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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 115474/2006
STUBBOLO, FRANK J.

vs

CITY OF NEW YORK
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

... to _____ were read on this motion to/for dismiss

	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 and cross-motion are

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER dated April 23, 2008

FILED
APR 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/23/08

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

FRANK J. STUBBOLO and
GAIL ELIZABETH STUBBOLO,

Plaintiff(s),

against

THE CITY OF NEW YORK, et al.,

Defendant(s).

Index No.: 115474/2006

DECISION/ORDER

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff Frank J. Stubbolo ("Stubbolo") sues to recover damages from defendants, City of New York, New York County District Attorney Robert Morgenthau, and various district attorneys, unit chiefs and investigators in the New York County District Attorney's Office, for injuries allegedly arising out of defendants' investigation and prosecution of Stubbolo on various criminal charges. The first cause of action of the complaint asserts state law claims for malicious prosecution, defamation in connection with the prosecution, false arrest and imprisonment, abuse of process, illegal search and seizure, negligence, and negligent infliction of emotional distress. This cause of action also asserts a federal claim for whistle-blowing under 18 USC § 1513 and a federal claim for civil rights violations pursuant to 42 USC § 1983. The second cause of action asserts a derivative claim by Stubbolo's wife, plaintiff Gail Stubbolo. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).[1] Plaintiffs' cross-move for a default judgment based on defendants' failure to answer the complaint.

[1]While defendants argue for the first time on the reply that the complaint was not properly served on them, they request that the motion to dismiss be decided on the merits. (See Reply Aff., ¶ 9.)

At the outset, plaintiffs' cross-motion for a default judgment against defendants is denied. Defendants have a reasonable excuse for their approximately two-month delay in answering or moving, based on their understanding that plaintiffs' counsel would consent to an extension. Notably, plaintiffs did not move for a default judgment until three months after defendants served their motion, and there is no prejudice to plaintiffs as a result of defendants' delay. Under these circumstances, the court declines to enter a default judgment. (See DeMarco v Wyndham Intl., Inc., 299 AD2d 209 [1st Dept 2002]; Terrones v Morera, 295 AD2d 254 [1st Dept 2002].) Defendants' motion will accordingly be considered on the merits.

Defendants first move to dismiss certain of the claims on statute of limitations grounds. The complaint asserts state and federal claims arising out of execution of a search warrant in May 2000, the arrest and indictment of Stubbolo in 2002 for grand larceny and insurance fraud, the arrest and indictment of Stubbolo in 2003 for tax evasion, and two grand jury presentations in 2005 of charges for tax evasion which did not result in the filing of indictments. Stubbolo was acquitted of all charges in the 2002 indictment (New York County Indictment No. 724/02) as of July 2004. He was acquitted of all charges in the 2003 indictment (New York County Indictment No. 4133/03) in July 2005. A notice of claim was timely served on or about October 18, 2005, and the instant action was commenced on or about October 16, 2006.

While defendants concede the timeliness of plaintiff's state and federal claims "involving his prosecution under Indictment Number 4133/2003," as well as the timeliness of his "federal defamation and malicious prosecution claims stemming from Indictment Numbers 724/2002 and 4133/2003" (Ds.' Memo. Of Law In Support ["Ds.' Memo"] at 14), defendants contend that various of the state and federal claims are time-barred.

It is undisputed that the statute of limitations for the state law claims is set forth in General Municipal Law 50-i(1) which provides, in pertinent part, that an action against a city "for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city * * * or of any officer, agent or employee thereof" shall be commenced "within one year and ninety days after the happening of the event upon which the claim is based." It is further undisputed that the statute of limitations for plaintiff's cause of action pursuant to 42 USC § 1983 is three years from the date of accrual of each claim on which the § 1983 cause of action is based. (See 423 S. Salina St., Inc. v City of Syracuse, 68 NY2d 474, 486-487 [1986], cert denied 481 US 1008 [1987].)

As to the state claims, defendants argue that the intentional torts (false arrest, abuse of process, malicious prosecution, and defamation) arising out of the 2002 indictment, the negligence claims arising out of that indictment, and the claim for illegal search and seizure arising out of the 2000 search warrant are barred by the one year and ninety day statute of limitations. As this action was commenced in October 2006, any claims accruing prior to July 2005 ordinarily would be time-barred. Plaintiffs do not dispute that the one year and ninety day statute of limitations applies to these state claims or "that under ordinary circumstances the individual state law claims other than that of indictment 4133/2003 would be barred." (Raio Aff. in Opp., ¶ 12.) Plaintiffs argue, however, that defendants' acts constituted a continuous tortious prosecution which did not end until July 20, 2005, the date of plaintiff's last acquittal. Plaintiffs contend that their claims did not accrue until that date and therefore are timely.

Under New York law, "'despite the general principle that a cause of action accrues when the wrong is done, regardless of when it is discovered, certain wrongs are considered to be

continuing wrongs, and the statute of limitations, therefore, runs from the commission of the last wrongful act.'" (Leonhard v U.S., 633 F2d 599, 613 [2d Cir 1980], cert denied 451 US 908 [1981][quoting McLaughlin, 1972 Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C203:1].) "New York's continuing tort doctrine does not extend the limitations period for any continuing pattern of tortious conduct, but rather is limited to certain recognized torts that involve continuing harm." (Lucas v Novogratz, 2002 WL 31844913, *7 [SD NY 2002].) Courts have applied the doctrine in such contexts as claims for intentional infliction of emotional distress (Shannon v MTA Metro-North R.R., 269 AD2d 218 [1st Dept 2000]), employment discrimination (Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights, 225 AD2d 856, 858 [3d Dept 1996]), and lease violations (1050 Tenants Corp. v Lapidus, 289 AD2d 145, 146 [1st Dept 2001]). However, plaintiffs have not cited, and the court's own research has not located, any authority to support the application of the doctrine to the on-going investigations and prosecutions of criminal charges at issue.

Rather, as to the state law claims, it is well settled that a cause of action for malicious prosecution accrues when the action alleged to have been brought maliciously is terminated in the plaintiff's favor. (Nunez v City of New York, 307 AD2d 218, 219 [1st Dept 2003]; Scomello v Caronia, 232 AD2d 625 [2d Dept 1996], lv denied 90 NY2d 922 [1997].) A separate statute of limitations applies to a cause of action for false arrest and imprisonment, which accrues "at the time of plaintiff's actual physical release from confinement." (Allee v City of New York, 42 AD2d 899 [1st Dept 1973]; Nunez, 307 AD2d at 219.) Moreover, where, as here, there are claims based on separate arrests and imprisonments, "the claim for each of the imprisonments

[arises] as of the time each such imprisonment terminated and not from the ultimate date of acquittal of the charges." (Schildhaus v City of New York, 23 AD2d 409, 411 [1st Dept 1965] [internal citation omitted], affd 17 NY2d 853 [1966], cert denied 385 US 906.)

While courts have characterized false arrest and imprisonment as continuing torts, "their continuity is restricted to the period of actual restraint." (Lucas v Novogratz, 2002 WL 31844913 at *7.) It has therefore been held that arrests and prosecutions are separate acts and that false arrest and malicious prosecution are independent torts. (Id. [under New York law, arrests and prosecutions in different years were "separate and distinct acts" which, "if wrongful, constituted discrete torts"].)[2]

Under § 1983 as well, separate statutes of limitations have been applied to false arrest and malicious prosecution claims. (See Singleton v City of New York, 632 F2d 185, 192 [2d Cir 1980], cert denied 450 US 920.) Moreover, courts which have recently considered the applicability of the "continuing violation" doctrine to a § 1983 cause of action have concluded that this doctrine is not applicable except in "compelling circumstances," as where "the unlawful conduct takes place over a period of time, making it difficult to pinpoint the exact day the

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[2]The cases cited above, which have articulated the proposition that a cause of action for false arrest accrues from the date of the plaintiff's release from confinement, have not distinguished between arrests made without warrants and arrests, like those at issue here, made with warrants. It is now well settled that a claim that an arrest with a warrant was unlawful is one for malicious prosecution rather than false arrest. (See Broughton v Kellogg, 37 NY2d 451 [1975], cert denied sub nom Schanbarger v Kellogg, 423 US 929; Johnson v Kings County Dist. Attorney's Off., 308 AD2d 278 [2d Dept 2003]. See also Wallace v Kato, ___ US ___, 127 S Ct 1091 [2007].) Plaintiff does not, however, argue that the statute of limitations for malicious prosecution applies to plaintiff's state false arrest claims. Nor is there any allegation in the complaint that either of the allegedly unlawful arrests would have impugned a criminal conviction (as where the only evidence for conviction was obtained during the arrest), in which event, the statute of limitations for the § 1983 claim, to the extent based on the allegedly unlawful arrest, would not accrue until the termination of the criminal prosecution. (See Covington v City of New York, 171 F3d 117 [2d Cir 1999], cert denied sub nom City of New York v Covington, 528 US 946; Woods v Candela, 47 F3d 545 [2d Cir 1995], cert denied sub nom Candela v Woods, 516 US 808.)

violation occurred; where there is an express, openly espoused policy that is alleged to be discriminatory; or where there is a pattern of covert conduct such that the plaintiff only belatedly recognizes its unlawfulness." (McFadden v Kralik, 2007 WL 924464, *7 [SD NY 2007] [internal quotation marks and citation omitted] [doctrine not found applicable to § 1983 action based on malicious prosecution, false arrest, and false imprisonment]. Accord Bissinger v City of New York, 2007 WL 2826756 [SD NY 2007].) In the instant action, similarly, the court finds the doctrine inapplicable to the complaint as pleaded, given that the allegedly wrongful arrests and prosecutions occurred on discrete dates that were known to plaintiff, and there is no allegation of covert action that prevented plaintiff from suing on his claims within the applicable limitations periods.

Further, a conclusory assertion, like that made here, that the wrongful acts were "committed in furtherance of a conspiracy" or part of a common scheme or plan "does not postpone accrual of claims based on individual wrongful acts." (See Singleton, 632 F2d at 192.) Plaintiff was therefore required to bring the action within the statute of limitations for the earlier tort or "forgo that action." (See Lucas, 2002 WL 31844913 at *7.)

It is settled that a plaintiff also may not circumvent a shorter statute of limitations for a traditional tort by characterizing the claim as one with a longer statute of limitations. (See e.g. Klein v Martin, 221 AD2d 261 [1st Dept 1995], lv denied 88 NY2d 801 [1996]; Trott v Merit Dept. Store, 106 AD2d 158 [1st Dept 1985].) While, as noted above, the continuing tort doctrine has been applied to intentional infliction of emotional distress claims (see Shannon v MTA Metro-North R.R., 269 AD2d 218, supra), the specific wrongs alleged in the complaint include false arrest and imprisonment and malicious prosecution. As these wrongs have been held to

constitute separate torts rather than torts collectively subject to the continuing tort doctrine, the separate statute of limitations for each tort applies.

It is undisputed that the prosecution of Stubbolo for charges in the 2002 indictment terminated in his favor in July 2004. As the subsequent prosecution of Stubbolo for charges in the 2003 indictment was separate and distinct, it did not toll the statute of limitations for the state law claims arising out of the 2002 prosecution. Therefore, even if all of plaintiff's state claims in connection with the 2002 indictment are given the benefit of the July 2004 accrual date, they are time-barred. Plaintiffs' state tort claims in connection with the 2002 indictment for malicious prosecution, defamation, false arrest and imprisonment, abuse of process, negligence, and negligent infliction of emotional distress will accordingly be dismissed.

Further, the state law cause of action for illegal search and seizure, and the federal § 1983 cause of action to the extent based on illegal search and seizure, both allege that the property that was taken exceeded the scope of the search. (See Complaint, ¶ 16.) These causes of action both accrued at the time the property was taken. (See Murray v City of New York, 283 AD2d 560 [2d Dept 2001] [state law]; Kripp v Luton, 466 F3d 1171 [10th Cir 2006] [§ 1983]; Remigio v Kelly, 2005 WL 1950138 [SD NY 2005] [§ 1983].) As the property was taken in May 2000, the claims are untimely.

The illegal search and seizure claim is also based on an allegation that the warrant was illegally obtained. (See Complaint, ¶ 16.) The complaint acknowledges that "no charges were ever filed against the plaintiff as a result of the aforementioned search and seizure" (id., ¶ 17), and plaintiff thus does not contend that this claim accrued only upon termination of an ensuing criminal prosecution. This claim therefore also accrued at the time of the search and seizure, and

is untimely under both the state and federal causes of action.

Plaintiff asserts a state law cause of action for false arrest based not only on his February 2002 arrest, dismissed above as untimely, but also on his June 2003 arrest. Plaintiff's § 1983 cause of action alleges false arrest claims based on the two arrests. It is undisputed that plaintiff was released from prison in connection with both arrests within one day. Plaintiff's state and federal claims based on false arrest are accordingly barred by the one year and ninety day and the three year statute of limitations, respectively.

Plaintiff's state law defamation claims are also untimely to the extent based on statements made during the investigations. A cause of action for defamation generally accrues at the time the defamatory statement is first published. (See Firth v State of New York, 98 NY2d 365, 369 [2002]; Hoesten v Best, 34 AD3d 143, 150 [1st Dept 2006].) The complaint alleges two specific defamatory statements: that in February 2002, before plaintiff was actually indicted for the first time, defendants issued a press release falsely stating that plaintiff had been charged in a seven count indictment (Complaint, ¶ 19); and that during the course of the tax investigation, defendants made false statements to witnesses, including that plaintiff had committed felonies and was going to be indicted. (See Complaint, ¶¶ 21-22.) Although the complaint does not specify whether the 2002 or 2003 grand jury investigation was at issue, both were conducted more than one year and ninety days before commencement of this action, and the defamation claim, to the extent based on statements made during the investigation, is therefore time-barred.

Defendants do not seek, and the court accordingly does not consider, whether dismissal is required, based on the statue of limitations, of "federal defamation claims" in connection with either the 2002 or 2003 indictments. (Ds.' Memo. at 14.)

Defendants further argue that all of the claims that are timely must nevertheless be dismissed on the ground that the wrongful acts by defendants that are alleged in the complaint are protected by absolute prosecutorial immunity. Plaintiffs argue that this branch of the motion should be denied because there are issues of fact as to whether defendants' acts are protected by qualified or absolute immunity.

As defendants' motion is addressed to the face of the pleading pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction"and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].)

It is well settled that prosecutors are protected by absolute immunity from a civil damage action, whether brought under state tort law or federal § 1983, for prosecutorial activities that are "'intimately associated with the judicial phase of the criminal process'." (Rodrigues v City of New York, 193 AD2d 79, 85 [1st Dept 1993], quoting Imbler v Pachtman, 424 US 409, 430 [1976]; Johnson, 308 AD2d at 285.) A prosecutor is entitled to absolute immunity for the initiation of a criminal prosecution and presentation of the State's case at trial. (Imbler, 424 US at 431. See Buckley v Fitzsimmons, 509 US 259, 269 [1993][summarizing Imbler as holding

that prosecutors have "absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the State's case at trial"]. See also Arteaga v State of New York, 72 NY2d 212 [1988].) Such protection is available to prosecutors acting in the judicial phase of the prosecution even if "they acted maliciously to the injury and damage of" the plaintiff. (See Schanbarger v Kellogg, 35 AD2d 902 [3d Dept 1970], lv denied 29 NY2d 485 [1971], cert denied 405 US 919 [1972]; Shmueli v City of New York, 424 F3d 231 [2d Cir 2005].)

However, district attorneys "are not entitled to absolute immunity for official actions taken by them under any and all circumstances, and at all times." (Chetrick v Cohen, 305 AD2d 359, 361 [2d Dept 2003]. See Rodrigues, 193 AD2d at 85-87.) As to both state tort and § 1983 claims, courts take a "functional approach" to analyzing prosecutorial immunity by examining the nature of the prosecutorial acts at issue. (Rodrigues, 193 AD2d at 86; Imbler, 424 US at 430; Buckley, 509 US at 269.) There is some authority that a prosecutor is entitled to absolute immunity from state claims based on the prosecutor's acts not only in prosecuting but also in investigating criminal charges. (See Rodrigues, 193 AD2d at 87; Hirschfeld v City of New York, 253 AD2d 53, 59 [1st Dept 1999], lv denied 93 NY2d 814. But see Rosen & Bardunias v County of Westchester, 158 AD2d 679 [2d Dept 1990, lv denied 76 NY2d 703, cert denied sub nom Bardunias v County of Westchester, 498 US 1086 [1991]; Cunningham v State of New York, 71 AD2d 181 [3d Dept 1979].) However, both New York state and federal courts analyzing § 1983 claims recognize that a prosecutor is entitled only to qualified immunity from a § 1983 claim based on the prosecutor's investigative acts. (See Rodrigues, 193 AD2d at 87; Buckley, 509 US at 273 [prosecutor entitled only to qualified immunity "[w]hen prosecutor performs the investigative functions normally performed by a detective or police officer"].)

In applying these standards, the court must therefore examine the nature of the prosecutorial acts at issue. Plaintiff's state law causes of action arising out of the 2003 indictment and his § 1983 cause of action, which merely incorporates the allegations of the state law causes of action (Complaint, ¶ 41), are based in part on the claim that defendants are liable for malicious prosecution of the charges at trial (see e.g. Complaint, ¶ 37 [generally alleging malicious prosecution]; ¶¶ 30, 31 [alleging deliberate delays at trial]; ¶ 38 [alleging "knowingly procuring perjured testimony at trial"]) and before the grand jury. (Id., ¶ 40 [alleging, among other misconduct, "failing to correct known false testimony of witnesses presented to the Grand Jury panel," and not presenting exculpatory evidence].)

It is settled that a state law claim for malicious prosecution is barred by absolute immunity. (Drakeford v City of New York, 6 AD3d 302 [1st Dept 2004], appeal dismissed 3 NY3d 731, cert denied 543 US 909.) Under § 1983, the prosecutor is also entitled to absolute immunity from a civil action for malicious prosecution based on an indictment and prosecution, even where the prosecutor knowingly used false testimony or deliberately withheld exculpatory evidence (although such conduct could result in criminal prosecution of the prosecutor). (See Imbler, 424 US at 429.) Absolute immunity also covers the knowing presentation of perjurious testimony to a grand jury (Calderon v Morgenthau, 2005 US Dist Lexis 14270 [SD NY 2005]), and other abuses before the grand jury such as failure to instruct the grand jury on the law, "highly distorted presentation evidence," and lack of probable cause. (Cunningham, 71 AD2d at 183.) The claims for malicious prosecution must therefore be dismissed.

Plaintiff's allegation that defendants interrogated witnesses outside the presence of a sitting grand jury (see Complaint, ¶ 21) also fails to raise an issue as to whether they were acting

in their role as advocates rather than investigators. (Compare Hirschfeld, 253 AD2d at 57-58 [prosecutor held entitled to absolute immunity from abuse of process claim based on issuance of grand jury subpoenas where grand jury had been convened as of return date of subpoenas but not as of date of their issuance] with Rodrigues, 193 AD2d at 85-86 [prosecutors held not entitled to absolute immunity from abuse of process claim where they issued subpoenas to conduct their own investigation before grand jury was convened.)

The complaint does, however, plead allegations of prosecutorial misconduct in the investigation of charges against plaintiff which cannot be said as a matter of law to relate solely to the judicial phase of the criminal process. The complaint alleges generally that defendants negligently conducted an investigation which led to plaintiff's arrest. (Complaint, ¶ 23.) The more specific allegations, given the benefit of all favorable inferences, plead that during the tax investigation and before plaintiff's arrest and indictment, defendants made defamatory statements to "illict [sic] false testimony through the use of threats and scare tactics." (Complaint, ¶¶ 21, 22.) A prosecutor is not entitled to absolute immunity from a § 1983 claim premised on the prosecutor's alleged fabrication of evidence during the preliminary investigation of a crime. (See Buckley v Fitzsimmons, 509 US 259, supra.) Plaintiff's § 1983 claim, to the extent based on such allegation, is sufficiently pleaded to withstand the motion to dismiss.

The court does not find that any of the other allegations of the complaint is sufficient to support either the state law claims in connection with the 2003 indictment or the § 1983 claim. While the complaint alleges abuse of process, it does not identify any process other than the arrests and institution of grand jury or criminal proceedings. The abuse of process claim is therefore duplicative of the false arrest and malicious prosecution claims. Moreover, the abuse

of process claim does not allege that the process was used for a purpose outside its proper scope. (See Hornstein v Wolf, 67 NY2d 721 [1986].)

To the extent that the complaint alleges a claim for negligent supervision, the claim is not actionable under New York law, and plaintiff must proceed under the traditional torts of false arrest and malicious prosecution. (See Johnson, 308 AD2d at 284-285.)

The specifically identified state law defamation claims are time-barred, as held above. Although the complaint also alleges generally that defendants made false statements during the grand jury investigation and prosecution (Complaint, ¶ 21), the complaint fails to set forth "the particular words complained of," and therefore lacks the specificity necessary to state a defamation claim under state law. (See CPLR 3016[a].)

The § 1983 claim is not sustainable to the extent that it is based on alleged defamation. Defendants are entitled to absolute immunity for allegedly false statements made in judicial proceedings if related to the prosecution. (See Burns v Reed, 500 US 478, 489-491 [1991].) In contrast, the false statements alleged to have been made at a press conference or to witnesses during the investigation are entitled only to qualified immunity. (See Buckley, 509 US at 277-278.) However, these alleged statements are an insufficient basis for the § 1983 claim. It is well settled that defamation alone is not a deprivation of a constitutionally protected liberty interest, and that a § 1983 claim must be premised on "stigma plus" – that is, a deprivation of some other liberty or property right recognized by state or federal law. (See Paul v Davis, 424 US 693, 712 [1976]; Valmonte v Bane, 18 F3d 992 [2d Cir 1994]; Matter of Lee TT. v Dowling, 87 NY2d 699 [1996].) Here, the complaint fails to allege any such deprivation.

With respect to plaintiffs' claim of retaliation for whistle-blowing based on 18 USC §

1513(e), defendants correctly assert that this statute provides for criminal sanctions only and does not provide a private right of action. (See In Re Compact Disc Minimum Advertised Price Antitrust Litig., 456 F Supp 2d 131, 145 [D Me 2006], amended on other grounds 2006 US Dist Lexis 74781.)

The New York County District Attorney's Office will be dismissed as a defendant, without opposition and upon this defendant's showing that it is not a "suable entity." District Attorney Morgenthau also seeks dismissal of claims against him on the ground that he may not be held liable on a theory of respondeat superior for the acts of his subordinates. Plaintiff opposes this branch of the motion with a request for discovery as to the extent of the District Attorney's personal involvement, if any, in the investigation and prosecution of plaintiff. The general rule is that dismissal is not proper at an early stage of the case where the plaintiff has not had the opportunity to conduct discovery, and facts necessary to oppose the motion may exist but are within the exclusive knowledge or control of the moving party. (See e.g. Integrated Logistics Consultants v Fidata Corp., 131 AD2d 338 [1st Dept 1987]; Simpson v Term Indus., 126 AD2d 484 [1st Dept 1987]. See Ponce v St. John's Cemetery, 222 AD2d 361 [1st Dept 1995].) District Attorney Morgenthau's motion will therefore be denied as premature.

Defendants' motion is accordingly granted to the following extent:

It is hereby ORDERED that all causes of action in the complaint are dismissed as against defendant New York County District Attorney's Office, and it is further

ORDERED that all causes of action against the remaining defendants are dismissed, except the cause of action pursuant to 42 USC § 1983 to the extent that it is based on alleged fabrication of evidence prior to the initiation of the grand jury proceeding and prosecution in

connection with Indictment No.724/02 or Indictment No. 4133/03.

This constitutes the decision and order of the Court. The parties shall appear for a preliminary conference in Part 57 of this Court on May 15, 2008 at 11:30 a.m.

Dated: New York, New York
April 23, 2008

MARCY FRIEDMAN, J.S.C.