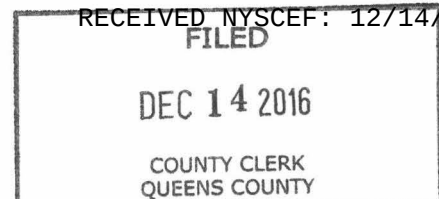


Neuman v Echevarria
2016 NY Slip Op 32622(U)
December 1, 2016
Supreme Court, Queens County
Docket Number: 703432/16
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Marvin Neuman,

Index
Number: 703432/16

Plaintiff,

- against -

Motion
Date: 11/16/16

David Echevarria and Richard Capuano,

Motion
Cal. Number: 108

Motion Seq. No.: 2

Defendants.
-----X

The following papers numbered 1 to 10 read on this motion by defendant, Richard Capuano, to dismiss.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... 1-4
Memorandum of Law in Opposition-Exhibit..... 5-7
Reply-Exhibit..... 8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Capuano to dismiss the action against him pursuant to CPLR 3211(a)1, 5 and 7 is denied.

This action stems from the seizure of plaintiff's parked motor vehicle on Queens Boulevard near 47th Street in Queens County on March 25, 2013 by defendant Capuano, a New York City Marshal, pursuant to a judgment and execution issued by the City for failure of plaintiff to pay outstanding parking violations under the City's Scofflaw Tow Program.

It is undisputed that plaintiff, while walking to his parked vehicle, encountered a tow truck in the process of towing his vehicle and Capuano with three other individuals sitting in an SUV supervising the towing. According to plaintiff, he approached Capuano and inquired why the vehicle was being towed and while the conversation was going on, the three other individuals exited the

SUV and struck plaintiff in the chest several times before returning to the SUV and leaving the scene with Capuano. Plaintiff then called 911 to report the assault, and approximately one hour later, a police officer who plaintiff identifies as defendant Sgt. Echevarria, arrived and refused to take any of plaintiff's information or even to talk to plaintiff, but instead radioed Capuano to ascertain his location and then left to meet Capuano. Subsequently, Echevarria returned to the scene and allegedly arrested plaintiff for obstruction of governmental administration. Plaintiff was allegedly released from custody the next day after his arraignment and the charges were dismissed.

On October 2, 2013, plaintiff commenced an action against the City, Echevarria, Capuano, the named individuals in the SUV who allegedly assaulted him, and other named and unnamed police officers who allegedly participated in plaintiff's detention, in federal District Court for the Eastern District of New York, alleging four claims under 42 U.S.C. §1983 and two claims under State law.

Claim one was against Echevarria and the other NYPD officers under §1983 for unreasonable search and seizure in violation of the Fourth Amendment.

Claim two was against Capuano under §1983 alleging merely that Capuano "conspired with Sergeant Echevarria to have plaintiff falsely arrested" and that he is liable under §1983 because he was acting under color of state law.

Claim three asserted a cause of action under §1983 against the City for his arrest by Echevarria and two other officers pursuant to an "unofficial policy" of the NYPD that encourages police officers to hinder complaints against law enforcement officers, including City Marshals, and to fabricate evidence against those who assert complaints of wrongdoing by law enforcement officers and Marshals.

Claim four asserted a cause of action under State common law for assault and battery against Capuano and the three other individuals in the SUV.

Claim five was a §1983 claim against Capuano and the three other individuals in the SUV for excessive force in violation of the Fourth Amendment.

Claim six was a claim of false arrest and imprisonment under State law against Echevarria and the various other NYPD personnel named in that action.

Capuano and the City moved separately for summary judgment dismissing all claims against them, which motions the District Court granted to the extent of dismissing plaintiff's §1983 claims. The District Court declined to exercise supplemental jurisdiction over plaintiff's State claims, however.

The District Court, pursuant to its decision and order issued on December 21, 2015 (13-CV-5466 [WFK][RER]), dismissed plaintiff's §1983 claims against Capuano and the three other persons with him in the SUV, which claims were for false arrest and excessive force, because the un rebutted evidence presented by Capuano was that he, as a City Marshal, did not have the power to arrest anyone in the course of his official duties and the three other individuals who plaintiff erroneously believed were Capuano's employees or agents were, in fact, employees of the private tow truck company that was hired to tow vehicles under the Scofflaw Program and, therefore, neither Capuano nor these others acted under color of state law, which is a requirement for a claim under 42 U.S.C. §1983 alleging false arrest. The District Court noted that a City Marshal may have arrest power only if he has received firearms training as a peace officer, but such was not the case with Capuano.

This Court notes that although the District Court did not specifically address plaintiff's second claim that Capuano conspired with Sgt. Echeverria to arrest him, this Court interprets the District Court's order dismissing plaintiff's §1983 claim for false arrest against Capuano upon the ground that he had no arrest power and therefore could not arrest anyone, falsely or otherwise, as also encompassing this claim alleging that he "conspired" with Echeverria to falsely arrest him.

With respect to plaintiff's §1983 claim against Capuano alleging excessive force, the un rebutted evidence presented was that Capuano did not participate in the alleged acts of force committed by the three other individuals, that these other individuals were not his employees and he did not acquiesce to any wrongdoing on their part and that, in any event, these individuals in fact did not use any force against plaintiff at all.

The District Court, however, declined to exercise supplemental jurisdiction over plaintiff's sole remaining claims against Capuano under state law.

Plaintiff subsequently commenced the present action on March 23, 2016 alleging a first cause of action against Echeverria under §1983 for unreasonable search and seizure by arresting plaintiff without a warrant, a second cause of action against Capuano for alleging that he conspired with Echeverria to have plaintiff

falsely arrested, and a third cause of action against Capuano alleging vicarious liability for the assaulting and battering of plaintiff by the others in the SUV who were employees or agents of Capuano.

Capuano moves for dismissal upon documentary evidence, pursuant to CPLR 3211(a)(1), that the action is barred by collateral estoppel, res judicata and the statute of limitations, pursuant to CPLR 3211(a)(5), and upon the ground that the complaint fails to state a cause of action, pursuant to CPLR 3211(a)(7).

Since the present action against Capuano alleges causes of action under New York law for false arrest and vicarious liability for assault and battery committed by his alleged employees or agents, and the District Court declined jurisdiction over such claims and only determined the federal claims under 42 U.S.C. §1983, neither res judicata nor collateral estoppel applies to bar the present action.

The "documentary evidence" that counsel contends his defense is founded upon under CPLR 3211(a)(1) is "the evidence produced as part of the Federal action [that] show[s] that the plaintiff was not assaulted". Counsel annexes this evidence to the moving papers consisting of a complaint letter of the Department of Investigation, excerpts from deposition transcripts and an affidavit from Capuano denying that the other individuals were his employees and that plaintiff was assaulted. These documents do not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1).

Counsel for Capuano also moves for dismissal under CPLR 3211(a)(5) upon the ground that since plaintiff's cause of action against Capuano arose on March 25, 2013, the action commenced against him on March 23, 2016, over two years later, is barred by the one year statute of limitations on actions against City marshals pursuant to CPLR 215(1). Counsel further argues that the provision of CPLR 205(a) affording a plaintiff an additional six months from the date a prior action was terminated to serve the defendant in a new action does not apply to the present case since the prior federal District Court action was terminated on the merits.

CPLR 205(a) provides, "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff...may commence a new action upon the same transaction or occurrence or series of

transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action and that service upon defendant is effected within such six-month period." Thus, a plaintiff will not have the benefit of the additional six-month period to commence a new action if dismissal of the prior action was on the merits. Capuano's counsel argues that this exception to CPLR 205(a) applies in the present matter because the dismissal was on the merits since plaintiff had a full and fair opportunity to litigate the same issues in the prior District Court case and, therefore, the dismissal of that case was *res judicata*. Since the dismissal of the federal action precludes the present action under *res judicata*, CPLR 205(a) also does not apply to the present action. Counsel's argument is without merit. As heretofore stated, the dismissal of plaintiff's federal Constitutional claims under §1983 in District Court was not preclusive of plaintiff's causes of action under New York common law, especially since the District Court declined jurisdiction over such causes of action and did not determine them, and, since the District Court did not reach plaintiff's state law causes of action, its declination to accept supplemental jurisdiction over those causes of action did not constitute a dismissal of those claims on the merits.

The Court record indicates that Capuano was served with the summons and complaint by substituted service upon a person of suitable age and discretion on April 29, 2016 and proof of said service was filed on May 9, 2016. Therefore, service of the summons and complaint upon Capuano was complete on May 19, 2016 (see CPLR 308[2]). Therefore, since Capuano was served within six months after the termination of the prior action on December 21, 2015, it is timely pursuant to CPLR 205(a).

Finally, there is no basis for dismissal under CPLR 3211(a)(7). The instant motion, which does not address the sufficiency of the pleadings but is based upon evidence annexed in the form of deposition transcripts and affidavits, is not properly one for dismissal for failure to state a cause of action under CPLR 3211(a)(7). A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) addresses merely the sufficiency of the pleadings. Unless a 3211(a)(7) motion is converted into a motion for summary judgment, pursuant to CPLR 3211[c], affidavits submitted in support of the motion are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v. Orofino Realty Co.*, 40 NY 2d 633 [1976]; *Hornstein v. Wolf*, 109 AD 2d 129 [2nd Dept 1985]), but may be received only for the limited purpose of remedying defects in the complaint, unless the affidavits conclusively establish that plaintiff has no cause of action (see *id.*). The affidavit of

Capuano and the deposition transcript excerpts annexed to the moving papers do not conclusively establish that plaintiff has no cause of action against Capuano.

Accordingly, the motion is denied.

Dated: December 1, 2016



KEVIN J. KERRIGAN, J.S.C.