

**Harper v City of New York**

2014 NY Slip Op 32618(U)

September 30, 2014

Sup Ct, Kings County

Docket Number: 501655-2012

Judge: Dawn M. Jimenez-Salta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS - PART 25

ETSON HARPER,

Plaintiff,

- against -

CITY OF NEW YORK, POLICE OFFICER DENNIS  
STEELE, POLICE OFFICER PETER MORALES, AND  
POLICE OFFICER JOHN DOE,

Defendants.

Index No. 501655-2012  
**DECISION AND ORDER**

HON. DAWN JIMENEZ-SALTA

Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

1. Plaintiff Etson Harper's Motion to Amend the Complaint and Substitute Parties dated April 30, 2014;
2. Defendants the City of New York, Police Officer Dennis Steele, Police Officer Peter Morales, and Police Officer John Doe's Affirmation in Opposition dated July 31, 2014; and
3. Plaintiff Etson Harper's Reply Affirmation dated August 5, 2014.

Papers

Numbered

Notice of Motion and Affirmation in Support.....	Plaintiff 1-2 (Exhs. A-E)
Affirmation in Opposition .....	Defendants 1 (Exh. A)
Reply Affirmation .....	Plaintiff 3

Upon the foregoing papers, Plaintiff Etson Harper moves pursuant to CPLR § 1024 for an order granting leave to amend the caption to substitute Police Officer Dennis Steele, Police Officer Peter Morales and Sergeant Mourad Mourad (hereafter "Sergeant Mourad") for the defendants named John Doe and conform the allegations in the Complaint accordingly. For the reasons set forth below, Plaintiff's motion is GRANTED in part and DENIED in part.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff began the present action with the filing of Complaint with the Court on June 26, 2012. The first complaint Plaintiff filed alleged various violations of federal and state laws against Defendants the City of New York and John Does one (1) through three (3). Plaintiff then ascertained the identities of two of the John Doe Defendants as being Police Officers Dennis Steele and Peter Morales. On September 25, 2013, Plaintiff then filed a Supplemental Summons and Amended Complaint. Plaintiff did so more than twenty (20) days after Defendant the City of New York served its Answer and without leave of the Court. The facts regarding the identity of the remaining and unidentified John Doe Defendant as being Sergeant Mourad are currently in dispute.

Plaintiff served the Complaint upon Defendant the City of New York on July 2, 2012. Defendant the City of New York answered on July 26, 2012. Plaintiff filed a supplemental Summons and Amended Complaint on September 25, 2012. The parties conferenced the matter on November 8, 2012, May 14, 2013, October 8, 2013, and January 28, 2014. Police Officer Defendants Dennis Steele and Peter Morales appeared for depositions on October 21, 2013. Defendants the City of New York do not oppose Plaintiff's motion as against Police Officer Defendants Dennis Steele and Peter Morales.

## ARGUMENTS

Plaintiff requested the identity of the third Defendant John Doe by service of demands for discovery and inspection on August 1, 2012, September 25, 2012, and December 6, 2012. During September 2012 Plaintiff ascertained the identity of two (2) of the John Doe Defendants named in the caption. Plaintiff now alleges that the identity of the third and unidentified John Doe Defendant was confirmed on October 21, 2013. Plaintiff argues that the Court should grant the present motion to substitute all the John Doe Defendants because he made a timely effort to identify the correct parties. Additionally, the statute of limitations has not run on many of the claims asserted. Plaintiff argues that the present motion is proper because Police Officer Dennis Steele, Police Officer Peter Morales and Sergeant Mourad were united in interest with Defendant the City of New York and Defendant the City of New York was timely served.

Plaintiff argues that the present motion to substitute all the John Doe Defendants should be freely given because Plaintiff's claims are meritorious and without prejudice. Plaintiff contends that granting such a motion would not prejudice the John Doe Defendants because: 1. the matter has been fully litigated as against Defendants City of New York, Police Officer Dennis Steele, and Police Officer Peter Morales; 2. Police Officers Dennis Steele and Peter Morales have been regarded as defendants since September 2012; 3. Sergeant Mourad is currently a member of the New York Police Department; 4. Sergeant Mourad has not made any changes to his behavior; 5. the allegations remain the same regarding Sergeant Mourad's participation in the alleged events that give rise to the present action; and 6. the proposed amendments to the Complaint do not assert a new cause of action.

In opposition, Defendants the City of New York, Police Officer Dennis Steele, Police Officer Peter Morales, and John Doe (hereafter collectively the "City of New York") do not oppose that portion of Plaintiff's motion to Amend the Complaint to substitute Police Officers Dennis Steele and Peter Morales for two (2) of the John Doe Defendants; however, are in opposition to Plaintiff's motion to amend the Complaint to substitute Sergeant Mourad for the remaining John Doe Defendant. Defendants the City of New York argues that the Court should deny Plaintiff's motion to amend the caption to add state law claims against Sergeant Mourad because the statute of limitations for such claims has expired.

In the present matter Plaintiff seeks recovery for injuries sustained when he was arrested on December 27, 2011. Pursuant to New York State General Municipal Law § 50-i an action for negligence in tort as against the City of New York must be commenced within one year and ninety days after the happening of the event upon which the claim is based. As such, the statute of limitations for Plaintiff's state claims expired on March 27, 2013.

Plaintiff's present motion is dated April 28, 2014. As such, Defendant contends that any state causes of action as against Sergeant Mourad are time barred.

Defendant the City of New York opposes, as meritless, Plaintiff's contention that the allegations made against Sergeant Mourad relate back to the Complaint originally served upon the currently named defendants. Defendants the City of New York argue that Plaintiff has failed to: 1. demonstrate how Sergeant Mourad is united in interest with Defendants the City of New York; 2. demonstrate how Sergeant Mourad knew or should have known that, but for an excusable mistake by Plaintiff, that an action would have been brought against him as well; 3. demonstrate how Plaintiff's mistake is excusable; 4. provide an explanation for the delay in bringing this motion to add an additional party; and 5. explain why he was unable to identify the additional party prior to the expiration of the statute of limitations. As such, Plaintiff's failure to identify the appropriate parties should not be viewed as a mistake but rather a conscious decision.

### COURT'S RULING

To make use of the "John Doe" procedure delineated in CPLR 1024, parties must demonstrate that they have exercised "due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, are unable to do so ... Any failure to exercise due diligence to ascertain the '[John] Doe's' name subjects the complaint to dismissal as to that party" (*Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 29-30, 883 N.Y.S.2d 99). Although courts generally take a liberal approach to such relief, where, as here, there is opposition to the motion, the Court must carefully search the record to see if, in fact, the petitioner had no knowledge of the respondent's name, or was unable to obtain it after making a reasonable and diligent search, before commencing this proceeding. CPLR § 1024.

Plaintiff's arrest, which gave rise to this action, occurred on December 27, 2011. Pursuant to General Municipal Law § 50-i, the one (1) year and ninety (90) day statute of limitations for Plaintiff's claims expired on March 27, 2013. On February 26, 2013, Defendants the City of New York provided its response to a Preliminary Conference. Defendants' response included a complaint report which identified Sergeant Mourad as the approving supervisor for the arrest. Plaintiff's present motion is dated April 28, 2014. Plaintiff was then aware of Sergeant Mourad's identity prior to the expiration of the statute of limitation for the present action. Here, the Plaintiff failed to exercise due diligence to discover the identity of the John Doe defendant, as being Sergeant Mourad, prior to the expiration of the statute of limitations (see *Temple v. New York Community Hosp.*, 89 A.D.3d 926, 927-928, 933 N.Y.S.2d 321, 322 - 323 (2d Dep't 2011); citing *Comice v. Justin's Rest.*, 78 A.D.3d 641, 642, 909 N.Y.S.2d 670; *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d at 29-30, 883 N.Y.S.2d 99; *Misa v. Hossain*, 42 A.D.3d 484, 486, 840 N.Y.S.2d 614; see also *Karagiannis v. North Shore Long Is. Jewish Health Sys., Inc.*, 80 A.D.3d 569, 569, 914 N.Y.S.2d 666). As such any state causes of action against Sergeant Mourad for injuries sustained by Plaintiff are time-barred under GML § 50-i.

Likewise, under the relation-back doctrine, a plaintiff may interpose a cause of action against a person or entity after the statute of limitations has expired, provided that the plaintiff

had timely commenced the action against another defendant, served process upon that other defendant within the applicable statutory period, and established that the defendant previously named and served was “united in interest” with the person or entity sought to be added as a defendant (CPLR 203[b]), *LeBlanc v. Skinner*, 103 A.D.3d 202, 209, 955 N.Y.S.2d 391, 397 (2d Dep’t 2012). In order to determine whether two defendants are united in interest—such that a plaintiff may invoke the relation-back doctrine to add a new defendant—it must be shown that: “(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well” (*LeBlanc v. Skinner*, 103 A.D.3d 202, 209, 955 N.Y.S.2d 391, 397 (2d Dep’t 2012); see also *Sally v Keyspan Energy Corp.*, 106 A.D.3d 894, 897, quoting *Austin v Interfaith Med. Ctr.*, 264 A.D.2d 702, 703).

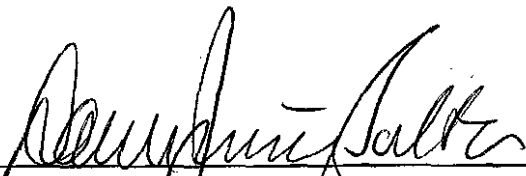
Plaintiff’s claim against Defendants Police Officer Dennis Steele, Police Officer Peter Morales, and Sergeant Mourad arose out the same conduct, transaction or occurrence. Plaintiff has not provided an explanation for the delay in bringing this motion or why plaintiff was unable to identify the additional party prior to the expiration of the statute of limitations. It cannot be shown that a “diligent effort” was made herein where Sergeant Mourad’s identity was revealed in a response to a discovery request from Plaintiff prior to the expiration of the aforementioned statute of limitations. Plaintiff has not shown that but for the mistaken identities Sergeant Mourad would have been sued. Accordingly, neither CPLR 1024 nor the relation-back doctrine of CPLR 203(c) barred application of the statute of limitations as against Sergeant Mourad. *Temple v. New York Community Hosp.*, 89 A.D.3d 926, 927-928, 933 N.Y.S.2d 321, 322 - 323 (2d Dep’t 2011). Plaintiff’s motion to amend the caption to allege state claims as against Sergeant Mourad is DENIED.

For the reasons set forth above, it is hereby

ORDERED that the branch of Defendants’ motion to substitute Defendants John Doe is GRANTED in part and DENIED in part.

This constitutes the Decision of the Court.

Dated: September 30, 2014  
Brooklyn, New York

  
\_\_\_\_\_  
Hon. DAWN JIMÉNEZ-SALTA  
Hon. Dawn Jimenez-Salta  
Justice of the Supreme Court

FILED  
KINGS COUNTY CLERK  
2014 OCT -9 AM 8:25