

Garcia v City of New York
2019 NY Slip Op 32765(U)
September 19, 2019
Supreme Court, New York County
Docket Number: 154096/2017
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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INDEX NO. 154096/2017

NESTOR GARCIA,

MOTION DATE 09/18/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, JOHN DOE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 37, 38, 39

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, plaintiff's motion is denied. Although not framed as such, the Court deems plaintiff's motion to amend the caption and pleadings as a motion to invoke the relation back doctrine for all causes of action except federal malicious prosecution, which is timely.

This case stems from an arrest that allegedly occurred on May 12, 2016. The criminal prosecution from this arrest culminated in the plaintiff accepting an adjournment in contemplation of dismissal (ACD) to resolve the matter. The civil action was timely commenced on May 3, 2017. On May 28, 2018, the City provided a response to the case scheduling order that identified the officers involved in the alleged incident. The instant motion was then filed on May 15, 2019. There appears no dispute that at that point in the litigation, all claims were time barred as to any individual defendants, with the exception of the federal malicious prosecution claim.

1 The Court does not reach the issue of appointing a guardian ad litem as plaintiff has failed to establish his entitlement to amend the caption/pleadings.

It is well established that a party seeking to invoke the *relation back* doctrine must establish that: first, the claims arose out of the same conduct, transactions, or occurrence; second, that the new party is united in interest with the original defendant, and will not suffer prejudice due to lack of notice; third, that the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Buran v Coupal*, 87 NY2d 173, 178, [1995] internal citations omitted). Moreover, a movant seeking to apply the relation-back doctrine to a later identified "John Doe" defendant, pursuant to CPLR § 1024, also has the burden of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations. See *Diaz v City of New York*, 160 AD3d 457, 457 [1st Dept 2018]; *Holmes v City of New York*, 132 AD3d 952, 954 [2nd Dept 2015].

Here, plaintiff has failed to allege any mistake in identifying the parties or diligent efforts made to ascertain the identities of the officers within the applicable statute of limitations. Notwithstanding that it is undisputed that plaintiff was aware of the identity of every single officer he seeks to add to this action within the statute of limitations for federal claims, plaintiff has failed to articulate any reason for the delay in the instant motion (*Crawford v City of NY*, 129 AD3d 554, 555 [1st Dept 2015]). As to the state law claims which had already run prior to plaintiff's awareness of the identities of the officers, plaintiff failed to establish that any diligent efforts were made prior to the statute running to identify those officers (*Diaz* 160 AD3d at 457).

Additionally, plaintiff has failed to establish that defendants are united in interest. Unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other (*Higgins v City of New York*, 144 AD3d

511, 512 [1st Dept 2016]). However, the City cannot be held vicariously liable for its employees' violations of § 1983 (*id.*).

It is undisputed that at the earliest plaintiff is imputed with the knowledge of officers' identities is May 28, 2018. Contrary to plaintiff's assertions, an amendment at this point, and any point prior to May 12, 2019, would have been timely for **all** of plaintiff's federal causes of action. Thus, there would have been no need to invoke the *relation back* doctrine. While the state law claims have long since expired and with respect to those claims *relation back* would surely have to have been invoked, plaintiff has simply failed to establish his entitlement to such relief.

With respect to the federal cause of action for malicious prosecution, this Court will deny amendment of that cause of action because the amendment would be futile. See *Finkelstein v Lincoln Nat'l Corp.*, 107 AD3d 759, 761 [2d Dept 2013] (holding that a party may not amend its complaint if such amendment is futile.); *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]; *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F 3d 162, 185 (2d Cir. 2012) The case law is very clear that an ACD is not a favorable termination for the purposes of sustaining a malicious prosecution cause of action, thus an acceptance of an ACD precludes an action for malicious prosecution. (See *Eke v City of New York*, 116 AD3d 403 [1st Dept 2014], citing *Hollender v Trump Vil. Coop.*, 58 NY2d 420, 423 [1983]).

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied.

This constitutes the Decision and Order of the Court.

9/19/2019
DATE


LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED				GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE