

**Townes v New York State Metropolitan Transp.
Auth.**

2011 NY Slip Op 32487(U)

September 14, 2011

Supreme Court, Nassau County

Docket Number: 9127/10

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY

MG, MG

ADRIENNE TOWNES,

Motion Sequence #1, #2
Submitted July 5, 2011

Plaintiff,

-against-

INDEX NO: 9127/10

NEW YORK STATE METROPOLITAN
TRANSPORTATION AUTHORITY, LONG
ISLAND RAIL ROAD, METROPOLITAN
TRANSPORTATION AUTHORITY POLICE,
NASSAU COUNTY DISTRICT ATTORNEY,
COUNTY OF NASSAU and THE STATE OF
NEW YORK,

Defendants.

The following papers were read on these motions:

Notice of Motion and Affs.....	1-3
Second Notice of Motion and Affs.....	4-6
Affs in Opposition.....	7-11
Affs in Reply.....	12-17
Memorandum of Law.....	18

Upon the foregoing , it is ordered that this motion by defendants, Metropolitan Transportation Authority ("MTA") and Long Island Rail Road ("LIRR"), prior to interposing an answer, for an Order: (1) pursuant to CPLR 3211(a)5., dismissing the plaintiff, Adrienne Townes' causes of action for negligence, assault and battery, false arrest and wrongful detention on the grounds that they are time barred; and, (2) pursuant to CPLR 3211(a)7.

dismissing the balance of plaintiff's claims for failure to state a cause of action is granted.

A second motion by defendants Nassau County District Attorney and County of Nassau (collectively referred to herein as the "County Defendants"), for an Order, pursuant to CPLR 3212, granting summary judgment in their favor to dismiss the plaintiff's complaint and any and all cross claims and also pursuant to CPLR 3211(a)7. dismissing said pleadings for failure to state a cause of action is also granted.

Both motions are granted. Plaintiff's complaint is dismissed in its entirety as against defendants, MTA, LIRR and the County Defendants.

This case arises out of an incident that occurred on March 3, 2009 when plaintiff Adrienne Townes failed to produce a ticket for a LIRR train on which she was traveling. The facts are as follows:

On March 3, 2009, at approximately 3:15 p.m., plaintiff, a 46 year old allegedly mentally challenged woman, was onboard an eastbound LIRR commuter train heading to Central Islip. Plaintiff claims that she boarded the train at Penn Station and was on her way home from work. During the train ride, a train conductor asked plaintiff to see her rail ticket. She claimed to have been made nervous by this request, despite having used the LIRR for the past 50 months. Nevertheless, she failed to present a valid rail ticket. According to the plaintiff, the conductor returned at least three times to make the same inquiry.

Plaintiff alleges that the conductor made some derogatory comments about her and held the train at a station until members of the Metropolitan Transportation Authority Police Department (hereinafter referred to as the "MTA Police") arrived. She alleges that the MTA Police asked her to leave the train. Plaintiff claims to have been confused and threatened at the thought of being removed from the train. While plaintiff alleges in her complaint that

“she knew that she had her valid monthly pass”, she never alleges that she told anyone that she had a valid ticket.

Plaintiff claims that she was removed to the Metropolitan Police facility in Nassau County and placed in a jail cell. She states that at the MTA police facility, the MTA police officers conducted an inventory search whereupon they discovered that she did in fact possess a valid monthly pass for March 2009. Apparently, the MTA Police also contacted plaintiff's parents and advised them of the arrest as well as the discovery of the valid monthly pass. Plaintiff's father then allegedly told them that the plaintiff was under a physician's care for anxiety. Upon learning this, the MTA Police brought plaintiff to the Nassau County Medical Center for proper mental evaluation before returning her to detention where she was held overnight. Plaintiff was held and charged with theft of service, resisting arrest and disorderly conduct.

Plaintiff admits that at all relevant times she failed to present her train ticket and that she refused to purchase a new ticket.

Plaintiff also alleges that she was charged with a crime and discussed plea arrangements with the Nassau County District Attorney's Office. Yet, she proffers no details of the disposition.

The complaint specifies five causes of action (though erroneously titled first, second, third, fifth and sixth, excluding a fourth): (1) negligence; (2) false arrest and wrongful detention; (3) assault and battery; (4) civil rights violations; and (5) violations of the Americans with Disabilities Act. Plaintiff also attempts to assert a federal claim pursuant to 42 USC §1983 for violations of the United States Constitution and the laws of the United States.

In addition, despite never having alleged a negligent training claim in her notice of claim, in his opposition papers, counsel for the plaintiff introduces a new claim against the MTA for the negligent training of the conductor and its police officers.

Notably, while defendants, MTA and LIRR, have yet to answer the plaintiff's complaint, the County Defendants, in their Answer, deny all the material allegations of the complaint. This Court will address both applications concurrently.

In deciding a motion made pursuant to CPLR 3211(a)7., the court must determine whether the pleader has a cognizable cause of action (*Leon v Martinez*, 84 NY2d 83; *Well v Yeshiva Rambam*, 300 AD2d 580). In so doing, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true (*511 West 232nd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144; *Well v Yeshiva Rambam, supra*). If, from the facts alleged in the complaint and the inferences which can be drawn from the opposition to the motion, the court determines that the pleader has a cognizable cause of action, the motion to dismiss must be denied (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409; *Stucklen v Kabro Assocs.*, 18 AD3d 461). While factual allegations contained in the complaint are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth (*In re Loukoumi, Inc.*, 285 AD2d 595; *Doria v Masucci*, 230 AD2d 764).

CPLR 3211(a)5. permits the defendant to seek and obtain a dismissal of one or more causes of action asserted against it on the ground that the cause of action is barred by the statute of limitations.

Defendants MTA and the LIRR are neither the State of New York, nor a municipality. Rather, the MTA and LIRR are public authorities. Defendant MTA Police Department is a

department within the MTA. Accordingly, reliance upon Section 50(e) of the General Municipal Law which is applicable to municipalities and the Court of Claims Act Section 10-3, 3-a and 3-2 which is applicable to claims against the State of New York, is misplaced. Claims asserted against public authorities, such as the MTA Defendants, are governed by the New York Public Authorities Law ("PAL").

Specifically, PAL §1276 governs actions against the MTA and LIRR (*Burgess v Long Is. R.R. Auth.*, 79 NY2d 777, 778; *Rose v Metro N. Commuter R.R.*, 143 AD2d 993, 994). Said section establishes a one year deadline to commence an action "founded on tort" against the MTA and LIRR, excluding only wrongful death actions to which PAL §2981 applies (Public Authorities Law §1276[2]). By operation of CPLR 204(a), the statutory stay of PAL §1276(1) tolls the one year limitations period set forth in section 1276(2) for 30 days (*Anderson v Long Is. R.R.*, 88 AD2d 328 *aff'd* 59 NY2d 657). Thus, the net limitation period governing a tort action against the MTA and LIRR is one year and 30 days (*Burgess v Long Island R.R. Auth.*, *supra* at 778; *Andersen v Long Is. R.R.*, *supra*; *Wenning v Metropolitan Transp. Auth.*, 112 AD2d 220). Accordingly, in order to timely commence a suit against the MTA for a common law tort claim, a plaintiff must file the summons and complaint within one year and 30 days of the accrual of the claim (*Sullivan v Atlantic Paratransit of NYC, Inc.*, 52 AD3d 817, 818).

A tort claim for negligence accrues at the time of injury (*Barrell v Glen Oaks Vil. Owners Inc.*, 29 AD3d 612, 613). Similarly, a cause of action for assault and battery also accrues immediately upon the occurrence of the tortious acts (*Lettis v U.S. Postal Service*, 39 F.Supp.2d 181, 204 [EDNY1998]). A cause of action for false imprisonment and wrongful detention, treated identically in New York, accrues when the unlawful confinement

ceases [CPLR 215(3); *Boland v. State of New York*, 30 NY2d 337; *Redding v County of Westchester*, 59 AD2d 776].

Plaintiff alleges that the acts constituting negligence by employees of the MTA causing her harm occurred on March 3, 2009. Therefore, plaintiff's claim for negligence and assault and battery accrued on March 3, 2009 while her claim for false arrest and wrongful detention accrued on March 4, 2009, the date she was allegedly discharged. Applying the one year and 30 day deadline to these dates, the last day plaintiff could file her action was April 2, 2010 for her negligence and assault and battery claims and April 3, 2010 for her false arrest and wrongful detention claim. Plaintiff filed her summons and complaint on May 11, 2010. Thus, plaintiff's tort claims for negligence, false arrest and wrongful detention, and assault and battery are time barred and therefore dismissed.

That her allegations arise from a set of occurrences where she was also allegedly a criminal defendant does not save the plaintiff from bringing a timely claim for assault and battery. The CPLR and the PAL conflict with respect to the time limitation to file a claim for the tort of assault. Specifically, CPLR 215(8) provides a one year extension when the defendant has been criminally prosecuted for the act that forms the basis of the civil suit (*Robinson v Franklin Gen. Hosp.*, 160 Misc.2d 893 [Sup. Ct. Nassau 1994]). Public Authorities Law §1276(1), on the other hand, sets a limit of one year and 30 days from the tortious conduct without any toll on the deadline.

