Alvarez v City of New York
2015 NY Slip Op 30495(U)
March 28, 2015
Sup Ct, New York County
Docket Number: 158326/12
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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MIGUEL ALVAREZ,

Plaintiff (s),

-against-

CITY OF NEW YORK, POLICE OFFICER STEVEN CARRA, SHIELD #04271, 32ND PCT. INDIVIDUALLY AND AS A POLICE OFFICER, POLICE OFFICER BRYAN PENA, 32ND PCT, INDIVIDUALLY AND AS A POLICE OFFICER, AND POLICE OFFICER JOHN DOE, 32ND PCT., SUED IN A FICTITIOUS CAPACITY, IDENTITY UNKNOWN,

Defendant (s).

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DECISION/ ORDER
Index No.: 158326/12
Seq. No.: 003

PRESENT:
Hon. Lynn R. Kotler
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Paper	**Numbered**
Pltf's n/m, JLE affirm, exhs	1
Def's n/x-mot, MF affirm, exhs	2
JLE affirm in opp	3
MF reply affirm, exh	4

Upon the foregoing papers, the decision and order of the Court is as follows:

In this action, plaintiff seeks to recover for, *inter alia*, defendants' alleged use of excessive force. Plaintiff now moves to amend the complaint to substitute Sgt. Kevin O'Doherty in place of Police Officer John Doe. Defendants City of New York (the "City"), Police Officer Carra, Police Officer Bryan Pena and Police Officer John Doe (collectively the "individual defendants") oppose the motion and cross-move for an order dismissing plaintiff's *Monell* claims against the City, or alternatively, an order bifurcating plaintiff's *Monell* claims for discovery and

trial purposes until plaintiff succeeds in establishing civil rights violations on the part of the individual defendants. Plaintiff opposes the cross-motion. The motions are decided as follows.

Facts and arguments

Plaintiff alleges that on March 24, 2012, at approximately 2:20 pm, he was lawfully driving a vehicle in the vicinity of 155th Street and Eighth Avenue in New York County (the "location"). Plaintiff legally parked his vehicle at the location. At this time, Police Officers Carra and Doe were driving an unmarked vehicle which they parked behind plaintiff's vehicle so as to "box[plaintiff's vehicle] in."

PO Carra and PO Doe exited their vehicle and approached plaintiff while he was sitting in his. One of the officers ordered plaintiff to turn his car off and place his keys on the hood. PO Carra opened plaintiff's car door, grabbed him and pulled him out of the car "with such force that plaintiff fell to the ground." Both officers then searched plaintiff's vehicle. PO Doe claimed that he found a folding knife in plaintiff's car and meanwhile, POCarra grabbed plaintiff's arms with great force, twisting them behind his back. "The plaintiff's arms felt like they were going to break. Upon information and belief, [PO] Carra handcuffed and arrested the plaintiff." PO Carra further removed plaintiff's wallet and searched it and plaintiff's person. The plaintiff was then placed in the back of the police vehicle and taken to the 32nd Precinct. PO Carra issued plaintiff a summons for Illegal Possession of a Knife over Four Inches Long (the "Summons").

The Summons was assigned to PO Pena. Plaintiff appeared in Criminal Court to answer the Summons (Docket Number 2012SN048768) on June 6, 2012, at which time the charges were dismissed.

Plaintiff now seeks to amend the summons and complaint to reflect that PO O'Doherty was PO Doe. Plaintiff previously moved to amend the summons and complaint to correct the

spelling of PO Carra's name and to substitute PO Pena for PO Doe. That motion was granted without opposition by the Hon. Kathryn Freed in a decision/order dated July 23, 2013.

Plaintiff maintains that he learned the identity of PO Doherty from the City's response to Plaintiff's discovery demands which it received on April 15, 2014. Plaintiff seeks to assert a 42 USC § 1983 claim against PO O'Doherty, only (sixth cause of action). The return date of this motion was June 30, 2014. According to the Court's file, this case was heard for oral argument on September 30, 2014 before the Hon. Kathryn Freed. The motion was reassigned to this Court on or about March 9, 2015.

Defendants claim that plaintiff was approached by PO Carra and O'Doherty after plaintiff made an illegal turn. Defendants further argue that plaintiff's fifth cause of action asserting a *Monell* claim (*Monell v. Department of Social Services of City of New York*, 436 US 658 [1978]) should be dismissed because it fails to state a claim. Alternatively, defendants contend that should the motion to dismiss be denied, discovery and the trial of plaintiff's *Monell* claim should be bifurcated and stayed until plaintiff establishes the individual defendants' liability.

Discussion

At the outset, plaintiff's motion to amend the summons and complaint is granted. Plaintiff's proposed second amended summons with amended verified complaint are sufficiently meritorious to warrant granting leave to amend (CPLR 3025 [b]; see *Derrick v. American Intern. Group, Inc.*, --- NYS 3d ---, 2015 NY Slip Op 02210 [1st Dept March 19, 2015]). Defendants' argument in opposition is essentially that even the amended pleading cannot survive a motion to dismiss. Accordingly, the motion to amend is granted. The Court now turns to the cross-motion.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and

if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference (*Morone v. Morone*, 50 NY2d 481 [1980]; *Beattie v. Brown & Wood*, 243 AD2d 395 [1st Dept 1997]).

A municipality cannot be held liable under 42 USC § 1983 on a theory of *respondeat superior* (*Elie v. City of New York*, 92 AD3d 716 [2d Dept 2012] citing *Monell*, 436 US at 691). In order to assert a cause of action pursuant to 42 USC § 1983 against a municipality, "the action that is alleged to be unconstitutional must implement[ ] or execute [ ] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" (*Monell*, 436 US at 690) or have occurred because of a practice "so permanent and well settled as to constitute a 'custom or usage' with the force of law" (*Monell*, 436 US at 691).

In support of his *Monell* claim, plaintiff alleges that PO Carra and PO O'Doherty, while acting within the scope of their employment, illegally seized plaintiff and deprived him of his rights and liberties as set forth in the federal and state constitutions under 42 USC § 1983 and/or 1986. Plaintiff alleges that his stop and seizure was pursuant to "an illegal and improper Stop and Frisk program, or policy, that was promulgated and enforced by the Defendants and/or their agents. ... [S]uch custom, policy and program has created a class of citizens, including the Plaintiff, who have been illegally stopped and seized, searched and questioned based on their race, and in order to meet arrest or summons quotas or performance incentives or goals." Plaintiff references a federal class action challenging Stop and Frisk presently pending before the Hon. Shira A. Scheindlin entitled *Floyd et al. v. City of New York et al.*, 08 CIV 1034 pending in the U.S. District Court, Southern District of New York. In that case, Judge Scheindlin found that

the class of plaintiffs were "detained and questioned, often on a public street" as part of the Stop and Frisk program, which resulted in numerous unconstitutional stops (Floyd, 959 F.Supp2d 540, 556 [SDNY 2013]).

Plaintiff also cites seven incidents occurring from 2007 through 2010 in the 32nd Precinct which are currently being handled by plaintiff's law firm. Plaintiff's counsel maintains that these seven incidents are factually similar to the instant case insofar as they involve minorities and police officers engaging in racial profiling, excessive use of force and otherwise acting in furtherance of the Stop and Frisk program.

Defendants maintain that plaintiff has failed to allege a "sufficient nexus" between the March 24, 2012 incident and the Stop and Frisk program. Specifically, defendants argue that plaintiff has failed to connect his stop to the Stop and Frisk program because "he was driving" and "[t]here is no evidence that the officers could have even seen plaintiff before pulling him over for a traffic violation, negating plaintiff's theory that he was stopped purely based upon his race." The Court rejects this argument. On a motion to dismiss, plaintiff's burden is relatively light. All plaintiff needs to do is allege sufficient facts to support every element of the cause of action. Here, plaintiff has easily met his burden. Plaintiff has alleged that the City maintained a policy or custom that caused him to be subjected to a denial of a constitutional right (see i.e. *Elie v. City of New York*, *supra* at 717-718).

Defendants caution that to permit plaintiff to bring his *Monell* claim would "set a dangerous precedent" because "every African American or Hispanic plaintiff who has been stopped by a police officer – whether in a car or on foot, will be able to plead enough facts to bring a *Monell* claim by simply alleging that the stop was initiated without cause" does not compel a different result. Defendants cannot cite any case law for the proposition that a *Monell*

claim should be subject to a higher standard on a motion to dismiss. Further, this is not simply a case where plaintiff alleges that he is Hispanic and has been stopped by a police officer. Here, plaintiff has alleged that he was lawfully driving his vehicle and then legally parked it on a public street. Thereafter, police officers ordered him to turn off his car, pulled him out with enough force to cause plaintiff to fall to the ground, and searched plaintiff's vehicle without consent. The police officers then forcefully twisted plaintiff's arms and handcuffed him. The criminal charge for which he was arrested was subsequently dismissed. Defendants' claim that plaintiff made an illegal turn is contraindicated by the fact that plaintiff was not given a summons for such a violation. Moreover, this factual claim by defendants improperly shifts the focus from the sufficiency of the pleadings to disputed issues of fact which is not pertinent to a motion to dismiss. Defendants claim that there was probable cause to stop plaintiff should be raised on a dispositive motion.

Alternatively, defendants argue that the fifth cause of action should be bifurcated and stayed for purposes of discovery and trial. Plaintiff argues that discovery as to this claim should not be difficult given that stop and frisk data that defendant would be required to turn over "has already been assembled and made available in other actions such as *Floyd*..." The Court rejects plaintiff's argument. Defendants point to *Elie v. City of New York, supra* and *Landsman v. Village of Hancock*, 296 AD2d 728, 731 (3d Dept 2002). *Elie* held that the trial court abused its discretion by denying bifurcation of the *Monell* claim, and *Landsman* affirmed the trial court's bifurcation, noting that since "[a] necessary threshold predicate to [a *Monell* claim] is that the officers' actions were unconstitutional", bifurcation was proper to avoid prejudice to the individual defendants and in the interests of judicial economy.

Accordingly, defendant's motion is granted only to the extent that plaintiff's fifth cause of action for purposes of discovery and trial is bifurcated and stayed pending trial of the remaining claims.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff's motion to amend the summons and complaint is granted and the second amended summons with verified complaint annexed to plaintiff's motion as exhibit "A" is deemed filed; and it is further

ORDERED that plaintiff is directed to serve the second amended summons with verified complaint annexed to plaintiff's motion as exhibit "A" upon Sgt. Kevin O'Doherty within 20 days from the date this decision/order is "entered" by the clerk; and it is further

ORDERED that plaintiff is directed to serve the second amended summons with verified complaint annexed to plaintiff's motion as exhibit "A" upon upon the remaining defendants within 30 days from the date this decision/order is "entered" by the clerk; and it is further

ORDERED that defendants' cross-motion is granted only to the extent that plaintiff's fifth cause of action is bifurcated and stayed pending trial of the remaining claims for purposes of discovery and trial; and it is further

ORDERED that defendants' cross-motion is otherwise denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: March 28, 2015
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.C.C.