Kirkpatrick v City of New York
2020 NY Slip Op 32210(U)
July 6, 2020
Supreme Court, New York County
Docket Number: 153440/2018
Judge: Dakota D. Ramseur

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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DARRELL KIRKPATRICK,

Plaintiff,

- v -

THE CITY OF NEW YORK (POLICE DEPARTMENT), P.O. JOHN DOE, P.O. JOHN DOE, NEW YORK CITY HOUSING AUTHORITY (POLICE DEPARTMENT), P.O. JAMES DOE, P.O. JAMES DOE

Defendants.

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INDEX NO. 153440/2018

MOTION DATE 2/14/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 40, 41

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

Plaintiff commenced this action against the City of New York, the New York City Housing Authority ("NYCHA") and unknown NYPD "John/James Doe" police officers (collectively the "City") to recover damages stemming from Plaintiff's August 5, 2017 arrest.[1] Plaintiff was arrested for selling marijuana near the Frederick Douglass Children's Aid Society at Columbus Avenue and 104th Street, processed and transported to Police Station Area 6 at 2770 Frederick Douglass Boulevard, and ultimately transported to Criminal Court, New York County (*NYSCEF 27* [*Complaint*] ¶¶ 11-16). After an October 17, 2017 appearance, the charges against Plaintiff were dismissed (*Complaint* ¶ 17). Plaintiff subsequently filed a Notice of Claim on October 30, 2017 (*NYSCEF 31*) and commenced this action on April 16, 2018, alleging causes of action for excessive force, unlawful arrest, unjust imprisonment, malicious prosecution, assault, battery, and federal civil rights violations.

Plaintiff now moves, pursuant to CPLR 3025(b), to amend the Summons and Complaint to substitute the names of New York City Police Officers Rafael Aquino and Erick Clarck for the "John Doe" police officers, arguing that there is no prejudice to the City because discovery has not yet occurred.[2] The City opposes, arguing: (1) that all state claims against Aquino and Clarck are barred by General Municipal Law (GML) § 50-i's one year and ninety day statute of limitations; (2) that the relation-back doctrine does not apply because the officers were named in

[1] Plaintiff discontinued the action against NYCHA by stipulation dated April 30, 2018 (*NYSCEF 4*). To the extent that Plaintiff, as the City notes, continues to invoke NYCHA (*see e.g. NYSCEF 22* at first ¶ 10), that appears to be an error.

[2] Plaintiff filed a similar motion on August 21, 2019 (sequence 001), withdrawn without prejudice on September 12, 2019 (*NYSCEF 20*). This motion was filed on September 17, 2019.

the Criminal Court Affidavit; and (3) that Plaintiff's assault, battery, or excessive force claims against the officers lack merit. For the reasons below, the Court agrees with the City and denies Plaintiff's motion.

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]).

Here, there is no dispute that GML§ 50-i(1) requires actions against New York City or its employees to be commenced within one year and ninety days after the subject incident. Accordingly, the statute of limitations on such claims would have run, for most of Plaintiff's claims, on November 5, 2018, one year and ninety days after Plaintiff's release from custody on August 6, 2017 (*Palmer v City of New York*, 226 AD2d 149 [1st Dept 1996]). At the very latest, the statute would have run on Plaintiff's malicious prosecution claims on January 15, 2019, one year and ninety days after the charges against Plaintiff were dismissed on October 17, 2017. However, Plaintiff did not file even the first iteration of this motion until August 21, 2019 (*NYSCEF 12*).

With respect to CPLR 1024 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]). "When an originally-named defendant and an unknown 'Jane Doe' or 'John Doe' party are united in interest, i.e. employer and employee, the later-identified party may, in some instances, be added to the suit after the statute of limitations has expired pursuant to the 'relation-back' doctrine of CPLR 203(f), based upon *postlimitations* disclosure of the unknown party's identity" (*id.* [emphasis added]). "The moving party seeking to apply the relation-back doctrine to a later-identified 'Jane Doe' or 'John Doe' defendant has the burden, inter alia, of establishing that diligent efforts were made to ascertain the unknown party's identity *prior to* the expiration of the statute of limitations" (*id.* [emphasis added]; *accord Burbano v New York City*, 172 AD3d 575, 576 [1st Dept 2019]).

Here, the Criminal Court Complaint listed the names and shield numbers of Officers Aquino and Clarck (*NYSCEF 32*). To the extent that Plaintiff argues in reply that the Criminal Complaint was "not sworn under penalty of perjury," and therefore "there is no way to be sure it was created accurately…," (*NYSCEF 40* at p 1), that is technically true, but elides that the Criminal Complaint *does* state—right above Aquino's signature—that "[f]alse statements made in this written instrument are punishable as a class A misdemeanor … and as other crimes" (*NYSCEF 32* at p 2). More importantly, however, the accuracy of the Criminal Complaint's

content is immaterial to this motion, as is Plaintiff's other argument that "the mere *existence* of a charging instrument does not prove it was given to Plaintiff" (*NYSCEF 40* at p 1 [emphasis in original]). It is Plaintiff's burden to demonstrate diligent efforts to ascertain the unknown officers' identity, whether or not Plaintiff, through counsel or otherwise, was provided a copy of the Criminal Complaint. Plaintiff could have done so by, for example, seeking to independently obtain the Criminal Complaint, some version of which is, of course, filed in every action brought in Criminal Court. Had Plaintiff obtained the document and named Aquino and Clarck, only to discover that they were not involved in Plaintiff's arrest, Plaintiff's argument regarding the accuracy of the document would be on firmer ground.

To the extent that Plaintiff argues, in reply, that "the statute to sue the officers in their individual capacity as private persons has not expired" and that "...[t]he possibility exists that through the course of discovery, [the City] can claim its officers were acting outside the bounds of their employment and without probabl[e] cause, in which case personal liability would attach," Plaintiff's Amended Complaint does not actually appear to do so. Rather, the Proposed Amended Complaint consistently frames the allegations against Aquino and Clarck as the actions of the City's agents/employees, acting on behalf of the City. Should the City later disclaim representation and assert that the officers acted outside the scope of their employment, or should Plaintiff be able to specify the precise manner in which the individual officers were not acting within the scope of employment. Plaintiff may revisit this argument. At this juncture, however, amendment must be denied.

Additionally, the City also argues that Plaintiff's proposed assault, battery, and excessive force claims are palpably deficient, highlighting the lack of physical injuries in the Bill of Particulars and Plaintiff's deposition testimony that he did not suffer any physical injuries, only the "discomfort and pain" of the handcuffs (*NYSCEF 34* 65:14-22; *NYSCEF 35*). The City is correct that the excessive force claim against the officers should not be permitted (*see Mendez v City of New York*, 137 AD3d 468, 472 [1st Dept 2016] ["...even assuming probable cause for the arrest, the officers' use of tight handcuffing on plaintiff was not unreasonable."]). Assault and battery claims, however, require a determination of probable cause, and are not entirely dependent upon the quantum of harm; it is therefore premature, at this juncture, to determine whether Plaintiff's assault and battery claims against the individual officers are palpably deficient (*see Johnson v Suffolk County Police Dept.*, 245 AD2d 340, 341 [2d Dept 1997] [arrest by police officer was unlawful, and therefore the officer committed a battery when he touched the plaintiff during the arrest]). In any event, any discussion of the assault, battery, and excessive force claims is academic given the Court's holding above. It is therefore

ORDERED that Plaintiff's motion to amend (sequence 002) is DENIED; and it is further

ORDERED that the City shall, within 30 days, serve a copy of this order with notice of entry upon all parties; and it is further

ORDERED that the parties shall, within 45 days, confer regarding outstanding discovery and either: (1) upload a discovery stipulation to be so-ordered; or (2) email Sam Wilkenfeld (swilkenf@nycourts.gov) to schedule a remote discovery conference.

This constitutes the decision and order of the Court.

7/6/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

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