Moore v New York City Police Dept.
2014 NY Slip Op 32062(U)
August 1, 2014
Supreme Court, Richmond County
Docket Number: 100147/14
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ANISHA MOORE,

Plaintiff,

-against-

THE NEW YORK CITY POLICE DEPARTMENT,

Defendant.

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Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 100147/14

Motion No: 1575-002

The following papers numbered 1 to 2 were fully submitted on the 18th day of June, 2014:

	Papers Numbered
Notice of Motion to Dismiss Complaint (Affirmation, Affidavit in Support) (Dated: May 21, 2014).....	1
Plaintiff's Affidavit in Opposition (Dated: May 23, 2014).....	2

Upon the foregoing papers, the motion of the defendant, The City of New York s/h/a The New York City Police Department (hereinafter the "City") is granted and the complaint is dismissed.

This matter arises out of the September 15, 2009 arrest of plaintiff, Anisha Moore, who claims that during the course thereof she was falsely imprisoned and subjected to the excessive use of force (*i.e.*, sprayed with mace) by defendant's employee, an unnamed police officer.

Insofar as it appears from plaintiff's inarticulately-worded *pro se* complaint (*see* City's Exhibits A, C) that: (1) the criminal charges against plaintiff were resolved by an adjournment in

contemplation of dismissal rendered in Criminal Court on March 25, 2010; (2) on October 27, 2010, plaintiff retained the law firm of "Jason Leventhal and Klein, LLP" (*see* City's Exhibit A, para 4) to represent her in a tort action against the City for monetary damages arising from, *inter alia*, her claim of false imprisonment; and (3) on May 16, 2011 Jason Leventhal and Klein, LLP returned documents to plaintiff along with an unspecified form of notification advising that they would not represent her in her action against defendant, and that "if [she] wish [sic] to persue [her] claims [she] must file the claim with[in] the applicable statute of limitations...in federal court, [*i.e.*,] within three years from the date of the incident..." (*see* City's Exhibit A, paras 5-6). On May 24, 2012, plaintiff filed an action in the United States District Court for the Southern District of New York[1] and on or about November 6, 2013, she commenced a separate action, together with a motion for leave to proceed as a poor person, in a malpractice case against the law firm of Jason Leventhal and Klein in the Supreme Court of Richmond County under Index No. 101836/2013. Subsequently, this action, together with a second motion for leave to proceed as a poor person, was commenced by filing on or about January 28, 2014. Upon the granting of said motion on March 26, 2014, plaintiff served the defendant City with the underlying complaint on April 3, 2014.

[1]No pleadings have been attached to this motion clarifying the nature of plaintiff's federal law suit, although it was almost certainly for damages arising from the alleged violation of plaintiff's civil rights pursuant to 42 USC §1983. In any event, plaintiff maintains that this action was ultimately dismissed "not on the merit [sic]" by the District Court. Whether or not plaintiff moved for leave to proceed as a poor person in the legal malpractice action is not disclosed.

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In the motion *sub judice*, the City seeks (1) dismissal of plaintiff's state law claims based on her failure to serve a notice of claim and failure to timely commence the action within the one year-and-ninety-day statute of limitations set forth in General Municipal Law §50-i(1)(c), and (2) dismissal of any federal claims predicated on the violation of USC §1983 as barred by the three-year statute of limitations applicable to such actions (*see* Saunders v. State of New York, 629 FSupp 1067, 1070 [N.D. N.Y. 1986]).

In support of its application, the City attaches, in pertinent part, the May 21, 2014 affidavit of Michael Aaronson, the Chief of the Bureau of Law and Adjustment of the Office of the Comptroller for the City of New York, who avers that after a thorough search of the records maintained by his office, no record was found of any Notice of Claims filed by plaintiff relating to her September 15, 2009 arrest (*see* City's Exhibit E).

In opposition to the motion, plaintiff submits a *pro se* affidavit wherein she states that she thought her attorneys were filing the Notice of Claim, and that "this lawsuit was timely because it was started right after a dismissal not on the merit by the Southern District Court [sic]" (*see* Plaintiff's Affidavit in Opposition, para 2).

It is a condition precedent to the maintenance of any tort action against the City that a Notice of Claim be served upon it within 90 days after a claim arises (*see* General Municipal Law §50-e[1][a]; 50-i[1][a]). Of course, it is statutorily provided that a court may, in the exercise of its discretion, extend the 90-day time limit (*see* General Municipal Law §50-e[5]; Lucero v. New York City Health & Hosps. Corp. [Elmhurst Hosp. Ctr.], 33 AD3d 977, 978; Matter of Kressner v. Town of Malta, 169 AD2d 927, 927-928), but in exercising this discretion, it is mandated that

the court "shall consider, **in particular**, whether the public corporation...acquired actual knowledge of the essential facts constituting the claim within [90 days after the claim arose] or within a reasonable time thereafter" (General Municipal Law §50-e[5][*emphasis added*]; *see e.g.* Matter of Dell'Italia v. Long Is. R.R. Corp., 31 AD3d 758, 759)[2]. Other relevant factors identified for consideration by the court include whether there is a reasonable excuse for the delay, and whether the delay in notice has substantially prejudiced the municipality in mounting a defense on the merits (*id.*; *see* Matter of Leeds v. Port Washington Union Free School Dist, 55 AD3d 734 and *cases cited therein*).

Here, not only has plaintiff failed to serve a Notice of Claim upon the City, but she has likewise failed to move for leave to serve a late Notice of Claim as authorized by General Municipal Law §50-e(5). Moreover, although a certain level of laxity in matters of procedure traditionally have been overlooked where a party is proceeding *pro se*, plaintiff at bar has provided this Court with no proof whatsoever of the City's acquisition of actual knowledge of the essential facts constituting her claim within 90 days after the claim arose "or within a reasonable time thereafter" (General Municipal Law §50-e[5]).

In any event, with respect to plaintiff's claim of false imprisonment, even if the Court were to assume that plaintiff had been held in continuous custody until March 25, 2010, the date on

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[2]Pursuant to General Municipal Law §50-i(1)(b), it is also required that it appear "by and as an allegation in the complaint...that at least thirty days have elapsed since the service of [said] notice [of claim]...and that adjustment or payment thereof has been neglected or refused..." Also a late Notice of Claim filed without leave of the court is considered a nullity (*see e.g.*, Ellman v. Village of Rhinebeck, 27 AD3d 414, 415).

which her case in Criminal Court was adjourned in contemplation of dismissal (*see* CPL 170.55), any cause of action predicated thereon became statutorily barred when her action was not commenced within one year-and-ninety-days of her posited release, *i.e.*, by June 23, 2011 (General Municipal Law §50-i[1][c]; *see* Ellman v. Village of Rhinebeck, 27 AD3d 414). Likewise, plaintiff's claim against the City for the alleged use of excessive force, which accrued on or about the date of her arrest on September 15, 2009, became time-barred upon her failure to commence her action within one year-and-ninety-days thereafter, *i.e.*, on or about December 14, 2010.

Thus, this Court has no alternative but to dismiss her action against the City as barred by the Statute of Limitations in General Municipal Law §50-i(1)(c). Nevertheless, it should be noted that plaintiff's malpractice action against her attorneys Jason Leventhal and Klein is still pending.

As for plaintiff's claims predicated upon the alleged violation of 42 USC §1983, it is well established that a claim thereunder will be deemed to accrue once the plaintiff "knows or has reason to know of the injury which is the basis of the action" (Veal v. Geraci, 23 F3d 722, 724 [2d Cir 1994] *quoting* Singleton v. New York, 632 F2d 185, 191 [2d Cir 1980]), and that any action based thereon must be commenced within three years of the date of accrual (*see* Saunders v. State of New York, 629 FSupp at 1070). Hence, plaintiff's federal claims became time-barred upon the expiration of three years following her alleged subjection to the use of excessive force on the date of her arrest on September 15, 2009. As previously indicated, the present action was not commenced until more than three years thereafter, *i.e.*, on January 28, 2014.

Accordingly, it is

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ORDERED that the motion by defendant The City of New York, s/h/a New York City Police Department, is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

Dated: August 1, 2014

/s/
Hon. Thomas P. Aliotta
J. S. C.