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| <b>Davis v City of New York</b>  |
| 2014 NY Slip Op 31580(U)   |
| June 19, 2014  |
| Sup Ct, New York County  |
| Docket Number: 400538/2012   |
| Judge: Kathryn E. Freed  |
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| This opinion is uncorrected and not selected for official publication.   |

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CV 6/23/2014

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

**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**

**PRESENT:** \_\_\_\_\_

**PART** 5

Index Number : 400538/2012  
DAVIS, WASHINGTON  
vs  
CITY OF NEW YORK  
Sequence Number : 005 *dal. #15*  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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**

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

**FILED**

JUN 23 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/19/14  
JUN 19 2014

*[Signature]*  
**HON. KATHRYN FREED** J.S.C.  
**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:

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

PAPERS

NUMBERED

FILED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....  
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....  
ANSWERING AFFIDAVITS.....  
REPLYING AFFIDAVITS.....  
MEMORANDUM OF LAW.....  
OTHER.....

.1(Exs. A-H)  
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.....

MAR 23 2014

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 3211(a)(7), to dismiss plaintiff pro se Washington Davis's claims of violations of his state and federal constitutional rights. Plaintiff does not oppose the motion. Upon a review of the motion papers and relevant statutes and case law, the City's motion is **granted**.

**Factual and Procedural Background:**

In his notice of claim, filed March 2, 2011, plaintiff alleged 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 165<sup>th</sup> and 166<sup>th</sup> in Woody Crest Ave. [in The Bronx] while the Park was occupied by other citizens at the time...” Ex. A, at par. 2.<sup>1</sup> Plaintiff further alleged 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 4<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> amendment[s] to the United States Constitution and those same rights under [the New York State] Constitution.” Ex. A, at pars. 3, 9(b).

Plaintiff further alleged 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. Ex. A, at pars. 4, 7.

Plaintiff commenced the instant action by filing a summons and complaint on or about March 2, 2012. Ex. B. In his complaint, plaintiff alleged false arrest, false imprisonment, malicious prosecution, and fraud and incorporated by reference the constitutional violations asserted in the notice of claim. The City served its answer and discovery demands on March 23, 2012. Ex. C.

On or about August 16, 2012, plaintiff moved for an order precluding the City from presenting any evidence due to its alleged failure to provide plaintiff with a bill of particulars. Plaintiff also moved for summary judgment on his complaint. The City 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 due to plaintiff’s alleged

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<sup>1</sup>All references are to the exhibits annexed to the City’s affirmation in support of the instant motion.

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, the City argued that plaintiff's causes of action for false arrest and false imprisonment had to be dismissed because they were time barred. It further asserted 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.<sup>2</sup>

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 (Ex. D), 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 did provide one to plaintiff and thus preclusion of the City was not warranted. This Court further held that plaintiff's motion for preclusion and summary judgment was denied since discovery was "woefully incomplete." This

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<sup>2</sup>This 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."

Court did not address specific grounds for denying the City's cross-motion and its decision was silent as to plaintiff's constitutional claims.

The City subsequently moved to reargue its cross-motion to dismiss, asserting, inter alia, that plaintiff's claims for false arrest and false imprisonment were time barred and that plaintiff's claims of fraud and malicious prosecution failed to state causes of action. By order dated March 17, 2014 (Ex. E), this Court granted the City's motion for reargument and, upon reargument, dismissed plaintiff's claims of false arrest, false imprisonment, malicious prosecution, and fraud, and held that the action was to continue based solely on plaintiff's constitutional claims. In its motion for reargument, the City did not set forth any grounds for the dismissal of plaintiff's constitutional claims. Ex. E.

The City now moves, pursuant to CPLR 3211(a)(7), to dismiss the constitutional claims. As noted above, no opposition has been submitted to the motion.

**Position of the City:**

In support of its motion to dismiss, the City asserts that plaintiff's constitutional claims must be dismissed because he has failed to state a valid cause of action based on a violation of his civil rights. Specifically, the City asserts that plaintiff failed to plead that the City had a particular policy, practice or custom which gave rise to the alleged constitutional violations.

**Conclusions of Law:**

In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), "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 88, 97 (1994); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). However, 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), *aff’d* 66 N.Y.2d 946 (1985).<sup>3</sup>

Here, as noted above, plaintiff alleged in his notice of claim 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 civil rights “under the 4<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> amendment[s] to the United States Constitution and those same rights under [the New York State] Constitution.” Ex. A, at pars. 3, 9(b). He subsequently incorporated these allegations which, in effect, assert a violation of 42 U.S.C. § 1983, by reference into his complaint. Ex. B, at par. 6.<sup>4</sup>

This Court finds that plaintiff has failed to sufficiently assert a claim pursuant to 42 U.S.C. § 1983. It is well settled that a plaintiff may not hold a municipality liable pursuant to § 1983 under a theory of respondeat superior. *See Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). In order to assert a claim against a municipality for civil rights violations pursuant to

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<sup>3</sup>Although this Court recognizes that a defendant is ordinarily entitled to make one motion to dismiss pursuant to CPLR 3211 (*see, Ramos v City of New York*, 51 AD3d 753 [2008]), the City’s initial motion to dismiss was, as noted above, denied without prejudice and, for that reason, this Court considers the instant application.

<sup>4</sup>Plaintiff specifically incorporates the notice of claim by reference in connection with his claims for false arrest, false imprisonment, and malicious prosecution, each of which has already been dismissed (Exs. B, E) and does not mention any constitutional or civil rights violations in his complaint. Nevertheless, this Court, affording the plaintiff the benefit of every inference (*see Leon v. Martinez, supra* at 97), considers the constitutional and civil rights violations alleged in the notice of claim in evaluating whether plaintiff has sufficiently pleaded such claims.

§ 1983 based on the alleged tortious actions of its employees, as plaintiff does here, the plaintiff must allege and plead that the alleged actions resulted from an official municipal policy or custom that caused plaintiff to be subjected to a denial of a constitutional right (*see Monell, supra* at 691; *see also Leftenant v. City of New York*, 70 A.D.3d 596 (1<sup>st</sup> Dept. 2010); *Leung v. City of New York*, 216 A.D.2d 10 (1<sup>st</sup> Dept. 1995).

Liability cannot lie against a municipality pursuant to § 1983 unless a municipal custom or policy actually caused the constitutional violation and not merely because the municipality employs one who committed a constitutional violation. *See Monell, supra* at 691. Indeed, a single incident alleged in a complaint, such as that alleged here, “especially if it involved only actors below the policy-making level, does not suffice to show municipal liability” (*Harley ex. rel. Johnson v. City of New York*, 36 F. Supp. 2d 136, 142 [E.D.N.Y. 1999]).

While this Court recognizes that plaintiff is not an attorney and is likely unaware of statutory mandates and legal concepts, such as pleading requirements, it also notes that he alone commenced this action. Although 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, a plaintiff who opts not to retain an attorney does so “at [his or her] 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 to dismiss plaintiff’s constitutional claims is granted and the complaint against it is dismissed.

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

ORDERED that the motion by defendant The City of New York seeking to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted; and it is further,

ORDERED that defendant The City of New York shall serve a copy of this order, with notice of entry, on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

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

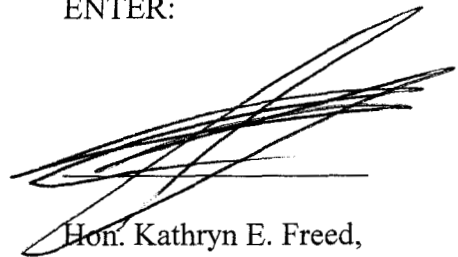
DATED: June 19, 2014

ENTER:

**FILED**

JUN 23 2014

COUNTY CLERK'S OFFICE  
NEW YORK



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