

Baker v New York City Off. of the Controller

2009 NY Slip Op 32334(U)

October 6, 2009

Supreme Court, New York County

Docket Number: 118838/07

Judge: Karen Smith

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

PRESENT: HON. KAREN SMITH

PART 62

Index Number : 108838/2007

BAKER, RALPH

vs.

OFFICE OF THE COMPTROLLER OF

SEQUENCE NUMBER : 005

DISMISS

INDEX NO. _____

MOTION DATE 8/27/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

2,3,4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to the attached memorandum decision and order.

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

FILED
OCT 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/6/09

HON. KAREN SMITH

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: PART 62

-----X
RALPH BAKER,

Plaintiff,

-against-

Index No.: 118838/07

Motion Seq.: 005

Motion Date: 8/27/09

DECISION AND ORDER

NEW YORK CITY OFFICE OF THE CONTROLLER
WILLIAM C. THOMPSON AND MELANIE
COLEMAN,

Defendants.

-----X

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant New York City Office of the Comptroller's motion seeking an order dismissing plaintiff's case pursuant to CPLR § 3211, is granted for the reasons stated more fully below.

Plaintiff Ralph Baker, who commenced this action *pro se* but has also been represented by counsel for portions of the case including most of the papers filed on this motion,¹ is a sight-impaired photographer who generally works in areas of high tourist traffic, taking photographs of passersby for a fee. In his complaint, plaintiff alleged that he was wrongfully arrested, that his reputation was wrongfully damaged, and that his photographic equipment has been wrongly

¹ Plaintiff appears to have had a turbulent relationship with his counsel for reasons unknown to the Court. Plaintiff has told the Court that he terminated counsel's services more than once, but later allowed her to represent him at conferences and in opposition to this motion. At oral argument on June 18, 2009, plaintiff again made representations that he no longer wanted Ms. Bukowski to represent him, but then wavered. At oral argument, plaintiff was given a final opportunity to decide whether he wanted to proceed *pro se* or by counsel, explaining that plaintiff's constant indecision was untenable for the Court and for counsel. It was decided that plaintiff would proceed *pro se* for all matters except the instant motion. Despite this directive, plaintiff submitted additional papers himself, after which counsel also submitted papers in which she referenced plaintiff's papers. Both sets of papers are considered for disposition of the motion.

seized and improperly stored by New York City Police Department officers. Defendant New York City Office of the Comptroller s/h/a New York City Office of the Controller, William C. Thompson and Melanie Coleman (hereinafter, "Comptroller") now moves for an order dismissing plaintiff's complaint pursuant to CPLR § 3211(a)(7) and (a)(5).

According to the Comptroller, plaintiff has been arrested numerous times over many years in connection to his street photography business, which defendant alleges is often conducted in very busy and densely packed locations in the City. Plaintiff, in his capacity as street photographer, is categorized as an "unlicensed general vendor," and according to the Comptroller, has long failed to comply with the laws applicable to such regulation, including obstructing vehicular traffic and other offenses, leading to his arrest on more than one occasion. For nearly a decade now, plaintiff has commenced countless lawsuits against defendant or other New York City departments and agencies in multiple venues, including both state and federal courts. In 2001, plaintiff commenced an action in the Southern District of New York alleging that the City's regulation of him as an unlicensed general vendor, and subsequent treatment of him as such, violated his First and Fourteenth Amendment rights. On September 25, 2002, Judge Naomi R. Buchwald granted defendants summary judgment and found that neither the arrests nor the regulation of plaintiff as an unlicensed general vendor were unconstitutional. Approximately three weeks later, plaintiff, acting *pro se*, commenced another action in the Southern District seeking essentially the same relief and also alleging unlawful arrest. In dismissing the case, Judge John S. Martin found that plaintiff's claims were barred by collateral estoppel, including the arrests he alleged were unlawful, because they each were or could have been raised in the prior action dismissed by Judge Buchwald. Plaintiff appealed Judge Martin's decision, which

* 4]

was later affirmed, (*Baker v Kelly, et al.*, 164 FedAppx 156 [2d Cir 2006]), and commenced another action while the appeal was pending, alleging that the City of New York was “denying/depriving/forcibly withholding from Baker the right to choose which government agency is to regulate his street photography business.” By order dated November 25, 2003, Judge Barbara S. Jones denied plaintiff’s motion for a temporary restraining order and, recognizing that there could have been a claim regarding the legality of the arrests/tickets discussed by plaintiff in his complaint, permitted plaintiff 30 days to amend his complaint or the case would be dismissed. Plaintiff failed to so amend his complaint and the case was subsequently dismissed. In April 2004, plaintiff commenced yet another action in the Southern District of New York, in which he challenged the constitutionality of the City’s regulatory scheme as it applied to his photography business. Judge Thomas P. Griesa granted defendants’ motion to dismiss the complaint. When plaintiff commenced another action in the Southern District, Judge Buchwald again granted the City’s motion to dismiss, but also granted injunctive relief, prohibiting plaintiff from bringing any further suit in the Southern District of New York without an order of the court. According to plaintiff’s own papers, there even appears to have been other federal court actions based on essentially the same allegations, occurrences and transactions.

On October 12, 2006, plaintiff served and filed with the Office of the Comptroller a Notice of Claim, in which he listed July 16, 2006 as the “date damage occurred,” but also stated that his damages related to a ticket (No. 407203575-0) issued on December 9, 2001. Under the heading “how damage occurred,” plaintiff stated that it occurred “through character assassination, improper storage, seizure, handling and wrongful arrest.” Plaintiff’s complaint

states merely that he demands payment for two different "claims" - most likely Notices of Claim - he identifies as #2006P126835 and #2006PD025323. Plaintiff does not allege any facts or causes of action other than that he is entitled to be paid for those claims. The Comptroller contends on this motion that the complaint fails to state a cause of action and that the claims plaintiff describes in his Notice of Claim are barred by *res judicata* and collateral estoppel.

Plaintiff, by counsel, opposes the motion, contending that there are no constitutional challenges in his complaint and, therefore, that the claims are not barred by either *res judicata* or collateral estoppel. According to plaintiff, Judge Buchwald's 2002 decision explicitly acknowledged that even if the statutory scheme by which plaintiff is classified is constitutional, that does not automatically preclude claims that plaintiff was unlawfully harassed by police officers even though he was compliance with the law. This, according to plaintiff, is the basis of the complaint in this action. Plaintiff points to the allegation in the Notice of Claim that he was arrested on July 16, 2006. Counsel also contends that on November 3, 2006, plaintiff was issued a summons and wrongfully arrested. At a hearing held pursuant to General Municipal Law § 50-h, plaintiff testified that he was standing in front of 1450 Broadway, New York, New York, counting his money with no equipment whatsoever and without conducting any photography operations when police approached him and ordered him to leave the area. When he refused, plaintiff contends that he was arrested. According to plaintiff, these unlawful arrests and the police harassment have not been addressed in the previous actions. Counsel for plaintiff also argues that any errors regarding filing of the Notices of Claim for the incidents alleged in this action should be overlooked, as plaintiff was proceeding *pro se*.

Oral argument was held before the Court on June 18, 2009, at which time the Court held, on the record, that the Comptroller's motion is granted as to all claims which were or could have been raised in the prior actions brought by plaintiff. In addition, while plaintiff alleges he was wrongfully harassed and arrested on July 16, 2006 and November 3, 2006, plaintiff never filed a Notice of Claim regarding the November 3, 2006 arrest and his November 15, 2006 supplement to the October 12, 2006 Notice of Claim fails to make any mention of this second alleged arrest. Although plaintiff's counsel suggests that the failure to file a separate Notice of Claim should be overlooked because plaintiff was *pro se*, the Court explained on June 18, 2009, there is no discretion under General Municipal Law § 50-e in this regard. As plaintiff failed to file a Notice of Claim within 90 days for the occurrence, and did not move for leave to file a late Notice of Claim or to amend the Notice of Claim filed on October 12, 2009 to include the second alleged arrest, plaintiff is barred from asserting such claims now. (GML § 50-e).

Accordingly, plaintiff's only remaining claim in this action stems from the alleged arrest on July 16, 2006, which could not have been raised in any prior proceeding. As plaintiff has provided almost no facts pertaining to this alleged arrest in his Notice of Claim, his Amended Complaint, or at his GML § 50-h hearing, plaintiff has failed to state a cause of action for false arrest, harassment or any other claim. However, as plaintiff's Amended Complaint and most other papers in this action have been filed *pro se*, at counsel's request at oral argument on June 18, 2009, the Court granted an adjournment and gave plaintiff leave to file a cross-motion to amend the complaint, to be filed with the Part Clerk no later than July 17, 2009. (See Interim Order, Hon. Karen S. Smith, dated June 18, 2009). Plaintiff was instructed that the cross-motion to must be limited to amplifying the claim or claims related to July 16, 2006 arrest only, and that

failure to comply with the Interim Order would result in dismissal of plaintiff's complaint. Plaintiff's counsel subsequently wrote to the Court seeking additional time to file the cross-motion, citing difficulty accessing records and information relating to the "July 19, 2006" arrest because plaintiff had recently been evicted. The Court granted an adjournment to August 25, 2009.

On August 24, 2009, plaintiff filed an "EXPANDED AMMENDED COMPLAINT" [*sic*] (hereinafter "proposed Amended Complaint") with the Part Clerk, which he prepared *pro se*, while his counsel filed an "Affirmation in Opposition" with the Park Clerk on August 25. Neither is a cross-motion and neither seeks leave to amend the complaint. Plaintiff's proposed Amended Complaint is a rambling, unintelligible 52-page document that includes whole passages of dictionary definitions of legal terms, many of the same claims that were already dismissed by the Court. Counsel's Affirmation is identical in nearly every way to the Affirmation in Opposition submitted prior to the June 18, 2009 oral argument. There are no new factual allegations or evidence regarding the July 16, 2006 arrest, which was the sole basis of the Court's granting the adjournment in the first place. Counsel merely refers to the plaintiff's proposed Amended Complaint rather than submit a proposed Amended Complaint, in direct contravention of this Court's Interim Order. As such, there is no basis for permitting plaintiff to amend the Complaint and, as plaintiff's first Amended Complaint fails to state a cause of action and for the reasons stated on the record dated June 18, 2009, plaintiff's case is dismissed in its entirety.

Accordingly, it is

ORDERED that this motion by defendant New York City Office of the Comptroller

i/s/h/a New York City Office of the Controller William C. Thompson and Melanie Coleman,
seeking an order dismissing the complaint in its entirety pursuant to CPLR §§ 3211(a)(5) and (7),
is granted; it is further


ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that defendant serve a copy of this decision and order with notice of entry
upon the plaintiff directly at his last known address and also upon plaintiff's counsel, Jacequeline
MH Bukowski, at her place of business, within 20 days of entry hereof.

The foregoing constitutes the decision and order of this court.

Dated: October 6, 2009

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
OCT 13 2009
COUNTY CLERK'S OFFICE
NEW YORK