

<b>Bostic v City of New York</b>
2019 NY Slip Op 30991(U)
April 2, 2019
Supreme Court, New York County
Docket Number: 156605/2016
Judge: Verna Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 5**

*Justice*

-----X INDEX NO. 156605/2016

MOHAMMED BOSTIC,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK, POLICE OFFICER JOHN/JANE  
DOE(S) #'S 1-5,  
Defendants.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

**LEAVE TO AMEND COMPLAINT**

Plaintiff commenced this action seeking to recover damages for false arrest; excessive force; cruel and unusual punishment; and malicious prosecution stemming from his arrest on May 16, 2015, at his home located at 2937 8<sup>th</sup> Avenue, Apt. 27CC, New York, N.Y. Plaintiff now moves the court pursuant to CPLR § 3025(b) for leave to amend and to serve the annexed amended complaint.

Specifically, plaintiff seeks to amend his complaint to name Police Officer Rafael Sanchez, whose identity was produced through discovery, in place of "Police Officer John/Jane Doe(s)."

Defendants, City of New York and Police Officer John/Jane Doe(s) #1-5 (collectively, "City"), oppose the motion as to plaintiff's remaining claims for excessive force; cruel and unusual punishment; assault and battery; negligent infliction of emotional distress; and respondeat superior<sup>1</sup> on various grounds arguing that the statute of limitations has expired on all causes of action; that the stipulation to stay the case did not toll the statute of limitations<sup>2</sup>; that Officer Sanchez was not a party to the stipulation staying the matter and cannot be bound by its terms; that plaintiff failed to demonstrate a diligent inquiry into the identities of the intended defendants before the expiration of the statute of limitations; and, that the relation back doctrine does not apply to the causes of action in this case.

The City, relying on General Municipal Law (GML) § 50-i(1) and 42 USC §1983,<sup>3</sup> argues that plaintiff's claims against Police Officer Rafael Sanchez for excessive force and cruel and usual punishment would be untimely because they accrued on the date of occurrence and subsequently expired on August 15, 2016 and May 16, 2018 (the state and federal claims, respectively). Further, the City argues that the stipulation to stay the case, annexed as *Exhibit B*, did not toll the statute of limitations because it was a voluntary agreement; that plaintiff failed to assert fraud, deception, or

<sup>1</sup> Plaintiff agreed to withdraw the false arrest and malicious prosecution claims, with prejudice, pursuant to a stipulation of partial discontinuance, dated February 22, 2018.

<sup>2</sup> On October 4, 2016, the parties stipulated to a stay of all aspects of the instant litigation pending the resolution of criminal charges against plaintiff under Case No. 01871-2015, New York Supreme Court, Criminal Term.

<sup>3</sup> GML § 50-i (1) and 42 USC §1983 establish that the statutes of limitations are one year and ninety days from the date of accrual and three years from the date of accrual for plaintiff's state and federal claims, respectively.

misrepresentation to defeat a statute of limitation defense; and, that Officer Rafael Sanchez is not bound by the stipulation because he was not a party to same.

In support of its motion, the City claims that plaintiff fails to establish that the City engaged in fraud, deception, or misrepresentation which is required to subvert the statute of limitations. (See CPLR § 204; *Towers Food Serv., v New York City Health and Hosps. Corp.* 153 AD3d [1st Dept 2017] and *Dailey v Mazel Stores, Inc.* 309 AD3d 661, 663 [1<sup>st</sup> Dept 2003]).

Additionally, the City maintains that the relation back doctrine is not applicable to the instant action. Specifically, the City contends that Officer Sanchez is not united in interest with the originally-named defendant as it pertains to the federal law claims because the City cannot be held vicariously liable for employee police officers' violations of 42 USC §1983 and that the potential indemnification of Officer Sanchez is a separate and distinct legal issue from whether unity of interest exists. The City further contends that plaintiff does not demonstrate that he mistakenly failed to include Officer Sanchez as a defendant and instead was only "unsure." Defendants claim that plaintiff had ample opportunity to obtain the officer's identity, i.e., by submitting a Freedom of Information Act [FOIL] request to the New York City Police Department or by obtaining the criminal court file and that Officer Sanchez could not have reasonably known that he would be sued in this lawsuit given the amount of time that has elapsed since the incident.

In opposition, plaintiff contends that the City will likely indemnify the officer and thus, Officer Sanchez and the City are united in interest. Plaintiff relies on GML § 50-k which provides that the City will indemnify its employee so long as the employee was acting within the scope of his employment. Plaintiff avers that if City is arguing that it is not obligated or will not indemnify Officer Sanchez, then the City is in essence taking a position that Officer Sanchez acted outside the scope of employment or took wrongful action and consequently, the City should not continue to represent both itself and the officer.

In addition, plaintiff contends that Officer Sanchez knew from the underlying events specifically, "an individual arrested in a violent and sudden apprehension," that it was likely for him to be sued and that it was unlikely for the plaintiff to be able to observe and remember the badge number and name, which appears in small font.

As to the City's argument concerning due diligence or failure of the plaintiff to submit a FOIL request or obtain the criminal court file, plaintiff asserts that given the open criminal proceeding, a FOIL request would have been futile as the City can deny the release of police records or information if it interferes with a law enforcement investigation or judicial proceeding; and that while due diligence can be shown as an alternative way to establish applicability of the relation back doctrine, it is not an additional requirement.

Finally, as it pertains to whether the stipulation to stay tolled the statute of limitations or applied to Police Officer Sanchez, plaintiff argues that Court should employ doctrines of equitable estoppel and implied agency authority to prevent the City from asserting the statute of limitation defense where the City waited 89 days (6 days after expiration of the federal statute of limitations) to provide Police Officer Sanchez's name and further, that agency authority has been inferred by the City's representation of Police Officer Sanchez, inclusive of the instant motion before the Court.

Pursuant to CPLR § 3025(b), the court has discretion to grant leave to amend pleadings at any time and such leave shall be freely given upon such terms as may be just. (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). Further, under CPLR § 203 when specific circumstances are present an amendment to a complaint may relate back to the date of the original complaint notwithstanding the statute of limitations. In *Brock v Bua* (83 AD2d 61 [2d Dept 1981]), the court created a three-prong test to determine when the relation back doctrine is applicable. (See also *Mondello v NY Blood Ctr.*, 80 NY2d 219 [1992]). Under this test, the court is to consider whether “both claims arose out of the same conduct, transaction, or occurrence; whether the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and whether the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well.” (*Mondello*, supra). All three elements must be met for the statutory relation back remedy to be operative. *Id.*

In the case at bar, it is undisputed that plaintiff’s claims are outside the statute of limitations and thus, plaintiff is seeking to amend pursuant to the relation back doctrine. It is also undisputed that plaintiff is seeking to add Police Officer Rafael Sanchez as he was the arresting officer and thus a proper party to the instant action. In dispute is whether the named defendant is united in interest with Police Officer Sanchez, whether Officer Sanchez knew or should have known action would be brought against him, and whether the City can assert a statute of limitations defense in light of the stipulation staying the action.

With regard to the stay, the stipulation did not toll the federal statute of limitations as it did not expressly include a stay of same. However, the court concurs with plaintiff that the failure of the City to timely comply with discovery demands should not bar plaintiff from amending the complaint. The stay was lifted on February 22, 2018, the City was to have provided Police Officer Sanchez’s name by April 27, 2018 in accordance with the case scheduling order and compliance conference order. The City failed to provide a response until May 22, 2018, weeks after the response was due and days after the May 16, 2018, federal claim expiration. Thus here, the stipulation does not bar plaintiff’s requested relief.

As to whether or not the City is united in interest with Police Officer Sanchez and whether Officer Sanchez knew or should have known he would be sued, the Court finds that defendants are united in interest and Officer Sanchez knew or should have known he would be sued. As plaintiff asserts, the City cannot on one hand ignore its likely indemnification of Officer Sanchez and its decision on the other to represent both parties. Unless the City is alleging that Officer Sanchez operated outside the scope of employment, there is a sufficient basis to deem the City and Officer Sanchez as united in interest. Further, the City’s contention that Officer Sanchez did not know or could not have known, due to lapse of time or otherwise, that he would be sued is flawed at best. The *sine qua non* of relation back is notice and as the caretaker of the records involved here the City has notice. Arrest, and in particular an arrest of a violent nature, along with the commencement of proceedings puts the City and consequently, proposed officers on notice to a potential suit. Upon receipt by the City of the Notice of Claim and the summons and complaint, it was aware of the date and location of the arrest. This is ample information for the City and proposed officers to ascertain that they may potentially be sued. The City, in its opposition, indicates that plaintiff could have obtained his own criminal court records to find the identity of the unnamed officers. However, it is

the same information (namely, the arrest records) that the City already had in its possession that constitutes notice to the City.

In addition, the City contends that the plaintiff failed to exercise due diligence, but a review of the records reveals facts to the contrary. Plaintiff exercised diligence when, despite an open criminal case against him, he made discovery demands in order to ascertain the identity of the involved officers. When the criminal action was completed, the plaintiff immediately made an effort to lift the stay and the onus was then on the City to timely comply with said discovery demands. As plaintiff rightfully contends in reply, the City's expectation that plaintiff should have filed a FOIL request was unreasonable given the City's right and practice to deny the information pending an open criminal proceeding. Further, the court finds that the City has not taken into the consideration the nature of the stay when establishing what would constitute due diligence in these circumstances. During such a stay, a plaintiff is reasonably consumed with defending his/her liberty in a criminal proceeding and to require more undermines the very purpose of such a stay.

Finally, if not for the failure of the City to comply with discovery demands and turn over the information which was always in its possession, custody, and control, plaintiff would have been able to amend the complaint prior to the expiration of the statute of limitations. Thus, to deny the application despite plaintiff's diligence being met with defendant's noncompliance would unjustly reward the City and unfairly penalize plaintiff. Based upon the foregoing, the relation back doctrine is applicable. As such, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a compliance conference on April 23, 2019 at 2:00 PM, Part DCM, Room 106, 80 Centre Street, New York, N.Y.

April 2, 2019

  
HON. YERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE