

Cash v New York City Police Dept.

2014 NY Slip Op 31274(U)

May 15, 2014

Sup Ct, New York County

Docket Number: 109828/2011

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

FILED ON 5/19/2014

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 109828/2011
CASH, EDDIE

INDEX NO. _____

vs
NEW YORK CITY POLICE

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS

CALL: H 12

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAY 19 2014

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 5-15-14
MAY 15 2014

_____, 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
EDDIE CASH,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 109828/2011
Seq. No.: 001

NEW YORK CITY POLICE DEPARTMENT, P.O.
IVAN BROWN, SERGEANT "JOHN" LARSON
(actual first name unknown) and the
THE CITY OF NEW YORK,

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

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. A-H)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	FILED
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....MAY 19 2014
STIPULATIONS.....
OTHER.....

COUNTY CLERK'S OFFICE
NEW YORK

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

Defendants The City of New York ("the City") and New York City Police Department ("the NYPD") seek an order, pursuant to CPLR 3211(a)(7), dismissing the complaint as against all defendants for failure to state a cause of action. No opposition has been submitted by plaintiff. After a review of the instant motion and all relevant statutes and case law, this Court **grants** the motion to the extent of dismissing the complaint against the City and the NYPD.

Factual and Procedural Background:

On August 25, 2011, plaintiff filed a summons and complaint against the City, the NYPD, P.O. Ivan Brown, and Sergeant “John” Larson (actual first name unknown). Ex. A.¹ In his complaint, plaintiff alleged that, on March 1, 2009, he was lawfully visiting a friend at 213 West 115th Street in Manhattan when he was stopped by members of the NYPD, handcuffed, and arrested. Plaintiff’s appearance history (Ex. F) reflects that his arrest actually occurred on March 20, 2009. Plaintiff claimed that, for several hours after his arrest, he was held at the 28th Precinct, where he was subject to physical and verbal abuse by members of the NYPD, including the officers named in the complaint. On March 21, 2009, plaintiff pleaded guilty to criminal sale of marijuana in the fifth degree. Ex. G.

In his complaint, plaintiff set forth state law claims for false arrest, false imprisonment, malicious prosecution, negligent hiring and training, intentional infliction of emotional distress, and violations of the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and under 42 USC 1983. Ex. A. He further asserted that defendants acted “under the color of the statutes, ordinances, regulations, policies, customs and usages of the NYPD and the City” in depriving him of his rights to due process, freedom of speech, and from false arrest and imprisonment, malicious prosecution, abuse of process, unreasonable search and seizure, and excessive force. Ex. A, at pars. 26, 31. As a result of the foregoing, plaintiff claimed that he was entitled to punitive damages.

Plaintiff did not allege that he filed a notice of claim on the City or the NYPD. Ex. A.

¹Unless otherwise noted, all references are to the affirmation of counsel for the City and the NYPD in support of the motion.

* 4]

On or about September 20, 2011, the City and NYPD served their verified answer, in which they denied all substantive allegations of wrongdoing. Ex. B. The City asserts in its moving papers that it did not answer for defendants Officer Brown and Sergeant Larson because they “ha[d] been unable to confirm the identity or existence of these officers.” Plaintiff’s Aff. In Support, at par. 2.

In his bill of particulars dated April 16, 2012, plaintiff alleged that, on March 1, 2009, he was arrested while lawfully visiting a friend and was taken to the 28th Precinct, where he was strip searched, and placed in a holding cell. Ex. C. He alleged claims of false arrest, deprivation of his civil rights, “emotional harm, fear, depression and anxiety” caused by intimidation by police officers, false imprisonment, and malicious prosecution. He further alleged that the defendants deprived him of his rights under color of state law in the same manner as alleged in the complaint. Ex. C.

In an affidavit dated January 31, 2013, Lee McNeil, Chief of Claim Support in the New York City Office of the Comptroller, averred that his search of the City’s records revealed the plaintiff did not file a notice of claim based on an incident arising between March 1-9 of 2009. Ex. E. In an affidavit dated March 14, 2009, Maria Giordano, an Administrative Claims Manager in the Office of the New York City Comptroller, averred that plaintiff did not file a notice of claim with respect to any incident occurring between March 1 and 20, 2009. Ex. H.

Position of the City and NYPD:

The City and NYPD assert that plaintiff’s state law claims must be dismissed pursuant to General Municipal Law (“GML”) sections 50-e(1)(a) and 50-i due to his failure to file a notice of claim, which is a condition precedent to asserting a tort claim against a municipality. Although plaintiff twice stipulated to produce a copy of his notice of claim (Exs. D and E), he never did so,

plaintiff's counsel represented that no notice of claim was ever filed, and the affidavits of McNeil and Giordano establish that none was filed. Additionally, urge the City and NYPD, since plaintiff's complaint fails to state that a notice of claim was filed, it violates 50-i(1)(b). Moreover, they urge that it is too late for the plaintiff to seek leave to serve a late notice of claim pursuant to 50-e(5) because more than one year and 90 days have elapsed since the alleged wrongdoing in 2009.

The City and the NYPD further maintain that, because plaintiff pleaded guilty, there was probable cause for his arrest and thus his claims of false arrest, false imprisonment, and malicious prosecution must be dismissed.

In addition, defendants argue that plaintiff's claim pursuant to 42 USC 1983 is improperly pleaded and must also be dismissed. Defendant argues that "while plaintiff may have attempted to raise a claim under 1983, plaintiff nonetheless has failed to allege a municipal pattern of practice pursuant to which plaintiff's constitutional rights were allegedly violated." Moreover, the City asserts that it cannot be held responsible under the theory of respondeat superior.

The City and NYPD further assert that the claims against Officer Brown and Sergeant Larson are impermissibly vague and must be dismissed. They claim that, although the "complaint report", allegedly annexed to their motion as Exhibit F, lists Police Officer Carrasco, Sergeant Rodriguez and Sergeant Velez as those NYPD personnel involved in plaintiff's arrest, that report does not mention Officer Brown or Sergeant Larson and the City and NYPD have been unable to identify those individuals. They also argue that the complaint must be dismissed against Officer Brown and Sergeant Larson pursuant to CPLR 3215(c) because plaintiff failed to take a default judgment against them within one year.

[* 6]

Conclusions of Law:

Although the City and NYPD do not specify the subdivision of CPLR 3211 under which they move, it is apparent from their moving papers that they move pursuant to 3211(a)(7) for failure to state a cause of action. 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 the 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); *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 704 (2d Dept. 2008), *lv dismissed* 12 N.Y.3d 878 (2009); *511 W. 232nd Owners Corp. v. Jennifer Realty, Corp.*, 98 N.Y.2d 144 (2002). Viewing the complaint pursuant to this standard, this Court dismisses the same against the City and NYPD and denies that branch of the motion seeking the dismissal of the complaint against Officer Brown and Sergeant Larson.

The Claims Against The City and the NYPD

General Municipal Law 50-e (2) provides, in pertinent part, that the notice of claim shall set forth “the nature of the claim; the time when, the place where and the manner in which the claim arose; and the items of damage or injuries claimed to have been sustained.....” Since compliance with the requirements of GML 50-e (2) is a condition precedent to commencing a suit in tort against a municipality (*see Barchet v. New York City Transit Authority*, 20 N.Y.2d 1 [1968]), and since the affidavits of McNeil and Giordano establish that plaintiff failed to file a notice of claim, plaintiff’s claims against the City and the NYPD sounding in false arrest, false imprisonment, malicious

prosecution, negligent hiring and training, and intentional infliction of emotional distress must be dismissed.

Plaintiff's constitutional claims against the City and the NYPD must be dismissed as well. The only vehicle for an individual to seek a civil remedy for violations of constitutional rights committed under color of any statute, ordinance, regulation, custom or usage of any state is a claim brought pursuant to 42 U.S.C. § 1983. *See Manti v New York City Trans. Auth.*, 165 A.D.2d 373 (1st Dept. 1991). While a notice of claim is a prerequisite for tort claims asserted against a municipality, it is not required to establish a claim pursuant to § 1983. *See Chenkin v City of New York*, 103 AD3d 556 (1st Dept 2013). In order to assert a claim against a municipality for civil rights violations pursuant to 42 USC §1983 based on the alleged tortious actions of its employees, the plaintiff must plead that the alleged actions resulted from an official municipal policy or custom. *See Monell v. Dept. of Social Servs. of City of New York*, 436 U.S. 658 [1978]; *Leftenant v. City of New York*, 70 A.D.3d 596 (1st Dept. 2010); *Leung v. City of New York*, 216 A.D.2d 10 (1st Dept. 1995). There is no respondeat superior liability for a municipality under §1983 and, accordingly, the violation of plaintiff's civil rights by municipal employees, without more, will not render the municipality liable for such violation. *See Monell*, 436 U.S. *supra* at 694; *see also Ramos v. City of New York*, 285 A.D.2d 284, 302 (1st Dept. 2001).

Moreover, to recover on a §1983 claim against a municipality, a plaintiff must specifically plead and prove three elements: 1) an official policy or custom that 2) causes plaintiff to be subjected to and 3) a denial of a constitutional right. *Monell*, 432 U.S. 658 *supra* at 695. Liability may be imposed upon a municipality only where the conduct complained of "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. 658 *supra* at 690. "[A] municipality can be found liable under § 1983 only when the municipality itself causes the constitutional violation." *City of Canton v.*

Harris, 489 U.S. 378, 385 (1989) *citing Monell*, 436 U.S.658 *supra* at 691.

This Court finds that, since plaintiff has failed to sufficiently plead any official policy or custom of the City or the NYPD which caused plaintiff to be deprived of a constitutional right, plaintiff's claim of a §1983 violation is without merit and that claim is dismissed.

Additionally, as the City and the NYPD assert, plaintiff's guilty plea constituted a conviction establishing probable cause for his arrest. *See Bennet v New York City Hous. Auth.*, 245 AD2d 254 (2d Dept 1997). The existence of probable cause constitutes a "complete defense" to plaintiff's claims of false arrest, false imprisonment, and malicious prosecution under state law and to his claim pursuant to 42 USC § 1983. *Garcia v City of New York*, ___AD3d___, 981 NYS2d 528 (1st Dept 2014).

Moreover, plaintiff's claim for punitive damages lacks merit in that the Court of Appeals has consistently held that a municipality is not liable for punitive damages flowing from its employee's alleged misconduct. *Krohn v. New York City Police Dept.*, 2 N.Y.3d 329, 336 [2004]; *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 339 (1982).

Since the City and NYPD have established that the claims asserted against them fail to state a cause of action, the complaint, insofar as asserted against them, is dismissed pursuant to CPLR 3211(a)(7).

The Claims Against Officer Brown and Sergeant Larson

Initially, the instant motion must be denied on procedural grounds insofar as it seeks dismissal of the complaint as against Officer Brown and Sergeant Larson, neither of whom has appeared in this action nor has moved for the relief sought on this motion. "Pursuant to CPLR 2215, the court is only permitted to grant relief to a nonmoving party when, upon searching the record on a summary judgment motion pursuant to CPLR 3212, the court finds that summary

judgment is warranted for the nonmovant, or, pursuant to CPLR 3211(b), where plaintiff moves to dismiss a defense, and, upon searching the record, the court finds that the complaint should be dismissed (*see* CPLR 3212[b]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3211:40, at 55).” *Visentin v Haldane Cent. Sch. Dist.*, 4 Misc3d 918, 919 (Sup Ct Putnam County 2004). Since these circumstances do not exist in this case, such relief could not be granted to Officer Brown and Sergeant Larson even if they had appeared in the action.

As noted above, the City and NYPD represented that they did not answer for defendants Officer Brown and Sergeant Larson because they “ha[d] been unable to confirm the identity or existence of these officers.” Plaintiff’s Aff. In Support, at par. 2. However, the City and NYPD cannot on the one hand claim that they cannot locate these individuals and refuse to appear on their behalf while simultaneously moving for the dismissal of the claims against them.

This Court finds it rather puzzling that, while the City and the NYPD claim that they cannot identify Officer Brown and Sergeant Larson, they agreed to produce these individuals for deposition in a stipulation dated April 17, 2012. Ex. D. Further, the City and the NYPD do not discuss what efforts, if any, were made to ascertain whether those individuals were involved in the conduct alleged. Any such efforts presumably would have been made before the City and the NYPD agreed to produce these witnesses for deposition.²

Even if the tort claims against Officer Brown and Sergeant Larson were subject to dismissal due to plaintiff’s failure to file a notice of claim, that branch of the motion seeking dismissal of the claim against them pursuant to 42 USC §1983 warrants denial on the merits. “The requirement of pleading an official policy or custom of a municipality through which a constitutional injury has been

²Also curious is that, although the City and NYPD assert that the “complaint report,” allegedly annexed to their motion as Exhibit F, reflects that Police Officer Carrasco, Sergeant Rodriguez, and Sergeant Velez were involved in plaintiff’s arrest, the Exhibit F annexed to the moving papers contains neither a complaint report nor the names of those individuals.

inflicted upon a plaintiff applies only to 42 USC §1983 claims against a local government, and not to such claims against individual defendants in their official capacities.” *Bonsone v. County of Suffolk*, 274 A.D.2d 532, 534 (2d Dept. 2000). In order to state a claim against an individual defendant under that statute, “the plaintiff must allege, at a minimum, conduct by a person acting under color of law which deprived the injured party of a right, privilege or immunity guaranteed by the Constitution or the laws of the United States” and said claim is subject to dismissal where “no Federally protected right was clearly” alleged. *DiPalma v Phelan*, 91 N.Y.2d 754, 756 (1992). Here, plaintiff alleged that defendants acted “under the color of the statutes, ordinances, regulations, policies, customs and usages of the NYPD and the City” in depriving him of his rights to due process, freedom of speech, and from false arrest and imprisonment, malicious prosecution, abuse of process, unreasonable search and seizure, and excessive force. Ex. A, at pars. 26, 31. Given that plaintiff specifically alleged violations of Federally protected rights, the complaint sets forth a cognizable claim pursuant to 42 USC §1983.

The argument by the City and the NYPD that the complaint should be dismissed as against Officer Brown and Sergeant Larson pursuant to CPLR 3215 (c) is without merit. That section provides that a plaintiff must move for entry of a default judgment within one year of a defendant’s default or the court, upon motion or sua sponte, “shall” dismiss the complaint as abandoned. Here, the City and the NYPD assert, without any explanation or documentary support, that plaintiff’s right to move for a default judgment accrued on September 24, 2011 and expired on September 24, 2012. However, given that the motion papers do not contain any affidavits of service, this Court cannot ascertain when, or if, service was made upon Officer Brown and/or Sergeant Larson. Since the movants failed to provide this Court with the information necessary to determine whether and when Officer Brown and Sergeant Larson were served, and, if so, when their time to answer expired, dismissal cannot be granted pursuant to CPLR 3215(c).

Therefore, in accordance with the foregoing, it is:

ORDERED that the motion by defendants The City of New York and The New York City Police Department to dismiss the complaint insofar as asserted against them is granted to the extent that the complaint is dismissed in its entirety as against the said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the said defendants; and it is further,

ORDERED that the motion is otherwise denied; and it is further,

ORDERED that the action is severed and continued against the remaining defendants P.O. Ivan Brown and Sergeant "John" Larson; and it is further,

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that the Trial Support Office is to reassign this case to a non-City Part and to remove it from the Part 5 inventory; and it is further,

ORDERED that counsel for the moving party 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: May 15, 2014

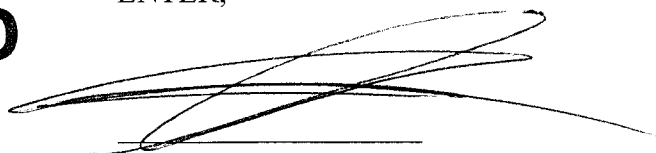
ENTER,

MAY 15 2014

FILED

MAY 19 2014

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Kathryn E. Freed,
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT