Barnett v City of New York
2015 NY Slip Op 30190(U)
January 15, 2015
Supreme Court, Bronx County
Docket Number: 311379/2011
Judge: Sharon A.M. Aarons
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[* 1]
FILED Jan 22 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24
---X
ROMEO BARNETT,
Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, and POLICE OFFICERS "JOHN DOE #1-2",
Defendants.
---X

Index No. 311379/2011

DECISION and ORDER
Present:
Hon. SHARON A. M. AARONS

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

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Cross-Motion and Affidavits Annexed	2
Replying Affidavits	3, 4

Upon the foregoing papers, the foregoing motion is decided as follows:

Defendants City of New York and New York City Police Department (collectively, "the City defendants") move for summary judgment dismissing the complaint pursuant to CPLR 3211 and 3212. Plaintiff cross-moves for leave to file an amended complaint. The motion and cross-motion are granted in part and denied in part.

In this action, plaintiff seeks damages for an alleged false arrest that took place on October 17, 2010, at 10:00 PM, at the intersection of East 232nd Street and Barnes Avenue in Bronx County. The City defendants contend that an identified citizen, i.e., the complainant "Patrick Bedford," identified the plaintiff at that place and time as one of two persons who had robbed him a short time earlier. The plaintiff contends that the existence of "Patrick Bedford" is a fabrication, invented by the arresting officers, who in fact arrested the plaintiff in retaliation for an earlier lawsuit commenced against the same officers. The complaint alleges causes of action for (1) false arrest, (2) negligent hiring, (3) negligent supervision, (4) negligent performance of police duties, (5) malicious prosecution, and (6) violation of 42 USC 1983.

FILED Jan 22 2015 Bronx County Clerk

In support of the motion, the City defendants submit the plaintiff's notice of claim; the plaintiff's GML 50-h hearing testimony[1]; the pleadings; and an uncertified copy of the arrest report prepared and filed by New York City Police Officer Joseph Helgerson, 47th Precinct, Bronx County. The City defendants argue that plaintiff's claims of false arrest fail because probable cause existed to effectuate an arrest based on the complaint of an identified citizen who identified the plaintiff. They further maintain that the plaintiff's claims under 42 USC 1983 must be dismissed, as plaintiff has not pleaded a violation of his civil rights based upon a municipal custom, policy or practice. Lastly, the City defendants allege that no cause of action for negligent hiring can be asserted, as the police officer was acting within the scope of his employment, citing *Karoon v. New York City Transit Auth.* (241 A.D.2d 323, 659 N.Y.S.2d 27 [1st Dept. 1997].)

In support of the cross-motion, plaintiff submits the complaint from a prior action commenced by the same plaintiff against the City and various unknown police officer (Index No. 30099/2010), and a proposed amended verified complaint.[2] Plaintiff maintains that the defendants have failed to submit any admissible evidence in support of the motion for summary judgment, as the arrest report is uncertified and unauthenticated, and no affidavit from a complaining witness or any of the police officers was adduced. Plaintiff argues that his claims of fabricated charges creates an issue of fact as to probable cause. Plaintiff cross-moves to amend the complaint to add Joseph Helgerson, the Police

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[1]The plaintiff's hearing testimony indicates, in substance, that he was arrested by police officers after a verbal altercation with his girlfriend, taken into custody, and brought to Central Booking. Later, the charges were dropped prior to arraignment, but he was held and brought before a judge due to "an outstanding warrant," which in fact did not exist. There was no robbery, and no show-up identification by any alleged victim occurred.

[2]The proposed amended complaint is virtually identical to the original complaint in this action, except that in the proposed amended complaint Police Officer Joseph Helgerson is named in place of John Doe #1.

Officer who filed the police report annexed to the moving papers, as a party defendant.

The court's function on a motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960].)

