

**Matos v City of New York**

2014 NY Slip Op 30742(U)

March 24, 2014

Supreme Court, New York County

Docket Number: 152010/12

Judge: Kathryn E. Freed

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

-----X  
DALVIN MATOS,

Plaintiff,

-against-

CITY OF NEW YORK, THE POLICE DEPARTMENT  
OF THE CITY OF NEW YORK,

Defendants.  
-----X

DECISION/ORDER

Index № 152010/12

Seq. No.: 002

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-D).
ANSWERING AFFIDAVITS..(X Motion).....	.2, 3 (Ex A-D).
REPLYING AFFIDAVITS.....	.....

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

This action concerns the use of a 2009 arrest photo as part of the photographic identification procedures used in the 2010 arrest and criminal prosecution of plaintiff Dalvin Matos (Matos). Under motion sequence 002, defendants City of New York (the City) and The Police Department of the City of New York (NYPD) (or together, defendants or the municipal defendants, as appropriate) move for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint for failure to comply with General Municipal Law (GML) §§ 50-e and 50-i, and for failing to state a cause of action for violation of federal constitution rights under 42 USC § 1983, or in the alternative, for an order, pursuant to CPLR 3212, granting summary judgment and dismissing all claims. Matos opposes the motion and cross-moves for leave to file an amended complaint. Upon considering the

contentions of the parties and the applicable statutes and case law, this Court **grants** the motion in part and **grants** the cross-motion in part.

It is undisputed that, in or about 2009, Matos was arrested on a minor (non-felony) marijuana possession charge, and as part of post-arrest processing procedures, the NYPD photographed Matos (Arrest Photo) and obtained his personal information, including his address at 71 Vermilyea Avenue, New York, New York. The marijuana charge was dismissed by the court pursuant to CPL 170.56, the statute which provides for an adjournment in contemplation of dismissal (ACD) of cases involving first arrest, marijuana possession charges below felony grade, and, except as provided in CPL 160.50 (1) (d), for the sealing of all records relating to that arrest and prosecution. CPL § 170.56 states, in relevant part:

“1. Upon or after arraignment in a local criminal court upon an information, a prosecutor's information or a misdemeanor complaint, where the sole remaining count or counts charge a violation or violations of section 221.05, 221.10, 221.15, 221.35 or 221.40 of the penal law and before the entry of a plea of guilty thereto or commencement of a trial thereof, the court, upon motion of a defendant, may order that all proceedings be suspended and the action adjourned in contemplation of dismissal, or upon a finding that adjournment would not be necessary or appropriate and the setting forth in the record of the reasons for such findings, may dismiss in furtherance of justice the accusatory instrument; provided, however, that the court may not order such adjournment in contemplation of dismissal or dismiss the accusatory instrument if: (a) the defendant has previously been granted such adjournment in contemplation of dismissal, or (b) the defendant has previously been granted a dismissal under this section, or (c) the defendant has previously been convicted of any offense involving controlled substances, or (d) the defendant has previously been convicted of a crime and the district attorney does not consent or (e) the defendant has previously been adjudicated a youthful offender on the basis of any act or acts involving controlled substances and the district attorney does not consent.

\* \* \*

“3. Upon or after dismissal of such charges against a defendant not previously convicted of a crime, the court shall order that all official records and papers, relating to the defendant's arrest and prosecution, whether on file with the court, a police agency, or the New York state division of criminal justice services, be sealed and, except as otherwise provided in paragraph (d) of subdivision one section 160.50 of

this chapter, not made available to any person or public or private agency . . . .

“4. Upon the granting of an order pursuant to subdivision three, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.”

The legislature enacted CPL § 170.56:

“for the purpose of giving first time marijuana defendants an opportunity to be relieved of a drug possession offense, in the interest of justice. The effect of this statute is that the defendant’s record is wiped clean and the arrest and everything following it is declared a nullity so that it does not form a blot on the defendant’s escutcheon”

(*People v Abramo*, 16 Misc 3d 306, 308 [Dist Ct Nassau County 2007] [internal quotation marks and citation omitted]).

