

Dorian v City of New York

2013 NY Slip Op 31194(U)

June 3, 2013

Supreme Court, New York County

Docket Number: 103817/2012

Judge: Kathryn E. Freed

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SCANNED ON 6/6/2013
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 103817/2012
DORIAN, ALISON
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS CAL # 35

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

JUN 06 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-3-13
JUN 03 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

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
ALISON DORIAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT
OF POLICE,

Defendant.

-----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.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....(plaintiff's memo of law)

.....1-2.....
.....3.....
.....4.....
.....5.....

FILED

JUN 06 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

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

Defendants move for an Order pursuant to CPLR§3212(a)(7) dismissing plaintiff's causes
of action of punitive damages, federal civil rights, abuse of process, intentional infliction of
emotional distress and unlawful eviction/ ejection. Defendants additionally move for an Order
pursuant to CPLR§ 504(3) and §510(1), changing the venue of the instant action from Supreme
Court, New York County to Supreme Court, Richmond County, where the aforementioned causes
of action arose, so that the surviving cause of action of assault and excessive force may be resolved.

Plaintiff *pro se* opposes. After a review of the instant motion, all relevant statutes and case law, the Court **grants** said motion in its entirety.

Factual and procedural background:

The instant matter emanates from an apparent longstanding dispute between plaintiff and the owner of the apartment located at 375 Travis Avenue, Richmond County, wherein she lived at the time of the alleged incidents, Rafaella Tulumello and Tulumello's boyfriend, Eugene Albtrect. According to plaintiff's Complaint, in September of 2009, she answered an advertisement in the Staten Island Advance, a local newspaper, offering the rental of a studio for \$700 per month. Tulumello, the owner of the building wherein said studio was located, assured plaintiff that the studio had a kitchenette, bathroom and some outdoor space. However, plaintiff would be responsible for paying for her own heat and hot water. No physical lease was drawn up and Tulumello orally promised that she would not raise plaintiff's rent for five years.

Within the first few weeks of her tenancy, plaintiff observed that certain items in her apartment were either missing or had been re-arranged. Consequently, she filed a complaint at the 122nd Precinct, alleging harassment. Thereafter, plaintiff alleges that Tulumello began harassing her by frequently calling her on the phone and hanging up. Additionally, she detected the odor of gas fumes on different occasions. Due to Tulumello's alleged inaction, plaintiff took it upon herself to call Keyspan and arrange for an emergency inspection of her stove. Upon inspection, Keyspan employees discovered that the pilot light was open even when not lit, and the broiler housing the pilot light had a dented door and broken handle.

After inhaling the fumes, plaintiff began experiencing persistent dizziness. Her physician recommended that certain testing be done at Staten Island Hospital. Alleging continuous harassment from Tulumello and Abrecht, plaintiff, in November 2010, wrote Tulumello's attorney a letter

wherein she alleged a Breach of the Warranty of Habitability. On June 23, 2011 at 10:00 pm, she returned to her apartment and discovered that she had been locked out. She also discovered a notice on the door apprising her that Tulumello had assumed possession of the apartment. Plaintiff alleges that Police Officer Alan Bungay, assigned to the 122nd Precinct in Staten Island, arrived and directed her to leave the premises or be arrested. He also denied her request to provide food and water to her pets or to retrieve any of her belongings.

On June 24, 2011, plaintiff obtained an Order To show Cause, permitting her to regain possession of her apartment. However, upon return to her apartment, Tulumello refused to allow her entry and advised her to “prepare to be arrested.” The police were called, and P.O. Bungay and other officers arrived. P.O. Bungay permitted plaintiff to enter her apartment, but held her arm and did not allow her to obtain any of her belongings. He also refused to believe her claim that there were cats inside her apartment, and threatened to arrest her, when she protested.

Plaintiff’s Complaint alleges abuse of process, breach of duty; assault; malice; and mental distress. It further alleges that P.O. Bungay aided in an illegal eviction, refused to allow her access to food and water for her cats; interfered with the use and occupancy of the premises; induced her to vacate the premises; breached the public duty of care; and violated the 14th Amendment. However, it should be noted that plaintiff’s Notice of Claim asserts only the claims of personal injury; mental distress; improper physical force; “abetting an illegal lock-out,” and that she was “unlawfully ejected from [her] former apartment.....” (see Exhibit “A,” ¶¶ 3-4).

Positions of the parties:

Defendants proffer several arguments in support of their motion. They argue that plaintiff’s claim which seeks punitive damages, warrants denial in that punitive damages are not recoverable against a municipality. They also argue that plaintiff fails to state a cause of action grounded in

abuse of process as said claim is not alleged in the Notice of Claim and plaintiff's Complaint fails to state a viable cause of action for abuse of process. Defendants also argue that plaintiff fails to state a cause of action grounded in breach of duty, malice and the intentional infliction of emotional distress, as these claims are not alleged in the Notice of Claim and plaintiff's Complaint does not state viable causes of action.

They also argue that plaintiff fails to state a cause of action grounded in unlawful eviction or ejection as she fails to allege a cognizable cause of action grounded in tort; that she may not assert additional theories of liability by amending the Notice of Claim alleging abuse of process, breach of duty, malice, arguable intentional infliction of emotional distress, and the unlawful eviction or ejection because the statute of limitations for these has since expired. Defendants also argue that plaintiff's federal cause of action in the Complaint warrants dismissal as she has failed to state a cognizable cause of action pursuant to Federal Law. Finally, defendants argue that upon dismissal of the aforementioned causes of action, the instant matter should be transferred to Richmond County to resolve the remaining claims of assault and excessive force.

In her opposition, plaintiff essentially addresses her allegation of assault, harassment, "exposure to loss and destruction," and "ongoing mental anguish," by reiterating factual allegations already pled. However, she now also requests disbursements for the filing of her Complaint, miscellaneous office supplies, legal forms and mailings. In her accompanying memorandum of law, plaintiff argues that she moves this court for an Order denying defendants' motion to dismiss and grant her a jury trial pursuant to 42 U.S.C. § 1983. Additionally, under the heading of "PUNITIVE DAMAGES," she argues that local bodies and local officials sued in their official capacities can be sued directly under this provision. However, she fails to argue why she is entitled to punitive damages under 42 U.S.C. § 1983. Furthermore, under the heading entitled "ABUSE OF PROCESS,

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS and UNLAWFUL EVICTION OR EJECTMENT, she merely reiterates her factual allegations, and fails to proffer any legal reasoning or support for same.

Conclusions of law:

It is well settled that “[o]n a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 N.Y.2d 83, 87 [1994]; see also *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *Breytman v Olinville Realty, LLC*, 54 A.D. 3d 703, 704 [2d Dept. 2008], *lv dismissed* 12 NY3d 878 [2009]; *511 W. 232nd Owners Corp. v. Jennifer Realty, Corp.*, 98 N.Y.2d 144 [2002]). However, “bare legal conclusions are not presumed to be true and are not accorded every favorable inference (*Kupersmith v. Winged Foot Golf Club, Inc.*, 38 A.D.3d 847, 848 [2d Dept. 2006]; see also *Parola, Gross & Marino, P.C. v. Susskind*, 43 A.D.3d 1020, 1020-1021 [2d Dept. 2007]; *Franklin v. Winard*, 199 A.D.2d 220 [1st Dept. 2003]).

In the case at bar, the Court first finds that plaintiff has failed to establish a cause of action for punitive damages. The Court of Appeals has consistently held that a municipality is not liable for punitive damages flowing from its employee’s alleged misconduct (see *Sharapata v. Town of Islip*, 56 N.Y.2d 332 [1982]; *Krohn v. N.Y. City Police Dept.*, 2 N.Y.3d 229 [2004]; *Kovachevich v. N.Y. City Hous. Auth.*, 290 A.D.2d 325 [1st Dept. 2002]). The Court notes that plaintiff failed to sue the officers individually. Therefore, plaintiff’s claim for punitive damages must be dismissed. Moreover, the Court agrees with defendants that her additional claims of abuse of process, breach of duty, malice, and intentional infliction of emotional distress also necessitate dismissal pursuant

to GML §50-e(1)(a).

GML § 50-e(1)(a) provides that “[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises....”

Thus, since the aforementioned causes of action allegedly accrued on June 24, 2011, plaintiff was required to serve a Notice of Claim no later than September 22, 2011, which she obviously failed to do. It should also be noted that a claimant may not amend his/her Notice of Claim to add new theories of liability that are time barred at the time of application (see *Gonzalez v. New York City Housing Auth.*, 181 A.D.2d 440, 441 [1st Dept. 1992]; *Semprini v. Village of Southampton*, 48 A.D.3d 543 [2d Dept. 2008]).

The Court notes that it is well aware that plaintiff is not an attorney and is probably unaware of statutory mandates, and various legal concepts. However, the Court also notes that she did make the effort to commence the instant action. Therefore, while this Court may afford her “some latitude” (*Duffen v. State of New York*, 245 A.D.2d 653, 653 [3d Dept. 1997], *lv den* 91 N.Y.2d 819 [1998]), the law is well settled that a pro se litigant “acquires no greater right than any other litigant” (*Roundtree v Singh*, 143 A.D.2d 995, 996 [2d Dept. 1988]) “and will be held to the same standards of proof as those who are represented by counsel” (*Duffen v. State of New York*, 245 A.D.2d at 654); see also *Sporten v. Samuel*, 31 Misc.3d 151[A], 2011 N.Y. Slip Op. 51123[U], 2011 WL 2505556 [App. Term, 9th & 10th Jud. Dists. 2011]). Thus, in her choice to represent herself, plaintiff does so “at [her] own peril” (*Banushi v Lambrakos*, 305 A.D.2d 524 [2d Dept. 2003], *lv den* 1 N.Y.3d 504 [2003]).

Plaintiff's causes of action grounded in unlawful eviction and/or ejection also warrants dismissal. Clearly, this is not a landlord-tenant proceeding, or an ejection proceeding properly brought pursuant to Article 6 of the RPAPL wherein plaintiff seeks to recover possession of the premises occupied or owned by defendants. Indeed, since neither the City or the Police Department has any ownership interest in plaintiff's former apartment, this cause of action must be dismissed.

The Court further finds that plaintiff has also failed to state a cause of action pursuant to 42 U.S.C. § 1983. In her Complaint, she alleges in pertinent part, that "Officer Alan Bugay, in his capacity as representative of the Police Department of the City of New York, had disregard for plaintiff's 14th Amendment Guarantee of Equal Protection Under the Law...." (see Exhibit "B," ¶ 15).

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 § 1983, based on the alleged tortious actions of its employees, a plaintiff must allege and plead that the alleged actions resulted from an official municipal policy or custom (see *Monell v. Department of Social Services 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), (Sup. Ct., N.Y. Co, Jaffe, J. 2011), *affd.* 99 A.D.3d 614 [1st Dept. 2010]).

"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*, 91 N.Y.2d 754, 756 [1992]).

Furthermore, “a municipality can be found liable under 1983 only when the municipality itself causes the Constitutional violation” (*City of Canton v. Harris*, 489 U.S.378, 385 [1989] citing *Monell*, 436 U.S.658 at 691). In the case at bar, the Court finds that plaintiff has failed to sufficiently plead the necessary elements which would constitute a violation under 42 U.S.C. § 1983.

Finally, defendants concede that the remaining causes of action of assault and excessive force are not subject to dismissal. They merely request that said causes of action be tried in the proper forum, which would be Richmond County, wherein the incident from which they emanate, occurred. In her Affirmation in Opposition, plaintiff’s objects to a change of venue, alleging that “there is prejudice within the enforcement arm of the law on Staten Island,” and that she has personal issues of health and safety.”

CPLR § 510, entitled “Grounds for change of place of trial,” states that “[t]he court, upon motion, may change the place of trial of an action where: 1. the county designated for that purpose is not a proper county; or 2. there is reason to believe that an impartial trial cannot be had in the proper county; or 3. the convenience of material witnesses and the ends of justice will be promoted by the change.”

Indeed, it is well established that venue lies in the county where the cause of action arose, and that rule “should be complied with absent countervailing circumstances” (*Rose v. Grow-Perini*, 271 A.D.2d 210 [1st Dept. 2000]; see also *Garces v. City of New York*, 60 A.D.3d 551 [1st Dept.

2009]; *Cardona v. Aggressive Heating*, 180 A.D.2d 572 [1st Dept. 1992]). The Court finds that a change of venue from New York County to Richmond County would be appropriate in the instant case. Since plaintiff merely offers conclusory allegations that are not based on any discernable evidence, the Court finds her argument against a change of venue to be unavailing.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants' motion dismissing the causes of action grounded in punitive damages, federal civil rights violations, abuse of process, intentional infliction of emotional distress and unlawful eviction/ejection is hereby granted; and it is further

ORDERED that the causes of action of assault and excessive force shall remain; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Richmond, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Richmond upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

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

DATED: June 3, 2013

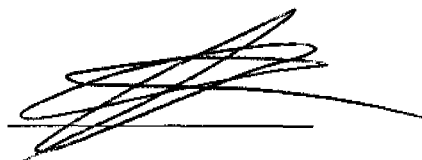
ENTER:

JUN 03 2013

FILED

JUN 06 2013

COUNTY CLERK'S OFFICE
NEW YORK



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