Dufanal v L.A. Prods. & Servs. Corp.
2022 NY Slip Op 32481(U)
July 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 503385/2019
Judge: Consuelo Mallafre Melendez
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At an IAS Term, Part 25 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the _22_day of _____JULY__ 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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YARDLY DUFANAL,
Plaintiff,

-against-

L.A. PRODUCTS AND SERVICES CORP., THE CITY OF NEW YORK, NYPD OFFICER JANNIE WONG and NYPD OFFICER JOHN DOE,
Defendants.

Index No. 503385/2019

DECISION & ORDER
Motion Sequence 001

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Hon. Consuelo Mallafre Melendez

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 19-31; 33-35; 36

In this is action for False Arrest and Malicious Prosecution under state and federal law, Plaintiff moves for an order pursuant to CPLR §1024, 305(c) and §3025(b) granting leave to amend the summons and complaint to substitute NYPD Officer Ramy Zakik in place and instead of defendant NYPD Officer John Doe. Plaintiff claims that she was falsely arrested on September 18, 2018, and that the charges against her were dismissed on January 7, 2019. On December 21, 2018, plaintiff served a Notice of Claim on The City of New York, naming NYPD Officer Jannie Wong and NYPD Officer "John Doe" claiming false arrest and assault and battery. On January 10, 2019, plaintiff served an Amended Notice of Claim on The City of New York, naming NYPD Officer Jannie Wong and NYPD Officer "John Doe," which added an additional claim for malicious prosecution. On February 14, 2019, this action was commenced by the filing of a summons and verified complaint.

On or about November 19, 2019, one month before the statute of limitations expired for the state false arrest claim (December 17, 2019) and five months before the expiration of the statute of limitations

of the state malicious prosecution claim, Plaintiff served a Demand for Discovery and Inspection and its First Set of Interrogatories requesting that the defendants "[i]dentify by name, rank, and current assignment the 'John Doe' referenced in plaintiff's complaint." Also on November 19, 2019, plaintiff filed an RJI and request for preliminary conference. No other discovery demands were served on the City in reference to ascertaining the identity of the John Doe police officer. The parties appeared for a discovery conference on January 6, 2020. It is noted that the preliminary conference order is not attached as an exhibit herein and thus not part of the record for this motion.

As to Plaintiff's motion to amend, "[i]t is familiar law 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" (*Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 [2d. Cir. N.Y. 1999] [internal citations and quotation marks omitted]). In order to employ the procedural "Jane Doe" or "John Doe" mechanism made available by CPLR 1024, a plaintiff must show that he or she made timely efforts to identify the correct party *before the statute of limitations expired*" (*Holmes v. City of New York*, 132 A.D.3d 952, 953 [2d Dept. 2015] [internal citation omitted] [emphasis added]). Failure to exercise due diligence to identify John and Jane Doe defendants prior to the Statute of Limitations warrants dismissal of the complaint as to that individually named defendant (see *Bumpus v. New York Cit Tr. Auth*., 66 AD3d 26, 35 [2d Dept. 2009]).

CPLR 1024 states that a "party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." Section 1024's 'due diligence' requirement is not forgiving. The onus of identifying an officer defendant's name, or at least making a good faith effort, lies on the plaintiff. (Hogan v. Fischer, 738 F.3d 509, at 518-19 (2d Cir. 2013). Due diligence is not exercised by "last minute" or token discovery requests (See, e.g., *Doe v. New York*, 97 F.Supp.3d 5 at 19; *JCG v. Ercole*, 2014 WL

1630815 (S.D.N.Y. Apr. 24, 2014); *Temple v. N.Y. Cmty. Hosp. of Brooklyn*, 89 A.D.3d 926, 927-28 (2d Dept. 2011)." *Barrett v City of Newburgh*, 720 Fed Appx 29, 33 [2d Cir 2017].

Here, Plaintiff failed to establish that they exercised due diligence to discover the identity of the John Doe defendant prior to the expiration of the statute of limitations for his claims. There is no indication in the record that the plaintiffs engaged in any pre-action disclosure or made any Freedom of Information Law requests (see CPLR 3102[c]; Public Officers Law art 6; *Temple v. New York Community Hosp. of Brooklyn*, 89 A.D.3d 926 [2d Dept 2011]; see *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d at 29–30, *Harris v. North Shore Univ. Hosp. at Syosset*, 16 A.D.3d 549, 550 [2d Dept 2005]; *Justin v. Orshan*, 14 A.D.3d 492, 492–49 [2d Dept 2005]; *Scoma v. Doe*, 2 A.D.3d 432, 433 [2d Dept 2003]; *Porter v. Kingsbrook OB/GYN Assoc*., 209 A.D.2d 497 [2d Dept 1994]). A request under the Freedom of Information Law might yield the name and work location of the individual. See, *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26. Here, Plaintiff sought assistance of the court, a mere 4 weeks before the statute ran on the false arrest claims, yet the action was commenced 9 months earlier and a Notice of Claim had been filed a year by the time this discovery was sought. See generally, *Temple v. New York Community Hosp. of Brooklyn*, 89 A.D.3d at 928; *Misa v. Hossain*, 42 A.D.3d 484, 486, [2d Dept 2007]; *Holmes v City of New York*, 132 AD3d 952 [2d Dept 2015]. Although the demand for identification of the John Doe police officer was served five months before the statute of limitations expired for malicious prosecution, no evidence is submitted to show any diligence in following up on the demand for identification. Indeed, there is no evidence that any activity took place between the court conference on January 6, 2020 and the "shutting down" of the courthouse due to the Covid pandemic in mid-March 2020. Additionally, there is no evidence that Plaintiff followed up on his demands or on any outstanding discovery which may have been the subject of the January 6, 2020 court order when the governor's executive order issuing a moratorium on court practice and proceedings was lifted in November 2020.

Additionally, Plaintiff cannot rely on the Relation Back doctrine to substitute the defendant outside the Statue of Limitations. "The relation-back doctrine allows a party to be added to an action after

the expiration of the statute of limitations, and the claim is deemed timely interposed, if (1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is *united in interest with the original party,* and (3) the additional 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 brought against the additional party as well.*" *Bumpus v. New York Cit Tr. Auth*., 66 AD3d at 35 [all internal citations omitted] [emphasis added].

"[U]nity 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." *Mercer v. 203 East 72nd Street Corp*., 300 AD 2d 105, 106 [1st Dept. 2002]; *Regina v. Broadway-Bronx Motel Co*., 23 AD 3d 255, 255 [1st Dept. 2005]. However, in this case, vicarious liability is not a legal certainty, but a factual determination within the discretion of the Corporation Counsel as to whether a City employee was acting within the scope of employment and is entitled to representation and indemnification. See, General Municipal Law §50-k[3] and §50-k[5]; *Matter of Williams v. City of New York,* 64 N.Y.2d 800, 80 [1985]; *Wong v. New York*, 174 A.D.2d 486 [1st Dept 1991]; *Hogan v. City of New York*, 2008 WL189891 [E.D.N.Y. 2008]. Further, no unity in interest can be found when individual officers may assert a separate and distinct defense. See *Connell v. Hayden*, 83 A.D.2d 30 [2d Dept. 1981]. Unity of interest fails "if there is a possibility that the new party could have a different defense than the original party. *Montalvo v Mad'ek Inc*., 131 A.D.3d 678, 680 [2nd Dept 2015]. One looks not to whether the two defendants will assert different defenses but rather whether they could assert such different defenses. *Connell v. Hayden*, 83 A.D.2d at 42.

Moreover, individual officers' mere involvement with the subject arrest and/or underlying investigation will not automatically impute them with notice of a cause of action or knowledge of any wrongdoing. See, *Caselli v. City of New York*, 105 A.D.2d 251 [2d Dept 984]. Further, the description "NYPD Officer John Doe" in the complaint herein was insufficient to fairly apprise the proposed additional defendant that he was the intended defendant. See, *Justin v Orshan*, 14 AD3d 492; *Thas v*

Dayrich Trading, Inc., 78 AD3d 1163 [2d Dept 2010]; CPLR 1024. Finally, both the CITY and newly named defendant officer would be unduly prejudiced by Plaintiff's proposed amendment to assert the time-barred claims. Officers "should quite justifiably be entitled to conclude that the failure to also bring suit against them within the period of limitations means that for whatever reason their trespasses were forgiven by the Plaintiff and that the matter has been laid to rest as far as they are concerned." *Brock v. Bua*, 83 A.D.2d 61, 70-71 [2d Dept. 1981].

It is noted that the CITY does not oppose Plaintiff's motion to amend the complaint to substitute Police Officer Ramy Zakik as the John Doe defendant with regards to the federal law claims. That portion of Plaintiff's motion is Granted. It is Denied in all other respects.

This constitutes the decision and order of the court.

ENTER:

Hon. Consuelo Mallafre Melendez