

**Steinbergin v City of New York**

2023 NY Slip Op 31141(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 159315/2021

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JUDY H. KIM **PART** **05RCP**

*Justice*

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TROY STEINBERGIN,

Plaintiff,

- v -

CITY OF NEW YORK, JAMAL HAIRSTON, UNDERCOVER OFFICER, UNDERCOVER OFFICER, ANTHONY RONDA, MATTHEW FORTE, SCOTT COTE, KEITH CARPENTER, ERICK ORTIZ, OSCAR FERNANDEZ, ANGEL NARVAEZ, ROBERT FRANK,

Defendants.

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**INDEX NO.** 159315/2021

**MOTION DATE** 01/03/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion for DISMISSAL.

Upon the foregoing documents, defendants’ motion to dismiss this action is granted for the reasons set forth below.

On June 21, 2014, plaintiff was arrested and charged with criminal possession of a controlled substance. On April 22, 2015, following a jury trial, plaintiff was convicted of Criminal Sale of a Controlled Substance in the Third Degree. On March, 27, 2018, the Appellate Division, First Department reversed Plaintiff’s conviction and remanded the case for a new trial (People v Steinbergin, 73 NYS 3d 547 [1st Dept 2018]). Upon remand, the criminal prosecution was dismissed and sealed, pursuant to CPL §160.50, on October 9, 2018.

On November 7, 2018, plaintiff served a notice of claim on defendant the City of New York (the “City”), alleging that:

Claimant was falsely arrested, falsely imprisoned, and illegally searched and seized in violation of his Constitutional Civil right to be free from illegal search and seizure by officers who were employees of the New York City Police Department... Claimant had an assault and battery committed to his person in violation of his constitutional right to be free from excessive force by employees of the NYPD.

....

On or about June 21, 2014 at approximately 7:15 P.M. in the vicinity of the front of 1760 Lexington Avenue, County of New York, State of New York, Claimant was illegally searched and seized by New York City Police Department ... officers who had no probable cause to do so. Claimant had not committed any crime or violation of the law.

...

Claimant had multiple assault and batteries committed to his person including but not limited to being placed in handcuffs too tight. Claimant was then taken to a local NYPD Precinct, and criminally processed. While in police custody claimant was illegally strip searched with a cavity inspection. Claimant was thereafter sent to various local and state correctional facilities where he was in custody for a period of approximately forty-one (41) months. While in custody, Claimant was subject to over Two-Hundred (200) strip searches. After being in custody over the course of approximately forty-one (41) months, claimant was released on or about November 16, 2017. Claimant was maliciously prosecuted for said incident from the date of arraignment until all charges against him were favorably dismissed on October 9, 2018 before the Hon. A. Scherzer ...

(NYSCEF Doc. No. 20 [Notice of Claim]).

The Notice of Claim set forth claims for: assault; battery; emotional distress; physical pain/injury; illegal search and seizure without a valid search or arrest warrant; violation of plaintiff's civil rights under the U.S. Constitution and 42 USC §1983; negligent hiring, retention and supervision; loss of liberty; loss of dignity and reputation; and malicious prosecution (Id.).

On February 12, 2019, plaintiff commenced an action in the United States District Court for the Southern District of New York under Docket No. 19-cv-01314 (JMF) (the "Federal Action"), against the City of New York, NYPD Officer Jamal Hairston, NYPD Undercover Officers ("UC") 76 and 39, and John or Jane Does 1-10. After discontinuing his claims under New

York State law for false arrest and assault and battery (NYSCEF Doc. No. 22 [Stipulation and Order of Partial Voluntary Dismissal with Prejudice]), plaintiff filed an amended complaint asserting a claim for false arrest under 42 USC §1983 and claims under state and federal law for: malicious prosecution; failure to intervene; abuse of process; and denial of the right to a fair trial (NYSCEF Doc. No. 23).

Defendants in the Federal Action moved for summary judgment, which motion was granted on February 4, 2021, in an Opinion and Order of Judge Jesse M. Furman. The Opinion and Order stated, in relevant part, that:

In 2014, Troy Steinbergin was arrested and convicted in New York state court for selling cocaine to an undercover police officer. Four years later, his conviction was overturned on appeal based on the appellate court's view that his initial detention, which led to the undercover officer's positive identification of him as the perpetrator, had been unlawful. In this suit, he brings claims, pursuant to 42 U.S.C. § 1983 and state law, against three police officers who were involved in his arrest and the City of New York (the "City")...

[D]rawing all inferences in Steinbergin's favor, the Court concludes that the malicious prosecution claim fails for two reasons. First, Steinbergin was indicted; indeed, he was indicted twice, by two different grand juries. That gives rise to a presumption of probable cause for his prosecution, and Steinbergin fails to rebut this presumption with any evidence of fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith. Steinbergin's sole argument to the contrary is that his own testimony "that he never sold any drugs . . . to defendant Undercover Officer 76" creates a genuine issue of material fact on this score. But it is well established that "the law . . . require[es] a malicious prosecution plaintiff to do more than simply prevail in a credibility contest with his accuser." It follows that the evidence is also insufficient to establish malice, as Steinbergin relies solely on the proposition that malice can be inferred from the lack of probable cause. Put simply, without more, Steinbergin's denial that he engaged in the drug sale is not a sufficient basis for a reasonable jury to conclude that the defendants acted with malice...

