

Excell v City of New York

2012 NY Slip Op 31435(U)

April 25, 2012

Supreme Court, Queens County

Docket Number: 529/10

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Tafari Excell,

Plaintiff,

- against -

Index
Number: 529/10

Motion
Date: 4/17/12

The City of New York, New York City Police
Department, New York City Department of
Corrections and "John Doe", et.al.,

Defendants.

Motion
Cal. Number: 6

Motion Seq. No.: 1

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The following papers numbered 1 to 8 read on this motion by
defendants for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motion is
decided as follows:

As a preliminary matter, since the New York City Police
Department and the New York City Department of Corrections are not
cognizable legal entities that may be sued, but are merely
departments, or agencies, of the City, the Court, sua sponte,
dismisses the action as against the Police Department and
Department of Corrections.

That branch of the City's motion for summary judgment pursuant
to CPLR 3212 dismissing the complaint against it is granted. That
branch of the motion to dismiss the complaint as against NYC Police
Commissioner Raymond Kelly, NYC Police Officer Jared Tepperman and
NYC Police Sgt. Goodman pursuant to CPLR 3215(c) is granted, there
appearing no opposition to this branch of the motion.

Plaintiff testified in his 50-h hearing and deposition to the
following facts, which are not in dispute: Plaintiff was a

passenger in the motor vehicle operated by his friend Richard Guppy at 4:00 a.m. on June 6, 2007. The vehicle was pulled over by police officers, later identified as P.O. Jared Tepperman and Sgt. Goodman, on Springfield Boulevard and 115th Street in Queens County for running a red light. The police searched the vehicle and recovered a gun. Plaintiff and Guppy were arrested for weapons possession and plaintiff was Mirandized at the police Precinct. In the holding cell at the Precinct, Guppy asked plaintiff to take the weapons possession charge for him and plaintiff agreed. He made a confession to the police that the gun recovered was his and wrote and signed a statement confessing that he owned the gun and that he hid the gun inside the vehicle when the vehicle was pulled over by the police. Plaintiff never apprised the police that he wished to recant his confession. He was arraigned and released from custody on June 7, 2007.

On July 27, 2007, plaintiff was arrested in Nassau County for weapons possession, possession of crack cocaine, possession of a forged instrument and vehicle violations. Plaintiff was remanded into custody on this second, unrelated arrest. On December 21, 2007, while remanded on the second arrest, plaintiff was indicted in the present matter for knowingly possessing a loaded gun with intent to use unlawfully against another, knowingly possessing a loaded gun outside of his home or place of business, knowingly possessing a defaced gun and knowingly possessing a gravity knife. At his arraignment on this indictment on February 7, 2008, the Court sua sponte raised plaintiff's bail to \$250,000 after being informed of plaintiff's second arrest while on bail in the present matter. Plaintiff did not make bail. Therefore, when he was released from custody on August 22, 2008 on the second arrest in Nassau County, he was incarcerated at Riker's Island for the present matter. He was released from Riker's Island on June 15, 2009 when all charges against him were dismissed.

Plaintiff served a notice of claim on September 10, 2009 alleging false arrest, false imprisonment, assault, battery, slander, violation of civil rights and negligent retention, training and supervision of the arresting police officers. He subsequently commenced the present action on January 8, 2010. In his complaint he alleges the following causes of action: violation of 42 U.S.C. §1983, malicious prosecution, malicious abuse of process, false arrest and imprisonment, intentional infliction of emotional distress, assault, battery and conspiracy. His §1983 cause of action is based upon the following alleged civil rights violations: his unlawful arrest and imprisonment by P.O. Tepperman and Sgt. Goodman, his subjection to a strip search as a result of the unlawful arrest and imprisonment, conspiracy on the part of P.O. Tepperman and Sgt. Goodman to deprive him of his

constitutional due process and equal protection rights, and the failure of defendants to instruct, supervise, control and discipline Tepperman and Goodman on a continuing basis so as to have prevented the commission by them of the false arrest and imprisonment of plaintiff.

The City moves for dismissal of plaintiff's state law claims, inter alia, upon the ground that plaintiff failed to serve a timely notice of claim.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Plaintiff's causes of action for assault and battery accrued on June 6, 2007, the date of his arrest, since plaintiff's assault and battery claims are limited to events that transpired on that date. Therefore, he had until September 4, 2007 to serve a notice of claim. His causes of action for false arrest and unlawful imprisonment accrued on the date he was released from physical custody on June 7, 2007 (see Ragland v New York City Housing Authority, 201 AD 2d 7 [2nd Dept 1994]). Therefore, he had until September 5, 2007 to serve a notice of claim on those grounds. His notice of claim asserting these claims, served on September 10, 2009, over two years past the 90-day deadline, without leave of court, was a nullity (see Chicara v. City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004]) and, thus, his causes of action for assault, battery, false arrest and unlawful imprisonment must be dismissed as a matter of law.

Plaintiff's causes of action for malicious prosecution, malicious abuse of process, intentional infliction of emotional distress and conspiracy asserted in his complaint must also be dismissed since plaintiff failed to assert said claims in his notice of claim (see Bonilla v City of New York, 232 AD 2d 597 [2nd Dept 1996]). The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" (General Municipal Law §50-e [2]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785 [2nd Dept 2008] internal quotations and citations omitted).

Moreover, even had plaintiff filed a timely notice of claim as to his assault, battery, false arrest and unlawful imprisonment claims, the action asserting said claims is untimely. The period of

limitation for commencing tort actions against a municipality is one year and 90 days (see General Municipal Law § 50-e[5]). Since the action was not commenced until January 8, 2010, two years and seven months after plaintiff's causes of action for the aforementioned claims accrued, these claims are now time-barred. The Court notes that the City interposed the affirmative defense of statute of limitations in its answer.

Moreover, since the late notice of claim with regard to the assault, battery, false arrest and unlawful imprisonment claims, served without leave of the Court, was a nullity, and since the causes of action asserted in the complaint for malicious prosecution, malicious abuse of process, intentional infliction of emotional distress and conspiracy were not included in the notice of claim, even if, arguendo, the present action had been commenced within the one year and 90-day limitation period applicable to plaintiff's state law claims, it was never properly commenced and is now time-barred (see Davis v. City of New York, 250 AD 2d 368 [1st Dept 1998]). The Court also notes that it has no authority to allow a late notice of claim at this late juncture, since the one year and 90-day statute of limitations has expired (see Hochberg v. City of New York, 63 NY 2d 665 [1984]). Indeed, plaintiff does not even seek leave to serve a late notice of claim.

Therefore, plaintiff's causes of action alleging assault, battery, false arrest, unlawful imprisonment, malicious prosecution, malicious abuse of process, intentional infliction of emotional distress and conspiracy must be dismissed.

As to plaintiff's remaining cause of action for civil rights violations pursuant to 42 U.S.C. §1983, the City contends that said cause of action must also be dismissed. The Court concurs.

The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any State is a claim brought pursuant to 42 U.S.C. §1983 (see generally Manti v New York City Transit Auth., 165 AD 2d 373 [1st Dept 1991]).

A municipality may only be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). A municipality cannot be held liable under a theory of respondeat superior for the unconstitutional acts of its employees, but may be found liable under §1983 "only where the municipality itself causes the constitutional violation at issue. In other words, 'it is when execution of a government's policy or

custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (Johnson v. King County District Attorney's Office, 308 AD 2d 278, 293 [2nd Dept 2003], quoting Monell, supra, at 694) (emphasis in original). There is no showing that plaintiff's arrest, detention and prosecution was as a result of the implementation of an official policy or custom of the City. Indeed, plaintiff fails to address this issue in his opposition papers. Therefore, plaintiff's §1983 causes of action must be dismissed, as a matter of law.

In any event, the existence of probable cause for the arrest and detention of plaintiff immunizes the City against a claim brought pursuant to §1983 (see Martinez v. City of Schenectady, 97 NY 2d 78 [2001]), even had plaintiff alleged an official policy or custom on the part of the City. It is undisputed, and indeed plaintiff himself testified, that he was arrested after a gun was retrieved from the vehicle in which he was a passenger and that he made a voluntary confession to the police that the gun belonged to him and that he secreted it in the vehicle after the vehicle was stopped. These undisputed facts establish that there was probable cause to arrest, detain and prosecute plaintiff.

Finally, that branch of the motion for dismissal of the complaint as against the individual defendants named in the complaint, Commissioner Kelly, P.O. Tepperman and Sgt. Goodman, pursuant to CPLR 3215(c) is granted, there appearing no opposition to that branch of the motion.

Accordingly, the motion is granted and the complaint is dismissed in its entirety. The Court need not reach, and will not decide, the remaining bases of the motion.

Dated: April 25, 2012

KEVIN J. KERRIGAN, J.S.C.