

Blanco v County of Suffolk

2006 NY Slip Op 30583(U)

November 9, 2006

Supreme Court, New York County

Docket Number: 7278-02

Judge: Mary M. Werner

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SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART XXXII, SUFFOLK COUNTY

PRESENT: HON. MARY M. WERNER
JUSTICE OF THE SUPREME COURT

ORIGINAL MOTION DATE: 6/29/06

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RICHARD MARTIN BLANCO and
JOHN BLANCO,

SUBMIT DATE: 8/17/06

Plaintiff(s),

MOTION NO. 001, MD

- against -

DEBRA S. REISER, ESQ.
Attorney for Plaintiff
100 Park Avenue, 33rd Floor
New York, New York 10017

THE COUNTY OF SUFFOLK,
THE SUFFOLK COUNTY POLICE DEPARTMENT,
POLICE OFFICER JOHN DOE "1",
POLICE OFFICER JOHN DOE "2",
POLICE OFFICER JOHN DOE "3",

CHRISTINE MALAFI, ESQ.
Suffolk County Attorney
Attorney for Defendant
County of Suffolk and The Suffolk
County Police Department
H. Lee Dennison Building
100 Veterans Memorial Highway
Post Office Box 6100
Hauppauge, New York 11788-0099

Defendant(s).
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Upon the following papers read on these motions: Notice of Motion and Supporting Papers 1-7 and Exhibits A-F; Notice of Cross- Motion and Supporting Papers 8-22 and Exhibits 1-5; Answering Affidavits and Supporting Papers 23-28; Replying Affidavit 29-35; it is

ORDERED that the motion by plaintiffs, Richard Martin Blanco and John Blanco (plaintiffs "Blanco") for an order compelling defendants, County of Suffolk, The Suffolk County Police Department, Police Officer John Doe "1", Police Officer John Doe "2" and Police Officer John Doe "3" (hereinafter "the John Doe defendants) to produce all Internal Affairs Division investigation records regarding the incident underlying this case for discovery and inspection by plaintiffs and to produce all employment records and Internal Affairs Division investigation records regarding Detective Gregory Cook, Officer Michael Dunn and Detective Edward Troyano (hereinafter collectively "the police officers") for in camera inspection to determine whether the records contain information relevant and competent in the above captioned case and for further discovery and inspection by plaintiffs is denied; and it is further

ORDERED that the cross-motion by defendants County of Suffolk, The Suffolk County Police Department (the "County defendants") for an order dismissing plaintiff's

claims against these defendants for failure to serve a proper Notice of Claim and Bill of Particulars and for denial of plaintiffs' motion for discovery and inspection pursuant to Civil Rights Law § 50-a is granted and the complaint is dismissed as to the County defendants.

Plaintiffs Blanco instituted this action to recover damages alleging that on December 13, 2000, they were assaulted and battered by three Suffolk County Police officers. In their first and second causes of action, plaintiffs individually seek damages against the three "John Doe" officers alleging they were "unlawfully, unjustifiably, intentionally, maliciously, wantonly, recklessly" assaulted and battered and generally allege that the defendant County "in failing to adequately, properly and competently hire, train, manage and supervise its police officer employees"(sic). In the third and fourth causes of action, plaintiffs individually seek damages for emotional distress from the alleged beating and allege generally that at the time of the alleged assault the three John Doe officers were "acting within the scope of their employment, and in so doing, were extreme and outrageous in their conduct and action in violation of the law and in violation of the rules, regulations and order of the Defendant County and its police department." In the fifth and sixth causes of action, the plaintiffs individually seek damages against defendant County for negligent supervision, hiring and retention alleging that the County knew these officers were "unable to perform their obligations and duties as police officers in a safe and responsible manner", were negligent in supervising and retaining them "despite their violent and assaultive propensities" and further allege a violation of their civil rights in that they were caused to suffer "severe embarrassment and humiliation", "legal expenses" and "suffered personal and mental injuries".

In their Bill of Particulars, plaintiffs Blanco simply repeat the allegations of the complaint against the three John Doe defendants without any specific allegations against the County or the Police Department. None of the three John Doe defendants, alleged by plaintiffs to be the three officers whose personnel files are sought by this motion, has been served in this action. The County Attorney points to its appearance in this action only on behalf of the moving defendants. The officers were not served with the complaint, no motion to amend the complaint was made, and the six year statute of limitations has now expired. While plaintiffs maintain that the County and the officers are "well aware of the identities of the 'John Doe' defendants and asserts that the parties should "so stipulate at the next conference", it is clear that the Court cannot simply order the addition of the three officers whose records are sought. Plaintiffs wholly fail to explain their failure to name the individual officers within the six years or to make an appropriate motion to amend the complaint to substitute these officers for the John Doe defendants. In the absence of service of the complaint within the statutory period of limitations, the Court lacks jurisdiction over these individuals.¹

¹In the absence of an appropriate motion, the Court need not consider at this juncture the effect of the "relation back doctrine" which, upon proper showing, authorizes the Court to allow a plaintiff to add a new defendant "united in interest" with a named co-defendant party after the limitation period has expired. See, McNir v. Khandakar, 30 A.D.3d 487, 818 N.Y.S.2d 224 (2nd Dep't, 2006); Pappas v. 31-08 Cafe Concerto, Inc., 5 A.D.3d 452, 773 N.Y.S.2d 108 (2nd Dep't, 2004).

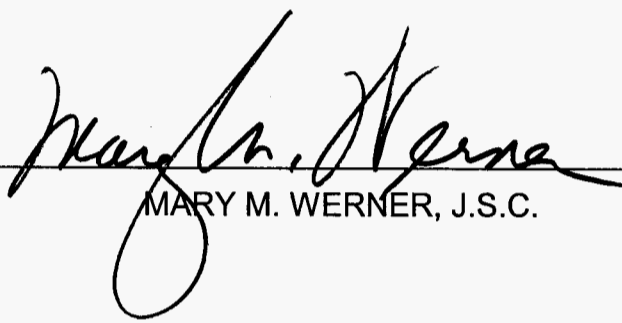
The County argues that the Blanco plaintiffs' demand for information pertaining to any Internal Affairs investigation and all employment records of the police officers is improper. Civil Rights Law § 50-a, as it pertains to police officers provides, "all personnel records, used to evaluate performance toward continued employment or promotion... shall be considered confidential and not subject to inspection or review without the express written consent of such police officer ... except as may be mandated by lawful court order" (Civil Rights Law § 50-a[11]). If an exemption is claimed under the Civil Rights Law §50-a, the agency must demonstrate that the personnel disclosures would create a substantial and realistic potential for the abusive use of the requested material against the officer. See, Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 710 N.E.2d 1072, 688 N.Y.S.2d 472 (1999). Further, prior to issuing an order for release of records under this section, "the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review" (N.Y. Civ. Rights Law § 50-a). Furthermore, police officers who are the subject of an internal investigation stand to be inequitably affected by any determination under this statute and are entitled to an opportunity to be heard before the court conducts an in-camera review of any such file (Dunnigan v. Waverly Police Dep't, 279 A.D.2d 833, 719 N.Y.S.2d 399 [3rd Dep't] *lv. to app. denied* 96 N.Y.2d 710; 751 N.E.2d 944; 727 N.Y.S.2d 696 [2001]); N.Y. Civ. Rights Law § 50-a [2] and [3]; see also, Telesford v. Patterson, 27 A.D.3d 328, 812 N.Y.S.2d 52 [1st Dep't, 2006]). Here, no notice has been provided to the three police officers and there are no waivers of confidentiality. In addition, plaintiffs have not yet set forth the necessary factual predicate to support in camera review or release of the employment records and/or investigative files. A bare allegation that a police officer was the subject of prior complaints is insufficient to support such review and/or disclosure. See, Zarn v. City of New York, 198 A.D.2d 220, 603 N.Y.S.2d 503 (2nd Dep't, 1993); Jacker v. County of Suffolk et. al., ___ Misc 3d ___, Index No. 21472-2003 (Sup. Ct., Suffolk Co. 2006).

The County defendants move for dismissal of the plaintiffs claims against them. They argue that plaintiffs' failure to allege negligent training and managing in their Notice of Claim bar them from asserting these claims in the complaint. The court agrees. Further, the third and fourth causes of action alleging intentional infliction of emotional distress as against the County defendants are dismissed. "It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity". Lauer v. City of New York, 240 A.D.2d 543, 659 N.Y.S.2d 57 (2nd Dep't, 1997). Additionally, "a municipality may not be held liable for the unconstitutional acts of its municipal employees on the basis of respondent (sic) superior.... a municipality can be found liable under 42 USC § 1983 for deprivation of constitutional rights only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to

SHORT FORM ORDER

represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.’” Johnson v. Kings County DA's Office, 308 A.D.2d 278, 308 A.D.2d 278 (2nd Dep’t, 2003) *citing*, Monell v. Department of Social Servs. of City of N.Y., 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 [1978]. To adequately plead a violation of civil rights on the theory of failure to train plaintiffs must show “that the policymaker knows ‘to a moral certainty’ that employees will encounter a given situation (Walker v. City of New York, *supra* at 297)”, “that the situation either presents the employee with a difficult choice, the kind which training will make less difficult, or that there is a history of employees mishandling the situation” and “that the wrong choice by the municipal employee will frequently result in the deprivation of a citizen's constitutional rights”. *Id.* “A local government may not be sued under 1983 for an injury inflicted solely by its agents or employees. Rather, there must be some direct, affirmative culpability on the part of the municipality”. Here, plaintiffs bare allegations contained in the fifth and sixth causes of action are insufficient to survive dismissal as to the County defendants. *c.f.* Watkins v. Village of Briarcliff Manor, 2006 NY Slip Op 7472, 2006 N.Y. App. Div. LEXIS 12437 (2nd Dep’t, 2006). Nor do the general allegations as against the County defendants establish a cause of action for negligent “hiring” or “supervision”.

Dated: 11/9/06



 MARY M. WERNER, J.S.C.

FINAL DISPOSITION _____ NON-FINAL DISPOSITION x

SCAN _____ DO NOT SCAN _____