

Dotson v Allied Barton Sec. Servs.

2013 NY Slip Op 31566(U)

July 11, 2013

Supreme Court, New York County

Docket Number: 156388/2012

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 5

Index Number : 156388/2012
DOTSON, HEYWARD
vs
ALLIEDBARTON SECURITY
Sequence Number : 001
DISMISS ACTION

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

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

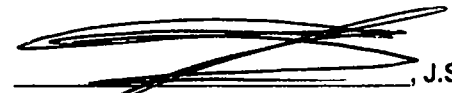
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 7-11-13
JUL 11 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
HEYWARD DOTSON,

Plaintiff,

-against-

ALLIED BARTON SECURITY SERVICES; ANGEL
BARBOSA; RICHARD CHENG; JOACHIN
KOKENJAK; ALEX MENUAU; OLUFEMI
ADEGOKI; MICHAEL MOES; PAUL POES; THE
CITY OF NEW YORK; DEPUTY SHERIFF KEVIN
SUTACK; BILLIE BOES; LARRY LOES.

Defendants.

-----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.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS..... 4,5.....
REPLYING AFFIDAVITS.....6.....
EXHIBITS.....
OTHER.....

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

Defendants The City of New York (“the City”) and Sheriff Kevin Sutack (“Sutack”), move for an Order transferring this action to a Differentiated Case Management (DCM) Part assigned to matters involving the City of New York and its agencies; and for an order pursuant to CPLR §3211(a)(7), dismissing the Complaint and all cross-claims, if any, as against said defendants, or in

the alternative; pursuant to CPLR§3212 granting summary judgment to said defendants, dismissing the Complaint and any cross-claims against them. Plaintiff opposes. No opposition has been submitted from any other named party. First, it is important to note that this case is now pending in the DCM part, so this particular aspect of the instant motion will not be addressed as it is deemed moot.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion.

Factual and procedural background:

This is an action wherein plaintiff seeks monetary damages for personal injuries he allegedly sustained on January 26, 2009 at 346 Broadway, County of New York. According to plaintiff, on that particular day, he was attempting to gain entry to the Courthouse at said address, to respond to a summons that had previously been issued to him. However, prior to being permitted entry, he was required to walk through a magnetometer. Despite the fact that he informed the individual security personnel at the scene that he could not safely do so because of his defibrillator, they nevertheless forced him to walk through it. As a result, he suffered a defibrillator malfunction, which knocked him to the floor and caused him to suffer excessive pain. Co-defendant Sutack, also present at the scene along with other officers, called for emergency medical technicians, who, after attending to plaintiff at the Courthouse, transported him to a nearby hospital via ambulance. Once at the hospital, he was examined and admitted for several days. After sufficiently recovering, he returned to the Courthouse to address the summons. Apparently recognized by the security personnel on duty, he was merely patted down as opposed to being compelled to go through the magnetometer.

Initially, plaintiff commenced an action against the City, Sutack, and several others in the United States District Court for the Southern District of New York under docket number 11 Civ. 1126 (PAE). On March 26, 2012, by Opinion and Order, the court therein dismissed plaintiff's causes of actions pursuant to 42 U.S.C. § 1983, and declined to exercise supplemental jurisdiction over plaintiff's New York State claims. (See *Dotson v. Faruggia*, 2012 U.S. Dist. Lexis 41195, 39-41). Thereafter, plaintiff commenced an action against the City via the filing of a Summons and Complaint on or about September 14, 2012. The City joined issue by service of its Verified Answer on or about October 10, 2012. On or about November 8, 2012, an Answer was interposed on behalf of the City and Sutack. The City asserts that to date, it has not received a Verified Answer on behalf of co-defendants AlliedBarton Security Services, Angel Barbosa, Richard Cheng, Joachim Kikenjak, Alex Menuau, and Olufemi Adegoki, who have appeared in this matter.

Positions of the parties:

Plaintiff argues that since his Complaint adequately alleges claims against the City defendants under the New York City Human Rights Law, the filing of a Notice of Claim is unnecessary. He argues that he has "adequately pled claims against the City Defendants for their failure to properly train/ to ensure the adequate training of those manning the magnetometer also seeks punitive damages, a declaratory judgment and an injunction relating to security protocol to ensure equal access to buildings owned and operated" by defendants, to individuals with defibrillators and various other cardiac devices. (*Sic*).

The City argues that plaintiff's Complaint and any cross-claims, warrant dismissal for failure to comply with General Municipal Law § 50-e, in that to date, plaintiff has failed to serve a Notice of Claim on the City for any alleged claims emanating from this incident within the statutorily

mandated ninety days of the date of the alleged injury. The City also argues that the Notice of Claim requirement is also applicable to the individually named Sutack, in that the Appellate Division, First Department, has held that the GML requires that the Notice of Claim must specifically name an individual in order to proceed with an action against said individual, where the municipality may be responsible for that employees's defense pursuant to GML§ 50-k (6). This section provides that any tort claim against the City or any agency or employee is subject to the Notice of Claim requirement.

Additionally, the City argues that plaintiff failed to seek leave to serve a late Notice of Claim within the mandated one year and ninety day statutory period pursuant to GML§ 50-i(1), and that plaintiff's request for punitive damages, a declaratory judgment and injunctive relief appearing solely in his "prayer for relief" should also be dismissed for failure to state a cause of action. The City asserts that it and Sutack only became aware of plaintiff's claim for same, upon receipt of his Summons and Complaint, as plaintiff failed to serve a Notice of Claim. The City argues that the claim for punitive damages is not viable in that punitive damages are not recoverable against a municipality. Furthermore, the City argues that plaintiff's claim which seeks a declaratory judgment warrants dismissal because it lacks the requisite specificity. Finally, the City argues that plaintiff's claim for injunctive relief also warrants dismissal in that it is entirely too over broad and vague, in that he requests that training and protocols be put in place to ensure that "equal access" is provided to individuals wearing defibrillators and other cardiac equipment.

Plaintiff responds that if documentary evidence is submitted in support of a CPLR § 3211(a)(7) motion to dismiss, dismissal would be warranted only if the evidence conclusively establishes that he has no cause of action, which he clearly does. He also argues that since he is not bringing state common law tort claims against the City defendants, but only discrimination claims

under the New York Human Rights Law and New York State Constitution, no Notice of Claim is necessary.

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 pleadings 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 *Guggenheimer v. Ginzburg*, 42 N.Y.2d 268, 275 [1977]; *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 704 [2d Dept. 2008], *lv dismissed* 12 N.Y.3d 878 [2009]; *511 W. 232nd Owners Corp. v. Jennifer Realty, Co.*, 98 N.Y.2d 144 [2002]).

Plaintiff is correct that the notice of claim requirements of General Municipal Law § 50-e do not apply to discrimination causes of action under the Human Rights Law inasmuch as those causes of action are not founded upon tort or negligence (GML § 50-e[1][a]; see *Mills v. County of Monroe*, 89 A.D.2d 776, 776 [4th Dept. 1982], *affd.* 59 N.Y.2d 307 [1983]; *Thygesen v. North Bailey Volunteer Fire Co. Inc.*, 106 A.D.3d 1458 [4th Dept. 2013]; *Sebastian v. New York City Health and Hosps. Corp.*, 221 A.D.2d 294 [1st Dept. 1995]; *Swinton v. City of New York*, 61 A.D.3d 557 [1st Dept. 2009]; *Doe v. Belmare*, 31 Misc.3d 904, 920 N.Y.S.2d 623 (Sup. Ct. Kings Co. 2011); *Tannenbaum v. City of New York*, 30 A.D.3d 357 [1st Dept. 2006]).

In the case at bar, plaintiff alleges six causes of action against the City and Sutack: respondeat superior liability of AlliedBarton Security Services; negligence; negligent hiring, screening, retention, supervision and training; violation of right to equal protection of law; violation of right to equal protection of law; constitutional tort; and violation of New York City Human Rights Law.

Clearly, since the First to Third Causes of Action specifically sound in tort, they come under the purview of the General Municipal Law. However, the remaining Fourth, Fifth and Sixth Causes of Action which allegedly pertain to plaintiff's discrimination claim, fail to state a cognizable claim of discrimination.

Plaintiff's Fourth Cause of Action, entitled "VIOLATION OF RIGHT TO EQUAL PROTECTION OF LAW," states in pertinent part that "[B]y the actions described above, all defendants violated plaintiff's rights to equal protection of law. The acts and conduct of defendants were the direct and proximate cause of injury and damage to the plaintiff and violated his statutory and common law rights as guaranteed by the laws and Constitution of the State of New York."

Plaintiff's Fifth Cause of Action, entitled "CONSTITUTIONAL TORT," states in pertinent part that "[a]ll defendants, acting under color of law, violated Plaintiff's rights pursuant to Article I, §§ 6, 11, and 12 of the New York State Constitution, and appropriate to ensure full realization of Plaintiff's rights under those sections." (*Sic*).

Plaintiff's Sixth Cause of Action entitled "HUMAN RIGHTS LAW," states in pertinent part that "[b]y the actions described above, all defendants violated plaintiff's right as protected by the New York City Human Rights Law (NYC Admin. Code § 8-101 *et seq.*). The acts and conduct of the defendants were the direct and proximate cause of injury and damage to the plaintiff and violated his rights as guaranteed thereby..." (See Complaint, City's motion, Exhibit "B," ¶ 79, ¶¶ 83-84, ¶ 88).

If anything, the gravamen of plaintiff's Complaint is negligence. He refers to the alleged contract between the City and co-defendant AlliedBarton Security Services, even citing to specific sections to support his allegations that defendants' failed to supervise the security personnel at the premises at the time of the incident, that they also failed to maintain accurate records of said

incident, which plaintiff characterizes as “spoliated” evidence, and that they negligently retained and supervised said security personnel.

Indeed, since plaintiff consistently pleads causes of action sounding exclusively in tort, the Court agrees with defendants that plaintiff was required to file a Notice of Claim within the ninety day statutory period mandated by GML§ 50-e. His failure to do so necessitates dismissal of his Complaint.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants City of New York and Deputy Sheriff Kevin Sutacks’ motion to dismiss the complaint pursuant to CPLR§ 3211(a)(7) is granted as to these defendants only; and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158; and it is further

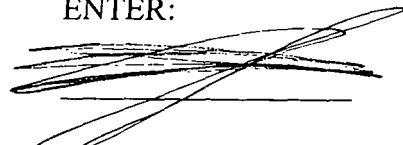
ORDERED that any compliance conferences currently scheduled are hereby cancelled and it is further

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

DATED: July 17, 2013

JUL 11 2013

ENTER:



Hon. Kathryn E. Freed

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT