[* 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 : 002
REARGUMENT/RECONSIDERATION

CAL: # 21

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
SEP 18 2013
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 9-10-13

SEP 10 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

[* 2]

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

DECISION/ORDER
Index No. 103817/2012
Seq. No. 002

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

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

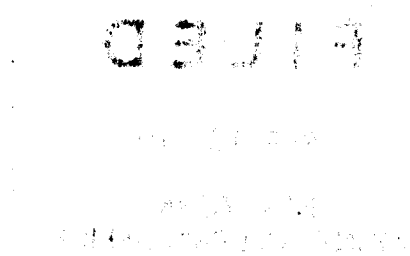
PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1,2(Ex A-W)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
AFFIDAVIT IN OPPOSITION	3(Ex A-C)
REPLYING AFFIDAVITS	
EXHIBITS	
OTHER (plaintiff's memo of law)	4

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

Plaintiff moves to reargue the Court's Decision/Order previously rendered on July 3, 2013, which granted defendant's motion pursuant to CPLR§3212(a)(7), dismissing plaintiff's causes of action which included punitive damages; federal civil rights violations; abuse of process; intentional infliction of emotional distress; and unlawful eviction and ejectment. The Court additionally granted a change of venue from Supreme Court, New York County to Supreme Court, Richmond County.

Defendants' opposes the instant motion. It should be noted that despite the fact that plaintiff relies on Rule 14(a) of the New York County Supreme Court Rules, as the statutory basis for her

[* 3]



instant motion, the Court will assume that plaintiff, who is *pro se,* actually intended to move to reargue pursuant to CPLR§ 2221(d), which is the proper procedural mechanism. The Court will also assume that plaintiff is specifically seeking to vacate its prior July3, 2013 Decision/Order.

In consideration of this, after a review of the instant motion, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

The instant matter emanates from an apparent longstanding dispute between plaintiff and Rafaella Tulumello, the owner of an apartment building located at 375 Travis Avenue, Richmond County. Tulumello's boyfriend, Eugene Abrecht, has also been actively involved in this dispute. According to plaintiff's Complaint, in September of 2009, she answered an advertisement in the Staten Island Advance, a local newspaper, which offered the rental of a studio apartment for $700 per month, situated in Tulumello's building. When plaintiff inquired about said apartment, Tulumello assured her that the studio was equipped with a kitchenette, bathroom and some outdoor space. She also advised plaintiff that plaintiff would be responsible for the payment of her own heat and hot water. Upon plaintiff's acceptance of the apartment, no physical lease was executed 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 alleged that Tulumello began repeatedly calling her on the phone and hanging up when plaintiff answered. Additionally, after her complaints to Tulumello about smelling gas fumes on several different occasions went unheeded, 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 would remain open even when not lit, and the broiler housing the pilot light had a dented door and a broken handle.

After inhaling the fumes, plaintiff began experiencing dizziness, prompting her to see her physician who 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, claiming that they breached 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. A notice on the door apprised her that Tulumello had assumed possession of the apartment. Plaintiff alleged that at that time, Police Officer Alan Bungay, assigned to the 122nd Precinct in Staten Island, arrived at her apartment and ordered her to leave the premises or be arrested. She also alleged that he denied her request to provide food and water for her pets or to retrieve any of her belongings. Plaintiff asserted that Officer Bungay warned her at least three times that she would be arrested if she did not leave. Additionally, she asserted that these threats caused her to suffer extreme mental and emotional distress. She maintained that by threatening her, the officer violated her constitutional rights.

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

As a result, plaintiff's Complaint alleged abuse of process; breach of duty; assault; malice; and mental distress. It further alleged that P.O. Bungay aided in an illegal eviction, refused to allow

her to provide food and water for her cats; interfered with the use and occupancy of the premises; induced her to vacate the premises; breached his public duty of care; and violated the 14th Amendment.

Positions of the parties:

In the instant motion, plaintiff supplements her earlier arguments with additional facts concerning the interaction between herself and officer Bungay, as well as additional facts about her interaction with other Officers, in an attempt to demonstrate a pattern of harassment against her by the NYPD as an entity. However, plaintiff fails to submit any evidence establishing a general pattern and practice of harassment. Plaintiff specifically emphasizes the fact that she has still not received any information regarding the status of her criminal complaint against Eugene Abrecht, wherein she alleged that he physically attacked her. She asserts that this is evidence of negligence by the Administration and proof of the NYPD's attitude and behavior toward her.

Plaintiff also argues that she did not need to file a notice of claim within 90 days of the alleged event because she received an acknowledgment of her claim from one "Michael Aaronson," Chief of the "Bureau of Law and Adjustment," on or about October 20, 2011. She asserts that this document states that "any lawsuit against the City must be started within one year and ninety days from the date of the occurrence." (Plaintiff's Affidavit in Support of Motion to Reargue, page 6, ¶ 22).

In their previous opposing papers, defendants proffered several arguments in support of dismissal. They argued that plaintiff's claim seeking punitive damages necessitated denial because it is well settled law that punitive damages are not recoverable against a municipality. They also argued that plaintiff failed to state a cause of action grounded in abuse of process, as said claim was

not alleged in her Notice of Claim, nor had she alleged the necessary elements constituting this claim. Additionally, defendants argued that plaintiff failed to state a cause of action grounded in breach of duty, malice and the intentional infliction of emotional distress, as those claims were not alleged in the Notice of Claim and her Complaint failed to establish these as viable causes of action.

Defendants further argued that plaintiff failed to state a cause of action grounded in unlawful eviction and ejectment in that she failed to allege a cognizable cause of action grounded in tort. They argued that she should not be permitted to assert additional theories of liability via amendment of her Notice of Claim, wherein she previously alleged abuse of process; breach of duty; malice; intentional infliction of emotional distress; and unlawful eviction/ejectment because the statute of limitations for these claims had expired. Defendants argued then and now that plaintiff's federal cause of action in her Complaint warrants dismissal due to her failure to state a cognizable cause of action pursuant to Federal Law.

Conclusions of law:

A motion for leave to reargue pursuant to CPLR§ 2221(d), shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the proper motion. Such motion is addressed to the sound discretion of the court (*William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 [1st Dept.1992], *lv dismissed*, 80 N.Y.2d 1005 [1992], *rearg denied* 81 N.Y.2d 782 [1993]). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted (*Foley v. Roche*, 68 A.D.2d 558 [1st Dept. 1979], *lv denied* 56 N.Y.2d 507 [1982]; *William P.Pahl Equip. Corp. v. Kassis*, 182 A.D.2d at 24; *Amato v. Lord & Taylor, Inc.*,10 A.D.3d 374 [2d Dept. 2004]). On

reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was previously misconstrued or overlooked (see *Macklowe v. Browning School*, 80 A.D.2d 790 [1st Dept. 1981]). Professor David Siegal in N.Y. Prac, § 254, at 434 [4th ed] succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

In the case at bar, the Court finds that plaintiff has failed to proffer arguments sufficient to warrant reargument and the vacating of its previous Decision/Order. The Court reiterates it previous finding with regard to the requirement of the timely filing of a Notice of Claim. 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...."

Moreover, GML§ 50-e (i)(a) requires that a Notice of Claim be filed within 90 days in which the claim arose, and this serves as a condition precedent to commencing an action against a municipality founded in tort. 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]). Therefore , this Court believes that it correctly dismissed plaintiff's claims of abuse of process; breach of duty; malice; and intentional infliction

of emotional distress.

The Court further finds that plaintiff has failed to submit new information sufficient for this Court to reinstate her cause of action pursuant to 42 U.S.C.§ 1983. 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. 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), 2011 N.Y. Slip Op. 51930(U) (Sup Ct NY County 2011), *affd.* 99 A.D.3d 614 [1st Dept. 2012]).

"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 within motion, the Court finds that even though plaintiff has supplied the Court with additional information about her run-ins with the NYPD on numerous occasions, that information relates only to incidents solely involving plaintiff. No discernable pattern and practice generally utilized by the Municipality, which would constitute a violation of 42 U.S.C.§ 1983, has been established. Finally, since, plaintiff again offers only conclusory allegations that are not based on any semblance of evidence, the Court deems these additional arguments to be unavailing.

It seems clear that plaintiff has only supplied additional information about the incidents set forth in her original papers. Additional information is not sufficient to warrant the Court's vacating its original decision. Moreover, plaintiff has failed to bring to this Court's attention any applicable principal of fact or law that this Court had misconstrued or overlooked (see *Macklowe v. Browning School*, 80 A.D.2d 790 [1st Dept. 1981]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion to reargue and to vacate the Court's previously rendered decision dated July 3, 2013, is denied; and it is further

ORDERED that the within matter is to be transferred to Richmond County for trial on the remaining causes of action; and it is further

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

FILED

SEP 18 2013

NEW YORK
COUNTY CLERK'S OFFICE

DATED: September 10, 2013

SEP 10 2013

ENTER:

Hon. Kathryn E. Freed

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT