Kalmenson v Williams
2016 NY Slip Op 31281(U)
July 5, 2016
Supreme Court, New York County
Docket Number: 159016/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

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STUART KALMENSON,

Plaintiff,

-against-

RAYMOND WILLIAMS, SHIELD #6627 and
OVIDIO ATILES, SHIELD #8192.

Defendants.

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DECISION/ORDER

Index No. 159016/2015
Mot. Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION, ATTY. AFF. IN SUPP. AND EXHIBITS ANNEXED	1, 2 (Exs. A-B)
AFF. IN OPP	4
ATTY. AFF. IN FURTHER SUPP	5

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant Ovidio Atiles moves, pre-answer, to dismiss the complaint against him on the grounds that it is barred by the applicable statutes of limitations and otherwise fails to state a cause of action. Plaintiff submits written opposition. Following oral argument, a review of the papers and relevant statutes and case law, the motion is **granted**.

Factual and Procedural Background:

Plaintiff alleges that, on August 31, 2012, his girlfriend suffered an alcoholic relapse.[1] Plaintiff called 911 and informed the dispatcher that his girlfriend was "having an alcohol related emergency, and she needed an ambulance to take her to the hospital." According to the complaint, "several minutes" later, defendants arrived at plaintiff's apartment. Plaintiff alleged that defendants were both EMTs employed by Continuum Health Partners, Inc. and St. Lukes/Roosevelt Hospital, neither of which was named as a defendant. Defendants initially refused to transport plaintiff's girlfriend to the hospital, and then told plaintiff that they would do so provided that he accompany her. Plaintiff refused to do so, telling defendants that he "did not need to go to the hospital." Defendants allegedly "then informed plaintiff that he was going to the hospital whether he wanted to or not" and, "as per the instructions give[n] by [d]efendants, the police officers then unlawfully handcuffed and arrested plaintiff, without probable cause or legal justification or any objective reason to believe defendant was a danger to himself or others." There is no indication in the complaint as to how or when the police officers arrived or how many of them there were. The "police officers then escorted [him] out of his apartment building in handcuffs in front of his neighbors," and defendants "transported [him] to Mount Sinai Hospital against his will."

Plaintiff commenced this action on August 31, 2015. There are six causes of action alleged although numbered one to seven, with the number five having been erroneously omitted from the sequence. The first, second and third causes of action, brought under 42 USC § 1983, allege that, while acting under color of state law, defendants violated plaintiff's First, Fourth and Fourteenth

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[1] For purposes of determining the instant motion, the facts are recited as alleged in the complaint and are accepted as true.

Amendment rights by causing him to be falsely arrested and imprisoned and for failing to intervene in same. The fourth cause of action is for negligence. There is no fifth cause of action. The sixth cause of action is for negligent infliction of emotional distress. The seventh cause of action is for violation of plaintiff's Fourth and Fourteenth Amendment rights.

Defendant Atiles now moves, pre-answer, to dismiss the complaint against him in its entirety on the grounds that the first, second and third causes of action fail to state a cause of action, and that the remaining causes of action are barred by the applicable statutes of limitations. Plaintiff opposes only the branch of the motion directed to the first three causes of action, and concedes that the remaining causes of action should be dismissed.

Positions of the Parties:

Atiles argues that this Court should reject plaintiff's opposition papers because they were untimely submitted and that the motion should be granted on default. He further claims that the first, second and third causes of action pursuant to 42 USC § 1983 must be dismissed because the complaint fails to adequately allege that he was acting under color of state law during the violations claimed. In response, plaintiff, primarily through the affirmation of his counsel, makes numerous factual allegations not appearing in the complaint and contends that there are sufficient facts to infer that defendants, despite being privately employed EMTs, were acting under color of state law for the purposes of liability for constitutional violations, citing to the public function doctrine and the joint participation doctrine.

Conclusions of Law:

Initially, since there is no indication that Atiles was prejudiced by plaintiff's untimely submission of opposition papers two days after they were due purusant to the parties' stipulation, this Court, in its discretion, will accept and consider the opposition to the motion. *See* CPLR 2004; 2214; *Bakare v Kakouras*, 110 AD3d 838, 839 (2d Dept 2013).

Turning to the merits, on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211, the complaint is afforded a liberal construction, the facts as alleged are accepted as true, the plaintiff is accorded "the benefit of every possible favorable inference," and the court's role is to determine only "whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see* CPLR 3026. It is axiomatic that civil liability pursuant to 42 USC § 1983 for violations of constitutional rights is predicated on the existence of state action. *See United States v Morrison*, 529 US 598, 624 (2000); *Sybalski v Independent Group Home Living Program, Inc.*, 546 F3d 255, 257-258 (2d Cir 2008). In order to establish state action where, as here, a "plaintiff [is] complaining that the actions of a nominally private entity violated h[is] constitutional rights[,the plaintiff must demonstrate] that there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Grogan v Blooming Grove Volunteer Ambulance Corps.*, 768 F3d 259, 264 (2d Cir 2014), *cert denied* 135 S Ct 1895 (2015) (internal quotation marks and citations omitted). To make such a demonstration, a plaintiff must, as relevant here, allege facts sufficient to pass muster under either the public function test or the joint participation test. *See Brentwood Academy v Tennessee Secondary Sch. Athletic Assoc.*, 531 US 288, 295-296 (2001).

Under the public function test, a plaintiff must demonstrate that defendants were engaged in

"'an activity that traditionally has been the exclusive, or near exclusive, function of the State or has been contracted out to a private entity.'" *Grogan v Blooming Grove Volunteer Ambulance Corps.*, 768 F3d at 264-265, quoting *Horvath v Westport Library Assn.*, 362 F3d 147, 151 (2d Cir2004); *see Flagg Bros., Inc. v Brooks*, 436 US 149, 157-158 (1978). Contrary to plaintiff's arguments addressed to the public function test, it has been conclusively held, in a comprehensive decision by the United States Court of Appeals for the Second Circuit, that the provision of emergency medical services is not a function traditionally associated with state sovereignty such that it qualifies under the test. *See Grogan v Blooming Grove Volunteer Ambulance Corps.*; 768 F3d at 267-268. Plaintiff has not alleged, as in *Synder v Albany Med. Ctr. Hosp.* (206 AD2d 816, 816 [3d Dept 1994]), that defendants had been given the power by the state to restrain him. Instead, he alleges only that police officers arrested him at defendants' direction.

Despite the factual assertions in the attorney affirmation in opposition to the motion, nothing in the complaint can be reasonably construed to support the conclusion that defendants, themselves, forcibly restrained plaintiff. Plaintiff has failed to alert this Court of any authority standing for the proposition that giving police officers "instructions" is equivalent to actually placing an individual under arrest for state action purposes. Most notably, apart from the ambiguous assertion that defendants gave police officers instructions, the complaint fails to allege how defendants had the authority to directly cause plaintiff to be arrested by giving the police officers such instructions. Further, unlike in *Rubenstein v Benedictine Hosp.* (790 F Supp 396 [ND NY 1992]), which concerned a hospital's ability to involuntarily commit individuals, this case concerns only an EMT's opinion that an individual's behavior made him a danger to himself or others. Thus, the complaint does not sufficiently set out facts sufficient to allow this Court to make an inference that the

defendants engaged in state action within the ambit of the public function test.

As for the joint participation test, it requires "pervasive entwinement of pubic institutions and public officials in [the] composition and workings" of a private entity such that its "nominally private character . . . is overborne." *Brentwood Academy v Tennessee Secondary Sch. Athletic Assn.*, 296 US at 298; *see Evans v Newton*, 382 US 296, 289-299 (1966); *Grogan v Blooming Grove Volunteer Ambulance Corps.*, 768 F3d at 268; *Tancredi v Metro. Life Ins. Co.*, 378 F3d 220, 229-230 (2d Cir 2004); *Horvath v Westport Library Assn.*, 362 F3d 147, 153-154 (2d Cir 2004). The entwinement contemplated by this test concerns not merely a single act, but the relationship between the entity and the State on an institutional level and, specifically, the degree of State control over matters such as management and personnel decisions. *See Lebron v Natl. R.R. Passenger Corp.*, 513 US 374, 400 (1999); *Grogan v Blooming Grove Volunteer Ambulance Corps.*, 768 F3d at 268-269; *Horvath v Westport Library Assn.*, 362 F3d at 151-154. Here, the complaint does not allege any amount of State involvement in the actions of defendants' employers, Continuum Health Partners, Inc. and "St. Lukes/Roosevelt Hospital." There is nothing alleged in the complaint to give this Court any basis on which to infer that there is any State control whatsoever over the management of their activities. The complaint states that Continuum Health Partners, Inc. "was a non-profit hospital system that operates medical facilities and ambulance services." The allegation that defendants and police were both involved in a single event does not, without more, transform Atiles into a state actor. Thus, this Court must conclude that plaintiff failed to demonstrate that Atiles was a state actor or engaged in state action within the meaning of 42 USC § 1983. The first three causes of action must thus be dismissed along with the remainder of the complaint.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion is granted and the complaint against Atiles is dismissed in its entirety; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 5, 2016

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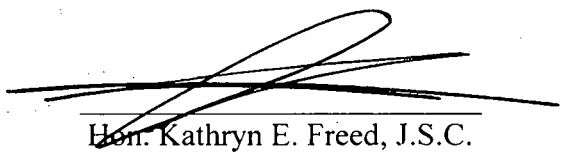

Hon. Kathryn E. Freed, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT