[* 1] SCANNED ON 7/2/2007

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

PRESENT: **HON. PAUL G. FEINMAN** PART 5L

Justice

SARIT SHMUELI

-v-

CITY OF NEW YORK
NYC POLICE DEPARTMENT

INDEX NO. 115002/99

MOTION DATE 1/16/07

MOTION SEQ. NO. 004

MOTION CAL. NO. 52

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 02 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION/ORDER

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

Dated: 6/25/07

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
SARIT SHMUELI,

Plaintiff,

against

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT,

Defendants.
----------X

Index Number	115002/1999
Submission Date	Jan. 16, 2007
Mot. Seq. No	004
Cal. No.	12

DECISION AND ORDER

For Plaintiff:
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For Defendant:
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Papers considered in review of this motion to dismiss :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits in Opposition.....	2
Replying Affidavits and Reports	3,4
Pl. Letters of 10/12/06 and 11/20/06 & encl.....	5,6
Copies of Pl. documents filed in Federal Court....	7-10
Decision of Hon. Paul A. Crotty dated June 6, 2007	11

PAUL GEORGE FEINMAN, J.:

Plaintiff moves to amend the complaint and caption and to compel discovery. For the reasons set forth below, the motion is granted only to limited extent indicated and otherwise denied.

Background

Plaintiff was arrested by the New York City Police Department on May 5, 1998 following the complaints of Martin Lieberman, a former romantic partner who had shared her apartment for a period of time in 1997. The Misdemeanor Complaint alleged 91 counts of aggravated

harassment 2d degree, one count of harassment 2d degree, and one count of menacing 2d degree (Aff. in Opp. Ex. 1, ex. J). The Misdemeanor Complaint is sworn to by Det. John Sekulo, and relates in nearly six full pages, allegations asserted by several informants, including Lieberman, that include numerous hang-up telephone calls to Lieberman's home or work, and the distribution of several letters and flyers to his family, friends, and business associates that included personal details about Lieberman, and an act of vandalism against a car used by Lieberman's son.

As set forth in the court's decision and order dated January 7, 2001 (*Shmueli v New York City Police Department, et al.*, 115002/1999 [Madden, J.]), plaintiff alleges that during the course of her arrest, she was handcuffed and interrogated for more than an hour and a half in the lobby of her work place, in the presence of her co-workers and other building occupants and guests; her office computer was examined and a disk was taken by the police; she was then escorted in handcuffs by five police officers to her apartment building, the handcuffs remained too tight despite her protests; the police officers ordered food and had it delivered to her apartment and made personal calls on her telephone; she was then taken to One Hogan Place and put in jail until about 4:00 a.m. the following morning when she as taken to 100 Centre Street, and saw the judge at about 4:00 p.m. She was taken to Rikers Island and held incommunicado by the police officers and ADA Stacey Mitchell and only released on May 7, 1998 after bail was posted by her employer.

Plaintiff contends that the officers involved in her arrest and members of the District Attorney's office deprived her of her constitutional right to liberty for three days, exposed her to degrading conditions, caused her conscious pain, suffering, mental anguish, as well as lost

earnings and injury to her reputation. She proffers documents which she argues show that former Assistant District Attorney Linda Fairstein wrongfully caused her arrest and detention as a favor to Lieberman, because she knew that Lieberman and his partner Ellen Kozminsky had written the letters at issue, that Fairstein also knew that Lieberman wanted to cause plaintiff injury because she refused to resume their relationship and promised to pursue the charges against plaintiff as if they were murder charges, and caused the arresting officers to detain plaintiff for the maximum allowable time, and that Detective Sekulo colluded with Fairstein and Lieberman to secure plaintiff's arrest and detention although he knew that Lieberman's motivation was due to personal reasons.

Plaintiff, represented by counsel, filed a Notice of Claim on July 17, 1998, claiming "tortious and malicious conduct as well as abuse of process and misuse of legal process, and a violation of civil rights," and "malicious[ ] . . . incarceration," which occurred during her arrest on May 5, 1998 and thereafter, and caused "[i]njury to her wrists, severe emotional distress and loss of earnings and reputation."[1] She commenced an action by filing on July 23, 1999, naming as defendants the New York City Police Department and the New York County District Attorney's Office. The complaint alleged use of excessive force, false arrest, false imprisonment, malicious prosecution, and violations of her civil rights pursuant to 42 USC § 1983 as well as negligence in the hiring, training, and supervision of police officers and assistant district attorneys.[2]

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[1]The Notice of Claim lists ADA Stacey Mitchell, Police Detective John Sekulo, and Martin Lieberman, and mentions that there were five police officers who arrested her.

[2]Although not articulated in her amended complaint or proposed second amended complaint, plaintiff alleges that she was assaulted on the street on June 15, 2000, and again on

The District Attorney moved to dismiss the complaint or to stay the proceeding pending the outcome in her criminal action, and this motion was granted on default on December 1, 1999. However, plaintiff filed an amended verified complaint, dated November 30, 1999, on December 13, 1999, naming as defendants the New York City Police Department and New York County District Attorney Robert M. Morgenthau. Thereafter defendant Morgenthau moved to dismiss the complaint as against him.[3] The motion was granted on January 9, 2001, by decision by another justice of this court, and plaintiff appealed. The Appellate Division, First Department affirmed the dismissal of the complaint as against Morgenthau in June 2002 (*Shmueli v New York City Police Dept., et al.*, 295 AD2d 271 [1st Dept. 2002]).

Plaintiff's criminal prosecution failed to proceed to trial in a timely manner and was ultimately dismissed pursuant to CPL 30.30, speedy trial grounds and the record sealed pursuant to CPL 160.50 on March 22, 2002 (Aff. in Opp. Ex. 1, ex. K).

On about February 24, 2003, plaintiff commenced an action in the United States District Court, Southern District, against the City of New York, the New York City Police Department, Martin Lieberman, and Assistant District Attorneys Fairstein, Mitchell, and Michelle Gieri, along

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July 10, 2000, the first time by Lieberman's friend, in his presence, and the second time by Lieberman himself, that she required medical treatment following both assaults, and that Lieberman was not arrested. (Pl. 21 Exhibits, unsworn letter dated Nov. 20, 2006, ¶¶ 14, 16, and exhibits N, P [hospital records]; exhibit Q [excerpts from undated 2003 affidavit filed in federal court action detailing the assaults and the police inaction or thwarting of her attempt to get help]). She also describes two previous assaults in October 1997, prior to her arrest (Pl. 21 Exhibits, ex. L and M [police reports of Oct. 24, Oct. 26, 1997, regarding assaults]), neither of which were mentioned in her original or amended complaint

[3]The claims against Morgenthau, which were the same claims initially asserted against the Office of the District Attorney, were negligent hiring, supervision and training, vicarious liability, and violations of 42 USC § 1983.

with 10 John Does (Aff. in Opp. Ex. 1, ex. D).[4] An amended complaint was served in that matter on about May 23, 2003, deleting Gieri as a named defendant (Aff. in Opp. Ex. 1, ex. F).[5] As described by the judge who ruled on the individual defendants' motion to dismiss, the federal action alleges malicious prosecution against all defendants, pursuant to 42 USC § 1983, and state law claims of intentional infliction of emotional distress, conspiracy, abuse of process, malicious prosecution, and violation of state Constitutional rights, employing the doctrine of respondeat superior as concerns the City and the Police Department (see Aff. in Opp., Ex. 1, ex. H, *Shmueli v City*, 03 Civ. 1195, transcription of decision and order, Oct. 3, 2003 [Stein, J.] [hereinafter Stein Decision). The individual defendants moved to dismiss the complaint, and their motion was granted in part in October 2003. The federal district judge dismissed all of plaintiff's state law claims except for the claims of malicious prosecution against the defendants in their individual capacities (Stein Decision, pp. 17-19). The claims of intentional infliction of emotional distress and conspiracy were dismissed for failure to comply with the notice of claim requirement for tort claims against the City, and the abuse of process claim was barred by the statute of limitations. The decision noted that except for the malicious prosecution claim, all of the state law claims were barred by res judicata "because plaintiff could have raised every single state law claim alleged here in the prior state law litigation" (Stein Decision, pp. 18-19). In

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[4]This action is entitled *Shmueli v The City of New York, New York City Police Department, Linda Fairstein, Stacey Mitchell, Michelle Gieri, Martin Lieberman, and John Doe 1-10, the names being fictitious, the intended persons being assistant district attorneys and New York City police officers involved in a false arrest, false imprisonment, assault and battery, malicious prosecution, and violation of Civil rights of the plaintiff herein.*

[5]In January 2007, plaintiff apparently sought to further amend her complaint, adding Gieri again as a defendant (see Aff. of Plaintiff, dated January 2, 2007, in the Southern District action, Ex. 36).

addition, the state law claims, except for malicious prosecution, were dismissed for "the failure of the plaintiff's opposition papers to address the defects of those claims raised in defendants' motion to dismiss" (Stein Decision, p. 19). In sum, the federal court dismissed the claims of malicious prosecution for actions occurring prior to plaintiff's arraignment, the section 1983 and state law claims against Fairstein and Mitchell in their official capacity, and all the state law claims except for malicious prosecution (Stein Dec. 20).

The two assistant district attorneys appealed, and the parties agreed to stay further discovery pending the outcome of the appeal (Stein Decision, pp. 21, 23). In September 2005, the Second Circuit reversed in part the lower court's decision, finding that under the law, the acts of a prosecutor are entitled to absolute immunity as long as there is a colorable claim of authority, and that the court may not evaluate the motive or reasonableness for the actions (Aff. in Opp. Ex. 1, ex. 1, *Shmueli v City, et al.*, United States Court of Appeals, 2d Cir., Docket No. 03-0287-pr [hereinafter Decision, 2d Cir.], pp. 10-13). Thus, the Court ordered dismissal of both the section 1983 claims and the entirety of the state law malicious prosecution claim against the two ADAs for damages, but left the claim for equitable relief contained in the amended complaint (Aff. in Opp. Ex. 1, ex. I, pp. 15, 16).

In August, 2006, the City moved in Federal Court to dismiss the action remainder of the complaint against it on the grounds that unlike the original complaint, the amended complaint fails to state a claim on which relief could be granted as it does not articulate a *Monell* claim, and that amendment of the complaint to add defendants or claims would be futile as the statute of limitations has run (Aff. in Opp. Ex. 1, City Defendants' Memo. of Law in Supp. of their Motion for Judg. on the Pleadings). This motion was decided by decision and order of the Hon. Paul A.

Crotty dated June 6, 2007. The District Court granted Lieberman summary judgment, granted motions to dismiss by the City and the Assistant District Attorneys, and denied partial summary judgment to the plaintiff and denied plaintiff's motion for leave to file a second amended complaint. The Federal action is now closed, all pending claims having been dismissed.

The Instant Motion

Here, plaintiff moves to amend the complaint for a second time to add new parties and new causes of action, and also for discovery. Specifically, she seeks to add the name of Detective Sekulo (who is deceased), and four "John Does," representing the police officers "that refused to release their names" and who were involved in her arrest (Not. of Mot., Proposed Second Amended Complaint). She seeks to "reinstate" ADA Gieri based on the existence of at least one document uncovered in the course of discovery underway in the federal court action. She also seeks to add a section 1983 claim, a malicious prosecution claim, a *Monell* claim against the City, claims of respondeat superior, and the violation of rights under the State constitution consisting of intentional infliction of emotional distress, conspiracy, abuse of process, malicious prosecution. In terms of discovery demands, she seeks the identification of the four other officers involved in her arrest,[6] the entire file of her criminal case contained in the office of the District Attorney[7]; the death certificate for Detective Sekulo, and documents and evidence concerning the post-arrest attacks, including the names of those involved, along with12 depositions (Not. of Mot., Pl. Mot. for Discovery, pp. 2-6).

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[6]She has since discovered that one of those involved in her arrest was Detective Gloria Silva (Pl. Reports: Criminal Acts Fraud Documents and Cover-Up ¶ 14).

[7] It appears that plaintiff has obtained a copy of the file through discovery in the federal court action (see Pl. Reports: Criminal Acts Fraud Documents and Cover-Up, Oct. 10, 2006).

