

**Scollar v City of New York**

2017 NY Slip Op 32824(U)

January 26, 2017

Supreme Court, New York County

Docket Number: 155608/2014

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN
Justice

PART 52

Index Number : 155608/2014
SCOLLAR, ALLISON
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

MOTION DETERMINED PURSUANT TO ANNEXED DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/26/17

HON. MARGARET A. CHAN, J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: Part 52**

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INDEX NO. 155608/2014

**ALLISON SCOLLAR,**  
Plaintiff,

**DECISION and ORDER**

- v -

**CITY OF NEW YORK and  
REGINA DEBELLIS,**  
Defendants.

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**Margaret A. Chan, J.:**

This action stems from an acrimonious custody battle between plaintiff and her former girlfriend, who is also the biological mother of plaintiff's adopted child. Plaintiff was awarded custody of the child but not without challenges allegedly made by defendant Regina Debellis, a Sergeant with the New York City Police Department. Plaintiff seeks to recover personal and punitive damages on her claims of violations of her civil and constitutional rights violations under 42 U.S.C. §1983 and §1985 (first cause of action); abuse of process under New York State constitutional law (second cause of action); malicious prosecution (third cause of action); negligent infliction of emotional distress (fourth cause of action); negligence (fifth cause of action); and negligent training and supervision (sixth cause of action). Defendants, the City of New York and Sergeant Debellis (collectively, the City), move pursuant to CPLR § 3211 to dismiss the action. Plaintiff submitted opposition to which defendants replied. The decision and order is as follows:

Plaintiff states that during the custody dispute, her former girlfriend, Brook Altman, complained about her to the New York City Administration for Children's Services (ACS) raising safety concerns of their child when the child was in her custody. On September 20, 2012, a New York County Family Court Judge determined that the claims by Ms. Altman regarding the safety of child were unfounded and awarded plaintiff full custody. After she won custody, plaintiff claims that Sergeant Debellis attempted to interfere with plaintiff's custodial rights on several occasions, alleging that

- on May 6, 2013, Debellis lodged a false complaint against her to ACS claiming that the child was in imminent danger, which ACS investigated the next day and found the claim untrue;
- on May 8, 2013, Debellis entered plaintiff's home without permission or a warrant, and without an ACS representative;

- on May 14, 2013, Debellis, without reason or provocation, directly contacted the Family Court Judge on her custody case. At other times she also contacted the New York City District Attorney's office, and twice contacted the child's law guardian in an effort to reverse the custody determination;
- on May 15, 2013, Debellis made another complaint against her to ACS;
- on June 10 and 16, 2013, a group of police officers, without cause or a warrant, entered plaintiff's home in a threatening manner, with their hands on their holstered weapons, claiming to investigate claims of child endangerment.

The City argues that it is entitled to dismissal of the of abuse of process, malicious prosecution, and negligent training and supervision claims because plaintiff's notice of claim did not allege these theories of liability. It is well settled that "[c]auses of action for which a notice of claim is required which are not listed in plaintiff's original notice of claim may not be interposed" (*Scott v City of New York*, 40 AD3d 408, 409 [1st Dept 2007] quoting *Mazzilli v City of New York*, 154 AD2d 355, 357 [1989][internal quotations omitted]).

The notice of claim asserted "negligence, personal injury, emotional distress, civil assault, harassment, prima facie tort in connection with attempting to influence a judge regarding an unrelated civil court proceeding, and violation and deprivation of claimant's civil rights under 42 U.S.C. Sections 1983, and 1985" (City Mot, exh B). Plaintiff responds that her eight-page notice of claim was highly factual and provided sufficient notice of the claims later asserted in the complaint.

Plaintiff's eight-page notice of claim, however, did not contain allegations, either express or implied, supporting her claims for abuse of process, malicious prosecution, and negligent training and supervision. Indeed, neither the notice of claim nor the complaint provided factual allegations constituting the basic necessary elements of abuse of process and malicious prosecution.

The claim of abuse of process requires that defendants issue process, either civil or criminal (*see Bd. of Ed. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO*, 38 NY2d 397 [1975]), which was not alleged here. Similarly, the elements of the tort of malicious prosecution require the commencement or continuation of a criminal proceeding by the defendant against the plaintiff and the termination of that proceeding in plaintiff's favor (*Mendez v City of New York*, 137 AD3d 468, 471 [1st Dept 2016]). No criminal proceeding by the defendant against plaintiff was alleged here. As to the negligent training and supervision claim, plaintiff's conclusory allegations in the notice of claim were too vague to provide defendants adequate notice for a proper investigation (*see Phoenix Sound, Inc. v City of New York*, 19 AD3d 328, 329 [1st Dept 2005]).

It is noted that plaintiff did not move to serve a late notice of claim or amend the original notice of claim. Any such motion would be denied in any event. The one year and ninety-day statute of limitations for leave to file a late notice of claim has expired (*see* GML §50-e(5)) and a request to amend the notice of claim merely permits the correction of good faith, nonprejudicial, technical mistakes, defects or omissions, not substantive changes in the theory of liability (*see* GML §50-e(6)). As such, plaintiff's claims for abuse of process, malicious prosecution, and negligent training and supervision are dismissed.

Plaintiff argues that the claims for abuse of process, malicious prosecution, and negligent training and supervision were made pursuant to 42 U.S.C. § 1983, and thus, do not require a notice of claim. While alleged federal civil rights violations are not subject to the notice of claim requirements of General Municipal Law (*see* 42 USC § 1983; GML § 50-i), the allegations in the complaint are too vague and conclusory to plead a cognizable claim under 42 U.S.C. § 1983.

The first cause of action broadly states that Sergeant Debellis and other police officers violated plaintiff's "rights, privileges, and immunities secured by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, including, but not limited to the following: freedom from unreasonable searches; freedom from the lodging of false charges by the police; freedom from malicious prosecution without probable cause; [and] freedom from abuse of process" in violation of 42 U.S.C. §§ 1983 and 1985 (City Mot, exh A, ¶¶ 72-77). Notably, plaintiff does not assert that she was ever subject to a search by Sergeant Debellis or the other officers who appeared at her home.

Under 42 U.S.C. § 1983, a party may pursue a civil claim for damages and injunctive relief against any person who acts under color of state law to deprive that party of a constitutional right (*see* 42 USC §1983). A municipality is not liable under 42 U.S.C. § 1983 for an injury inflicted solely by its employees or agents (*see Monell v Dept. of Social Servs. of City of New York*, 436 US 658 [1978]). "A cause of action under 42 USC § 1983 exists where the evidence demonstrates that an individual has suffered a deprivation of rights as a result of an official policy or custom, and must be pleaded with specific allegations of fact" (*Leung v City of New York*, 216 AD2d 10, 11 [1<sup>st</sup> Dept 1995][internal citations omitted]). Here, the pleading failed to provide facts related to an official policy or custom that caused plaintiff to be denied of a constitution right (*see Monell v Dept. of Social Servs. of City of New York*, 436 US 658 [1978]). The bald pleading that plaintiff's civil and constitutional rights were violated by the municipality, without more specific facts, does not meet the pleading standard for these claims (*see Colon v City of New York*, 60 NY2d 78, [1983]; *Monell v Dept. of Social Servs. of City of New York*, 436 US 658; *Leung v City of New York*, 216 AD2d 10 [1<sup>st</sup> Dept, 1995]; *Carattini v Grinker*, 178 AD2d 307 [1<sup>st</sup> Dept, 1991]). Therefore, the portion of the first cause of action made pursuant to 42 U.S.C. § 1983 is dismissed as against the municipality.

As to plaintiff's 42 U.S.C. §1985 claim, plaintiff fails to allege any facts that there was an agreement or a conspiracy among Sergeant Debellis and any other person, as required to state §1985 claim for conspiracy to violate plaintiff's civil rights (*see* 42 USC §1985). Plaintiff's claim under 42 U.S.C. §1985 is also dismissed.

As to the claim for negligent infliction of emotional distress, this claim generally "must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Either a claim for intentional or negligent infliction of emotional distress must be supported by allegations of conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community (*id.* citing *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). Police officers repeatedly appearing at plaintiff's residence to investigate an allegation of child endangerment, whether or not it is founded, does not meet this high burden, even when, as plaintiff claims, the officers placed their hands on their holstered weapons while inside of plaintiff's home. As such, this claim is dismissed.

The remaining cause of action, general negligence, is not cognizable (*see Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]). Plaintiff alleges that Sergeant Debellis acted with "reckless disregard of the rights and safety of plaintiff" (City Mot, exh A at ¶ 108). At bottom, this is a claim for negligent investigation, which the First Department's recent decision in *Bouet v. City of New York*, 125 AD3d 539 (2015) made clear is not cognizable as a matter of law. The investigation of an incident is a governmental function, and therefore, the City of New York is not liable for failing to properly investigate it unless a special duty to plaintiff existed, in contrast to a general duty owed to the public (*id.*). Plaintiff here neither pleaded a special duty, nor did she argue that one existed. Therefore, this claim is dismissed.

Accordingly, defendants' motion is granted in its entirety and the action is dismissed. The clerk of the court is directed to dismiss the complaint and enter judgment in favor of the defendants.

This constitutes the decision and order of the court.

Dated: January 26, 2017

  
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Margaret A. Chan, J.S.C.