

Tomlinson v City of New York
2014 NY Slip Op 3131 Í (U)
April 14, 2014
Supreme Court, New York County
Docket Number: 307251/12
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GENEA TOMLINSON, A MINOR BY HER MOTHER AND
LAWFUL GUARDIAN, GENE ROCHESTER,

DECISION AND ORDER

Index No: 307251/12

Plaintiff(s),

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, RIVERBAY CORP., POLICE
OFFICER ROBERT CANDREA, 45TH PCT., TAX REG
#939752, SUED INDIVIDUALLY AND AS A POLICE
OFFICER, SGT. CESAR POLANCO, 45TH PCT., TAX
REG #929450, SUED INDIVIDUALLY AND AS A
POLICE OFFICER, POLICE OFFICER JOSEPH
PAPASIDERO,, 45TH PCT., TAX REG #942324,
SUED INDIVIDUALLY AND AS A POLICE OFFICER,
POLICE OFFICER ONEZU, 45TH PCT., TAX REG
#947304, SUED INDIVIDUALLY AND AS A POLICE
OFFICER, POLICE OFFICERS JOHN DOE, JOE DOE,
JANE DOE. JIM DOE, EACH SUED IN HIS/HER
FICTITIOUS CAPACITIES AS HIS/HER IDENTITY
IS PRESENTLY UNKNOWN, EACH INDIVIDUALLY AND
AS A POLICE OFFICER, CO-OP CITY DEPARTMENT
OF PUBLIC SAFETY, PUBLIC SAFETY OFFICER
MARSANICO, SHIELD #3234, INDIVIDUALLY AND
AS A PUBLIC SAFETY OFFICER, AND CHIEF FRANK
APOLLO, COMMANDING OFFICER OF THE
DEPARTMENT OF PUBLIC SAFETY,

Defendant(s).

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In this action for, *inter alia*, false arrest, false
imprisonment, assault, battery, and excessive force, defendants THE
CITY OF NEW YORK (the City), THE NEW YORK CITY POLICE DEPARTMENT
(the NYPD), P.O. ROBERT CANDREA, TAX NO. 939752 (Candrea), SGT.
CESAR POLANCO, TAX NO. 929450 (Polanco), P.O. JOSEPH PAPASIDERO,

TAX NO. 942324 (Papasidero), P.O. BRIAN O'NEILL, TAX NO. 947304 (O'Neill) s/h/a P.O. ONEZU move seeking an order¹ pursuant to CPLR § 3211(a)(7) (1) dismissing all claims against the NYPD because insofar as it is not a suable legal entity, the complaint fails to state a cause against the NYPD; and (2) dismissing Tomlinson's seventh cause of action for intentional infliction of emotional distress insofar as, *inter alia*, such cause of action cannot be maintained against a municipality nor its agents acting in their official capacity. Tomlinson opposes the portion of the foregoing motion only to the extent that it seeks dismissal of her seventh cause of action. With respect to this cause of action, Tomlinson avers that the law provides for such a cause of action against the defendants and that the complaint, therefore, states a cause of

¹ Defendants' motion actually seeks an order (1) pursuant to CPLR § 3211(a)(7) dismissing all claims against the NYPD as well as Tomlinson's fifth and seventh causes of action; and (2) pursuant to CPLR § 3103 for a protective order, modifying the directives within this Court's preliminary conference order dated September 3, 2013. However, on March 6, 2013, after oral argument, the Court, by interim order, denied the portion of defendants' motion seeking to strike Tomlinson's fifth cause of action as moot inasmuch as Tomlinson withdrew all claims pursuant to 42 USC § 1983. Additionally and for the foregoing reason, the Court also granted the portion of defendants' motion seeking a protective order to the extent of modifying portions of the preliminary conference order. Specifically, the Court vacated the portion of said order requiring defendants to produce, for an *in camera* inspection, CCRB and IAB files, CPI indexes, and OG files for Candrea, Polanco, Papasidero, and O'Neill, for a period of 10 years prior to the date of this incident as well as the foregoing defendants' personnel files. Thus, this decision is limited to the portion of defendants' motion seeking dismissal of Tomlinson's claims against the NYPD and the seventh cause of action for intentional infliction of emotional distress.

action. Tomlinson cross-moves seeking an order² (1) pursuant to CPLR § 3025 granting her leave to amend her complaint to amplify her claims as to the seventh cause of action; and (2) pursuant to CPLR § 3124 compelling defendants to provide the discovery ordered within this Court's preliminary conference order dated September 3, 2013 and requested by Tomlinson in her Second Demand for Discovery and Inspection dated December 2, 2013. Defendants oppose Tomlinson's cross-motion averring that Tomlinson's motion to amend the complaint is belated and should be denied. Defendants also oppose Tomlinson's motion seeking to compel discovery averring that they have provided responses to all discovery ordered by this Court and requested by the Tomlinson.

² Tomlinson's cross-motion actually seeks an order (1) pursuant to CPLR § 3025 granting her leave to amend the complaint to amplify the claims as to the seventh cause of action for intentional infliction of emotional distress, to correct the complaint to add O'Neill - who was erroneously named as Onezu - as a defendant, and to add a cause of action for malicious prosecution; and (2) pursuant to CPLR § 3124 compelling defendants to provide the discovery ordered by this Court in the preliminary conference order dated September 3, 2013 and with the discovery requested within Tomlinson's Second Demand for Discovery and Inspection dated December 2, 2013. However, on March 6, 2013, after oral argument, the Court, by interim order, granted Tomlinson's cross-motion seeking leave to amend the complaint to allege a cause of action for malicious prosecution and to name O'Neill as a defendant. Moreover, as noted in footnote 1, the Court vacated the portions of its preliminary conference order for which Tomlinson seeks to have the Court compel compliance. Thus, this decision only addresses the portion of Tomlinson's cross-motion seeking leave to amend the complaint to amplify the seventh cause of action and compelling defendants to provide the discovery requested within Tomlinson's Second Demand for Discovery and Inspection dated December 2, 2013.

For the reasons that follow hereinafter, defendants' motion is granted and Tomlinson's cross-motion denied.

This is an action for alleged personal injuries resulting from, *inter alia*, alleged false arrest, false imprisonment, malicious prosecution, assault, battery, and excessive force. Tomlinson's complaint, alleges the following. On August 31, 2011, while at or near 140 Elgar Place, Bronx, NY (Co-op City) Tomlinson GENEVA TOMLINSON (Tomlinson) witnessed several police officers employing excessive force upon another individual. Tomlinson objected to what she was witnessing and was cursed at by the police officers, which officers were employed by the City and the NYPD, or by defendant RIVERBAY CORP (Riverbay). The officers then asked Tomlinson for identification and when she couldn't produce it, they grabbed her by her dress, exposing her panties, lifted her off the bench upon which she sat, and threw her on the ground. Thereafter, Tomlinson was handcuffed, searched, punched, and cursed at. Tomlinson was thrown into a police vehicle, thereafter grabbed by the neck by an unidentified officer who spit in her face, and thrown in a van. Tomlinson was taken to the precinct and falsely charged, via a complaint signed by Cabdrea, with resisting arrest, obstruction of governmental administration, and disorderly conduct. To the extent relevant, Tomlinson's seventh cause of action, incorporating the foregoing facts by reference, alleges a cause of action for intentional infliction of emotional distress on grounds

that defendants' acts and omissions were beyond all reasonable bounds of decency and done with the intent to cause Tomlinson emotional distress.

Defendants' Motion to Dismiss

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]).

CPLR § 3013, states that

[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 (2nd Dept. 2006); *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

Defendants' motion seeking dismissal of all claims against the NYPD is hereby granted insofar as the NYPD is not a suable entity, and therefore, the complaint fails to state a cause of action against the NYPD.

With regard to actions against municipal agencies, section 396 of the New York City Charter reads

[a]ll actions and proceedings for the recovery of penalties for the violation

of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law.

Accordingly, it is well settled that "[t]he NYPD is an agency of the City of New York and is therefore a non-suable entity" (*Davis v City of New York*, 2000 WL 1877045, n 1 [SDNY 2000]; *Jenkins v City of New York*, 478 F3d 76, n 19 [2d Cir 2006]). Deeming all allegations in the complaint against the NYPD as true, as the Court must, the complaint nevertheless fails to state a cause of action because as a non-suable entity, the NYPD cannot be sued.

Defendants' motion seeking dismissal of Tomlinson's seventh cause of action for intentional infliction of emotional distress is granted inasmuch as this cause of action does not lie against a municipality and as against Candrea, Polanco, Papasidero, and O'Neill, the individually named police officers, the acts comprising this cause of action fall within the ambit of Tomlinson's false arrest and excessive force claims.

To establish a cause of action for the intentional infliction of emotional distress, it must be pleaded or proven that (1) defendant committed extreme and outrageous conduct; (2) with the intent to cause, or the disregard of a substantial probability of causing, severe emotional distress; (3) that defendant's conduct caused the injury claimed; and (4) that plaintiff suffered severe emotional distress (*Howell v New York Post Company, Inc.*, 81 NY2d 115, 121 [1993]). Generally, the Courts have looked at the first

element in deciding whether plaintiff has an actionable claim as a matter of law (*id.* ["The first element--outrageous conduct--serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that Tomlinson's claim of severe emotional distress is genuine."]). This is because satisfaction of the first element requires a showing that a defendant's conduct "has been outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at 122). Accordingly, the majority of claims asserted have failed because the behavior complained of has not been found to be sufficiently outrageous (*id.* ["Indeed, of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous."]). When the allegations comprising the claim for intentional infliction of emotional distress fall within the ambit of another cognizable cause of action, a cause of action for negligent infliction of emotional distress will not lie (*Fischer v Maloney*, 43 NY2d 553, 558 [1978] ["Indeed, it may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process."]; *Sweeney v Prisoners' Legal Services of New York, Inc.*,

146 AD2d 1, 7 [3d Dept 1989] ["Moreover, a cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." (internal quotation marks omitted); *Afifi v City of New York*, 104 AD3d 712, 713 [2d Dept 2013]; *Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]).

It is well settled that "public policy bars claims alleging intentional infliction of emotional distress against governmental entities." (*Afifi* at 713; *Eckardt v City of White Plains*, 87 AD3d 1049, 1051 [2d Dept 2011]; *Ellison v City of New Rochelle*, 62 AD3d 830, 833 [2d Dept 2009]; *Lillian C. v Administration for Children's Services*, 48 AD3d 316, 317 [1st Dept 2008]; *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]).

Here, defendants' motion seeking dismissal of the seventh cause of action as against the City must be granted insofar as the City, a municipality, is a governmental entity against which such cause of action is barred (*Affi* at 713; *Eckardt* at 1051; *Ellison* at 833; *Lillian C.* at 317; *Pezhman* at 494).

Defendants motion seeking dismissal of the seventh cause of action as against Candrea, Polanco, Papasidero, and O'Neill is granted insofar as the facts upon which this cause of action is premised, namely the alleged excessive force used upon Tomlinson fall within the ambit of Tomlinson's other causes of action such as

her false arrest and excessive force claims (*Afifi* at 712; *Woklstein* at 637). Contrary to Tomlinson's assertion, the post-arrest conduct to which she was allegedly subjected, such as the denial of the use of a telephone, does not constitute a separate cause of action nor does it give rise to damages separate and apart from her other claims.

Tomlinson's Cross-Motion for Leave to Amend Her Complaint

Tomlinson's cross-motion seeking leave to amend her complaint to amplify her seventh cause of action for intentional infliction of emotional distress is denied.

Generally, leave to amend a complaint shall be freely granted absent prejudice or surprise resulting directly from the delay (*McMcCaskey, Davies and Associates, Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 (1978)). While delay in seeking leave to amend a pleading is not in it of itself a barrier to judicial leave to amend, denial of a motion to amend should be denied if it is belated and "coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Thus, a failure to adequately explain the delay in seeking to amend the pleadings, if coupled with prejudice, may serve as a basis for the denial of of motion to amend (*Morgan v Prospect Park Associates Holdings, L.P.*, 251 AD2d 306, 306 [2d Dept 1998]).

Even if there is no prejudice resulting from the proposed amendment, before leave is granted, it must be demonstrated that the proposed amendment has merit (*Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 170 [1989][Defendant's petition to amend its answer to assert an affirmative defense was denied when the court found that the defense even if asserted would not be meritorious]).

Here, while defendants wouldn't be prejudiced by the amendment sought, the proposed amended complaint would nevertheless fail to state a cause of action for intentional infliction of emotional distress. As noted above, Tomlinson's cause of action for intentional infliction of emotional distress, falling within the ambit of her other claims and barred against the City, fails as a matter of law and no additional facts would avail her. Accordingly, as against the moving defendants the cross-motion seeking leave to amend must be denied.

Tomlinson's Cross-Motion to Compel Discovery

Tomlinson's cross-motion seeking to compel discovery is denied.

"The purpose of disclosure procedures is to advance the function of a trial, to ascertain truth and to accelerate the disposition of suits" (*Rios v Donovan*, 21 AD 2d 409, 411 [1st Dept. 1964]). Accordingly, our courts possess wide discretion to decide whether information sought is "material and necessary" to the

prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968])). The terms

material and necessary, are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable

(*id.* at 406 [internal quotation marks omitted]). Accordingly, whether information is discoverable does not hinge on whether the information sought is admissible and information is therefore discoverable if it "may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175 [1st Dept 1996]).

Here, the portion of Tomlinson's cross-motion seeking that defendants comply with the preliminary conference order, Dated September 3, 2013, is denied as moot. To the extent that Tomlinson sought compliance with the portions of the order mandating a myriad of discovery for *in camera* review, as noted in footnote 1 of this decision, defendants were granted a protective within the interim order dated March 6, 2014. Accordingly, defendants need not comply with those portions of the order. With regard to the remaining portions of the preliminary conference order, defendants responded

to the same on February 10, 2014, proving the bulk of the discovery ordered by this Court, and indicating that any outstanding items, to the extent they existed, had been requested and would be provided.

The portion of Tomlinson's cross-motion seeking to compel defendants to provide the discovery requested in their Second Demand for Discovery and inspection dated December 1, 2013, is also denied.

Within the aforementioned demand Tomlinson seeks color photographs of the named police officers in this action as well as for any other officers who responded to the scene of the event giving rise to this action. Defendants objected to this demand as, *inter alia*, irrelevant. To the extent that Tomlinson utterly fails to establish how these photographs are relevant to the prosecution of this action, the Court finds that defendants properly interposed an objection to the demand and that Tomlinson has not established the relevance, materiality, nor the necessity of these photographs.

Similarly, within the aforementioned demand, Tomlinson requests copies of all DD5 reports. Defendants objected to this demand as vague, overbroad and confidential. In support of her motion to compel defendants to comply with this discovery demand, Tomlinson argues that defendants should be compelled to provide all DD5 reports for the subject incident because along with Tomlinson, defendants arrested other individuals on the scene. Whether the

charges lodged against those other individuals were dismissed and whether force was used upon them, Tomlinson argues, is relevant to the prosecution of this case. The Court finds Tomlinson's arguments unavailing.

Preliminarily, defendants' properly objected to disclosure of the DD5 reports for any other individuals arrested at the scene on grounds that these records were sealed and disclosure is, thus, barred by CPL § 160.50 (*Hynes v Karassik*, 47 NY2d 659, 662, [1979] ["The statute (CPL § 160.50) serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his having once been the object of an unsustained accusation. That detriment to one's reputation and employment prospects often flows from merely having been subjected to criminal process has long been recognized as a serious and unfortunate by-product of even unsuccessful criminal prosecutions."]). Defendants' objection to disclosure on this ground is presumed as asserting that the records sought are sealed and is, therefore, sufficient to accord them the privilege. While Tomlinson argues that defendants fail to demonstrate that the records of all other arrestees were in fact sealed - a prerequisite to asserting the privilege under CPLR § 160.50 - here, where defendants claim that the privilege applies, it is incumbent on Tomlinson to demonstrate that the records she seeks were not in fact sealed and, therefore, subject to disclosure. Notwithstanding

the foregoing, it is hard to imagine what relevance any these records would have with respect to Tomlinson's causes of action. Whether anyone else was arrested, beaten, and subsequently exonerated or had the charges against them dismissed bears no relevance to the salient issues in this case, namely, whether Tomlinson was falsely arrested, beaten, and maliciously prosecuted. It is hereby

ORDERED that Tomlinson's action as against the NYPD be dismissed. It is further

ORDERED that Tomlinson's seventh cause of action for intentional infliction of emotional distress be dismissed. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon Tomlinson within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : April 14, 2014
Bronx, New York



MITCHELL J. DANZIGER, J.S.C.