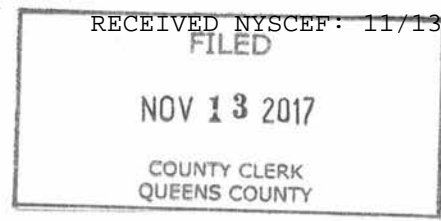


<b>Ben-Jacob v City of New York</b>
2017 NY Slip Op 32671(U)
November 6, 2017
Supreme Court, Queens County
Docket Number: 700131/13
Judge: Kevin J. Kerrigan
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This opinion is uncorrected and not selected for official publication.



Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN  
Justice

Part 10

-----X  
Daniel Ben-Jacob,

Index  
Number: 700131/13

Plaintiff,

- against -

Motion  
Date: 10/23/17

City of New York, New York City Police  
Department, Avery Dean as the Administrator  
of the Estate of Terrance Dean, Police  
Officer Jane Done, in her individual and  
official capacity, et.al.,

Motion  
Cal. Number: 12  
Motion Seq. No.: 2

Defendants.  
-----X

The following papers numbered 1 to 14 read on this motion by  
defendants to dismiss and for summary judgment; and cross-motion by  
plaintiff for an order striking the defendants' answer and for an  
extension of time to file the note of issue.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation.....	5-7
Affirmation in Opposition.....	8-9
Affirmation in Opposition to Cross-Motion-Exhibit.....	10-12
Reply.....	13-14

Upon the foregoing papers it is ordered that the motion and  
cross-motion are decided as follows:

That branch of the motion by the City, on behalf of itself and  
the Jane Doe and John Doe police officer defendants to dismiss the  
complaint against the New York City Police Department, pursuant to  
CPLR 3211(a)(7), is granted, there being no opposition to this  
branch of the motion. Since the NYPD is not a distinct legal entity  
but merely a department, or agency, of the City, it is not a  
cognizable party.

Those branches of the motion to dismiss plaintiff's negligence causes of actions against the City and Doe defendants, to wit, the third cause of action for failure to protect, the fourth cause of action alleging general negligence and the fifth cause of action for negligent hiring, retention and training, for failure to state a cause of action upon the ground that these causes of action were not set forth in the predicate notice of claim, and to dismiss the complaint against the Doe defendants upon the ground that plaintiff did not make any diligent efforts to ascertain the identities of the Doe defendants and to move to substitute the true names of these defendants in place of the Doe designations and to serve them, pursuant to CPLR 1024, are granted.

Plaintiff allegedly sustained psychological injuries on January 9, 2012 when an NYPD officer, Terrance Dean, who was one of the officers who responded to plaintiff's 911 call to report a possible break-in of an automobile in front of his home at 85-22 211<sup>th</sup> Street in Queens County, drew his sidearm after having an animated private conversation on his cell phone, pointed it at plaintiff and then turned it on himself and shot himself in the head, in plaintiff's presence, splattering plaintiff with brain matter and skull fragments.

Plaintiff served a notice of claim on March 20, 2012 upon the City, relating that "the claimant was harassed and assaulted by Respondents, their agents, servants and/or employees, including but not limited to Police Officer Terrance Dean, who, without legal cause or justification and while acting in the course of his employment and under color of law when responding to a 911 call placed by Claimant, pointed his service weapon at Claimant and threatened him with deadly physical force, in the presence of another police officer, causing Claimant imminent fear and apprehension for his life and safety. Police Officer Terance Dean then turned the weapon to his own head and shot himself in the head, killing himself in front of Claimant and causing blood and parts of his skull to come at Claimant's person, thereby further injuring Claimant".

Plaintiff thereafter commenced this action against the City, NYPD, the administrator of Dean's estate and a Jane Doe and two John Doe police officers, alleging causes of action against the estate of Dean for assault and battery, and, as against all defendants, a second cause of action for excessive force and deliberate indifference, a third cause of action against the City and Doe officers for failure of the Doe officers to protect plaintiff from Dean, knowing his suicidal tendencies, a fourth cause of action for negligence based upon the claim that the City knew of Dean's mental disability and failed to take the appropriate

actions of taking away his weapon and not allowing him to remain on duty dealing with the public and that such negligence caused plaintiff's injuries, a fifth cause of action against the City for negligent retention, training and supervision of Dean and the defendant Doe officers, a sixth cause of action against the City and NYPD for respondeat superior, and a seventh cause of action against the administrator of Dean's estate for negligent infliction of emotional distress.

Since the notice of claim annexed to the moving papers does not set forth any negligence claims but only claims that respondents harassed and assaulted him, intentional torts, they may not be asserted in the complaint, since a notice of claim setting forth his claims and the time, date and manner in which the claims arose is a condition precedent to commencement of an action (see General Municipal Law §§50-e, 50-i). In opposition, plaintiff's counsel contends that the copy of the notice of claim annexed to the moving papers is inaccurate and that the notice of claim served upon the City contained six additional paragraphs that set forth plaintiff's negligence claims. However, counsel fails to annex to his opposition a copy of the supposed correct notice of claim and thus has failed to demonstrate that his negligence causes of action against the City and its officers were set forth in his notice of claim. This Court notes that the City's counsel represents that no notice of claim in any form other than the one annexed to the moving papers was served upon the City.

Moreover, plaintiff did not make any reasonably diligent efforts to ascertain the identities of the Doe defendants prior to the expiration of the one year and 90-day statute of limitations. Indeed, to this day, plaintiff has not moved to amend the summons and complaint to substitute any named police officers in place and stead of the Doe designations.

That branch of the motion for summary judgment dismissing the remaining causes of action against the City is denied. The motion, having been made well in excess of 120 days after the note of issue was filed on October 27, 2016, is untimely and the City has failed to demonstrate good cause for leave to make a late motion for summary judgment (see CPLR 3212[a]).

Cross-motion by plaintiff to strike the City's answer or to preclude it from offering any evidence at trial, pursuant to CPLR 3126, is denied without prejudice and with leave to move again for said relief before the Justice of the Trial Scheduling Part-City in which this action is currently pending and has been adjourned to January 11, 2018.

Finally, plaintiff's alternative request for an extension of time to file a note of issue is denied. This Court is puzzled by counsel's request, since, as noted, he already filed a note of issue on October 27, 2016.

Accordingly, the third, fourth and fifth causes of action are dismissed, the action is dismissed in its entirety against the NYPD and the Doe defendants, and is denied in all other respects, and the cross-motion is denied. The caption of this action is amended to read as follows:

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Daniel Ben-Jacob,

Index  
Number: 700131/13

Plaintiff,

- against -

City of New York and Avery Dean as the  
Administrator of the Estate of  
Terrance Dean,

Defendants.

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Dated: November 6, 2017



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KEVIN J. KERRIGAN, J.S.C.

FILED  
NOV 13 2017  
COUNTY CLERK  
QUEENS COUNTY