

**Lewis-EI v State of New York**

2012 NY Slip Op 30316(U)

January 24, 2012

Supreme Court, Nassau County

Docket Number: 12765/11

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 11 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***  
**Justice of the Supreme Court**

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**DARRYL LEWIS-EL,**

Index No. 12765/11

**Plaintiff(s),**

Motion Submitted: 11/3/11

Motion Sequence: 001, 002

**-against-**

**THE STATE OF NEW YORK, COUNTY OF  
NASSAU, NASSAU COUNTY POLICE  
DEPARTMENT, POLICE OFFICER HOWARD  
FRIEDBURG SHIELD #2222, HOWARD  
FRIEDBURG, OFFICER DOE, JOHN, OFFICER,  
JANE DOE #1, JANE #2, ASTORIA FEDERAL  
SAVINGS BANK [2090 MERRICK ROAD,  
MERRICK, NEW YORK REPUBLIC, 11566-4737]  
MONIKA SHAH, MONIKA SHA, [2090 MERRICK  
ROAD, MERRICK, NEW YORK REPUBLIC,  
11566-4737] AMY SUAUA, AMY SUAUA [2090  
MERRICK ROAD, MERRICK NEW YORK  
REPUBLIC, 11566-4737],**

**Defendant(s).**

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The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendants Astoria Federal Savings Bank, Monika Shah and Amy Suau ("the Bank defendants") move this Court for an Order dismissing the complaint against them. Plaintiff opposes the requested relief.

Plaintiff moves this Court for an Order granting him leave to amend his pleadings, and adjourning this matter for the purposes of discovery. The Bank defendants oppose the requested relief.

It appears that the County of Nassau/Nassau County Police Department has interposed an answer in this action.

This action arises from an incident that occurred on June 10, 2010, at Astoria Federal Savings Bank, located in Nassau County, New York. Plaintiff was present in the bank to deposit and to withdraw sums of money. Defendants Shah and Suau questioned plaintiff's signature, and advised plaintiff that they were attempting to verify his identity for his own safety. At some point, the discussion with the Bank employees escalated to the point where the employees summoned the Nassau County Police Department to the bank.

Plaintiff was given his cash withdrawal, but before he could leave the bank, plaintiff alleges that the police officer physically restrained him although the Bank employees had processed the transaction and allegedly stated to the officer that "everything is ok." After additional police officers arrived, plaintiff was questioned further about his identification. Ultimately, plaintiff exited the bank, and no criminal charges were filed against him.

Plaintiff filed his original complaint with the Nassau County Clerk's office on September 2, 2011. In the complaint, plaintiff alleges four causes of action: 1) battery, 2) assault, 3) false imprisonment, and 4) intentional infliction of emotional distress. The first three causes of action name only the police officer who initially responded to the incident. The fourth cause of action also names the police officer, but alleges that "the bank officers involved in the instant matter are equally liable, pursuant to the doctrine of respondeat superior."

The Bank defendants move for dismissal of the complaint against them on the grounds that plaintiff has failed to state a cause of action, and that plaintiff's claims against them are time-barred.

Plaintiff's proposed amended complaint includes the first four causes of action outlined above, and seeks to add fifth and sixth causes of action. The fifth cause of action alleges that the Bank employees and the police officer were negligent in their treatment of plaintiff, thereby violating his civil rights (sections 1983 and 1981). The sixth cause of action alleges that the Bank defendants and the police officer were "negligent in their duty of care" and inflicted emotional distress upon plaintiff. Plaintiff does not allege any new facts.

In the first instance, plaintiff's proposed amendment of the complaint must be made pursuant to CPLR § 3025 (b), as plaintiff's twenty days to amend the complaint without leave has long expired. The proposed amendment was received by the Nassau County Clerk's office on October 20, 2011, more than one year after the original complaint was filed.<sup>1</sup>

Leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay (*CPLR § 3025, Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 A.D.2d 310, 711 N.Y.S.2d 510 (2d Dept., 2000); *Sewkarran v. DeBellis*, 11 A.D.3d 44, 782 N.Y.S.2d 758 [2d Dept., 2004]), and unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit (*Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 A.D.3d 809, 811, 862 N.Y.S.2d 513 (2d Dept., 2008) citing *Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238 [2d Dept., 2008]).

Plaintiff's assertion in the proposed fifth cause of action, which is that the Bank defendants (and the police officer) "were negligent in the treatment to me in the discharge of their duty as a member of the public and both the bank and the police officer had a duty as a Citizen not to be treated in the manner that my Civil Rights will not be violated," alleges a violation of the federal Civil Rights Act found in 42 United States Code, Sections 1981 and 1983.

Plaintiff has not alleged that he has been deprived of a specific right, or rights, secured by the Constitution and the laws of the United States, and plaintiff has not alleged that the bank defendants deprived him of a right, or rights, while acting under color of state law. Thus, plaintiff has not alleged two basic elements of a claim under 42 U.S.C. § 1983 (*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L. Ed. 2d 185 [1978]).

Plaintiff's reference to 42 U.S.C. § 1981 likewise fails to state a cause of action. That section requires a plaintiff to allege that he was denied a contract because of discriminatory reasons, nor does it appear that plaintiff could make such a claim under the facts of this matter as presented in plaintiff's papers (*see Chun Suk Bak v. Flynn Meyer Sunnyside, Inc.*, 285 A.D.2d 523, 727 N.Y.S.2d 656 [2d Dept., 2001]).

Rather, it appears to the Court that the gravamen of plaintiff's fifth proposed cause of action is that he did not care for the way he was treated, not that there is a duty of care to be treated in any particular manner by defendants. "Absent a duty of care, there is no breach, and without breach there can be no liability" (*Fox v. Marshall*, 88 A.D.3d 131, 135, 928

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<sup>1</sup>Plaintiff, appearing pro se, has not actually filed a motion seeking leave to amend the complaint, but has, instead, simply filed the amended complaint, presumably as his motion.

N.Y.S.2d 317 [2d Dept., 2011]).

Plaintiff's sixth proposed cause of action alleges "negligence in their duty of care, treatment, behavior, and inflicted emotional distress to me . . . ." It appears to the Court that this proposed cause of action possibly sounds in negligent infliction of emotional distress; however, it may be that plaintiff has simply reworded the fourth cause of action alleging intentional infliction of emotional distress by the police officer, for which plaintiff claims the Bank defendants are liable pursuant to the theory of respondeat superior.<sup>2</sup>

In any event, the Court finds that plaintiff's proposed cause of action sounding in either intentional or negligent infliction of emotional distress as to the Bank defendants is patently devoid of merit. None of the actions of the Bank defendants as alleged, including their summoning the police when the disagreement escalated, was so extreme, outrageous and intolerable in a civilized society so as to sustain a cause of action for intentional infliction of emotional distress (*Howell v. New York Post Company, Inc.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993); see also *Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978); *Andrews v. Bruk*, 220 A.D.2d 376, 631 N.Y.S.2d 771 [2d Dept., 1995]). Likewise, a cause of action for negligent infliction of emotional distress cannot be sustained (*Perry v. Valley Cottage Animal Hospital*, 261 A.D.2d 522, 690 N.Y.S.2d 617 (2d Dept., 1999); *Lauer v. City of New York*, 240 A.D.2d 543, 659 N.Y.S.2d 57 [2d Dept., 1997]).

Upon even the most liberal reading of the proposed amendments to the complaint, and for all the foregoing reasons, this Court is constrained to deny plaintiff leave to amend, and his motion is denied.

The Court now turns to the Bank defendants' motion to dismiss the complaint as against them.

The Bank defendants are named in only the fourth cause of action alleged in the complaint filed in September 2010. Specifically, and after alleging numerous acts of wrongdoing by the Nassau County police officer who responded to the incident, plaintiff alleges that "the bank officers involved in the instant matter are equally liable, pursuant to the doctrine of respondeat superior."

It is hornbook law that the doctrine of respondeat superior renders a master vicariously

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<sup>2</sup>Plaintiff moves to amend the complaint after the Bank defendants first moved to dismiss the complaint asserting that the doctrine of respondeat superior is inapplicable to them in this context with regard to the actions of the police officer.

liable for a tort committed by his servant while acting within the scope of his employment (*Riviello v. Waldron*, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 418 N.Y.S.2d 300 [1979]). Imposition of liability under this doctrine requires, at the minimum, an existing relationship between the employer and the third person who committed the tortious act (*Louks v. Community Home Care Services*, 209 A.D.2d 484, 618 N.Y.S.2d 826 [2d Dept., 1994]).

It is beyond dispute that the police officer who responded to the incident in this case is not employed by the Bank defendants, but by the County of Nassau/Nassau County Police Department, who are the second and third-named defendants in this action. Thus, the fourth cause of action is dismissed for failure to state a cause of action as to the Bank defendants.

Although plaintiff has not named the Bank defendants in the remaining three causes of action, those claims also fail under a theory of respondeat superior for the foregoing reason. Furthermore, plaintiff does not allege that any of the Bank defendants directly committed any acts constituting battery, assault, and/or false imprisonment.

Finally, had those claims been directly asserted against the Bank defendants, they are untimely. Causes of action sounding in assault, battery and false imprisonment shall be commenced within one year (*CPLR § 215 [3]*). The incident giving rise to this action occurred on June 10, 2010, and the action was not commenced until September 2, 2011. Thus, those claims as to the Bank defendants are time-barred.

The Bank defendants' motion for dismissal of the complaint as against them is granted.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 7<sup>th</sup> of March, 2012, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

The foregoing constitutes the Order of this Court.

Dated: January 24, 2012  
Mineola, N.Y.

  
J. S. C.

**ENTERED**  
JAN 30 2012 5  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE