

Davis v City of New York
2014 NY Slip Op 30704(U)
March 17, 2014
Supreme Court, New York County
Docket Number: 101499/2011
Judge: Kathryn E. Freed
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SCANNED ON 3/21/2014
**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 400538/2012
DAVIS, WASHINGTON
vs
CITY OF NEW YORK
Sequence Number : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CAL: #22

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s) _____

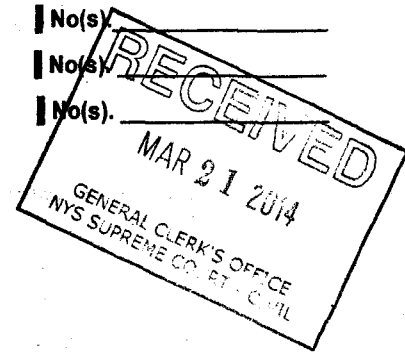
Answering Affidavits — Exhibits _____

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

MAR 21 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3-17-14

_____, 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

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

-----X
WASHINGTON DAVIS,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

-----X
HON. KATHRYN E. FREED:

DECISION/ORDER

Index No. 101499/2011
Seq. No. 003,

PRESENT:

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

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

FILED

PAPERS

NUMBERED

MAR 21 2014

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1(Exs. A-G)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.2..(Exs. A-I)
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
MEMORANDUM OF LAW.....5.....
OTHER.....

COUNTY CLERK'S OFFICE
NEW YORK

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

Defendant The City of New York ("the City") moves, pursuant to CPLR 2221, for reargument of its motion to dismiss the complaint pursuant to CPLR 3211 or, in the alternative, for summary judgment pursuant to CPLR 3212. Its motion was denied by Order of this Court dated June 28, 2013. Plaintiff pro se Washington Davis opposes the City's motion and moves, by order to show cause pursuant to CPLR 3212, for an order granting him summary judgment on liability as well as for sanctions against the City. Following oral argument and a review of the motion papers and relevant case law, the City's motion for reargument is **granted** and, upon reargument, plaintiffs

causes of action for false arrest, false imprisonment, malicious prosecution, and fraud are **dismissed**. Plaintiff's claim for punitive damages and that portion of the complaint seeking an injunction are also **dismissed**. Plaintiff's motion for summary judgment and for sanctions is **denied**.

Factual and Procedural Background:

In his notice of claim, filed March 2, 2011, plaintiff alleges that, on August 10, 2009, he was falsely arrested and imprisoned and charged with Criminal Trespass by employees of the New York City Police Department ("NYPD") for "merely walking through an open park between 165th and 166th in Woody Crest Ave. [in The Bronx] while the Park was occupied by other citizens at the time..." Plaintiff further alleges that he was then "illegally imprisoned" and "maliciously prosecuted", that his rights were violated under the due process and equal protection clauses of the New York State and United States Constitutions, and that he was deprived of his rights "under the 4th, 8th, and 14th amendment[s] to the United States Constitution and those same rights under [the New York State] Constitution."

Plaintiff further alleges in his notice of claim that, on August 11, 2009, the arraigning judge "determined that probable cause existed" for his arrest and plaintiff was paroled pending trial. On February 3, 2011, the criminal charges against plaintiff were dismissed.

Plaintiff commenced the instant action by filing a summons and complaint on or about March 2, 2012. In his complaint, plaintiff alleged false arrest, false imprisonment, malicious prosecution, and fraud. He also sought a "permanent injunction prohibiting [the City] from contacting any pro se plaintiff, under the pretense of settlement, to impede the process of his or her action ensuring the timely filing of a notice of claim..." Plaintiff demanded monetary damages of \$300,000 plus

punitive damages of \$ 3 million.

The City served its answer and discovery demands on March 23, 2012. The City asserts that included with the same was a letter, dated March 22, 2012, requesting that plaintiff execute authorizations for the NYPD and District Attorney's Office, as well as for the unsealing of related Criminal Court records. On April 19, 2012, plaintiff served the City with a demand for a verified bill of particulars. On July 6, 2012, Assistant Corporation Counsel Anthony Bila informed plaintiff by telephone that the City had not yet received plaintiff's response to the City's demands.

On July 18, 2012, Mr. Bila sent plaintiff another letter accompanied by blank authorizations and filed a Request for Judicial Intervention ("RJI") requesting that a preliminary conference be scheduled.

On or about July 3, 2012, plaintiff contacted Mr. Bila, who told plaintiff that he had not received plaintiff's bill of particulars. According to plaintiff, Mr. Bila promised to send him "another relief [sic] form to sign and then dalt [sic] deceitfully with [him] by instructing [him] to seek out a court intervention [sic] for the propose [sic] of creating discovery deadlines."

On or about August 16, 2012, plaintiff moved for an Order precluding the City from presenting any evidence based on the City's "arbitrary and inexcusable failure and refusal to furnish plaintiff with a Bill of Particulars." Plaintiff also moved for summary judgment on his complaint.

Defendant opposed plaintiff's motion and cross-moved for an Order, pursuant to CPLR 3211(a)(7) and/or 3212, dismissing the complaint or, in the alternative, pursuant to CPLR 3126, dismissing the complaint for failure to provide the City with authorizations to obtain the NYPD and District Attorney's files as well as to unseal plaintiff's criminal court file. Alternatively, the City sought an Order setting this matter down for a compliance conference and compelling the production

of the said authorizations. In support of its motion, defendant argued that plaintiff's causes of action for false arrest and false imprisonment had to be dismissed because they were time barred. It asserted that plaintiff's claim for false arrest accrued on August 10, 2009 and that his action for false arrest accrued once he was released from physical custody/confinement, which plaintiff claimed was August 11, 2009. Plaintiff filed his notice of claim on March 2, 2011. The City maintained that, since plaintiff's notice of claim was not served prior to November 11, 2010, which was one year and ninety days after his claims for false arrest and false imprisonment accrued, it was untimely.

The City also argued that plaintiff's causes of action for malicious prosecution and fraud were subject to dismissal for failure to state a cause of action. Further, the City asserted that plaintiff's motion seeking preclusion and summary judgment had to be denied and that the Court should set this matter down for a compliance conference if the complaint were not dismissed.¹

In an affirmation in opposition to the City's motion, plaintiff acknowledged that he received the City's bill of particulars on March 12, 2012. Plaintiff also maintained that it provided the City with the requested authorizations on July 18, 2012 and that the City's denial that it received them arose from its intentional destruction of the same in order to impede justice.

By Order dated June 28, 2013, this Court denied the motion and cross-motion, without prejudice. In denying plaintiff's motion to preclude, this Court noted that, although the City did not produce a bill of particulars in a timely fashion, it provided one to plaintiff and thus preclusion of

¹This Court notes that, in response to plaintiff's motion to preclude, this Court (Jaffe, J.) rendered a written decision/order on October 15, 2012, wherein she stated that "[p]laintiff's motion to preclude is granted solely to the extent of directing the parties to appear for a compliance conference on November 13, 2012 at 2 pm at 80 Centre Street, New York, NY, room 103, rather than the previously scheduled conference on January 8, 2013. Plaintiff is not entitled to the relief sought in this early stage of the action."

the City was not warranted. This Court further stated that plaintiff's motion for preclusion and summary judgment was denied since discovery was "woefully incomplete." Although this Court's Order suggested that the City's cross-motion for dismissal was also denied due to outstanding discovery, it did identify this as a specific ground for the denial.

Positions of the Parties:

In support of its motion for reargument, the City asserts that plaintiff's claims for false arrest and false imprisonment should have been dismissed as time barred. It argues that these claims accrued when plaintiff was arrested on August 10, 2009 and when he was released on August 11, 2009 and that, to be timely, he had to have filed a notice of claim no later than November 11, 2010. However, since the notice of claim was not filed until March 2, 2011, and plaintiff never sought an extension of time to file the notice of claim within one year and ninety days, those claims were barred pursuant to GML §§ 50-e and 50-i. The City further asserts that plaintiff's malicious prosecution and fraud claims must be dismissed for failure to state a cause of action. Finally, the City asserts that plaintiff is not entitled to a "permanent injunction prohibiting the [City] from contacting any pro se plaintiff, under pretense of settlement, to impede the process of his or her action ensuring the timely filing of a notice of claim." The City does not set forth any ground upon which to dismiss plaintiff's Constitutional claims.

In opposition to the City's motion and in support of his motion, plaintiff argues that he is entitled to summary judgment on liability because the charges against him were dismissed in the criminal action against him. He further asserts that the City should be sanctioned because its motion for reargument is frivolous.

Plaintiff claims that, on January 3, 2012, he called the Office of the City's Comptroller, which directed him not to commence a lawsuit against the City, and indicated that it wanted to discuss settlement with plaintiff. Plaintiff claims that this was "fraud aimed at impeding the commencement of [his lawsuit] beyond the one year expiration date so that [the City] could invent a statute of limitations defense against the action itself."

In addition, plaintiff claims that he had to appear in court in connection with his criminal matter more than 20 times, spending 8-9 hours at each appearance until his case was called. He thus claims he is entitled to amend the amount of money sought in this action "to the actual proof reflecting his los[s], to wit: at least 100 million dollars" resulting from the fact that he was "deprived of his opportunity to make his bets, and it is clear from the evidence that the [City] cannot prove that the plaintiff would not have won the New York Lottery on anyone [sic] of the 12 days that he was confined to the courtroom [in his criminal action] and unable to engage in his travel to [play the lottery]." Plaintiff's annexes as an exhibit winning lottery tickets as "proof of [his] ability to win."

In its affirmation in opposition to plaintiff's motion and in further support of its motion for reargument, the City reiterates that plaintiff's false arrest and imprisonment claims are time barred, that plaintiff is not entitled to compensation merely because the criminal charges against him were dismissed, that the City's motion to reargue is meritorious and thus does not require the imposition of sanctions, that plaintiff lacked standing to seek an injunction on behalf of all pro se litigants, and that plaintiff's claim that he is entitled to damages for missed opportunities to play the lottery is without merit.

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 22, 27 (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 (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st 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 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th 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.”

This Court hereby grants reargument of the City’s motion to dismiss and for summary judgment and, upon reargument, dismisses plaintiffs causes of action for false arrest, false imprisonment, malicious prosecution, and fraud. It also dismisses plaintiff’s claim for punitive damages and that portion of the complaint seeking an injunction. However, plaintiff’s Constitutional claims are not dismissed.

Initially, this Court should have dismissed the plaintiff’s causes of action for false arrest and false imprisonment as time barred. As the City correctly asserts in its motion for reargument, plaintiff failed to file a timely notice of claim regarding his causes of action for false arrest and false

imprisonment and did not serve a notice of claim containing these claims until March 2, 2011, more than one year and ninety days after the alleged torts were committed. The alleged false arrest and imprisonment occurred on August 10, 2009 and ended the following day. Therefore, plaintiff had until November 11, 2010 to commence an action against the City on these causes of action. Since plaintiff did not do so, and failed to seek an extension of time to file a late notice of claim within one year and ninety days following the alleged torts, these claims are time barred. *See* GML §§ 50-e, 50-i; *Plaza v New York Health & Hosps. Corp.*, 97 AD3d 466 (1st Dept 2012).

Next, plaintiff's claim of malicious prosecution, for which, the City concedes, a timely notice of claim was filed, must be dismissed. The elements of a claim of malicious prosecution are 1) the initiation of a proceeding against the plaintiff; 2) an outcome favorable to the plaintiff; 3) lack of probable cause; and 4) malice. *See Hernandez v City of New York*, 100 AD3d 433 (1st Dept 2012). The existence of probable cause to arrest is a complete defense to a claim of malicious prosecution. *Id.* Here, as noted above, plaintiff concedes that the arraigning judge determined that there was probable cause for his arrest. Therefore, his claim for malicious prosecution fails as a matter of law. *Id.* Moreover, although the plaintiff alleges a claim of malicious prosecution in the complaint, he fails to set forth any details whatsoever regarding the alleged tort and has thus failed to plead the same adequately. *See* CPLR 3013; *Sibersky v New York City*, 270 AD2d 209 (1st Dept 2000).²

The plaintiff's fraud claim must also be dismissed. In support of this claim, plaintiff alleges,

²This Court acknowledges that, in plaintiff's notice of claim, which he incorporated into the complaint by reference, he alleges that the City acted with malice because his brother, Donald Davis, was repeatedly arrested after another brother, Larry Davis, was killed in prison and that he was charged in 2009 because he became involved in his brother's defense. Even assuming that there had not been probable cause for his arrest, plaintiff's unsubstantiated and conclusory allegation of malice would have been insufficient to sustain the cause of action. *See Alexander v Scott*, 286 AD2d 692 (2d Dept 2001).

in essence, that certain misrepresentations by the City prevented him from filing a timely notice of claim. However, the claim is not pleaded with the particularity required in a fraud action by CPLR 3016 but rather is “bare-bone[d],’ without referencing, for example, specific places and dates of the alleged misrepresentations.” *Fariello v Checkmate Holdings, LLC*, 82 AD3d 437 (1st Dept 2011).³

Plaintiff’s claim for punitive damages must also be dismissed. The Court of Appeals has consistently held that a municipality is not liable for punitive damages flowing from its employee’s alleged misconduct (*see Krohn v N.Y. City Police Dept.*, 2 NY3d 329 [2004]; *Sharapata v Town of Islip*, 56 NY2d 332 [1982]) and here, plaintiff has failed to sue the arresting officers individually. Additionally, plaintiff’s claim that he is entitled to amend his complaint to seek damages of at least \$100 million in lost potential lottery winnings must be disregarded as wildly speculative.

