Cartagena v City of New York
2020 NY Slip Op 32002(U)
June 24, 2020
Supreme Court, New York County
Docket Number: 159452/2017
Judge: Dakota D. Ramseur
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

EDWIN CARTAGENA,

Plaintiff,

- v -

THE CITY OF NEW YORK, P.O. VERONICA NICKEY, FORMER P.O. ALFONSO RODRIGUEZ, THE OFFICER WHO PLACED, OTHER NEW YORK CITY POLICE OFFICERS, AS IT PERTAINS TO THE

Defendant.

----------X

INDEX NO. 159452/2017

MOTION DATE 2/14/20

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for LEAVE TO FILE.

Plaintiff Edwin Cartagena commenced this tort action against the City of New York and several police officers to recover damages for injuries allegedly sustained in an April 24, 2016 incident at East 129th Street and Third Avenue, Bronx, New York. Plaintiff now moves, pursuant to CPLR 3025(b), 1003, and 1024, to amend the Complaint to add Sergeant Leron Lewis and Police Officer Matthew Meister as defendants to the first through sixth causes of action (*see NYSCEF 19* [*Proposed Amended Complaint*]).[1] The City opposes, arguing in sum and substance that all such claims are time-barred and do not sufficiently relate back to the original allegations. For the reasons below, Plaintiff's motion is granted solely to the extent that the federal malicious prosecution claim against Lewis and Meister is permitted.

BACKGROUND FACTS AND PROCEDURAL HISTORY

In the initial Complaint, filed October 24, 2017, Plaintiff alleged, in sum and substance, that Defendant Police Officers Nickey and Rodriguez and three other officers identified as John Does I through III, stopped Plaintiff, who had been riding his motorcycle, and unlawfully detained and assaulted him while applying handcuffs. A criminal complaint, signed by Nickey, charged Plaintiff with obstructing governmental administration in the second degree. The criminal complaint, in addition to discussing Rodriguez's role, asserted that Nickey "was unable to handcuff [Plaintiff] without the aid of three other police officers" (*NYSCEF 20* [*Pl Exh 10*]). On February 22, 2017, all charges were dismissed on speedy trial grounds (*NYSCEF 14* p 32). In the Complaint, Plaintiff asserted state claims against the City and all officers for: (1) excessive

[1] One of Plaintiff's point headings seeks to add "Police Officer Marksberry" as a defendant (*NYSCEF 10* [*Pl Affirm*] p 6). As this name appears nowhere else in the body of Plaintiff's submission, or in any evidence, this appears to be an error and is not addressed further in this decision.

force; (2) assault; (3 and 4) unlawful detention;[2] and (5) malicious prosecution; and federal § 1983 claims against (6) the individual officers, known and unknown; and (7 and 8) the City of New York for negligent hiring training and supervision and custom and practice which alleged caused the officers' conduct.

After the City answered, on July 10, 2018, Plaintiff served various discovery demands, including a demand for the City to identify the officers who responded to the subject incident (*NYSCEF 14* p 36). On December 11, 2018, the Court (Saunders, J.) issued a case scheduling order which, as relevant here, directed the City to name all witnesses (*NYSCEF 15*). On February 22, 2019, the City deposed Plaintiff (*NYSCEF 22* [*Pl EBT*]). During that deposition, Plaintiff testified that he filed a Civilian Complaint Review Board complaint on April 26, 2016, two days after the subject incident (*Pl EBT* 66:14, *et seq.*).[3] On March 26, 2019, the City responded, naming as witnesses—in addition to Officers Nickey and Rodriguez—Sergeant Lewis and Officer Meister (*NYSCEF 16* ¶ 7). The City also produced a copy of Nickey, Rodriguez, and Lewis's memo book entries for the subject incident, documents from Manhattan Criminal Court, and authorizations for production of the CCRB file (*NYSCEF 16* p 5).

On May 16, 2019, Plaintiff deposed Officer Nickey (*NYSCEF 17* [*Nickey EBT*]). Plaintiff alleges that it was not until this deposition that Plaintiff learned that, contrary to the criminal complaint, other officers, but not Nickey, had handcuffed Plaintiff. Thus, Plaintiff argues, though the statute of limitations has run on the majority of claims against Sergeant Lewis and Officer Meister, the relation back doctrine nevertheless permits Plaintiff to amend its Complaint to include those officers.

DISCUSSION

I. General standards for amendment/federal malicious prosecution claim

Under CPLR § 3025(b), a party may amend a pleading "at any time by leave of court", and "[l]eave shall be freely given upon such terms as may be just" (CPLR 3025[b]). Moreover, "[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" (Cruz v Brown, 129 AD3d 455 [1st Dept 2015], citing *Miller v Cohen*, 93 AD3d 424 [1st Dept 2012]). "An amendment that seeks to add a cause of action which is time-barred by the applicable statute of limitations is patently devoid of merit" (*Roco G.C. Corp. v Bridge View Tower, LLC*, 166 AD3d 1031, 1033 [2d Dept 2018]; *accord Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 161 AD3d 1263, 1266 [3d Dept 2018]).

The parties agree that the statutes of limitations have run on claims except for the federal malicious prosecution claim (*Pl Affirm* ¶ 19, 21; *City Affirm in Opp* ¶¶ 12, *et seq.*). On that basis alone, in the absence of opposition regarding that claim (*City Affirm in Opp* ¶ 2) and because leave to amend should freely be granted unless a proposed amendment is palpably deficient, the

---

[2] Plaintiff's third and fourth causes of action are identical (*NYSCEF 12* [Complaint] ¶¶ 8-13; *Proposed Amended Complaint* ¶¶ 8-13).

[3] Both parties are advised, in light of the undersigned's part rules, to utilize pinpoint citations in future submissions rather than citations to the entire transcript or other exhibit.

Court grants the branch of Plaintiff's motion seeking permission to amend the Complaint to add Sergeant Lewis and Officer Meister to Plaintiff's federal malicious prosecution claims.

II. Remaining claims/relation-back

For the remainder of the claims, to the extent that Plaintiff utilizes CPLR 1024 to attempt substitution of named officers for the John Doe Defendants, "[t]he general rule is that 'John Doe' pleadings cannot be used to circumvent statutes of limitations because replacing a 'John Doe' with a named party in effect constitutes a change in the party sued" (*Vasconcellos v City of NY*, 2014 US Dist LEXIS 143429, at *10 [SDNY Oct. 2, 2014], citing *Barrow v Wethersfield Police Dep't,* 66 F3d 466, 468 [2d Cir 1995], *mod on other grounds*, 74 F3d 1366 [2d Cir 1996]).[4] Thus, Plaintiff seeks to employ the relation-back doctrine, which allows new defendants to be added to a previously-commenced action 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" with the original defendants, and will not suffer prejudice due to lack of notice; 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 NY*, 144 AD3d 511, 512-513 [1st Dept 2016], citing CPLR 203 [b], [c]).

The first prong is not in dispute. However, the City argues with respect to the other prongs that Plaintiff has not demonstrated that the proposed new defendants are not "united in interest" with the City, and that Plaintiff has not demonstrated due diligence sufficient to justify amendment.

i. United in interest

In opposition, the City argues that the City and individual officers are not "united in interest" for relation-back purposes. The Court agrees, though only with respect to federal § 1983 claims. The requirement of unity of interest, which is "more than a notice provision," requires an examination of "the interest of the parties in the subject-matter"; that is, whether they "stand or fall together [such] that judgment against one will similarly affect the other" (*Higgins v City of NY*, 144 AD3d 511, 513 [1st Dept 2016]; *see also 27th St. Block Assn. v Dormitory Auth.*, 302 AD2d 155, 165 [1st Dept 2002] ["More is required than a common interest in the outcome."]).

Thus, 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*, 144 AD3d at 513.). However, the City "cannot be held vicariously liable for its employees' violations of 42 USC § 1983" because the City "can be held liable under 42 USC § 1983 only … through an unconstitutional official policy or custom" (*id.* at 513-14 [holding that the two officers sought to be added are not "united in interest with the City with respect to the federal false arrest and excessive force claims against them," and rejecting plaintiffs' proposed theory that unity of interest is "not claim specific"]). The cases cited by Plaintiff to support the argument that the City is united in interest with the officers sought to be added analyze only state tort claims, not

[4] The distinction is ultimately academic; as discussed below, both require a showing of diligence that, as discussed below, is not met.

federal § 1983 claims, and are thus distinguishable as to the 1983 claims (*see e.g. Llerando-Phipps v City of NY*, 390 F Supp 2d 372, 385 [SDNY 2005]; *Reznick v MTA/Long Is. Bus*, 7 AD3d 773, 774 [2d Dept 2004]).[5]

However, unlike federal § 1983 actions and as held by the cases cited by Plaintiff, municipalities may be liable, under the doctrine of *respondeat superior*, for common law torts, such as false arrest, malicious prosecution, assault, and battery, committed by their employees (*Lepore v Town of Greenburgh*, 120 AD3d 1202, 1204 [2d Dept 2014]). Nor can Sergeant Lewis or Officer Meister reasonably claim prejudice due to a lack of notice, as the City has conceded those officers' direct involvement—at minimum, as witnesses (Bostic v City of New York, 2019 NY Slip Op 30991[U], 3-4 [Sup Ct, NY County 2019] ["The *sine qua non* of relation back is notice and as the caretaker of the records involved here the City has notice. Arrest, and in particular an arrest of a violent nature, along with the commencement of proceedings puts the City and consequently, proposed officers on notice to a potential suit."] [Saunders, J.]).

Thus, the City and the individual officers are united in interest with respect to plaintiff's remaining state law claims. Plaintiff's proposed federal claims against Sergeant Lewis and Officer Meister, other than the federal claim for malicious prosecution, fall outside the statute of limitations, and are therefore palpably deficient and may not be amended.

ii. Diligence

In opposition, the City argues that the Court should not permit amendment because Plaintiff has not demonstrated diligent pursuit of the other officers sought to be added. In its initial paper and in reply, Plaintiff argues that its diligent efforts were thwarted by "lies or misrepresentations" in the criminal complaint signed by Officer Nickey which were not revealed until Nickey's deposition (*Pl Affirm* ¶ 7).

Like standard CPLR 1024 analysis—that is, when the statute of limitations is not at issue—"a party seeking to apply the relation-back doctrine to a later-identified 'John Doe' defendant, must establish that it made diligent efforts to ascertain the unknown party's identity prior to the expiration of the statute of limitations" (*Temple v NY Community Hosp. of Brooklyn*, 89 AD3d 926, 927 [2d Dept 2011]; *Walker v Hormann Flexon, LLC*, 153 AD3d 997, 998 [3d Dept 2017] [amendment denied where plaintiff's third amended complaint was filed nearly 10 months after the statute of limitations expired, with the delay essentially unexplained but for one ambiguous explanation]). Phrased another way, the failure to name intended defendants cannot be a "mistake" which satisfies the third prong of the relation-back test if a plaintiff knew or should have known a party's identity and potential liability yet fails to promptly seek to remedy the mistake (*Goldberg v Boatmax://, Inc.*, 41 AD3d 255, 256 [1st Dept 2007] [amendment denied where plaintiff knew identities and roles of intended defendants for nearly one year before seeking to add them]; *see also Burbano v New York City*, 172 AD3d 575, 576 [1st Dept 2019] ["plaintiff's more than two-year delay in seeking to add the new defendant as a party after learning her identity [cannot] be characterized as a mistake for relation-back purposes"]; *see also*

[5] Plaintiff did not address the City's unity-in-interest argument at all in reply.

Nasca v DelMonte, 111 AD3d 1427, 1429 [4th Dept 2013] [failure to name the correct party must be "a mistake and not the result of a strategy to obtain a tactical advantage").

Conversely, where there is an indication that a plaintiff has attempted to learn the identities of, and bring an action against, the correct defendants, but is nevertheless thwarted through no fault of the plaintiff, courts have justified amendment (*see e.g. May v Buffalo MRI Partners, L.P.*, 151 AD3d 1657, 1659 [4th Dept 2017] [permitting amendment where plaintiff's discovery demands went unanswered for a year]). Thus, "the relation back requirements do not protect a plaintiff who knows the actual identities of all potential defendants and who chooses not to bring timely suit against some of them, apparently for tactical reasons" (*Lamb v Prime Computer, Inc.*, 158 AD2d 798, 799 [3d Dept 1990]). Notably, the Court of Appeals has held that a mistake need not rise to the level of "excusable" (*Buran v Coupal*, 87 NY2d 173, 179 [1995]).

While no firm benchmark for due diligence has been established, courts have generally been satisfied where a plaintiff pursues some pre-action discovery and/or a FOIL request or, if the action is promptly commenced, repeated pursuit of discovery (*see e.g. Henderson-Jones v City of NY*, 87 AD3d 498, 502 [1st Dept 2011] [plaintiff served three discovery notices, compliance conference stipulation indicated that plaintiff intended to move to enforce compliance with discovery notices, and plaintiff moved several months thereafter]; *Morales v City of NY*, 2017 NY Slip Op 30305[U], *3 [Sup Ct, NY County, D'Auguste, J.] [plaintiff's FOIL request and repeated subsequent inquiries demonstrated due diligence]; *Hanna v City of NY*, 2016 NY Slip Op 31082[U], *3 [Sup Ct, NY County, D'Auguste, J.] ["In order to rise to the level of 'due diligence,' it appears that [plaintiff] should have used any means available to obtain the identities of the 'John Doe' defendants."]; *cf Temple v NY Community Hosp. of Brooklyn*, 89 AD3d 926, 927 [2d Dept 2011] [plaintiff failed to pursue pre-action discovery or FOIL request, and when discovery responses received were less than adequate, plaintiff failed to promptly seek further discovery, neglected to submit a properly executed authorization to the disclosing party, and failed to properly and promptly seek assistance from the Supreme Court]; *cf Tucker v Lorieo*, 291 AD2d 261, 262 [1st Dept 2002] [amendment to add defendant's identity denied where plaintiff took no steps to ascertain identity until 10 months after filing summons and complaint and did not move to amend caption until more than one year after commencement]; *cf Holmes v City of NY*, 132 AD3d 952, 954 [2d Dept 2015] [affirming denial of amendment where plaintiffs moved to amend about 7 months after discovery officers' identities in criminal trial where "[t]here is no indication in the record that the plaintiffs engaged in any pre-action disclosure or made any Freedom of Information Law requests, or … that the plaintiffs 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"]).

As the City highlights in opposition, Plaintiff filed a CCRB report just days after the incident (*City Affirm in Opp* ¶ 4), a fact which Plaintiff does not dispute, and potentially also with the Internal Affairs Bureau (*Pl EBT* 66:13-67:7). There is no indication that Plaintiff followed up on either complaint until recently, or filed any FOIL or pre-action discovery request.

The Court also notes the timeline of this action. Plaintiff did not file this action until October 24, 2017, over a year after the subject incident and 8 months after charges against

Plaintiff had been dropped, did not serve discovery demands or seek a preliminary conference until July 12, 2018, at least 5 months after the City served its Amended Answer, and did not file this motion until July 22, 2019, nearly 4 months after the City revealed Lewis and Meister's identities.

To explain the delay in seeking amendment, Plaintiff argues that the failure to name the additional officers until this motion was a mistake caused by the City. Specifically, Plaintiff argues that the criminal complaint signed by Officer Nickey stated incorrectly that "Defendant's actions made it so that I was unable to handcuff him without the aid of three police officers, three other police officers" (*NYSCEF 20*), later contradicted by Nickey's EBT testimony denying that she personally attempted to handcuff or arrest him (*Nickey EBT* 58:5, *et seq.*). Viewed in context, however, the questioning and Nickey's responses appear to relate to the pretext for the obstruction charge and Nickey's involvement, not the identity or involvement of other officers. Indeed, Plaintiff deposed Nickey on May 16, 2019, nearly two months after the City had already disclosed Sergeant Lewis and Officer Meister's identities. To the extent that Plaintiff argues, in reply, that the City's disclosure named Lewis and Meister only as witnesses, this argument is undermined by the fact that, at Nickey's deposition, Plaintiff asked only about Lewis.

More importantly, Nickey's testimony did not reveal any new information with respect to the incident itself that Plaintiff did not already know; that is, Plaintiff already knew—if not from his own presence at the incident then certainly from the criminal complaint—that other officers, identities unknown, were involved in handcuffing him. Plaintiff's knowledge of the other officers' involvement, if not their identity, is bolstered by the fact that the Complaint named, in addition to Officers Nickey and Rodriguez, three other John Doe officers, including one explicitly involved in handcuffing Plaintiff. Thus, the delay cannot reasonably be tied, as Plaintiff urges, to any inconsistency between the criminal complaint and Nickey's testimony. Nevertheless, Plaintiff, as illustrated by the timeline above, did not diligently pursue discovery, either before or after this action was commenced. Accordingly, the third prong of the relation-back test is not satisfied, and thus the statute of limitations renders Plaintiff's proposed amendments, other than the undisputed federal malicious prosecution claim which is not barred by the statute of limitations, palpably deficient.

CONCLUSION/ORDER

For the above reasons, it is

ORDERED that Plaintiff's motion (001) is **GRANTED** solely to the extent that Plaintiff shall be permitted to amend its sixth cause of action, a federal cause of action for malicious prosecution, against Sergeant Lewis and Officer Meister, and the Proposed Amended Summons and Complaint (*NYSCEF 19*) is deemed filed and served only to that extent, consistent with this decision and order; and it is further

ORDERED that all other amendments are denied; and it is further

ORDERED that the City shall, within 30 days of receipt of this order, e-file and serve a copy of this order with notice of entry; and it is further

ORDERED that the Clerk of Court shall amend the caption to reflect the proposed caption in the Proposed Summons and Complaint (*NYSCEF 19*).

This constitutes the decision and order of the Court.

6/24/20
DATE

DAKOTA D. RAMSEUR, J.S.C.

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