

Dawes v City of New York

2013 NY Slip Op 30098(U)

January 16, 2013

Supreme Court, New York County

Docket Number: 103957/2008

Judge: Kathryn E. Freed

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 1

Index Number : 103957/2008
DAWES, SR., DURVEN
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CAL: HLT

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

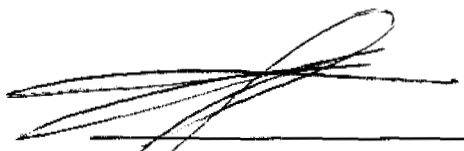
FILED

JAN 23 2013

COUNTY CLERK'S OFFICE
NEW YORK IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1-16-13
JAN 16 2013



_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
DURVEN DAWES, SR., DURVEN DAWES, JR., AND
RAINEE F. DAWES,

Plaintiffs,

DECISION/ORDER
Index No.: 103957/2008
Seq. No.: 001

-against-

THE CITY OF NEW YORK,

FILED

JAN 23 2013

Defendant
**COUNTY CLERK'S OFFICE
NEW YORK**

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1,2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....3-6.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant moves for an Order pursuant to CPLR§ 3211, dismissing plaintiff's pleadings alleging violations of civil rights, pursuant to the United States Constitution, Section 1983 of Title 42 of the United States Code, and loss of services and consortium; or in the alternative, granting it summary judgment pursuant to CPLR§ 3212. No opposition has been submitted by plaintiffs.

After a review of the instant motion, all relevant statutes and caselaw, the Court grants the motion.

Factual and procedural background:

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs' Durven Dawes, Sr. and Durven Dawes, Jr., as a result of an incident allegedly occurring on December 21, 2006, when they were placed under arrest. Plaintiffs' commenced the instant action on March 17, 2008, via Summons and Complaint which alleges several causes of action. The first five causes of action refer to both Durven Dawes, Jr. and Durven Dawes, Sr. The first cause of action alleges assault and battery; the second alleges false arrest and false imprisonment; the third alleges malicious prosecution; the fourth alleges civil rights violations; and the fifth alleges due process and equal protection violations. The sixth cause of action relates specifically to Durven Dawes, Jr., and alleges assault and battery. The seventh cause of action relates specifically to Rainee F. Dawes, and alleges loss of services and consortium. Issue was subsequently joined on April 25, 2008, when defendant served its Answer. Plaintiffs filed a Note of Issue on June 27, 2012.

Defendant asserts that plaintiffs' fourth and fifth cause of action should be dismissed because plaintiffs have failed to state valid claims for violations of Durven, Junior and Seniors' constitutional and civil rights. It argues that these claims are not actionable because they are improperly plead in that they are devoid of any particularized allegations of fact, thus precluding liability and because defendant cannot be held liable pursuant to 42 U.S.C. § 1983 on a theory of respondeat superior. Defendant also argues that in order "to recover on a 1983 claim against a municipality, a 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."

Defendant further argues that plaintiffs' seventh cause of action on behalf of Rainee F. Dawes for loss of services and consortium also warrants dismissal because it was not included in the Notice of Claim.

The fourth cause of action contained in the instant claim states in pertinent part:

28. "Each and every act of defendant's officers alleged herein were done by them, not as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of New York, City of New York and County of New York, and under the authority of their office as police officers for said City and County.

29. Defendant officers, acting under the color of law, deprived plaintiff of their rights under the constitution of the United States and the laws of the State of New York because of their race, in violation of Section 1983 of Title 42 of the United States Code, and Section 40-c of the New York State Civil Rights Law.

30. By virtue of the defendant's violations of plaintiffs DURVEN DAWES, SR. and DURVEN DAWES, JR.'s civil rights, plaintiffs sustained physical and emotional injuries and special damages as well." (See Verified Complaint at ¶¶ 28-30 annexed to defendant's moving papers as Exhibit "B").

The fifth cause of action contained in the instant claim state in pertinent part:

34. "Defendant's actions in the assault, battery, false arrest and imprisonment, malicious prosecution and civil rights violations of plaintiffs DURVEN DAWES, SR. and DURVEN DAWES, JR. were in violation of their rights of due process and equal protection of the laws under the New York State and United States Constitutions.

35. By virtue of the defendant's violations of plaintiffs' constitutional rights, plaintiffs

sustained physical and emotional injuries and special damages as well.” (See Verified Complaint ¶¶ 34-35).

Conclusions of law:

In order to assert a claim against a municipality for civil rights violations pursuant to 42 USC § 1983 based on the alleged tortious actions of its employees, the plaintiff must allege and plead that the alleged actions resulted from an official municipal policy or custom (*see Monell v. Dep. of Social Servs. Of City of New York*, 436 U.S. 658 [1978]; *Leftenant v. City of New York*, 70 A.D.3d 596 [1st Dept. 2010]; *Leung v. City of New York*, 216 A.D.2d 10 [1st Dept. 1995]; *Chavez v. City of New York*, 33 Misc.3d 1214(A), 939 N.Y.2d 739, 2011 N.Y. Slip Op. 5193(U) (N.Y. Sup. 2011), *affd* 99 A.D.3d 614 [1st Dept. 2012]). There is no respondeat superior liability for a municipality under section 1983 and, accordingly, the violation of plaintiffs’ civil rights by municipal employees, without more, will not render the municipality liable for such violation(s) (*see Monell*, 436 U.S. at 694; *see also Ramos v. City of New York*, 285 A.D.2d 284, 302 [1st Dept. 2001]).

“The requirement of pleading an official policy or custom of a municipality through which a constitutional injury has been inflicted upon a plaintiff applies only to 42 USC § 1983 claims against a local government, and not to such claims against individual defendants in their official capacities” (*Bonsone v. County of Suffolk*, 274 A.D.2d 532, 534 [2d Dept. 2000]). However, “[i]n order to state a claim [against an individual defendant], under that statute, the 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 Constitution or the laws of the United States” and said claim is subject to dismissal where “no Federally protected right was clearly” alleged (*DiPalma v.*

Phelan, 81 N.Y.2d 754, 756 [1992]).

In the case at bar, the complaint fails to allege that a municipal policy or custom caused plaintiffs to be deprived of a right, privilege or immunity guaranteed to them by the Constitution or the laws of the United States (*see* R.A.C. Group, Inc. v. Board. of Educ. Of City of New York, 295 A.D.2d 489, 489 [2d Dept. 2002]). Indeed, the facts as alleged herein, even when liberally construed, do not implicate larger policy issues with the requisite degree of specificity. The complaint fails to allege, other than in wholly conclusory terms, how the actions of the municipal defendants (police officers), caused the deprivation of plaintiffs' civil rights and fails to identify with any specificity, the protected rights allegedly violated by defendant.

Furthermore, plaintiff's seventh cause of action also warrants dismissal. Said cause of action refers specifically to plaintiff Rainee F. Dawes, and asserts loss of services and consortium. This cause of action fails in that it is well settled that pursuant to General Municipal Law § 50-e(2), a Notice of Claim must specify " the nature of the claim; the time when, the place and the manner in which the claim arose and the items of damages or injuries claimed to have been sustained..."(*see also* Rosenbaum v. City of New York, 8 N.Y.3d 1 [2006]).

In accordance with the foregoing, it is

ORDERED: that defendant's motion pursuant to CPLR § 3211 dismissing plaintiffs' pleadings which allege violations of civil rights pursuant to the United States Constitution, Section 1983 of Title 42 of the United States Code, (specifically, plaintiffs' fourth and fifth causes of action) and also loss of services and consortium, (specifically, the seventh cause of action) is hereby granted and it is further

ORDERED that all remaining causes of action shall remain and it is further

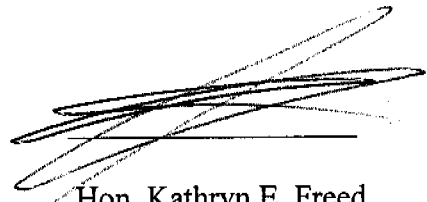
ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Court and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 16, 2013

ENTER,

JAN 16 2013



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

JAN 23 2013

COUNTY CLERK'S OFFICE
NEW YORK