FILED Jul 22 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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SARABJEET PERSAUD,

Plaintiff(s),

- against -

THE CITY OF NEW YORK: COMMISSIONER RAYMOND W. KELLY; P.O. ROBYN KREPPEL SHIELD #05420; P.O. VINCENT TROZZI; P.O. JOHN DOES #1-20; THE INDIVIDUAL DEFENDANTS SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Defendant(s).

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DECISION AND ORDER

Index No: 303266/10

In this action for, *inter alia*, false arrest, false imprisonment, excessive force, malicious prosecution, and violations of 42 USC §§ 1983, 1985, and 1986, plaintiff moves for an order granting reargument of the portion of this Court's order dated September 30, 2014, which granted defendants' motion to dismiss all claims against defendants P.O. VINCENT TROZZI s/h/a P.O. VINCINT TROZZI (Trozzi) and P.O. ROBYN L. KREPPEL s/h/a P.O. ROBYN KREPPEL (Kreppel). Specifically, plaintiff avers that in dismissing the state law claims against Kreppel on grounds that plaintiff failed to name her in the notice of claim filed in this action, the Court misapprehended the facts because Kreppel was named in the notice of claim. Further, plaintiff argues that in dismissing the federal claims pursuant to 42 USC § 1983 against

Trozzi and Kreppel - purportedly on grounds that the complaint failed to identify a municipal custom and practice - the Court misapplied the law because such grounds would only warrant dismissal of the foregoing claims to the extent they were brought in Trozzi and Kreppel's official capacity. Defendant THE CITY OF NEW YORK (the City) opposes the instant motion to the extent that plaintiff seeks to reargue the portion of the Court's prior order dismissing the federal claims against Trozzi and Kreppel. Specifically, the City argues that contrary to plaintiff's assertion, the Court correctly dismissed the foregoing federal claims against Trozzi and Kreppel in their entirety - not because the complaint failed to identify a municipal custom and practice - but because it failed to plead specific facts in support of that cause of action as required by controlling law.

For the reasons that follow hereinafter, plaintiff's motion for reargument is granted, in part.

CPLR § 2221(d)(1), prescribes the reargument of a prior decision on the merits and states that such motion

> shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to

> establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR § 2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3rd Dept 2002]).

Plaintiff's motion seeking reargument of the portion of this Court's prior order, which dismissed the state law claims against Kreppel, is granted insofar as the Court misapprehended the facts previously before it. Preliminarily, it should be noted that on the prior motion by the City, Trozzi and Kreppel, they sought dismissal of "all of plaintiff's causes of action, as alleged against the individually named municipal defendants (P.O. Robyn Kreppel and P.O Vincent Trozzi) for failure to state a cause of action." Thus, the Court granted defendants' motion seeking

dismissal of the state law claims against Kreppel and Trozzi because

> [i]n the First Department, it is equally well settled that the failure to name an individual defendant within a notice of claim bars an action against that individual (*Cleghorne v City of New York*, 99 AD3d 443, 446 [1st Dept 2012] ["Furthermore, the action cannot proceed against the individual defendants because they were not named in the notice of claim."]; *Tannenbaum v City of New York*, 30 AD3d 357, 358 [1st Dept 2006] ["General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim."], *abrogated on different grounds by Kapon v Koch*, 23 NY3d 32, *37 [2014] [Court held that contrary to the holding in *Tannenbaum*, a party seeking disclosure from a non-party need not establish that the disclosure sought could not be obtained from another source.]).

Thus, because plaintiff failed to name Trozzi or Kreppel in the caption of their notice of claim and because - contrary to the assertion of the parties - defendants sought dismissal of *all* claims against the foregoing defendants, the Court dismissed all state law claims against Trozzi and Kreppel.

Nevertheless, since in support of reargument, plaintiff saliently argues that the Court erred in dismissing the state law claims against Kreppel on the foregoing grounds because not only did defendants not seek such relief, but because Kreppel is identified in the body and second page of the notice of claim, it is clear that the Court misapprehended the facts. This is further

borne out by the fact that despite the City's preliminary request that all claims against Kroppel be dismissed, a review of the prior papers evinces that no such relief was actually sought in the affirmation in support of the prior motion. Insofar as it is clear that Kreppel was in fact named in the body and second page of the notice of claim and the City - despite the express language in portions of its prior motion - now contends it did not seek to have the state law claims dismissed against Kreppel, reargument is granted and the *three* of the state law claims against Kreppel are hereby restored[1].

Plaintiff's motion seeking reargument of the portion of the Court's prior order dismissing the federal claims pursuant to 42 USC § 1983 against Trozzi and Kreppel on grounds that the Court misapprehended the facts and misapplied the law is granted, in part, to the limited extent of restoring a portion of the foregoing claim. More specifically, the claims pursuant to 42 USC § 1983 are restored to the extent that it is alleged that Trozzi and Kreppel violated the foregoing statute in their individual capacities. In

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[1] Plaintiff response to the City's motion seeking, *inter alia*, summary judgment with respect to plaintiff's claims for false arrest, false imprisonment, malicious prosecution, and abuse of process, agreed that those claims should be dismissed. Thus, in a decision dated the same date as this one, the Court dismissed all of the foregoing claims and for that reason, the Court shall only restore the three state law claims against Kreppel, which because the City failed to seek dismissal survived after the aforementioned motion - namely, the claim for excessive force, *repondeat superior*, and punitive damages.

dismissing the foregoing claims against Trozzi and Kreppel the court noted that

> [w]hen the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

Based on the foregoing, the Court then held that

> [h]ere, with respect to plaintiff's cause of action against the individual defendants pursuant to 42 USC § 1983, the complaint fails to state a cause of action insofar as it fails to allege any specific facts or identify the specific acts committed by the individual defendants which violate 42 USC § 1983. Indeed, the cause of action against these individual defendants is pled in the very conclusory fashion proscribed by law. As noted, above, when the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc.* at 401; *O'Riordan* at 800).

Thus, the foregoing federal claims were dismissed against Trozzi and Kreppel not because - as argued by plaintiff - "where claims are asserted against individual municipal employees in their official capacities, there must be proof of a municipal custom or policy in order to permit recovery" (*Vargas v City of New York*, 105 AD3d 834, 837 [2d Dept 2013]; *see Rosen & Bardunias v County of Westchester*, 228 AD2d 487, 488 [2d Dept 1996] ["An action against a government official in his official capacity is functionally

equivalent to an action against the municipality."]), but rather because the Court concluded that plaintiff failed to plead clear and concrete facts in support of that cause of action. However, while because, as here, where the claim pursuant to 42 USC § 1983 was dismissed against the City, no claim thereunder against Trozzi and Kreppel in their individual capacities can stand[2] (*Vargas* at 837; *Rosen & Bardunias* at 488), the claims pursuant to 42 USC § 1983 as asserted against Trozzi and Kreppel in their individual capacities should not have been dismissed. To be sure, a person has a private right of action under 42 USC § 1983 against an individual who, acting under color of law, violates federal constitutional or statutory rights (*Delgado v City of New York*, 86 AD3d 502, 511 [1st Dept 2011] ["A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute (42 USC § 1983) against that officer."]; *Morgan v City of New York*, 32 AD3d 912, 914-915 [2d Dept 2006] ["The complaint states a cause of action for violation of the decedent's Fourth Amendment rights pursuant to 42 USC § 1983, alleging both an unreasonable seizure and confinement of the person in the absence

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[2] While the Court concedes error in dismissing the claims against Trozzi and Kreppel pursuant to 42 USC § 1983 on grounds that the complaint was bereft of concrete facts to support the same, this does not avail plaintiff in restoring these claims to the extent asserted in Trozzi and Kreppel's official capacity. Indeed, to the foregoing extent, these claims fail insofar as the complaint fails to identify the requisite municipal custom and practice, such failure being fatal.

of probable cause."]). Here, to the extent that plaintiff does indeed premise his claims pursuant 42 USC § 1983 against Trozzi and Kreppel - in their individual capacities -on the tortious conduct alleged elsewhere in his complaint, namely, his false arrest, false imprisonment, and excessive force, which acts he attributes to Trozzi and Kreppel, the foregoing claims should stand and the Court erred in dismissing the same. It is hereby

ORDERED that plaintiff's state law claims for excessive force, *repondeat superior*, and punitive damages against Kreppel be restored. It is further

ORDERED that plaintiff's federal law claims pursuant to 42 USC § 1983 against Kreppel and Trozzi, to the extent asserted in their individual capacities, be restored. It is further

ORDERED that the plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : July 13, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.