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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~HON. MARGARET A. CHAN~~ *Justice*

PART 52

J. Wiggens

-v-

City of N.Y.

INDEX NO. 112205/10

MOTION DATE _____

MOTION SEQ. NO. 002

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

see attached decision and order

FILED

FEB 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/4/13

_____, J.S.C.
MARGARET A. CHAN
J.S.C.

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

CIVIL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY, PART 52

JERRELL WIGGINS,

Plaintiff,

-against-

THE CITY OF NEW YORK POLICE OFFICER SERGIO MERINO, INDIVIDUALLY AND AS A POLICE OFFICE, SHIELD # 07385, 32ND PCT., POLICE OFFICER JOHN DOE, INDIVIDUALLY AND AS A POLICE OFFICER, POLICE OFFICER TIM DOE, INDIVIDUALLY AND AS A POLICE OFFICER, DEPUTY INSPECTOR KEVIN CATTALINA INDIVIDUALLY AND AS A POLICE OFFICER, 32ND PCT.,

Defendants.

Index Number: 112205/2010

Motion Sequence Number: 002, 003

Submitted: 12/3/12

DECISION/ORDER

HON. MARGARET CHAN

Judge, Civil Court

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 5, were considered for motions 002 and 003:

	Papers Numbered:
Moving papers (002 and 003)	1, 2
Cross-Motion and Oppositions	3
Reply to Cross-Motion	4
Reply to Plaintiff's Opposition	5

Plaintiff moves (motion sequence 002) to compel production of documents pursuant to CPLR § 3124 which were previously requested in plaintiff' discovery demands dated January 5, 2011, and some of which were ordered at a prior compliance conference on April 11, 2012, by another Justice of this Court. Plaintiff simultaneously filed a motion (motion sequence 003) to amend the pleadings to add the names of previously unknown police officers and to supplement the pleadings. Defendants (the "City") cross-moved as to motion 002, pursuant to CPLR § 3211(a)(7) to dismiss plaintiff's fifth, sixth, and seventh causes of action alleging negligent retention and supervision, intentional infliction of emotional distress, and civil rights violations under *Monell v Dept. of Social Servs. of City of New York* (436 US 658 [1978]), respectively, or, in the alternative, bifurcating plaintiff's *Monell* claim. The City also seeks to dismiss plaintiff's claim for punitive damages and opposes plaintiff's motion to amend to the extent that plaintiff expanded upon its seventh cause of action for its *Monell* claims.

On December 10, 2009, plaintiff was stopped and frisked by the New York City Police Department. Marijuana was recovered from the plaintiff's possession. Plaintiff claimed that he was assaulted and battered by police officers on the scene The City claimed that plaintiff resisted arrest. Plaintiff was injured after his arrest and his injuries included a fractured eye socket. Plaintiff claimed he was denied medical treatment at the precinct, where he was stripped searched and held for processing. Plaintiff was charged with unlawful possession of marijuana and resisting arrest. On July 27, 2010, the charges were dismissed on speedy trial grounds. Plaintiff maintains his innocence and stated that he was falsely accused. As to the *Monell* theory, plaintiff alleged that the City has an illegal stop and frisk program.

First addressing motion sequence 003, plaintiff's motion to amend its pleadings. The motion is granted to the extent that the pleadings may be amended so that the names of previously unknown police officers, PO Frank Adames and Sgt. Matthew Reid, shall be added in place of their unknown identities currently reflected in the caption (*see* CPLR § 3025). Plaintiff also seeks to amend its seventh cause of action. Discussed more fully below, that cause of action is dismissed, and therefore amendment of it is moot.

Addressing plaintiff's other motion, sequence 002, to compel discovery, defendant cross-moved against it seeking to dismiss the fifth, sixth and seventh, causes of action. It makes more sense to address the cross-motion first as it will have bearing on the necessary discovery in the action.

In deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory (*id.*).

Plaintiff's fifth cause of action alleged negligent hiring and retention, generally, "where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention." (*Karoon v New York City Tr. Auth.*, 241 AD2d 32 [1st Dept, 1997] *citing Eifert v Bush*, 27 AD2d 950 [2d Dept 1967]). Where, as here, the alleged perpetrators were police officers who arrested plaintiff, their employer, the municipal defendants herein, would be liable for any acts of negligence, and thus there is no basis for a separate claim based on negligent hiring and retention. As stated by the Appellate Division in *Karoon*, the only exception to the above is where the individuals have acted with gross negligence and the claim is for punitive damages. However, such a claim for punitive damages cannot be sustained against municipal defendants (*id.* at 324). Therefore, the fifth cause of action for negligent hiring and retention is dismissed in its entirety, and, likewise, any claims for punitive damages against the municipal defendants are dismissed.

As to the sixth cause of action, the claim of intentional infliction of emotional distress against government bodies is barred as a matter of public policy (*see Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). There are four elements: [1] extreme and outrageous conduct; [2] intent to cause or disregard of a substantial probability of causing severe emotional distress; [3] a causal connection between the conduct and the injury; and [4] severe emotional distress (*see Howell v New York Post Co., Inc.*, 81 NY2d 115[1993]). A cause of action for intentional infliction of emotional distress must be supported by

allegations of conduct by a defendant " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (*see Dillon v City of New York* 261 AD2d at 41 *citing Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1st Dept 1999]). The facts pled by defendant were vague. The complaint did not state with any specificity the nature of the extreme and outrageous conduct nor the injury. Plaintiff summarily stated that he suffered physical and mental pain as a result of the incident, but did not describe "severe emotional distress" (*see Howell v New York Post Co., Inc.*, 81 NY2d 115). Therefore, this cause of action is dismissed.

Concerning the seventh cause of action, which plaintiff supplemented in its motion to amend the pleadings, in order to assert a claim against a municipality 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 US 658 [1978]; *Leftenant v. City of New York*, 70 AD3d 596 [1st Dept 2010]; *Leung v City of New York*, 216 AD2d 10 [1st Dept 1995]). There are four ways a plaintiff may show such a policy or custom: (1) a policy officially promulgated by the municipality's officers (*see Monell, supra* at 690); (2) an acknowledged custom or practice that is so pervasive that the municipality had either actual or constructive knowledge of it (*see Pembaur v City of Cincinnati*, 475 US 469 [1986]); (3) actions or decisions made by the municipal policy-maker establishing a de-facto policy (*see City of St. Louis v Praprotnik*, 485 US 112 [1988]); or (4) the failure of the municipality to train its employees that rises to level of deliberate indifference to the constitutional rights or others (*see City of Canton, Ohio v Harris,* 489 US 378 [1989]; *Reynoso v City of New York*, 27 Misc3d 1206(A) [NY Sup, Bronx Cty 2010]).

The details, or lack thereof, pled by plaintiff as to the *Monell* claim were insufficient (*see* CPLR § 3013; *Leung v City of New York*, 216 AD2d 10 [1st Dept, 1995]; *Carattini v Grinker*, 178 AD2d 307 [1st Dept, 1991]). Plaintiff attempted to enhance its pleading by citing the recent case of *Floyd v City of New York*, 08 Civ 1034(SAS)(SDNY, May 16, 2012), where class certification was granted to challenge NYPD's stop and frisk procedures. The Southern District in *Floyd* held that class certification was proper, which was the only question considered in that decision. The standard for class certification involves an analysis of numerosity, commonality, typicality, and adequacy pursuant to Rule 23 of the Federal Rules of Civil Procedure. That analysis engendered a discussion of the merits of the case beyond the pleadings (*see id.*; *Shahriar v Smith & Wollensky Restaurant Group, Inc.*, 659 F3d 234, 251 [2d Cir, 2011]). The *Floyd* court discussed deposition testimony from officers of the NYPD concerning the stop and frisk program as well as statistics from city-wide stop and frisks. Plaintiff sought to use the decision in *Floyd* to demonstrate that there was a policy of arrest/summons quotas and the mistreatment of officers for reporting NYPD misconduct (Pltf's Amended Complaint ¶ 89).

However, the decision in *Floyd* only went to class certification. It did not make a finding of either of the alleged policies plaintiff claimed were at play here. Moreover, plaintiff failed to provide a nexus between the alleged illegal policies of the NYPD and the incident at hand. Of particular interest, the amended pleadings came after the deposition testimony of defendant police officer ("PO") Sergio Merino, the arresting officer, yet notably, plaintiff did not allege that the actions by PO Merino were a result of an alleged policy of arrest/summons quotas and the mistreatment of officers for reporting NYPD misconduct (*see Monell, supra* at 690).

Further, plaintiff's inclusion of the narratives of twenty-three cases where individuals were stopped and frisked and the charges subsequently dismissed does not serve him (Pltf's Amended Verified Complaint, ¶¶ 91(a)- (w)). The vague and conclusory narratives of twenty-three other alleged illegal stop and frisks have no relation to plaintiff, and as such, plaintiff failed to establish his *Monell* claim. Therefore, the motion to amend, as to the enhanced pleading of the seventh cause of action is denied. While leave should be given freely to amend a pleading, it should not be amended where merit is plainly lacking causing an amendment to be idle (CPLR § 3025(b)).

What remains is plaintiff's motion to compel certain discovery. Plaintiff's motion to compel discovery is granted to the following extent: the so ordered stipulation dated April 11, 2012 must be complied with within 30 days of entry of this decision or sanctions will be contemplated. Considering the foregoing dismissal of plaintiff's seventh cause of action, some of plaintiff's discovery requests are now moot. Another supplemental demand may be served upon the City within 30 days of this order, and either side may seek a compliance conference to be scheduled thereafter.

Plaintiff's motion to amend the complaint, motion sequence 003, is granted to the extent that the amended complaint, in the form annexed to the motion papers, shall be deemed served on the existing parties; furthermore, it is hereby:

ORDERED, that a supplemental summons and amended complaint in the form annexed to the moving papers shall be served in accordance with the Civil Practice Law and Rules upon the proposed additional parties in this action within 30 days after service of a copy of this order with notice of entry; it is further,

ORDERED that the upon said service the caption shall be amended accordingly, and it is further,

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the additional parties; and it is further

ORDERED, defendant's cross-motion is granted to the extent that the fifth, sixth, and seventh causes of action are dismissed, and any claim for punitive damages against the municipal defendants, only, is dismissed.

This constitutes the decision and order of the court.

Dated: February 4, 2013

MARGARET A. CHAN