

Martire v City of New York

2009 NY Slip Op 31648(U)

July 20, 2009

Supreme Court, New York County

Docket Number: 106827/2008

Judge: Saliann Scarpulla

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

PRESENT: Salvatore Scarpulla, J.S.C.

PART 52

Index Number : 106827/2008
MARTIRE, GIANNI
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
AMEND CAPTION/PARTIES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

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 *is decided in accordance with the accompanying memorandum decision.*

FILED
JUL 24 2009

COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JUL 22 2009
IAS MOTION SUPP
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MDP

Dated: 7/20/09

Salvatore Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

----- X
GIANNI MARTIRE,

Plaintiff,

- against-

Index No.:106827/2008
Submission Date: 5/27/2009

THE CITY OF NEW YORK,
P.O. PETER COSTE (Shield # 16211),
P.O. MAZZARTI (Shield # unknown),,

DECISION AND ORDER

Defendants.

----- X

For Plaintiff:
Burns & Harris
233 Broadway, Suite 900
New York, NY 10279

For Defendant City of New York:
Michael A. Cardozo, Corporation Counsel
100 Church Street, 4th Floor
New York, NY 10007

Papers considered in review of this motion to amend the caption and the complaint:

Notice of Motion	1
Aff in Support	2
Aff in Opp.	3
Reply Aff	4

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. SALIANN SCARPULLA, J.:

In this action to recover for personal injuries as a result of police action, plaintiff Gianni Martire ("Martire") moves to substitute a party in the caption, amend the complaint, and extend the time for Martire to serve the substituted party under the original index number.

On May 15, 2008, Martire commenced this action by filing a summons and complaint against the defendants the City of New York (the "City"), Police Officer Peter Coste ("P.O. Coste") and Police Officer Mazzarti ("P.O. Mazzarti"), alleging causes of action for civil

002

rights violations, false arrest and imprisonment, malicious prosecution, assault and battery and negligence resulting from Martire's arrest on September 7, 2007.

The City appears to have answered the complaint, and also served an amended answer on behalf of both the City and P.O. Coste.¹ Martire did not receive an answer on behalf of P.O. Mazzarti, and subsequently moved for a default judgment against P. O. Mazzarti. In opposition to the motion for default judgment, the City interposed an affirmation in which a City representative stated that the New York Police Department did not employ an officer by the name of "Mazzarti" on September 7, 2007, or at any time within the past twenty years. The City's representative also indicated that at the time of Martire's arrest, P.O. Coste worked with Police Officer Jack Maestranzi. Based upon the foregoing, on January 29, 2009 this Court (J. Cooper) denied Martire's motion for default judgement against a P.O. Mazzarti.

Martire now moves to amend the complaint to substitute P.O. Jack Maestranzi ("P.O. Maestranzi") for P.O. Mazzarti as a defendant in this case. In opposition, the City argues that P.O. Maestranzi was not named in Martire's notice of claim, that the time to file a notice of claim naming P.O. Maestranzi has expired, and that Martire may not amend his notice of claim to include P.O. Maestranzi.

¹ Martire's attorney states that the City served its answer on or about June 23, 2008, and an amended answer on behalf of P.O. Coste on or about September 3, 2008. The affirmation indicates that both answers are annexed thereto. However, only an unsigned, undated amended answer by both the City and P.O. Coste is annexed to the motion papers. The defendants do not address this in their affirmation in opposition, nor do they annex a copy of their answer.

Discussion

CPLR §3025(b) permits a party to amend the pleadings at any time with leave of court, provided that the opposing party is not prejudiced thereby. Motions to amend pleadings are to be liberally granted absent prejudice or surprise. *See Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28 (1st Dept. 2001). However, such leave should not be granted when the proposed amendment is, on its face, insufficient or without merit. *See Strook & Strook & Lavan v. Beltramini*, 157 A.D.2d 590, 591 (1st Dep't 1990); *Boakye-Yiadom v. Roosevelt Union Free School District*, 57 A.D.3d 929, 931 (2d Dep't 2008).

Here, Martire is seeking to amend the caption and complaint to add a new party, P.O. Maestranzi, as a defendant. Martire, however has not named P.O. Maestranzi in his notice of claim. Martire argues that his failure to name P.O. Maestranzi in the notice of claim does not prevent an amendment adding him as a defendant in this action because *service* of a notice of claim is not a condition precedent to an action against a police officer. *See Delgado v. Connolly*, 246 A.D.2d 484 (1st Dep't 1998).

That a police officer need not be served with the notice of claim does not obviate the need to *name* the police office in a notice of claim before asserting a tort or negligence action against him or her. *See Tannenbaum v. City of New York*, 30 A.D.3d 357, 358 (1st Dep't 2006) (“General Municipal Law §60-e makes unauthorized an action against individuals who have not been named in a notice of claim”); *White v. Avrill Park Central School District*, 195

Misc. 2d 409, 410 (Ren. Co. 2003) (citing Gen. Mun. Law. §50-e(1)(b)).² Thus, the caption and complaint may not be amended to add P.O. Maestranzi as a defendant without Martire first filing a notice of claim naming P.O. Maestranzi, as this action cannot proceed against P.O. Maestranzi if he is not named in the notice of claim. *Tannenbaum*, 30 A.D.3d at 358.

A claimant must serve a notice of claim within ninety days after the claim arises. *Nunez v. City of New York*, 307 A.D.2d 218, 219 (1st Dep't 2003). Here, false arrest, assault, battery and negligence claims Martire's claims arise out of his arrest on September 7, 2007 and detention until September 8, 2007. The time to file the notice of claim against Maestranzi on these claims has lapsed. However, "a court may grant the claimant leave to

² Martire also argues that the City is barred from challenging the addition of P.O. Maestranzi as a defendant by the doctrine of equitable estoppel, because the City failed to notify plaintiff that there was a possible defect in the notice of claim. This argument is unavailing, as "[t]he doctrine of equitable estoppel, [] applies only 'where a governmental subdivision acts or comports itself wrongly or negligently, inducing reliance by a party who is entitled to rely and who changes his position to her detriment or prejudice.'" *Nowinski v. City of New York*, 189 A.D. 2d 674, 675 (1st Dep't 1993) (quoting *Bender v. New York City Health & Hosps. Corp.*, 38 N.Y.2d 662, 668 (1976)). There is no indication that the City "induced" Martire to rely on any information or misinformation about the names of the police officers involved in the incident. In fact, the City, in opposition to the motion for default judgment, properly identified the police office working with P.O. Coste on the date of the incident. The doctrine of equitable estoppel is inapplicable under these circumstances. *Nowinski*, 189 A.D.2d at 675; *LoCicero v. MTA*, 288 A.D.2d 353, 354 (2d Dep't 2001).

Moreover, Martire's argument that the City "could have advised" plaintiff "sooner than they did" that Martire had named the wrong individual is misplaced. The City, the main defendant in this action, is under no obligation to notify plaintiff of defects in the notice of claim. It is the plaintiff's responsibility to investigate and conduct any necessary pre-action discovery so that a notice of claim can be timely filed against the proper parties.

file a late notice of claim within one year and 90 days of accrual.” *Nunez*, 307 A.D. 2d at 219 (citing Gen. Mun. Law §50-e(5); *Pierson v. City of New York*, 56 N.Y.2d 950 (1982)).

Martire’s false arrest claim accrued on September 8, 2007, the date he was released from custody.³ *Nunez*, 307 A.D.2d at 219; *Roche v. Village of Tarrytown*, 309 A.D.2d 842, 843 (2d Dep’t 2003). Leave to file a late notice of claim must be sought within one-year and 90-days of September 8, 2007, or December 8, 2008. As this date has passed, Martire may not seek leave to file a late notice of claim against P.O. Maestranzi for the false arrest cause of action. December 8, 2008 was also the deadline for seeking leave to file a late notice of claim for the causes of action for assault, battery and negligence. *See Battle v. City of New York*, 19 Misc. 3d 1129A (Sup.Ct, Kings Co. 2008) (claims for assault, battery and negligence accrue on the date of the alleged torts).

As Martire’s time to file a late notice of claim for the false arrest, assault, battery and negligence causes of action against P.O. Maestranzi has expired, he may not amend his complaint to assert these causes of action against P.O. Maestranzi. “Inasmuch as plaintiff may not maintain causes of action for which he failed to serve a timely notice of claim, the repleading of those causes of action, the amendment of the complaint with respect to them,

³ Martire’s complaint alleges that he was arrested on September 7, 2007 and released 17 hours later, but the exact time of his arrest is not indicated the notice of claim is not annexed to his motion papers.

or the addition of new claims similarly barred by the failure to timely serve a notice of claim, would be palpably insufficient.” See *Boakye-Yiadom*, 57 A.D.3d at 93.⁴

As to Martire’s claim for malicious prosecution against P.O. Maestranzi, the time to seek leave to file a late notice of claim had not yet expired at the time Martire made this motion. The cause of action for malicious prosecution accrued on March 4, 2008, the date the criminal proceeding ended in Martire’s favor. *Ragland v. New York City Housing Authority*, 201 A.D.2d 7, 9 (2d Dep’t 1994). As to the malicious prosecution claim, therefore, the Court construes Martire’s motion as one to seek leave to file a late notice of claim as against P.O. Maestranzi as well as a motion to amend the complaint.

When considering a motion to file a late notice of claim, key factors considered by the court include: (1) whether the petitioner demonstrated a reasonable excuse for failing to file a timely notice of claim; (2) whether the respondent acquired actual notice of the essential facts constituting the claim within ninety days after the claim arose or within a reasonable time thereafter; and (3) whether the respondent was prejudiced by the delay. See *Nieves v. New York Health and Hospitals Corp.*, 34 A.D.3d 336 (1st Dept. 2006). “Nothing

⁴ Even were the Court to construe Martire’s motion as one to “amend” or “correct” the notice of claim, rather than to file a late notice of claim, Martire would still not be able to add P.O. Maestranzi to the notice of claim on the false arrest, assault, battery and negligence claims. General Municipal Law §50-e(6) allows amendment of a notice of claim at any time “absent bad faith on the part of the plaintiff or prejudice to the defendants.” *Cancel v. NYCHA*, 200 A.D.2d 384 (1st Dep’t 1994). However, “General Municipal Law §50-e(6) does not permit amendments to a notice of claim that are substantive in nature.” *Zwecker v. Clinch*, 279 A.D.2d 572, 574 (2d Dep’t 2001). Adding a party is a substantive amendment to the notice of claim, and is not permitted. See *Moore v. Melesky*, 14 A.D.3d 757, 759 (3d Dep’t 2005).

[* 8]

in the statute makes the presence or absence of any one factor determinative.” *Bay Terrace Cooperative Section IV, Inc. v. New York State Employees' Retirement System Policemen's and Firemen's Retirement System*, 55 N.Y.2d 979, 981 (1982).

Here, the City was clearly on actual notice of the facts constituting the claim in a timely fashion. Martire’s notice of claim was timely as to P.O. Coste and the City, thereby putting the defendants on notice of claims arising out of Martire’s September 7, 2007 arrest. And it was the City which alerted Martire of the proper identity of the other police officer involved. Moreover, as the defendants were on actual notice of the claim, they cannot demonstrate any prejudice caused by the delay. *See, e.g., Gibbs v. City of New York*, 22 A.D.3d 717, 719 (2d Dep’t 2005).

As for the reasonableness of the delay, Martire alleges he failed to timely file a notice of claim against P.O. Maestranzi because he did not learn his identity until the City served its opposition to the default judgment motion in this case. While this excuse is not compelling, “the absence of a reasonable excuse for the [] delay is not necessarily fatal to [an] application for leave to serve a late notice of claim when balanced against the lack of prejudice to the municipality and the fact that the municipality obtained actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter.” *March v. Wappinger*, 29 A.D.3d 998, 999 (2d Dep’t 2006).

Here, the totality of the other relevant factors warrants granting Martire’s motion to the extent of permitting him to file a late notice of claim as to the malicious prosecution

claim. Accordingly, Martire is granted leave to file a late notice of claim *nunc pro tunc* to allege a cause of action for malicious prosecution only against P.O. Maestranzi.

Martire also alleges a cause of action premised on 42 U.S.C. §1983. “The notice of claim requirements of General Municipal Law §50-e do not apply to Federal civil rights claims brought pursuant to 42 U.S.C. §1983.” *Zwecker v. Clinch*, 279 A.D.2d 572, 574 (2d Dep’t 2001); *see also Tannenbaum*, 30 A.D.3d at 358.

Turning back to Martire’s motion to amend the complaint, in light of the foregoing the Court considers the motion only as it pertains to the causes of action for malicious prosecution and pursuant to 42 U.S.C. §1983. As stated above, leave to amend is to be freely given absent prejudice or surprise. “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment.” *Valdes*, 289 A.D.2d at 29.

At this stage in the proceeding, the defendants will not be prejudiced by the proposed amendment, as Martire does not offer a new theory of liability or assert claims based on a different set of underlying facts. Similarly, the defendants cannot claim surprise, as it was the City’s due diligence which revealed the name of the police officer Martire now seeks to add as a party to this action.

Accordingly, the Court grants Martire’s motion to amend only to the extent of permitting amendment of the complaint to add in P.O. Maestranzi as a defendant and to permit pleading of causes of action for malicious prosecution and civil rights violations

pursuant to 42 U.S.C. §1983 only as against P.O. Jack Maestranzi, and to amend the caption to substitute Police Officer Jack Maestranzi for P.O. Mazzarti.

In accordance with the foregoing, it is

ORDERED that plaintiff Gianni Martire's motion is granted to the extent of granting him leave to serve a late notice of claim *nunc pro tunc* against P.O. Maestranzi to assert a cause of action malicious prosecution against P.O. Maestranzi, and the late notice of claim is deemed served as of the date of this order; and it is further

ORDERED that plaintiff Gianni Martire's motion to substitute a defendant in the caption, amend the complaint, and extend the time to serve the substituted defendant is granted to the extent that plaintiff may substitute "Police Officer Jack Maestranzi" for "P.O. Mazzarti" in the caption, and may amend the complaint only as to add causes of action for malicious prosecution and pursuant to 42 U.S.C. §1983 against P.O. Maestranzi; and it is further

ORDERED that plaintiff Gianni Martire is directed to serve the amended complaint on all defendants appearing in this action and on the newly added defendant within thirty (30) days of the date of this order.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 20, 2009

ENTER:

Saliann Scarpulla
Saliann Scarpulla, J.S.C.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK