Hodge v County of Westchester
2013 NY Slip Op 32773(U)
January 29, 2013
Sup Ct, Westchester County
Docket Number: 61572/2012
Judge: Lester B. Adler

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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WILLIE B. HODGE,

Plaintiff,

-against- **DECISION & ORDER**

COUNTY OF WESTCHESTER and WESTCHESTER COUNTY DEPARTMENT OF CORRECTIONS, Index No.: 61572/12

Defendants.
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ADLER, J.

The following papers numbered 1 to 10 were read on defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(7):

	Papers Numbered
Notice of Motion; Affirmation of Sara Beaty, Esq.; Exhibits	1-4
Memorandum of Law	5
Affirmation in Opposition of Thomas W. Hochberg, Esq.; Exhibits	6-9
Reply Affirmation of Sara M. Beaty, Esq.	10

In this action to recover damages for injuries allegedly sustained by plaintiff while an inmate at the Westchester County Jail, defendant moves to dismiss the complaint on the ground that plaintiff has failed to state a cause of action (see CPLR §3211[a][7]).

On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true (*Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996, 913

N.Y.S.2d 668; *Pacific Carlton Dev. Corp. v. 752 Carlton*, 62 A.D.3d 677, 679, 878 N.Y.S.2d 421). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274, quoting *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [internal quotations omitted]; *513 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus on a motion to dismiss" (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26; *Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455, 456, 745 N.Y.S.2d 72).

The Court will first consider defendants' claim that defendant Westchester County Department of Corrections ("WCDOCS") is not a suable entity since it is merely an "administrative arm" of defendant County of Westchester (the "County"). "Under New York Law, departments which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued" (*Hall v. City of White Plains*, 185 F.Supp.2d 293, 303 [S.D.N.Y. 2002]; *Fanelli v. Town of Harrison*, 46 F.Supp.2d 254 [S.D.N.Y. 1999]). Consequently, where both the municipality and the municipal agency are named as defendants, courts have dismissed the claims against the agency (see *Hall v. City of White Plains*, 185 F.Supp.2d at 303). Plaintiff has not addressed defendants' contention, and since

WCDOCS is a County agency, the proper party defendant is the County (see *Jones v. Westchester County Dept. of Corrections Med. Dept.*, 557 F.Supp.2d 408, 416, fn. 4), and the action against WCDOCS should be dismissed.

The Court will now address the motion to dismiss insofar as the causes of action are asserted against defendant County. Plaintiff seeks to recover damages for injuries he sustained on or about November 7, 2011 when he was allegedly assaulted by another inmate at the Westchester County Jail.

It is alleged in the first cause of action that the assault and plaintiff's injuries were the result of the negligence of defendant County and/or its agents, servants, employees and/or licenses. In the second cause of action, it is alleged that the corrections officers were negligent in failing to properly and adequately provide safety and to properly supervise detainees/inmates. Specifically, it is alleged that the corrections officers knew of the offending detainee/inmate's violent propensity, knew that the detainee/inmate was to be separated from nonviolent detainees/inmates, and that due to the corrections officers' negligence in supervising the detainee/inmate, the detainee/inmate caused and was permitted to punch plaintiff in the face causing him to sustain serious and permanent injuries.

"Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the [County] owes a duty of care to safeguard inmates, even from attacks by fellow inmates" (*Sanchez v. State of New York*, 99 N.Y.2d 247, 252, 754 N.Y.S.2d 621, 784 N.E.2d 675; *Vasquez v. State of New York*, 68 A.D.3d 1275, 1275-1276, 890 N.Y.S.2d 184). This duty does not, however, render the County "an insurer of inmate safety, and negligence cannot be established

by the mere occurrence of an inmate assault" (*Barnette v. City of New York*, 96 A.D.3d 700, 701, 945 N.Y.S.2d 749). Rather, "[l]ike other duties in tort, the scope of the [County's] duty to protect inmates is limited to risks of harm that are reasonably foreseeable" (*Sanchez v. State of New York*, 99 N.Y.2d at 253). "Foreseeability of an inmate-on-inmate assault is not limited to situations in which the municipality had actual knowledge of a danger, but also includes situations in which the municipality had constructive notice of the danger" (*Brown v. City of New York*, 95 A.D.3d 1051, 1052, 944 N.Y.S.2d 599). In making a determination as to whether a municipality had "reason to know" about a danger, "its knowledge of the particular inmates is relevant, but so are its knowledge of risks to a class of inmates, its expertise or prior experience, and its own policies and practices designed to address the risks" *(Id.* at 1052).

Here, viewing the allegations in the light most favorable to plaintiff and accepting the allegations as true, the compliant adequately pleads a cause of action for common law negligence. Plaintiff has alleged that while in the custody and care of defendant County, he was assaulted by another detainee/inmate who was known to be violent, was suppose to be separated from nonviolent detainees/inmates, and as a result of the negligence of corrections officers in separating the detainee/inmate, the detainee/inmate was permitted to punch plaintiff.

In the third and fourth causes of action, plaintiff asserts causes of action for negligent hiring and training. It is alleged in the third cause of action that defendant County negligently hired incompetent employees and failed to hire a sufficient number of employees to supervise detainees/inmates. In the fourth cause of action, it is alleged

that defendant County negligently trained its employees so as to enable them to supervise and control inmates at the Westchester County Jail.

A necessary element of a cause of action for negligent hiring and negligent supervision "is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Kelly G. v. Board of Educ. of City of* Yonkers, 99 A.D.3d 756,757, 952 N.Y.S.2d 229, quoting *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161, 654 N.Y.S.2d 791, *cert. denied* 522 U.S. 967, 118 S.Ct. 413, 139 L.Ed.2d 316). Here, there are no allegations in the complaint concerning this element or the identity of the employees involved (see *Id;* see also *Mason v. Ben Roy Das, Inc.*, 34 A.D.3d 768, 825 N.Y.S.2d 515) and, as a result, it fails to allege a cause of action for negligent hiring and/or negligent training.

Lastly, in the fifth cause of action, plaintiff alleges that the failure of defendant County to adequately protect him violated his civil rights as set forth in 42 U.S.C. §1983.[1] Although not specifically alleged in the complaint, it appears plaintiff is claiming a violation of his rights under either the Fourteenth or the Eighth Amendment.

The Eighth Amendment applies only to convicted prisoners, while the Due Process Clause of the Fourteenth Amendment applies to pre-trial detainees held in state custody (*Caiozzo v. Koreman*, 581 F.3d 63, 69 [2d Cir. 2009]; *Weyant v. Okst*, 101 F.3d 845, 856 [2d Cir. 1996]; *Liscio v. Warren*, 901 F.2d 274, 275-276 [2d Cir. 1990]). It is unclear from the allegations in the complaint whether plaintiff was a pre-

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[1]Pursuant to 42 U.S.C. §1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage * * * subjects or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

trial detainee or was serving a term of imprisonment at the time of the alleged assault. This ambiguity, however, is of no moment to a determination on the instant motion. Courts have held that since "an unconvicted detainee's rights are at least as great as those of a convicted prisoner" (*Weyant v. Okst*, 101 F.3d at 856), the same standard of review for Eighth Amendment claims are applicable to the deliberate indifference claims of pre-trial detainees (see *Cuoco v. Moritsuqu*, 222 F.3d 99, 106 [2d Cir. 2000]; *Hamm v. Hatcher*, 2013 WL 71770 [S.D.N.Y. 2013]).

"Under the Eighth Amendment * * * prison officials must take reasonable measures to guarantee the safety of inmates in their custody (*Blaylock v. Borden*, 547 F.Supp.2d 305, 310 [S.D.N.Y. 2008], quoting *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 620). Although "[p]rison officials have a duty to protect prisoners from violence at the hands of other inmates" (*Id.*, quoting *Lee v. Artuz*, 96 Civ. 8604, 2000 WL 231083 at *4 [internal quotations omitted]), "not * * * every injury suffered by one prisoner at the hands of another * * * translates into constitutional liability for prison officials responsible for the victims safety" (*Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811). In order to prevail on a "failure-to-protect" claim, a plaintiff "must show that, objectively, the conditions of his incarceration posed a substantial risk of serious harm, and, subjectively, that defendants acted with deliberate indifference to that risk" (*Blaylock v. Borden*, 547 F.Supp.2d at 310; *Warren v. Goord*, 476 F.Supp.2d 407, 410 [S.D.N.Y. 2007]). "In the failure-to-protect context, a prison official acts with deliberate indifference and thus has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he

disregards that risk by failing to take reasonable measures to abate the harm" (*Blaylock v. Borden*, 547 F.Supp.2d at 310, quoting *Lee v. Artuz*, 2000 WL 321083 at *5 [internal quotations omitted]).

It is well settled that a municipality cannot be held liable under §1983 on a *respondeat superior* theory (*Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611; *Elie v. City of New York*, 92 A.D.3d 716, 938 N.Y.S.2d 595). Thus, in order to hold defendant County liable under §1983 for an alleged violation of plaintiff's Eighth or Fourteenth Amendment, plaintiff must prove that a municipal policy or custom caused the deprivation of his constitutional rights (*Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. at 694; *Hudson Val. Marine, Inc. v. Town of Cortlandt*, 79 A.D.3d 700, 912 N.Y.S.2d 623; *Maio v. Kralik*, 70 A.D.3d 1, 10-11, 888 N.Y.S.2d 582). Therefore, in order to assert a cause of action under §1983, the complaint must contain allegations describing actions that suggest "at least circumstantially" the inference that such a policy or practice exists (*Zahra v. Town of Southold*, 48 F.3d 674, 685 [2d Cir. 1995]).

The existence of a policy or practice may be demonstrated in four ways. First, a plaintiff may provide evidence of a formal policy officially adopted by the municipality (*Monell*, 436 U.S. at 690). Second, a single deliberate unconstitutional act or decision taken by an authorized decision-maker may be considered policy (*Board of County Commrs. v. Brown*, 520 U.S. 397, 404-406, 117 S.Ct. 1382, 137 L.Ed.2d 626). Third, a policy may be established by demonstrating that the acts of a municipal agent were part of a widespread practice that, while not expressly authorized, constitutes a custom or

usage of which a supervising policy-maker was aware (*Id.* at 403-404). Fourth, where a municipality's failure to provide adequate training or supervision of its agents rises to the level of deliberate indifference, liability may be imposed *(Id.)*. However, "a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy" (*DeCarlo v. Fry*, 141 F.3d 56, 61 [2d Cir. 1998], quoting *Ricciuti v. New York Trans. Auth.*, 941 F.2d 119, 123 [2d Cir. 1991]).

After affording plaintiff's allegations every possible favorable inference, the complaint falls to allege that defendant County had an unconstitutional policy or custom that caused plaintiff's injury. Furthermore, the complaint does not allege that the violation of his constitutional rights was the result of a widespread practice that constitutes custom or usage, nor does it allege that a single act or decision by an authorized decisionmaker resulted in the assault. Rather, it is merely alleged that defendant County's failure to adequately protect him violated his civil rights as set forth in §1983. Although the complaint alleges that the corrections officers were aware that the offending inmate was violent, this conclusory allegation is insufficient to maintain a §1983 deliberate indifference claim.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss the complaint insofar as asserted against defendant WCDOCS is GRANTED; and it is further

ORDERED, that defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) as asserted against defendant County is GRANTED as to the third, fourth and fifth causes of action; and it is further

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) as asserted against defendant County is DENIED as to the first and second causes of action; and it is further

ORDERED that the parties appear in the Preliminary Conference Part, Room 811, on February 19, 2013 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 29, 2013

HON. LESTER B. ADLER
SUPREME COURT JUSTICE

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