

Paiba v FJC Sec., Inc.
2015 NY Slip Op 30384(U)
February 27, 2015
Supreme Court, Bronx County
Docket Number: 306872/2012
Judge: Mary Ann Brigantti
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

-----X
SONIA PAIBA,

Plaintiff,

-against-

DECISION / ORDER
Index No. 306872/2012

FJC SECURITY, INC., and THE CITY OF NEW YORK,

Defendants
-----X

The following papers numbered 1 to 7 read on the below motions noticed on March 25, 2014 and duly submitted on the Part IA15 Motion calendar of **November 6, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Notice of Motion, Memo of Law, Exhibits	1,2,3
Pl.'s Aff. in Opp., Exhibits	4,5
FJC's Aff. in Opp.	6
Def.'s Aff. In Reply	7

Upon the foregoing papers, defendant the City of New York ("City") moves to dismiss the complaint of the plaintiff Sonia Paiba ("Plaintiff") and all cross-claims, pursuant to CPLR 3211(a)(7). Plaintiff, as well as co-defendant FJC Security, Inc. ("FJC") oppose the motion.

I. Background

This action arises out of an alleged incident that occurred on October 24, 2011, when Plaintiff was within the premises of the Melrose Job Center on East 161st Street in the Bronx. According to the Notice of Claim, Plaintiff was "negligently assaulted, restrained, and falsely imprisoned by Security Guards hired and employed by the City of New York..." Plaintiff later filed a summons and complaint against the City and FJC. In the complaint, Plaintiff contends, *inter alia*, that she was assaulted by security guards employed by FJC, an entity hired by the City for security services at the subject premises. The City now moves to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7).

The City argues that the complaint fails to state a cognizable claim, since it only alleges that Plaintiff was assaulted by FJC security guards that were hired by the City. Her theory of

liability against the City is, therefore, based on *respondeat superior*. However, the City contends that FJC was an independent contractor, and therefore the City cannot be responsible for allegedly wrongful acts of FJC's employees. The City annexes the contract between FJC and the City that was in effect on the date of this incident. It states, in pertinent part, that the contractor (FJC) shall be solely responsible for any claim arising out of the acts or omissions of its agents, and shall hold harmless and indemnify the City from liability upon any claim for damages due to the acts or omissions of FJC or its agents. The City argues that FJC security guards are not its employees, but rather independent contractors.

Next, the City argues that the Notice of Claim failed to give adequate notice that the City was responsible for any negligence or wrongful acts committed against Plaintiff. The Notice of Claim did not allege any theory of liability against the City aside from *respondeat superior*, and gave "no hint as to what the City should investigate to assess the merits of the claim." In addition, Plaintiff cannot cure the pleadings or file a late Notice of Claim because the applicable statute of limitations has expired.

In opposition, Plaintiff contends that her Notice of Claim complied with General Municipal Law §50-e(2), as it gave an adequate description of the nature of the claim, and the time and place it occurred. Moreover, the Notice of Claim must be read in conjunction with the Security Incident Report prepared by employees of FJC, that lists certain New York City police officers as persons involved in this incident. At her 50-h hearing, Plaintiff testified that she was assaulted by several security guards as well as other police officers. Plaintiff also provides an affidavit of a non-party witness, Frances Perez, states that she witnessed police officers as well as security guards assault and restrain Plaintiff.

Plaintiff argues that the test of a Notice of Claim's sufficiency is not limited to the four corners of the notice, but rather, a court may look to evidence adduced at a section 50-h hearing, and other evidence properly submitted (citing *Goodwin v. NYCHA*, 42 A.D.3d 63 [1st Dept. 2007], *D'Allessandro v. NYCTA*, 83 N.Y.2d 891, 893 [1994]). Here, Plaintiff argues that the Notice of Claim, when read in conjunction with the Security Incident Report and 50-h hearing, complies with GML.

Plaintiff also argues that the complaint adequately states a claim against the City so as to

avoid dismissal under CPLR 3211(a)(7).

FJC also opposes the motion, and contends that the complaint adequately asserts a claim against the City to the extent that it alleges wrongdoing on the part of the City's own employees. Further, the Security Incident Report listed "Police Officer Santos" and "Police Officer Supervising Sergeant Keniff" as individuals involved with this incident.

In reply, the City argues, *inter alia*, that the security incident report cannot be considered since it had no knowledge of the report until it was introduced by FJC some two years after this action was commenced. Since the notice of claim only asserted a claim against the city on the theory of *respondeat superior*, the City was not apprised of what it should investigate to assess the merits of the claim. The City also argues that the cases cited by Plaintiff are inapplicable to this matter.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997])[on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]. When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR 3026). The court must "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 into any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept. 1992]).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211

(a)(7) may properly be negated by affidavits and documentary evidence (CPLR 3211[a][1], *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1st Dept. 2005]). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.*, citing *Leon v. Martinez*, *supra.*) Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint (*Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 [2nd Dept. 2001]). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under CPLR 3211(a)(7) (*Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 [1st Dept. 1983]).

III. Applicable Law and Analysis

Upon review, the complaint adequately states a causes of action against the City, as it alleges wrongdoing on the part of both defendants and/or their employees (Par. 12, 13). Accordingly, construing the complaint broadly as is required, the City's alleged liability under the theory of *respondeat superior* is based not only on the acts of FJC's employees, but also its own employees. The complaint is therefore sufficient on its face and survives the City's motion made pursuant to CPLR 3211(a)(7). The City is, moreover, not entitled to dismissal under CPLR 3211(a)(1), as the FJC-City contract, alone, does not conclusively establish a defense to the asserted claims as a mater of law (*see 511 West 232 Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 [2002]; *Leon v. Martinez*, *supra.*).

The City further contends that they are entitled to dismissal because the Notice of Claim did not give it adequate notice of the facts and circumstances surrounding this incident, in compliance with General Municipal Law. It is settled that the Notice of Claim requirement of GML §50-e is to be applied "flexibly," and the test for sufficiency is "merely whether it includes information sufficient to enable the city to investigate" (*Goodwin v. NYCHA*, 42 A.D.3d 63, 69 [1st Dept. 2007]; *Brown v. City of New York*, 95 N.Y.2d 389, 393 [2000]). Further, evidence adduced at a hearing pursuant to General Municipal Law §50-h, as well as other evidence that is

properly before the court, may be used to determine the sufficiency of a Notice of Claim” (*Phillips v. New York City Transit Auth.*, 68 A.D.3d 461, 462 [1st Dept. 2009], citing *D’Alessandro v. New York City Tr. Auth.*, 83 N.Y.2d 891, 893 [1994]). In this case, the Plaintiff testified at her 50-h hearing that she was assaulted by several “security guards” while at the subject location, handcuffed, and was issued “tickets” for disorderly conduct and harassment. She also testified that she encountered City police officers before being transported away in an ambulance. An incident report generated by FJC indicates the presence of officers described as “P.O.’s” and “Sgt’s”. When viewed together, this evidence, in addition to the Notice of Claim, provided sufficient information to allow the City to perform an investigation. The City’s contention that they are “prejudiced” by the consideration of FJC’s incident report is unavailing, since the City has not made the necessary showing that ^{it} made an attempt to investigate this incident (*see Goodwin v. New York City Housing Auth.*, 42 A.D.3d at 68, citing *Miles v. City of New York*, 173 A.D.2d 298 [1st Dept. 1991]). Moreover, municipal authorities have an “obligation to obtain the missing information if that can be done with a modicum of effort...” (*Phillips v. New York City Transit Auth.*, 68 A.D. 3d at 462-63., citing *Goodwin, supra.*; see also *Basile by Basile v. City of New York*, 156 A.D.2d 239 [1st Dept. 1989]). Defendant City’s motion to dismiss the complaint is therefore denied.


IV. Conclusion

Accordingly, it is hereby

ORDERED, that the City’s motion to dismiss Plaintiff’s complaint, pursuant to CPLR 3211(a)(7), is denied.

This constitutes the Decision and Order of this Court.

Dated: 2/20/15, 2015



 Hon. Mary Ann Brigantti, J.S.C.