

Hilario v City of New York
2017 NY Slip Op 31812(U)
August 28, 2017
Supreme Court, New York County
Docket Number: 162144/2014
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

LUIS HILARIO,

Plaintiff,

- against -

DECISION & ORDER

Index No. 162144/2014
Motion Seq. No. 002

THE CITY OF NEW YORK, POLICE OFFICER
VERDEJO Shield 14642 (HNMAN IRT) Individually and
in his Official Capacity; and, POLICE OFFICER SSA
EDWARD DEGIACOMO, Tax No. 922212 (HBMAN
IRT) Individually and in his Official Capacity,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

LUIS HILARIO,

Plaintiff,

- against -

Index No. 150494/2017

THE CITY OF NEW YORK, POLICE OFFICER
VERDEJO SHIELD 14642 (HBMAN IRT) Individually
and in his Official Capacity; and, POLICE OFFICER
EMERSON CHARLES SHIELD 25595 Individually and
in his Official Capacity; and, POLICE OFFICER SSA
EDWARD DEGIACOMO Tax No. 9222129 (HBMAN
IRT) Individually and in his Official Capacity,

Defendants.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion

	Papers Numbered
Notice of Motion	1
Answering Affidavits	2
Replying Affidavits	3

ALEXANDER M. TISCH, J:

Plaintiff Luis Hilario moves to consolidate his two New York County Supreme Court actions pursuant to CPLR § 602(a). Hilario's initial 2014 action names the City of New York ("City"), Police Officer Verdejo, and Police Officer DeGiacomo as defendants. Hilario's second 2017 action names City, Police Officer Verdejo, Police Office DeGiacomo, and Police Officer Charles as defendants. Defendants City, Verdejo, and DeGiacomo cross-move to dismiss the claims made against them in Hilario's second 2017 action pursuant to CPLR 3211(a)(4). For the reasons set forth below, City, Verdejo, and DiGiacomo's cross-motion is granted in regard to the 2017 claims of false arrest, malicious prosecution, and excessive force and is denied in regard to all other 2017 claims. Hilario's motion to consolidate the causes of action is granted.

Both of Hilario's actions arise from an alleged improper arrest and police misconduct that took place on March 3 and March 4 in 2014. Hilario filed a summons and complaint on December 9, 2014 claiming false imprisonment, malicious prosecution, assault, battery, and negligent hiring, retention and supervision against City, Officer Verdejo, and Officer DeGiacomo. He also alleged a violation of his civil rights under 42 U.S.C. § 1983 by City only. Hilario's second summons and complaint filed on January 12, 2017 consist of a claim under 42 U.S.C. § 1983 against Officer Charles and Officer Verdejo for false arrest, malicious prosecution, excessive use of force, failure to intervene, fabrication of evidence, and due process violations, a claim under 42 U.S.C. § 1983 against City for failure to train and municipal policy, and a claim under 42 U.S.C. § 1985 against Officer Charles, Officer Verdejo, and Officer DeGiacomo for conspiracy to deprive Hilario of his Constitutional rights. Hilario moved to consolidate the two actions on March 27, 2017. The defendants filed a cross-motion to dismiss April 4, 2017.

The Court will address City, Officer Verdejo, and Officer DeGiacomo's cross-motion to dismiss first. These defendants contend that Hilario's second causes of action against them should be dismissed because there is already a pending action between the same parties for the same cause of action stemming from the same underlying series of events.

Pursuant to CPLR 3211(a)(4), a party may move to dismiss a cause of action when there is another action pending between the same parties for the same cause of action. Dismissal pursuant to CPLR 3211(a)(4) is left to the discretion of the court. *See Cherico, Cherico & Assoc. v. Midollo*, 67 A.D.3d 622, 622 [2d Dep't 2009]. In order for dismissal to be appropriate, "the two actions must be "sufficiently similar" and the relief sought must be "the same or substantially the same."" *Montalvo v. Air Dock Sys.*, 37 A.D.3d 567 [2d Dep't 2007] (internal citations omitted). The "critical element" to weigh when determining whether to dismiss an action under CPLR 3211(a)(4) "is that both suits arise out of the same subject matter or series of alleged wrongs." *Cherico, Cherico & Assoc.* at 622.

