

Aponte v City of New York

2010 NY Slip Op 33593(U)

November 22, 2010

Supreme Court, Richmond County

Docket Number: 103937/06

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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DENNIS APONTE,

Plaintiff,

Part C-2
Present:
Hon. Thomas P. Aliotta

-against-

THE CITY OF NEW YORK and
SERGEANT SCOTT BRADY,

Defendants.

DECISION AND ORDER

Index No. 103937/06
Motion Nos. 278-001
776-002

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The following papers numbered 1 to 4 were fully submitted on the 22nd day of September, 2010:

	Pages Numbered
Plaintiff's Notice of Motion, <i>inter alia</i> , to compel Discovery and Inspection, with Supporting Papers (dated January 12, 2010).....	1
Cross Motion for Summary Judgment by Defendant The City of New York, with Supporting Papers (dated February 23, 2010).....	2
Affirmation in Opposition by Plaintiff Dennis Aponte (dated April 28, 2010).....	3
Reply Affirmation by Defendant The City of New York (dated July 22, 2010).....	4

Upon the foregoing papers, the motion (No. 278) of plaintiff Dennis Aponte to (1) compel a response to his Demand for Discovery and Inspection dated January 11, 2010, and (2) direct defendant New York City Police Sergeant Scott Brady to submit to a further deposition is granted to the extent set forth herein; the cross motion (No. 776) of defendant The City of New York to dismiss the first and second causes of action pursuant to CPLR 3211(a) or, in the alternative, for summary judgment dismissing the complaint in its entirety pursuant to CPLR 3212 is denied.

This is an action for personal injuries and property damages arising from an incident that allegedly occurred on November 19, 2005 at approximately 9:00 a.m. on or near 2177 Victory Boulevard on Staten Island, New York, wherein defendant Scott Brady (hereinafter, “Sergeant Brady”), an off-duty police sergeant employed by the New York City Police Department, is claimed to have discharged his firearm twice in the direction of and in close proximity to plaintiff, striking and killing his dog, which was being held by plaintiff at the time of the second shot.

In Motion No. 278-001, plaintiff moves to compel defendant-employer The City of New York (hereinafter, “the City”) to furnish a response to his Notice for Discovery and Inspection dated January 11, 2010 which seeks (1) a copy of the personnel files for Sergeant Brady, and (2) a copy of any complaints made to the City and/or to its Civilian Complaint Review Board prior to November 19, 2005 regarding this police officer. In support of his request, plaintiff points to a 42 USC §1983 (hereinafter, “1983”) action that was commenced against Sergeant Brady and other named police officers in the United States District Court for the Southern District of New York, in which it is alleged that Sergeant Brady perpetrated and/or attempted to cover-up, *inter alia*, an assault against a husband and wife in February 2005 (Doe v Del Rio, et al., 06 CV 3761).¹ According to plaintiff, these prior allegations constitute notice to the City of Sergeant Brady’s violent propensities, and that any evidence of his prior “bad acts” as an officer is presently within the exclusive possession and control of the City and cannot be obtained by other means. According to plaintiff, the disclosure of such evidence is necessary to establish that the City acted with “deliberate indifference” to the rights of persons with whom Sergeant Brady subsequently came into contact. Furthermore, plaintiff argues that if said defendant had a history of prior violent and/or sexual misconduct, any policy or custom by the City or his superiors which permitted him to carry an off-duty

¹ The present status of that action is undetermined.

firearm could form the basis of a so-called Monell action (*see Monell v Department of Social Servs. of the City of New York*, 436 US 658)

In opposition, the City objects to the requested disclosure on the grounds that any records of disciplinary action taken against its police officers, police personnel files, and the records of the Civilian Complaint Review Board are confidential under New York Civil Rights Law §50-a(1).

In its cross motion (No. 776-002) to dismiss the first and second causes of action for failure to state a cause of action and/or for summary judgment and dismissal of the complaint in its entirety, the City contends that plaintiff's allegations of injury arise from a tort actionable under state law, rather than §1983 since he has failed to plead the existence of facts supportive of a deprivation of a federally protected right. Alternatively, the City argues that even if plaintiff could prove that a right "secured by the constitution" is at issue in this case, the deposition testimony of the parties indicates that Sergeant Brady's actions were directed solely toward Mr. Aponte's dog. Thus, *plaintiff's* federally protected rights were not violated. It is also argued that plaintiff improperly seeks to predicate municipal liability under §1983 on an ordinary claim of *respondeat superior*.

In addition, the City maintains that the single incident of misconduct by Sergeant Brady alleged in the federal complaint in Del Rio is legally insufficient to establish the City's liability under §1983, and that plaintiff's failure to plead facts supportive of any custom or policy on the part of the City which empowered Sergeant Brady to deprive plaintiff of his constitutional rights renders his Monnell claim facially defective (*see Monell v Department of Social Servs. of the City of New York*, 436 US at 692).

Turning to plaintiff's first (§1983) cause of action, it is alleged therein that plaintiff sustained "emotional injuries and was caused to suffer actual economic harm" from the events

of November 19, 2005. The City contends that this claim, predicated on the intentional and negligent infliction of emotional distress, must be dismissed on the grounds (1) that the courts of this State have refused to recognize such a cause of action arising from the death of a pet, and (2) that the “zone of danger theory” does not apply to threats to the safety of animals. Therefore, it is argued that plaintiff’s allegations of being in close proximity to his dog at the time of the shooting is insufficient to sustain a cause of action for the intentional and negligent infliction of emotional distress.

In addition, the City maintains that since it is undisputed that Sergeant Brady was acting within the scope of his employment at the time of the incident, the City, as his employer, is liable for any damages caused by his negligence under the theory of *respondeat superior*. Hence, the allegations against the City for the negligent hiring, retention or training of Sergeant Brady are duplicative and should be dismissed. Finally, the City seeks the dismissal of plaintiff’s attempt to recover punitive damages against Sergeant Brady, since the facts pleaded and the evidence presented do not establish that he was acting with actual malice, evil motives, or even a willful and wanton disregard of plaintiff’s rights in the underlying incident.

Turning first to the City’s cross motion, it is dispositive that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a), the factual allegations of the complaint must be deemed to be true, and plaintiff must be afforded the benefit of every possible favorable inference that can be drawn therefrom. Whether or not these allegations can ever be proven in court is therefore irrelevant (*see Leon v Martinez*, 84 NY2d 83, 87-88; *Johnson v Kings County Dist. Attorney’s Off.*, 308 AD2d 278, 284). “The motion must be denied where the complaint adequately alleges, for pleading survival purposes, viable causes of action. The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned

which taken together manifest any cognizable action at law, a motion for dismissal will fail” (Harris v IG Greenpoint Corp., 72 AD3d 608, 609; *see* Guggenheimer v Ginzburg, 43 NY2d 268, 275).

Consonant with the foregoing principles, it is clear that for present purposes, the allegations in the complaint and plaintiff’s opposing affidavit, if accepted as true, demonstrate that he (1) was standing approximately one foot to eighteen inches away from his dog when Sergeant Brady fired his first shot, (2) was holding onto his dog by the tail when the sergeant fired for the second time, and (3) was sufficiently put in fear of his life and so splattered with the animal’s blood that he believed that he had also been shot. In addition, it is worthy to note that contrary to the City’s contention, plaintiff specifically alleged in his complaint that the actions of Sergeant Brady operated to deprive him individually of his federally protected rights under the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

“For a cause of action pursuant to 42 USC §1983 to lie against a municipality, the action that is alleged to be unconstitutional must implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers or have occurred pursuant to a practice so permanent and well settled as to constitute a custom or usage with the force of law” (Pendleton v City of New York, 44 AD3d 733, 736 [citations and internal quotations marks omitted]; *see* Ellison v City of New Rochelle, 62 AD3d 830, 832-833). “A city may [also] be [held] liable pursuant to 42 USC §1983 for a failure to properly train police officers, but ‘only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact’ (City of Canton v Harris, 489 US 378, 388 [1989])” (Pendleton v City of New York, 44 AD3d at 736-737; Ramos v City of New York, 285 AD2d at 304) In the matter at bar, the allegations in the complaint and plaintiff’s opposing affidavit, along with the allegations of Sergeant

Brady's prior misconduct, if accepted as true and construed liberally as a whole, are sufficient to satisfy this Court that the pleading requirements of a cause of action under §1983 have been met for purposes of staying-off a motion to dismiss under CPLR 3211(a) (*see Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d at 289-290; *see also Rovello v Orofino Realty Co.* 40 NY2d 633, 635-636; *Ramos v City of New York*, 285 AD2d at 304). So, too, would the dismissal of plaintiff's cause of action under *Monell* be premature at this early stage of the proceedings (*see Barash v Estate of Sperlin*, 217 AD2d 558, 559). Particularly is this so where, as here, plaintiff's motion to discover the facts underlying Sergeant Brady's alleged history of prior police misconduct is still pending. Moreover, and again contrary to the City's claim that its liability under the theory of *respondeat superior* moots plaintiff's allegations of, e.g., negligent training, it would appear that evidence of such negligence would be relevant to plaintiff's allegations of, *inter alia*, "deliberate indifference" under §1983 (*Pendleton v City of New York*, 44 AD3d at 736-737; *Ramos v City of New York*, 285 AD2d at 304; *see also Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d at 289-290).

Turning to so much of plaintiff's first cause of action in which he claims to have sustained "emotional injuries" resulting from the trauma *he* experienced during the incident, under existing tort law in New York, proven emotional and/or psychological injuries are recoverable as damages in negligence (*see Martinez v Long Is. Jewish Hillside Med. Ctr.*, 70 NY2d 697, 699; *Kennedy v McKesson Co.*, 58 NY2d 500, 504-505, 506).

Finally, viewed in a light most favorable to plaintiff, his second cause of action, based on allegations of assault and battery, is legally sufficient to support his claim for compensatory and punitive damages against the individual defendant (*see CPLR 3026; see also Doria v Masucci*, 230 AD3d 764, *lv denied* 89 NY2d 811).

As for plaintiff's motion to compel the City to furnish, *inter alia*, Sergeant Brady's

personnel file, the plaintiff correctly notes that New York Civil Rights Law §50-a(1) does not preclude the discovery of police personnel files in federal civil rights litigation (*see Mann v Alvarez*, 242 AD2d 318, 320; *Svaigsen v City of New York*, 203 AD2d 32, 33). Here, it is the opinion of this Court that the request to discover and inspect the files and records sought by plaintiff are plainly relevant to, e.g., his federal claims, since it “appears reasonably calculated to lead to the discovery of [other relevant and] admissible evidence” (Fed Rules Civ Pro rule 26[b][1]).

Accordingly, it is

ORDERED, that plaintiff’s motion to compel discovery is granted to the extent that defendant The City of New York shall produce for in camera inspection the records requested in plaintiff’s Notice for Discovery and Inspection dated January 11, 2010 within sixty (60) days of the service upon defendants of a copy of this Order with notice of entry thereof, or at such other time as the Court may direct upon prior application; and it is further

ORDERED, that said branch of plaintiff’s motion which is for a further deposition of defendant Sergeant Scott Brady is denied without prejudice to renewal following the disclosure of the records released as hereinabove provided in response to plaintiff’s Notice for Discovery and Inspection dated January 11, 2010; and it is further.

ORDERED, that so much of The City of New York’s cross motion as is to dismiss the complaint for failure to state a cause of action is denied; and it is further

ORDERED, that so much of the same cross motion as is for summary judgment is denied without prejudice to renewal upon the completion of discovery pursuant to CPLR 3212(f).

E N T E R,

Dated: November 22, 2010

/s/ _____
 Hon. Thomas P. Aliotta
 J.S.C.