

Diaz v City of New York
2015 NY Slip Op 32942(U)
August 20, 2015
Supreme Court, New York County
Docket Number: 105003/09
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5**

-----X
JUAN CARLOS DIAZ,

Plaintiff (s),

-against-

THE CITY OF NEW YORK and POLICE OFFICER
"JOHN" LOOR,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 105003/09
Seq. No.: 001

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
Def's n/m, KH affirm, exhs.....	1
KJ affirm in opp.....	2
KH reply affirm.....	3

FILED

AUG 31 2015

**NEW YORK
COUNTY CLERK'S OFFICE**

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

This is a personal injury action which arises from plaintiff's arrest on August 16, 2008. Defendants City of New York (the "City") and P.O. EDER LOOR s/h/a "John" Loor move to dismiss plaintiff's third and fifth causes of action and portions of the second cause of action for failure to comply with GML § 50-e and/or in the alternative dismissing plaintiff's fourth cause of action to the extent that it alleges a Section 1983 claim or New York State Constitutional violation against an individual officer; and/or in the alternative dismissing plaintiff's fifth cause of action. Plaintiff opposes the motion. The motion is decided as follows.

Plaintiff's notice of claim asserts causes of action sounding in false arrest, assault and battery. Plaintiff's complaint asserts five causes of action: assault (first COA); false arrest and imprisonment (second COA); malicious prosecution (third COA), civil rights violations under

the United States and New York State Constitutions by the defendants (fourth COA); and intentional infliction of emotional distress (fifth COA).

Defendants argue that the false imprisonment portion of the second cause of action and the third and fifth causes of action must be dismissed based upon plaintiff's failure to timely file a notice of claim with respect thereto. Defendants further argue that plaintiff's fourth cause of action against the individual officer are improperly pled. In turn, plaintiff maintains that the notice of claim does not need to specifically mention the terms malicious prosecution, false imprisonment or intentional infliction of emotional distress. Plaintiff contends that defendants are precluded from relying on GML § 50-e because they did not assert such an affirmative defense in their answer. Finally, plaintiff points to the 50-h hearing held on January 15, 2009 where plaintiff testified about his arrest and court appearances, as well as his deposition testimony on August 12, 2009.

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]).

The filing of a notice of claim within 90 days after the claim arises is a condition precedent to maintaining a cause of action against a municipality pursuant to GML § 50-e. GML § 50-e is strictly construed and failure to comply with the timely notice of claim requirement mandates dismissal. GML § 50-e further provides that "[a]t any time after the service of a notice

of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner of time of service thereof, may be corrected, supplied or disregarded as the case may be, in the direction of the court, provided it shall appear that the other party was not prejudiced thereby.”

Here, plaintiff admits that the notice of claim does not contain the terms malicious prosecution, false imprisonment or intentional infliction of emotional distress. The failure to set forth the malicious prosecution or intentional infliction of emotion distress claims in the notice of claim is more than a mere mistake, omission or good faith defect. Since these claims are not contained in the notice of claim, plaintiff is precluded from suing to recover under such theories of liability. It is of no moment that defendants did not assert an affirmative defense based upon GML § 50-e or even that the City would not be prejudiced and/or had actual notice of the subject claims (*see i.e. Varsity Transit v. Board of Education*, 5 NY3d 532 [2005]). Accordingly, defendants' motion seeking to dismiss the portion of the third and fifth causes of action are granted.

The court disagrees with defendants as to the false imprisonment portion of the second cause of action because such a claim is concomitant with the false arrest claim (*see comments to PJI 3:5*). Accordingly, the branch of the motion seeking to dismiss portions of the second cause of action is denied.

Finally, defendants argue that the fourth cause of action is improperly pled since it fails to set forth the specific wrongdoing by any individual defendant or articulate what civil right was violated. The court rejects this argument as well. At this stage of the litigation, plaintiff has alleged sufficient facts to support the fourth cause of action. Plaintiff alleged being assaulted and

beaten without reason by Police Officer Loor and other members of the New York City Police Department. Accordingly, this branch of the motion to dismiss the fourth cause of action is also denied.

Conclusion

In accordance herewith, it is hereby

ORDERED that defendants' motion is granted only to the extent that the third and fifth causes of action are severed and dismissed; and it is further

ORDERED that the 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: August 20, 2015
New York, New York

So Ordered:



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

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