SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5
Justice

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JOHN HAYES,
Plaintiff,

- v -

CITY OF NEW YORK, "SERGEANT O", real identity Unknown, the person intended being the NYPD sergeant who ordered the arrest of Plaintiff on January 15, 2015, "JOHN DOE No. 1," and "JOHN DOE NO. 2" real identities unknown, the persons intended being the NYPD Police officers who approached and questioned Plaintiff on a public street on 113th Madison Avenue in Harlem, New York, on January 15, 2015,
Defendants.

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INDEX NO. 154035/2017

MOTION DATE 2/25/20

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL.

BACKGROUND FACTS AND PROCEDURAL HISTORY[1]

Plaintiff commenced this false arrest/malicious prosecution action against the City of New York (the "City") and two "John Doe" defendants representing the officers who ordered Plaintiff's arrest and questioned Plaintiff, respectively. NYPD officers arrested Plaintiff on January 15, 2015 at 113th Street and Madison Avenue in New York, New York for Criminal Possession of a Controlled Substance. Plaintiff was released on January 21, 2015, and the charges were dismissed on April 8, 2015.

On June 26, 2015, with the assistance of the same attorney currently representing Plaintiff, Plaintiff filed a Notice of Claim alleging "False arrest/imprisonment; Unlawful Search and Seizure; Malicious prosecution; [and] Violation of civil and constitutional rights" (*NYSCEF 14*). The Notice of Claim triggered a September 11, 2015 50-h hearing conducted by an outside firm contracted by the City (*NYSCEF 15; NYCSEF 13* ¶ 7). On May 2, 2017, Plaintiff filed the Summons and Complaint against the City and fictitious Codefendants representing the arresting officer(s), asserting three causes of action: (1) 42 USC § 1983 claims that Plaintiff's Fourth Amendment rights were violated; (2) common law false arrest; and (3) 42 USC § 1983 and common law malicious prosecution. The City answered on May 16, 2017, asserting various

[1] For the purposes of this motion, the Court accepts as true the facts alleged by Plaintiff and accords Plaintiff the benefit of every possible favorable inference.

affirmative defenses but excluding, as relevant here, a statute of limitations defense (*NYSCEF 16*).

Defendant City of New York (the "City") now moves: (1) pursuant to CPLR 3211(a)(5) and General Municipal Law [GML] § 50-i, to dismiss all state claims for failure to file a timely summons and complaint as to all state causes of action; (2) pursuant to CPLR 3211(a)(7) and GML § 50-e, to dismiss Plaintiff's state false arrest claim for failure to file a timely notice of claim; and (3) pursuant to CPLR 3211(a)(7), to dismiss Plaintiff's 42 USC § 1983 claims for false arrest and malicious prosecution because the City can be sued only for unconstitutional or unlawful policies, not its employees' unlawful acts. Plaintiff cross-moves: (1) pursuant to CPLR 3124, to compel the City to disclose the John Doe Defendants' true identities; and (2) pursuant to CPLR 3025(b), for leave to amend the Complaint upon the reveal of those identities. The City replied, and Plaintiff sur-replied. For the reasons below, the City's motion to dismiss is granted, the Plaintiff's cross-motion to compel/amend is denied, and the Complaint is dismissed.

DISCUSSION

I. Plaintiff's cross-motion to compel/amend

The Court addresses Plaintiff's cross-motion to compel/amend first because, as the City acknowledged in briefing and oral argument, permitting amendment would moot the City's motion by permitting the City to file a new answer and/or re-file its motion to dismiss (*NYSCEF 21* ¶ 20). Plaintiff argues, in sum and substance, that substantial efforts were undertaken to identify the arresting officers, that the City should be compelled to identify the officers, and that Plaintiff should then be entitled to amend the Complaint to name the officers.

In reply, the City argues that Plaintiff was aware of two officers, Police Officer Uddin and Sergeant Willis as early as the City's October 1, 2018 discovery response (*NYSCEF 22*), and aware of Uddin and another officer, Ferreira, as early as January 16, 2015, the date that Plaintiff was arraigned and provided with Uddin's Criminal Court Affidavit (*NYSCEF 21* ¶ 7, *et seq.*). The City also argues that amendment of the federal claims should not be permitted under the "relation back" doctrine because the individual officers are not united in interest with the City.

In surreply, Plaintiff's counsel denies receipt of the 2018 discovery response, and argues that the 2015 Criminal Court Affidavit "does not change the analysis" because he had not previously seen the document and, in any event, the document does not identify which officers "approached and questioned Plaintiff on a public street on 113th Street on Madison Avenue in Harlem" (*NYSCEF 24* ¶ 17). Plaintiff also argues that further discovery is necessary.

To employ the "John/Jane Doe" procedure authorized by CPLR 1024, parties must, in addition to sufficiently describing the unidentified party, "exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name" (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 29-30 [2d Dept 2009]; *see also Holmes v City of NY*, 132 AD3d 952, 954 [2d Dept 2015] [dismissing action where there was "no indication in the record that the plaintiffs engaged in any pre-action disclosure or made any Freedom of Information Law requests," or "sought assistance from either the Criminal Court or the Supreme Court to learn the

identities of the individual officers before the statute of limitations had run" and rejecting contention that delay was caused by pending investigation by the NYPD's Internal Affairs Bureau]).

Where a plaintiff cannot show that the failure to identify defendants was a mistake, or that the plaintiff conducted a diligent inquiry prior to the statute of limitations running, amendment is not permitted (*Diaz v City of New York*, 160 AD3d 457 [1st Dept 2018], citing *Holmes v City of New York*, 132 AD3d 952, 953 [2d Dept 2015] [affirming denial of substitution of named officers for "John Doe" defendants made 8 months after expiration of statute of limitations where plaintiffs did not diligently seek to learn identities of the officers before the statute of limitations had run, *e.g.* engage in pre-action disclosure, make any Freedom of Information Law requests, or seek assistance from Criminal or Supreme Court]; *Tucker v Lorieo*, 291 AD2d 261, 262 [1st Dept 2002] [reversing permission to substitute where "plaintiff did not request decedent's hospital records until 10 months after the filing of the summons and complaint and did not move to amend the caption until more than one year after commencement, long after the Statute of Limitations had expired"]; *see also Cruz v Brown*, 129 AD3d 455 [1st Dept 2015], citing *Miller v Cohen*, 93 AD3d 424 [1st Dept 2012] ["[O]n a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit."]).

As discussed in detail below, the statutes of limitations—1 year and 90 days for state claims and 3 years for federal claims—have expired. Nevertheless, substitution is permissible when a plaintiff demonstrates diligent efforts to learn the identities of unknown parties. Factors to be considered in determining whether a plaintiff has made diligent effort include, for example, documented attempts by counsel to review relevant documents and reports and the complexity of the litigation (*Luckern v Lyonsdale Energy Ltd. Partnership*, 229 AD2d 249, 253-54 [4th Dept 1997] [affirming substitution in complex litigation where counsel, retained just four months before three-year statute of limitations ran, "satisfactorily demonstrated that they made a diligent inquiry," including review of various reference publications that disclosed the identities of numerous and investigative reports, neither of which explicitly named the appropriate defendants]; *and see Walker v GlaxoSmithKline, LLC*, 161 AD3d 1419, 1421 [3d Dept 2018] [rejecting argument that measurement of due diligence begins when a party retains counsel]; *see also U.S. Bank Nat. Ass'n v Losner*, 145 AD3d 935, 937 [2d Dept 2016] [substitution of party affirmed where plaintiff moved to amend less than five months after commencing foreclosure action, within the statute of limitations period]).

Here, even setting aside the issue of Plaintiff's counsel's receipt of the October 1, 2018 response naming Police Officer Uddin and Sergeant Willis—according to counsel, not until it was attached to the City's December 13, 2019 reply to Plaintiff's cross-motion (*NYSCEF 24* ¶ 19)—Plaintiff nevertheless clearly received, either personally or through his criminal attorney, the Criminal Court Affidavit signed by Officer Uddin. To the extent that Plaintiff argues that the affidavit does not identify the name of the officer who approached Plaintiff (*NYSCEF 24* ¶ 17), Uddin's affidavit clearly states that Uddin "approached the [Plaintiff]" (*NYSCEF 23* pp 1-2).

