

Corse v Carthage

2020 NY Slip Op 35338(U)

July 13, 2020

Supreme Court, Nassau County

Docket Number: Index No. 601867/20

Judge: Diccia T. Pineda-Kirwan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN**
Justice

IA PART 27

-----X
ERICK CORSE,

Plaintiff(s),

Index No.: 601867/20
Motion Date: 6/18/20
Motion Cal. #: 21, 22
Seq. No.: 1, 2

-against-

RUSSELL CARTHAGE, ET AL,

Defendant(s).
-----X

The following numbered papers read on this motion by defendants The County of Nassau, The Nassau County Department of Social Services, and Nassau County Police Department to dismiss and cross motion by plaintiff for leave to file a late notice of claim, or deem his prior notices of claim timely filed, *nunc pro tunc*.

PAPERS

NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 3 - 12
Notice of Cross-Motion-Affidavit-Exhibits.....	EF 13 - 20
Answering-Affidavits-Exhibits.....	EF 22
Reply.....	EF 23

Upon the foregoing cited papers, and after Skype for Business conference, it is ordered that the motion by defendants The County of Nassau (County), The Nassau County Department of Social Services (NCDSS), and Nassau County Police Department (NCPD) (collectively "Nassau Defendants") to dismiss, and plaintiffs' cross motion for leave to file a late notice of claim, are consolidated for disposition, and are determined as follows:

Plaintiff commenced the instant action alleging causes of action sounding in negligence, assault, battery, intentional infliction of emotional distress, false arrest, malicious prosecution, and violation of 42 USC §1983, among others, arising from an altercation with defendant Russell Carthage on April 8, 2019, at the premises located at 186 East Pennywood Avenue, Freeport, New York (Premises). Plaintiff attempted to serve two separate notices of claim, one regarding the negligence causes of action, and one regarding his false arrest and malicious prosecution causes of action. The Nassau Defendants now move to dismiss pursuant to CPLR 3211(a)(1), (5) and (7). Plaintiff cross-moves for leave to file a late notice of claim, or deem his prior notices of claim deemed timely filed, *nunc pro tunc*.

As to plaintiff's negligence causes of action, it is undisputed that on July 2, 2019, plaintiff served a notice of claim on County and NCDSS. Defendants County and NCDSS contend that plaintiff's negligence causes of action should be dismissed as they did not own the Premises or employ defendant Russell Carthage, and thus did not owe plaintiff a duty.

In support, County and NCDSS submit, among other things, a copy of the deed to the Premises, and the affidavit of Jeanne Vassel, the Director of Human Resources/Payroll for NCDSS.

The deed shows that the Premises are owned by non-party Nairda LLC.

Ms. Vassel states that she conducted a search of NCDSS' employment records, including the Nassau Unified Human Resources System, containing payroll information, and General Client Inquiry containing imaged personnel files, and determined that Mr. Carthage was not employed by NCDSS on the date of the incident. Thus, as NCDSS neither owned the Premises nor employed Mr. Carthage, the negligence causes of action asserted against it are dismissed.

As to defendant County, however, Ms. Vassel simply avers that she requested that County's Human Resources Department conduct a search of its employee records, and that based on these records, Mr. Carthage was not a County employee. Ms. Vassel however does not state how she requested this search, how the alleged search was conducted, what records were produced, nor provide any details as to how it was purportedly determined that Mr. Carthage was not a County employee. Thus, plaintiff's negligence causes of action as asserted against defendant County survive.

Defendants NCPD and County further seek to dismiss plaintiff's causes of action arising from his false arrest, for failure to serve a notice of claim and expiration of the statute of limitations.

As to NCPD, plaintiff provides affidavits of service that NCPD was served with a notice of claim regarding plaintiff's false arrest and malicious prosecution claims on July 2, 2019, and again on August 30, 2019, by service upon a managing agent authorized to accept service. NCPD fails to demonstrate that this service was untimely or otherwise improper. Thus, NCPD received timely notice of these causes of action.

As to defendant County, plaintiff provides affidavits of service that County was served with a notice of claim regarding plaintiff's false arrest and malicious prosecution claims by service upon County c/o the Office of the Nassau County Comptroller, on July 2, 2019, and again on August 30, 2019. County alleges that the Office of the Nassau County Comptroller does not constitute service upon County. Plaintiff cross-moves for leave to serve a late notice of claim, or deem his prior notices of claim deemed timely filed, *nunc pro tunc*.

