

Lam v New York City
2018 NY Slip Op 30204(U)
February 2, 2018
Supreme Court, New York County
Docket Number: 158560/2016
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17**

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YUK YIN "LORETTA" LAM,

Plaintiff,

Index No.:158560/2016

-against-

**NEW YORK CITY, POLICE OFFICER JOHN DOE,
POLICE OFFICER JANE DOE, individually, and in their
capacity as members of the New York City Police
Department, INVESTIGATOR JASON MALONE,
INVESTIGATOR DAVID LEE, INVESTIGATOR KEITH
CHRISTENSEN, INVESTIGATOR PAT MCKENNA,
ASSISTANT DISTRICT ATTORNEY EDWARD
STARISHEVSJY, and ASSISTANT DISTRICT
ATTORNEY JULIETA LOZANO, individually, and in
their capacity as members of the New York County District
Attorney's Office,**

DECISION/ORDER

Defendants.
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HON. SHLOMO S. HAGLER, J.S.C.:

This action stems from the alleged actions of defendants New York City, Police Officer John Doe, Police Officer Jane Doe, individually and in their capacity as members of the New York City Police Department, Investigator Jason Malone ("Malone"), Investigator David Lee ("Lee"), Investigator Keith Christensen ("Christensen"), Investigator Pat McKenna ("McKenna"), Assistant District Attorney Edward Starishevsky ("ADA Starishevsky")¹, and Assistant District Attorney Julieta Lozano ("ADA Lozano"), individually, and in their capacity as members of the New York County District Attorney's Office ("DA"), in relation to the May 2012

¹ Plaintiff has incorrectly spelled Starishevjy's name in the caption; the correct spelling is Starishevsky.

indictment of Abacus Bank and certain of its loan department employees, including plaintiff Yuk Yin “Loretta” Lam. Plaintiff brought this action pursuant to 42 USC § 1983, and alleges that defendants “intentionally and willfully subjected Plaintiff to . . . false arrest, malicious prosecution, malicious abuse of process, and denial of a right to a fair trial.” Complaint, ¶ 2. Defendants Malone, Lee, Christensen, ADA Starishevsky and ADA Lozano (collectively, defendants), move, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing plaintiff’s complaint.²

BACKGROUND AND FACTUAL ALLEGATIONS

The relevant facts are as follows: plaintiff states that she moved to the United States from Hong Kong in 1992, and currently resides in Queens, New York. Plaintiff alleges that she speaks Cantonese and that she “cannot express herself fully in English.” *Id.*, ¶ 15. From 1992 until 2007, plaintiff was employed as a loan processor with Abacus Bank. She explains that she “had no client interaction and was involved solely in processing paperwork for loan applications.” *Id.*, ¶ 16.

In a pre-arrest indictment, allegations were presented to the grand jury that Abacus Bank and several of its loan department employees prepared residential mortgage loan documents containing false information. On May 25, 2012, after the grand jury’s vote, the Supreme Court of the State of New York issued arrest warrants for plaintiff and other defendants. Plaintiff’s arrest warrant charges plaintiff with “conspiracy 4th degree and other charges.” Defendants’ Exhibit “1” at 1. Plaintiff contends that the investigation was conducted by Malone, Lee,

² Defendants note that McKenna passed away in 2014, and that they cannot accept service on his behalf. Further, plaintiff has since stipulated to discontinue the action against New York City and has also removed defendants PO John Doe and PO Jane Doe from the caption.

Christensen, McKenna, Starishevsky and Lozano. She claims that, although one employee from Abacus Bank embezzled money and stole from its customers, the DA's office did not prosecute this individual. Instead, plaintiff and several other employees were indicted. She believes that the DA's office "bullied" Abacus Bank, which is a "small community bank servicing the Chinese community," to build a reputation as being "tough on 'white collar' crime." Complaint at 3.

According to plaintiff, Abacus Bank was an easier target for the DA's office than any large bank on Wall Street and "remains the only bank to be criminally prosecuted in New York following the financial crisis that began in 2008." *Id.*, ¶ 18. Plaintiff further claims that Abacus Bank was prosecuted, "despite its mortgages being paid at a significantly higher rate than industry standard." *Id.*, ¶ 19.

In any event, on the morning of May 31, 2012, "PO John Doe and PO Jane Doe" arrived at plaintiff's home, handcuffed her, and escorted her to the DA's office. Plaintiff states that she was humiliated when she was arrested on the street in front of her friends and family. Plaintiff alleges that she spent "several hours" at the DA's office and then was taken to court, where she was charged with grand larceny, conspiracy, mortgage fraud and falsifying business records. Plaintiff was released in the early morning of June 2, 2012.

On September 11, 2013, the Honorable Renee A. White issued a decision and order in response to several motions brought by plaintiff and the other defendants involved in the criminal charges. Judge White described the allegations, in relevant part:

"The allegations are that defendants stole money from Fannie Mae in that the defendants induced Fannie Mae to buy home mortgage loans based upon falsified information. In addition to paying to purchase the loans, the defendants realized additional profits in the form of fees and commissions Fannie Mae paid Abacus and in

turn, its employees, to service and maintain the mortgages. The evidence before the Grand Jury supports these allegations.”

Defendants’ Exhibit “2” at 5.

In pertinent part, after an in camera inspection of the grand jury minutes, Judge White found that they were “legally sufficient to establish the offense charges except as noted below. The People’s instructions to the Grand Jury were, likewise, sufficient and appropriate.” *Id.* at 2.³ The decision noted that “[t]he evidence before the Grand Jury established that Abacus and its employees engaged in a scheme over several years intended to generate profits it used to maintain the bank and pay its employees. Clearly there was no intent to return these funds. The loan department generated the most money for Abacus.” *Id.* at 6. As relevant to plaintiff, among other charges, Judge White reiterated that “[i]n sum, the Grand Larceny counts are supported by legally sufficient evidence.” *Id.* at 8.

On September 9, 2015, based on the recommendation of the DA’s office, the pending criminal charges against plaintiff were dismissed. Plaintiff states that, prior to the dismissal of the charges, plaintiff was prevented from traveling outside of the country and could not see her sick mother again prior to her mother’s death.

Plaintiff subsequently commenced this action pursuant to 42 USC § 1983, alleging that defendants, in their individual and official capacities, violated plaintiff’s civil, constitutional and

³ Counts five, six, seven, ten and eleven of the indictment were dismissed because they were based on documents prepared and filed prior to the statute of limitations period. *Id.* at 23. In relevant part, the counts of conspiracy in the 4th degree, falsifying business records and grand larceny were not dismissed.

statutory rights. In the first cause of action, plaintiff claims that defendants falsely arrested her.⁴

The second cause of action states that, in violation of the fourth and fourteenth amendments to the United States Constitution, defendants maliciously prosecuted plaintiff. In support of this cause of action, plaintiff alleges that, “[t]he malicious prosecution was initiated by defendants without legal justification and without probable cause, in that defendants caused the commencement and continuation of criminal proceedings against Plaintiff, the proceedings terminated in favor of Plaintiff, and in that the action was commenced and continued intentionally and with malice and deliberate indifference to Plaintiff’s rights.” Complaint, ¶ 43.

The third cause of action alleges that plaintiff “suffered from defendants’ malicious abuse of process.” *Id.*, ¶ 47. In the fourth cause of action, for conspiracy, plaintiff alleges that defendants conspired to maliciously prosecute plaintiff and deny her the right to a fair trial. Plaintiff’s fifth cause of action states that she was denied the right to a fair trial. In support of this contention, she alleges that “[d]efendants created false information likely to influence a jury’s decision and then forwarded that information to prosecutors, resulting in Plaintiff suffering a deprivation of liberty and a violation of her rights.” Complaint, ¶ 57.

Statute of Limitations and Sufficiency of Pleadings

In their motion, defendants provide several theories for why plaintiff’s claims must be dismissed. According to the complaint, plaintiff’s claims arise from the incident in May 2012, when she was falsely arrested and indicted. Defendants argue that, to the extent that the

⁴ In opposition to defendants’ motion, plaintiff withdrew her claims for false arrest and malicious abuse of process. This Court notes that plaintiff has since stipulated to discontinue the action against New York City. As a result, the sixth cause of action, grounded in respondeat superior, alleging that New York City was vicariously liable for defendants’ actions, was also withdrawn.

allegations are premised on the initial investigation and indictment, except for the malicious prosecution claim, the two remaining 42 USC § 1983 claims, for conspiracy and the denial of her right to a fair trial, are time-barred by the applicable three-year statute of limitations because plaintiff did not commence this action until October 11, 2016.

Plaintiff argues that her remaining 42 USC § 1983 claims for malicious prosecution, conspiracy and the denial of her right to a fair trial are not barred by the three-year statute of limitations, because she did not become aware of her injury until the criminal charges were dismissed in September 2015.

Among other arguments, defendants state that the remaining causes of action fail because plaintiff only recites the elements of a claim, and does not provide any factual allegations to support these claims. Similarly, defendants argue that plaintiff cannot support her claims because she does not differentiate between any of the defendants and does not provide any information as to how each defendant specifically and personally violated, or initiated a violation of, her civil rights.

The Eleventh Amendment and Absolute Immunity

Defendants argue that the Eleventh Amendment constitutionally bars those claims that are asserted against the defendants in their official capacities. Here, as the defendants were acting in their official capacities when deciding whether or not to initiate a prosecution, they may not be sued in their official capacities. In addition, state officials acting in their official capacities can only be sued for injunctive or prospective relief. In the present situation, defendants argue that plaintiff is seeking relief for actions that already took place, and is not alleging an ongoing injury.

Further, defendants argue that, as the remaining causes of action stem from the prosecutor's role in plaintiff's prosecution, absolute immunity bars those claims against defendants in their individual capacities. As prosecutorial immunity is broad, it covers the allegations in plaintiff's complaint, including the allegations that defendants engaged in misconduct, presented false evidence to the grand jury, or fabricated evidence. In addition to protecting DA Starishevsky and DA Lozano, defendants argue that a prosecutor's immunity may be extended to the remaining defendants, as they were acting at the direction of the prosecutors.

Plaintiff addresses the Eleventh Amendment and absolute immunity arguments in tandem, alleging that all defendants were performing investigatory functions, which are not shielded by the Eleventh Amendment or absolute immunity. She explains that no police officers were involved in her interview or investigation and that defendants performed these functions.⁵ Specifically, plaintiff states that Malone interviewed her and that DA Starishevsky and DA Lozano allegedly oversaw and assisted in these investigatory functions, which are not protected by absolute or Eleventh Amendment immunity.

Malicious Prosecution

In addition to arguing that the malicious prosecution claim is barred by the Eleventh Amendment and absolute immunity, defendants contend that probable cause also acts as a complete defense for this cause of action. Here, plaintiff's grand jury indictment creates a presumption of probable cause, and plaintiff has not plausibly shown any fraud or misconduct in

⁵ Plaintiff states that "[d]efendants acknowledged that no police officers were involved in this case whatsoever." Plaintiff's mem of law at 7.

connection to the indictment. They reiterate that plaintiff has not specified who created the false information and how or when it was provided to the prosecutors.

In opposition, although plaintiff concedes that the indictment creates a presumption of probable cause, she argues that this presumption is rebutted, because defendants “procured the indictment by presenting perjured testimony and false information to the Grand Jury.” Plaintiff’s mem of law at 10. She explains that defendants made false statements in the indictment and to the grand jury, and that defendants misled the grand jury with fraudulent testimony. For example, she claims that defendants “misled the Grand Jury with respect to the law of Grand Larceny falsely stating that Abacus employees, including Ms. Lam, were guilty of Grand Larceny, even though the Abacus loans in question were never in default, meaning Fannie Mae suffered no long-term financial loss.” *Id.* at 11.

Conspiracy

In addition to being immune from suit, defendants argue that plaintiff’s conspiracy claim must fail because she has not provided any factual support for this claim. For instance, plaintiff has not provided any details as to how, or why, all or some of defendants entered into an agreement to deprive her of her constitutional rights. Further, defendants allege that, as plaintiff’s conspiracy claim is asserted against employees of the same agency, each acting within the scope of his or her employment, the conspiracy claim is barred pursuant to the intra-corporate conspiracy doctrine.⁶

In opposition, plaintiff again alleges that the defendants conspired to prosecute Abacus as a way to bolster the reputation of the DA’s office and because Abacus was an easier target than

⁶ Plaintiff does not address this argument.

the larger banks. Further, she alleges that, after the 2008 financial crisis, Abacus was the only bank to be prosecuted, “despite its mortgages being paid at a significantly higher rate than industry standard.” Plaintiff’s mem of law at 12.

Denial of the Right to a Fair Trial

In addition to being immune from suit, defendants argue that plaintiff’s conclusory allegations cannot establish a claim for a denial of the right to a fair trial. According to defendants, plaintiff “fails to assert the manner, in what way, or to what effect or which ‘defendants,’ specifically, ‘created’ the false information or even when [sic] ‘false’ statement was passed on to the prosecutors.” Defendants’ mem of law at 22.

In response, plaintiff claims that she does allege the personal involvement of defendants. She states that, although Malone interviewed her, all of the named defendants “were involved in the investigation, creation of false evidence, and presentation of false evidence to the Grand Jury.” Plaintiff’s mem of law at 8. Plaintiff continues that her pleadings satisfy the lenient threshold required to defeat a motion to dismiss.

DISCUSSION

Dismissal

On a motion to dismiss pursuant to CPLR 3211, “the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference,” and the court must determine simply “whether the facts as alleged fit within any cognizable legal theory.” *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration.” *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013)

(internal quotation marks and citation omitted). “In assessing a motion under CPLR 3211 (a) (7), . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Leon v Martinez*, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted). “On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired.” *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016).

Statute of Limitations

“[C]auses of action pursuant to 42 USC § 1983 have a three-year statute of limitations.” *Id.* “A cause of action under 42 USC § 1983 accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action.” *Palmer v State of New York*, 57 AD3d 364, 364 (1st Dept 2008) (internal quotation marks and citation omitted).

42 USC § 1983 Malicious Prosecution

The statute of limitations for plaintiff’s malicious prosecution claim began to run when the charges were dismissed against plaintiff on September 9, 2015. *See e.g. id.* at 364-365 (internal quotation marks and citations omitted) (“Thus, the statute of limitations on claimant’s federal malicious prosecution claim began to run when the underlying criminal action [was] conclusively terminated, i.e., where an order dismissing the entire accusatory instrument against [him] . . . was entered”). As plaintiff commenced this action on October 11, 2016, this claim is timely.

To plead a viable malicious prosecution claim under 42 USC § 1983, plaintiff must demonstrate that her Fourth Amendment rights were violated and that she can establish the

elements of a malicious prosecution claim under New York law. *Manganiello v City of New York*, 612 F3d 149, 160-161 (2d Cir 2010). “The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice.” *De Lourdes Torres v Jones*, 26 NY3d 742, 760 (2016) (internal quotation marks and citations omitted). Here, “the presumption of probable cause [attaches to plaintiff’s] Grand jury indictment.” *Pang Hung Leung v City of New York*, 216 AD2d 10, 11 (1st Dept 1995). “That presumption may be rebutted only by evidence that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.” *Manganiello v City of New York*, 612 F3d at 162 (internal quotation marks and citations omitted).

In the instant situation, plaintiff argues that the presumption of probable cause has been rebutted because the defendants provided the grand jury with false information and perjured testimony. However, plaintiff cannot rebut the presumption of probable cause for her initial indictment and her arrest with only conclusory allegations. As noted in the facts, at plaintiff and the other defendants’ request, Judge White reviewed the grand jury minutes and found that the evidence submitted supported the initial indictment. Furthermore, the fact that plaintiff’s charges were dismissed does not negate the probable cause that attached to the grand jury indictment. *See e.g. Bertuglia v Shaffler*, 672 Fed Appx 96, 100 (2d Cir 2016), *cert denied* ___ US ___, 138 S Ct 78 (2017) (“the dismissals of the indictments due to legally insufficient evidence did not vitiate the presumption of probable cause created by the indictments”).

Regardless, even accepting plaintiff's allegations as true, absolute immunity would bar the claim for malicious prosecution asserted against the defendants in their individual capacities. "[A] prosecutor is entitled to absolute immunity for actions taken within the scope of his or her official duties in initiating and pursuing a criminal prosecution and in presenting the People's case." *Spinner v County of Nassau*, 103 AD3d 875, 877 (2d Dept 2013); see also *Parkinson v Cozzolino*, 238 F3d 145, 150 (2d Cir 2001) ("[A] prosecutor has absolute immunity against a claim for damages based on her performance of tasks as an advocate in the conduct of the prosecution").

Plaintiff attempts to distinguish defendants' actions as being outside the protection of absolute immunity, by alleging that all defendants interviewed her and performed investigatory functions. However, this argument is unavailing, as defendants' actions were directly related to the decision whether or not to prosecute plaintiff and are shielded by absolute immunity. See e.g. *Spinner v County of Nassau*, 103 AD3d at 877 (internal quotation marks and citations omitted) ("acts of [defendants] about which the plaintiff complains concerned investigation in the course of pretrial preparation and, thus, were intimately associated with the judicial phase of the criminal process, and were performed by [those defendants] in a quasi-judicial capacity"); compare *Burns v Reed*, 500 US 478, 496 (1991) (absolute immunity not extended to prosecutors for giving legal advice to the police).

Absolute immunity protects a prosecutor's decision to prosecute, even if that decision was motivated by bad faith. See e.g. *Dory v Ryan*, 25 F3d 81, 83 (2d Cir 1994) ("absolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate"). In her argument that the presumption

of probable cause is rebutted due to fraud, perjury or the suppression of evidence, plaintiff alleges that defendants “misled” the grand jury, made false statements to the grand jury and made false statements in the indictment, without specifying any individual. However, as relevant to the instant situation, absolute immunity protects a prosecutor from claims stemming from allegations that false information and testimony were knowingly presented to the grand jury. *See e.g. Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (internal quotation marks and citation omitted) (“A prosecutor is also entitled to absolute immunity despite allegations of his knowing use of perjured testimony and the deliberate withholding of exculpatory information”).

Although not all of the defendants are prosecutors, the remaining defendants were assisting DA Starishevsky and DA Lozano with initiating and pursuing the prosecution, and are similarly protected by absolute immunity. *See Hill v City of New York*, 45 F3d 653, 660 (2d Cir 1995) (internal quotation marks and citations omitted) (“Because absolute immunity is essential to protecting the integrity of the judicial process, it extends to those performing functions closely associated with that process. This includes not only officials performing discretionary acts of a judicial nature, but also individual employees who assist such an official and who act under that official’s direction in performing functions closely tied to the judicial process”). Accordingly, the cause of action alleging a violation of 42 USC § 1983 on the basis of malicious prosecution is dismissed against the defendants in their individual capacities, on the basis of absolute immunity.

Eleventh Amendment

Further, as set forth below, the cause of action for malicious prosecution asserted against the defendants in their official capacities is barred by the Eleventh Amendment. A person has a private right of action under 42 USC § 1983 “against a person who, under color of state law,

subjects, or causes to be subjected, [the citizen] to the deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws.” *Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health*, 11 NY3d 179, 186 (2008) (internal quotation marks and citation omitted). Defendants are sued herein in their official capacities. “To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state.” *Ying Jing Gan v City of New York*, 996 F2d 522, 529 (2d Cir 1993); see also *Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health*, 11 NY3d at 187 (internal quotation marks and citation omitted) (“under Eleventh Amendment sovereign immunity, neither a State nor its officials acting in their official capacities are persons under § 1983”). Although “[s]tate officials acting in their official capacities may . . . be sued for injunctive or prospective relief,” here, plaintiff’s claims are premised on defendant’s actions in connection to her arrest and indictment. *Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health*, 11 NY3d at 188. Accordingly, as plaintiff is not alleging an ongoing violation that would create an exemption to Eleventh Amendment immunity, the malicious prosecution claim alleged against defendants in their official capacities, is dismissed.

42 USC § 1983 Civil Conspiracy

“In civil conspiracies it is settled law that the statute of limitations commences to run upon the commission of the overt act causing damage.” *Afshar v Procon, Inc.*, 442 F Supp 887, 891 (SD NY 1977), *aff’d* 580 F2d 1044 (2d Cir 1978). To the extent that plaintiff’s conspiracy claim is based on her allegations that the defendants conspired to prosecute Abacus Bank in 2008, leading to her indictment in 2012, this claim is time-barred as being outside the three-year

statute of limitations. If, as plaintiff states, she was “unlawfully” caught up in the conspiracy leading to the prosecution of Abacus Bank, the last “overt act causing damage” would have occurred in May 2012, when plaintiff and the other defendants, including Abacus Bank, were indicted. As plaintiff did not commence her action until at least four years later, the cause of action for conspiracy is dismissed as time-barred.

“To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.” *Pangburn v Culbertson*, 200 F3d 65, 72 (2d Cir 1999). Even if the cause of action alleging a Section 1983 conspiracy was not dismissed as time-barred, it would be dismissed pursuant to CPLR 3211 (a) (7), because plaintiff has only presented conclusory allegations of a conspiracy. Specifically in connection to a motion to dismiss a Section 1983 claim, courts have found that “complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.” *Ciambriello v County of Nassau*, 292 F3d 307, 325 (2d Cir 2002) (internal quotation marks and citation omitted). Plaintiff’s theory that defendants conspired against her and Abacus Bank as a way to build their reputation and because Abacus was an easy target, is speculative and is inadequate to establish a cause of action for a Section 1983 conspiracy claim.

Furthermore, despite referencing Malone as the investigator who interviewed her, plaintiff does not differentiate among any of the defendants. She does not provide any

information detailing what the conspiracy agreement entailed or how defendants followed through. See e.g. *id.* (internal quotation marks and citations omitted) (Court dismissed Section 1983 conspiracy claim holding “conspiracy allegations are strictly conclusory. [Plaintiff] has not provided any details of time and place, and he has failed to specify in detail the factual basis necessary to enable [defendants] intelligently to prepare their defense”).

42 USC § 1983 Denial of the Constitutional Right to a Fair Trial

“A law enforcement officer denies a defendant a fair trial when he creates false information likely to influence a jury's decision and forwards that information to prosecutors.” *Bertuglia v Schaffler*, 672 Fed Appx at 101 (internal quotation marks and citation omitted). Plaintiff alleges that defendants created false information and passed it to prosecutors, who, in turn, used it in her indictment. For statute of limitations purposes, in a Sixth Amendment fair trial claim, “[t]he reference to knowledge of the injury does not suggest that the statute does not begin to run until the claimant has received judicial verification that the defendants’ acts were wrongful. Thus a fair trial claim premised on fabrication of evidence accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant some injury.” *Mitchell v Victoria Home*, 377 F Supp 2d 361, 373 (SD NY 2005) (internal quotation marks and citations omitted). As plaintiff’s claim is based on fabrication of evidence, plaintiff’s date of injury is when she was arrested and arraigned, not when the charges were dismissed.

Again, if, as plaintiff alleges, defendants created false information to use as a basis for her arrest and indictment, she would have realized her injury when she was arrested and arraigned. As this occurred in May 2012, the cause of action for denial of a right to a fair trial is dismissed

as time-barred. *See e.g. id.* at 374 (“Upon plaintiff’s arrest, her ... fair trial claim premised on fabrication of evidence accrued because plaintiff knew or should have known that the evidence was fabricated and that she had suffered some injury as a result”).

In any event, even if the cause of action was not time-barred, it would be dismissed as it is insufficiently pled. “A complaint is fatally defective on its face if it fails to allege that the defendants were directly and personally responsible for the purported unlawful conduct.” *Adams v Galletta*, 966 F Supp 210, 212 (SD NY 1997). In support of her contention that all of the defendants were personally involved, she provides only conclusory and broad allegations that all of the named defendants investigated, created false evidence and presented false evidence to the grand jury. Specifically in connection to the denial of a right to a fair trial claim, plaintiff claims that a false statement on her indictment was “obtained by all defendants acting in investigatory roles.” Plaintiff’s mem of law at 13. As plaintiff does not plead the personal and direct involvement of each individual plaintiff, defendants cannot be held liable for plaintiff’s 42 USC § 1983 claims, including the cause of action for denial of a right to a fair trial.

Moreover, as with the other causes of action, plaintiff’s cause of action for denial of a right to a fair trial pursuant to 42 USC § 1983 only recites the elements necessary to establish a claim, and would be dismissed as insufficiently pled. *See e.g. Pang Hung Leung v City of New York*, 216 AD2d at 11 (“Plaintiff’s broad and conclusory statements, coupled with his failure to allege facts of the alleged offending conduct, are insufficient to state a claim under section 1983”).

CONCLUSION


Accordingly, it is

ORDERED that the motion of defendants Investigator Jason Malone, Investigator David Lee, Investigator Keith Christensen, Assistant District Attorney Edward Starishevsky and Assistant District Attorney Julieta Lozano to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 2, 2018

ENTER:



J.S.C.
SHLOMO S. HAGLER, J.S.C.