Even if Plaintiff or Plaintiff's counsel had never seen the affidavit until they were attached to the City's reply, Plaintiff nevertheless failed to demonstrate diligent efforts prior to the expiration of the statute of limitation to obtain that information. As set forth by Plaintiff's counsel, the pre-statute of limitations efforts comprise: (1) an oral request by Plaintiff's counsel to the City's contract counsel at the 50-h hearing; (2) an April 21, 2016 letter and June 3, 2016 fax to Plaintiff's criminal attorney requesting the criminal file; (3) one year later, a July 26, 2017 letter to Corporation Counsel; and (4) an August 17, 2017 email to Corporation Counsel with a CPL 160.50 release noting that a hard copy would be mailed (*NYSCEF 13* ¶¶ 6-8; *NYSCEF 24* ¶¶ 20-23, *NYSCEF 25-26*).

In other words, the earliest documented effort to seek information did not occur until approximately one year after the underlying events.[2] Plaintiff did not file any FOIL request (Public Officers Law § 89),[3] did not seek pre-action disclosure (*see Bumpus,* 66 AD3d at 33, citing CPLR 3102[c]), and did not pursue the information through the courts—including requesting a discovery conference after filing the Summons and Complaint. Instead, Plaintiff waited until the City filed its motion to dismiss to cross-move to compel disclosure. Because Plaintiff's efforts to identify the individual officers cannot be characterized as diligent, amending the Complaint—now that the officers have been identified, the request to compel is moot—is not justified.

Additionally, though Plaintiff's federal claims against the City were undisputedly timely when filed (*NYSCEF 21* ¶ 22), amendment of the Complaint is nevertheless unauthorized because the relation-back doctrine does not apply. New parties may be joined as defendants in a previously-commenced action, even after the statute of limitations has expired, where the plaintiff establishes: (1) that the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants; (2) that the new defendants are "united in interest"; and (3) that the new defendants knew or should have known that, but for the plaintiff's mistake, they would have been included as defendants (*Higgins v City of New York*, 144 AD3d 511, 512-14 [1st Dept 2016]).

With respect to the second prong, "unity of interest is more than a notice provision. The test is whether the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other" (*id.* at 513). "Unity of interest fails if there is a possibility that the new defendants may have a defense unavailable to the original defendants" (*id.*). Because "the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983 [but r]ather ... only for violating that statute through an unconstitutional official policy or custom, ... it simply cannot be said that the fortunes in this action of the City and of [its employee officers] stand or fall together and that judgment against one will similarly affect the other" (*id.* at 513-14). Thus, claims against the individual officers do not relate back to the original, timely federal claims against the City. Accordingly, Plaintiff's cross-motion is denied.

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[2] Because Plaintiff attaches only the first three pages of the 50-h transcript (*NYSCEF 15*), the Court is unable to discern whether Plaintiff actually requested the officers' identities at the hearing, or shortly thereafter in writing.
[3] At oral argument, Plaintiff's counsel indicated that he rarely, if ever, pursues FOIL requests.

II. City's motion to dismiss (statute of limitations/notice of claim)

On a CPLR 3211 motion to dismiss, a 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]). "[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

As an initial matter, the City argues correctly that Plaintiff's state law cause of action for false arrest and unlawful imprisonment began to accrue on January 21, 2015 (*NYSCEF 4* ¶ 3; *NYSCEF 5* ¶ 30), and thus a notice of claim should have been filed by April 16, 2015 (*Palmer v City of New York*, 226 AD2d 149 [1st Dept 1996] [false arrest/false imprisonment claims accrue upon release from custody]). Because the Notice of Claim was not filed until June 26, 2015, and because Plaintiff failed to move for leave to file a late notice of claim, Plaintiff's Notice is a nullity and the state/common law claims for false arrest and unlawful imprisonment claims must be dismissed on that basis (*Walker v New York City Health and Hosps. Corp.*, 36 AD3d 509, 510 [1st Dept 2007]; GML §§ 50-e, 50-i; *see also* Hall v City of New York, 1 AD3d 254, 256 [1st Dept 2003] [motion court had no discretion to deem late notice of claim timely after expiration of statute of limitations). Despite the opportunity for opposition, surreply, and oral argument, Plaintiff could not justify its argument that the failure to file a Notice of Claim is an affirmative defense that must be asserted in an answer and/or can be waived, and did not contest that the Notice of Claim was otherwise untimely. Accordingly, dismissal of the false arrest claims is appropriate.

As to the remaining state claims, Plaintiff is generally correct that the City's statute of limitations defense, like that of any non-municipal defendant, can be waived. The year-and-90-day period in General Municipal Law (GML) § 50–i is a statute of limitations and not, like a notice of claim, a condition precedent to suit (*Campbell v City of New York*, 4 NY3d 200, 202 [2005]). Thus, unlike the failure to file a notice of claim, a party seeking to enforce the year-and-90-day filing period must plead it as an affirmative defense or it will be waived (*Matter of Augenblick*, 66 NY2d 775, 777 [1985]; CPLR 3211[e]).

To the extent that the City argues, in reply, that "there is strong public policy against allowing [untimely] claims to proceed against public bodies" (*NYSCEF 21* ¶ 16), and that General City Law § 20(5) provides that the City lacks the power to waive a statute of limitations defense, "where the waiver results as a matter of law from the failure to raise the defense either in a pleading or by motion in a pending action, a municipal defendant, like any other, will thereafter be precluded from raising such a defense" (*Rubino v City of New York*, 145 AD2d 285, 289 [1st Dept 1989]; *see also Private Capital Group, LLC v Hosseinipour*, 170 AD3d 909, 910 [2d Dept 2019] ["A defendant may waive the right to seek a dismissal pursuant to CPLR 3215(c) by serving an answer or taking 'any other steps which may be viewed as a formal or informal appearance'"]). Here, the City undisputedly failed to plead any statute of limitations defense in

its Answer, and seeks to assert that defense, for the first time, two years later in a motion to dismiss.

Nonetheless, as the City correctly argues, "[t]here is no prohibition against moving for summary judgment based on an unpleaded defense where the opposing party is not taken by surprise and does not suffer prejudice as a result," particularly where the lack of prejudice stems from a failure by a plaintiff to adequately investigate relevant information before the statute of limitations has run (*Arteaga v City of New York*, 101 AD3d 454, 454 [1st Dept 2012], citing *Rosario v City of New York*, 261 AD2d 380, 380-81 [2d Dept 1999] [affirming dismissal based on unpled statute of limitations defense where "[t]he record fails to indicate that the plaintiffs made any effort within the Statute of Limitations' period to determine the true identity of the officers involved in the incident. Indeed, by the time the plaintiffs scheduled the first preliminary status conference, after which relevant discovery was conducted, the Statute of Limitations period had already expired. ... Had the plaintiffs performed minimal investigation, they might have determined that the officers were employed by the NYCHA, the proper party to the action."]). Here, Plaintiff does not claim surprise or prejudice.

Having found that the statute of limitations arguments are cognizable, the Court agrees with the City that the statute of limitations pertaining to all state claims has expired. The state claims have a year-and-90 day statute for false arrest and unjust imprisonment, which began to run here on January 21, 2015, five days after Plaintiff's arrest upon release from custody, Plaintiff and expired on April 20, 2016. Similarly, the statute of limitations for Plaintiff's malicious prosecution terminated 1 year and 90 days after criminal charges were dismissed, or July 7, 2016. Because Plaintiff filed the Summons and Complaint approximately one year after those dates, the Summons and Complaint were untimely.

With respect to the only remaining claims—that is, the federal claims against the City itself—the City also argues correctly that it cannot be held liable under a theory of *respondeat superior*. Indeed, "...a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983. It is only when the 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under § 1983" (*City of Canton v Harris*, 489 US 378, 385 [1989] [emphasis in original, holding that plaintiff's claim that the city's failure to provide training to municipal employees resulted in constitutional deprivation is cognizable under § 1983, but can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants (*City of Canton v Harris*, 489 US 378, 392 [1989])], citing *Monell*, 436 US 658). Accordingly, the § 1983 claims against the City must also be dismissed.

CONCLUSION/ORDER

For the above reasons, it is

ORDERED and ADJUDGED that Defendants' motion to dismiss (001) is GRANTED, and the Clerk of Court shall enter judgment accordingly in favor of Defendant dismissing the Complaint; and it is further

ORDERED that Plaintiff's cross-motion to compel/amend (001) is DENIED; and it is further

ORDERED that within 10 days, Defendants shall e-file and serve upon all parties a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

3/3/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE