

Chiles v City of Buffalo
2019 NY Slip Op 34106(U)
July 30, 2019
Supreme Court, Erie County
Docket Number: 812850/2017
Judge: Mark Montour
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

SABRIENA CHILES,

Plaintiff,

Index # 812850/2017

vs.

DECISION

CITY OF BUFFALO, ET AL,

Respondents.

Appearances:

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Mark A. Montour, JSC

Defendant, by a notice of motion, has sought an order of the Court, pursuant of CPLR §3126 and General Municipal Law §50, dismissing the complaint on the basis that: (1) plaintiff has failed to appear and give testimony required under General Municipal Law §50(h); and (2) plaintiff failed to comply with a scheduling order of this Court. Plaintiff brought a cross-motion to extend the scheduling order and further seeks confirmation that the provisions of General Municipal Law §50 (h) are inapplicable to the first and second causes of action based upon 42 USC §1983. In support of their motion, defendant submitted an affirmation dated May 6, 2019, of assistant corporation counsel, Maeve E. Huggins, Esq., with exhibits attached thereto and a reply affirmation dated June 3, 2019 of Maeve E. Huggins, Esq. Plaintiff submitted an affirmation of attorney Brett D. Tokarczyk, Esq., dated May 28, 2019, in opposition to the defendant's motion and in support of plaintiff's cross-motion. Oral argument on the motion and cross-motion was held on June 27, 2019.

Background

On September 12, 2017, plaintiff commenced the instant action by filing a summons and complaint alleging claims for unlawful arrest and Constitutional rights violations against the defendants stemming from an August 18, 2016 arrest. Defendants joined issue by filing and serving an answer citing various defenses and raising an affirmative defense that plaintiff failed to timely serve a notice of claim as required by General Municipal Law §50(e)(1)(a). Plaintiff subsequently sought leave and was granted by the Court an order dated February 15, 2018, deeming plaintiff's November 17, 2016 Notice of Claim "timely served *nunc pro tunc*, upon defendants, City of Buffalo and Buffalo Police Department, as if it had been served within ninety (90) days of the incident giving rise to this action". Defendants, on February 15, 2018, pursuant to General Municipal Law §50-h, promptly noticed an examination under oath of plaintiff for April 12, 2018. The §50-h hearing never occurred because plaintiff adjourned the examination without appearing or rescheduling. Over the next eleven (11) months defendants repeatedly attempted to reschedule the §50-h hearing. Plaintiff's general response opposing the §50-h hearing was to the effect that since the matter was in suit it would be "redundant" to conduct both a §50-h hearing and an examination before trial.

On March 7, 2019, the parties’ attorneys appeared at a pretrial conference with the Court and a “Uniform Scheduling Order” was issued directing that “plaintiff’s §50-h hearing [be] completed by April 30, 2019. “If not done, then precluded”. On April 24, 2019, plaintiff proposed either May 6, 13 or 20th as dates for the 50-h hearing. Defendant’s attorney pointed out “those dates are all beyond the Court’s scheduling order”. Since the §50-h hearing was not conducted within the time frame allotted in the scheduling order the defendants brought their motion to dismiss.

According to the complaint, on August 18, 2016, plaintiff left her home to walk to the corner store. As she crossed the street at the corner of East Lovejoy and Longnecker, several Buffalo Police Department vehicles pulled in front of a home on the corner. She saw a neighbor on the porch of the home, waived to the neighbor, and continued walking. She was subsequently questioned, arrested by Buffalo Police officers, and eventually released. She was charged with disorderly conduct in violation of Penal Law §240.20(3). The charges were ultimately dismissed. Plaintiff brought this action against the Buffalo Police Department and other defendants on September 12, 2017, alleging *inter alia* false arrest, unlawful imprisonment, deprivation of rights, and municipal liability, under 42 U.S.C. §1983.

Legal Standard

A. Failure to appear at §50-h hearing or abide by court scheduling order:

Compliance with a demand for a General Municipal Law §50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action. *Hymowitz v City of New York*, 122 AD3d 681, 682 (2d Dept 2014); *see also, McDaniel v City of Buffalo*, 291 AD2d 826, 826, (4th Dept 2002) (holding that where a demand for examination has been served no action shall be commenced against the school district against which the claim is made unless the claimant has duly complied with such demand for examination). It is well settled that a plaintiff who has not complied with General Municipal Law §50-h (1) is precluded from maintaining an action against a municipality. *See, McDaniel, supra; see also, Patterson v Ford*, 255 AD2d 373 (2d Dept 1998); and *see, Secor v Town of Orangetown*, 250 AD2d 588 (2d Dept 1998); NY Gen Mun Law §50-h.

This proposition was recently affirmed by the Appellate Division, Fourth Department in *Kluczynski v Zwack*, 170 AD3d 1656 (4th Dept 2019). In *Kluczynski*, defendants were employees of the Village of Blasdell and appealed from an order denying their motion to dismiss the complaint on the ground that, *inter alia*, plaintiffs failed to comply with defendants' demand for an oral examination pursuant to General Municipal Law §50-h (1). The Appellate Court reversed the lower court following the position outlined in *McDaniel* that a plaintiff who has not complied with General Municipal Law §50-h (1) is precluded from maintaining an action against a municipality. *Id.* In *Kluczynski* plaintiffs failed to appear at the scheduled examination due to an apparent disagreement with their attorney. Under the circumstances, the Court stated, "plaintiffs had the burden of rescheduling the examination and, because they failed to do so, they were barred by statute from commencing an action". *Kluczynski*, at 1656.

Although compliance with General Municipal Law §50-h may be excused in exceptional circumstances, it is well settled that, where a party disobeys a court order and by their conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the complaint is within the broad discretion of the trial court. *See, Zletz v Wetanson*, 67 NY2d 711, 713 (1986). Compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully. *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999). The Court of Appeals has been consistently critical of litigants that remorselessly disregard of statutory time frames and scheduling orders. In *Brill v City of New York*, 2 NY3d 648 (2004), the Court reversed an award of summary judgment for defendant, without considering its merit, on the ground that the motion, made more than 120 days after note of issue was filed, failed to comply with the statutory requirement that "good cause" be shown for the late filing. In *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 (2004), the Court commented "as we made clear in *Brill*, and underscore here, statutory time frames — like court-ordered time frames — are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored". *Miceli*, at 726-727. In *Kihl*, the Court held that if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a court may make such orders as are just, including dismissal of an action. *Id.*, at

123. Finally, we underscore and reiterate that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully. *See, Kihl*, at 123.

B. 42 USC §1983:

Pursuant to 42 USC §1983:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Thus, a person has a private right of action under 42 USC §1983 against police officers who, acting under color of law, violate federal constitutional or statutory rights. *See, Delgado v City of New York*, 86 AD3d 502, 511 (1st Dept 2011). General Municipal Law §50-h does not apply to that cause of action. *See, General Municipal Law §50-h (1); see, Palmieri v Town of Babylon*, 139 AD3d 925 (2d Dept 2016); *Felder v Casey*, 487 US 131, 134 (1988); *Corvetti v Town of Lake Pleasant*, 227 AD2d 821 (3d Dept 1996; *Rattner v Planning Com of Pleasantville*, 156 AD2d 521 (2d Dept 1989); *Zurat v Stockport*, 142 AD2d 1, 3 (3d Dept 1988).

A 42 USC §1983 action based upon a claim that a state official acted outside the scope of his or her authority is not an action against the state and is cognizable in a New York State Supreme Court. *See, Woodward v State of New York*, 23 AD3d 852 (3d Dept 2005); *see also, Mulcahy v New York City Dept of Educ*, 99 AD3d 535 (1st Dept 2012) (holding that federal and state courts possess concurrent jurisdiction over 42 USC §1983 actions).

Application

Here, plaintiff's excuses for avoiding appearance at the §50-h hearing were the redundancy of a §50-h hearing and an examination before trial, maternity leave of a paralegal, and being busy with other cases on dates proposed by defendants. Such excuses for the repeated failure to appear

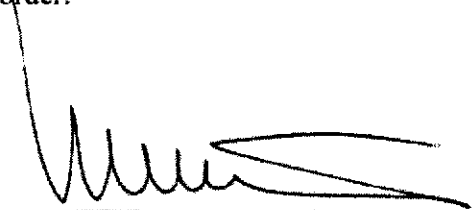
at or reschedule the hearings are unacceptable. Furthermore, the only dates the plaintiff had offered to reschedule the §50-h hearing were after the date certain set forth in the scheduling order. At this stage of the litigation, plaintiff has alleged sufficient facts to state a cause of action founded under 42 USC §1983 and that her Constitutional rights were violated by the individual officers when they unlawfully stopped her, falsely arrested her, maliciously prosecuted her. Therefore, with the exception of the plaintiff's first two causes of action initiated upon the alleged violations of 42 USC §1983, plaintiff's complaint is dismissed based upon plaintiff's failure to appear for a §50-h examination and/or reschedule the §50-h hearing within the time frame established in the Court's scheduling order.

Conclusion

For the foregoing reasons, defendant's motion to dismiss the plaintiff's complaint is granted in part and denied in part by dismissing plaintiff's causes of action with the exception of the first two causes of action based upon 42 USC §1983, which shall remain viable. The plaintiff's cross motion to extend the scheduling order is denied.

Defendants shall submit an order, on notice to plaintiff, within twenty (20) days of receipt of this decision. This decision shall be attached to the order.

Dated: **JUL 30 2019**


Mark A. Montour, JSC