

Long v Cosin-Hayes

2011 NY Slip Op 31958(U)

June 13, 2011

Sup Ct, NY County

Docket Number: 118036/09

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
CYNTHIA S. KERN

PRESENT: _____
Justice

PART 52

BENJAMIN LONG

INDEX NO. 118036/09

- v -

MOTION DATE _____

COUSIN - HATES

MOTION SEQ. NO. 01

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

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

FILED

JUN 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/13/11

CSK

CYNTHIA S. KERN 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 52

-----X
BENJAMIN LONG,

Plaintiff,

Index No. 118036/09

-against-

DECISION/ORDER

P.O. MICHAEL COSIN-HAYES, SHIELD 03487,
28th PCT, P.O. JUAN BERRIO, SHIELD 28430,
28th PCT, THE CITY OF NEW YORK, NEW YORK
CITY POLICE DEPARTMENT, P.O. JANE DOE 1-10
and P.O. JOHN DOE 1-10,

FILED

JUN 15 2011

Defendants.
-----X

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u> </u>
Answering Affidavits to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages he allegedly sustained stemming from an incident that occurred on April 1, 2008. The City of New York (the "City") now moves to dismiss plaintiff's complaint, or, in the alternative, for summary judgment. For the reasons set forth below, the City's motion is granted.

The relevant facts are as follows. On April 1, 2008, plaintiff was arrested at or near 275 West 114th Street, New York, New York and charged with four counts of Assault 2nd Degree and

one count of Criminal Possession of a Weapon. Plaintiff was released from prison on May 30, 2008 and the criminal case against him was dismissed on October 29, 2009 in New York State Supreme Court, New York County, Part 41. On May 13, 2008, prior to his release, plaintiff filed a Notice of Claim regarding this incident in which he alleged assault, battery, false arrest, false imprisonment, negligent hiring and retention and infliction of emotional distress. Plaintiff commenced this action on December 23, 2009 with the purchase of an index number and the filing of a Summons and Verified Complaint with the New York County Clerk's Office. In his Summons and Complaint, plaintiff claims violations of his constitutional rights, assault, battery, false arrest, false imprisonment, negligent hiring and retention, malicious prosecution and intentional infliction of emotional distress.

Prospective plaintiffs must commence an action against a municipality within one year and ninety days of the date the cause of action accrues. *See* General Municipal Law §50-i. G.M.L. §50-i(1) provides that “[n]o action or special proceeding shall be prosecuted or maintained against a city...unless, (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.” It is well-settled that it is not within the Court's discretion to grant a petitioner leave to serve a late Notice of Claim after the expiration of the statute of limitations for that claim. *See Hochberg v. City of New York*, 63 N.Y.2d 665, 665-666 (1984).

The City is entitled to summary judgment dismissing plaintiff's claims for false imprisonment and false arrest as those claims are time-barred. A cause of action for false arrest and/or false imprisonment accrues once an individual is released from physical custody or confinement. *See Palmer v. City of New York*, 226 A.D.2d 149 (1st Dept 1996). The statute of

limitations in this action accrued when plaintiff was released from NYPD custody on May 30, 2008. However, plaintiff did not file a Summons and Complaint until December 23, 2009, over three months after the expiration of the statute of limitations. Therefore, plaintiff's causes of action for false arrest and false imprisonment are dismissed as time-barred.

The City is also entitled to summary judgment dismissing plaintiff's claims of assault and battery as time-barred. Plaintiff alleges the assault and battery took place while plaintiff was in police custody on April 1, 2008, the date of his arrest. For these causes of action to be timely, a Summons and Complaint alleging assault and battery should have been filed on or before July 1, 2009, as these causes of action accrued on the date of the alleged wrongful conduct. *See Komar v. City of New York*, 24 A.D.2d 941 (1st Dept 1965). In this case, the Summons and Complaint was filed on December 23, 2009, over five months after the expiration of the statute of limitations. Consequently, plaintiff's claims of assault and battery are dismissed as time-barred.

The City is also entitled to summary judgment dismissing plaintiff's claim of negligent hiring and retention as time-barred. A claim for negligence brought against the City must be commenced within one year and ninety days from the happening of the event upon which the claim is based. GML § 50-e. In this action, plaintiff's cause of action for negligence accrued on April 1, 2008 when the incident occurred. For the cause of action against the City to be timely, the Summons and Complaint had to be filed on or before July 1, 2009. However, the Summons and Complaint was filed on December 23, 2009, over five months later. Thus, plaintiff's claim of negligent hiring and retention must be dismissed as time-barred. Even assuming, however, that plaintiff did timely plead a negligent hiring and retention claim, which he did not, a claim of negligent hiring and retention is not actionable against the City when plaintiff's theory of

negligence is based on respondeat superior. See *Karoon v. New York City Transit Authority*, 241 A.D.2d 323 (1st Dept 1997). Where an employee is acting within the scope of his employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a respondeat superior theory, no claim may proceed for negligent hiring and retention. *Id*, citing *Eifert v. Bush*, 27 AD2d 950 (2d Dept 1967). Therefore, because the City found that the police officers who were involved in effectuating plaintiff's arrest were acting within the scope of their employment, making the City liable for any damages caused by their negligence, plaintiff's claim of negligent hiring and retention must be dismissed.

The City is also entitled to summary judgment dismissing plaintiff's claim for intentional infliction of emotional distress as such claims against government bodies are prohibited as a matter of public policy. See *Dillon v City of New York*, 261 A.D.2d 34, 41 (1st Dept 1999); see also *Wheeler v. State of New York*, 104 A.D.2d 496 (2d Dept 1994).

The City is also entitled to summary judgment dismissing plaintiff's claim of civil rights violations as plaintiff did not plead the violations with sufficient specificity. To establish a 42 U.S.C. § 1983 claim against a municipality, plaintiff must specifically plead and prove three elements: (1) an official policy or custom that (2) causes plaintiff to be subjected to (3) a denial of a constitutional right. See *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978); see also *Batista v. Rodriguez*, 702 F.2d 393 (2d Cir. 1984). Liability may only be imposed on a municipality when the conduct complained of "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officer." *Monell*, 436 U.S. at 690. Moreover, a "single incident...especially if it involved only actors below the policy making level, generally will not suffice to raise an inference of a custom or

policy.” *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993). As the plaintiff has failed to allege specific facts which show a particular policy leading to the alleged civil rights violation, plaintiff’s § 1983 claim against the City must be dismissed. *See Leung v. City of New York*, 216 A.D.2d 10 (1st Dept 1995) (“A cause of action under 42 USC § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom...and must be pleaded with specific allegations of fact.”) Plaintiff’s Complaint alleges a single incident and does not particularize a specific policy of the government which is discriminatory. Consequently, his § 1983 claim against the City is dismissed.

Finally, the City is entitled to summary judgment dismissing plaintiff’s claim of malicious prosecution as no valid Notice of Claim alleging malicious prosecution was ever filed. “A cause of action for malicious prosecution accrues when the criminal proceeding terminates favorable to the plaintiff.” *Bumbury v. City of New York*, 62 A.D.3d 621 (1st Dept 2009). Proceedings terminate in favor of plaintiff only when the final disposition is such as to indicate that the accused is not guilty. *See Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980). In the instant action, the case was dismissed and sealed on October 29, 2009 in New York County, Part 41. As the criminal charges were dismissed favorably against plaintiff on October 29, 2009, plaintiff’s claim for malicious prosecution accrued on that date. Therefore, in order to assert a claim for malicious prosecution, plaintiff had to serve his Notice of Claim within ninety days after October 29, 2009. Plaintiff, however, served his Notice of Claim on the City on May 13, 2008, prior to the accrual of plaintiff’s malicious prosecution claim. This Notice of Claim, however, is not valid as to plaintiff’s malicious prosecution claim as “the notice of claim shall...be served...within ninety days *after the claim arises*” and not before the cause of action

