

Real v City of New York
2019 NY Slip Op 32603(U)
September 4, 2019
Supreme Court, New York County
Docket Number: 152286/2017
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 52**

HECTOR REAL,

X

Plaintiff,

INDEX #: 152286/2017

SEQ. NO.: 001

-against-

THE CITY OF NEW YORK and THE NEW YORK
CITY POLICE DEPARTMENT,

DECISION & ORDER

Defendants.

X

ALEXANDER M. TISCH, J.:

Defendants, The City of New York (City) and The New York City Police Department (NYPD), move pursuant to CPLR 3211 (a) (7) for an order dismissing plaintiff Hector Real's verified complaint for failing to state a cause of action. In the alternative, defendants move pursuant to CPLR 3212 for an order granting summary judgment in their favor. Plaintiff opposes the motion and cross-moves pursuant to CPLR 3025 (b) for an order permitting him to amend his verified complaint to include additional causes of action.

BACKGROUND

This is an action for personal injuries¹ sustained by plaintiff on February 3, 2016, when he was allegedly hit with a tactical shield which was being used by Detective Juan Espailat, (Espailat) an employee of the NYPD.² Espailat testified under oath, that he was assisting in

¹In his notice of claim, plaintiff alleges his injuries included, but were not limited to, a laceration to his face which required stitches.

²It is undisputed that on the day in question, Espailat was employed as a detective with the NYPD, and was assigned to the Manhattan North Narcotics Unit.

executing a search warrant at 2036 Amsterdam Avenue, Apartment 3C, in the County, City and State of New York (premises) at the time of the incident, and that he was responsible for securing the safety of the other officers, detectives, and anyone else located in the apartment (tr at 18:2-3; 57:15-18). Espailat further testified that upon entering the premises, he opened a door located to his right and yelled “police” as he entered the room. Espailat instructed everyone to get down and show their hands (tr at 33:11-12). Espailat admitted he was carrying his tactical shield in his left hand and a Glock nine millimeter pistol in his right hand. Espailat observed numerous people in the room, as well as a small chair with no armrest. Espailat stated that the people in the room that were to his right complied with his directives, but that the person to his left, who was sitting in the small chair, did not obey his commands. Espailat identified plaintiff as the person sitting in the chair (tr at 36:7-10). Espailat directed plaintiff to show his hands and get on the floor, however, it is alleged that plaintiff did not comply. Espailat gave plaintiff additional commands and when plaintiff again refused to comply, Espailat, while still giving commands, began walking toward plaintiff. Espailat claimed that he could not see plaintiff’s left hand and when he was next to plaintiff, he used his tactical shield to glide plaintiff out of the chair. As plaintiff moved forward to brace himself for the fall to the floor, Espailat was able to see plaintiff’s left hand for the first time (tr. at 32:16-25).

In his verified complaint, plaintiff alleges causes of action for negligence in the performance of duties and negligent hiring and supervision. The motion and cross motion are decided as follows.

LEGAL STANDARD

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a

liberal construction and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘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 at 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [other citations omitted]). “[U]nless it has been shown that a material fact as claimed by the pleader 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” (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

Finally, “[i]t is true that ‘in considering a motion to dismiss brought pursuant to CPLR 3211 (a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference’ However, ‘factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration’” (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007]).

It is well settled that “a movant for summary judgment bears the initial burden of presenting affirmative evidence of its entitlement to summary judgment” (*Hairston v Liberty Behavioral Mtg. Corp.*, 157 AD3d 404 [1st Dept 2018]; *see Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593 [1st Dept 2012]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a

matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

ANALYSIS

Initially, the Court notes that plaintiff withdraws all claims against the NYPD; as well as his claim of negligent hiring and supervision against the City. Accordingly, the Court will address plaintiff's sole remaining negligence claim against the City, as well as plaintiff's cross motion to amend.

The City's Motion To Dismiss Plaintiff's Claim for Negligence

Plaintiff's first cause of action alleges that while being lawfully at the premises, he suffered personal injuries as a result of the "negligence, carelessness and/or recklessness of the defendant "City" and/or "NYPD" when he was stuck about his face by a shield wielded or otherwise in use by an agent, servant, and/or employees of the defendants "NYPD" and/or "City" (verified complaint at ¶ 14).

The City moves for an order pursuant to CPLR 3211 (a) (7), dismissing plaintiff's negligence claim for failing to state a cause of action. Specifically, the City alleges that plaintiff failed to meet his burden of establishing that the City owed him a special duty of care.

