

Vargas v City of New York

2013 NY Slip Op 31671(U)

July 23, 2013

Sup Ct, NY County

Docket Number: 150556/2011

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT Justice

PART 5

VARGAS, WALTER
-v-
CITY OF New York

INDEX NO. 150556/11

MOTION DATE _____

MOTION SEQ. NO. 001

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

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

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

Dated: 7-23-13
[JUL 23 2013]


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

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

-----X
WALTER VARGAS,

Plaintiff,

-against-

THE CITY OF NEW YORK, P.O. BRIAN BUIITH,
Shield No. 5691, Individually and in his Official
Capacity, and P.O. GURVINDE SINGH, Shield No.
9521, Individually and in his Official Capacity.

Defendants.

DECISION/ORDER

Index No. 150556/2011

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

NUMBERED

NOTICE OF MOTION, CROSS-MOTION AND AFFIDAVITS ANNEXED ...1-4.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....5.....
REPLYING AFFIDAVITS.....6.....
EXHIBITS.....
OTHER.....(Memoranda of Law).....7-8.....

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

Plaintiff moves for an Order pursuant to CPLR§ 3025(b), to amend the complaint to include compensatory damages; and also pursuant to CPLR§306 (b), for an Order extending the time to properly serve the individual police officer defendants. Defendants cross-move for an Order pursuant to CPLR§ 3211(a)(7) and (8), dismissing the complaint against them for failure to state a cause of action and because the Court lacks personal jurisdiction over the individual defendant police officers.

After a review of the instant motion, all relevant statutes and case law, the Court denies the motion and denies the cross-motion as moot.

Factual and procedural background:

According to plaintiff, on September 21, 2010, he was stopped by defendant police officers for walking between subway cars. Despite the fact that he produced a facially valid New York State driver's license, defendant officers extended his detention for the purpose of conducting a further investigation without any justification to do so. Eventually, he was handcuffed and arrested.

Consequently, plaintiff filed a Summons and Complaint on December 1, 2011, which was served on the City on December 2, 2011. A copy of same was delivered to both defendant police officer's respective assigned precincts. The City served its Answer and Demand For Discovery on December 22, 2012. After a stipulation extending time for discovery was entered into, on April 4, 2012, Assistant Corporation Counsel Gloria Yi informed plaintiff's counsel that Corporation Counsel only represented the City and not the named police officers. However, on May 15, 2012, Ms. Yi advised plaintiff's counsel that her office would also be representing defendant officers.

Thereafter, the parties engaged in extensive discussions regarding the possibility of defendants stipulating to a set of facts to avoid protracted discovery, and the prospect of an amendment to the complaint to include the request for compensatory damages. On July 13, 2012, plaintiff's counsel sent Ms. Yi a proposed stipulation of facts. On July 20, 2012, defendants, via Ms. Yi, informed plaintiff's counsel that they declined to stipulate to plaintiff's proposed facts. Additionally, the parties again discussed the issue of defective service on the individual police officers and attempted to agree to dismiss the matter as to the named police officers if the City would stipulate to a narrower set of facts. On September 20, 2012, Ms. Yi informed plaintiff's counsel that her clients still refused to stipulate to a narrower set of facts.

On October 25, 2011, plaintiff's counsel e-mailed a prospective amended complaint to Ms. Yi, and provided additional discovery on November 14, 2012. On November 16, 2012, Ms. Yi apprised plaintiff's counsel that her clients would not consent to amending the Complaint unless plaintiff agreed to dismiss the individual defendant police officers from his action. On December 18, 2012, further attempts at settlement proved unsuccessful, thus necessitating the filing of the instant motion. Plaintiff asserts that he has not made a formal demand for discovery, and that no depositions have been conducted.

The City asserts that plaintiff was detained and subject to a background check after he was observed by defendant police officers Buith and Singh, violating the New York City Transit Regulations which prohibit passengers from using the end doors of a subway car to pass from one car to another. The City argues that service of the Summons and Complaint on Buith and Singh was defective, because a copy of same was left with an officer at Transit District 2 in the Canal Street Subway Station, and at a specific address, "18 Jackson Street, New York, NY 10002." (See Yi Aff., Exhibit "B"). Ms. Yi asserts that on or about May 15, 2012, she informed plaintiff's counsel, Martha Rayner, of said defective service. Additionally, she asserts that according to City records, plaintiff has not yet filed a Notice of Claim with the Comptroller's Office regarding his claims.

Positions of the parties:

Plaintiff argues that the time to serve the individual police officers should be extended in the interest of justice. He asserts that said police officers were served within the 12 day period, however service was later found to be defective. Additionally, plaintiff argues that defective service due to law office mistake, confusion or oversight does not preclude relief under CPLR §306-b. He argues that since there is no question that the City of New York was properly served within the 120 day period, there would be no prejudice to defendants if the Court permits an extension to effect proper

service.

Plaintiff also argues that “there is every reason to believe that defendant police officers respective assigned precincts received the Summons and Complaint since it was served at each officer’s respective assigned precinct less than a week after the action was commenced and thus they were each on notice of the instant matter” (see Plaintiff’s Mem. of Law, p.7). He also reminds the Court that the officers’ employer, the City, was properly served and apprised of said officers’ names and shield numbers.

Plaintiff also argues that he brought the instant motion promptly and that his complaint has merit in that he seeks to challenge a common police practice that requires judicial scrutiny. Finally, he argues that his motion to amend should be granted in that he seeks to make minor amendments to the complaint, none of which would change the facts alleged in his Complaint or the legal theory of liability.

Defendant City of New York (“the City”), argues that since plaintiff has failed to state a cause of action against any defendant under any cognizable theory, dismissal of his complaint is warranted. The City also argues that plaintiff commenced the instant action “on the unsupported premise that individuals who commit ‘minor, non-criminal subway infractions’ should be subject to only minimal police response, limited only to what is necessary to issue a summons or warning. There is no legal support for this assertion, however, as individuals who commit even minor offenses are subject to lawful arrest” (See City’s Mem. of Law, p.4).

The City also argues that plaintiff cannot state a viable tort claim of false arrest or false imprisonment based on his “unlawful detention,” because the subject officers had probable cause to confine him.

Conclusions of law:

Prior to even considering the validity of the motion to amend the instant complaint to add compensatory damages, the Court must address the issue of whether it has jurisdiction to even issue a determination. Indeed, since the subject police officers have not been properly served, it is clear that the Court is devoid of personal jurisdiction over them. While plaintiff concedes that the subject officers were not properly served, he claims that he has acted “diligently to remedy the problem, including initiating the instant motion.” (Plaintiff’s Mem. Of Law, p.6). He also asserts that the blatant defective service has not prejudiced defendants in that “there is every reason to believe the defendant police officers received the summons and complaint since it was served at each officer’s respective assigned precinct less than a week after the action was commenced and thus, they were each on notice of the instant matter.” (*Id.* p.7).

First, plaintiff claims to have served the individual police officers by leaving a copy of the Summons and Complaint with another police officer at “Transit District 2 in the Canal Street Subway Station,” and also at a particular address “18 Jackson Street, New York, NY 10002.” Plaintiff fails to proffer any explanation as to why service was effected at this specific address.

Moreover, CPLR § 308 which addresses personal service on individuals, requires in pertinent part that subsequent to leaving a copy of a summons with a person of suitable age and discretion, plaintiff must also “mail the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’”

As proof of service, plaintiff herein refers the Court to Exhibit “F” of his moving papers. Exhibit “F,” is merely an E-Filed Confirmation of the New York County Supreme Court, dated 12/15/2011. Under the sub-title “Document Type,” it states “Affirmation/Affidavit of Service.”

Under the sub-title “Description,” it states “Affidavits of Service of Summons and Complaint.” Under the sub-title of “Received date/time,” it states “12/15/ 2011 03:09 PM.” The Court does not consider this sufficient proof that plaintiff complied with the mailing requirement promulgated by CPLR§ 308 (2).

Plaintiff also argues that his request for an extension of time to serve the individual police officers falls squarely within the relief available pursuant to CPLR§306-b, in that same were served within the 120 day period, but service was later found to be defective. Plaintiff asserts that the Summons and Complaint was filed and an index number purchased on December 1, 2011. Said Summons and Complaint were “delivered” to P.O. Buith and P.O. Singh on September 7, 2011, at their assigned precinct (Reynor Aff. ¶¶ 5,7, 8).

CPLR§306-b provides in pertinent part that “[s]ervice of the summons and complaint.....shall be made within one hundred twenty days after the filing of the summons and complaint...If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.”

Additionally, upon a motion to dismiss based on lack of proper service, the court may, “upon good cause shown or in the interest of justice, extend the time for service” (CPLR§ 306(h)). Whether to grant such an extension rests within the trial court’s discretion (see *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 101 [2001]; *Matter of Richards v. Office of the N.Y. State Comptroller*, 88 A.D.3d 1049, 1050 [3d Dept. 2011]). Upon addressing the interest of justice argument, courts must balance the competing interests and may consider any relevant factors including “diligence, or lack thereof,....expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request

for the extension of time, and prejudice to defendant [s]" (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 105-106).

In consideration of the foregoing, the Court does not find that plaintiff has proffered a convincing argument as to why he should be afforded another opportunity to attempt proper service, via an extension of time to do so. Indeed, while plaintiff argues "law office failure," he fails to indicate with any semblance of specificity, what constituted said law office failure. Moreover, while plaintiff may have executed service, (while nevertheless improper), on the subject police officers within the statutory 120 days promulgated by CPLR§ 306-b, he waited until January 2013 to make his request for an extension via the instant motion. This is not indicative of diligence as contemplated by the statute and/or case law.

Therefore, it is hereby

ORDERED that plaintiff's motion is hereby denied in its entirety; and it is further

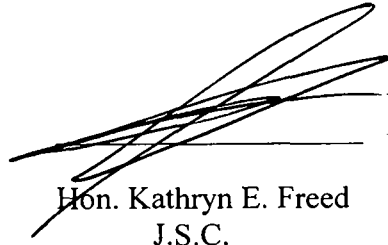
ORDERED that the instant case is dismissed without prejudice; and it is further

ORDERED that defendant shall serve a copy of this order on plaintiff and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

DATED: July 23, 2013

JUL 23 2013

ENTER



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

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**