

Shmueli v City of New York

2008 NY Slip Op 30593(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0115002/1999

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 52

Index Number : 115002/1999

SHMUELI, SARIT

VS.

NYC POLICE DEPT.

SEQUENCE NUMBER : # 005

AMEND CAPTION

Justice

INDEX NO.

115002-99

MOTION DATE

MOTION SEQ. NO.

#005

MOTION CAL. NO.

read on this motion to/for _____

PAPERS NUMBERED

1
2
3

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

Answering Affidavits — Exhibits con motion

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 29 2008

MOTION AND CROSS MOTIONS ARE DECIDED IN ACCORDANCE WITH AMENDED DECISION AND ORDER

NEW YORK CITY CLERK'S OFFICE

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

Dated: 2/25/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

SARIT SHMUELI,
Plaintiff,

Index Number 115002/1999
Mot. Seq. No 005

against

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

DECISION AND ORDER

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For Plaintiff:
Sarit Shmueli, *pro se*
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New York NY 10021

For Defendant:
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
By: Chevon Andre Brooks, Esq.
100 Church Street
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FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to amend and cross-motion to reargue:

Papers ¹	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion and Affidavits.....	<u>2</u>
Plaintiff's Reply to Opposition and Cross.....	<u>3</u>

PAUL GEORGE FEINMAN, J.:

Plaintiff moves to amend the complaint and caption to add four persons to the caption. Defendant City of New York cross-moves to reargue portions of the court's June 25, 2007 decision and order. For the reasons set forth below, the motion is granted. The cross-motion seeking reargument is granted and upon reconsideration, the court amends its June 25, 2007 decision and order as set forth below so as to deny amendment of the complaint to add a claim of abuse of process claim as against the City of New York.

¹After the motion and cross-motion were marked fully submitted, plaintiff filed and served additional papers which were received by the court while the motion was *sub judice*. These papers have not been considered on this motion and cross-motion.

Background

This action concerns the arrest of plaintiff on May 5, 1998 and the subsequent dismissal of the criminal prosecution on speedy trial grounds on May 22, 2002. The extensive procedural history of plaintiff's litigation was set forth in the court's decision and order of June 25, 2007, and need not be repeated here.

Plaintiff, who is self-represented, seeks permission to amend the complaint for a third time so as to add the name of Detective Gloria Silva as well as the unknown names of Silva's supervisor and two other officers who participated in her arrest.

Defendant cross-moves to reargue the court's June 25, 2007 decision and order as it pertains to plaintiff's abuse of process claim and its finding of a unity of interest between Det. Silva and the City of New York. It also opposes plaintiff's motion to add parties based on the running of the statute of limitations. In addition, it seeks additional time to comply with the court's directive concerning production of witnesses and certain documents.

Legal Analysis

Defendant's Cross-Motion

Defendant seeks to reargue portions of the June 25, 2007 decision. The granting of a motion to reargue is discretionary and will be granted in order to allow a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). CPLR 2221 allows a party to seek reargument by motion made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry (CPLR 2221[d] [3]). Here, the June 25, 2007 decision was entered on July 2, 2007. According to plaintiff's process server's

affidavit of service housed in the County Clerk's file, a copy of the decision with the stamped July 2, 2007 entry date, was mailed to defendant's attorney on July 16, 2007. There is no evidence that plaintiff included *written notice* along with the copy of the order, as required by the statute. The mere service of a copy of an entered decision/order is insufficient notice so as to trigger the running of the 30-day period to file a motion to reargue. Accordingly, defendant's cross-motion, filed on August 23, 2007, cannot be found untimely.

Defendant argues that the court misapprehended the law as concerns the claim of abuse of process. The decision of June 25, 2007 held that plaintiff sufficiently alleged a cause of action sounding in abuse of process and that under the relation back doctrine, there would be no prejudice to defendant in allowing amendment of the complaint to add the claim, given that the City was aware of the Criminal Court proceeding and that the cause of action was already alleged (Dec. & Ord., June 25, 2007, at 15-16).²

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 damages (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Inc., Local 1998 AFT AFL-CIO*, 38 NY2d 397 [1975]). Defendant argues that the claim of abuse of process, an intentional tort,

²The Notice of Claim alleged abuse of process.

cannot be made against a municipality and even if it could, plaintiff has not sufficiently alleged that the municipality had an intent to do harm, citing *Johnson v Kings Co. Dist. Atty's Office*, 308 AD2d 278, 288-289 (2d Dept. 2003) (negligence not a basis for abuse of process claim), *Santoro v Town of Smithtown*, 40 AD3d 736, 738 (2d Dept. 2007) (no allegation of intent to harm); *Curiano v Suozzi*, 63 NY2d 113, 116-117 (1984) (malicious motive insufficient alone insufficient to claim abuse of process). It argues that to find a valid cause of action against the City of New York for abuse of process because of the actions of certain of its employees, would incorrectly transfer the intent prong from the individuals to the City. It further argues that if certain of its employees did act with intent to harm plaintiff by detaining her without justification and doing the other acts which she has alleged, they would not be acting within the scope of their employment and the City would not be united in interest with them.

Defendant's motion to reargue is granted and upon reargument, the Court vacates that portion of the June 25, 2007 decision and order as concerns the addition of a claim of abuse of process as against the City of New York. While such a claim may be valid against employees of defendant, plaintiff has not sufficiently alleged that the New York Police Department, *as an entity*, engaged in acts that were an abuse of process. Accordingly, the branch of plaintiff's previous motion to amend her complaint to add a claim of abuse of process against the City of New York and the New York City Police Department, must be denied.³

Plaintiff's Motion to Add Parties

CPLR 3025(b) provides that "leave to amend the pleadings shall be freely given, absent

³The remainder of defendant's cross-motion/opposition is discussed below.

prejudice or surprise resulting from the delay” (*see, McCaskey, Davies & Assoc., Inc., v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 [1983]). The statute is “liberally construed” (*Leutloff v Leutloff*, 47 Misc 2d 458, 459 [Sup. Ct., Onondaga County 1965]).

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.” Where the statute of limitations has run prior to the acquisition of knowledge concerning the identity of the defendant, as it has in the instant matter, 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]).

As noted in the court’s June 25, 2007 decision, plaintiff learned during the course of the last round of motion practice, that one of the detectives involved in her arrest was Detective Gloria Silva, and the court explicitly stated that it would entertain the instant motion to amend the caption to add Silva, as well as the names of any other detectives or officers who were involved in her arrest. The court’s June 25, 2007 decision held that, based on the motion papers and an examination of the court file, for statute of limitations purposes, Silva could be deemed to be united in interest with defendant, and that pursuant to CPLR 203 (b), plaintiff’s claims against Silva related back to the claims previously asserted against defendant for statute of limitations purposes.

Defendant now argues that if Silva conducted herself in the manner claimed by plaintiff,

she acted outside the scope of her employment and would not be united in interest with the City. It opposes the motion to amend the complaint to add Silva as a defendant on the basis that the three-year statute of limitations has run and argues that there is no unity of interest between the detective and the municipality.

The doctrine of “unity in interest” requires a relationship between the proposed new party and the defendant that gives rise to vicarious liability of one for the conduct of the other (*Mercer v 203 E 72nd St. Corp.*, 300 AD2d 105, 106 [1st Dept. 2002]). The relationship must be such that the two parties will stand or fall together in the litigation (*Donovan v All-Weld Prods. Corp.*, 34 AD3d 257, 257 [1st Dept. 2006]). A judgment against one would similarly affect the other (*Martz v City of N.Y.*, 2005 NY Slip Op. 51728U, 9 Misc. 3d 112A [Sup. Ct., N.Y. County 2005]).

Here, defendant admittedly has not ascertained what Silva’s actions were, and whether her actions were proper and within the scope of her employment. Therefore, it cannot at this juncture argue that there is no unity of interest between her and it. Accordingly, plaintiff’s motion to amend her complaint to add Detective Gloria Silva as a defendant is granted. The court adheres to its prior ruling that finds a unity of interest between Silva and the City.