Defendants argued in opposition, that the motion should not be decided pending the decision in the federal court action concerning their motion to dismiss the entirety of the complaint in that action, as a dismissal would be *res judicata* and obviate the need for further action. The District Court has now dismissed the Federal action in its entirety. In addition, the City advises that in its June 19, 2001 Response to Preliminary Conference Order, it indicated that a search had been conducted for records pertaining to the incident at issue and that none were found, and in a stipulation dated September 18, 2002, the City's attorney represented that it has no record of plaintiff's arrest and that investigation revealed that only the District Attorney's office was involved in the arrest and prosecution (Aff. in Opp. Ex. 1, ex. C; Ex. 2).[8]

The City argues that the motion to amend the complaint is time-barred, as the statute of limitations for the claim of malicious prosecution, the most recent cause of action, expired on March 22, 2005, three years after the date the criminal charges were dismissed. It further argues that adding Detective Sekula as a defendant should be denied, as plaintiff has known his name since at least the time of her 50-h hearing on May 18, 1999 (Aff. in Opp. Ex. 1, ex. B [50(h) Hearing, May 18, 1999, p. 4]).

Legal Analysis

Pursuant to CPLR 3025(b), "leave to amend the pleadings shall be freely given, absent prejudice or surprise resulting from the delay" (*see, McCaskey, Davies & Assoc., Inc., v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 [1983]). CPLR 3025 is to be "liberally construed," and amendment will be allowed "in the absence of laches, undue prejudice and unfair

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[8]In the September 2002 stipulation, the City indicated that it would serve a formal response stating the same facts. It is unknown whether the City did so provide.

advantage." (*Leutloff v Leutloff*, 47 Misc 2d 458 [Sup. Ct., Onondaga County1965]). In the context of a motion to amend, prejudice means "the loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (*Seaman Corp. v Binghamton Savings Bank*, 243 AD2d 1027, 1028 [3d Dept 1997]). The party opposing the amendment would be hindered in preparing its case or prevented from taking some action in support of its position (*Garrison v Wm. H. Clark Municipal Equipment*, 239 AD2d 742, 742-743 [3d Dept 1997]).

Motion to Add New Parties

The relation back doctrine, CPLR 203[b], allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are "united in interest." Similarly, CPLR 203(e) allows a new claim or claims against the same party to be asserted without running afoul of the statute of limitations. The doctrine allows a plaintiff to correct pleading errors after the statutory limitations period has expired, where the court has determined that there will be no undue prejudice to the defendant or potential defendant (*Buran v Coupal*, 87 NY2d 173, 177-178 [1995], citing *Duffy v Horton Mem. Hosp.*, 66 N.Y.2d 473, 477 [1985]). In order to assess the issue of undue prejudice, the Court of Appeals has implemented a three-part test (*see, Mondello v New York Blood Ctr.*, 80 NY2d 219, 226 [1992]). The three conditions are, first, that both claims arose out of same conduct, transaction, or occurrence; second, that the new party is "united in interest" with the original defendant(s), and by reason of that relationship can be charged with having notice of the action underway and will not be prejudiced in maintaining a defense on the merits; and third, the new party knew or should have known that, but for a

mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well (*Buran v Coupal*, 87 NY2d at 179, citing *Brock v Bua*, 83 AD2d 61, 69 [2d Dept. 1981]). In order to establish a "unity of interest" between two parties, courts have held that there must be a relationship between them that gives rise to vicarious liability of one for the conduct of the other, such that they would stand or fall together and a judgment against one will similarly affect the other (see *Mondello v New York Blood Ctr.*, 80 NY2d at 226; *Matter of 27th Street Block Assn. v Dormitory Auth. of State of New York*, 302 AD2d 155, 164, [1st Dept. 2002]; *Mercer v 203 East 72nd Street Corp.*, 300 AD2d 105, 106 [1st Dept. 2002]). As for the third prong, the Court of Appeals has cautioned that "mistake" is to be narrowly construed so as not to punish a plaintiff for minor drafting errors and other mistakes of that nature, but rather to thwart attempts to manipulate the course of litigation such as where a plaintiff chooses not to assert a claim against a party known to be potentially liable in order to gain a tactical advantage, or to prevent "delay or disruption in the normal course of the lawsuit" (*Buran v Coupal*, 87 NY2d at 181).

Applying the three-prong test to the facts before the court, plaintiff's motion to add the now-deceased Detective Sekulo as a defendant, is denied. Plaintiff has been aware of his role in her arrest since at least her 50-h hearing in 1999, but made no attempt to amend the complaint to add his name before this. This is not an instance where she did not know his name or role in her arrest (*cf., Monir v Khandakar*, 30 AD3d 487 [2d Dept. 2006] [permitting relation back where the plaintiff lacked knowledge that a corporation existed as a potential party until defendant's deposition one-and-a-half years after commencement of action]). Her decision not to seek amendment prior to the running of the three-year statute of limitations is fatal to her motion now.

Similarly, the branch of the motion to add four "John Doe" police officers is also denied, as she was well aware of the number of officers involved in her arrest and there are already 10 John Does listed in the caption, some of whom represent police officers involved in her arrest.

The court notes that after filing her papers in the instant motion, plaintiff learned the name of one of the detectives involved in her arrest, namely Detective Gloria Silva (Pl. Reports: Criminal Acts Fraud Documents and Cover-Up ¶ 14). CPLR 1024 explicitly allows a party who "is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party," to proceed against the person as an unknown party by designating what is known of the name and identity and, if or when the name becomes known, "all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." However, where the statute of limitations has run prior to the acquisition of knowledge concerning the identity of the defendant, a plaintiff must show timely efforts were made to identify the correct party before the statute of limitations expired or face denial of the motion (*see Opiela v May Indus., Corp.*, 10 AD3d 340, 341 [1st Dept. 2004]). Thus, where a plaintiff commenced a wrongful death action against a hospital, two doctors, and a John Doe, M.D. described as a licensed physician with privileges at the hospital who performed the surgery on the decedent, and the plaintiff requested the hospital records only 10 months after the filing of the summons and complaint, and moved a year after the expiration of statute of limitations to amend the caption to insert the doctor's name, the motion to amend was denied (*see, Tucker v Lorieo, M.D.*, 291 AD2d 261 [1st Dept. 2002]). In *Tucker*, the Court held that the relation back doctrine was also inapplicable, as the plaintiff failed to meet the third prong of the test concerning mistake, because the failure to identify and timely serve the doctor was due to laxness by the

plaintiff in requesting the hospital records (*Tucker* at 262).

Here, the first and second prong of the relation back doctrine are met, as the claims against Det. Silva encompass the same conduct and, as an employee of the Police Department, Silva is united in interest with the original defendant, the City of New York, and will not be prejudiced in maintaining a defense. Satisfaction of the third prong required an examination of the entire file in the matter, obtained from the office of the County Clerk. It shows that at the preliminary conference held on June 28, 2001, over the objection of the City's attorney, the parties agreed to provide names and addresses of witnesses and notice witnesses, to schedule depositions for September 11, 2001, and that the City would provide the arrest report, complaint report, and memo book entries, among other items. The order indicates that there were three male and two female police officers "o/l/o D.A.'s office."

Given the events of that day, the depositions did not commence on September 11, 2001, and it is unclear what progress was made in the months immediately thereafter. Plaintiff discharged her attorneys by letter in February 2002. The compliance conference of February 20, 2002, was adjourned because of plaintiff's pending Criminal Court matter. At the compliance conference on May 15, 2002, the City agreed to provide a response to the preliminary conference order within 45 days and depositions of plaintiff and "all arresting officers" were scheduled for August 2002. At the next conference on September 18, 2002, it was only noted that plaintiff had "added [a] new claim based on dismissal of criminal charges," that she would be allowed to amend her complaint and "possibly bring in new party," and that the City "represents that City has no record of [plaintiff's] arrest & that their investigation reveals that only the DA's office was involved in arrest & prosecution." On November 16, 2002, the parties agreed to extend the

time for discovery because plaintiff was bringing an action in Federal Court; it was also anticipated that the State court action would be removed to Federal Court. On March 12, 2003, the compliance conference stipulation indicated that the Federal Court action had been commenced and that plaintiff would advise when the action was removed from State court. On May 7, 2003, the action was stayed, pending removal to Federal Court. On September 10, 2004, the court sent a letter of inquiry regarding the status of the case. The next compliance conference apparently occurred only on April 20, 2005 and was adjourned pending decision of the appeal of the Federal Court decision. On September 14, 2005, it was again adjourned for the same reason. Meanwhile, in the Federal Court action, the commencement of discovery was stayed while the appeal by the assistant district attorneys was pending. After the decision by the Second Circuit was issued, discovery commenced, with plaintiff receiving over 2,000 pages of discovery in September, 2006 (Pl. Reports: Criminal Acts Fraud Documents and Cover-Up, ¶ 1).

Given the procedural history of this matter, with its many delays in part due to waiting for judicial decisions and the ultimate "non-transfer" of the case from State to Federal Court, it cannot be found that plaintiff was unnecessarily dilatory in seeking the records so as to discover the names of the individual officers. Accordingly, the court will entertain a proper motion to amend the caption to add Silva, and any other detectives or officers whose names she has just learned from recent discovery. However, the branch of the instant motion to "reinstate" ADA Gieri is denied for the reasons set forth in the decisions of Judge Stein and Judge Crotty in the Southern District of New York and the Second Circuit as concerns the other assistant district attorneys, namely that Gieri is immune from prosecution in her capacity as an assistant district attorney as plaintiff has failed to sufficiently allege that she acted without a colorable claim of

authority.

Motion to Add New Claims

Plaintiff seeks to add four new claims, apparently initially drafted into her Federal complaint. She seeks to add a second claim of violation of rights pursuant to 42 USC § 1983, as well as a *Monell* claim, respondeat superior, and a claim of violation of rights under State law, specifically intentional infliction of emotional distress, conspiracy, abuse of process, and malicious prosecution. This branch of her motion is decided pursuant to CPLR 203, in accordance with the analysis set forth above, and in accord with the previous decisions by Justice Madden in State court and Judge Stein and Judge Crotty in the Federal Court which are *res judicata*. In particular, Judge Crotty's recent decision dismissing plaintiff's claims pursuant to 42 USC § 1983 and *Monell v Dep't of Soc. Servs.*, 436 U.S. 658 (1978) is binding on the parties here inasmuch as they were fully litigated with the same parties. Plaintiff's attempt to amend her state complaint to now allege these federal causes of action which have been dismissed would be an inappropriate second bite at the apple in a new forum. Accordingly, the court is constrained to deny amendment of the complaint insofar as it pertains to plaintiff's Section 1983 claims and her malicious prosecution and *Monell* claims on *res judicata* grounds.

In Judge Stein's decision, the claims of intentional infliction of emotional distress and conspiracy were deemed to have "fail[ed] to comply with the notice of claim requirement for tort claims against public corporations or any of its officers or employees" (Decision & Order, Stein, J., p. 18, citing *O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981], and *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61-62 [1984]). Accordingly, under the principle of *res judicata*, these claims, which concern the same incident, may not now be added to her State law complaint, as

they have already been ruled upon.

Although the abuse of process claim was also dismissed by Judge Stein, based the Court of Claims Act §10(3) which requires that tort claims against officers or state employees must be filed within 90 days after the accrual of such claim, the Court of Claims Act does not pertain to the City of New York. Accordingly, the one-year statute of limitations applies (*see, Gallagher v Directors Guild of America., Inc.*, 144 AD2d 261, 262 [1st Dept. 1988], *lv denied* 73 NY2d 708 [1989]; CPLR 213[b]). Although it has been held that accrual of the claim need not wait until a favorable termination (*Kelly v Butler*, 246 NY 249, 255 [1927]; *see also Cunningham v State*, 53 NY2d 851, 853 [1981]), where the claim could not accrue prior to the favorable termination because the claimant would not have a cause of action, it has been held that accrual commences at the time of the acquittal or other favorable termination (*see, Dobies v Brefka*, 263 AD2d 721, 723 [3d Dept. 1999], *lv dismissed* 95 NY2d 931 [2000]). Here, the Criminal Court proceeding was dismissed on March 22, 2002, and therefore the claim needed to be interposed before March 22, 2003.

In order to claim abuse of process, a plaintiff must establish (1) regularly issued legal process, civil or criminal, compelling performance or forbearance of some act; (2) the person or entity activating the process was moved by an ulterior purpose to do harm, without economic or social excuse or justification; (3) the person or entity activating the process sought some collateral advantage or corresponding detriment to the plaintiff that is outside the legitimate ends of the process; and (4) actual or special damage (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Inc., Local 1998 AFT AFL-CIO*, 38 NY2d 397 [1975]). Here, plaintiff sufficiently alleges a cause of action sounding in abuse of

process. Moreover, under the relation back doctrine, there is no prejudice to defendants as the action was already commenced and they were aware of the Criminal Court proceeding. Accordingly, this branch of plaintiff's motion is granted.

The other cause of action plaintiff seeks to add is that of malicious prosecution. Notably, there was a claim of malicious prosecution claim pending in the Federal action against the City, concerning the same incident. As that claim has now been dismissed by Judge Crotty, principles of *res judicatat* and collateral estoppel bar it from being relitigated in this court. Accordingly, the branch of her motion seeking to add a cause of action for malicious prosecution must be denied.

Motion to Compel Discovery

Plaintiff seeks the names of the police officers involved in her arrest. The City has already indicated that it does not have this information. To the extent that it has not served a formal notice concerning its attempt to find and produce the names of the officers, the City is directed to serve a *Jackson* affidavit setting forth the details of the search undertaken and the results, within 20 days of entry of this decision and order.

As noted above, through the course of discovery in the Federal action, plaintiff has learned the name of at least one of those involved in her arrest, Detective Silva. If Detective Silva is in the employ of the NYPD, she is to be produced for a deposition within 60 days of service of a copy this decision and order with notice of its entry. If she is no longer in the employ of the NYPD, or was never in the NYPD's employ but rather was a member of the District Attorney's Detective Squad, defendants should provide her last known address should be provided to plaintiff in order that plaintiff may attempt to subpoena her for a deposition.

Plaintiff seeks a copy of the file in her Criminal Court proceeding. Indeed, plaintiff has submitted copies of many of these documents to the court while this motion was *sub judice*. It appears that this has been provided to her through discovery in the Federal court. Accordingly, this branch of her motion is denied.

Plaintiff's request that the City provide a copy of the death certificate of Detective John Sekulo is denied. Death certificates are public record, and she may procure a copy on her own initiative.

Plaintiff requests various items gathered at the "crime scene" when she was allegedly assaulted and beaten by Martin Lieberman, as well as "all files and documents" concerning the alleged attacks on her by Lieberman and associates in October 1997 and June and July 2000. To the extent these items and documents have not been produced in the Federal action, the City is to produce them or provide *Jackson* affidavits concerning the search, within 60 days of the date of service of a copy of this decision and order with notice of its entry.

Plaintiff's request for copies of the arrest and search warrants issued in her criminal matter are denied without prejudice to seeking appropriate relief in the Criminal Term.

Plaintiff's requests for the names of all investigators and police officers and detectives involved the initial investigation as well as in her arrest and prosecution is redundant with her request for the file in the criminal matter and is therefore denied as such.

Plaintiff's request for all "records and files from triple AAA service" in the possession of the Police Department is denied as being vague and overly burdensome.

Plaintiff's request that any items not yet returned which were taken in the course of the search of her office and apartment on May 8, 1998, is denied as beyond the scope of this

proceeding.

Plaintiff's final request (Item 13) for "all documents retained by agents, accountants or attorneys," which include computer files, financial records, interoffice communications, and many other types of items, is denied as being broad, vague, and overly burdensome.

Plaintiff seeks the depositions of the four John Does (Silva being one of them), as well as 11 other individuals. The deposition of Det. Silva, one of the John Does, has already been addressed. To the extent that the individuals are non-party witnesses, plaintiff is to complete the discovery of party witnesses before the court will entertain applications to subpoena non-party witnesses for depositions. The plaintiff shall follow statutory guidelines for subpoenaing them set forth in CPLR 3106 and 3107. Two of the individuals whom plaintiff seeks to depose are Detective Rohan and Detective Flenery, their first names being unknown. If these detectives are still employed by the NYPD, they are witnesses and need not be served with subpoenae (CPLR 3106[b]) and the Corporation Counsel shall make them available for deposition within 60 days of service of a copy of this decision and order with notice of its entry.[9] If no longer employed by the NYPD, or if they are employees of the non-party District Attorney's detective squad, then defendants shall provide their full names and last known addresses, if known.

Accordingly, it is

ORDERED that the branch of the motion to amend the complaint is granted to the extent that the complaint shall be amended to add a claim of abuse of process, and is otherwise denied;

[9]It is unclear what plaintiff seeks to learn from either individual, as their names are unfamiliar to the court. Plaintiff is cautioned that it is unlikely she will be given an opportunity to question every person who had anything to do with her arrest.

and it is furthermore

ORDERED that plaintiff is to file and serve an amended verified complaint in accordance with this decision within 30 days of the date of its entry, after which defendants are to answer pursuant to the CPLR; and it is further

ORDERED that the branch of the motion to compel discovery is granted to the extent set forth in the text of the decision and otherwise denied.

This constitutes the decision and order of the court.

Dated: June 25, 2007
New York, New York

J.S.C.