Approximately a year later, on February 17, 2010, an undercover police officer purchased a controlled substance inside 71 Vermilyea Avenue as part of an NYPD undercover narcotics operation. No arrests were made at the scene. Some two months later, on April 20, 2010, the NYPD arrested Matos and charged him, upon a criminal indictment, with criminal sale of a controlled substance in the second degree, Penal Law § 220.41 (6), a class A-II felony in New York. Matos contends, and defendants do not dispute, that prior to the arrest, the undercover police officer involved in the February 17, 2010 narcotics operation had viewed the Arrest Photo as part of a photo array, or “photo set,” of men who live in or about 71 Vermilyea Avenue, after which Matos was presented before the officer for a “show up” procedure. The narcotics officer’s confirmatory identification of Matos as a participant in the narcotics sale resulted in his arrest. After his arraignment, Matos remained in jail for approximately one year. A pretrial identification hearing resulted in the suppression of the identification evidence, namely, the Arrest Photo and the tainted “show up” procedure. Following the hearing, Matos was found not guilty after a bench trial.

On April 20, 2012, Matos commenced the instant action for damages by filing a summons and complaint in the Office of the New York County Clerk, and approximately one month later, he filed a notice of claim against the City and the NYPD. Matos's complaint contains four causes of action sounding in malicious prosecution, false arrest and false imprisonment, battery and assault, and violation of his civil and constitutional rights under 42 USC 1983 (also referred to as a "civil rights" or "Section 1983" claim). Underlying the complaint are allegations that the municipal defendants, as a matter of custom and practice within their units, ignored the rules and regulations set forth in CPR §§ 170.56 and 160.50,<sup>1</sup> pertaining to the sealing of arrest records, electing instead to maintain and use arrest photos, including that of plaintiff, for investigative purposes without a court order. The unauthorized use of Matos's Arrest Photo ultimately led to his arrest and imprisonment prior to his suppression hearing and trial on the felony drug charge.

Upon commencement of the action, Matos moved for an order, pursuant to General Municipal Law § 50-e (5), deeming his notice of claim, filed on or about May 15, 2012, timely and satisfactorily precedent to his summons and complaint. Defendants opposed the motion and, by order dated April 22, 2013, this court denied plaintiff's motion (the Prior Order). Defendants now move for a dismissal of plaintiff's claims, subject to the requirements of GML 50-i and 50-e, as well as his civil right claim, pursuant to 42 USC § 1983. In response, Matos seeks leave to amend the complaint to provide supplemental detail to his civil rights claim.

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<sup>1</sup> CPL § 160.50, which provides for the sealing, rather than the destruction, of all records relating to the arrest and prosecution following a dismissal of non-felony marijuana charges pursuant to CPL § 170.56, also provides that the sealed records are not to be made available to any person or public or private agency absent a court order to that effect. The purpose of the sealing requirement is "to lessen the adverse consequences of unsuccessful criminal prosecutions by limiting access to official records and papers in criminal proceedings which terminate in favor of the accused" (*Matter of Harper v Angiolillo*, 89 NY2d 761, 766 [1997]).

Defendants present three central arguments in support of their motion and/or in opposition to plaintiff's cross motion. First, they assert that because tort claims may not be maintained against a municipality unless a notice of claim is filed with that municipality (*see* GML §§ 50-e and 50-i), the complaint should be dismissed on the simple ground that plaintiff never filed a notice of claim. Second, they contend that plaintiff is time-barred from amending his complaint (*see* CPLR 214 [5]). Third, defendants assert that Matos's motion for leave to file an amended complaint should also be denied on the ground that his pleadings do not meet the pleading requirements for advancing a civil rights claim, adding that, even if they did, there is no merit to his allegations because there is no evidence of a municipal policy, practice or custom that resulted in a constitutional violation.

For the following reasons, the motion and cross motion are each granted in part and denied in part.

In the Prior Order, this court determined that Matos had failed to present a reasonable excuse for failing to timely file his notice of claim (GML § 50-e [5]). Inasmuch as the timely filing of a notice of claim is a condition precedent to maintaining tort claims against these municipal defendants, his causes of action sounding in malicious prosecution, false arrest and false imprisonment, and battery and assault, must be dismissed (GML § 50-i). Plaintiff does not dispute this aspect of defendants' motion. However, because the notice of claim requirements do not apply to civil rights claims asserted pursuant to Section 1983, his failure to timely file, or to timely seek leave to file, a notice of claim, *nunc pro tunc*, does not require a dismissal of that claim (*see Pendleton v City of New York*, 44 AD3d 733, 738 [2d Dept 2007], citing *Felder v Casey*, 487 US 131 [1988]).

With respect to the statute of limitations, defendants point out that the relevant limitations

period for the filing of Section 1983 claims is three years in New York (CPLR 214 [5]). As the accrual time runs from “when the plaintiff knows or has reason to know of the injury which is the basis of his action” (*Pearl v City of Long Beach*, 296 F3d 76, 809 [2d Cir 2002] [internal quotation marks and citation omitted], *cert denied* 538 US 922 [2003]; *Miro v City of New York*, 2007 WL 549418, \*5, 2007 US Dist LEXIS 15412, \*14 [SD NY 2007]), which here, according to defendants, was at the time of his arrest, on April 20, 2010, the last possible date for Matos to move to amend his complaint was on April 20, 2013. Having not moved for this relief until October 15, 2013, the date he served the instant cross motion, his motion must be denied as untimely.

Plaintiff disagrees, noting that, because his tort allegations are actually the underpinnings, or “alter egos” of his Section 1983 claim, and his original complaint was timely filed, his motion to amend his pleadings is also timely.

CPLR 203 (f) states:

“[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

Defendants do not address CPLR 203 (f), nor do they, or can they, meaningfully argue that they lacked notice of plaintiff’s intent to claim a civil rights violation based on the circumstances surrounding his arrest, as a violation of Section 1983 was alleged in plaintiff’s original complaint.

Furthermore, a reading of the proposed allegations reveals that Matos is not looking to assert a new theory of recovery, nor is he basing his expanded allegations on transactions or occurrences which were not claimed in the original complaint. Rather, he seeks to include additional facts to those set forth in his original complaint (fourth cause of action), and endeavors to connect these facts

to his expanded theory and explanation as to how his civil rights, like those of other, similarly situated, individuals, were violated under defendants' policy, custom and practice of maintaining and using arrest photos for investigative purposes, despite the statutory prohibitions set forth under CPL §§ 170.56 and 160.50. Additionally, New York recognizes a

“principle, termed the ‘relation-back doctrine,’ [which] permits a plaintiff to interpose a claim or cause of action which would ordinarily be time barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint”

(*Pendleton v City of New York*, 44 AD3d at 736; 39 *Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 454-455 [2d Dept 2006]). Therefore, even if Matos had not specifically identified a Section 1983 claim in his original complaint, he would not be barred, by the statute of limitations, from amending his complaint because the allegations underlying the malicious prosecution, false arrest and false imprisonment, and battery and assault claims provide adequate notice of the occurrences which underlie a Section 1983 claim.

It is also well settled that “[p]ermission to amend pleadings should be freely given (CPLR 3025, subd [b]). The decision to allow or disallow the amendment is committed to the court’s discretion” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal citation and quotation marks omitted]). Factors to be considered are whether the proposed amended pleading is palpably insufficient or patently devoid of merit, and whether the opposing party is somehow surprised or prejudiced directly from a delay in seeking leave (*Seidman v Industrial Recycling Props., Inc.* (83 AD3d 1040, 1041 [2d Dept 2011])). Again, as Matos alleged a violation of Section 1983 in his original complaint, defendants cannot legitimately claim surprise or prejudice where the proposed amended claim is premised on the same facts and occurrences alleged in that earlier

complaint (*see Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008]).

Next, the parties dispute the sufficiency of the allegations set forth in plaintiff's proposed amended complaint. For their part, defendants detail the rigorous standards as they apply to pleading requirements in a civil rights claim brought pursuant to Section 1983, and argue that plaintiff's proposed amended complaint, much like the original complaint, does not meet these standards (*see Ashcroft v Iqbal*, 556 US 662, 678 [2009]; *Monell v Department of Social Serv. of City of New York*, 436 US 658, 694-695 [1978]; and *Batista v Rodriguez*, 702 F2d 393, 397 [2d Cir 1983]). Defendants point out that, under controlling case law, the pleadings must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (*Ashcroft v Iqbal* 556 US at 678 [internal quotation marks and citations omitted]). Merely offering "labels and conclusions or a formulaic recitation of the elements of a cause of action will not do" (*id*), and requires a dismissal of the claim.

To this end, defendants describe Matos's allegations, both in the original complaint and the proposed amended complaint, as either formulaic or conclusory and vague on issues pertaining to policies, practices and customs, and they assert that the pleadings fail to show, as they must, a nexus between the alleged conduct and a municipal policy.

Next, defendants assert that, because there is no municipal policy or custom to use arrest photos stemming from marijuana charges and CPL 170.56 ACD, Matos's Section 1983 claim is actually based on the doctrine of respondeat superior, in that he is seeking to hold the municipal defendants liable for a constitutional violation based on the actions of one, or several, of its

employees. This, defendants contend, is prohibited under *Monell v Department of Social Serv. of City of New York* and *Batista v Rodriguez* and their progeny. These cases stand for the proposition that, although “municipalities may be sued directly under § 1983 for constitutional deprivations inflicted upon private individuals pursuant to a governmental custom, policy, ordinance, regulation, or decision . . . [a municipality] may not be held liable for the actions of its employees or agents under a theory of respondeat superior” (*Batista v Rodriguez*, 702 F2d at 397). Rather, for a municipality to be held liable for a violation of a plaintiff’s civil rights, the plaintiff must specifically plead and prove the existence of a governmental custom or policy, and that the unconstitutional action was taken pursuant to that custom and policy (*id.*; *Monell v Department of Social Serv. of City of New York*, 436 US at 691, 694).

Moreover, even if one or more police officers did take an action which resulted in the deprivation of a federally protected right, that action would be insufficient to impose Section 1983 liability against the municipal defendants (*see Monell v Department of Social Serv. of City of New York*, 436 US at 694; *see also Walker v City of New York*, 974 F2d 293 [2d Cir 1982], *cert denied* 507 US 961 [1993]). This, defendants explain, is because “proof of a ‘single incident’ of objectionable conduct by a municipality is insufficient to establish the existence of a municipal ‘policy’ for § 1983 purposes in the absence of any wrong which could be ascribed to municipal decision makers” (*Simpson v New York City Tr. Auth.*, 112 AD2d 89, 91 [1<sup>st</sup> Dept], *affd* 66 NY2d 1010 [1985], quoting *City of Oklahoma City v Tuttle*, 471 US 808, 821 and 824 [1985]).

Plaintiff acknowledges the controlling case law, denies relying on the doctrine of respondeat superior as a basis for liability, and argues that his proposed amended complaint sufficiently alleges conduct that amounts to, or can be construed as, a specific municipal policy, custom and practice that

violates an individual's constitutional rights.

Specifically, Matos contends that, based on a policy and practice officially adopted and promulgated by the City and NYPD, that is so well settled as to constitute a custom or usage with the force of law, defendants disregarded CPL §§ 170.56 and 160.50, by failing to seal his record after the marijuana possession charge was dismissed pursuant to CPL 170.56, and by maintaining and using it for future investigations. He contends that it was solely due to defendants' adherence to this custom, practice and procedure that his Arrest Photo, like that of other similarly situated individuals, was, without the requisite court order, used in the photo set of persons residing in or near 71 Vermilyea Avenue, and that such improper conduct ultimately led to his arrest and being held in jail on a felony drug charge. As indicated above, these expanded pleadings make the required nexus between the conduct and the claimed violation of his civil rights, and the allegations, which are neither boilerplate, nor conclusory or vague, meet the specificity standard required for pleading constitutional deprivation upon a private citizen based on a governmental custom, policy or procedure (*see Ashcroft v Iqbal*, 556 US at 678; *Monell v Department of Social Serv. of City of New York*, 436 US at 695; and *Batista v Rodriguez*, 702 F2d at 397).

Accordingly, it is

ORDERED that the defendants' motion is granted to the extent that the causes of action sounding in malicious prosecution (first cause of action), false arrest and false imprisonment (second cause of action), and battery and assault (third cause of action) are dismissed; and it is further

ORDERED that the plaintiff's cross motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the fourth cause of action alleging a violation of 42 USC § 1983, and to this extent the amended complaint in the form annexed to the moving papers shall be

deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed first, second and third causes of action and those causes of action are stricken and dismissed; and it is further

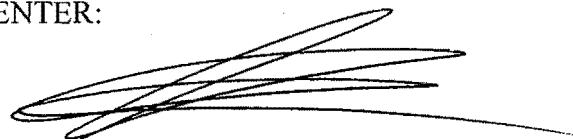
ORDERED that the defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a compliance conference at 80 Centre Street, Room 103, on May 13, 2014, at 2 p.m.

Dated: March 24, 2014

MAR 24 2014

ENTER:



KATHRYN E. FREED,  
J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT