SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CHRISTOPHER COLBERT,

Index No.: 25861/2017E

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

-against-

THE CITY OF NEW YORK, et al.,

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion to Amend the Summons and Complaint:	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibits....	1
Affirmation in Opposition.....	2
Affirmation in Reply.....	

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Plaintiff moves pursuant to CPLR §§203(f), 1003, 1024, 3025(b), and 3025(c) to amend the summons and complaint herein to (i) add the following claims: (A) state law false arrest, (B) state and federal malicious abuse of process, (C) state and federal failure to intervene, (D) state and federal denial of a fair right to trial, (E) state and federal negligent hiring, training, supervision, and retention, and (F) a federal "*Monell*" claim against only the City of New York; and (ii) add the seventeen (17) proposed individual defendants, Joseph Lyons, Matthew Fialkovic, David Johnson, Daniel Hickey, Michael Cullen, John Stangenberg, Jeannie Corporan, Gerard Kranz, Roberto Rodriguez, Jeffrey Balzotti, Thomas Aasheim, Richard Gibson, Mark Martin, William O'Toole, Ralph Cilento, Patrick Hickey, Nicholas Ciuffi, to the caption as party defendants for all claims enumerated within plaintiff's proposed complaint.

This action arose from an interaction between the plaintiff, the defendants, and the proposed individual officers. According to plaintiff's notice of claim (Pl. Ex. A) and plaintiff's initial summons and complaint (Pl. Ex. B), plaintiff was falsely arrested, unlawfully imprisoned, illegally searched and seized, assaulted and battered, subjected to excessive force, maliciously prosecuted and were deprived of his civil rights on September 28, 2011, when the plaintiff was arrested for an incident that allegedly took place on September 17, 2011, at approximately

6:46am in the vicinity of 710 East 187th Street, Bronx, New York. Plaintiff's complaint indicates that the plaintiff was maliciously prosecuted for five (5) years and was held in custody for the duration until he was acquitted after trial, on November 14, 2016. Plaintiff was charged with murder in the 2nd degree. (Pl. Ex. C).

The Court notes that the proposed individual officers were not named in the notice of claim, nor in the original summons and complaint.

The summons and complaint was filed in this matter on June 29, 2017 alleging claims for malicious prosecution, claims pursuant to 42 U.S.C. §1983, and negligent hiring and retention. The City answered on August 2, 2017 and then served an amended answer on November 22, 2017. On November 29, 2017, via stipulation, plaintiff withdrew all of his claims pursuant to 42 U.S.C. §1983, with prejudice. (Def. Ex. F). On April 12, 2018, the City served a motion to dismiss plaintiff's two remaining claims for negligent hiring and retention and malicious prosecution. (Def. Ex. H). Plaintiff cross-moved to amend his pleadings to "amplify" his malicious prosecution claim. (Def. Ex. I). On November 20, 2018, this Court issued an order dismissing plaintiff's negligent hiring and retention claim and denying defendant's motion to dismiss plaintiff's malicious prosecution claim. This Court granted plaintiff leave to amplify his pleadings, noted that no new parties were added to the case, and deemed plaintiff's amended complaint served. (Def. Ex. J). Plaintiff's remaining claim is for state law malicious prosecution.

The plaintiff argues: (i) that he should be permitted to amend his complaint to add the abovementioned claims because the claims relate back to the events and occurrences alleged in plaintiff's original complaint, (ii) that plaintiff should be permitted to reinstate and re-plead his claim sounding in negligence and add a Monell claim against the City, and (iii) that the proposed party defendants should be added to the caption as they are united in interest with the presently named individual defendants and that the statute of limitations has not yet run for certain federal claims.

The defendant City opposes plaintiff's motion arguing: (i) the statute of limitations has run on all of plaintiff's proposed new claims; (ii) plaintiff voluntarily withdrew his federal claims with prejudice via stipulation; (iii) plaintiff's proposed amendment is untimely and prejudicial; and (iv) the relation back doctrine is not applicable here.

Plaintiff was arrested on September 28, 2011. (Pl. Ex. B and C). Plaintiff was indicted on October 14, 2011. (Def. Ex. T). Plaintiff's prosecution commenced November 22, 2011. (Def. Ex. S). Plaintiff was acquitted after trial on November 14, 2016. The statute of limitations for the majority of plaintiff's state law claims, including negligent hiring and retention, and failure to intervene expired on or about December 27, 2012. Plaintiff's state law claim for false arrest expired on February 12, 2018. The statute of limitations expired for plaintiff's federal claims on September 28, 2014. With respect to plaintiff's abuse of process claims, the statute of limitations for the state law abuse of process, if calculated from the date of plaintiff's arrest would be December 27, 2012, and if calculated from the date his criminal prosecution commenced, would be February 20, 2013. The statute of limitations for plaintiff's federal abuse of process claim would have expired on either September 28, 2014 or November 22, 2014. As plaintiff's argues that his notice of claim and summons and complaint provide notice for his abuse of process claim, plaintiff cannot argue that he was not aware of the abuse of process until his acquittal. (*Palmer v. State of New York,* 57 A.D.3d 364 [1st Dep't. 2008], *Duamutef v. Morris,* 956 F. Supp. 1112 [S.D.N.Y. January 29, 1997]). Plaintiff's state and federal denial of a fair trial claim expired on January 14, 2013 and October 14, 2014, respectively, as plaintiff's denial of a fair trial claim is based on fabrication of evidence. (Pl. Ex. F, *Lam v. City of New York*, 2018 N.Y. Misc. LEXIS 416 (N.Y. Sup. Ct. 2018). The amendment with respect to the above causes of action are barred by the applicable statute of limitations. Further, plaintiff's negligent hiring and retention claim was dismissed by order of this Court on November 20, 2018, after plaintiff failed to oppose the City's motion to dismiss the same. Therefore, plaintiff's motion to amend their pleadings to add: (A) state law false arrest, (B) state and federal malicious abuse of process, (C) state and federal failure to intervene, (D) state and federal denial of a fair right to trial, (E) state and federal negligent hiring, training, supervision, and retention, and (F) a federal "*Monell*" claim against only the City of New York, is denied.

Next, plaintiff seeks to add seventeen (17) proposed individual defendants: Joseph Lyons, Matthew Fialkovic, David Johnson, Daniel Hickey, Michael Cullen, John Stangenberg, Jeannie Corporan, Gerard Kranz, Roberto Rodriguez, Jeffrey Balzotti, Thomas Aasheim, Richard Gibson, Mark Martin, William O'Toole, Ralph Cilento, Patrick Hickey, Nicholas Ciuffi, to the caption as party defendants for all claims enumerated within plaintiff's proposed complaint.

Initially, the Court addresses the portion of the motion seeking to substitute the actual names of the officers pursuant to CPLR §1024. Based upon the record and applicable case law, the Court finds that plaintiff has failed to establish that he exercised due diligence in attempting to ascertain the identities of the police officers prior to the expiration of the statute of limitations. Therefore, plaintiff cannot avoid the same by utilizing CPLR §1024 (*Goldberg v. Boatmax, Inc.*, 41 A.D.3d 255 [1st Dep't., 2007]). Indeed, due diligence has been established where a plaintiff demonstrates that he or she engaged in pre-action discovery and did more than serve one discovery demand (see generally: *Henderson-Jones v. City of New York*, 87 A.D.3d 498 [1st Dep't., 2011]; Tucker *v. Lorieo*, 291 A.D.2d 261 [1st Dep't., 2002]; *Temple v. New York Community Hosp. of Brooklyn,* 89 A.D. 3d 926 [2d Dep't., 2011], *Holmes v. City of new York*, 132 A.D. 3d 952 [2d Dep't., 2015]). Here, plaintiff has not even mentioned in his motion nor submitted anything to indicate that he diligently attempted to ascertain the identities of these investigating officers prior to commencing the action and prior to the expiration of the statute of limitations. In light of this failure to establish diligence, the portion of the motion seeking to substitute pursuant to CPLR §1024, is denied.

Turning the portion of motion seeking to amend pursuant to CPLR §§ 203 and 3025. Under the relation-back doctrine of CPLR 203(b) and (c), new parties may be joined as defendants in a previously commenced action, after the statute of limitations has expired on the claims against them, where the plaintiff establishes that each of the following three criteria are satisfied. First, the plaintiff must show that the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants. Second, the plaintiff must show that the new defendants are "united in interest" (CPLR§203[b],[c]) with the original defendants, and will not suffer prejudice due to lack of notice. Third, the plaintiff must show 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, 512–13 [1st Dep't., 2016]).

As for the second prong, 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* at 513; *Mercer v. 203 East 72nd Street Corp.,* 300 A.D. 2d 105 [1st Dep't., 2002]. It has been held that the City cannot be held vicariously liable for its employee's violation of 42 U.S.C.§ 1983 (*Higgins* at 513-14). However, unlike causes of actions asserted pursuant to §1983,

municipalities may be liable, under the doctrine of respondeat superior, for the common law torts, such as false arrest assault and battery, committed by their employees (*Lepore v. Town of Greenburgh*, 120 A.D.3d 1202 [2d Dep't., 2014]; *Linson v. City of New York,* 98 A.D.3d 1002 [2d Dep't., 2012]; *Eckhardt v. City of White Plains*, 87 A.D. 3d 1049 [2d Dep't., 2011]). Therefore, the City and the individual officers are united in interest in connection with plaintiff's remaining state law claim for malicious prosecution.

The third prong of the relation-back doctrine is also satisfied here. The fact that one of the parties is vicariously liable for the acts of the other, permits the new party to be charged with notice. (*Austin v. Interfaith Medical Center*, 264 A.D.2d 702 [2d Dep't., 1999]). The City argues that the City was not on notice that plaintiff would attempt to add future claims, however, this point is moot, as that portion of plaintiff's motion is denied.

In addition to the foregoing, the Court notes that the City's arguments with respect to prejudice are not persuasive as they relate to the portion of plaintiff's motion that seeks to add new claims. Therefore, plaintiff is permitted to supplement his summons and amend his complaint to add the seventeen (17) proposed individual officers to his remaining state law malicious prosecution claim only.

Plaintiff is directed to serve a supplemental summons and amended complaint on all parties, including the newly named individual officers, in conformity with this order and with the CPLR, within 30 days of the entry date of this order. Plaintiff shall serve notice of entry within 30 days.

The above constitutes the decision and order of the Court.

Dated: 3/3/20
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.