(Steinbergin v City of New York, 2021 WL 396690, at \*1; 2021 U.S. Dist. LEXIS 21436 [SDNY 2021]). Judge Furman dismissed all of plaintiff's federal claims with prejudice but declined to

exercise supplemental jurisdiction over plaintiff's remaining state law claims and dismissed those claims without prejudice (Id. at \*6).

The Second Circuit affirmed Judge Furman's decision, noting, as to plaintiff's malicious prosecution claim asserted under federal law, that:

The return of the grand jury indictment creates a presumption of probable cause against a claim of malicious prosecution "that may only be rebutted by evidence that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith ... Steinbergin's assertion that he never sold drugs to UC 0076, without more, cannot reasonably support an inference of fraud, perjury, suppression of evidence, or other bad-faith police misconduct, and thus this claim fails as well.

(See Steinbergin v City of New York, 2022 WL 1231709, at \*7; 2022 US App. LEXIS 11369 [2d Cir 2022] [internal citations and quotations omitted]).

On October 2, 2021, plaintiff commenced the instant action by summons and complaint. As relevant here, the complaint asserts claims for: "retaliation for protected speech" (first cause of action); unlawful search and seizure (third cause of action); malicious prosecution (ninth cause of action); "abuse of process" (eleventh cause of action); denial of right to due process (thirteenth cause of action); violation of New York City Administrative Code §10-403 (fifteenth cause of action); "biased racial profiling" in violation of New York City Administrative Code §14-151 (sixteenth cause of action); equal protection violation under state law (seventeenth cause of action); and "failure to intervene" (twentieth cause of action)<sup>1</sup>. The City interposed an answer asserting, inter alia, affirmative defenses based on the expiration of the statute of limitations as well as collateral estoppel and res judicata.

Defendants Jamal Hairston, Undercover Officer No. 0076, Undercover Officer No. 0039, Anthony Ronda, Matthew Forte, Scotte Cote, Keith Carpenter, Erick Ortiz, Oscar Fernandez,

<sup>1</sup> Plaintiff does not oppose defendants' motion to dismiss the federal claims asserted in his complaint or his state law claims for false arrest and assault and battery.

Angel Narvaez, Robert Frank and the City of New York (collectively, the “City”) now move to dismiss these claims. The City argues that this action must be dismissed as to Ronda and Frank because they were never served with the summons and complaint. The City also argues that all of the remaining causes of action are barred as a matter of res judicata. Specifically, it argues that the malicious prosecution claim has already been considered and rejected on its merits in the Federal Action and that the remaining causes of action are barred because they could have been brought in the Federal Action but were not. Finally, the City argues that the causes of action other than malicious prosecution claim must be dismissed based upon plaintiff’s failure to include them in the notice of claim (which notice of claim was, in any event, untimely) as well as plaintiff’s failure to timely commence this action prior to the expiration of the statute of limitations, per GML §50-i.

In opposition, plaintiff argues that his malicious prosecution claim is not precluded by the Federal Action because “[u]nder state law malicious prosecution, the City, as named defendant, includes a wider breath of all its agents and employees who participated in the criminal prosecution of [p]laintiff” and plaintiff has adequately pled that defendant UC 76 fabricated information concerning his identification of plaintiff to the Grand Jury in order to secure plaintiff’s indictment (NYSCEF Doc. No. 34 [Raquib Affirm. in Opp. at ¶¶33-34]).

Plaintiff also maintains that he was not required to specifically include his claims for retaliation, abuse of process, denial of a right to fair trial, violations of New York City Administrative Codes, equal protection violations, and failure to intervene in his notice to claim. Alternatively, he argues that defendants may not raise this deficiency now, because they failed to raise this issue as an affirmative defense in their Answer. Finally, plaintiff argues that the City’s

statute of limitations argument is precluded by its failure to assert this affirmative defense with sufficient specificity in its Answer.

### DISCUSSION

That branch of the City's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted. As an initial matter, plaintiff does not dispute that he never served officers Anthony Ronda and Robert Frank (See NYSCEF Doc. No. 34 [Raquib Affirm. in Opp. at ¶6]). As plaintiff's time to serve these individuals has elapsed and plaintiff has not cross-moved for an extension of time to effect such service<sup>2</sup>, this action must be dismissed as against them, pursuant to CPLR §306-b.

The malicious prosecution claim is dismissed as to all defendants, on two separate grounds. As to Jamal Hairston, UC 39, and UC 76, this claim is barred as a matter of collateral estoppel. In analyzing the federal malicious prosecution claim, Judge Furman has already determined that plaintiff produced no evidence of malice and no evidence to rebut the presumption of probable cause created by the two indictments of plaintiff, which presents a bar to this claim (See Berrio v City of New York, 212 AD3d 569 [1st Dept 2023]; see also Tartaglione v Pugliese, 34 AD3d 446, 447 [2d Dept 2006]). To the extent plaintiff asserts that he intends to demonstrate that UC 76 fabricated evidence provided to the jury, this was also alleged in the Federal Action (NYSCEF Doc. No. 23 [Am. Compl. at ¶132]) and he may not now relitigate this issue. The malicious prosecution claim must also be dismissed as to the other defendants, who were not named in the Federal Action, as barred by the statute of limitations. As the criminal charges against plaintiff were dismissed on October 9, 2018, the statute of limitations for his state malicious prosecution

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<sup>2</sup> In his opposition, plaintiff represented that he would cross move for an extension of time to effect such service. However, plaintiff has neither made such a cross motion nor offered substantive arguments for an extension of time within his opposition papers.

claim expired one year and ninety days after that date, or January 7, 2020 (See CPLR §217-a; Bumbury v. City of New York, 62 AD3d 621 [1st Dept 2009]). This action was commenced on October 12, 2021, well past that deadline.

Plaintiff's remaining claims—for retaliation, abuse of process, denial of a right to fair trial, violations of New York City Administrative Codes, equal protection violations, and failure to intervene—must be dismissed on four separate and independent grounds. First, dismissal is warranted based upon plaintiff's failure to include these claims in his (untimely) notice of claim. “Causes of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed” (Scott v City of New York, 40 AD3d 408, 409 [1st Dept 2007] quoting Mazzilli v City of New York, 154 AD2d 355, 357 [1989]; see also Tully v City of Glen Cove, 102 AD3d 670, 671 [2d Dept 2013]).

Second, these remaining causes of action must be dismissed based on the untimeliness of this notice of claim, which was served on November 7, 2018, four years and four months after plaintiff's arrest on June 21, 2014, rather than the ninety days required under GML §50-e. In opposition, plaintiff does not assert that the notice of claim was timely but instead argues only that the City's failure to include the inadequacy of the notice of claim as an affirmative defense precludes this argument. Plaintiff is incorrect (See Keeney v New York City Hous. Auth., 168 AD3d 581, 582 [1st Dept 2019]; Lozano v New York City Hous. Auth., 153 AD3d 1173, 1174 [1st Dept 2017]; Singleton v City of New York, 55 AD3d 447 [1st Dept 2008]).

Third, dismissal is warranted based upon plaintiff's failure to file the complaint within the one year and ninety days statute of limitations expiring on January 7, 2020 (See GML §50-i). Notably, plaintiff does not dispute that the statute of limitations had lapsed at the time the summons and complaint was filed but instead argues that defendants may not assert this defense because it



was not pled with sufficient specificity in the City's Answer. However, this argument erroneously relies upon Federal Rule of Civil Procedure 9(c), which does not govern proceedings in this Court.

Finally, these claims are barred as a matter of res judicata. "New York's transactional approach to res judicata issues disallows other claims arising out of the same transaction or series of transactions, once a claim has been finally determined on the merits in a proceeding where the opponent of preclusion has had a full and fair opportunity to litigate the claim. This rule applies to claims actually litigated or that could have been litigated, and despite the fact that the claims are based on a different theory or seek a different remedy" (Thomas v City of New York, 239 AD2d 180, 180 [1st Dept 1997] [internal citations omitted]). "Ultimately, the application of the transactional approach to claim preclusion seeks to prevent litigants from taking two bites at the apple" (Simmons v Trans Express Inc., 37 NY3d 107, 112 [2021] [internal citations omitted]).

In this case, plaintiff does not offer any explanation as to why these claims—all of which indisputably arise from his arrest and prosecution—were not asserted in the Federal Action but instead included for the first time herein, years later. Likewise, no explanation is offered as to why Officers Fore, Cote, Carpenter, Ortiz, Fernandez and Narvaez were not included in the Federal Action. This failure mandates dismissal (See e.g., Paramount Pictures Corp. v Allianz Risk Transfer AG, 31 NY3d 64, 66 [2018]).

Accordingly, it is

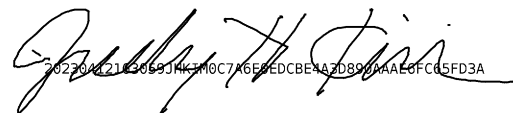
**ORDERED** that Jamal Hairston, Undercover Officer No. 0076, Undercover Officer No. 0039, Anthony Ronda, Matthew Forte, Scotte Cote, Keith Carpenter, Erick Ortiz, Oscar Fernandez, Angel Narvaez, Robert Frank and the City of New York's motion to dismiss is granted and this action is dismissed in its entirety; and it is further

**ORDERED** that counsel for the City of New York is directed to serve a copy of this decision and order, with notice of entry, upon plaintiff within fifteen days of the date of this decision and order; and it is further

**ORDERED** that counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E filing” page on this court’s website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)).

This constitutes the decision and order of the Court.



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4/12/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

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APPLICATION:

CHECK IF APPROPRIATE: