

Colbert v City of New York

2018 NY Slip Op 34479(U)

November 6, 2018

Supreme Court, Bronx County

Docket Number: Index No. 0025861/2017E

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 33



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CHRISTOPHER COLBERT,

DECISION/ORDER

Plaintiffs,

Present:
HON. MITCHELL J. DANZIGER

-against-

Index No.: 25861/2017E

THE CITY OF NEW YORK, et. al.,

Respondent(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this MOTION TO DISMISS AND FOR PROTECTIVE ORDER, AND CROSS-MOTION TO AMEND AND TO COMPEL

Papers Numbered

Notice of Motion, Affirmation in Support with Exhibits.....	<u>1</u>
Notice of Cross-Motion, Affirmation in Support of Cross-Motion and in Opposition to Motion.....	<u>2</u>
Reply Affirmation in Support of Motion and in Opposition to Cross-Motion	<u>3</u>
Reply Affirmation in Support of Cross-Motion.....	<u>4</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Motion by defendants to dismiss plaintiff’s cause of action for negligent hiring, training, and retention is granted as plaintiff has no opposition to that portion of the motion.

The portion of the defendants’ motion seeking dismissal of plaintiff’s cause of action for malicious prosecution under CPLR 3211(a)(7), as improperly pled, is denied. Plaintiff’s cross-motion to amend the complaint to clarify his malicious prosecution claim is granted. While plaintiff was indicted by a Grand Jury, this Court is presented with evidence indicating that police may have withheld certain exculpatory information from the district attorney’s office during its prosecution of plaintiff’s underlying criminal case. The presumption of probable cause created by indictment by a Grand Jury may be, “overcome by evidence establishing that the police witnesses have not made a complete and full statement of facts to the district attorney, that they have misrepresented or falsified evidence, that they withheld evidence, or that they otherwise acted in bad faith (*Torres v. Jones*, 26 N.Y. 3d 742, 762 [2016], *Rivera v. City of New York*, 148 A.D.3d 462 [1st Dep.’t., 2017]).

While the statute of limitations on plaintiff's malicious prosecution claim has expired, the Court notes that no new claims or parties are being added to the case. Instead, plaintiff only seeks to amplify his allegations within the malicious prosecution claim. Motions to amend the pleadings should be freely granted absent surprise or prejudice to the opposing party (*McChashy, Davis and Associates Inc. v. New York City Health and Hosps. Corp.* 59 N.Y. 2d 755 (1983). Where the amendment seeks to clarify claims that have already been pled, the court has discretion to permit the amendment, absent prejudice to the defendant (*Bumbury v. City of New York*, 62 A.D.3d 621 [1st Dep't., 2009]). Prejudice requires some indication that the defendant has been hindered in the preparation of their case or has been prevented from taking some measure in support of their position (*McGhee v. Odell*, 96 A.D.3d 449 [1st Dep't. 2012]).

The Court finds no prejudice arises from permitting the amendment because defendants were previously presented with plaintiff's evidence indicating that potentially exculpatory information may have been withheld from the district attorney's office by police. Further, little discovery has taken place in this action to date as no preliminary conference has been held. Consequently, the supplemental summons and amended complaint submitted as exhibit 10 to the cross-motion is deemed served. Defendants shall serve an answer within 20 days of the service of this order with notice of entry.

Defendants also seek a protective order denying plaintiff's request for disciplinary records of the named officers in this case. Plaintiff cross-moves to compel the production of said records, or for defendants to submit said records to the Court for an in-camera inspection. The Court notes that all of plaintiff's federal claims have been withdrawn and therefore, the more limited standard of discovery applied by New York State applies here. However, the record suggests that officers within the 48th precinct may have withheld information from the district attorney's office during plaintiff's underlying criminal prosecution. This issue is compounded by the fact that it was discovered during plaintiff's criminal trial that the officers lost or destroyed their notes and memo books prior to the trial. Notwithstanding the above, whether evidence was withheld from the district attorney's office by police officers in plaintiff's underlying criminal case is the issue of fact that plaintiff is entitled to discovery on. At this point, the Court finds that plaintiff has failed to make a sufficient showing that the personnel files and disciplinary records of all named police officers

herein, are material and necessary to the prosecution of plaintiff's claims. Either the police withheld information from the district attorney's office in plaintiff's underlying criminal prosecution, or they did not. At this stage of the litigation at least, the police officers' prior disciplinary records have no bearing on what was done, or not done, during plaintiff's criminal prosecution.

Therefore, the Court directs that the parties should commence discovery, including deposing the parties named herein. At this time, the Court finds that defendants need not provide plaintiff with the named officer's prior disciplinary and personnel records. However, if through further discovery, plaintiff believes he can make a showing that such records are material and necessary to the prosecution of his state malicious prosecution case, than he may make any further application to the court, if so advised.

Plaintiff is directed to serve a copy of this order with notice of entry upon defendants within 30 days the entry date.

The above constitutes the decision and order of the Court.

Dated: 11/26/18
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.