To prevail on a general negligence cause of action, plaintiff must show 1) defendant owed a duty to plaintiff, 2) defendant breached such duty, and 3) plaintiff's injuries resulted from defendant's breach (*Ewen v Maccherone*, 32 Misc 3d 12 [App Term 1st Dept 2011]; see *Akins v Glens Falls City Sch. Dist.*, 53 NY2d 325, 333 [1981]). However, to sustain liability on a negligence cause of action against a municipality, the duty breached must be more than that owed the public generally (*Valdez v City of New York*, 18 NY3d 69 [2011]; *Lauer v City of New York*, 95 NY2d 95 [2000]). Under the public duty rule, "although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created" (*Valdez*, 18 NY3d at 75).

When a negligence claim is asserted against a municipality, the court must first determine whether the municipality was engaged in a proprietary function or exercising a governmental function. If the municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a special duty to the injured party (*Valdez*, 18 NY3d at 69; see *Sebastian v State of New York*, 93 NY2d 790 [1999] [internal quotation marks and citations omitted]). Plaintiff has the burden to prove that the municipality owed a special duty of care to the injured party and failure to meet this burden ends the analysis (*Valdez*, 18 NY3d at 80).

A municipality is performing a governmental function when it undertakes to protect and safeguard the public pursuant to the general police powers, and when doing so, the State remains generally immune from negligence claims, absent a special relationship between the injured party and the State (*Ortiz v City of New York*, 171 AD3d 1198 [2d Dept 2019]). Police protection is a

quintessential example of a governmental function (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428 [2011]). In the instant case, plaintiff does not dispute the fact that the City is a municipality and that it was acting in a governmental capacity when plaintiff was injured during the execution of the search warrant operation.

Initially, the Court notes that contrary to defendants' position, plaintiff does not allege that he was falsely arrested or wrongfully imprisoned, rather the gravamen of his complaint is negligence. Because plaintiff alleges his damages arose from injuries resulting from defendants' conduct, not from his arrest and/or detention, plaintiff may, if he can establish a special duty, seek recovery under general negligence principles rather than by established rules defining the torts of false arrest and imprisonment (*Ferguson v Dollar Rent A Car, Inc.*, 102 AD3d 600, 600-01 [1st Dept 2013]). In the instant case, the issue to be determined is whether or not the City owed plaintiff a special duty of care.

While a municipal defendant is immune from liability for negligence claims arising from the performance of its governmental functions, a narrow class of cases have recognized an exception to this general rule, and have upheld tort claims based upon a 'special relationship' between the municipality and the claimant (*Giresi v City of New York*, 125 AD3d 601, 603 [2d Dept 2015]; see *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; see *Kircher v City of Jamestown*, 74 NY2d 251 [1989] [internal citations and quotations omitted]).

"The elements of this 'special relationship' are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that

party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]; *Giresi*, 125 AD3d at 603). Here, plaintiff's allegations are insufficient to raise an issue of fact as to whether the City by executing a search warrant at the premise had assumed a special duty to protect plaintiff from injuries. Plaintiff has failed to point out any facts, promises, actions or an affirmative duty made by the City to act on plaintiff's behalf.

In the instant case, there is no reasonable view of the allegations supporting a conclusion that Espalliat, in his brief encounter with the plaintiff, owed or voluntarily assumed a special duty to plaintiff beyond that generally associated with Espalliat's routine law enforcement function. Plaintiff has not alleged that the City assumed an affirmative duty to act specifically on plaintiff's behalf. Espalliat's conduct in executing a search warrant created nothing more than a generalized duty owed to the public at large. The plaintiff has not established that he was owed a special duty, therefore, the City may not be held liable for a negligence claim arising from the performance of its governmental functions.

Based on the foregoing, the City's motion to dismiss plaintiff's negligence cause of action pursuant to CPLR 3211 (a) (7) is granted.

Plaintiff's Cross Motion To Amend

Plaintiff moves for an order, pursuant to CPLR 3025 (b) permitting him to amend his verified complaint to assert causes of action for assault, battery, excessive and unnecessary force, and civil rights violations under 42 USC § 1981. The defendants oppose the motion.

Pursuant to CPLR 3025 (b) leave to amend a pleading is freely given, absent prejudice or surprise resulting directly from the delay (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404 [1st Dept 2009]). The determination of whether to allow such an amendment is reserved for the court's discretion, and exercise of that discretion will not be overturned without a showing that the facts offered for the amendment do not support the new claims (*Eighth Ave. Garage Corp.*, 60 AD3d at 404, citing *Murray v City of New York*, 43 NY2d 400 [1977]). In order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted (*Megaris Furs v Gimble Bros.*, 172 AD2d 209 [1st Dept 1991]).

Plaintiff's first proposed cause of action for assault and battery

Plaintiff's first proposed cause of action alleges that the City³ intentionally committed an assault and/or battery upon him; and as a result, he suffered personal injuries. The City argues that plaintiff's first proposed cause of action for assault and battery should be dismissed because the statute of limitations has expired.

On April 13, 2016, plaintiff filed a notice of claim against the City and the NYPD setting forth various claims including among others, assault and battery. The notice asserted that the claim arose on February 3, 2016. The notice of claim did not state the name of the individual detective or officer involved in the alleged incident.

Plaintiff commenced this action on March 9, 2017 by filing a summons and verified complaint against the City and the NYPD asserting only causes of action for negligence and negligent hiring and supervision. Issue was joined, discovery was completed and plaintiff filed

³The City is the sole named defendant in plaintiff's amended verified complaint.

his note of issue on March 29, 2018. Thereafter, on August 8, 2018, plaintiff filed an amended verified complaint seeking to add causes of action for among other things, assault and battery.

Plaintiff's proposed assault and battery causes of action are governed by a one-year and ninety-day limitation period (General Municipal Law § 50-1).

The defendants have met their prima facie burden of establishing that the statute of limitations on the assault and battery cause of action had expired prior to plaintiff filing his amended verified complaint. Specifically, the underlying incident occurred on February 3, 2016 and thus, the one-year and ninety-day statute of limitations period for plaintiff's assault and battery claims expired on May 4, 2017 (*see LeBlanc v Skinner*, 103 AD3d 202, 208 [2d Dept 2012]). In opposition, the burden shifts "to the plaintiff to establish the applicability of the relation-back doctrine" (*id.* at 209; *see also Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007]). Here, plaintiff does not set forth any argument as to the applicability of the relation-back doctrine. Accordingly, having failed to satisfy his burden on this issue, the plaintiff's motion to amend his complaint to include causes of action for assault and battery is denied as time-barred.

Plaintiff's second proposed cause of action for negligence

Plaintiff's second proposed cause of action alleges that the City was negligent and careless in the ownership, operation, control, management, supervision and maintenance of agents, servants and/or employees of the City, including police officers and detectives of the NYPD and agents, servants and/or employees. The City opposes plaintiff's proposed second cause of action for negligence on the grounds that the amendment lacks merit.

A review of the proposed amended negligence cause of action reveals plaintiff has alleged that the City owed him a special duty (proposed amended complaint, at ¶¶ 11, 22). However, plaintiff's mere allegation that a special duty existed, without a showing of facts to support the new claim is insufficient (*Eighth Ave. Garage Corp.*, 60 AD3d 404, citing *Murray*, 43 NY2d at 400). Accordingly, plaintiff's motion to amend this cause of action is denied.

Plaintiff's third proposed cause of action for civil rights violations under 42 USC § 1981

Plaintiff's third proposed cause of action alleges that the City intentionally committed an assault and/or battery upon him; and as a result, he suffered personal injuries. The City opposes this amendment on the grounds that 42 USC § 1981 does not create an independent right of action against a municipality and plaintiff failed to specifically plead a § 1983 action.

The plaintiff's cross motion to add a third cause of action pursuant to 42 USC § 1981 is denied, insofar as no such cause of action lies. Rather, the express action at law provided by § 1983 for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. Here, in the absence of a viable cause of action against a State actor under 42 USC § 1983, there can no be claim against the State pursuant to 42 USC § 1981 (*Brown v City of New York*, 56 Misc3d 1218(A) [Sup Ct, Bronx County], *aff'd* 170 AD3d 596 [1st Dept 2019]).

Accordingly, plaintiff's motion to add a cause of action pursuant to 42 USC § 1981

is denied.

Plaintiff's fourth proposed cause of action for excessive and unnecessary force

Plaintiff's fourth proposed cause of action alleges that during his arrest, the City used excessive and unnecessary force upon him which resulted in severe and protracted injuries.

It is undisputed that contact was made between the plaintiff and Espalliat's tactical shield during the execution of the search warrant. However, the mere allegation contained in plaintiff's amended verified complaint is that "excessive and unnecessary force was used to effectuate said arrest." The plaintiff fails to set forth any facts in support of this new claim and the proposed claim is therefore, insufficient to state a cause of action for unnecessary and excessive force. Accordingly, plaintiff's cross motion to amend the verified complaint to include a cause of action for unnecessary and excessive force is denied.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that plaintiff's claims against defendant, The New York City Police Department, are withdrawn and dismissed; and it is further

ORDERED that plaintiff's cause of action for negligent hiring and supervision, as against defendant, The City of New York, is withdrawn and dismissed; and it is further,

ORDERED that the portion of defendant, The City of New York's motion pursuant to CPLR 3211 (a) (7), dismissing plaintiff's claim for negligence is granted; and

it is further

ORDERED that plaintiff's cross motion to amend the verified complaint is denied in its entirety. This constitutes the decision and order of the Court.

DATED: September 4, 2019

ENTER:



ALEXANDER M. TISCH, J.S.C.