

Daniels v City of New York

2015 NY Slip Op 32134(U)

October 5, 2015

Supreme Court, Bronx County

Docket Number: 300688/14

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 300688/14
Motion Cal. No. 9, 10, 11
Motion Date: 6/22/15

HOWARD DANIELS.,
Plaintiff(s),

-against-

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court,

CITY OF NEW OF NEW YORK, NEW YORK CITY
DEPARTMENT OF CORRECTION,
CORRECTION OFFICER "JANE" THOMPSON,
CORRECTION OFFICER "JOHN" MCCABE, Badge No 18930
CORRECTION OFFICER ABELARDO FERRER, Badge NO. 8256
CORRECTION OFFICER VICTOR DIAZ,
CORRECTION OFFICER "JOHN" MUNDY and
CORRECTION OFFICER "JOHN" THOMPSON, first
names "JANE" and "JOHN" being fictitious and unknown
at the present time
Defendant(s).

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affidavit in Support, Memorandum of Law and Exhibits Thereto.....	1
Defendant's Affidavit in Opposition and Exhibits.....	2

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Plaintiff moves this Court pursuant to C.P.L.R. 3215 for an Order granting plaintiff a default judgment against the individually named correction officer defendants.

Defendants C.O. Michael Macabe s/h/a C.O. "John" McCabe, C.O. Abelardo Ferer, C.O. Victor Diaz, C.O. Farad Mundy s/h/a C.O. "John" Mundy and C.P. Thurman Thomson s/h/a C.O. "John" Thompson, move this Court for and Order dismissing the plaintiffs complaint pursuant to C.P.L.R. 3211(a)(7), dismissing the state law claims as they should be heard in the Court of Claims

as dictated in New York Corrections Law 24. Dismissing the Section 1983 cause of action due to the plaintiff's failure to exhaust his administrative remedies as required under 1997e(a) of the Prison Litigation Reform Act; dismissing the assault and battery causes of action as they are time barred and dismissing pursuant to C.P.L.R. 3211(a)(8) for failure to effectuate service upon the defendants.

Plaintiff also moved pursuant to C.P.L.R. 3025 for an Order amending the caption and the summons and complaint and serving the same on the defendants.

For purpose of disposition all motions are consolidated and decided as follows:

Plaintiff commenced this action seeking damages for injuries allegedly sustained on November 20, 2012 as the result of an assault allegedly caused by the individual corrections officers herein while plaintiff was incarcerated at Otis Bantum Correctional Center, Rikers Island. The plaintiff commenced this action by filing the summons and complaint on February 28, 2014. Service of the summons and complaints occurred on March 3, 2014.

Plaintiff's motion for default judgment against the defendants named as Correction Officer "John" McCabe, "Officer "John" Mundy, Victor Diaz and Officer "John" Thompson is hereby denied as plaintiff has failed to properly effectuate service on these defendants. C.P.L.R. 308(b).

Service upon defendant Abelardo Ferrer was sufficient as, according to the uncontroverted affidavit of service, it was personally served. Notwithstanding, pursuant to C.P.L.R. 5015 defendant Ferrer has presented a reasonable excuse for the delay and meritorious defense as defendant Ferrer indicates that upon receipt of the summons and complaint he turned it over to his Union for representation which was subsequently denied. As such, the plaintiff's motion for a default judgment is also denied as to defendant Abelardo Ferrer.

As to defendants motion to dismiss: That portion of defendants motion which seeks to dismiss the complaint pursuant to C.P.L.R. §3211(a)(7) arguing that this matter should be heard in the New York State Court of Claims as dictated by New York Corrections Law 24 is denied. Pliar v. City of New York, 789 F. Supp. 2d 489 (S.D.N.Y. 2011). That portion of defendants motion which seeks to dismiss the assault and battery causes of action as time barred is denied. See, Gen Mun. Law 50-i.

A motion for leave to amend a pleading is committed to the sound discretion of the trial court (see Edenwald Contr. Co., Inc. v. City of New York, 60 N.Y.2d 957, 471 N.Y.S.2d 55, 459

N.E.2d 164). Generally, leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted (see CPLR 3025[b]; Inwood Tower, Inc. v. Fireman's Fund Ins. Co., 290 A.D.2d 252, 252-253, 735 N.Y.S.2d 762). However, “[w]here there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay” (Heller v. Louis Provenzano, Inc., 303 A.D.2d 20, 24, 756 N.Y.S.2d 26, quoting Jablonski v. County of Erie, 286 A.D.2d 927, 928, 730 N.Y.S.2d 626).

The December 16, 2014 stipulation in which the City and plaintiff stipulated that Correction Officer “Jane” Thompson is correctly named Correction Officer Chamiqua Thompson. As to the remaining defendants, plaintiff has failed to show due diligence in attempting to ascertain the name of the defendants by submitting the Freedom Of Information Law (FOIL) request in 2013.

On January 2, 2013, the plaintiff sought information through the FOIL request, to wit, the Injury to Inmate Report, the Accident/Incident Reports, Custody Transfer Records and Inmate Processing Records. Although the City of New York, responded on January 4, 2013 that a decision would be rendered on releasing said documents within 10 days, no such decision was forthcoming. On June 6, 2013, the plaintiff again sent a request with authorization which was responded to by the City on October 22, 2013. Absent from the plaintiff’s moving papers are the documents themselves, however, the letter does indicate that all documents except redacted information such as birth dates were provided. If in fact, the documents were not responsive to the plaintiff’s request, the plaintiff failed to exhaust the administrative remedy of appealing pursuant to New York State Public Officers Law, Section (4) as indicated in the letter.

Assuming arguendo, that the information requested was responsive, As noted above, the Summons and Complaint was filed on February 28, 2014 and improper service effectuated on March 3, 2014, after the October 22, 2013 response to the FOIL request. A motion for a default Judgment was made on October 27, 2014, in which the plaintiff continued to list some defendants as “John.” Plaintiff alleges that the necessary information was not provided until the December 4, 2014 affirmation in opposition to the default motion, in which the defendants attached letters declining representation by the City, the letters bearing their names and identifying information. However, the motion to Amend the Complaint was not made until January 5, 2015. Notably, by the time the plaintiff made the motion to amend the complaint, the statute of limitations had expired. As such,

the plaintiff's claims are time barred and the relation back doctrine does not apply. "Under CPLR 1024, due diligence 'requires that a plaintiff show that he made timely efforts to identify the correct party before the statute of limitations expired.'" Doe v. New York, 2015 W.L. 1221495 (internal citations omitted); Neil v. City of New York, 95 A.d3d 608, (1st Dept. 2012). The plaintiff has failed to show that he exercised due diligence. As such, the motion to amend is denied and the defendant's motion to dismiss is granted.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment pursuant to C.P.L.R. 3215 is denied in its entirety. It is further

ORDERED that defendants motion to dismiss is granted as to the individual defendants, C.O. Michael Macabe s/h/a C.O. "John" McCabe, C.O. Abelardo Ferer, C.O. Victor Diaz, C.O. Farad Mundy s/h/a C.O. "John" Mundy and C.P. Thurman Thomson s/h/a C.O. "John" Thompson only. It is further

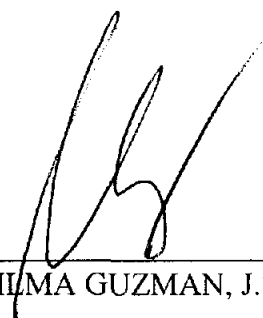
ORDERED that plaintiff's motion to amend is denied. It is further

ORDERED that the Clerk of the Court is directed to mark the Court file accordingly. It is further

ORDERED that the plaintiff serve a copy of Plaintiff is directed to this Order with Notice of Entry within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

10/5/15
DATE



HON. WILMA GUZMAN, J.S.C.