

Smith v City of New York

2005 NY Slip Op 30433(U)

April 7, 2005

Supreme Court, New York County

Docket Number: 109370/04

Judge: Michael D. Stallman

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

PRESENT: MICHAEL D. STALLMAN
J.S.C. Justice

PART 5

Smolin, Shanel

INDEX NO. 109370/04

MOTION DATE 12/21/04

MOTION SEQ. NO. 01

MOTION CAL. NO. 106

- v -

City

The following papers, numbered 1 to _____ were read on this motion to/for _____

DA
TT

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

Notice of X.M.
Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is *decidedly jointly with sequence 02 and 15*

"is determined in accordance with the annexed memorandum decision and order."

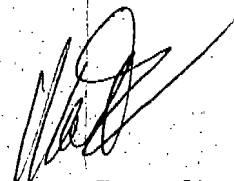
FILED

APR 12 2005

NEW YORK COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 4/7/05



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5**

-----X
Shamel Smith,

Index No. 109370/04

Plaintiff,

Decision and Order

-against-

The City of New York and Robert Morgenthau,
District Attorney, County of New York,

Defendants.
-----X

HON. MICHAEL D. STALLMAN, J.:

The City moves for partial summary judgment dismissing plaintiff's cause of action for false arrest and false imprisonment¹ based on his alleged failure to serve a timely Notice of Claim pursuant to General Municipal Law § 50-e as a condition precedent to suit. District Attorney Morgenthau moves for dismissal of the complaint for failure to state a cause of action. Plaintiff cross-moves to deem the notice of claim timely served nunc pro tunc. It is undisputed that a portion of the notice of claim, pertaining to the malicious prosecution claim, is timely as against the City.

FACTS

By New York County Indictment Number 1429/2001, filed on March 22, 2001, plaintiff was charged with Criminal Possession of a Forged Instrument in the Second Degree (Penal Law § 170.25), Attempted Grand Larceny in the Second Degree (Penal Law §§ 110.00, 155.40[1], and Attempted Grand Larceny in the Fourth Degree (Penal Law §§ 110.00, 15.30[6]. An arrest warrant was issued on March 22, 2001. According to records of the Supreme Court, New York County, plaintiff was arrested on April 5, 2001. Plaintiff was released on bail on April 8, 2001.

¹ Under New York law, the tort of "false arrest" is another name for the tort of "false imprisonment." Jackson v Police Dept. of City of N.Y., 86 AD2d 860 (2d Dept. 1982).

Plaintiff was convicted on April 26, 2002 of Criminal Possession of a Forged Instrument in the Second Degree and acquitted of the Attempted Grand Larceny counts and was subsequently imprisoned. Plaintiff was released from prison on April 11, 2003. On June 26, 2003, the Appellate Division reversed plaintiff's conviction.

On August 28, 2003, plaintiff served a notice of claim on the City; a summons and complaint was served on the City on or about June 24, 2004.

I

The City contends, inter alia, that the false imprisonment claims must be dismissed because plaintiff failed to serve a timely notice of claim, a condition precedent to commencing a tort action against a public corporation or any of its officers, agents or employees. See General Municipal Law §§ 50-e and 50-(i)(1). A notice of claim must be served as-of-right within 90 days after the claim arises. GML § 50-e(1)(a). GML § 50-e(5) provides that the period in which one may seek leave to file a late notice of claim is co-extensive with the statute of limitation for commencing an action against a public corporation, i.e., one year and 90 days. See Pierson v City, 56 NY2d 950.

Pursuant to General Municipal Law § 50-i, the date of the occurrence ordinarily is the transactional event for determining when a cause of action in tort accrues. Blanco v AT&T Company, 90 NY2d 757. Because plaintiff was in custody and released on bail, and thereafter imprisoned post-conviction, and released upon completion of his sentence, his cause of action for false imprisonment is in reality two separate claims of false imprisonment, each with its own accrual date.

The first false imprisonment claim accrued on April 8, 2001, the day plaintiff was released from custody after making bail. See Peresluha v City, 60 AD2d 226. Pursuant to GML § 50-e

(1)(a), the last day to serve a notice of claim as-of-right for the first false imprisonment was July 8, 2001; plaintiff did not serve a notice of claim within that 90-day as-of-right period. He served an unauthorized late notice of claim on August 28, 2003. An untimely notice of claim served without leave is a nullity. See De La Cruz v City, 221 AD2d 168. Plaintiff could have moved for leave to serve a late notice of claim until July 8, 2002, the last day of the statute of limitations period. However, he did not cross-move for relief as to his late notice of claim until December 14, 2004, long after expiration of the period of limitation on July 8, 2002. The time in which plaintiff was permitted to move for leave to serve a late notice of claim expired before the cross-motion was made; this Court lacks jurisdiction to permit him to do so now.

Notwithstanding a subsequent acquittal or dismissal, it has long been held that a cause of action for false imprisonment accrues upon release from that imprisonment. See, e.g., Schildhaus v City of New York, 23 AD2d 409, aff'd, 17 NY2d 853, cert. den. 385 US 906; Caminito v City of New York, 25 AD2d 848, aff'd 19 NY2d 931; Reddy v County of Westchester, 59 AD2d 776. In Caminito, supra, the indictment was dismissed on the prosecutor's motion after a federal court granted a writ of habeas corpus suppressing evidence and ordering a new trial. There is no legal basis for differently analyzing a reversal where no new trial was ordered.

As the Court of Appeal held in Schildhaus, supra, "[c]ause[s] of action against [the] city for false imprisonments arose at [the] time each terminated and not at ultimate date of acquittal on charges for which claimant was imprisoned, and thus [a] notice of claim filed more than 90 days after the imprisonments ended was untimely." 17 NY2d at 855.

The second false imprisonment claim accrued on April 11, 2003, the day plaintiff was released from custody after completing his sentence. Pursuant to GML § 50-e(1)(a), the last day to

* 5] .

serve a timely notice of claim as-of-right for the second false imprisonment was July 10, 2003. Plaintiff served a late notice of claim on August 28, 2003 without having sought leave of court to do so pursuant to GML 50-e(5). An untimely notice of claim served without leave is a nullity. See De La Cruz v City, 221 AD2d 168. Plaintiff could have moved for leave to deem this late notice of claim timely served until July 10, 2004, the last day before expiration of the one year 90-day statute of limitations period. However, he did not cross-move for this relief until December 4, 2004, after expiration of the limitation period on July 10, 2004. Plaintiff's time to move to deem the late notices of claim timely served expired as set forth above; this Court lacks jurisdiction to permit him to do so now.

Accordingly, defendant City's motion to dismiss plaintiff's causes of action as against the City for false imprisonment on the grounds that a timely notice of claim was not served is granted.

II

As for the District Attorney's motion, on August 27, 2003 plaintiff served a notice of claim upon inter alia, DA Morgenthau (Complaint ¶ 4), which asserted causes of action against DA Morgenthau for "false arrest and imprisonment, malicious prosecution, and unjust conviction."

On June 24, 2004, plaintiff purportedly delivered his summons and complaint to DA Morgenthau. In his complaint, plaintiff requests money damages based for events surrounding his arrest and prosecution under New York County Indictment Number 1429/2001. The complaint does not allege that DA Morgenthau was personally involved in plaintiff's arrest and processing, or that DA Morgenthau himself took an active role in plaintiff's prosecution. Plaintiff is apparently arguing that DA Morgenthau is liable under the theory of respondeat superior.

County Law § 54 prevents suit for money damages against the head of any agency, department, bureau or office of a county for any acts or omissions of subordinates. County Law § 54 bars the naming of a district attorney, whether by individual name or by title, as a defendant in a negligence action based on the acts of his office. See Tucker v City of New York, 184 Misc.2d 491. Indeed, the First Department has clearly held that a plaintiff's "[s]tate law claims against District Attorney Morgenthau, seeking to hold him vicariously accountable for the acts or omissions of his subordinates, . . . [are] properly dismissed [upon motion pursuant to CPLR § 3211(a)(7)], since claims premised on vicarious liability do not lie against the head of a county agency." Shmueli v New York City Police Dept., 295 AD2d 271 (1st Dept. 2002).

Moreover, plaintiff's false imprisonment claims are facially deficient as against the DA because plaintiff does not allege that DA Morgenthau played any role whatsoever in his arrest and the detention. Plaintiff does not allege that the arresting police officers involved arrested him based on orders from DA Morgenthau. As such, the complaint does not allege that DA Morgenthau was personally involved in the events which allegedly gave rise to his claim for false imprisonment and false arrest.

Finally, the doctrine of absolute prosecutorial immunity bars suit against prosecutors for monetary claims arising from acts or omissions during a prosecution including the decision to initiate, decline or pursue prosecution or to investigate a crime. See Moore v Dormin, 252 AD2d 421, 426.

Accordingly, District Attorney Morgenthau's motion for summary judgment dismissing all claims against him for failure to state a cause of action is granted.

It is therefore

ORDERED that the City's motion for partial summary judgment dismissing plaintiff's cause of action for false arrest and false imprisonment based on his failure to serve timely notice(s) of claim for these claims and expiration of the period in which to move for leave to serve a late notice of claim is granted; plaintiff's cross-motion for leave to serve a late notice of claim is denied as time-barred; and it is further

ORDERED that the District Attorney's motion to dismiss all claims against the District Attorney is granted and the complaint is dismissed as against Robert Morgenthau, District Attorney, New York County, in all respects.

Plaintiff's counsel and the City are reminded of the June 28, 2005 compliance conference at 9:30 a.m., 80 Centre Street, Room 103, New York, New York.

This constitutes the decision and order of the Court.

Dated: April 7, 2005
New York, New York

ENTER:


MICHAEL D. STALLMAN, J.S.C.

FILED
APR 12 2005
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COUNTY CLERK'S OFFICE