

Guzman v City of New York

2011 NY Slip Op 30797(U)

April 1, 2011

Supreme Court, New York County

Docket Number: 100314/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 100314/2009

GUZMAN, ERNIS

vs
CITY OF NEW YORK

Sequence Number : 001

AMEND PLEADINGS

CAL. No.: 51

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

1, 2
3

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/1/11

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
ERNIS GUZMAN and ALEXANDRA CERDA,

Index No. 100314/09

Plaintiffs,

Motion Date: 2/15/11

Motion Seq. No.: 001

Motion Cal. No.: 51

-against-

DECISION AND ORDER

THE CITY OF NEW YORK,

FILED

Defendant.

APR 05 2011

-----X
BARBARA JAFFE, JSC:

For plaintiffs:
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For defendant: NEW YORK
Lynn M. Leopold, COUNTY CLERK'S OFFICE
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By notice of motion dated October 12, 2010, plaintiffs move pursuant to CPLR 3025 for an order granting them leave to serve a supplemental summons and amended complaint.

Defendant City opposes and, by notice of cross motion dated October 25, 2010, cross-moves pursuant to CPLR 3211 for an order dismissing plaintiffs' false arrest and imprisonment claims.

I. BACKGROUND

On January 11, 2008, plaintiffs were allegedly assaulted and battered by police officers, and thereafter arrested for assaulting the officers (both a felony and misdemeanor) and obstructing governmental administration. (Affirmation of Andrew F. Plasse, Esq., dated Oct. 12, 2010 [Plasse Aff.], Exh. A). Guzman's arrest report reflects that he tried to prevent Police Officer Michael King from taking another defendant into custody by punching and shoving officers and resisted arrest by waving his arms and shoving the officers away from himself.

(Affirmation of Lynn M. Leopold, ACC, dated Oct. 25, 2010 [Leopold Aff.], Exh. 6). King processed plaintiffs' arrests. (*Id.*).

That same day, plaintiffs were each charged with assault in the second degree. In the criminal court complaint, it is alleged that following a car accident, the driver of the vehicle in which plaintiffs were passengers was arrested for driving while intoxicated, and that when Police Officer Diana Fontanez asked the front-seat passenger to exit the vehicle, the passenger refused to leave and punched Fontanez when she attempted to remove her. Plaintiff Cerda then tried to hit Fontanez, who struggled with her, causing Fontanez injury, and plaintiff Guzman then swung his arms at Fontanez and Police Officer Jason Kinsella, forcing them to wrestle with Guzman, and causing Kinsella injury. (Plasse Aff., Exh. C).

On or about April 11, 2008, plaintiffs served City with their notices of claim. (Leopold Aff., Exh. 1). On June 6, 2008, plaintiff Guzman testified at a 50-h hearing, as pertinent here, that he was released from custody on January 12, 2008. (*Id.*, Exh. 2). Plaintiff Cedra testified similarly at her 50-h examination held on June 11, 2008. (*Id.*, Exh. 4).

On or about January 30, 2009, plaintiffs served their summons and complaint on City, alleging that City was liable pursuant to respondeat superior for the officers' assault and battery, false arrest, and malicious prosecution, and that it had negligently hired, trained, and supervised the officers. (Plasse Aff.). On or about February 9, 2009, City served its answer. (*Id.*, Exh. B).

II. MOTION TO AMEND

A. Contentions

Plaintiffs contend that they were unaware of the identities of the officers who were involved in the incident at issue until August 6, 2010, when City's deposition was held and they

were provided with a copy of the criminal court complaint. They thus move to amend their summons and complaint to add the officers as individual defendants and to include federal civil rights claims against them and City. (Plasse Aff., Exh. D).

City argues that the officers may not be added as defendants as they were not named in plaintiffs' notices of claim as required by GML 50-e and as the proposed claims against them are now time-barred. (Leopold Aff.). City also denies that plaintiffs were unaware of the officers' identities before August 2010, observing that plaintiffs testified at their 50-h hearings that they knew King's name and Fontanez's first name and badge number and that the officers worked at the precinct at 100th and Columbia Streets, and as City served plaintiffs in July 2010 with the arrest records reflecting King's name. (*Id.*, Exhs. 2, 3, 6).

In reply, plaintiffs assert that as their proposed claims against the individual officers are premised on the officers' violations of their federal civil rights, they were neither required to plead these claims in their notices of claim, nor are the proposed claims time-barred. (Reply Affirmation, dated Nov. 8, 2010).

B. Analysis

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether a party may amend its complaint. (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977]; *Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209 [1st Dept 1997]).

The service of a notice of claim within 90 days after the accrual of a cause of action is a condition precedent to the commencement of a tort action against City. (GML 50-a[1][a]; GML 50-i[1][a]; *Shahid v City of New York*, 50 AD3d 770 [2d Dept 2008]). The notice of claim must

identify any City employee against which a plaintiff intends to bring a cause of action, and the failure to do so requires dismissal of the cause of action. (*Tannenbaum v City of New York*, 30 AD3d 357 [1st Dept 2006]). However, a plaintiff is not required to plead in a notice of claim any claims premised upon federal civil rights violations against individual City employees. (*Tannenbaum*, 30 AD3d at 358; *see also Swinton v City of New York*, 61 AD3d 557 [1st Dept 2009] [notice of claim not required to assert claim for civil rights violations]).

As plaintiffs' proposed claims arise from the officers' alleged violations of their federal civil rights and they were thus not required to plead them in a notice of claim, and as the claims are not time-barred (*see Rlmany v Town of Dover*, 72 AD3d 918 [2d Dept 2010], *lv denied* 15 NY3d 705 [section 1983 civil rights claims governed by three-year statute of limitations]), plaintiffs have established their entitlement to an order granting them leave to amend their complaint and serve a supplemental summons on City and the proposed individual defendants.

III. MOTION TO DISMISS

A. Contentions

City contends that as causes of action for false arrest and false imprisonment accrue when a person is released from physical custody or confinement and, as plaintiffs did not plead in their notices of claim the date on which they were released from custody, these claims are defective and must be dismissed. (*Leopold Aff.*). In its reply, City observes that plaintiffs did not address this issue on their opposition. (*Reply Affirmation*, dated Nov. 29, 2010).

B. Analysis

A notice of claim is pleaded adequately if it "includes information sufficient to enable [the municipality] to investigate . . ." (*Rosenbaum v City of New York*, 8 NY3d 1 [2006]). In

determining whether a notice of claim is sufficient, the court is not limited to the notice itself but may consider the testimony given at a 50-h hearing or any evidence before it. (*D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891 [1994]; *Phillpps v New York City Tr. Auth.*, 68 AD3d 461 [1st Dept 2009]). Claims for false arrest and false imprisonment accrue when an individual is released from physical custody or confinement. (*Bumbury v City of New York*, 62 AD3d 621 [1st Dept 2009]; *Nunez v City of New York*, 307 AD2d 218 [1st Dept 2003]).

As the notices of claim here contained information sufficient to permit City to discover when plaintiffs were released from custody, and as plaintiffs testified as to the date of their release at their 50-h examinations, plaintiffs have sufficiently pleaded their false arrest and false imprisonment claims. (*See eg Malcolm v City of New York*, 2 AD3d 696 [2d Dept 2003] [although notice of claim for false arrest cause of action did not include location of plaintiff's arrest, it contained sufficient information to allow City to investigate claim, and plaintiff disclosed location at 50-h hearing]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for leave to serve a supplemental summons and amended complaint is granted; it is further

ORDERED, that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon all parties who have appeared in the action upon service of a copy of this order with notice of entry upon those parties; it is further

ORDERED, that a supplemental summons and amended complaint, in the form annexed to the moving papers, shall be served, in accordance with the Civil Practice Law and Rules, upon

the additional parties in this action within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED, that upon said service, the action shall bear the following caption:

ERNIS GUZMAN and ALEXANDRA CERDA,

Plaintiffs,

- against -

THE CITY OF NEW YORK, SGT. MCKENNA,
POLICE OFFICER DIANA FONTANEZ
[Shield No. 26559], POLICE OFFICER JASON
KINSELLA [Shield No. 9398], and POLICE
OFFICER MICHAEL KING [Shield No. 9372] in
their individual and official capacities as Police
Officers employed by the City of New York,

Defendants.

FILED

APR 05 2011


NEW YORK
COUNTY CLERK'S OFFICE

It is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional parties; and it is further

ORDERED, that defendant's cross-motion to dismiss is denied.

ENTER:



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

DATED: April 1, 2011
New York, New York