

**Ashanti v City of New York**

2020 NY Slip Op 33228(U)

October 2, 2020

Supreme Court, New York County

Docket Number: 155062/2019

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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KARL ASHANTI,

Plaintiff,

- v -

THE CITY OF NEW YORK, P.O. JOHN SHAPIRO, P.O.
LUIGI TIRRO, POLICE OFFICERS JOHN DOE
Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 45, 55

were read on this motion to/for MOTION TO DISMISS

This action arises out of alleged injuries following the interaction and subsequent arrest of plaintiff by defendants P.O. JOHN SHAPIRO, P.O. LUIGI TIRRO, POLICE OFFICERS JOHN DOE NUMBERED 1-10. Defendant, THE CITY OF NEW YORK (City), moves to dismiss the state law defamation claim on the grounds that plaintiff failed to state a cause of action, and further argues that the plaintiff failed to properly place the City on notice in their Notice of Claim. Plaintiff opposes the motion on the grounds that the defendant police officers' allegedly false statements published in publicly filed court documents and/or transmitted to several news and/or media outlets for publication are not absolutely immune as a matter of law. For the reasons set forth below, the City's motion is GRANTED.

The City argues that the plaintiff failed to properly state a cause of action in their Notice of Claim. Mot. Dismiss at ¶ 19. The City argues that statements made by police officers within

1 The parties stipulated to the resolution of Motion No. 002 in full, and the partial resolution of Motion No. 001. NYSCEF Doc. No. 57. The sole remaining issue for this motion is the state law claim of defamation. Id.
2 The Court would like to thank Tessa Tigar-Cross for her assistance in this matter.

criminal complaints and other publicly filed court documents enjoy absolute privilege and thus are immune from suit. Mot. Dismiss at ¶ 19; *Mosesson v Jacob Fuchsberg Law Firm*, 257 AD2d 381, 382 [1st Dept 1999]. Explained more precisely, though, is that the absolute privilege being claimed by the City extends only to those statements made in the course of court proceedings which have even “a minimal possibility of pertinence” to the litigation. *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007] (abrogated on other grounds by *Front, Inc. v Khalil*, 24 NY3d 713 [2015]); see also *Flomenhaft v Finkelstein*, 127 AD3d 634, 637 [1st Dept 2015]. Thus, the City contends that plaintiff failed to state a proper cause of action for a state law claim of defamation by alleging defamation on the basis of publicly filed court documents. Mot. Dismiss at ¶ 18. Further, the City maintains that any attempt by the Plaintiff to stretch their theory of defamation to encompass those conversations or any other allegedly defamatory communications prior to and/or after the publishing of the criminal complaint should be ignored by this Court as plaintiff only included in their Notice of Claim allegedly defamatory statements in “publicly filed court documents.” Mot. Dismiss at ¶ 14; Mot. Dismiss Ex. A at 2–3.

Plaintiff argues that the absolute privilege extends to statements made in the course of court proceedings, which does not include statements made to a prosecutorial official “prior to [the] commencement of a criminal proceeding.” Reply at ¶¶ 23–28; *Toker v Pollak*, 44 NY2d 211, 219 [1978]. Plaintiff further argues that “the communication of a complaint, without more, to a District Attorney does not constitute or institute a judicial proceeding.” *Toker*, 44 NY2d 211, 219–21. Plaintiff anticipatorily argued that “the fact that [the statements] were ultimately embodied in the criminal complaint filed in court does not alter the scope of immunity.” Reply at ¶ 30. During oral argument, plaintiff similarly argued that his Notice of Claim inherently alleged

these previous communications as a basis for defamation by having stated that the allegedly defamatory statements were contained in the publicly filed criminal complaint. This is not so.

Under well-established New York state law, “a plaintiff is bound by the Notice of Claim and all new causes of action are barred if they are not alleged in the Notice of Claim.” *Jagatpal v Chamble*, 2017 NY Slip Op 32630[U], \*4 [Sup Ct, NY County 2017]) (citing *Gonzalez v NYCHA*, 181 AD2d 440, 441 [1st Dept 1992]; *Ajjarapu v City of New York*, 2011 NY Slip Op 30778[U], \*5 [Sup Ct, NY County 2011]). As such, a plaintiff is precluded from alleging a narrow claim of liability within their Notice of Claim and later add to, and not simply expand upon, their theory of liability in subsequent pleadings.<sup>3</sup> *Cruz v City of New York*, 135 AD3d 644, 645 [1st Dept 2016] (“[T]he notices of claim do not allege that defendant breached its duty as a common carrier to provide her with a safe means of ingress. That theory of liability is therefore precluded here.”); *Mahase v Manhattan & Bronx Surface Transit Operating Auth.*, 3 AD3d 410, 411 [1st Dept 2004]; *Barksdale v N.Y. City Transit Auth.*, 294 AD2d 210, 211 [1st Dept 2002]; see also *White v NYCHA*, 734 NYS2d 11, 12 [1st Dept 2001] (“Plaintiff’s new allegation was not within the scope of permissible corrections to the notice of claim covered by General Municipal Law § 50-e (6). Instead, this allegation created a new theory of liability.”).

In this case, the plaintiff alleged in their Notice of Claim that the defendant Officers “defamed claimant by publishing said false information regarding the facts and circumstances of his arrest in publicly filed court documents, which they knew were open to the public for viewing.” Mot. Dismiss Ex. A at 3. However, the criminal complaint itself may not serve as the

<sup>3</sup> The Court notes that the Plaintiff did not at any proper time prior to this Decision cross move to amend their Notice of Claim. See *Mahase v Manhattan & Bronx Surface Transit Operating Auth.*, 3 AD3d 410, 411 [1st Dept 2004] (holding a plaintiff’s theory of liability not alleged within their original notice of claim could not be added to their claim via a late notice of claim as it would exceed the one year and ninety-day statutory limitation for filing a late notice).

basis for a claim of defamation. Further, the case which the plaintiff relies on in arguing that the criminal complaint is not absolutely immune from suit, *Token*, concerns an affidavit and not a criminal complaint. 44 NY2d 211, 216 [1978]. Allowing plaintiff to additionally claim, as they did in their subsequent pleadings, that the conversations and/or communications prior to and/or after the publishing of the criminal complaint are the basis for a state law claim of defamation would go directly against precedent as it an additional theory of liability and would obviate the spirit of the Notice of Claim.

The Court therefore does not reach the issue on plaintiff's later theory of liability concerning either alleged communications between the defendant officers with the District Attorney's office prior to and/or after the publishing of the criminal complaint, or alleged conveyance of information by the defendant officers to news and/or media outlets. As stated above, these are not before the Court as they were not set out in the notice of claim.

Accordingly, it is hereby

ORDERED the City's motion for dismissal as to the defamation claim is granted.

10/2/2020  
DATE

*LF*  
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LYLE E. FRANK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

**HON. LYLE E. FRANK  
J.S.C.**