A notice of claim must be served within 90 days after a claim arises when a party seeks recovery for damages against a public corporation (*see* General Municipal Law § 50-e[1][a]). Leave to file a late notice of claim after the expiration of the statutory 90 days rests in the Court's discretion (*see Platt v New York City Health & Hospitals Corp.*, 105 AD3d 1026, 1027 [2013]). General Municipal Law § 50-e is to be "applied flexibly" (*Goodwin v New York City Housing Auth.*, 42 AD3d 63, 66 [2007]).

When considering whether to grant leave to file a late notice of claim, there are several factors to be considered, including: (1) whether the public corporation acquired actual knowledge of the essential facts of the claim within the statutory 90-day period or a reasonable time thereafter, (2) whether plaintiff had a reasonable excuse for the delay, and (3) whether the public corporation will be substantially prejudiced by the delay (*see* General Municipal Law §50-e(5); *Rodriguez v Woodhull Sch.*, 105 AD3d 1050, 1051 [2013]; *Castaneda v Nassau Health Care Corp.*, 89 AD3d 782, 782 [2011]).

In support of the application, plaintiff submits, among other things, copies of the notices of claim, and a report allegedly authored by NCDSS.

The report is dated April 9, 2019, and states, among other things, that surveillance footage shows defendant Carthage "physically attacking" plaintiff, resulting in plaintiff being "rendered unconscious." Plaintiff argues that this report, coupled with NCPD's investigation and arrest of plaintiff, are sufficient to impute actual knowledge of plaintiff's claims for false arrest and malicious prosecution on County.

"Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim" (*Nunez v Vill. of Rockville Ctr.*, 176 AD3d 1211, 1214-15 [2019], quoting *Caselli v City of New York*, 105 AD2d 251, 255 [1984]). "[F]or a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation" (*Matter of*

Fethallah v New York City Police Dept., 150 AD3d 998, 1000 [2017] [internal quotation marks omitted]). Here, not only was the NCPD involved with plaintiff's arrest, but the report states that surveillance video shows that plaintiff was the one attacked. Plaintiff has thus met his burden as to whether County acquired actual knowledge of the essential facts of the claim within the statutory 90-day period or a reasonable time thereafter.

To the extent that County argues that the statute of limitations has expired, plaintiff's cross motion was made within one year and ninety days after the happening of the event upon which the claim is based, and is therefore timely (*see* GML §50-i[1][c]).

As to the reasonable excuse for the delay, here plaintiff attempted to serve County twice by service upon the Office of the Nassau County Comptroller, through which it appears the County received the notice of claim as to plaintiff's negligence causes of action, but not plaintiff's notice of claim as to his false arrest and malicious prosecution causes of action. To the extent such service was improper, the absence of a reasonable excuse is not fatal, where as here, County had actual knowledge of the essential facts constituting the claim, and failed to demonstrate that it will suffer any prejudice (*see Fox v New York City Dep't of Educ.*, 124 AD3d 887, 889 [2015]).

Lastly, defendants NCPD and County further seek to dismiss plaintiff's claim alleging a violation of 42 USC §1983, on the basis that it is conclusory. However, the allegations in the complaint sufficiently plead a cause of action for violation of 42 U.S.C. §1983 (*see Leatherman v Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 US 163, 168 [1993]), and movants fail to submit any evidence disputing plaintiff's allegations.

Accordingly, the motion is granted solely to the extent that plaintiff's negligence causes of action as against defendant NCDSS are dismissed. Plaintiff's cross motion for leave to file a late notice of claim is granted.

Any request for relief not expressly granted herein is denied.

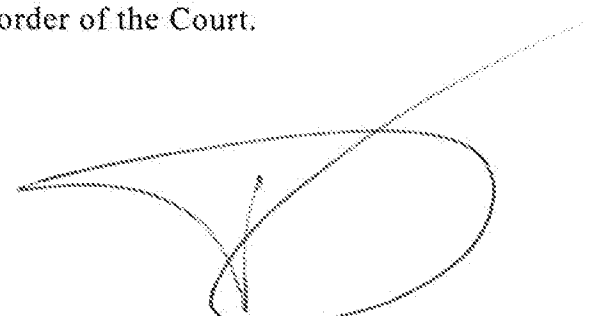
This constitutes the decision and order of the Court.

ENTERED

Jul 21 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: July 13, 2020



DICCIA T. PINEDA-KIRWAN, J.S.C.