

Owens v City of New York

2010 NY Slip Op 34081(U)

September 7, 2010

Supreme Court, Kings County

Docket Number: 2730/09

Judge: Kenneth P. Sherman

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**SUPREME COURT
COUNTY OF KINGS, PART 20**
**Denise Elliot Owens, as Administrator of the Estate
of Khiel Coppin, deceased,**

Index No.: 2730/09

Plaintiff,

DECISION/ORDER

-against-

Hon. Kenneth P. Sherman

**The City of New York and The New York City
Police Department,**

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Order to Show Cause:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed.....	<u>1, 2, Ex A-G</u>
Answering Affidavits/Affirmations.....	<u>3</u>
Reply Affidavits/Affirmations.....	<u>4</u>

Upon the foregoing cited papers, the decision/order on this motion is as follows:
Plaintiff Denise Elliot Owens (plaintiff or Owens), as Administrator of the Estate of Khiel Coppin (decedent or Coppin), deceased, moves for an order pursuant to CPLR 3025(b) for leave to serve and file an Amended Verified Complaint to include causes of action pursuant to 42 USC §1983, and to deem the Amended Verified Complaint filed and served *nunc pro tunc* upon defendant the City of New York and the New York City Police Department (collectively City).

Background

The instant matter arises out of the death of decedent on November 12, 2007, at approximately 7:20 PM at 590 Gates Avenue, Brooklyn, New York, when decedent was allegedly shot by New York City Police Officers who believed decedent was emotionally and psychologically disturbed. The police officers allegedly shot and killed decedent when decedent allegedly threatened the police officers with what appeared to be a weapon.

On February 1, 2008, the Kings County Surrogate's Court issued Temporary Letters of Administration appointing plaintiff as Temporary Administrator of decedent's estate. Plaintiff commenced the instant action on February 8, 2008, with the filing of a Notice of Claim upon the City. On March 3, 2008, the Kings County Surrogate's Court issued Permanent Letters of Administration appointing plaintiff as Administrator of decedent's estate.

Plaintiff's initial complaint alleged causes of action sounding in wrongful death and negligence. The plaintiff now brings the instant motion seeking to amend the Verified Complaint pursuant to CPLR 3025(b) to include causes of action pursuant to 42 USC §1983.

Discussion

CPLR 3025(b) provides that "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." On a motion seeking leave to amend a complaint pursuant to CPLR 3025(b), leave to amend will be granted in the absence of prejudice or surprise to the opposing party unless the proposed amendment is palpably insufficient or patently devoid of merit (*see Malanga v Chamberlain*, 71 AD3d 644, 646 [2010]; *Lucido v Mancuso*, 49 AD3d 220 [2008]; *see also Santori v Met Life*, 11 AD3d 597 [2004]). In *Lucido v Mancuso*, the Appellate Division Second Department established the standard that "a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance" (49 AD3d at 227). Under this standard, the party seeking to amend a pleading has the burden of showing that "'the facts as alleged' in the proposed amended complaint or answer 'fit within [a] cognizable legal theory' as a cause of action or defense, as the case may be, but does not require the proponents to make any evidentiary showing that the amendment has merit" (*James v Government of St Lucia*, 23 Misc.3d 1110[A], 2009 WL 1018628, [NY Sup Ct, Kings County 2009] *citing Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). Additionally, the opposing party has the burden of showing prejudice or surprise (*see Hickey v Hutton*, 182 AD2d 801, 802 [1992]; *see also James v Government of St Lucia*, 23 Misc.3d 1110[A], 2009 WL 1018628, [NY Sup Ct, Kings County 2009], *supra*).

The plaintiff proposes to amend the Verified Complaint to reflect allegations that

defendants violated decedent's constitutional rights under 42 USC §1983 which creates a civil cause of action for a violation of a person's constitutionally protected rights effected under color of state law (*see Mays v City of Middletown*, 70 AD3d 900, 903 [2010]). "A municipality can be found liable under 42 USC §1983 for deprivation of constitutional rights only where the municipality itself causes the constitutional violation at issue" (*Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 293 [2003]; *see also Monell v Department of Social Servs. of City of N.Y.*, 436 US 658, 694 [1978]; *Ellison v City of Rochelle*, 62 AD3d 830, 833 [2009]; *Liu v New York City Police Dept.*, 216 AD2d 67, 68 [1995], *lv denied* 87 NY2d 802 [1995], *cert denied* 517 US 1167 [1996]; *Jackson v Police Dept. of City of N.Y.*, 192 AD2d 641, 642 [1993], *lv denied* 82 NY2d 658 [1993], *cert denied* 511 US 1004 [1994]). "It cannot be held liable pursuant to 42 USC §1983 based solely upon the doctrine of respondeat superior or vicarious liability" (*Jackson*, 192 AD2d at 642; *see also Johnson*, 308 AD2d at 293; *Liu*, 216 AD2d at 68; *Bryant v City of New York*, 188 AD2d 445, 556 [1992]).

In support of its motion to amend the Verified Complaint, plaintiff argues that the facts as set forth in plaintiff's proposed Amended Verified Complaint make clear that prior to the shooting of the decedent, there were several instances in which the City's officers "shot innocent members of the public to death" (*see Reply Affirmation*). Plaintiff further argues that the claims pursuant to 42 USC §1983 are premised upon the same facts underlying the initial claims sounding in negligence and wrongful death.

In response, defendants argue that the proposed Amended Verified Complaint alleging claims under 42 USC §1983 should be examined under federal law and are insufficient under federal law pleading standards. Defendants further submit that plaintiff's proposed Amended Verified Complaint contains conclusory statements that fail to properly allege a plausible cause of action under 42 USC §1983.

After examining the papers submitted, the Court finds that the plaintiff's proposed Amended Verified Complaint alleging causes of action under 42 USC §1983 should be granted. Plaintiff's proposed pleadings give sufficient notice of "the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3103), and therefore, even if the pleadings were governed pursuant to the more

liberal federal standard, as advocated by defendants, the pleadings would be sufficient.

More specifically, the plaintiff's proposed Amended Verified Complaint pleads all the elements required under a claim pursuant to 42 USC §1983, mainly that there is (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right" (*Jackson*, 192 AD2d at 642; *see also Ellison*, 62 AD3d at 833; *Pendleton v City of New York*, 44 AD3d 733, 736 [2007]).

The submitted proposed Amended Verified Complaint states, that "[a]cting under color of law and pursuant to official policy, practice, or custom, defendant City of New York intentionally, knowingly, negligently and recklessly failed to instruct, supervise, control and discipline, on a continuing basis, its officers, including the officers involved in the incident, in their duties to refrain from unlawfully, recklessly and/or intentionally shooting members of the public, and in particular, those known to be emotionally disturbed, such as the deceased" (*see* Amended Verified Complaint, exhibit A). Plaintiff further alleges the City's failure to follow, supervise and instruct the City's officers on the correct procedure for "making an arrest and/or subduing an emotionally disturbed person, such as the deceased was in this incident" (*see* Amended Verified Complaint, exhibit A).

Plaintiff's Amended Verified Complaint also enumerates constitutional deprivations alleging that the City's conduct deprived the decedent of "the right to be free from the use of excessive force in that the deceased was unwarrantedly shot numerous times, intentionally, recklessly, wrongfully and without justification, by the City's officers, and that said shooting directly led to the deceased's death" (*see* Amended Verified Complaint, exhibit A).

Finally, plaintiff submits allegations that the City's actions in the instant matter involve official policy and custom, in that the instant matter was "not an isolated incident. The City and its police commissioner has been aware for some time, from lawsuits, notices of claim, complaints filed with the Civilian Complaint Review Board, and judicial rulings suppressing evidence and finding officers incredible as a matter of law, that a disturbing number of their police officers unlawfully harm innocent members of the public, and also fail to intervene in, prevent the obviously unlawful actions of their fellow officers. Nevertheless, the City and its police commissioner have allowed policies and practices that allow the aforementioned to

persist" (see Amended Verified Complaint, exhibit A). Plaintiff further mentions other instances of "unlawful shooting and brutalization of members of the public by the City's officers, agents and/or employees, such as shooting of undercover officer Desmond Robinson in 1994; the sodomization of Abner Louima in 1997; the shooting/killing of Amadou Diallo in 1999; the shooting/killing of Patrick Dorismond in 2000; the shooting/killing of Ousmane Zongo in 2003; the shooting/killing of Sean Bell in 2006; and the shooting of off duty officer Omar Edwards in 2009" (see Amended Verified Complaint, exhibit A).

Contrary to the defendants' arguments that the motion should be denied because the plaintiff's proposed amendments merely state conclusory statements and plaintiff fails to prove a §1983 claim, the plaintiff need not establish the merits of the Amended Verified Complaint at this point in the proceedings (see *Lucido v Mancuso*, 49 AD3d 220 [2008], *supra*; see also *James v Government of St Lucia*, 23 Misc.3d 1110[A], 2009 WL 1018628, [NY Sup Ct, Kings County 2009], *supra*). Rather, the proposed amendments must only fit within a cognizable legal theory (*James v Government of St Lucia*, 23 Misc.3d 1110[A], 2009 WL 1018628, [NY Sup Ct, Kings County 2009] *citing Nonnon v City of New York*, 9 NY3d 825, 827 [2007], *supra*). The Court finds that upon examining the proposed Amended Verified Complaint, the proposed amendments, fall within a cognizable legal theory because plaintiff alleges factual allegations that fall within the required enumerated elements pursuant to 42 USC §1983, and moreover, the Amended Verified Complaint is based on the same set of facts and circumstances on which the plaintiff's initial complaint is based. Plaintiff need not at this point establish evidentiary support for these allegations. Furthermore, the defendants fail to establish any prejudice or surprise that would result from the proposed amendments.

Accordingly, the Court grants the plaintiff's motion to amend the Verified Complaint to allege causes of action pursuant to 42 USC §1983 and the Court deems the Amended Verified Complaint duly served *nunc pro tunc* pursuant to the instant order.

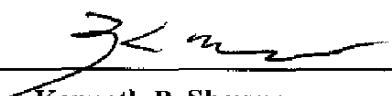
Conclusion

Accordingly, the plaintiff's motion to amend the Verified Complaint is granted because the amendments are neither palpably insufficient nor devoid of merit and there is no evidence of surprise or prejudice to the defendants, and the Amended Verified Complaint is deemed duly

served and filed *nunc pro tunc*.

The foregoing constitutes the decision, order, and judgment of the court.

September 7, 2010



Kenneth P. Sherman
Justice Supreme Court

Hon. Kenneth P. Sherman, J.S.C.