

Murillo v City of New York

2013 NY Slip Op 30215(U)

January 23, 2013

Sup Ct, New York County

Docket Number: 105440/2011

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART ✓

Index Number : 105440/2011
MURILLO, GUILLERMO
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS CAL 1168

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

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

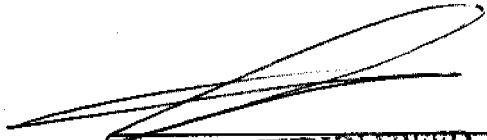
DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-23-13



HON. KATHRYN FREED, J.S.C.
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

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
GUILLERMO MURILLO,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendants.

DECISION/ORDER

Index No.: 105440/2011
Seq. No.: 001

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

- NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
- ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
- ANSWERING AFFIDAVITS.....
- REPLYING AFFIDAVITS.....
- EXHIBITS.....
- STIPULATIONS.....
- OTHER.....

NUMBERED
FILED
 1-.....

 FEB. 01 2013
 3-6.....
 NEW YORK
 COUNTY CLERK'S OFFICE

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

Defendant seeks and Order pursuant to CPLR§ 3211(a)(7) and/or CPLR§ 3212, dismissing the complaint for noncompliance with GML§ 50(e)(2) and pursuant to CPLR§ 3211(a)(7) and/or CPLR§ 3212, dismissing all of plaintiff's state claims other than excessive force and his 42 U.S.C. § 1983 claims. No opposition has been submitted by plaintiff.

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

Factual and procedural background:

On September 29, 2010, plaintiff served a Notice of Claim alleging only a cause of action for excessive force emanating from his arrest on July 3, 2010. On May 9, 2011, plaintiff commenced the instant action via service of a Summons and Complaint, also alleging the additional causes of action for false arrest, malicious prosecution and negligent hiring, training and retention, as well as a federal cause of action pursuant to § 1983. On March 2, 2011, plaintiff testified at his 50-H hearing.

On June 2, 2011, defendant served its Answer, and mailed same with a letter to plaintiff, instructing him to remit authorizations enabling defendant to obtain discovery from the NYPD, the District Attorney's Office, and the Criminal Court. On June 20, 2011, defendant followed up with a second letter with the same instruction. On November 15, 2011, plaintiff provided a Bill of Particulars. On April 9, 2012, a Case Scheduling Order was issued. On May 24, 2012, defendant responded to the Case Scheduling Order, noting that its discovery exchange would be forthcoming upon receipt of an NYPD authorization from plaintiff and an unsealing order for the criminal court. Plaintiff has consistently failed to appear at two compliance conferences scheduled respectfully for July 31, 2012 and August 21, 2012.

Defendant asserts that plaintiff's Notice of Claim is "devoid of any meaningfully identifying information concerning the manner in which the claim allegedly arose." While plaintiff asserts he sustained injuries due to excessive force utilized by New York City Police Officers, he fails to identify them. He also fails to proffer a sufficient statement or narrative concerning what the nature of his alleged interaction with the police was or how and in what manner, the police used said force.

Defendant asserts that while plaintiff testified at his hearing that the officers threw him to the ground at the precinct, nowhere in the hearing transcript, the Notice of Claim, or in the complaint, does he identify them or the precinct the incident occurred at. Defendant argues that as a result of these glaring omissions, it is prejudiced in that it cannot conduct an adequate investigation into plaintiff's claims. The prejudice has been exacerbated by plaintiff's failure to provide authorizations necessary to obtain crucial discovery from the NYPD. Consequently, defendant argues that all claims other than one alleging excessive force warrant dismissal as they were not alleged in the Notice of Claim and are time barred.

Defendant also argues that plaintiff's 1983 claims are improperly plead and thus, must also be dismissed. Defendant argues that "while plaintiff may have attempted to raise a claim under 1983, plaintiff nonetheless has failed to allege a municipal pattern of practice pursuant to which plaintiff's constitutional rights were allegedly violated." Defendant also argues that it cannot be held responsible under the theory of respondeat superior. Defendant further argues that plaintiff's claim pursuant to § 1983 for attorney's fee and punitive damages also warrant dismissal because they were not alleged in the Notice of Claim, and said damages are not available against a municipality.

Conclusions of law:

General Municipal Law § 50-e(2) provides in pertinent part that the Notice of Claim shall 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 damage or injuries claimed to have been sustained....."

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 Vreeburg v. Smith*, 192 A.D.2d 41 [2d Dept. 1993]).

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. Dept. 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 §1983 and, accordingly, the violation of plaintiff's civil rights by municipal employees, without more, will not render the municipality liable for such violation(s) (*see* Monell, 436 U.S. 658 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]). Moreover, 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 and 3) a denial of a constitutional right (Monell, 436 U.S. 658 at 695).

In the case at bar, the Court finds that defendant has failed to plead the necessary elements of a § 1983 claim. Indeed, assuming that they had been properly plead, conclusory assertions alone, are insufficient to assert the necessary elements of a civil right claim. The Court also finds that the subject Notice of Claim only alleged a cause of action for excessive force stemming from plaintiff's arrest. All other claims except the § 1983 are now time barred.

Additionally, plaintiff has failed to comply with the requirements promulgated by GML §50-e(2), in that he failed to provide any information that would have given defendant sufficient notice and a basis to conduct an investigation concerning his allegations. Since compliance with the requirements of GML § 50-e(2) is a condition precedent to commencing a suit in tort against the city, (*see Barchet v. New York City Transit Authority*, 20 N.Y.2d 1 [1968]), plaintiff's complaint necessitates dismissal.

Plaintiff's civil rights claims are dismissed in that, as set forth above, he has failed to plead the necessary elements of a §1983 action. Moreover, plaintiff's claim for punitive damages lacks merit in that it is horn book law that punitive damages are not recoverable against a municipality (*Krohn v. New York City Police Dept.*, 2 N.Y.3d 329 [2004]). Nor, will the Court permit treble damages and/or attorney's fees.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the motion of defendant City of New York to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of

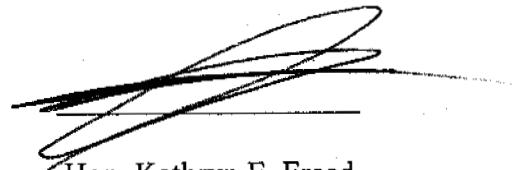
entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158)
and it is further

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

DATED: January 23, 2013

ENTER,

JAN 23 2013



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

FILED
FEB 01 2013
NEW YORK
COUNTY CLERK'S OFFICE