Rattley v City of New York
2016 NY Slip Op 32746(U)
June 29, 2016
Supreme Court, Bronx County
Docket Number: 350148/10
Judge: Howard H. Sherman
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FILED Jul 11 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Patricia Rattley, Gary Tyler, Winston Smith, Jose Ortiz, Frances Rivera, Maritza Rivera, *individually and as mother and natural guardian of* Steven Medina, and George Rodriguez, Terrence Bostick , Jr., *an infant by his mother and natural guardian,* Antoinette Barkley,

Decision and Order

Plaintiffs

Index No.350148/10

-against-

The City of New York , P.O. Cruz, P.O. Alba, P.O. Soto, and "JOHN DOES" and "JANE DOES", *said names being fictitious and presently unknown*

Defendants

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The following papers numbered 1- 4 read on this motion by defendants for an order pursuant to CPLR 3215 (c) dismissing the amended verified complaint as abandoned , and pursuant to CPLR 3211(a)(7) dismissing the 42 U.S.C. 1983 claims and the negligence claims against the City for failure to state a cause of action and for an order precluding any testimony or documentary evidence regarding injuries asserted in plaintiff Rattley's supplemental bill of particulars and for an order extending the time in which to move for summary judgment

PAPERS	NUMBERED	
Notice of Motion -Affirmation - Exhs A-J	1	
Affirmation in Opposition - Exhs 1-49 /Memorandum of Law	2,3	
Affirmation in Reply - Exhibits K,L	4	

Procedural History

Plaintiffs commenced this action in March 10, 2010 alleging causes of action in excessive force, false arrest, negligent supervision, and with respect thereto violations of 42 USC § 1983 , as well as claims for negligent hiring , training and retention , and on

behalf of the infant plaintiff Terrence Bostick, Jr., a claim that he was within the zone of danger, having witnessed the beating of his father during the incident . In addition , plaintiffs seek punitive damages against the individual defendants.

Issue was joined in August 2010, and in January 2011, an amended answer was served on behalf of police officer defendants Juan Cruz (Cruz) , and Wilson D. Alba (Alba) . In pertinent part, the amended answer asserts that City of New York acknowledges that it employed the officers "who were acting within the scope of their employment ." [¶3]

By order of this court (Schachner, J.) dated May 27, 2011, plaintiffs' motion for leave to amend the complaint to assert causes of action in malicious prosecution on behalf of plaintiffs Patricia Rattlley (Rattley) , Winston Smith (Smith), Jose Ortiz (Ortiz), Steven Medina (Medina), George Rodriguez (Rodriguez), and Terrence Bostick, Sr. (Bostick, Sr.) was granted on default, and the amended complaint was deemed filed and served.

The Note of Issue was filed on August 28, 2013, and defendants moved to strike and to compel further discovery, including the depositions of plaintiffs Smith , Frances Rivera, Medina, Rodriguez, and the infant plaintiff Bostick, as well as the production of authorizations for treatment records, and the scheduling of IMEs. On December 19, 2013, the motion was withdrawn upon stipulated terms including the scheduling of

depositions, and the production of certain authorizations.

To the extent that defendants' motion is predicated on a challenge to the sufficiency of the pleadings, and the allegations of the respective bills of particulars, the amended verified complaint is set forth below in extensive detail, as are the bills of particulars.

The **first** cause of action entitled "Excessive Force and Violation of Civil Rights Under Federal and State Laws" alleges that the action arises under the first, fourth, fifth, and fourteenth amendments and the Civil Rights Act, Title 42, Section 1983 , as well as the state constitution , and that the acts of the defendants were not done as individuals , but "under the color and pretense of the statutes, ordinances, regulations, custom and usages of the State of New York , and under the authority of their office as police officers of said City and State." [2]

It is further alleged that plaintiffs were lawfully present at the location [13], and the defendant officers Cruz, Alba and Soto , and "John " and "Jane Doe", wantonly , intentionally , maliciously, relentlessly, illegally, and brutally assaulted , attacked , beat , kicked, struck with a deadly weapon and/or object , maced and battered the Plaintiffs " excepting the minor Bostwick , by reason of which they were injured [15-16], with these injuries caused "solely by reason of the carelessness, negligence, intentional infliction of emotional distress, abuse of process, excessive use of brutal force, and wrongful assault

and battery of on the part of defendants. . . . in violation of Plaintiff's Civil and Constitutional rights..." [17]

The **second** cause of action for false arrest reiterates the above allegations and asserts that plaintiffs were illegally arrested, detained , confined and imprisoned without any just or probable cause, and as a result caused to sustain serious injuries , and that these injuries " in violation of Plaintiff's Civil and Constitutional rights..."[37]

The **third** cause of action entitled negligent supervision under state and federal law alleges that the City of New York has "carelessly, negligently, wrongfully, wantonly , intentionally and maliciously established a rule, policy, practice and/or procedure whereby police officers in Bronx County are required to 'make their numbers' by reaching a certain level of arrests each reporting period [ ] " , and failing to do so would be 'subject to adverse employment actions , including loss of overtime opportunities or other benefits." [40]. It is further alleged that this practice "has led to abuses in predominately minority areas of the Bronx and has fostered discriminatory actions and racial profiling on the part of the defendants .....leading to the arrest of innocent people [ ] ", and "[t]hese pressures led the officers in this case to stop and frisk and then arrest Gary Taylor without just or probable cause [ ] " leading to the unlawful arrest of the co-plaintiffs [41].

The **fourth** cause of action , 42 U.S.C § 1983 asserts that the actions of the individual defendants were committed under the color and pretense of the statutes, ordinances, and regulations , custom and usages of the State and City of New York , and under the authority of their office as police officers.

The **fifth** cause of action for negligent hiring, training and retention alleges that the City of New York breached its duty "to select and screen for hiring for retention or discharge as employees those who are not fit " by virtue of vicious propensities or psychological traits as well as its duty to train and/or supervise its officers, and by virtue of these breaches, plaintiffs were caused to suffer injuries .

Bill of Particulars [10/22/10]

Plaintiff Rattley alleges that she sustained permanent physical and psychological injuries from the encounter with the defendant officers, including multiple blunt trauma and blows to the back, flank , abdomen and body with multiple contusions , and serious and severe aggravation/exacerbation of pre-existing spinal joint changes, and "severe and persistent pain in the back and body." [3]. It is asserted that these injuries are accompanied by restriction of motion , and severe pain and difficulty with prolonged sitting, standing, walking and bending, and the impairment of spinal integrity and exacerbation of any pre-existing changes .

Supplemental Bill of Particulars [10/18/13]

It is asserted that plaintiff sustained an incident-related herniated disc at L5-S1, and an osteoarthritic ridge at L4-L5, and spondylosithesis at L5 , and a fracture of the pars interarticulars of L5 , as well as an "avulsion fracture of the distal phalange of the thumb of the right hand."

Motion and Contentions of the Parties

Defendants now move for an order: 1) pursuant to CPLR 3215[c] dismissing as abandoned the amended complaint ; 2) pursuant to CPLR 3211 [a][7] dismissing a) the federal claims as insufficiently pled for failing to explicitly allege the violations of the enumerated rights of the plaintiffs committed by each individual defendant and/ or to allege with any factual detail the respective involvement of each in the incident , and/or allege for purposes of the claim as against the City of New York, a particular municipal pattern and practice pursuant to which plaintiffs' constitutional rights were allegedly violated (see, Monell v New York City Dept. of Social Servs., 436 US 658, 98 S Ct 2018, 56 L Ed 2d 611 [1978]), and b) the state claims of negligence asserted in the third and fifth causes of action as it is not here controverted that the defendant officers whose conduct is at issue , were at the time of the incident, acting within the scope of their employment; 3) to preclude plaintiff Rattley from offering evidence /testimony in support of the new injuries asserted in the 10/18/13 Supplemental Bill of Particulars , and 4) an extension of

time to move for dispositve relief. [1]

1) *CPLR 3215[c]*

Defendants never served an answer to the amended complaint, and it is their contention that the failure of plaintiffs to timely move for a default judgment requires that the amended complaint be dismissed as abandoned.

Plaintiffs argue that defendants have waived their right to move for dismissal since they have served answer and an amended answer to the original complaint, asserting several affirmative defenses, and have participated in extensive discovery, including the deposition of defendants and the named officers, as well as motion practice since the amended complaint was deemed timely served.

Alternatively, plaintiffs maintain that both prior and subsequent to the filing of the amended complaint , they have also engaged in extensive litigation of the subject claims, the latter period including two motions to compel discovery, and submission to examinations before trial, as well as participation in settlement conferences before the court, and the filing of the Note of Issue and the filing of opposition to the City's motion to strike the Note, and the resolution of that motion , and the supervision of the post-note discovery "so-ordered." It is argued that this conduct precludes any finding that plaintiffs have abandoned their amended complaint.

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[1]The parties have stipulated to the terms of such an extension.

In addition , plaintiffs maintain that the testimony of the plaintiffs , tendered as Exhibits 39-47 to the papers in opposition, demonstrates the merit of the claims that they were subjected to excessive force, malicious prosecution and other violations of their civil rights , and defendants have neither claimed nor established that they were prejudiced by the failure to timely move for relief pursuant to CPLR 3215 .

2. CPLR 3211[a][7]

a) 42 U.S.C. §1983 Claims

Defendants argue that the first, second, third, and fourth causes of action alleging federal claims must be dismissed as against the City of New York and the individual defendants because they have been inadequately pled, whether analyzed pursuant to the Federal Rules of Procedure (see, Fed.R.Civ.P. 8[a][2]; Ashcroft v. Iqbal, 556 U.S. 662, 678 , 129 S. Ct. 1937 [2009]), or the more stringent requirements of CPLR 3013 , which in pertinent part, provides that statements in a pleading "shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

It is maintained that the first and second causes of action lack the requisite specificity to sufficiently plead allegations of violations of enumerated constitutional rights of any of the ten plaintiffs as they impermissibly "lump [ ] all the officers together

collectively " without providing factual details concerning the individual involvement of each defendant in the violations alleged, while also failing to assert the existence of a municipal custom or practice to properly interpose a Monell claim against the City of New York.

Defendants argue that the third cause of action for negligent supervision must also be dismissed for failure to state a cause of action because the pleadings allege only conclusory assertions of a practice "to make numbers" that "led to abuse" that "foster[ed] discriminatory actions and racial profiling" without any factual underpinning of the existence of a municipal policy or of any nexus between such a practice and the incident of May 14, 2009.

Defendants argue that the fourth cause of action should also be dismissed as the pleading fails to identify the specific municipal practice or policy or to allege any specific wrongful act of any defendant officer.

Plaintiffs counter that the federal claims against the individual defendants asserted in the first and second causes of action sufficiently establish that the individual defendants , acting in their capacity as police officers, physically assaulted plaintiffs while they were lawfully on the premises , and effected their arrest/imprisonment without any just or probable cause , resulting in the deprivation of their rights. In addition, it is argued that the first cause of action specifically delineates the liability of

the City of New York that operated/maintained/managed /controlled a police department that employed such officers and failed to ensure that the officers conformed to a lawful standard of conduct .

Plaintiffs also maintain that the third cause of action sufficiently sets forth a Monell claim giving the City fair notice of a specific policy whereby officers were to " make their numbers" requiring a certain level of arrests or face adverse employment actions resulting in racial profiling leading to the arrests of innocent people , and for purposes of the fourth cause of action , this policy led the defendant officers to use excessive force and arrest plaintiffs without probable cause.

b) Negligence Claims

It is argued that the third cause of action alleging negligent supervision under state and federal law , and the fifth asserting a claim for negligent hiring , training and retention should be dismissed as predicated on the same claims for false arrest and malicious prosecution and, with respect to the fifth cause of action, on the further grounds that as asserted against the City, he claim does not lie as it is conceded that at the time of the underlying incident, the individual defendants were acting within the scope of their employment with the City of New York.

Plaintiffs argue that the negligence claims relate to the policy and specified practice and policy resulting in abuses in minority areas including the unlawful arrest of

plaintiffs, and the claim for negligent supervision was properly asserted as it is alleged that the City knew or should have known of its employees' propensity to engage in the causative culpable conduct .

3. Order of Preclusion

Defendants contend that all of the injuries asserted in the supplemental bill of particulars , which was served after the filing of the Note of Issue, and without leave of court, are new injuries that must be asserted by leave to amend. It is noted that plaintiff's non-specific testimony of back pain at her 02/18/11 deposition, prompted defense counsel to note on the record, that no specific injury to the back had been asserted [EBT: 79], and there is no reasonable excuse offered for the failure to move to amend the bill of particulars to assert this injury in the intervening two and one-half years. Defendants maintain that plaintiff should be precluded from producing evidence /testimony of the new injuries asserted .

Plaintiffs argue that Rattley's deposition testimony also references her ongoing chiropractic treatment and diagnosis [62-62], while the original bill of particulars incorporates allegations of both aggravation of pre-existing spinal changes and severe and persistent back pain, and the natural sequelae of the back injury, serving to preclude any finding that this is a "new" injury.

Discussion and Conclusions

CPLR 3215[c]

Upon consideration of the papers on submission and the applicable law, the court denies the motion to dismiss the amended complaint , the defendants having waived benefits of the rule in light of the extensive procedural history here (see, Myers v. Slutsky, 139 A.D.2d 709 ,527 NYS2d 464 [2d Dept. 1988]; HSBC USA v. Lugo, 127 A.D.3d 502, 9 N.Y.S.3d 6 [1st Dept. 2015]). Moreover , this protracted history would not support a finding that plaintiffs intended to abandon the action , nor that the defendants were prejudiced by plaintiffs' failure to seek as against them a default judgment on the amended complaint (see, Atlantic Mutual Ins.Co. v. Joyce International Inc., 31 A.D.3d 353 , 820 N.Y.S. 2d 12 [1st Dept. 2006]).

3211[a][7]

The established "sole" criteria for the court's consideration of a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7) , " 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 a motion for dismissal will fail (see Foley v D'Agostino, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:24, p 31; 4 Weinstein-Korn-Miller, NY Civ Prac,

par 3211.36). " Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 , 372 N.E.2d 17 [1977] To this end, the court is required to " liberally construe the complaint (see e.g. Leon v Martinez, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; CPLR 3026), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion (see Sokoloff v Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001] [collecting cases]; Wieder v Skala, 80 NY2d 628, 631, 609 N.E.2d 105, 593 N.Y.S.2d 752 [1992]) " , according plaintiff " the benefit of every possible favorable inference (see Sokoloff, 96 N.Y.2d at 414, 729 N.Y.S.2d 425, 754 N.E.2d 184). " 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152, 773 N.E.2d 496 [2002] ; see also, Toth v. New York City Dept. of Citywide Admin. Servs., 119 A.D.3d 431, 988 N.Y.S.2d 488 [1st Dept. 2014]). The question of ""[w]hether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (Philips S. Beach, LLC v ZC Specialty Ins. Co., 55 AD3d 493, 497, 867 NYS2d 386 [1st Dept 2008] [emphasis added], lv denied 12 NY3d 713, 910 NE2d 430, 882 NYS2d 682 [2009]). " African Diaspora Mar. Corp. v. Golden Gate Yacht Club, 109 A.D.3d 204, 211, 968 N.Y.S.2d 459 [1st Dept. 2009]

As noted, the criteria for assessment of the motion is not whether plaintiffs will ultimately prevail on their respective claim , but whether, they are "entitled to offer evidence to support the claims. " (Villager Pond v. Town of Darien, 56 F.3d 375, 378 [2d

Cir. 1995]).

a) Claims Under 42 USC § 1983

Individual Defendants

The court finds that the federal claim as asserted against the individual defendants in the first cause of action meets the requirements to clearly allege that conduct by police officers acting under the color of law exceeded the standard of objective reasonableness under the Fourth Amendment (see, Koeiman v City of New York, 36 AD3d 451, 453, 829 NYS2d 24 [1st Dept 2007], lv denied 8 NY3d 814, 870 NE2d 160, 838 NYS2d 840 [2007]; Pacheco v. City of New York , 104 A.D.3d 548,549,961 N.Y.S. 2d [1st Dept. 2013]) , thereby depriving the plaintiffs of rights, privileges and/or immunity guaranteed by the Constitution or the laws of the United States (see, DiPalma v. Phelan, 81 N.Y.2d 754, 756, 609 N.E. 131 [1992]) .

With respect to the second cause of action , it is settled that the elements of the state false arrest claim "are substantially the same" as the "parallel" federal claim , and "are evaluated in much the same way." Torres v. Jones, 26 N.Y.3d 742,762, 47 N.E. 3d 747 [2016] To establish a claim for false arrest under § 1983, "a plaintiff must show that the defendant intentionally confined him without his consent and without justification." Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir.2004) (internal quotation marks omitted); compare with Minott v. Duffy, 11 Civ. 1217(KPF), 2014 U.S. Dist. LEXIS 49791, at *28

(S.D .N.Y. Apr. 8, 2014) (identifying the four elements under New York law as "[i] the defendant intended to confine him, [ii] the plaintiff was conscious of the confinement, [iii] the plaintiff did not consent to the confinement and [iv] the confinement was not otherwise privileged" (internal quotation marks omitted) Where, as here, an arrest is made without a warrant, "a presumption arises that the plaintiff's arrest was unlawful." Jenkins v. City of New York, 478 F.3d 76, 88 (2d Cir.2007). Defendants can rebut this presumption by demonstrating that there was probable cause for the arrest (see, Jackson v. City of New York, 2014 U.S. Dist. LEXIS 34769, at 34 [E.D.N .Y. Mar. 17, 2014]

The court finds that plaintiffs have sufficiently pled a federal civil rights claim of a violation of a protected right as against the individual defendants in their official capacities devolving from an arrest and confinement without probable cause.

City of New York

The defendant municipality "cannot be held liable solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory. " (Monell v. Dept. of Social Servs. of City of New York, supra at 691; see also, Ramos v. City of New York, 285 A.D.2d 284, 301, 729 NYS2d 678 [1st Dept. 2011]) As such , the motion seeking dismissal of the fourth cause of action as predicated upon the conduct of the individual defendants should be granted.

For purposes of a viable federal claim against the City of New York , plaintiffs must allege that the "moving force" behind their constitutional injuries (see, Torres, supra., at 767 quoting Board of the County Comm'rs v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382 [1st Cir 2005]), was either : 1) an officially endorsed formal policy, or 2) actions taken or decisions made by officials responsible for making such policy that caused the alleged violation of plaintiffs' civil rights, or 3) a custom or "practices so persistent and widespread as to practically have the force of law [ ] " (Connick v Thompson, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 [2011], see also, Simpson v New York City Transit Authority, 112 AD2d 89, 91, 491 N.Y.S.2d 645 [1st Dept 1985], affd 66 NY2d 1010, 489 N.E.2d 1298, 499 N.Y.S.2d 396 [1985]) , or 4) a failure by official policy-makers to properly train or supervise subordinates to such an extent that it "amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact (see, Moray v. City of Yonkers, 924 F.Supp. 8, 12 [S.D.N.Y. 1996] City of Canton v. Harris, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 [1989] ; Torres v. Jones, supra at 767).

While " there is no heightened pleading requirement for complaints alleging municipal liability under 42 U.S.C.S. § 1983, a complaint does not suffice if it tenders naked assertions devoid of further factual enhancement [ ] , [and] to survive a motion to dismiss, a plaintiff cannot merely allege the existence of a municipal policy or custom,

but must allege facts tending to support, at least circumstantially, an inference that such a municipal policy or custom exists. " Triano v. Town of Harrison, 895 F. Supp. 2d 526, [S.D.N.Y. 2012]

The third cause of action , while denominated one for negligent supervision[2], asserts a Monell claim not as predicated on the "deliberate indifference" category above, but based on the third, an identified custom of which constructive knowledge can be implied whereby police officers in Bronx county were required 'to make their numbers' by reaching a certain level of arrests each reporting period" and were "subject to adverse actions " if they did not, a practice that it is further alleged culminated in subjecting plaintiffs to denials of their constitutional rights.

As afforded all favorable inferences, the court finds that the pleadings sufficiently allege facts supporting a plausible inference that the constitutional violations alleged took place pursuant to a specific municipal practice of borough-wide arrest quotas.

As noted, the criteria for assessment of the motion is not whether plaintiffs will ultimately prevail on their respective claim , but whether, they are "entitled to offer evidence to support the claims. " (Villager Pond v. Town of Darien, 56 F.3d 375, 378 [2d Cir. 1995]).

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[2] To the extent this cause of action asserts a negligence claim, it is also considered under the topic that follows.

b) *Negligence Claims*

As the City of New York concedes that the defendant police officers were acting within the scope of their employment at the time of the incident, that branch of the motion seeking the dismissal of the claims of negligent supervision and negligent hiring/training/retention as asserted in the third and fifth causes of action , should be granted (see, Karoon v. New York City Transit Auth., 241 A.D.2d 323, 659 N.Y.S.2d 27 [1st Dept. 1997]; Talavera v. Arbit, 18 A.D.3d 738, 795 N.Y.S.2d 708 [2d Dept. 2005]; Delgado v. City of New York, 86 A.D.3d 502, 928 N.Y.S.2d 487 [1st Dept. 2011]; Medina v. City of New York, 102 A.D.3d 101, 953 N.Y.S.2d 43 [1st Dept. 2012]; compare, Timothy Mc. v. Beacon City Sch. Dist., 127 A.D.3d 826, 7 N.Y.S.3d 348 [2d Dept. 2015]).

3 *Order of Preclusion*

Upon consideration of the bills of particulars, it is clear that the original injuries alleged by Rattley include the aggravation / exacerbation of pre-existing spinal changes . The findings of the diagnostic studies of the lumbar spine that comprise the supplemental bill serve in some measure to confirm the existence of degenerative disease. The extent to which the positive findings represent pre-existing changes , and the issue of whether these disc changes were exacerbated by the incident are matters to be determined by the triers of fact upon consideration of the testimony of the medical

experts.

However, it is also clear that the injury described as an avulsion fracture of the distal phalange of the thumb of the right hand was never asserted previously, nor have plaintiffs sought leave to amend the bill of particulars to allege this injury.

Accordingly , that branch of the motion seeking to preclude testimony/evidence is granted solely with respect to this new injury .

Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of dismissing the negligent supervision claim asserted against the City of New York in the third cause of action , and the fourth and fifth causes of action asserted here, and it is further

ORDERED that plaintiff Patricia Rattley be and hereby is precluded from offering evidence with respect to the injury alleged in the supplemental verified bill of particulars as an "avulsion fracture of the distal phalange of the thumb of the right hand", and the motion is in all other respects, is denied .

This shall constitute the decision and order of this court

Dated: June 29, 2016

Howard H. Sherman