| **Wilson v City of New York** |
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| 2015 NY Slip Op 31010(U) |
| May 4, 2015 |
| Supreme Court, Queens County |
| Docket Number: 702529/12 |
| Judge: Phyllis Orlikoff Flug |
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ORIGINAL

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

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| ABDULLAH WILSON,<br><br>Plaintiff,<br><br>-against-<br><br>THE CITY OF NEW YORK, POLICE OFFICER MICHAEL SINGER, DETECTIVE ALFRED TRICARICO, SERGEANT LOUIS VITTIGLIO, DETECTIVE "FNU" HORN (FIRST NAME UNKNOWN), DETECTIVE "FNU" BURKE (FIRST NAME UNKNOWN), "JOHN DOES" 1 THROUGH 15 (POLICE OFFICERS AND NON-UNIFORMED EMPLOYEES OF THE NEW YORK CITY POLICE DEPARTMENT, THE IDENTITY AND NUMBER OF WHOM ARE PRESENTLY UNKNOWN), AND ASSISTANT DISTRICT ATTORNEY KENNETH RUSSO,<br><br>Defendants. | Index Number..702529/12<br><br>Motion Date...6/20/14<br><br>Motion Cal. Number........92<br><br>Sequence No...5 |

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The following papers numbered 1 to 6 read on this motion

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| Notice of Motion | 1 - 2 |
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Defendant, the City of New York (hereinafter "City"), and individually named defendants Police Officer Michael Singer, Detective Alfred Tricarico, Detective Louis Vittiglio, Detective Samuel Horn s/h/a Detective "FNU" Horn and Detective John Burke s/h/a Detective "FNU" Burke, collectively move *inter alia* for summary judgment, dismissing plaintiff's complaint as asserted against them. Plaintiff cross-moves *inter alia* to strike defendants' answer for failure to comply with discovery.

This is an action to recover damages relating to plaintiff's alleged false arrest and subsequent malicious prosecution and false imprisonment in the County of Queens, City and State of New York.

Specifically, on December 22, 1992, complainant Roger Erra was robbed at gunpoint. A Want Card was issued for plaintiff's arrest after Erra and a witness to the robbery, John Lucas, identified plaintiff as one of the two armed robbers. On October 27, 1994, plaintiff was arrested for an unrelated offense, and was identified in a lineup by Erra the following day. Plaintiff claims that Lucas orchestrated the robbery with the intent to blame him and was unduly suggestive in procuring Erra's identification of him.

On December 12, 1994, Wilson was indicted by a Grand Jury for robbery in the first degree and robbery in the second degree. On October 14, 1995, plaintiff was convicted of robbery in the second degree following a jury trial. On November 15, 1995, plaintiff was sentenced to a prison term of seven and one-half to fifteen years.

On June 24, 2009, the Second Circuit held that plaintiff had been denied the right to effective assistance of counsel and instructed the District Court to issue a writ of habeas corpus within 60 days unless the District Attorney took concrete and substantial steps expeditiously to retry Wilson.

On October 19, 2009, the Queen County District Attorney moved to dismiss the indictment in the interest of justice as plaintiff had already served the sentence, in full.

In an Order dated June 10, 2013, this Court granted defendants' motion to dismiss, in part. The sole remaining cause of action against the City of New York is a Monell claim. The remaining causes of action against the NYPD defendants are 42 U.S.C. § 1983 claims for malicious prosecution, *Brady* violations, malicious abuse of process, failure to investigate, conducting unduly suggestive identification procedures, denial of procedural and substantive due process, conspiracy, unreasonably prolonged detention, and failure to intervene.

Defendants first seek to amend their Third Amended Answer because due to clerical oversight the Third Amended Answer does not include the individually named NYPD defendants, despite the fact that those defendants were individually named in the Second Amended Answer. In addition defendants seek to amend their Third Amended Answer to admit that the NYPD defendants were acting in the scope of their employment and to assert the affirmative defenses of collateral estoppel.

While plaintiff does not submit opposition to that portion of defendants' motion seeking to amend their Third Amended Answer to

include the individually named NYPD defendants and admit that those defendants were acting in the scope of their employment, plaintiff opposes that portion of the motion seeking leave to amend to assert the affirmative defenses of res judicata and collateral estoppel.

Leave to amend an answer pursuant to CPLR § 3025 shall be freely given in the absence of prejudice or surprise to the non-moving party, unless the proposed amendment is patently devoid of merit (See Lucido v. Mancuso, 49 A.D.3d 220, 222 [2d Dept. 2008]). Mere lateness is not a barrier to amendment in the absence of significant prejudice to the other side (See Ciminello v. Sullivan, 120 A.D.3d 1176, 1177 [2d Dept. 2014]; Henry v. MTA, 106 A.D.3d 874, 875 [2d Dept. 2013]).

Plaintiff fails to demonstrate that defendants failure to include the affirmative defenses of res judicata and collateral estoppel in any of their previously served answers, and their delay in seeking to assert those defenses, resulted in the loss of some special right, or a change of position or significant trouble or expense that otherwise could have been avoided (See Murray v. City of New York, 51 A.D.3d 502, 503 [1st Dept. 2008]). This is particularly true in light of plaintiff's participation in the original proceedings and subsequent extensive appellate proceedings on which the subject defenses are based (See id.).

Moreover, contrary to plaintiff's contentions, these defenses are not patently without merit (See Wallace v. Dillon, 921 F. Supp. 946, 953 [E.D.N.Y. 1996]; cf. Cameron v. Fogarty, 806 F.2d 380, 384-85 [2d Cir. 1986]).

At a pre-trial Wade hearing in plaintiff's criminal case, Justice Timothy Flaherty specifically held that the arrest of the plaintiff was based on probable cause, that the testimony by Officers Tricarico and Singer was credible, and that the identification procedures used in the case were sound.

The Wade hearing determination became "final" for purposes of res judicata and collateral estoppel when plaintiff was convicted and sentenced in the original criminal trial (See People v. Roc, 39 Misc.3d 687, 692 [Sup. Ct. Queens Co. 2013]).

Although this conviction was subsequently overturned, the basis for overturning the conviction was ineffective assistance of counsel. As the Wade hearing determinations were not challenged in plaintiff's criminal appeals, were never overturned in one of those appeals, plaintiff remains collaterally estopped from relitigating this issue (See Charlotten v. Heid, No. 1:09-cv-0891 (LEK/RFT), 2011 U.S. Dist. LEXIS 86060, at *15 [N.D.N.Y. August 4, 2011]).

Nevertheless, contrary to defendants' contentions, the fact

that the determinations at the Wade Hearing constitute collateral estoppel as to certain causes of action, it does not entirely dispose of plaintiff's Complaint.

The Wade hearing determination that there was probable cause is dispositive of plaintiff's first and second causes of action alleging false arrest, false imprisonment and malicious prosecution (See Whyte v. City of Yonkers, 36 A.D.3d 799 [2d Dept. 2007]; see also Rodgers v. City of New York, 106 A.D.3d 1068, 1069 [2d Dept. 2013]; Reape v. City of New York, 66 A.D.3d 755, 756 [2d Dept. 2009]).

Further, the Wade hearing determination that the testimony by officers Tricarico and Singer was credible and that the identification procedures used in the case were sound bar plaintiff's sixth cause of action for unduly suggestive identification procedures. In addition, this determination defeats plaintiff's fourth, seventh and eighth causes of action for abuse of process, which is based on the alleged fabrication of testimony by the officers. To the extent that the fourth and seventh causes of action set forth additional bases for liability not barred by the Wade hearing determination, they are duplicative of plaintiff's third cause of action for *Brady* violations.

In addition, plaintiff's fifth cause of action for negligent investigation must be dismissed as it is not a cognizable cause of action (See Hernandez v. State, 228 A.D.2d 902, 904 [3d Dept. 1996]; Coyne v. State, 120 A.D.2d 769, 770 [3d Dept. 1986]; see also Carlton v. Nassau County Police Dep't, 306 A.D.2d 365, 366 [2d Dept. 2003]).

However, plaintiff's third cause of action, alleging *Brady* violations, and plaintiff's eleventh cause of action alleging a *Monnell* claim based on these violations, are not barred by the Wade hearing determination and remain viable causes of action (See generally Ramos v. City of New York, 285 A.D.2d 284 [1st Dept. 2001]). Defendants have failed to demonstrate their entitlement to judgment on these causes of action.

It is well settled that a moving defendant cannot establish its entitlement to judgment merely by pointing to gaps in a plaintiff's case (See Calderone v. Town of Cortlandt, 15 A.D.3d 602, 602-03 [2d Dept. 2005]; Kucera v. Waldbaums Supermarkets, 304 A.D.2d 531, 532 [2d Dept. 2003]).

Moreover, as the failure to turn over exculpatory material pursuant to *Brady* constitutes a violation of a clearly established constitutional right, defendants have failed to demonstrate their entitlement to qualified immunity on the third cause of action (See generally Harlow v. Fitzgerald, 457 U.S. 800, 818-19 [1982]).

Defendants likewise fail to establish their entitlement to judgment on plaintiff's ninth and tenth causes of action for unreasonably prolonged detention and failure to intervene, respectively.

With respect to plaintiff's cross-motion, the extreme sanction of striking a party's pleading for failing to comply with discovery is only warranted where the moving party has demonstrated that the failure to comply is willful, contumacious, or in bad faith (See Jenkins v. Proto Prop. Servs., LLC, 54 A.D.3d 726, 726-27 [2d Dept. 2008]; Harris v. City of New York, 211 A.D.2d 663, 664 [2d Dept. 1995]).

Determination of whether or not to strike a pleading rests within the sound discretion of the trial court (Patterson v. Greater N.Y. Corp. of Seventh Day Adventists, 284 A.D.2d 382, 383 [2d Dept. 2001]).

In light of the fact that this is plaintiff's first application for this relief and that defendants ultimately, although belatedly and allegedly incompletely, complied with the required discovery striking their answer would be unwarranted (See Brennan v. McCarthy, 255 A.D.2d 477, 477-78 [2d Dept. 1998]).

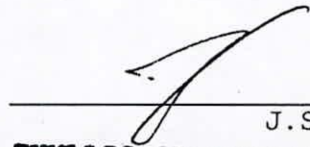
Accordingly, defendants' motion is granted to the extent that plaintiff's first, second, fourth, fifth, sixth, seventh, and eighth causes of action are dismissed in their entirety.

The motion is denied in all other respects, and plaintiff's third, ninth, tenth and eleventh causes of action remain validly asserted against the defendant's named therein, except to the extent provided in this Court's Order dated June 10, 2013.

Plaintiff's cross-motion is granted to the extent that plaintiff is directed to serve defendants a notice of discovery detailing all allegedly outstanding discovery sought by plaintiff in relation to the remaining causes of action no later than June 12, 2015 and defendants are directed to respond to any notice of discovery so served no later than July 24, 2015.

Plaintiff's cross-motion is denied, without prejudice to renewal, in all other respect.

May 4, 2015



J.S.C.

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