That portion of the complaint seeking a permanent injunction is also dismissed. CPLR 6301 provides that an injunction may be granted only “where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of plaintiff’s rights respecting the subject of the action...” The standard for obtaining a permanent injunction is essentially the same as that for a preliminary injunction with the exception that plaintiff must actually succeed on the merits of the case. *See Weizmann Institute of Science v Neschis*, 229 F Supp 2d 234, 258 (SDNY 2002); *Moore v Ruback’s Grove Campers Assn., Inc.* 85 AD3d 1220, 1221 (3d Dept 2011). Since the dismissal of plaintiff’s claims prevents him from succeeding on the merits, he has

³Although plaintiff does not allege in the complaint a specific date on which he claims the City made its misrepresentation relating to a possible settlement, plaintiff’s asserts in his motion papers that this was on January 3, 2012. By this date, plaintiff was already time barred from bringing claims for false arrest and false imprisonment. Thus, even if plaintiff had properly pleaded his fraud claim, he failed to establish that he sustained damages as a result of the City’s actions, a necessary element of his claim. *See Salles v Chase Manhattan Bank*, 300 AD2d 226, 235 (1st Dept 2002).

failed to establish his right to a permanent injunction. Further, since plaintiff's demand for a permanent injunction seeks to protect "any pro se plaintiff" and not "[his] rights respecting the subject of the action", he lacks standing to seek this relief.

Since the City's motion for reargument was clearly not frivolous, plaintiff's motion for sanctions is denied. *See* 22 NYCRR 130-1.1(a). Moreover, plaintiff's motion for summary judgment on his surviving Constitutional claims is denied since he has failed to establish his prima facie entitlement to recover on these claims as a matter of law. *See, Zuckerman v City of New York*, 49 NY2d 557 (1980). Although the City's motion sought dismissal of the entire complaint, it did not set forth any reason why dismissal of plaintiff's Constitutional claims was warranted. This Court finds that plaintiff's claim that he was arrested "for merely walking through an open park" is sufficient to state a claim that his rights were violated and thus refuses to dismiss his Constitutional claims. *See* CPLR 3211(a)(7).

The Court notes that it is well aware that plaintiff is not an attorney and is probably unaware of statutory mandates and legal concepts such as pleading requirements. However, the Court also notes that he made the effort to commence the instant action. Therefore, while this Court may afford him "some latitude" (*see Duffen v. State of New York*, 245 A.D.2d 653, 653 [3d Dept 1997], *lv denied* 91 NY2d 810 [1998]), the law is well settled that a pro se litigant "acquires no greater right than any other litigant" (*Roundtree v Singh*, 143 A.D.2d 995, 996 [2d Dept 1988]) "and will be held to the same standards of proof as those who are represented by counsel." *Duffen v. State of New York*, *supra* at 654. Thus, in his choice to represent himself, plaintiff did so "at his own peril." *Banushi v Lambrakos*, 305 A.D.2d 524 (2d Dept 2003), *lv denied* 1 NY3d 504 (2003).

In light of the above, the City's motion for reargument of its motion to dismiss the complaint pursuant to CPLR 3211 or 3212 is granted and, upon reargument, the City's motion to dismiss the complaint is granted to the extent that plaintiff's causes of action for false arrest, false imprisonment, malicious prosecution, and fraud are dismissed. Plaintiff's claim for punitive damages and that portion of the complaint seeking an injunction are also dismissed. The action may proceed based on plaintiff's Constitutional claims. Plaintiff's motion for summary judgment and for sanctions is denied.

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

ORDERED that the motion of defendant The City of New York to reargue its motion seeking dismissal of the complaint pursuant to CPLR 3211 and 3212 is granted; and it is further,

ORDERED that, upon reargument, this Court vacates those portions of its prior Order, dated June 28, 2013, which denied the dismissal of plaintiff's causes of action for false arrest, false imprisonment, malicious prosecution, and fraud, plaintiff's claim for punitive damages and that portion of the complaint seeking an injunction; and it is further,

ORDERED that the action is to continue based solely on plaintiff's Constitutional claims; and it is further,

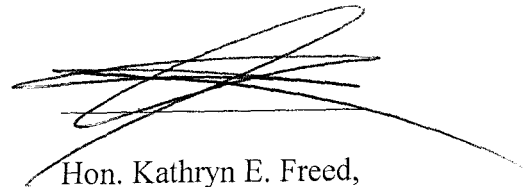
ORDERED that plaintiff's motion for summary judgment and for sanctions against The City of New York is denied; and it is further,

ORDERED that this constitutes the Decision and Order of the Court.

DATED: March 17, 2014

MAR 17 2014

ENTER:



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

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

MAR 21 2014

COUNTY CLERK'S OFFICE
NEW YORK