The Court of Appeals held in *Tharps v. New York*, 59 NY2d 1023, 1023, that:

The limitations period applicable to actions for assault was reduced by the Legislature in 1962 to one year. When in 1969 the Legislature extended the period of limitations applicable to an action against the Transit Authority "founded on tort" to one year and 90 days it was, therefore, aware that some torts, including assault, were governed by a lesser, one-year period. Having failed to differentiate between

types of tort actions against the authority, the Legislature must be deemed to have intended to change the limitation period for an action against the authority for assault to one year and 90 days.

In this case, plaintiff alleges that she was wrongfully detained for one night. However allegations surrounding her status as a criminal defendant and, if she was, the date of the final disposition of that criminal matter remain unclear. Nonetheless, said issue is moot because inasmuch as her false arrest and wrongful detention cause of action against the MTA and LIRR is essentially a tort claim, the time limitations of the Public Authorities Law govern; CPLR 215 is superseded (*Tharps v City of New York, supra*).

As against the County Defendants, plaintiff alleges that they were negligent in the prosecution of the plaintiff in this incident; specifically, that the County Defendants were negligent in reviewing the evidence and preparing its case for prosecution against the plaintiff. However “[a]s a matter of public policy, there is no cause of action in the State of New York sounding in negligent prosecution” (*Secard v Department of Social Servs. of County of Nassau*, 204 AD2d 425 citing *Pandolfo v U.A. Cable Sys. of Watertown*, 171 AD2d 1013 and *Coyne v State of New York*, 120 AD2d 769, 770). Moreover, actions against prosecutors such as the Nassau County District Attorney relating to a prosecution are barred by the doctrine of absolute immunity (*Johnson v Town of Colonie*, 102 AD2d 925). Therefore, plaintiff’s claim against the County Defendants for negligent prosecution is dismissed.

Plaintiff’s false arrest and wrongful detention claims, together with her assault and battery claims as against the County Defendants are also dismissed for failure to state a cause of action. Plaintiff alleges that her arrest and detention was done by the MTA and LIRR; she does not claim, nor is there any evidence, that the County Defendants were

involved in her arrest and detention. In fact, there is also no allegation, nor any evidence, that the MTA detention facility where plaintiff was initially held was controlled or under the jurisdiction of the County Defendants. The charges made against the plaintiff of theft of services, resisting arrest and disorderly conduct were brought by MTA police who originally detained the plaintiff at an MTA police facility. The plaintiff did not come under the control of the County Defendants until her arraignment. Her complaint does not allege that the alleged assault and battery took place at her arraignment or anytime after she was under the control of Nassau County or its employees or agents. Therefore, since the LIRR conductor and the MTA police are not employees of Nassau County, the County Defendants cannot be held liable for any alleged wrongful conduct.

Accordingly, plaintiff's false arrest and wrongful detention claim together with her assault and battery claims are also dismissed for failure to state a cause of action as against the County Defendants.

The balance of plaintiff's claims for state civil rights violations, violations of the U.S. Constitution, the laws of the United States including the Americans with Disabilities Act, are also dismissed for failure to state a cause of action.

Initially it is noted that to state a claim for a federal civil rights violation pursuant to 42 USC §1983, a plaintiff must allege, at a minimum, conduct by a person acting under color of law, which deprived the injured party of a right, privilege or immunity guaranteed by the U.S. Constitution or the laws of the United States (*DiPalma v Phelan*, 81 NY2d 754). Here, plaintiff fails entirely to plead or allege any factual allegation that the challenged conduct was attributable to a person acting under color of law. Plaintiff complains of the conduct of MTA employees. Yet she fails entirely allege that a *person* acting under color

of law deprived her of a federal right.

Further “[f]or 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 [citations omitted]). Thus, not only has the plaintiff failed to allege that any individual human actor deprived her of a federal right while acting under color of law, but she also fails to make any factual allegations that the implementation or execution of any MTA policy or custom resulted in a violation of her federal rights.

Therefore, this Court finds that plaintiff has also failed state a cause of action for violation of her federal civil rights under the U.S. Constitution or the laws of the United States.

Her claims for state civil rights violations are also dismissed. It is true that “the recognition of the [plaintiff’s] state constitutional claims [is] neither necessary nor appropriate to ensure the full realization of [her] rights, because the alleged wrongs could have been redressed by an alternative remedy, namely, timely interposed common-law tort claims for assault and battery, false imprisonment, and the intentional and negligent injury to his property” (*Lyles v State of New York*, 2 AD3d 694 *aff’d* 3 NY3d 396). While the plaintiff in this case failed to timely interpose said tort claims, the fact is that she had adequate common law remedies available to her which preclude a state constitutional law claim.

In *Brown v State of New York*, 89 NY2d 172, a civil damage remedy was recognized for a violation of a State constitutional provision; however, said remedy is only applicable in circumstances where the alleged violation does not fit within the definition of any common-law tort remedy (*Brown v. State of New York, supra* at 188). Where there exist alternative statutory or common-law remedies, it has been held improper to find a State constitutional claim (see, e.g., *Lyles v State, supra*; see also *Donas v City of New York*, 2008 WL 293038 [Sup. Ct. New York 2008]). Accordingly, said claims are herewith dismissed.

Plaintiff has also failed to state a cause of action for violations of the Americans with Disabilities Act (“ADA”). The ADA was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” (42 USC § 12101[b][1] [2000]). Its first three titles proscribe discrimination against individuals with disabilities in employment and hiring (Title I), access to public services (Title II), and public accommodations (Title III). Titles I and III are inapplicable to the facts at hand.

The anti-discrimination provision of Title II provides as follows: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity” (42 USC § 12132).

In order to establish a violation under the ADA, the plaintiff must demonstrate that (1) she is a “qualified individual” with a disability; (2) that the defendants are subject to the ADA; and (3) that she was denied the opportunity to participate in or benefit from

defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of her disability (*Henrietta D. v Bloomberg*, 331 F.3d 261 [2nd Cir. 2003]; see also *Doe v. Pfrommer*, 148 F.3d 73, 82 [2nd Cir. 1998]).

Here, plaintiff fails to allege that her purported disability falls within the scope of a "qualified individual" with a disability. She also fails to allege that she was denied access and the use of the LIRR and the MTA facilities and services *because* of her disability.

Plaintiff alleges that the train conductor misperceived the plaintiff because of her purported disability, outward appearance and mannerisms. In fact, she avers that the train conductor incorrectly perceived her to be indigent. She claims that based upon this misperception of indigence, the train conductor determined that she could not pay her fare (as well as her apparent refusal to present her train ticket to the conductor after three requests). She claims that based upon the mistaken determination that she could not pay her fare, the conductor made the decision to remove her from the train. Despite alleging that "all defendants recognized that plaintiff appeared to be a person mentally challenged", plaintiff still never alleges that the train conductor, the MTA Police or any MTA employee denied her access to the train by virtue of a "qualified" disability, a required element to properly state a claim for a Title II violation. Thus, even under the most liberal reading of the plaintiff's complaint, this Court is hard pressed to find a cause of action against the defendants for a violation of the ADA.

Further, where, as here, the plaintiff seeks money damages as a remedy for the defendants' alleged Title II violation, she must show not only that there was a violation, *supra*, but also that such violation was motivated by either discriminatory animus or ill will stemming from plaintiff's "qualified" disability (*Powell v National Bd. Of Med. Exam'rs*, 364

F3d 79 [2nd Cir. 2004]). Yet, no where does the plaintiff allege that any alleged ADA violation was motivated by discriminatory animus or ill will stemming from the plaintiff's "qualified" disability. In fact, plaintiff's allegations explicitly attribute her treatment by MTA employees to her indigent appearance, mannerisms and appearance as "a person of low statue [sic]".

In light of the fact that the plaintiff's ADA claim offers nothing more than conclusory statements alleging discrimination, and the complaint fails to state that the exclusion from a service is because of a plaintiff's qualified disability, the claim is herewith dismissed (*Pappanikolaou v New York City*, 2005 WL 1661649 [EDNY 2005]).

Finally, plaintiff's new claim against the MTA and LIRR, asserted for the first time in her opposition and sur reply papers and sounding in negligent training, is dismissed on the grounds that the notice of claim filed by the plaintiff did not mention this claim (General Municipal Law § 50-e; *Finke v City of Glen Cove*, 55 AD3d 785, 786; *Urena v City of New York*, 221 AD2d 429).

Accordingly, defendants, MTA and LIRR's pre-answer motion, for an Order, dismissing the plaintiff's complaint is granted in its entirety. Similarly, the County Defendants' motion for an Order granting it summary judgment dismissal of the plaintiff's complaint is also granted in its entirety.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

Dated: **SEP 14 2011**



 UTE WOLFF LALLY, J.S.C.

12

ENTERED

SEP 19 2011

NASSAU COUNTY
 COUNTY CLERK'S OFFICE

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