails to set forth any claims after 2016.

Pursuant to General Municipal Law §50-e(2), in order for a notice of claim to be sufficient, it must, inter alia, state "the time when, the place where and the manner in which the claim arose" (Rosenbaum v City of New York, 8 NY 3d 1, 10 [2006]). A notice of claim must contain sufficient information to allow the municipal authority to ascertain the location, time and nature of the claim (see Brown v City of New York, 95 NY 2d 389 [2000]; Palmieri v New York City Transit Authority, 288 AD 2d 361 [2nd Dept 2001]).

The latest date set forth in the notice of claim is 2016 regarding plaintiff's performance evaluations. Although the notice of claim also alleges "subsequent other performance evaluations", no specifics as to dates or the nature of the evaluations is set forth. Therefore, the cause of action for negligent infliction of emotional distress set forth in the complaint insofar as it relates to defendants' actions accruing after 2016 must be dismissed as the condition precedent to asserting this claim has not been met. Conversely, to the extent that the State law cause of action for negligent infliction of emotional distress relates to defendants' actions accruing prior to January of 2018,it is also time-barred.

Furthermore, the seventh cause of action for negligent hiring, retention and supervision must be dismissed, even to the extent that it relates to the conduct of NYPD personnel occurring after January 2018, as such cause of action was not set forth in the notice of claim. There is no federal constitutional component to this cause of action, but is purely a creature of State law principles of negligence. In addition, no cause of action lies against the City for negligent hiring, retention and supervision as a matter of law. It is a well-established principle that no action for negligent hiring, training or supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent hiring, training and supervision would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324).

This principle applies to the instant matter, even as to plaintiff's claims of intentional conduct of the individual NYPD personnel. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 AD 2d 777 [2nd Dept 1990]). Indeed, intentional conduct of police officers committed while on the job may be found to be within the scope of their employment (see generally Garcia v. City of New York, 104 AD 2d 438 [2nd Dept 1984]). There is no dispute, and plaintiff alleges, that the defendants' actions took place during the scope and course of their employment and, thus, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]).

Therefore, the sixth and seventh causes of action must be dismissed.

As to plaintiff's constitutional claims under §1983, all such claims must be dismissed as time-barred, except those relating to the domestic violence investigation against plaintiff by Roe, including his failure to appear for questioning and his reprimand for failure to appear and his being informed that charges would be brought against him for failure to appear for questioning, and all other claims of retaliation and creation of a hostile work environment after he was assigned to IAB Group 52 in January 2016, inclusive of his denial of sick leave and medical authorization for his line of duty wrist injury and his removal from his supervisory position at IAB Group 52. However, although these remaining claims are not time-barred, they still must be dismissed for failure to state a cause of action.

Plaintiff's claims under 42 U.S.C. §1981 must be dismissed as plaintiff has not alleged that the retaliatory actions against him were motivated by racial discrimination. Plaintiff has also failed to state a cause of action against the City for constitutional violations pursuant to §1983 under Monell. A municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original). There is no showing and there are no facts alleged that the alleged retaliatory actions taken against plaintiff were as a result of the implementation of an official policy or custom of the City.

The complaint also sets forth no facts that would state a cause of action for violation of the First, Fourth, Fifth or Fourteenth Amendments or a cause of action for conspiracy, failure to intercede or "supervisory liability".

Finally, since the NYPD and the IAB are merely departments, or agencies, of the City and not distinct legal entities, they are not cognizable parties and, therefore, the action must be dismissed against these named defendants.

Accordingly, the motion is granted, the complaint is dismissed and the cross-motion to amend the complaint is moot.

Dated: February 10, 2021

KEVIN J. KERRIGAN, J.S.C.

FILED

2/11/2021
04:16 PM

COUNTY CLERK
QUEENS COUNTY