

Pidvirny v Metropolitan Transp. Auth.

2016 NY Slip Op 31883(U)

October 7, 2016

Supreme Court, New York County

Docket Number: 151758/15

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ
Justice

PART _____

MARIAN PIDVIRNY and GALINA PIDVIRNA,
Plaintiffs,

INDEX NO. 151758/15

MOTION DATE 09-07-2016

- v -

MOTION SEQ. NO. 002

THE METROPOLITAN TRANSPORTATION
AUTHORITY, MTA POLICE, THE MTA LONG
ISLAND RAILROAD, JOHN DOE #1 and JOHN
DOE #2,
Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion by defendants to dismiss and plaintiffs' cross-motion to amend the caption to name the individual police officer instead of John Doe #1.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1-2	_____
3-4	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion by defendants to dismiss all claims asserted in the summons and complaint on the grounds that plaintiffs failed to comply with the requirements of Public authorities Law (PAL) § 1276, General Municipal Law (GML) §§ 50-e and 50-i, and based upon defendant's entitlement to qualified immunity is granted solely to the extent of dismissing all claims asserted in the complaint with respect to a July 4, 2014 incident, the remainder of the motion is denied. The Plaintiffs' cross motion is granted, Police Officer Michael Arcati is substituted as a party defendant in place and stead of John Doe #1 and #2 and the pleadings are amended to reflect the substitution.

Plaintiffs bring this action to recover against the defendants for false arrest, false imprisonment, malicious prosecution, assault and battery, and violations of his constitutional and civil rights under 42 U.S.C. § 1983 arising from the arrest, handcuffing and jailing of plaintiff Marian Pidvirny. The arrests took place on March 12, 2014 and April 10, 2014 at the same location and were effectuated by the same police officer. Plaintiffs filed their notices of claim dated June 2, 2014 on June 4, 2014. (see Cross-motion Exhibit 9).

On October 27, 2014, more than 90 days after having been served with the notice of claim on these two incidents, the defendants served plaintiffs' attorney with a notice to appear at the offices of defendants' attorney on November 24, 2014 for a 50-h hearing. Plaintiffs failed to appear on the scheduled date. On February 4, 2015 defendants again served plaintiff's attorney with a notice to appear at the offices of defendants' attorney on March 5, 2015 for a 50-h hearing. Again plaintiffs failed to appear. Plaintiffs commenced this action on February 9, 2015.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Defendants now move to dismiss the action as against them on the grounds that Plaintiffs failed to comply with the requirements of Public Authorities Law (PAL)§ 1276, General Municipal Law (GML) §§50-e and 50-i, and because defendants are entitled to Qualified Immunity. Defendants allege that Plaintiffs failed to file a timely notice of claim with respect to a July 4, 2014 incident, that the notice of claim filed in June 2014 failed to name the individual police officer therefore the claim as against John Doe #1 and 2 should be dismissed, that the claims against these officers should be dismissed because they are entitled to qualified immunity and that the entire claim should be dismissed because plaintiffs failed to appear for a hearing prior to commencing this action.

Plaintiffs oppose the motion and cross-move to amend the caption, the summons and the complaint to substitute MTA Police Officer Michael Arcati as a party defendant in place and stead of John Doe #1 and 2.

General Municipal Law§50-e mandates that in any case founded on tort where a notice of claim is required, it be served within ninety (90) days after the claim arises. The filing of a notice of claim is a statutory condition precedent without which an action against a municipal entity is barred (Scantlebury v. N.Y. City Health and Hospitals Corp., 4 N.Y.3d 606, 830 N.E. 2nd. 292, 797 N.Y.S. 2d 394[2005];Barchet v. New York City Transit Authority, 20 N.Y. 2d 1, 228 N.E. 2d 361, 281 N.Y.S. 2d 289[1968]; Pierre v. City of New York, 22 A.D. 3d 733, 804 N.Y.S. 2d 365, [2nd. Dept. 2005]; See General Municipal Law § 50-i). Furthermore, General Municipal Law §50-e (2) provides the form and content of a proper notice of claim (See GML § 50-e(2)).

Plaintiffs provided a notice of claim with respect to the March 12, and April 10, 2014 incidents; However, plaintiffs did not provide a notice of claim with respect to the July 4, 2014 incident alleged in plaintiff's complaint.

General Municipal Law 50-h(1) grants the entity against which a notice of claim is filed "...The right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, which examination shall be upon oral questions unless the parties otherwise stipulate and may include a physical examination of the claimant by a duly qualified physician...."

General Municipal Law 50-h(2) states"...The Demand for examination shall be made in writing and shall be served personally or by registered or certified mail upon the claimant unless the claimant is represented by an attorney, when it shall be served personally or by mail upon his attorney. The Demand shall give reasonable notice of the examination. It shall state the person before whom the examination is to be held, the time, place and subject matter thereof and, if a physical examination is to be required, it shall so state. **NO DEMAND FOR EXAMINATION SHALL BE EFFECTIVE AGAINST THE CLAIMANT FOR ANY PURPOSE UNLESS IT SHALL BE SERVED AS PROVIDED IN THIS SUBDIVISION WITHIN NINETY DAYS FROM THE DATE OF FILING OF THE NOTICE OF CLAIM....**"(Emphasis added).

Defendants were served with a Notice of Claim for the March 12, and April 10, 2014 incidents on June 4, 2014. They did not request an examination until more than 120 days had passed from the date of filing of the notice of claim, therefore the demands for examination served by regular on the plaintiffs attorney on October 27,

2014 and February 4, 2015 were not effective. Plaintiffs were not required to appear for examinations that were not timely noticed. (See GML § 50-h(2)).

“ The statute setting forth information that must be included in tort claimant’s notice of claim against a municipality does not require statutorily required information to be stated with literal nicety or exactness, but rather the test of sufficiency of a notice of claim is merely whether it includes information sufficient to enable [the entity] to investigate and nothing more may be required. The court should focus on the purpose served by the notice of claim and whether, based on the claimant’s description, the authority can locate the place, fix the time and understand the nature of the incident (*Brown v. City of New York*, 95 N.Y.2d 389, 740 N.E.2d 1078, 718 N.Y.S.2d 4 [2000]). The claimant must put the municipality on notice even in a generic way that its individual employee would become a defendant (see *Alvarez v. City of New York*, 134 A.D.3d 599, 22 N.Y.S.3d 362 [1st. Dept. 2015]).

Plaintiffs have set forth information in their notice of claim sufficient to place the defendants on notice, even in a generic way, that their individual employee police officer would become a defendant. Plaintiffs notice of claim in its 6 paragraphs refers to the actions of defendants’ police officer that caused plaintiffs’ injuries. In addition, plaintiffs attach to their notice of claim copies of the tickets given to plaintiff Marian Pidvirny by the officer on March 12 and April 10, 2014. (See Notice of Claim moving papers Exhibit F). Finally, the failure to state the individual defendant’s particular name in this notice of claim did not hamper the investigation of plaintiffs’ claim or prevent the defendants from ascertaining the time, place and nature of the accident.

In an action for false arrest under New York common law the existence or absence of probable cause is a question of fact precluding dismissal of the case against the individual officer based on qualified immunity (*Holland v. City of Poughkeepsie*, 90 A.D.3d 841, 935 N.Y.S.2d 583 [2nd. Dept. 2011]). There is a question of fact in this case precluding dismissal of the claim against the individual police officer based on qualified immunity.

Plaintiffs cross-move to amend the caption, the summons and the complaint to substitute MTA Police Officer Michael Arcati as a party defendant in place and stead of John Doe #1 and 2.

CPLR 3025 allows a party to amend pleadings at any time by leave of court or by stipulation. Leave shall be freely given upon such terms as may be just.

In accordance with CPLR §1001(a) “persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants...” Police Officer Michael Arcati ought to be a party and ought to be substituted for John Doe #1 and #2 in this action in order to afford the parties in the action complete relief.

Accordingly, it is hereby ORDERED, that defendants' motion to dismiss all claims asserted in the summons and complaint on the grounds that plaintiffs failed to comply with the requirements of Public authorities Law (PAL) § 1276, General Municipal Law (GML) §§ 50-e and 50-i, and based upon defendant's entitlement to qualified immunity is granted solely to the extent of dismissing all claims asserted in the complaint with respect to the July 4, 2014 incident, and it is further

ORDERED that the claims asserted in the complaint with respect to the July 4, 2014 incident are severed and dismissed, and it is further

ORDERED, that the clerk enter judgment accordingly, and it is further

ORDERED that the remainder of the motion is denied, and it is further

ORDERED that plaintiffs' cross-motion to amend the caption, the summons and complaint to substitute MTA Police Officer Michael Arcati as a party defendant in place and stead of John Doe #1 and #2 is granted, and it is further

ORDERED that MTA Police Officer Michael Arcati is substituted as a party defendant in place and stead of John Doe #1 and John Doe #2, and it is further

ORDERED that the caption, the summons and the complaint are amended to reflect the substitution of MTA Police Officer Michael Arcati as a party defendant in place and stead of John Doe #1 and John Doe #2, and it is further

ORDERED the caption as amended shall read as follows:

MARIAN PIDVIRNY and GALINA PIDVIRNA,
Plaintiffs,

- Against -

THE METROPOLITAN TRANSPORTATION AUTHORITY,
THE MTA POLICE, THE MTA LONG ISLAND RAILROAD,
and POLICE OFFICER MICHAEL ARCATI,
Defendants.

and it is further

ORDERED, that within 20 days from the date of entry of this order Plaintiff serve a copy of this order with notice of entry upon the defendants, the County Clerk (Room 141 B) and the General Clerk's Office Trial Support Clerk (Room 119) pursuant to e-filing protocol at genclerk-ords-non-mot@nycourts.gov, , and it is further

ORDERED that the County Clerk and General Clerk's Office Trial Support Clerk are directed to amend the caption to reflect the substitution of the parties, and it is further

ORDERED that the plaintiffs serve a copy of this order with notice of entry, together with a copy of the amended summons and Verified Complaint, in the form annexed to the motion papers, in accordance with the Civil Practice Law and Rules, upon the substituted party in this action within 30 days from the date of entry of this order, and it is further

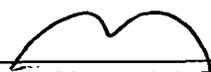
ORDERED that all the defendants shall serve an answer to the Amended verified Complaint within 30 days of service, and it is further

ORDERED that the parties appear for a ^{compliance} preliminary conference in IAS part 13 located at 71 Thomas street, Room 210, New York, N.Y. , on December 14, 2016 at 9:30 A.M.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: October 7, 2016



Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE