

**Vargas v City of New York**

2014 NY Slip Op 30639(U)

March 13, 2014

Sup Ct, NY County

Docket Number: 150556/11

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

-----X  
WALTER VARGAS,

Plaintiff,

-against-

DECISION/ORDER  
Index No.: 150556/11  
Seq. No.: 002

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

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.....	1-2(Exs. 1-6)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
STIPULATIONS.....	.....
OTHER.....	.....

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

Plaintiff Walter Vargas moves for an order granting reargument of 1) his motion to amend the complaint to add a claim for compensatory damages against defendant New York City Police Officers Brian Buith and Gurvinde Singh and defendant the City of New York (“the City”); and 2) the cross-motion by defendants Officer Buith, Officer Singh, and the City seeking dismissal of the complaint against the officers based on lack of personal jurisdiction and to dismiss the complaint in

its entirety because it failed to state a cause of action. After a review of the papers presented, all relevant statutes and case law, the Court 1) **grants** plaintiff's motion for reargument and, upon reargument, 2) **vacates** those portions of its Order dated July 23, 2013 granting defendants' cross-motion seeking dismissal of the complaint in its entirety, denying the defendants' cross motion as moot, and denying plaintiff's motion to amend the complaint to add a claim for compensatory damages, 3) **denies** defendants' cross-motion insofar as it sought dismissal of the complaint against the City based on the absence of personal jurisdiction and failure to state a cause of action; 4) **grants** plaintiff's motion to amend his complaint to add a claim for compensatory damages; and 5) **adheres** to its initial determination that the claims against Officers Buith and Singh must be dismissed based on the absence of personal jurisdiction.

**Factual and Procedural Background:**

Plaintiff claims that, on September 21, 2010, he was stopped by defendant Police Officers Brian Buith and Gurvinde Singh for walking between subway cars. After plaintiff showed the officers his valid New York State driver's license, the officers allegedly extended his detention for the purpose of conducting a further investigation without any justification to do so. During this time, the police allegedly detained plaintiff while they conducted a criminal record check revealing that he had been convicted of a prior crime. Plaintiff was then handcuffed and arrested, during which time he dropped a marijuana cigarette to the ground and stepped on it. Plaintiff was charged with Unsafe Riding in Restricted Areas Within the Transit Authority (New York City Transit Authority Regulation ["TAR"] § 1050.9[d]), Criminal Possession of Marijuana (Penal Law section 221.10[1]) and Attempted Tampering With Physical Evidence (Penal Law sections 110 and 215.40[2]).

On December 1, 2011, plaintiff commenced this action against the City and Officers Buith and Singh. In his complaint, plaintiff alleged the facts above and further claimed, inter alia, that “[e]xtending detentions of subway passengers stopped for subway infractions [into] full blown arrests upon obtaining information that the passenger has a criminal record history is a widespread practice of New York City police officers.” Plaintiff alleged that, by detaining him “for a minor subway infraction” in order to check his criminal record, defendants violated Article I, § 12 of the New York State Constitution. It is undisputed that the City was properly served with the complaint on December 2, 2011 and that Officers Buith and Singh were never properly served.

The parties thereafter discussed a possible stipulation to a set of facts in order to avoid protracted discovery, as well as the prospect of an amendment of the complaint to include a request for compensatory damages. They also discussed the possible dismissal of the claims against the defendant officers based on defective service of process if the City stipulated to certain facts.

On October 25, 2011, plaintiff’s counsel e-mailed a prospective amended complaint to counsel for the defendants. In November of 2012, defendants’ attorney advised plaintiff’s counsel that the defendants would not consent to amending the complaint unless plaintiff agreed to dismiss the claims against the defendant police officers.

After further attempts at resolving the foregoing issues proved unsuccessful, plaintiff, who conceded that service of process on the defendant officers was improper, moved on January 8, 2013 for an extension of time to properly serve them pursuant to CPLR 306-b. Plaintiff also moved, pursuant to CPLR 3025(b), to amend the complaint to assert a claim for compensatory damages.

Defendants cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. They asserted that plaintiff was detained and subject to a background

check after he was observed by Officers Buith and Singh violating TAR § 1050.9(d), which prohibits passengers from using the end doors of a subway car to pass from one car to another. The defendants also moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against the officers based on lack of personal jurisdiction due to the defective service of process on the officers.

By Order dated July 23, 2013, this Court denied plaintiff's motion in its entirety. In so holding, this Court stated that it refused to extend the time to serve the officers in the interest of justice because there was no basis stated for service of process at the address where it was attempted and that plaintiff failed to prove that the officers were mailed the summons and complaint after it was left with a person of suitable age and discretion as required by CPLR 308(2). This Court also reasoned that, since this action was commenced on December 1, 2011 and plaintiff did not seek an extension of time to serve the officers until January of 2013, plaintiff was not diligent in moving for this extension of time and thus did not establish good cause warranting extra time to serve the officers pursuant to CPLR 306-b.

This Court did not set forth a specific reason for denying that branch of plaintiff's motion seeking to amend the complaint to add a claim for compensatory damages.

While stating that it denied defendants' cross-motion to dismiss the complaint as "moot", this Court also dismissed the complaint "without prejudice." The sole ground cited for dismissal of the complaint as against all of the defendants was the improper service on the defendant officers.

#### **Positions of the Parties:**

Plaintiff argues that his motion for reargument must be granted because this court overlooked

issues of law and fact in granting defendants' motion to dismiss.<sup>1</sup> Specifically, plaintiff asserts that the complaint should not have been dismissed as against the City because it was properly served and because defendants only sought dismissal against Officers Buith and Singh. Alternatively, plaintiff asserts that, if his motion to reargue is granted, his claim should not be dismissed for failure to state a cause of action. Further, plaintiff asserts that, if its motion to reargue is granted and the case against the City is restored, then his motion to amend the complaint to add a claim for compensatory damages should be granted.

In opposition, defendants assert that plaintiff's motion for reargument must be denied. Defendants assert that the complaint was properly dismissed because plaintiff failed to state a cause of action against them. They further assert that the claims against the defendant officers were properly dismissed based on lack of personal jurisdiction since they were not properly served.

In his rely affirmation, plaintiff asserts this Court should not dismiss the complaint for failure to state a cause of action because its decision of July 23, 2013 set forth no basis for doing so. Plaintiff further asserts that this Court had no basis for dismissing the action against the City on jurisdictional grounds.

### **Conclusions of Law:**

A motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d

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<sup>1</sup>Plaintiff states in his motion that, although he will appeal this Court's Order denying him an extension of time to serve the officers pursuant to CPLR 306-b, he is not seeking reargument of that portion of the July 23, 2013 Order denying him this relief.

22, 27 (1<sup>st</sup> 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 (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1<sup>st</sup> Dept. 1984]), or to present arguments different from those originally asserted. *William P. Pahl Equip. Corp. v. Kassis*, *supra* at 27; *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 misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1<sup>st</sup> Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5<sup>th</sup> ed) succinctly states 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." Here, plaintiff has established his entitlement to reargument since his claim against the City should not have been dismissed based on jurisdictional grounds or a failure to state a claim and his motion seeking to amend the complaint to add a claim for compensatory damages should have been granted.

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 pleading a liberal construction, accept all 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 also Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. *See Morone v. Morone*, 50 N.Y.2d 481 (1980); *Gertler v. Goodgold*, 107 A.D.2d 481 (1<sup>st</sup> Dept. 1985), *affd* 66 N.Y.2d 946 (1985). Where evidence is

submitted by the movant in support of the CPLR 3211(a)(7) motion, the court must determine whether the proponent of the pleading actually has a cause of action, not whether he has stated one. See *Leon v. Martinez*, *supra*, at 87; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976); *Simos v. Vic-Armen Realty, LLC*, 92 A.D.3d 760 (2d Dept. 2012); *Fishberger v. Voss*, 51 A.D.3d 627 (2d Dept. 2008).

Here, plaintiff has set forth a claim, sufficient to withstand dismissal pursuant to CPLR 3211(a)(7), that his constitutional rights were violated because he was detained for “a minor subway infraction” prior to his arrest so that the police could check his criminal background. Although defendants correctly maintain that Criminal Procedure Law section 140.10(1)(a) allows the police to arrest an individual for an offense committed in an officer’s presence, they do not cite any case holding that detention prior to an arrest for the purpose of investigating one’s criminal background is constitutional. Thus, plaintiff’s claim may proceed against the City but not, for the reasons set forth below, as against the defendant officers.

This Court overlooked the law and facts by dismissing the complaint as against all of the defendants while there were jurisdictional grounds to dismiss it only as against the defendant officers. There is no dispute that the City was properly served with process and plaintiff concedes that the defendant officers were not. Thus, upon reargument, this Court determines that it properly dismissed the claims against the defendant officers but that its Order of July 23, 2013 should not have stated that the defendants’ motion to dismiss was denied as “moot.”

Upon reargument, this Court also grants that branch of plaintiff’s motion which sought to amend the complaint to add a claim against the City for compensatory damages. It is well-settled that leave to amend a pleading shall be “freely given upon such terms as may be just.” CPLR

3025(b). Plaintiff is granted leave to amend his complaint to assert a claim for compensatory damages since he is permitted to seek such damages based on the violation of any rights declared in the declaratory judgment action. *See Lynch v Bailey*, 279 A.D. 650 (1<sup>st</sup> Dept. 1951), *affd* 304 N.Y. 669 (1952).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that this court grants plaintiff's motion for reargument of 1) his motion to amend the complaint to add a claim against the City for compensatory damages; and 2) the cross-motion by defendant Police Officers Buith and Singh and defendant the City of New York seeking dismissal of the complaint against the officers based on lack of personal jurisdiction and to dismiss the complaint in its entirety based on a failure to state a cause of action; and it is further,

ORDERED that, upon reargument, this Court vacates those portions of its Order dated July 23, 2013 granting defendants' cross-motion seeking dismissal of the complaint in its entirety, denying the defendants' cross motion as moot, and denying plaintiff's motion to amend the complaint to add a claim for compensatory damages; and it is further,

ORDERED that, upon reargument, this Court denies that branch of defendants' cross-motion seeking dismissal of the complaint against the City based on the absence of personal jurisdiction and failure to state a cause of action; and it is further,

ORDERED that, upon reargument, this court grants that branch of plaintiff's motion seeking to amend his complaint to add a claim for compensatory damages; and it is further,

ORDERED that, upon reargument, this court adheres to its initial determination dismissing the claims against Officers Buith and Singh based on the absence of personal jurisdiction; and it is

further,

ORDERED that plaintiff is directed to serve, within 20 days after service of this order with notice of entry, an amended complaint in a form substantially similar to the proposed amended complaint attached to the plaintiff's moving papers, and that defendant City of New York will serve an answer or otherwise respond to the amended complaint within 20 days after service of the same; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendant Police Officers Buith and Singh; and it is further,

ORDERED that the action is severed and continued against the remaining defendant the City of New York; and it is further,

ORDERED that the caption be amended to reflect the dismissal against defendant Police Officers Buith and Singh and that all future papers filed with the court bear an amended caption deleting the names of those defendants; and it is further,

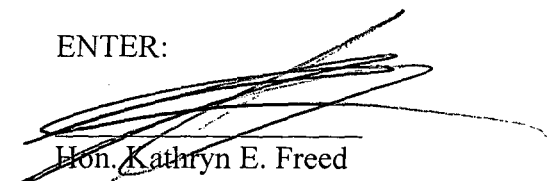
ORDERED that counsel for defendant Police Officers Buith and Singh shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

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

DATED: March 13, 2014

MAR 13 2014

ENTER:

  
Hon. Kathryn E. Freed  
J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT