Chacko v City of White Plains
2017 NY Slip Op 32957(U)
November 28, 2017
Supreme Court, Westchester County
Docket Number: 51405/2015
Judge: Alan D. Scheinkman

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMPLIANCE PART

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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MATTHEW CHACKO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 51405/2015
Motion Seq. No. 3

CITY OF WHITE PLAINS, JOHN FITZSIMMONS, NATHAN SWIFT, PO ABBUZZESE, FRANK MADERA and JOHN DOE NO.1 - JOHN DOE NO.5,

Defendants.

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SCHEINKMAN, J.,

Plaintiff, Matthew Chacko, moves to reargue this Court's September 6, 2017 decision and order to the extent that it granted the motion by defendants, City of White Plains, John Fitzsimmons, Nathan Swift, PO Abbuzzese, Frank Madera (collectively, "City defendants") for judgment dismissing plaintiff's first count of the complaint pursuant to CPLR 3211(a)(7) and 3212 against the City of White Plains, and upon reargument, denying the City defendants' motion.

Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (CPLR 2221[d][2]; *Vaccariello v Meineke Car Care Ctr., Inc*, 136 AD3d 890 [2d Dept 2016]). A motion to reargue, however, shall not include any matters of fact not offered on the prior motion (CPLR 2221 [d] [2]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Mazino v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]; *McGill v Goldman*, 261 AD2d at 593-594).

In this matter, plaintiff has made the necessary showing to grant reargument. While the Court did not overlook or misapprehended matters of fact or law in determining the prior motion

on substantive grounds, the Court misconstrued plaintiff's counsel's affirmations as advising the Court that plaintiff was either withdrawing his claims against the City or not asserting certain claims against the City. However, a review of plaintiff's papers indicates that plaintiff did not intend to withdraw or abandon his state law claim against the City for assault and battery. Therefore, reargument is warranted under the circumstances.

Turning to the City defendants' motion to dismiss plaintiff's complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), plaintiff alleges in his complaint that on February 28, 2014, he was detained, arrested and taken into custody by the police officers. Paragraph "10" of the complaint alleged that the police officers were employed by the City of White Plains. Paragraph "11" of the complaint alleged that the police officers "were acting under color of law." Paragraph "19" of the complaint which followed after the heading "Count I: Assault and Battery" reads in boilerplate fashion that the City "is vicariously liable for acts of the individual defendants herein."

When dismissal is sought pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez,* 84 NY2d 83, 87 [1994]). However, plaintiff's bare legal conclusions are not presumed true (*Parola, Gross & Marino, P.C.*, 43 AD3d 1020 [2d Dept 2007]). Under New York state law, a municipality may be held vicariously liable on state law claims, such as assault and battery, asserted against individual officers under a theory of respondeat superior (*see Linson v City of New York*, 98 AD3d 1002, 1003 [2d Dept 2012]). Pursuant to the doctrine of respondeat superior, liability for an employee's tortious acts may be imputed to the employer when they were committed in furtherance of the employer's business and within the scope of employment (*Mayo v New York City Transit Authority*, 124 AD3d 606 [2d Dept 2015]).

Here, the City defendants are correct that plaintiff did not set forth the allegation in his complaint that the police officers were acting within the scope of their employment. But plaintiff is also correct that the City defendants failed to raise this argument in support of their motion to dismiss. While the City defendants generally argued that the complaint was "inarticulate" and that "plaintiff has not clearly stated whether he is stating his claim against the defendants in their official capacity as police officers or in their individual capacity,"[1] the City defendants did not advance this argument with respect to plaintiff's claim for assault and battery against the City. Indeed, the City defendants' argument is disengenuous in light of their inapposite contention that the appropriate amount of force was used by the officers to arrest plaintiff in accordance with the City's excessive force policy.

Even so, "[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed

[1]Svensson Affirmation in Support, paragraph 84.

by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Agai v Liberty Mut. Agency Corp.*, 118 AD3d 830, 832 [2d Dept 2014]). The evidentiary material submitted on this motion demonstrates that plaintiff may have a cause of action against the City for the officers' acts allegedly committed during the scope of their employment. Contrary to the City defendants' contentions, the City may be held vicariously liable under the state law claim for assault and battery purportedly committed by the officers (*Holland v City of Poughkeepsie*, 90 AD3d 841 [2d Dept 2011]). For the reasons more particularly set forth in this Court's September 6, 2017 decision and order, the determination of whether the actions of the police officers were reasonable at the time of the arrest and whether they used the appropriate amount of force in effectuating said arrest should be submitted to a jury (*see Woods v City of New York*, 29 AD2d 550 [2d Dept 1967]). Consequently, a determination as to the City's vicarious liability for assault and battery purportedly committed by the officers must also await trial.

Conclusion

The Court has considered the following papers in connection with this application:

Plaintiff's Notice of Motion - Affirmation in Support - Exhibits 1-3
Defendants' Affirmation in Opposition
Plaintiff's Affirmation in Reply

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that plaintiff's motion for reargument is granted, and upon reargument, the motion by defendants for summary judgment (sequence #1) is denied in its entirety and it is further

ORDERED the parties appear in the Settlement Conference Part, Courtroom 1600 on December 19, 2017 at 9:15 a.m. for a settlement conference.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 28, 2017

HON. ALAN D. SCHEINKMAN, JSC

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