| **Wilder v City of New York** |
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| 2021 NY Slip Op 31843(U) |
| June 2, 2021 |
| Supreme Court, New York County |
| Docket Number: 152918/2015 |
| Judge: Dakota D. Ramseur |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

*Justice*

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ALFRED WILDER,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, P.O. JOHN DOE #1, P.O. JOHN DOE #2

Defendant.

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**INDEX NO.** 152918/2015

**MOTION DATE** 10/19/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL.

Plaintiff, Alfred Wilder (plaintiff), commenced this action seeking damages for false arrest and false imprisonment, malicious prosecution, negligent hiring, training and supervision, and under 42 USC § 1983, stemming from his arrest on December 12, 2012. Defendants, the City of New York (City) and the New York Police Department (NYPD) (collectively, defendants) now move pursuant to CPLR 3211(a)(7) to dismiss the complaint. Plaintiff cross-moves for leave to amend the complaint to add the arresting officer, NYPD Officer Francis Zito (Officer Zito), as a defendant. The motion and cross-motion are opposed. For the following reasons, and after oral argument on June 1, 2021, defendants' motion is granted, and plaintiff's motion is denied.

This action arises out of plaintiff's arrest on December 12, 2012, at 125th Street and 7th Avenue in the County, City and State of New York. Plaintiff testified that he was arrested for possession of a controlled substance with intent to sell. At a suppression hearing on January 24, 2014, the justice presiding over the criminal matter determined that Officer Zito's testimony concerning the events leading up to plaintiff's arrest were vague and warranted suppressing the controlled substance found on plaintiff. Plaintiff testified that he entered a "drug treatment program," upon the completion of which the charges against him were dismissed.

In support of their motion, defendants argue: 1) that plaintiff's state law claims be dismissed, as plaintiff failed to file a notice of claim within 90 days of his arrest and dismissal of the criminal charges against plaintiff; 2) that plaintiff's federal claims be dismissed because, first, plaintiff fails to identify any policies, customs or practices for his §1983 claims, and second, because plaintiff fails to allege a nexus between a municipal policy, custom or practice and the alleged violation of plaintiff's civil rights; 3) that plaintiff's negligent hiring, retention, and training must be dismissed, as the NYPD officer(s) were acting within the scope of their employment; and 4) that this matter should be dismissed against the NYPD as it is not a suable

entity. In support of his cross-motion, plaintiff argues that he should be granted leave to add Officer Zito as a defendant in this action because Officer Zito and City are united in interest.

**DISCUSSION**

***Defendants' motion to dismiss***

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, " 'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . ., are not entitled to such consideration' " (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836, [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists. Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

General Municipal Law (GML) § 50-e(5) provides that a court may extend the 90-day notice of claim filling deadline up to the expiration of the 1-year and 90-day statute of limitations for claims against the City (*Plaza v NY Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 467 [1st Dept 2012] [The failure to seek a court order excusing an untimely notice of claim within one year and 90 days after accrual of the claim requires dismissal of the action]; *Campbell v City of NY*, 4 NY3d 200, 203 [2005] ["(The Court of Appeals) has consistently treated the year-and-90-day provision contained in section 50-i as a statute of limitations."]). Here, plaintiff failed to file a notice of claim in this action, and further fails to address this point in his opposition and cross-motion. Accordingly, plaintiff's state law claims are dismissed.

Defendants next argue that plaintiff's § 1983 claims should be dismissed for failure to plead the allegations with sufficient specificity.

42 USC § 1983 provides, in relevant part, that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

While § 1983 claims against municipalities are permitted, "a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory" (*Monell v Dept. of Social Servs.*, 436 US 658, 691 [1978] [emphasis in original]). Rather, § 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights" (*id.* at 692). Thus, "it is when execution of a government's policy or

custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983" (*id.* at 694; *accord Higgins v City of NY*, 144 AD3d 511, 513 [1st Dept 2016] ["[t]he City can be held liable under 42 USC § 1983 only for violating that statute through an unconstitutional official policy or custom."]).

A municipality can be held liable under § 1983 in four situations: (1) an officially promulgated policy endorsed or ordered by the municipality; (2) a custom or practice that is so pervasive and widespread that the municipality had either actual or constructive knowledge of it; (3) actions taken or decisions made by the municipal employee who, as a matter of state law, is responsible for establishing municipal policies with respect to the area in which the action is taken; or (4) where the failure of the municipality to train its employees rises to the level of deliberate indifference to the constitutional rights of others (*Wahhab v City of NY*, 386 F Supp 2d 277, 284 [SDNY 2005] [collecting cases]). "The mere invocation of the 'pattern' or 'plan' will not suffice without [a] causal link" (*Batista v Rodriguez*, 702 F2d 393, 397 [2d Cir 1983]; *accord Jackson v Police Dept.*, 192 AD2d 641, 642 [2d Dept 1993]). Failure to "specifically plead the existence of an official policy or custom" which deprived an individual of a constitutional right in violation of 42 USC § 1983 is "fatal to any claim against the municipality" (*Liu v NY City Police Dept.*, 216 AD2d 67, 68 [1st Dept 1995]). Here, the Court finds that plaintiff has failed to plead the elements which would constitute a § 1983 violation, as the allegations contained in the complaint are conclusory and consist of boilerplate law. Plaintiff's opposition also fails to address this point. Accordingly, the federal law claims are dismissed.

Defendants also correctly argue that the claims against the NYPD must be dismissed as it is a non-suable entity (New York City Charter § 396; *Jenkins v City of New York*, 478 F3d 76, 93, n.19 [2d Cir. 2007] [noting that dismissal of claims against NYPD appropriate since it is a non-suable agency of the City]). Accordingly, plaintiff's claims against the NYPD are dismissed.

***Plaintiff's motion to amend***

On a motion to amend, the "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" (*Miller v Cohen*, 93 AD3d 424 [1st Dept 2012] [internal quotation marks omitted).

Pursuant to the relation back doctrine, a plaintiff may add a new party to an action after the statute of limitations has expired where:

> "(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 that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well."

(*Mondello v New York Blood Center-Greater New York Blood Program*, 80 NY2d 219, 226 [1992]).

Here, fatal to plaintiff's cross-motion, "[t]he City cannot be held vicariously liable for its employees' violations of 42 U.S.C. § 1983, and there is no unity of interest in the absence of a relationship giving rise to such vicarious liability" (*Thomas v. City of New York*, 154 AD3d 417, 418 [1st Dept 2017], citing *Higgins v City of New York*, 144 AD3d 511 [1st Dept 2016]). More importantly, and as discussed in the previous section, plaintiff fails to plead the necessary elements maintain a claim under § 1983.

The court also notes that plaintiff fails to demonstrate that he made genuine effort to ascertain the identity of Officer Zito prior to the running of the Statute of Limitations (CPLR 1024; *Tucker v Lorieo*, 291 AD2d 261 [1st Dept 2002]; *Justin v Orshan*, 14 AD3d 492, 492 [2d Dept 2005]). Plaintiff's argument that his delay in seeking leave to add Officer Zito until after the statute of limitations expired was due to law office failure lacks detail regarding the change in personnel at plaintiff's law firm that resulted in plaintiff's belated motion for leave to amend the complaint.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint is denied; and it is further

ORDERED that defendants shall serve a copy of this order and decision upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

6/2/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

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