Defendant also argues that the branch of plaintiff’s motion seeking to add three unnamed officers also involved in her arrest, should be denied because she does not know the actual names and the court’s decision indicated it would entertain a motion to add the names of “any other detectives or officers whose names she has just learned from recent discovery” (Dec. & Ord., June 25, 2007, at 13). However, defendant has admittedly not yet complied with discovery demands, including producing Detective Silva for a deposition, and it seeks an extension of time

in which to do so. Thus, plaintiff legitimately has not yet learned the names of the other officers involved in her arrest, but can only describe them as Silva's supervisor, and John Doe 1 and 2. For the reasons set forth above concerning the amending of the complaint to add Detective Silva, plaintiff's motion to add the three other officers is granted.

Defendant seeks additional time to comply with the court's June 25, 2007 order directing (1) the production of a *Jackson* affidavit setting forth the search undertaken by the City to discover the names of the police officers; (2) the production of Dct. Silva for a deposition *or* her last known address; (3) various items not previously produced as concerns the "crime scene," and "all files and documents" concerning attacks on plaintiff in October 1997 and June and July 2000, *or Jackson* affidavits if such materials are not found, and (4) production of Detective Rohan and Detective Flenery for depositions *or* their full names and last known addresses if they are no longer or never were employed by the NYPD.⁴ The City seeks an additional 90 days. It explains that if Detective Silva is added as a defendant, the City must determine whether she was acting within the scope of her duties and should be represented by the Corporation Counsel's office, and will then set a date for her examination before trial. The documents to be produced, defendants further state, are "likely" to be in the possession of the Office of the District Attorney, a non-party, and thus require additional time to acquire (Not. of Cross-Mot. Brooks Off. ¶ 14).

Defendant's application for an extension of time is granted as follows:

It shall produce a *Jackson* affidavit setting forth the search undertaken by the City to discover the names of the police officers within 10 days of service of a copy of the decision with

⁴This is a summary of the court's Decision and Order of June 25, 2007, at 16-18.

notice of its entry.

It is to produce Detective Silva for a deposition, or her last known address; within 30 days of service of a copy of this decision and order with notice of its entry.

It is to produce within 45 days of the date of service of a copy of this decision and order with notice of its entry, either *Jackson* affidavits concerning the unsuccessful searches for the following, or produce the items not previously produced in the Federal litigation, that were gathered at the “crime scene” when plaintiff was allegedly assaulted and beaten by Martin Lieberman, and “all files and documents” concerning the alleged attacks on her by Lieberman in October 1997 and June and July 2000.

It is produce within 45 days of service of a copy of this decision with notice of its entry, both Detective Roan and Detective Flencry for depositions if they are still employed by the NYPD. If one or both is no longer employed by the NYPD or is employed by the District Attorney’s office, then defendant shall provide their full names and last known addresses within 45 days.

The failure of the City to adhere to the time frames set forth in this decision and order may result in the court imposing sanctions, upon motion made with notice. It is

ORDERED that the motion to amend the complaint for a third time to add the names of Detective Silva and three other John Doe officers is granted, and the caption is hereby amended to read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
SARIT SHMUELI,

Plaintiff,
against

Index Number

115002/1999

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, DETECTIVE GLORIA SILVA, and JOHN DOES # 1-#3, representing Officers or Detectives at the scene of plaintiff's arrest, with one person being Silva's supervisor,
Defendants.

-----X;

and plaintiff is directed to serve a copy of this decision and order upon the County Clerk's office (Basement, 60 Centre Street), Motion Support (room 119, 60 Centre), and the DCM office (room 102, 80 Centre Street);⁵ and it is further

ORDERED that the cross-motion to reargue the decision and order of June 25, 2007 is granted, and upon reconsideration, the court vacates the portion of its June 25, 2007 decision and order that granted plaintiff's motion to add a claim of abuse of process as against defendant City of New York, and otherwise adheres to its earlier decision; and it is further

ORDERED that defendant is to comply with the disclosure schedule set forth herein, within the time frame set forth herein, or be subject to sanctions issued upon motion; and it is further

ORDERED that the parties are to appear at the previously scheduled compliance conference on May 7, 2008, in 80 Centre Street, room 103.

The foregoing shall constitute the decision and order of this court.

Dated: Feb. 25, 2008
New York, New York

J.S.C.

HON. PAUL G. FEINMAN
FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

(2008 Pt 52 D&O_115002_1999_005)