

McCullough v City of New York
2019 NY Slip Op 34040(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 150263/2018
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

ROBERT MCCULLOUGH,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, P.O. HASTINGS, P.O. JOHN DOES

Defendant.

INDEX NO. 150263/2018
MOTION DATE 09/22/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

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

Upon the foregoing documents, plaintiff's motion is denied.1 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 as this matter is now beyond the applicable statute of limitations, except for the claim of malicious prosecution, which will be discussed separately below.

Background

This action arises out of an arrest that occurred on February 4, 2017. On November 12, 2017, the criminal prosecution culminated with the plaintiff accepting an adjournment in contemplation of dismissal (ACD) to resolve the matter pursuant to CPL § 170.55. The civil action was timely commenced on January 10, 2018. On June 21, 2018, the City provided a response to the case scheduling order that identified the officer and witnesses involved in the alleged incident. This response included information identifying CARRIE TALENKSY, ESQ.,

1 The Court would like to thank Tessa Tigar-Cross for her assistance in this matter.

SGT. BRIAN FLYNN, AND LT. ENGEL as a witness and officers involved in the arrest, respectively. NYSCEF Doc. No. 29 at 2, 5, 10. The Plaintiff did not move to amend this action until July 15, 2020.

Plaintiff alleges they first obtained the names of witness TALENSKY and officers SGT. FLYNN and LT. ENGEL at the deposition of defendant P.O. HASTINGS on February 10, 2020. Mot. Amend. at ¶¶ 7, 8. The City argues that the Plaintiff had the relevant information within the City's case scheduling order response dated June 21, 2018, to timely identify witness TALENSKY and SGT. FLYNN and LT. ENGEL as named defendants and did not timely move to amend the caption.

Legal Standard

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]; *Goldberg v. Boatmax://, Inc.*, 41 AD3d 255 (1st Dept 2007) (citing *Tucker v Lorieo*, 291 AD2d 261 (1st Dept 2002) ("CPLR 1024 does not avail plaintiff as he now seeks to amend the caption to name the intended defendants, since he has not

demonstrated that he conducted a diligent inquiry into the actual identities of the intended defendants before the expiration of the statutory period.”).

It is proper for the Court in analyzing the Plaintiff's *relation back* argument to consider both the amount of time the Plaintiff had available to timely move to amend the pleadings to reflect the proper identities of the parties, and to consider the amount of time the Plaintiff waited beyond the statute of limitations to untimely move to amend. *Crawford v City of NY*, 129 AD3d 554, 555 [1st Dept 2015].

Discussion

Despite having received the relevant information necessary to ascertain the identities of the “John Does” on June 21, 2018, the Plaintiff alleges they only knew of the identities of the parties on February 10, 2020. In this case, the Plaintiff did not just fail to allege any diligent efforts made to ascertain the identities of the officers and witness within the applicable statute of limitations, but instead gave credence to the opposite. Further, plaintiff has failed to articulate any reason for the oversight and delay in the instant motion. *Crawford*, 129 AD3d at 555.

The Plaintiff failed to allege any mistake in identifying the parties, having simply not addressed this prong of the *relation back* doctrine. Additionally, the 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.*

With respect to the federal cause of action for malicious prosecution, which does appear to be timely, this Court denies 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]; *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 applicable precedent is 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

ADJUDGED that plaintiff's motion is DENIED.

10/15/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

LYLE E. FRANK, J.S.C.

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