

**Piedra v New York State Dept. of Corrections &
Community Supervision**

2014 NY Slip Op 30040(U)

January 7, 2014

Supreme Court, New York County

Docket Number: 402417/12

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

OLGA PIEDRA,
Plaintiff,

Index No.: 402417/12

Motion Date: 06/07/13

- v -

Motion Seq. No.: 01

NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION (formerly New
York State Division of Parole), P.O.
ROBERSON, SPO PEART and AREA SUPERVISOR
JENKINS,
Defendants.

The following papers, numbered 1 to 3 were read on this motion to dismiss.

FILED

Notice of Motion/Order to Show Cause -Affidavits Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying Affidavits - Exhibits	No(s)	3

JAN 10 2014

NEW YORK
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Cross-Motion: Yes No

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

Upon the foregoing papers,
Defendants New York State Department of Corrections and
Community Supervision (DOCCS), P.O. Roberson, SPO Peart and Area
Supervisor Jenkins move, pursuant to CPLR 3211 (a) (2), (4), (5),
(7) and (8) for an order dismissing the complaint on the grounds
that: this court lacks subject matter jurisdiction over the
proceeding; there is another action pending between the same
parties for the same cause of action; the action is barred by the
statute of limitations; and, the State defendants are entitled to

- 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

absolute judicial and qualified immunity. Defendants further argue that plaintiff has failed to allege the individual defendants' personal involvement in the alleged Constitutional deprivation in violation of 42 USC § 1983, and has also failed to sufficiently allege the individual defendants' intentional and purposeful discrimination against plaintiff in alleging a section 1983 violation.

Plaintiff Olga Piedra (Piedra) was incarcerated for a 2009 conviction for grand larceny, auto, in the fourth degree, in Bronx County Supreme Court. She was sentenced to an indeterminate sentence of one year and four months to four years. She was later convicted of collecting unemployment income while she was still employed, and of practicing law without a license. In January 2010, Piedra was released to parole supervision. Among the conditions of her parole were that she would not "have a checking account savings, debit or credit card account without PO [parole officer] permission." If plaintiff adhered to the conditions of parole, she was to be supervised until August 30, 2011.

On May 26, 2011, when Piedra reported to her parole officer, P.O. Roberson, she was declared delinquent and taken into custody. P.O. Roberson discovered that Piedra had several debit and/or credit cards in her possession. She was charged with four violations of her conditions of release: (1) possession of a Bank

of America debit card without permission from her parole officer; (2) possession of a netSpend debit card without permission from her parole officer; (3) possession of a Chase debit card without permission from her parole officer; and (4) possession of a Chase business check card without permission from her parole officer.

Piedra brings this action alleging that she was falsely arrested by defendants, that defendants maliciously prosecuted her, and that she was deprived of her civil rights under 42 USC § 1983 due to the alleged false arrest.

After her arrest, plaintiff had a preliminary hearing on June 7, 2011. The hearing officer found probable cause for the arrest, and a final parole revocation hearing was scheduled. That hearing was held on August 12, 2011. The first charge was dismissed, but Piedra was found guilty on the remaining three violation charges. Plaintiff was held at the Taconic Correctional Facility in Bedford Hills, New York, and was released on November 10, 2011. Her parole expired on August 28, 2012. Piedra contends that she asked her attorney to appeal the final parole revocation determination, however, no notice of administrative appeal from the final hearing decision was filed. Instead, her attorney filed a petition for a writ of habeas corpus in Westchester County Supreme Court, which was dismissed as moot on November 15, 2011, because Piedra had been released from prison.

Piedra filed an Article 78 proceeding challenging the final hearing decision in Bronx County Supreme Court on July 3, 2012. Piedra v New York State Division of Parole, index No. 260497/2012 (Sup Ct, Bronx County 2012). That court granted the motion to dismiss on December 4, 2012, finding that Piedra had failed to exhaust her administrative remedies. Plaintiff filed a notice of appeal, which appeal is currently pending.

Initially, the court notes that neither party included a copy of the summons and complaint with their papers. While that can result in an automatic denial of the motion to dismiss, the court will consider the merits of the motion in the interest of judicial economy. See Soule v Lozada, 232 AD2d 825, 825 (3d Dept 1996). The court accessed the summons and complaint through electronic court files.

Defendants contend that in asserting claims for false arrest and malicious prosecution, plaintiff is challenging the legitimacy of defendants' determination that she violated the terms of her parole. However, plaintiff never appealed the final hearing decision, and has, therefore, failed to exhaust her administrative remedies.

Plaintiff contends that she did not fail to exhaust her administrative remedies. She requested that her attorney file an appeal, but the attorney filed a writ of habeas corpus because an administrative appeal would have taken longer than the time left

on her term. Plaintiff states that she filed a notice of intent to file a claim with the attorney general's office within the statute of limitations, and commenced an Article 78 proceeding to overturn the parole violations. The Article 78 proceeding was dismissed for failure to exhaust administrative remedies, and is now on appeal.

The elements of a claim for false arrest are "that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged." Hernandez v City of New York, 100 AD3d 433, 433 (1st Dept 2012). Obviously, if the plaintiff was convicted after being arrested, the confinement was "otherwise privileged." Here, Piedra was convicted of having violated parole. Unless that determination is reversed, the claim for false arrest is without merit.

The elements of malicious prosecution are "(1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice" (Colon v City of New York, 60 NY2d 78, 82 [1983])." Morant v City of New York, 95 AD3d 612, 612-613 (1st Dept 2012). Here, again, Piedra cannot show that the prosecution terminated favorably to her, and her claim has no merit unless the conviction is reversed. Thus, both the false arrest and malicious prosecution causes of action are dependent upon a finding that the determination of the

administrative agency that Piedra violated her parole was incorrect.

There is no question that a person who objects to the determination of an administrative agency must exhaust any administrative remedies before applying to the courts for relief. Galín v Chassin, 217 AD2d 446, 447 (1st Dept 1995). Here, plaintiff acknowledges that she did not appeal the final determination, but concludes that because her attorney filed a writ of habeas corpus instead, she should be permitted to challenge the administrative determination in the courts. There is no basis for such a conclusion. Her attorney chose to pursue habeas corpus relief in an effort to have her released from prison earlier. However, that was not an administrative review, and does not enable plaintiff to now challenge the determination that she violated her parole conditions. Further, that relief was not granted; Piedra was released from prison and the habeas corpus relief was denied as moot. Since a successful challenge to the conviction is a prerequisite for any finding of false arrest or malicious prosecution, those causes of action are dismissed.

With respect to any portion of this action that seeks to challenge the finding of the administrative agency, another obstacle to this court addressing the merits is that plaintiff brought an Article 78 proceeding challenging the same

determinations, which is currently on appeal. This court declines to address a matter that is currently sub judice in another court. CPLR 3211 (a) (4).

Piedra's third cause of action is based upon an alleged violation of 42 USC § 1983, based on wrongful conviction and false arrest. With respect to so much of the claim as rests on wrongful conviction and imprisonment, in Heck v Humphrey (512 US 477 [1994]), the United States Supreme Court held that a prisoner may not bring an action for damages under section 1983, arising from a wrongful conviction or sentence unless that conviction or sentence was overturned. *Id.* at 486-487. Plaintiff cannot demonstrate that her conviction was overturned because it has not been. Therefore, her action to recover damages based upon her allegedly wrongful conviction cannot be entertained.

With respect to Piedra's claims based upon false arrest, pursuant to the eleventh amendment of the United States Constitution, DOCCS is immune from suit unless there was a waiver of sovereign immunity. Florida Dept. of State v Treasure Salvors, Inc., 458 US 670, 684 (1982); Quern v Jordan, 440 US 332, 342-343 (1979). This immunity also extends to any claims against state officials sued in their official capacities if the state is the real party in interest. Will v Michigan Dept. of State Police, 491 US 58, 70-71 (1989). There is no indication that the DOCCS waived its immunity in this action. Therefore,

those claims, as well, must be dismissed. Ford Motor Co. v Department of Treasury of State of Indiana, 323 US 459, 464 (1945), *overruled on other grounds* Lapides v Board of Regents of Univ. Sys. of Georgia, 535 US 613 (2002).

Additionally, Piedra has failed to allege facts to support her claim that P.O. Roberson had no probable cause to arrest her. She acknowledges that P.O. Roberson found her in possession of bank cards. Upon finding those cards, P.O. Roberson had probable cause to arrest Piedra for violation of parole, regardless of whether a later inquiry could reveal that the cards did not prove to be violative of her parole. In fact, the preliminary hearing and the final determination both concluded that Piedra violated the terms of her parole, thus supporting P.O. Roberson's actions in arresting plaintiff for a violation of parole. In view of Piedra's failure to sufficiently allege lack of probable cause, her claim for false arrest is dismissed. Jaegly v Couch, 439 F3d 149, 152 (2d Cir 2006).

Plaintiff raises claims against P.O. Roberson, SPO Peart and Area Supervisor Jenkins. Correction Law § 24¹ requires that any claims against current or former DOCCS employees that relate to actions taken during their employment be brought in the Court of

¹ Correction Law § 24, as applied to § 1983 claims, was held to violate the Supremacy Clause in Haywood v Drown (556 US 729 [2009]). However, plaintiff does not raise this issue, and, in fact, seeks a transfer to the Court of Claims.

Claims. Further, Executive Law § 259-q bars suits against officers and employees of the board of parole or former division of parole in their personal capacities. Plaintiff also seeks damages against the DOCCS. Such claims must also be brought in the Court of Claims. New York Const, art VI, § 9; Court of Claims Act, article II § 8. Accordingly, plaintiff seeks to have this court transfer the action to the Court of Claims. However, in view of this court's conclusion that plaintiff cannot pursue her claims at all, due to her failure to exhaust administrative remedies, and her related inability to demonstrate a successful challenge to the underlying charge, there is no basis to transfer this matter to the Court of Claims for adjudication.

Accordingly, it is hereby

ORDERED that defendants' motion is granted and the complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: January 7, 2014

ENTER:

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 JAN 10 2014
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Debra A. James
 DEBRA A. JAMES J.S.C.