All the defendants named in Hilario's first action are also named in his second action. The only difference is that Officer Charles is only named in the second action. That Officer Charles is also named in Hilario's second action does not automatically mean dismissal is not appropriate in this case. *See White Light Prods. v. On the Scene Prods.*, 231 A.D.2d 90, 94 [1st Dep't 1997] ("The presence of additional parties, however, will not necessarily defeat a motion pursuant to CPLR 3211(a)(4) where, as here, both suits arise out of the same subject matter or series of alleged wrongs") (internal citations omitted). Because both actions are based on the same events and arise from the same subject matter, dismissal under CPLR 3211(a)(4) is still permissible.

Three of the six allegations against City, Verdejo, and DiGiacomo in Hilario's 2017

action repeat allegations previously made in his 2014 action. Although the 2017 action also alleges violations of Hilario's federal Constitutional rights and the 2014 action just alleges violations of his state-protected rights, both actions allege false arrest, malicious prosecution, and excessive use of force, among other claims. Hilario's two claims are sufficiently similar to warrant dismissal of Hilario's later-filed 2017 claim of false arrest, malicious prosecution, and excessive use of force. Hilario, however, raises new allegations of failure to intervene, fabrication of evidence, and due process violations that were not addressed in his initial 2014 action. Those claims involve different causes of action that are not sufficiently similar to the allegations made in his 2014 action. Therefore, City, Verdejo, and DiGiacomo's cross-motion to dismiss is granted solely to the allegations of false arrest, malicious prosecution, and excessive use of force in Hilario's 2017 action but denied for the allegations of failure to intervene, fabrication of evidence, and due process violations.

As for Hilario's motion to consolidate, under CPLR § 602(a), the court may consolidate actions involving a common question of law or fact. The choice to consolidate actions is at the discretion of the court. *See Geneva Temps, Inc. v. New World Communities, Inc.*, 24 A.D.3d 332, 333 [1st Dep't 2005]. Although it is discretionary, consolidation is favored by the court when doing so would "serv[e] the interests of justice and judicial economy." *Zupich v. Flushing Hosp. & Med. Ctr.*, 156 A.D.2d 677, 442 [2d Dep't 1989]. *See also Gutman v. Klein*, 26 A.D.3d 464, 465 [2d Dep't 2006] (holding that consolidation was appropriate when it would "avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts"). Consolidation also is appropriate when it would prevent the court from reaching inconsistent decisions on the same question of fact. *See Gutman* at 465. When there is a common question of law or fact, a motion

to consolidate actions should be granted unless a party opposing the motion can prove prejudice to a substantial right. *Kally v. Mount Sinai Hosp.*, 44 A.D.3d 1010 [2d Dep't 2007].

Because Hilario's actions both arise from the same series of events that occurred on March 3 and March 4 of 2014, the actions rest on a common question of fact. Hilario would have to prove the existence of the same events at trial for each action if they were not consolidated. Both of Hilario's actions involve City, Verdejo, and DiGiacomo. Although Charles is an additional defendant named in Hilario's second action, Hilario would need to prove many of the same facts from the first action in his second action against Charles. Consolidating Hilario's two actions will conserve judicial resources, attorney fees for the parties, and other litigation costs. Consolidation will also prevent the court from reaching inconsistent decisions on the same question of fact. Defendants have also not alleged that consolidation would prejudice any of their substantial rights. Therefore, Hilario's motion to consolidate the causes of action is granted.

Accordingly, it is ORDERED that City, Verdejo, and DiGiacomo's cross-motion to dismiss is granted solely to the 2017 causes of action for false arrest, malicious prosecution, and excessive force and is denied as to the 2017 causes of action for failure to intervene, fabrication of evidence, and violations of due process. Hilario's motion to consolidate the remaining causes of action is granted and are consolidated under Index No. 162144/2014.

This constitutes the decision and order of the Court.

Dated: August 28, 2017
New York, New York



Alexander M. Tisch, J.S.C.

HON. ALEXANDER M. TISCH