

Hairston v Deoliveira
2011 NY Slip Op 32104(U)
August 1, 2011
Sup Ct, NY County
Docket Number: 100608/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE

PART 5

Index Number : 100608/2011
HAIRSTON, WILLIAM
 VS.
P.O. LEONARDO DEOLIVEIRA
 SEQUENCE NUMBER : 001
 DISMISS
 CAL # 50

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for dismiss

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

AUG 02 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/1/11
AUG 01 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X
WILLIAM HAIRSTON,

Plaintiff,

-against-

P.O. LEONARDO DEOLIVEIRA, SHIELD # 03164
MNIRT; P.O. GERASIMOS PYRAMIDES, SHIELD
#03030, MNIRT; JOHN DOE 1-3 MNIRT; SGT. JOHN
DOE 30TH PCT; CITY OF NEW YORK; RAYMOND
KELLY, COMMISSIONER, NYPD, NEW YORK CITY
POLICE DEPARTMENT,

Defendants.

-----X
BARBARA JAFFE, J.S.C.:

For defendants:
Colin Marville, ACC.
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-676-8348

Index No. 100608/11

Motion Date: 6/17/11
Motion Seq. No.: 001
Motion Cal. No.: 50

DECISION AND ORDER

FILED

AUG 02 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

By notice of motion dated April 30, 2010 and submitted on default, defendants City of New York, Commissioner Raymond Kelly s/h/a Raymond Kelly, Commissioner, NYPD, and City of New York s/h/a New York City Police Department (collectively, defendants), move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's claims against them.

I. BACKGROUND

In his notice of claim, filed with City on February 3, 2010, plaintiff asserted state claims against defendants for false arrest, false imprisonment, malicious prosecution, and punitive damages, and federal claims for illegal stop and search, assault, excessive force, intimidation, pain and suffering, and negligent and intentional infliction of emotional distress. He alleged that

on November 1, 2009, near 540 West 145th Street in Manhattan, he was arrested and taken into custody without reasonable suspicion, assaulted, battered and deprived of immediate medical attention, and falsely and maliciously prosecuted. (Affirmation of Colin Marville, ACC, dated Apr. 31, 2010 [Marville Aff.], Exh. A). He was released from custody on or before November 2, 2009 and the charges against him were dismissed on December 29, 2009. (Marville Aff.).

On or about January 14, 2011, plaintiff commenced this action by filing a summons and complaint in which he asserts additional claims against defendants. (*Id.*, Exh. B). Plaintiff never sought leave to file a late notice of claim.

II. ANALYSIS

As defendant Kelly, sued solely in his capacity as Commissioner of the New York City Police Department, is immune from liability for the conduct of his employees (County Law §§ 54, 941), the complaint is dismissed as against him (*see Barr v Albany County*, 50 NY2d 247 [1980] [sheriff not personally liable for acts or omissions of employees]; *Mertens v State*, 73 AD3d 1376 [3d Dept 2010], *lv denied* 15 NY3d 706 [Commissioner of Corrections immune from liability]; *Shmueli v New York City Police Dept.*, 295 AD2d 271 [1st Dept 2002] [claims based on vicarious liability may not be maintained against head of county agency]).

Pursuant to General Municipal Law (GML) § 50-a, in order to commence a tort action against a municipality, a claimant must serve a notice of claim upon the municipality within 90 days of the date on which the claim arose. The service of a timely notice of claim is a condition precedent to maintaining such an action, and a late notice of claim, served without leave of the court, is a nullity. (*Croce v City of New York*, 69 AD3d 488 [1st Dept 2010]; *Laroc v City of New York*, 46 AD3d 760, 761 [2d Dept 2007]).

Here, as plaintiff served his notice of claim for false arrest and false imprisonment more

than 90 days after his release from custody, the notice as to these causes of action is a nullity (see *Palmer v City of New York*, 226 AD2d 149 [1st Dept 1996] [as false arrest and imprisonment claims accrued upon petitioner's release from custody, notice of claim untimely]; see also *Bumbury v City of New York*, 62 AD3d 621 [1st Dept 2009] [false arrest/imprisonment claim accrues upon release from custody]), as is his claim for negligent hiring and retention which accrued on the date of the incident (see eg *Gorman v Sachem Cent. School Dist.*, 232 AD2d 452 [2d Dept 1996] [state tort law claims accrued at time of alleged wrongful act]; *Figueroa v City of New York*, 22 Misc 3d 1111[A], 2009 NY Slip Op 50089[U] [Sup Ct, Kings County 2009] [claim for negligent hiring accrued on date of alleged false arrest]).

Moreover, a claim for intentional infliction of emotional distress may not be maintained against a municipality or its subdivisions or employees. (*Pehzman v City of New York*, 47 AD3d 493 [1st Dept 2008]; *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]; see also *Ellison v City of New Rochelle*, 62 AD3d 830 [2d Dept 2009] [dismissing intentional infliction of emotional distress claim against defendants City, police department, and police officer]).

While federal civil rights claims need not be pleaded in a notice of claim (*Pendleton v City of New York*, 44 AD3d 733 [2d Dept 2007]; *Tannenbaum v City of New York*, 30 AD3d 357 [1st Dept 2006]), such a pleading must be supported by specific facts or allegations showing that the defendant City violated an official policy or custom by arresting, detaining, or prosecuting. (See *Leung v City of New York*, 216 AD2d 10 [1st Dept 1995]; *Liu v New York City Police Dept.*, 216 AD2d 67 [1st Dept 1995], *lv denied* 87 NY2d 802, *cert denied* 517 US 1167 [1996]; see also *Bosone v County of Suffolk*, 274 AD2d 532 [2d Dept 2000] [requirement of pleading official policy or custom in claim did not apply to claim against individual defendants for federal civil rights violations]). Absent any specific facts or allegations demonstrating that City violated an

official policy or custom by arresting, detaining, or prosecuting plaintiff, his federal constitutional rights claims against City are dismissed.

Punitive damages are not recoverable against a municipality. (*Krohn v New York City Police Dept.*, 2 NY3d 329 [2004]).

III. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that defendants' motion for an order dismissing the complaint is granted to the extent that:

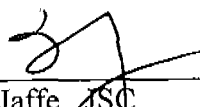
- (1) the complaint is dismissed against defendant Raymond Kelly as the Commissioner of the New York City Police Department, and the clerk of the court is directed to enter judgment in favor of said defendant accordingly;
- (2) plaintiff's claims for false arrest, false imprisonment, negligent hiring and retention, intentional infliction of emotional distress, and punitive damages are dismissed; and
- (3) plaintiff's federal claims against defendant City of New York are dismissed.

It is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the parties appear for a preliminary conference on September 20, 2011, at 2 p.m., in room 103 at 80 Centre Street, New York, New York.

ENTER:


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

FILED

AUG 02 2011

DATED: August 1, 2011
New York, New York

AUG 01 2011