Pursuant to CPLR 3211 (e), a motion to dismiss, based upon CPLR 3211 (a) (7), for failure to state a cause of action upon which relief may be granted, may be made at any time subsequent to joinder of issue. In determining a CPLR 3211 (a) (7) motion, the test is whether the challenged cause of action has been sufficiently stated within the four corners of the challenged pleading. (*Frank v Daimler Chrysler Corporation*, 292 A.D.2d 118, 120-121, 741 N.Y.S.2d 9 [1st Dept. 2002]). The court's role is to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

Leave to amend a pleading should be granted freely where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party. (*Saleh v. 5th Ave. Kings Fruit & Vegetable Corp.*, 92 A.D.3d 749, 750, 939 N.Y.S.2d 102 [2d Dept. 2012].) A determination whether to grant such leave is within the court's broad discretion, and the exercise of that discretion will not be disturbed lightly. (*Id.*)

With respect to the defendants' motion for summary judgment pursuant to CPLR 3212, the defendants have not established a prima facie case that an arrest was made based on the complaint of

FILED Jan 22 2015 Bronx County Clerk

an identified civilian witness. The only evidence of such a complainant is an uncertified police complaint report. An uncertified document constitutes hearsay. (*Silva v. Lakins*, 118 A.D.3d 556, 988 N.Y.S.2d 585 [1st Dept. 2014] [uncertified police report attached to counsel's affirmation constitutes inadmissible hearsay]).

Moreover, even if the defendants had adduced proof in admissible form, the plaintiff's sworn GML 50-h testimony raises issues of fact as to the existence of any such complainant. Probable cause to believe that a person committed a crime is a complete defense to claims of false arrest and malicious prosecution. (*Fortunato v City of New York*, 63 A.D.3d 880, 882 N.Y.S.2d 195 [2d Dept. 2009]). "The existence or absence of probable cause becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest." (*MacDonald v. Town of Greenburgh*, 112 A.D.3d 586, 586-587, 976 N.Y.S.2d 189, 2d Dept. 2013].)

With respect to the motion predicated on CPLR 3211, the defendant argues that the claims for negligent hiring, supervision and retention do not state a cause of action. In *Karoon* (supra), a personal injury action arising out of an automobile accident, the First Department found that the defendants were entitled to summary judgment dismissing plaintiff's negligent hiring, retention and training claims. The Court reasoned that where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training." (*Id* at 324.)

Here, however, it is alleged by plaintiff that the arrest was based entirely on personal motivations, and was not within the scope of the police officer's duty. Thus, to the extent that plaintiff

has asserted such a claim against defendants, and absent a clear concession by defendants that the officers were acting within the scope of their employment at the time of the alleged incident, the claim may not be dismissed. (*See Pickering v State*, 30 AD3d 393, 816 N.Y.S.2d 566 [2d Dept 2006] [absent clear concession by defendant that officer acted completely within scope of employment, plaintiff entitled to discovery related to negligent hiring and training claims]; *Chavez v. City of New York*, 33 Misc. 3d 1214(A), 939 N.Y.S.2d 739, 2011 N.Y. Misc. LEXIS 5046, 2011 NY Slip Op 51930(U) [Sup. Ct., N.Y. Co, Jaffe, J.], affirmed, 99 A.D.3d 614, 953 N.Y.S.2d 33 [1st Dept. 2012] [trial court properly declined to dismiss the negligent hiring and retention claim where defendants failed to make proper evidentiary showing that the officers were acting within the scope of their official duties].)

With respect to the claims predicate under 42 USC 1983, however, the complaint, and the proposed amended complaint failed to sufficiently plead a cause of action under that section. As established by *Monell v Department of Social Services of City of New York* (436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 [1977]), a municipality bears liability under 42 USC § 1983 only where the action by its agent "is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" (*Id* at 690). The existence of an official policy or custom which deprived him of a constitutional right in violation of 42 USC § 1983 is a necessary element which must be plead. (*Liu v New York City Police Dept.*, 216 AD2d 67, 68, 627 N.Y.S.2d 683 [1st Dept 1995]). Moreover, the complaint must allege facts from which it could be reasonably inferred that the defendants had a policy or custom of which caused the constitutional tort alleged. (*Cozzani v County of Suffolk*, 84 AD3d 1147, 1147, 923 N.Y.S.2d 348 [2d Dept 2011] ["Although the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy

or custom which the conduct purportedly advanced.]; *R.A.C. Group, Inc. v Board of Educ. of City of New York*, 295 AD2d 489, 490, 744 N.Y.S.2d 693 [2d Dept 2002] ["because the plaintiffs failed to plead the existence of a specific policy or custom which deprived them of a constitutional right in violation of 42 USC § 1983, that cause of action must be dismissed as well."]; *Bryant v City of New York*, 188 AD2d 445, 446, 590 N.Y.S.2d 913 [2d Dept 1992] ["Given the complete absence of any factual allegations in the complaint regarding the alleged "policies" of the municipal defendants which led to the officers' conduct, or evidencing their approval or "ratification" of this conduct, the plaintiffs' causes of action against these defendants pursuant to 42 USC § 1983 were properly dismissed"]).

Plaintiff's sixth cause of action fails to allege any factual predicate that the City's liability stems a custom and practice; that the custom violated plaintiff's constitutional rights; and that consequently the City defendants violated 42 USC § 1983. As a motion to dismiss for failure to state a cause of action under 42 USC § 1983 must be granted where the complaint fails to allege any facts from which it could be reasonably inferred that the defendants had a policy or custom of which caused the constitutional tort alleged (*Vargas v. City of New York*, 105 A.D.3d 834, 963 N.Y.S.2d 278 [2d Dept. 2013] [complaint failed to allege any facts from which it could be reasonably inferred that the defendants had a policy or custom of depriving medical treatment to persons in police custody]); *Cozzani v County of Suffolk*, 84 AD3d 1147, 1147, 923 N.Y.S.2d 348 (2d Dept 2011] ["Although the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced."]; *R.A.C. Group, Inc. v Board of Educ. of City of New York*, 295 AD2d 489, 490, 744 N.Y.S.2d 693 [2d Dept 2002] ["because the plaintiffs failed to plead the existence of a specific

FILED Jan 22 2015 Bronx County Clerk

policy or custom which deprived them of a constitutional right in violation of 42 USC § 1983, that cause of action must be dismissed as well."]), the sixth cause of action must be dismissed. Further, as the proposed amended complaint contains identical language, it is also palpably insufficient.

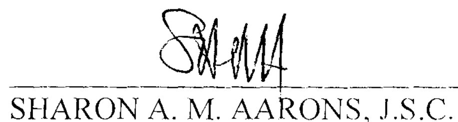
No prejudice or surprise has been shown as to any amendment of the complaint to add Police Officer Joseph Helgerson as a party defendant, an no objection has been raised by the City defendants in this regard.

Accordingly, that part of the City defendants' motion seeking summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212 is denied; that part of the City defendants' motion seeking to dismiss plaintiff' complaint pursuant to CPLR 3211 is granted only to the extent of dismissing the sixth cause of action alleging a violation of 42 USC 1983; and the cross-motion is granted to the extent of permitting the plaintiff to amend the complaint except as to the sixth cause of action alleging a violation of 42 USC 1983. It is accordingly,

ORDERED that the sixth cause of action alleging a violation of 42 USC 1983 is dismissed pursuant to CPLR 3211(a)(7), and it is

ORDERED that plaintiff is granted leave to serve and file an amended verified complaint substantially in the form submitted to the Court on plaintiff's cross-motion, except that the said amended verified complaint shall not contain the proposed sixth cause of action alleging a violation of 42 USC 1983.

Dated: January 15, 2015



SHARON A. M. AARONS, J.S.C.