

Matter of Diop v City of New York

2010 NY Slip Op 31121(U)

May 3, 2010

Sup Ct, NY County

Docket Number: 103582/2010

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 5

Diop, Dussey Noy

INDEX NO. 103J82/10

- v -

MOTION DATE _____

City of NY

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 10 2010

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 5-3-10
MAY 03 2010

BARBARA JAFFE 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 : PART 5 BARBARA JAFFE
-----X J.S.C.

In the Matter of Application of OUSSEYNON DIOP,

Index No. 103582/10

Petitioner,

Motion Date: 04/20/10

-against-

THE CITY OF NEW YORK,

Respondent.

-----X
BARBARA JAFFE, JSC:

For petitioner:
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For respondent:
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FILED
MAY 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

By order to show cause dated March 18, 2010, petitioner seeks an order granting leave to serve and file a late notice of claim upon respondent. Respondent opposes. For the reasons that follow, the petition is granted in part and denied in part.

Petitioner alleges that on February 13, 2009, he was wrongfully and maliciously arrested without probable cause when a police officer arrested him on charges of criminal possession of a forged instrument in the third degree and unlicensed general vendor arising from his possession of an allegedly invalid vendor's license. (Affirmation of David Fisher, Esq., dated Mar. 18, 2010 [Fisher Aff.]). On April 1, 2009, petitioner timely served respondent with a notice of claim alleging false arrest, false imprisonment, and malicious prosecution. (*Id.*; Exh. B). On May 21, 2009, petitioner testified at a hearing pursuant to General Municipal Law § 50-h. (*Id.*). On October 16, 2009, petitioner filed a complaint in the Southern District of New York against

respondent and the arresting police officer alleging claims under state and federal law. (*Id.*).

In support of this petition, petitioner alleges that on January 13, 2010, he learned from respondent that his arrest was likely based on an error made by the Department of Consumer Affairs (DCA) on his vendor's license, which error resulted in the license appearing to be invalid. (*Id.*). Given his recent revelation that the DCA's error was the cause of his arrest and prosecution, petitioner now seeks to amend his notice of claim to include causes of action relating to DCA's error: negligence, negligent infliction of emotional distress, and negligent hiring, supervision, training and retention of DCA employees by respondent. (Fisher Aff., Exh. A). Petitioner argues that leave should be granted because respondent had actual knowledge of the facts of his claim, it will not be prejudiced, and there is a reasonable excuse for the late notice, namely, his prior ignorance of DCA's error. (*Id.*). The proposed notice also includes new allegations relating to his arrest and prosecution: assault and battery, excessive force, negligent infliction of emotional distress, and negligent hiring, supervision, training and retention of officers employed by the New York City Police Department. (*Id.*).

Respondent opposes the petition, except with respect to the new allegations relating to petitioner's arrest and prosecution, and alleges, without dispute, that petitioner's license was issued in July 2008. (Affirmation of Peter C. Lucas, Esq., dated Apr. 19, 2010).

The statute of limitations for claims against respondent is one year and 90 days "after the happening of the event upon which the claim is based." (General Municipal Law [GML] § 50-i). Where a petitioner files a petition for leave to file a late notice of claim beyond the limitations period, the court has no authority to grant the petition. (*Pierson v City of New York*, 56 NY2d 950, 955-56 [1982]; *Mullins v East Haven Nursing and Rehabilitation Ctr., LLC*, 66 AD3d 578,

* 4]
579 [1st Dept 2009]).

Here, the statute of limitations for the proposed claim that DCA negligently issued the license commenced running in July 2008 when the license was issued (*see Doyle v 800 of Inc.*, 72 AD2d 761, 762 [2d Dept 1979] [statute of limitations against City of Yonkers for negligently issuing certificate of occupancy begins to run when certificate is issued]), and is not tolled by petitioner's ignorance of the error (*see Jensen v City of New York*, 288 AD2d 346 [2d Dept 2001] [statute of limitations under GML § 50-i not tolled pending discovery of injuries or damages]; *Doyle*, 72 AD2d at 762 [same]). Accordingly, I have no discretion to grant leave to file a late notice of claim for this cause of action and thus, need not address petitioner's other issues relating to the license (*cf Doyle*, 72 AD2d at 762 [where action barred by statute of limitations, other issues raised are academic]). To the extent that petitioner's cause of action for negligent infliction of emotional distress stemming from the issuance of the license by DCA is not time-barred, it is not actionable and is patently meritless absent any claim that respondent owes petitioner a special duty or that the parties had a special relationship. (*See McLean v City of New York*, 12 NY3d 194, 202 [2009] ["[M]inisterial acts may support liability only where a special duty is found."]). And absent a special duty, there can be no breach thereof. The same holds true for the negligent hiring cause of action.

For all of these reasons, it is hereby

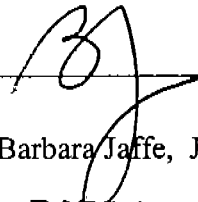
ORDERED, that the petition is granted to the extent that petitioner is granted leave to amend his notice of claim to include assault and battery, excessive force, negligent infliction of emotional distress, and negligent hiring, supervision, training and retention of officers employed by the New York City Police Department; it is further

ORDERED, that the petition is otherwise denied; and it is further

ORDERED, that defendant serve the amended notice of claim within fifteen days of this order.

This constitutes the decision and order of the court.

DATED: May 3, 2010
New York, New York


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

FILED
MAY 10 2010
NEW YORK
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