Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Maria De Lourdes Torres,

Plaintiff,

- against -

The City of New York, Police Officer Jones, Sergeant Harp, Detective Irma Santiago, Detective Denitor Guerra, Detective Erik Hendriks, Detective Daniel Corey, Detective Michael McEntee, Detective John Reynolds, Lieutenant Vilardi, and Detective Macpherson,

Defendants.

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Index Number: 24709/07

Motion Date: 7/10/12

Motion Cal. Number: 16

Motion Seq. No.: 2

The following papers numbered 1 to 8 read on this motion by defendant, The City of New York, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Reply	8

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

Plaintiff commenced this action on October 3, 2007 alleging, as a first cause of action, a claim against the individual defendants under 42 U.S.C. §1983 for violation of her constitutional rights as a result of her false arrest, false imprisonment and malicious prosecution, as a second cause of action, a claim against the individual defendants for wanton, willful and reckless conduct, and, as a third cause of action, a claim against the City for negligent supervision of the actions of the individual defendants and negligent failure "to review the incident and subsequent arrest".

It is undisputed that service of the summons and complaint

were not effected upon defendants Santiago, Guerra, Hendricks, Corey or Vilardi. The Corporation Counsel interposed an answer only on behalf of the City.

On October 26, 2009, plaintiff filed an order to show cause seeking an extension of time to effect service of the summons and complaint upon the aforementioned defendants pursuant to CPLR 306-b, or, in the alternative, in the interest of justice, or, in the alternative, for leave to discontinue the action without prejudice as to said defendants so as to enable plaintiff to commence a new action against them. This Court declined to sign the order to show cause.

On January 21, 2010, plaintiff commenced a second action against the "New York City Police Department", Santiago, Guerra, Hendricks, Vilardi and Corey (Index No. 1590/10). It is undisputed that the aforementioned individuals were served with this second summons and complaint. The complaint in the second action alleges a first cause of action against defendants under 42 U.S.C. §1981, a second cause of action pursuant to 42 U.S.C. §1983, a third cause of action under 42 U.S.C. §1983 as against defendant NYPD, a fourth cause of action against defendants for malicious prosecution and abuse of process, a fifth cause of action against defendants for false arrest and false imprisonment, and a sixth cause of action against the individual defendants for punitive damages. The Corporation Counsel interposed an amended answer on behalf of the City and Santiago, Guerra and Hendricks in that action. The City did not answer for Vilardi or Corey and these individual defendants have not appeared in the second action.

No motion was made for consolidation of these actions. Instead, they have remained separate actions, both including Santiago, Guerra, Hendricks, Vilardi and Corey as defendants in the caption. Moreover, the complaint in the second action alleges additional causes of action against them not asserted in the complaint in the present action. The Corporation Counsel has made the identical summary judgment motion in both actions on behalf of the City, Santiago, Guerra and Hendricks. The Court notes that counsel for the City annexes the same affirmation to the moving papers of both motions, indicating in each, "The instant motion is being filed concurrently under each of the index numbers for the first and second complaints."

The Court notes, and counsel for the City also contends in a footnote in his affirmations in both motions, that since the City did not interpose an answer on behalf of the individual defendants in the present action and these defendants did not otherwise answer or move, they were in default. Therefore, since plaintiff did not

move for a default judgment against the individual defendants within one year of their default, this action against them is deemed abandoned pursuant to CPLR 3215, leaving the City as the only remaining defendant in this action. The Court also notes that since the second action was commenced on January 21, 2010 and Vilardi and Corey have not appeared, and since plaintiff has not moved within one year for a default judgment against them, the second action is also deemed abandoned and dismissed against Vilardi and Corey.

Indeed, plaintiff does not dispute that she has abandoned her claims against all individual defendants except Santiago, Guerra and Hendricks, and counsel for both sides have proceeded upon the basis that the only defendants are the City, Santiago, Guerra and Hendricks.

Therefore, plaintiff's first and second causes of action against the individual named defendants are dismissed and the caption of this action is hereby amended to read as follows:

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Maria De Lourdes Torres,

Plaintiff,

- against -

The City of New York,

Defendant.

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Index Number: 24709/07

Motion by the City for summary judgment dismissing the complaint against it is granted. The remaining branches of the motion for summary judgment dismissing the complaint against Santiago, Guerra and Hendricks are denied as moot since the present action against them was abandoned and said branches of the motion do not pertain to this action.

Plaintiff alleges she was falsely arrested on September 24, 2002 for the murder of one Einstein Acuna. The evidence presented on this record indicates that subsequent to the murder, plaintiff was questioned by police after their retrieval of telephone records listed several calls between plaintiff and Acuna in proximity to the estimated time of his death. Defendants Detective Santiago and Detective Guerra came to her apartment and questioned her in Spanish, as plaintiff only spoke that language, and showed her a photograph of Acuna. She denied knowing him, whereupon said

defendants left. Approximately one to two weeks later, said defendants returned and asked her to come to the police precinct for questioning. She agreed and went voluntarily. After being shown photographs, she then admitted that she knew Acuna. Plaintiff admitted that she was romantically involved with Acuna and that she engaged in sexual relations with him in exchange for his payment to her of money. She was subsequently given a polygraph examination, which she failed, and after being Mirandized, she signed a confession to the murder on November 9, 2002. Said confession was written by Detective Santiago and read to plaintiff, as plaintiff stated that she could not write well, whereupon she signed it. She was thereupon arrested. In January 2003 plaintiff was indicted by a Grand Jury on two counts of second degree murder and criminal possession of a weapon in the fourth degree. Pursuant to the memorandum issued by Justice Robert J. Hanophy on March 19, 2003, Torres' motion in the criminal matter, inter alia, to inspect the Grand Jury minutes and to dismiss the indictment was granted solely to the extent that upon inspection of the Grand Jury minutes, the Court found that there was sufficient evidence to sustain the indictment and, accordingly, denied that branch of the motion to dismiss the indictment. On June 4, 17 and 22, 2003, a Huntley/Mapp hearing was conducted by Judicial Hearing Officer (JHO), the Honorable Thomas A. Demakos, who issued the following findings of fact and conclusions of law.

The victim, Acuna, was stabbed to death on September 24, 2002. Based upon telephone records that calls were made from plaintiff's apartment, Detective McEntee went to the apartment and showed plaintiff a photograph of the victim and asked her if she knew him, whereupon she responded in the negative and McEntee left. On October 25, 2002, Santiago and Hendricks went to the apartment and Santiago questioned plaintiff. Plaintiff denied knowing the victim and denied making any telephone calls to the victim's cell phone. At that point, since the individuals with whom plaintiff resided were present at the time of the conversation, Santiago, for purposes of privacy, asked plaintiff to come to the 115th Precinct. Plaintiff consented.

At the Precinct, plaintiff was questioned again as to whether she knew the victim and placed telephone calls to him. After being confronted with the telephone records, plaintiff admitted that she knew the victim and lied about the phone calls because she did not wish to admit in front of the owner of the apartment that she had used the telephone, which she did not have permission to use.

On November 8, 2002, plaintiff was again brought to the Precinct and told that she was going to be administered a polygraph test and thereafter was brought to the District Attorney's Office for the test. Prior to the pre-test interview, conducted through

Santiago as the translator, defendant signed a polygraph unit consent. Thereafter the polygraph test was conducted. After the exam, plaintiff was brought back to the 115th Precinct where she was read her Miranda warnings in Spanish by Santiago. Plaintiff acknowledged that she understood each warning by writing "Si" (yes) on the Miranda form.

Thereupon, plaintiff made a statement in Spanish which Santiago wrote out at plaintiff's request. Plaintiff then signed the statement.

JHO Demakos concluded, inter alia, that the People established beyond a reasonable doubt that plaintiff's confession was voluntarily made and should be admissible at trial, since plaintiff was not abused, coerced or otherwise mistreated and the statements were knowingly, intelligently and voluntarily made following her waiver of her Miranda rights. Thereafter, the findings of fact and conclusions of law of the Honorable Demakos were confirmed and adopted in their entirety pursuant to the order of Justice Hanophy issued on September 17, 2003.

On January 25, 2007, the Office of the District Attorney moved to dismiss all charges against plaintiff. She was released from incarceration 72 hours later.

As heretofore stated, the only remaining defendant in this action is the City and the only remaining cause of action is the third cause of action against the City. Said cause of action, in actuality, alleges two causes of action: one for negligent supervision of the actions of the individual defendants, and one for negligent failure "to review the incident and subsequent arrest" (in other words, it asserts a claim for negligent investigation). The City is entitled to summary judgment dismissing said causes of action, as no cause of action exists for negligent supervision against the City where its employees were acting within the scope and course of their employment, and no cause of action may be maintained for negligent investigation, as a matter of law.

It is a well-established principle that no action for negligent supervision may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent supervision would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the ...adequacy of the

[supervision]" (Karoon at 324).

Where the employer concedes that its employee was acting within the scope of his employment, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]).

Here, there is no dispute that the individual police officers was acting within the scope and course of their employment. Therefore, the City is entitled dismissal of plaintiff's cause of action for negligent supervision (see Ashley v. City of New York, 7 AD 3d 742, supra).

Plaintiff's cause of action alleging negligent investigation is also not a cognizable cause of action and must be dismissed as a matter of law (see Coyne v State, 120 AD 2d 769 [3rd Dept 1986]). In any event, since the alleged negligent investigation was a discretionary act, it may not form the basis of liability (see McLean v City of New York, 12 NY 3d 194 [2009]; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.). Therefore, plaintiff's cause of action for negligence must also be dismissed, as a matter of law.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: August 6, 2012

KEVIN J. KERRIGAN, J.S.C.