SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

COLEEN DOWELL

INDEX NO. 158752/12

MOT. DATE

- v -

MOT. SEQ. NO. 001 and 002

CITY OF NEW YORK et al.

The following papers, numbered 1 to ____ were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3

In motion sequence number 001, Defendants Daniel Tilman, Oscar Rosa and Andy Aguayo move to dismiss the complaint against them pursuant to CPLR § 3211[a][7]. Plaintiff opposes the motion to dismiss. In motion sequence number 002, plaintiff moves for an order granting her sixty days to serve the summons and verified complaint upon defendant Douglas Strong pursuant to CPLR § 306-b. Strong cross-moves to dismiss the complaint. Plaintiff opposes the cross-motion. The court's decision follows.

The following facts are alleged in the Verified Complaint. This action arises from an incident which allegedly occurred at the restaurant where plaintiff was waitressing at. On February 16, 2012, Tilman, Rosa and Aguayo and Strong were at the restaurant to celebrate Strong's birthday. They were all on-duty detectives at the time. At approximately 11:00 p.m., the restaurant owner, Jose Hernandez told plaintiff to sit down and eat and drink with Tilman, Rosa, Aguayo and Strong (collectively the "detectives"). Plaintiff sat with the detectives for at least an hour. Tilman, Rosa and Aguayo allegedly "boast[ed] to plaintiff about defendant Strong" and "encouraged both plaintiff and defendant Strong to drink alcohol." At approximately 12:00 a.m., the restaurant owner and Strong asked plaintiff to "come to the back of the restaurant." Tilman, Rosa and Aguayo "cheered at the restaurant owner's suggestion (that plaintiff go to the back of the restaurant."

Plaintiff thought she was going to a public area of the restaurant, but she was led to a room at or near the end of the hallway. Plaintiff had never seen this room before. The restaurant owner unlocked the door to the room, which "had a bed and the specific type of wine plaintiff had been drinking in it." Plaintiff "became afraid" but entered the room. The restaurant owner left the room shortly thereafter. Although plaintiff attempted to avoid Strong's advances, Strong began kissing and touching her. "Plaintiff lost consciousness during her protesting and was thus physically unable to communicate unwillingness to act." She was fully clothed at that time.

Dated: June 21, 2016

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

At approximately 3:00 a.m., plaintiff woke up naked to find the restaurant owner "touching and sexually assaulting her..." She got dressed and left the restaurant crying. Plaintiff alleges that "[e]ach of the detectives, through their words and actions, communicated to Hernandez that he would not be arrested, punished or otherwise interfered with."

Plaintiff thereafter went to the hospital and took a rape kit test which was commandeered by the NYPD's Internal Affairs Bureau ("IAB"). Plaintiff spoke to IAB detectives several times but does not know the results of the rape kit test or the IAB investigation. Upon information and belief, the detectives were placed on modified duty and two of them were ordered to go to a rehab program for alcohol abuse.

Plaintiff has asserted the following causes of action: [1] as against Strong, sexual assault and battery; [2] as against Tilman, Rosa and Aguayo, violation of 42 USC § 1983 – state created danger; and [3] as against Strong, violation of 42 USC § 1983 – state created danger. Plaintiff has brought a second action entitled *Dowell v. City of New York et al.*, Index Number 158752/12 (the "2012 Action"), under which Index Number 151517/15 (the "2015 Action") was consolidated pursuant to the decision/order of the Hon. Donna Mills dated December 25, 2015. The remaining claims in this consolidated action are not being challenged in either of the motions which are the subject of this decision.

DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

In motion sequence number 001, the movants argue that plaintiff's § 1983 claim against them is not viable because she has failed to allege a "legitimate governmental objective that was being pursued" by them. Movants argue that their alleged actions were purely private and therefore not under color of state law. The Due Process Clause provides, "[N]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It has been read "to guarantee more than fair process ... and to cover a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them" *Pena v.* DePrisco, 432 F3d 98 [2d Cir 2005] quoting *County of Sacramento v. Lewis*, 523 US 833, 840 (1998).

As plaintiff points out, *Pena*, *supra*, is factually on point. In that case, the Second Circuit found that off-duty and on-duty NYPD officers engaged in state-created danger when they drank with an off-duty officer and encouraged that officer to drink. That officer later killed three people while driving drunk. The Second Circuit reasoned that allegations that the officers assisted in creating or increasing the danger to a victim would implicate the victim's rights under the Due Process Clause (*Pena*, *supra* at 108). Of further concern to that court was the distinction between active and passive facilitation.

Here, in light of *Pena*, the court finds that plaintiff has alleged sufficient facts to support her claim that Tilman, Rosa and Aguayo actively facilitated the underlying incident by encouraging her to drink, cheering Strong and the restaurant owner's actions, and also to the extent that plaintiff alleges that Tilman, Rosa and Aguayo actively encouraged the restaurant owner to rape her. Accordingly, motion sequence number 001 is denied.

The court now turns to motion sequence number 002. Plaintiff commenced the 2012 Action on December 10, 2012, wherein she brought claims against Strong and the restaurant owner for, *inter alia*, assault, battery and false imprisonment, and against the City for negligent hiring, supervision and reten-

tion. Plaintiff also brought claims against the three then-unknown detectives, Tilman, Rosa and Aguayo. On May 2, 2014, the Hon. Kathryn Freed dismissed the case against Strong, without prejudice, for lack of personal jurisdiction due to improper service.

On February 13, 2015, plaintiff commenced the 2015 Action. On May 12, 2015, within the 120-day period within which to serve her verified complaint in the 2015 Action, plaintiff arranged for service by the same process server who had served Strong in the 2012 Action. On May 14, 2015, plaintiff's counsel mailed copies of her summons, verified complaint and notice of mandatory electronic filing to the process server for service on Strong. According to plaintiff's counsel, he "never got anything back 'return to sender,' so [he] assumed the mail got there." On June 4, 2015, plaintiff's counsel called the process server, because he had not yet received an affidavit of service. The process server told him Strong had been personally served and upon receipt of the affidavit of service, he filed it with the court.

On August 25, 2015, plaintiff's counsel spoke to Strong's attorney. Strong's attorney told plaintiff's counsel that Strong stated he had not received any papers. Plaintiff's counsel then looked at the affidavit of service and realized that it was the same affidavit that was filed in the 2012 Action. Plaintiff's counsel then immediately called the process server, who informed him that she had never received the summons and complaint in the 2015 Action and therefore never served Strong. According to the process server, "she thought [plaintiff's counsel] was asking for a copy of the old affidavit of service." Plaintiff filed motion sequence number 002 on September 2, 2015.

Strong's counsel argues that there is "no reasonable excuse for why Strong was never served ... in light of the prior errors and dismissals." Strong's counsel further maintains that it is irrelevant that he was "monitoring the prior action" by attending compliance conferences. Strong further maintains that fatal to plaintiff's application is her inability to demonstrate a meritorious claim.

The court finds that plaintiff's motion should be granted on the facts at bar. Plaintiff has demonstrated that her motion to extend the time for service should be granted in the interest of justice (CPLR § 306-b; *cf Pierce v. Village of Horseheads Police Department*, 107 AD3d 1354 [3d Dept 2013]). For the same reasons that the court has already stated with respect to the claims against Tilman, Rosa and Aguayo, the court finds that plaintiff does indeed state a meritorious claim against Strong. The court finds Strong's arguments that plaintiff is attempting to exaggerate her claims. At this stage of the litigation, plaintiff need only allege sufficient facts to state a cause of action necessary to establish a cognizable cause of action. Strong's attacks on plaintiff's credibility are improper at this juncture.

Further, the court finds that CPLR § 306-b relief is warranted since Strong will not be prejudiced in his defense of the underlying action since he was a party to the 2012 Action insofar as his counsel continued to "monitor" the status of the action, albeit in case the dismissal order was reversed. Moreover, Strong has not explained how his defense will be prejudiced by the late service beyond arguing that he will have to continue to pay for legal services, which is not a sufficient basis to find prejudice.

Therefore, plaintiff's motion is granted and defendant's motion to dismiss is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 001 is denied in its entirety; and it is further

ORDERED that in motion sequence number 002, plaintiff's motion to extend her time to serve the complaint upon Strong is extended to 60 days after notice of entry of this decision/order and defendant's cross-motion to dismiss is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: June 21, 2016
New York, New York

So Ordered:

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