Bansey v City of New York
2020 NY Slip Op 33936(U)
October 1, 2020
Supreme Court, Bronx County
Docket Number: 25562/2018E
Judge: Mitchell J. Danziger

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ZAIRE BANSEY,

Plaintiff,

Index No.: 25562/2018E

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, AND POLICE OFFICER JOHN DOE,

Defendants,

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

Plaintiff's motion to amend the complaint to replace the "Police Officer John Doe" designation in the summons and complaint herein with "Detective Sergio Lovera" ("Lovera") is resolved as follows:

As an initial matter, plaintiff concedes that his fifth cause of action as it relates to a federal claim for "*Monell*" liability under 42 U.S.C. §1983 does not state a claim. Therefore, the portion of the City's motion seeking dismissal of plaintiff's fifth cause of action as it relates to a "*Monell*" claim is granted.

The Court notes that for all state law causes of action, it is undisputed that the statute of limitations has expired. Further, the statute of limitations for all federal claims with the exception of malicious prosecution, have expired. Plaintiff asserts in his reply that the relation back doctrine set forth by CPLR §203(f) applies.

The Court also notes that the Notice of Claim served in this matter fails to name the individual officer sought to be added herein (see Notice of Claim submitted as Exhibit "A" to plaintiff's motion). Under *Tannenbaum v. City of New York* (30 A.D. 3d 357 [1st Dep't., 2006]), which is still controlling in the First Department, "[g]eneral municipal law §50-e makes unauthorized an action against individuals who have not been named in the notice of claim"

(*Tannenbaum* at 358). While the Notice of Claim need not name individual officers in connection with federal law claims, lawsuits alleging state law claims against individual officers in their official capacity, who were not named in the notice of claim, are unauthorized (*Id.*; see also *Alvarez v. City of New York* [134 A.D.3d 599 [1st Dep't., 2015]). Therefore, to the extent that the proposed amended complaint seeks to assert state law claims against Lovera in his official capacity, said claims are unauthorized under *Tannenbaum,* because the individual officer was not named in the Notice of Claim. Here, the proposed amended complaint alleges that Lovera, "was employed by the City of New York, as an officer of the NYPD, and....was acting within the scope of and in the course of his employment...". (See exhibit "3" to the motion). The Court notes that there has been no application to serve an amended Notice of Claim herein and the Court is without discretion to permit a late notice of claim against the individual officers on the state law causes of action as the statute of limitations for the same has expired. While amendments to pleadings are to be freely granted pursuant to CPLR §3025(b), leave to amend should not be granted, when the proposed amendment is plainly lacking in merit. (*Posner v. Central Synagogue*, 202 A.D.2d 284 (1st Dep't., 1994). Here, the amendment to add Lovera to the state law claims lacks merit because lawsuits alleging state law claims against individual officers in their official capacities, who are not named in the notice of claim, are not authorized. (*Alvarez v. City of New York* [134 A.D.3d 599 [1st Dep't., 2015]). In light of the lack of merit of the state law claims against Lovera, the Court need not conduct a "relation-back" doctrine analysis.

Consequently, the Court finds that the amendment should be permitted in relation to plaintiff's federal claim for malicious prosecution because the motion was made prior to expiration of the relevant statute of limitation, and plaintiff has set forth a meritorious claim for same. Moreover, the Court finds that defendants will suffer little prejudice if the amendment is permitted for the federal claim for malicious prosecution.

Plaintiff has not established that the relation back doctrine should apply here. As set forth by CPLR §203(f), for the relation back doctrine to apply to plaintiff's untimely federal claims, he must establish that, "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that

relationship, can be charged with such notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against the new party." (*Buran v. Coupal*, 87 N.Y. 2d 173 [1995]). Moreover, failing to demonstrate the "excusability" of plaintiff's failure to name the proper parties does not automatically result in the relation back doctrine being precluded (*Id.*).

Initially, the Court finds that the claims against Lovera arise out of the same conduct set forth against the original defendants in the original complaint. Therefore, the first prong of the relation back doctrine has been satisfied. However, the second prong of "unity of interest" has not been established.

> "The requirement of 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.' 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. Unity of interest fails if there is a possibility that the new defendants may have a defense unavailable to the original defendants. (*Higgins v City of New York*, 144 AD3d 511, 513 [1st Dep't., 2016][internal citations omitted]).

Employers can be held vicariously liable for their employees' torts, only to the extent that the underlying acts were committed within the scope of the employment. (*Adams v. New York City Transit Auth.*, 88 N.Y.2d 116 [1996]). However, it is well settled that the City cannot be held vicariously liable for it's employees' violations of 42 U.S.C. 1983 (*Higgins* at 513). Therefore, plaintiff has not established that the proposed individual officer is united in interest for plaintiff federal claims of, false arrest, false imprisonment, delay of medical treatment, and excessive force.

Based on the forgoing, the motion is granted solely to the extent that the plaintiff is permitted to amend the summons the complaint to include a federal claim against Lovera for malicious prosecution, only. However, leave to include Lovera for all state law claims and all

other federal claims, are denied.

The portion of the plaintiff's motion to compel defendants to comply with plaintiff's discovery demands dated September 3, 2019, or for the Court to sign so ordered subpoenas for the discovery, is denied. Defendants' cross-motion to strike plaintiff's pleadings for failure to comply with the Court's October 24, 2019 order, is denied. A review of the most recent status conference order indicates that the October 24, 2019 order was complied with by the parties crossing out the language stating that discovery was due. Further, a review of the response provided by the City to plaintiff's September 3, 2019 demand, indicates that the City in fact, responded. Plaintiff makes no argument nor cites any legal authority setting forth why he is entitled to the discovery sought, specifically, the District Attorney's files and Lovera's personnel file and disciplinary history.

Accordingly, plaintiff's motion is granted in part and the City's cross-motion is granted in part. Plaintiff is directed to serve a supplemental summons and amended complaint on all parties, including Lovera, in conformity with this order and with the CPLR, within 30 days the entry date of this order.

This constitutes the decision and order of the Court.

Dated: 10/14/2020

Bronx, New York

Hon. Mitchell J. Danziger, J.S.C.