

**Spruill v City of New York**

2022 NY Slip Op 32648(U)

August 3, 2022

Supreme Court, New York County

Docket Number: Index No. 153749/2019

Judge: J. Machelie Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 62

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JEREMIAH SPRUILL,

Plaintiff,

Index No.: 153749/2019

-against-

**DECISION AND ORDER  
ON MOTION**

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT UNDERCOVER OFFICER C0039, NEW YORK CITY POLICE DEPARTMENT; UNDERCOVER OFFICER C0076, NEW YORK CITY POLICE DEPARTMENT DETECTIVE OSCAR FERNANDEZ, NEW YORK CITY POLICE DEPARTMENT DETECTIVE JAMEL HAIRSON (SHIELD NO. 303), NEW YORK CITY POLICE DEPARTMENT DETECTIVE CHRISTOPHER HEREDIA (SHIELD NO. 1339), AND JOHN AND/OR JANE DOES 1,2,3, ETC. (WHO ARE MEMBERS OF THE NEW YORK CITY POLICE DEPARTMENT, BUT WHOSE IDENTITIES ARE UNKNOWN AT THIS TIME),

Defendants.

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**HON. J. MACHELLE SWEETING, J.S.C.**

This action arises out of damages sustained by plaintiff Jeremiah Spruill when he was allegedly unlawfully arrested and detained by defendants New York City Police Department (“NYPD”) Undercover Officer C00339 (“UC39”), NYPD Undercover Officer C0076 (“UC76”), NYPD Detective Oscar Fernandez (“Fernandez”), NYPD Detective Jamel Hairson (Shield No. 303) (“Hairson”), NYPD Detective Christopher Heredia (Shield No. 1339) (“Heredia”) (collectively “individual defendants”). Defendant the City of New York and the individual defendants (collectively, “defendants”) move, pursuant to Civil Practice Law and Rules (“CPLR”) Sections

3211 (a) (5) and (7), for an order dismissing plaintiff's claims for failing to timely serve a notice of claim and for being insufficiently pled.

Plaintiff cross-moves, for an order, pursuant to CPLR § 3025(b), for leave to amend the complaint in this action and also for an order deeming the notice of claim timely filed pursuant to General Municipal Law ("GML") § 50-e (5). Oral argument on this motion was heard before the undersigned on April 28, 2022 and are incorporated herein.

For the reasons set forth below, defendants' motion is granted in part and plaintiff's cross-motion to amend is granted in part.

### **BACKGROUND AND FACTUAL ALLEGATIONS**

Plaintiff was arrested and detained on March 12, 2014. According to the complaint, plaintiff was "on his way to work, when, without reasonable suspicion that he was or had been engaged in criminal activity, NYPD Officers Fernandez, Hairston, and Heredia unlawfully stopped and arrested him." NYSCEF Doc. 1, ¶ 15. These defendants, "who are members of the Manhattan North drug squad, were involved in a buy-and-bust operation near the area before plaintiff's unlawful arrest." *Id.*, ¶ 17. Plaintiff was stopped because he had allegedly "matched the vague description UC39 sent over the radio of a man who he had engaged with him in a drug sale." *Id.* When the police officers arrested plaintiff, they searched him, "and did not find pre-recorded buy money nor contraband." *Id.*, ¶ 18. The complaint alleges that, although Fernandez, Hairston and Heredia "knew that UC39's identification of plaintiff was false," they arrested him anyway. *Id.*, ¶ 19.

Based on UC39's allegedly false testimony, plaintiff was charged with criminal sale of a controlled substance. UC39 and UC76 purportedly also provided false police reports about the buy-and-bust operation and about plaintiff's arrest. A grand jury convened on March 28, 2014, where "UC39 falsely testified that he had purchased crack-cocaine from plaintiff." *Id.*, ¶ 24. The grand jury charged plaintiff with two counts of the class B felony criminal sale of a controlled substance in the third degree, in violation of New York Penal Law § 220.39 (1). At the hearing prior to plaintiff's criminal trial, the Court "suppressed UC39's testimony regarding the description of plaintiff because of its incredible nature." *Id.*, ¶ 26. Nonetheless, UC39 still allegedly provided the false testimony that he had "actually seen plaintiff twice after the alleged drug sale occurred and had directed UC76 via radio to follow plaintiff after the first identification." *Id.*, ¶ 27. Plaintiff alleges that, prior to his trial, the "New York County District Attorney's Office had voluntarily dismissed at least five cases in which UC39 was the sole witness in a buy-and-bust operation because his testimony was incredible." *Id.*, ¶ 32.

During plaintiff's criminal trial in New York County Supreme Court, "the prosecution's case rested entirely on UC39's false testimony." *Id.*, ¶ 28. On December 2, 2014, plaintiff was convicted of the charges. On March 2, 2015, plaintiff was sentenced to six years imprisonment and three years of post-release supervision. Plaintiff was housed in various prisons during his incarceration period and was subjected to "frequent lockdowns, unsanitary conditions, poor ventilation," among other things. For instance, while he was incarcerated at Clinton Correctional Facility, due to the "escape of Richard Matt and David Sweat," he was kept in lockdown for almost one month where he was "locked in his cell without phone calls, mail, commissary and only one shower per week." *Id.*, ¶ 42. During the time he was incarcerated at Clinton Correctional Facility,

he “endured abusive and racial charged language from corrections officers, who plaintiff found were also more aggressive than the medium security facilities. He witnessed countless acts of violence between incarcerated people.” *Id.*, ¶ 43. In the spring of 2017, plaintiff was “released on bail, pending his CPL § 440.10 application.” *Id.*, ¶ 45.

Plaintiff moved to vacate his conviction, “based on the newly discovered evidence of UC39’s extensive history of misconduct.” *Id.*, ¶ 46. “The people consented to plaintiff’s motion and filed their own letter recommending dismissal of the indictment.” *Id.*, ¶ 47. On January 18, 2018, the New York County Supreme Court dismissed the indictment and vacated plaintiff’s conviction.

Through counsel, plaintiff filed a notice of claim with defendants on March 16, 2018. The nature of the claim states the following:

Claimant was stopped, falsely arrested, and maliciously prosecuted by members of the New York City Police Department (NYPD); officers illegally stopped claimant without adequate suspicion and arrested him for criminal offenses without probable cause. Claimant alleges unlawful seizure; false arrest; false imprisonment; abuse of process; assault; battery; intentional, reckless, and negligent infliction of emotional distress; negligence and gross negligence; negligence in hiring; negligence in training; negligent supervision; negligent discipline; defamation of character; and deprivation of privileges and immunities under the Constitution of the State of New York, the U.S. Constitution (including but not limited to the Fourth and Fourteenth Amendments), 42 U.S.C. §§ 1983 applicable federal and state laws. The deprivation of rights, remedies, privileges and immunities as outlined above occurred, at least in part, because of the policies, practices and/or customs of the above named parties, acting under pretence [sic] and color of state law, in their individual and official capacities, and within the scope of their employment.

NYSCEF Doc. No. 28, Notice of Claim at 1-2.

### Instant Action

In April 2019, plaintiff commenced this action against defendants, alleging that the individual defendants, who are members of the NYPD, “unlawfully detained plaintiff without any suspicious or illegal activity, lodged false criminal charges against him, forwarded fabricated

evidence to the prosecutor's office, and maliciously prosecuted him." Complaint, ¶ 8. As set forth below, defendants argue that all causes of action must be dismissed as a matter of law.

In the first cause of action alleging violations of the New York State Constitution, plaintiff claims that defendants' conduct, with respect to his wrongful conviction, breached the protections guaranteed to plaintiff by the New York State Constitution.

At the outset, defendants argue that the NYPD must be dismissed from the action because it is a non-suable entity. With respect to the constitutional claims, defendants argue that these must be dismissed where, like here, alternate remedies are available.

In opposition, plaintiff concedes that the NYPD is not a proper party to the action and states that the caption should be changed to take out the extraneous semi colon before UC76.

The second cause of action, alleged against the individual NYPD defendants, is grounded in negligence and states that these defendants "negligently failed to use due care in the performance of their duties . . . ." Complaint, ¶ 54. Defendants explain that a notice of claim must be filed with the City of New York within 90 days after the claim arose and a lawsuit must be commenced within one year and ninety days after the claim started to accrue. According to defendants, plaintiff's negligence claim started to accrue on March 12, 2014, the date of his arrest. As his notice of claim was not filed until March 16, 2018, and his complaint was not filed until April 11, 2019, this cause of action is untimely and must be dismissed. Defendants also argue that the negligence claim must be dismissed as plaintiff's allegations of negligence rely on the same set of facts that support both the false arrest/imprisonment and assault/battery causes of action.

In opposition, plaintiff states that his notice of claim is timely, as he filed his notice of claim on March 16, 2018, which is within 90 days from the vacatur of his conviction and dismissal of the

indictment against him. Alternatively, if the notice of claim is found to be untimely for certain claims, plaintiff requests that the notice of claim be deemed timely filed, *nunc pro tunc*. Plaintiff argues that defendants cannot show any prejudice resulting from this request because they have actual notice of the underlying arrest at issue and the resulting proceedings. With respect to negligence, plaintiff argues that he properly pled negligence and intentional misconduct as alternative theories of liability.

In the third cause of action, plaintiff states that the individual defendants, by their actions, engaged in intentional, reckless or negligent infliction of emotional distress. Among other reasons, defendants argue that this claim must be dismissed as time barred. As with the claim for negligence, the cause of action started to accrue on March 12, 2014. Defendants continue that, even if the claim did not start to accrue until plaintiff's release from incarceration on June 29, 2017, it would still be untimely.

Plaintiff reiterates that this claim is sufficiently pled, as he has alleged that the individual defendants knew that he was innocent of the crime, yet continued to falsely arrest him. He argues that the individual defendants "participated in the criminal prosecution of Plaintiff, testifying falsely about the events preceding Plaintiff's arrest, which caused him to be indicted, convicted, and languish in prison for over three years." (NYSCEF Doc. No. 26, Arena Affirmation at 10).

The fourth cause of action, grounded in assault and battery, alleges that the individual defendants "without just cause of consent, willfully and maliciously used harmful and/or offensive physical force against plaintiff to arrest him causing injury." Defendants again assert that the claim started to accrue on the date of plaintiff's arrest and must be dismissed as time barred. Plaintiff does not oppose defendants' arguments.

In the fifth cause of action, plaintiff asserts that the acts and conduct of the individual defendants constituted false arrest and false imprisonment. According to defendants, as this claim started to accrue on the date of plaintiff's release from confinement, it must be dismissed as time barred.

Plaintiff argues that his false arrest claim should be deemed timely because defendants have actual notice of the underlying incident and they will not be prejudiced if the notice of claim is deemed timely filed *nunc pro tunc*.

The sixth cause of action is alleged against the City of New York and states that the City failed to adequately train, supervise and discipline its NYPD employees and that this failure resulted in plaintiff's wrongful conviction. Defendants state that this claim is not viable because they have acknowledged that the individual defendants were acting within the scope of their employment. "As a result, if the individual defendants are found liable, the City will be liable under the theory of respondeat superior" (NYSCEF Doc. No. 14, Zissu Affirmation in Support, ¶33). In the alternative, defendants argue that this claim, as alleged in connection with the arrest, must be dismissed as time barred.

In opposition, plaintiff argues that the cause of action alleging negligent training, supervision and discipline is properly pled because defendants had notice of the prior civil rights claims asserted against the individual defendants for their similar misconduct.

The final cause of action alleges that the City of New York is responsible for the individual defendants' conduct under the doctrine of respondeat superior. Defendants argue that respondeat superior is not an independent cause of action, but a legal theory that can attach to an underlying claim and must, therefore, be dismissed.

Plaintiff concedes that respondeat superior is a theory of liability and not an independent cause of action. In his proposed amended complaint (“PAC”), plaintiff alleges that the individual defendants’ actions for each of the claims are directly chargeable to the City of New York under the doctrine of respondeat superior.

Cross-Motion

Plaintiff cross-moves for an order granting leave to file and serve an amended complaint and for an order deeming plaintiff's notice of claim as timely filed *nunc pro tunc* pursuant to General Municipal Law ("GML") Section 50-e (5). Plaintiff submitted a PAC along with his opposition and cross-motion. According to plaintiff, pursuant to CPLR 305 (c), he should be permitted to amend the caption to correct a misnomer. He explains that the caption in the original complaint contained two spelling errors within the names of the individual defendants and that it also had an extra semi colon. In the PAC, plaintiff amended the caption to correct typographical and spelling errors and removed the John Doe defendants.

Plaintiff then argues that he should be permitted to amend the complaint to clarify the factual allegations in the original complaint and to include a cause of action alleging malicious prosecution. He asserts that the PAC relates back to the original complaint and that defendants will not be surprised by the addition of this claim. Plaintiff claims that he is not seeking to add defendants, but to include another claim against the existing defendants. Further, defendants were put on notice regarding a potential claim for malicious prosecution because it was set forth in the notice of claim. He continues that plaintiff "timely commenced the actions against the Individual Defendants and served process on the Individual Defendants within the applicable statutory period" (NYSCEF Doc. No. 26, Arena affirmation at 15).

Defendants oppose the cross-motion to amend, stating that, as the claims in the pleading are time barred, the proposed amendment would be futile. Among other things, defendants also argue that plaintiff never moved to file a late notice of claim for the malicious prosecution claim and is now prohibited from doing so.

## DISCUSSION

### The NYPD

Defendants argue that the NYPD is a non-suable agency, as it is an agency of the City of New York. *See* New York City Charter § 396. As noted, plaintiff concedes that the NYPD is not a party in this action. There was a typographical error in the caption whereby a semi colon was placed after the NYPD and before UC76. This is corrected in the PAC.

### CPLR 3211 (a) (7)

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), “the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference,” and the court must determine simply “whether the facts as alleged fit within any cognizable legal theory.” *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration.” *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted).

### Notice of Claim

“On a motion to dismiss a complaint, pursuant to CPLR 3211 (a) (5), on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired.” *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016). Service of a notice of claim is required prior to the commencement of a tort action against a municipality to enable “authorities to investigate, collect

evidence and evaluate the merits of a claim. . . .” *Davis v City of New York*, 153 AD3d 658, 660 (2d Dept 2017) (internal quotation marks and citation omitted); *see* GML § 50-e (1) (a). The notice of claim shall be served “within ninety days after the claim arises.” *See* GML § 50-e (1) (a).

***Negligence, Assault and Battery, and Negligent Training, Supervision and Discipline***

The complaint alleges that the individual defendants failed to exercise due care in the course of their duties as NYPD officers; that they assaulted him during his arrest; and that the City of New York’s failure to adequately train and supervise these employees resulted in his wrongful conviction. Plaintiff’s claims for negligence, assault and battery, and negligent training, supervision and discipline, started to accrue on March 12, 2014, the date of his arrest. *See e.g. Grullon v City of New York*, 222 AD2d 257, 257 (1st Dept 1995) (“claims for an alleged assault . . . accrues on the date of the assault”); *see also Murray v City of New York*, 283 AD2d 560, 561 (2d Dept 2001) (The cause of action to recover damages for “negligent hiring, training, and retention of police officers, and the third cause of action alleging negligent impounding of her vehicle . . . , are related to [plaintiff’s] arrest”). Here, however, plaintiff did not file his notice of claim until March 16, 2018. As the notice of claim was served more than ninety days after the date of his arrest, it is untimely for these causes of action.

***False Arrest/False Imprisonment, and Intentional, Reckless or Negligent Infliction of Emotional Distress***

A claim for false arrest/false imprisonment started to accrue on the date plaintiff was released from custody. *See e.g. Nunez v City of New York*, 307 AD2d 218, 219 (1st Dept 2003) (“The false arrest and unlawful imprisonment claims accrued . . . when the claimant was released from prison . . .”).

A claim for reckless or negligent infliction of emotional distress starts to accrue “on the date of injury.” *Bellissimo v Mitchell*, 122 AD3d 560, 561 (2d Dept 2014). Here, plaintiff claims it was “outrageous for UC39 to falsely arrest an individual uninvolved with the purported crime” (NYSCEF Doc. No. 26, Plaintiff’s memorandum of law at 10). As a result, the events giving rise to the claim arose from the initial arrest, but possibly started to accrue, at the latest, when plaintiff was released from custody. *See e.g. Avgush v Town of Yorktown*, 303 AD2d 340, 341 (2d Dept 2003) (“the causes of action alleging intentional and negligent infliction of emotional distress were properly dismissed since they also arose from the 1997 arrest and culminated in Avgush’s release from custody”).

Defendants’ records indicate that plaintiff was released from prison on June 29, 2017. As a result, these causes of action started to accrue on June 29, 2017, and the 90-day period within which to file a notice of claim expired on September 27, 2017. As plaintiff did not file his notice of claim by September 27, 2017, it is untimely for these two causes of action.

### *New York State Constitutional Claims*

With respect to any constitutional claims, the notice of claim states the following, in relevant part: “Claimant alleges . . . deprivation of privileges and immunities under the Constitution of the State of New York, the U.S. Constitution (including but not limited to the Fourth and Fourteenth Amendments), 42 U.S.C. §§ 1983 (sic) applicable federal and state laws.” Other than a claim for “deprivation of privileges and immunities,” plaintiff does not set forth specific alleged violations of the New York State Constitution. In any event, claims brought pursuant to the New York State Constitution are also subject to the notice of claim requirement. *See e.g. Kassapian v City of New York*, 155 AD3d 851, 854 (2d Dept 2017) (citations omitted) (“The Supreme Court properly granted dismissal of the cause of action alleging violations of the State Constitution on the ground that the plaintiff failed to serve a notice of claim”). As with plaintiff’s other causes of action, any alleged violations of the New York State Constitution started to accrue either on March 12, 2014 (the date of arrest) or on June 29, 2017 (the date plaintiff was released from custody). Accordingly, plaintiff’s notice of claim, which was not filed until March 16, 2018, is untimely for any claims alleging violations of the New York State Constitution.

According to plaintiff, defendants’ argument regarding untimeliness should be rejected, as it was only raised in the reply to his cross-motion. However, plaintiff’s arguments are without merit. First, plaintiff had a chance to respond to this argument in his own reply papers. *See* NYSCEF Doc. No. 42; *compare Dannasch v Bifulco*, 184 AD2d 415, 416 (1st Dept 1992) (“Dismissal of plaintiff’s complaint in this manner was improper. Plaintiff had no opportunity to respond to defendant’s reply absent express leave of the court”). Next, plaintiff was on notice of this argument, as defendants moved pursuant to CPLR 3211 (a) (5). In any event, the court has

discretion to consider this argument. *See e.g. Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 422 (2013) (“And even if Eujoy had, in fact, presented a new legal argument about the lease to Supreme Court in a reply brief, neither that court nor the Appellate Division would have been prohibited from considering it”).

#### Late Notice of Claim

Although GML § 50-e (5) gives the court discretion to grant leave to serve a late notice of claim upon consideration of the factors set forth in the statute, “[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation.” Therefore, “once the statute of limitations has expired, the court is without discretion to entertain an application for leave to file a late notice of claim.” *Matter of Goffredo v City of New York*, 33 AD3d 346, 347 (1st Dept 2006).

Pursuant to GML § 50-i (1) (c), “the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.” Here, plaintiff failed to seek leave to file a late notice of claim within one year and ninety days from either March 12, 2014, the date of plaintiff’s arrest, or June 29, 2017, the date of his release from prison. Accordingly, this court has no discretion to extend the time to serve the late notice of claim. *See e.g. Zayed v New York City Dept. of Design & Constr.*, 157 AD3d 410, 410 (1st Dept 2018) (citation omitted) (“The motion court was not permitted to grant an extension after the statute of limitations had run since, to do so, would render meaningless the portion of General Municipal Law § 50-e (5) that expressly prohibits the court from doing so”); *see also Matter of N.M. v Westchester County Health Care Corp.*, 10 AD3d 421, 423 (2d Dept 2004) (“Because [petitioner] did not seek leave to

serve WCHCC with a late notice of claim until September 2002, well after the one year and 90-day statute of limitations period had expired, the Supreme Court was without authority to grant the branch of the petition concerning her claim”).

Here, plaintiff failed to timely move for leave to file a late notice of claim for all claims included in the complaint. As plaintiff’s notice of claim was untimely, it is a “nullity.” *Flores v Fraser*, 159 AD3d 499, 500 (1st Dept 2018). Accordingly, defendants’ motion, pursuant to CPLR 3211 (a) (5), for dismissal of the claims for violations of the New York State Constitution, negligence, infliction of emotional distress, assault, battery, false arrest, false imprisonment and negligent supervision, is granted. *See e.g. Frank v City of New York*, 240 AD2d 198, 198 (1st Dept 1997) (“The action was properly dismissed [against the City of New York] on the basis that notice of claim was not served until the 91st day after the accident and no motion for leave to serve a late notice of claim was made within the one-year-and-ninety-day Statute of Limitations”).

### ***New York State Constitutional Claims***

Even if this cause of action were not dismissed for failure to serve a timely notice of claim, it would still be dismissed on alternative grounds. Courts have routinely held that a claim alleging violations of the New York State Constitution is not viable, where, like here, a claimant has an alternative remedy available. It is well settled that “[a] plaintiff cannot assert a constitutional tort claim under the New York State Constitution if he has an alternative remedy either at state common law or under federal law.” *Allen v Antal*, 2014 WL 2526977, \*10, 2014 US Dist LEXIS 79031, \*28 (SD NY 2014), *affd* 265 Fed Appx 9 (2d Cir 2016); *see also Jones v State of New York*, 171 AD3d 1362, 1363 (3d Dept 2019) (internal quotation marks and citations omitted) “[w]hile a private

cause of action to recover monetary damages for state constitutional violations is permissible in certain limited situations, this narrow remedy does not apply where an adequate remedy is available to the claimant in an alternate forum”).

Here, the notice of claim itself indicates that plaintiff has alternate remedies for pursuing his state constitutional claims, either through 42 USC § 1983, or through New York common law claims for malicious prosecution, abuse of process, false arrest and imprisonment, among others.<sup>1</sup> Plaintiff argues that his claim alleging violations of the New York State Constitution must survive because, among other reasons, the right to due process under the New York State Constitution is broader than the right to due process under the United States Constitution. However, courts have routinely dismissed claims for deprivation of due process under the New York State Constitution as being redundant, where there are adequate alternate remedies. *See e.g. Biswas v City of New York*, 973 F Supp 2d 504, 526-527 (SD NY 2013) (“Because the plaintiff has a remedy for substantive due process violations under § 1983 and the federal Constitution, her claim under the state Constitution is precluded”).

Accordingly, as plaintiff had the opportunity to plead alternative remedies to his New York State Constitutional Law claims, they are redundant and precluded. *See e.g. Lyles v State*, 2 AD3d 694, 695 (2d Dept 2003), *affd on other grounds*, 3 NY3d 396 (2004) (Dismissal of state constitutional claims was proper as, “the recognition of the claimant’s state constitutional claims was neither necessary nor appropriate to ensure the full realization of his rights, because the alleged wrongs could have been redressed by an alternative remedy, namely, timely interposed common-

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<sup>1</sup> At oral argument before this court, plaintiff’s counsel reported that an action arising from plaintiff’s arrest in this matter is also currently pending in federal court.

law tort claims for assault and battery, false imprisonment, and the intentional and negligent injury to his property”).

### ***Respondeat Superior***

The doctrine of respondeat superior, “merely provides a theoretical means for transferring the *liability* of an employee to his employer and imposing upon the latter financial responsibility for the legally cognizable culpable conduct of the former.” *Karaduman v Newsday, Inc.*, 51 NY2d 531, 545-546 (1980) (internal citation omitted); *see also N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 (2002) (“Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer’s business and within the scope of employment”). Plaintiff concedes that the doctrine of respondeat superior is not an independent cause of action, but a theory of liability that may be applicable to the City of New York for each of the individual claims. *See e.g. Biswas v City of New York*, 973 F Supp 2d at 540 (internal quotation marks and citation omitted) (“Under New York law, respondeat superior does not stand alone as a substantive cause of action”). Accordingly, the seventh cause of action alleging respondeat superior, is dismissed.

### Plaintiff's Cross-Motion

In general, “[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay.” *Murray v City of New York*, 51 AD3d 502, 503 (1st Dept 2008) (internal quotation marks and citations omitted). Further, “the legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt.” *Lucido v Mancuso*, 49 AD3d 220, 227 (2d Dept 2008) (internal quotation marks and citations omitted).

Plaintiff cross-moves to amend the complaint to include, *inter alia*, a claim for malicious prosecution. Contrary to the claims alleged by defendants, this court notes that the notice of claim with respect to the malicious prosecution claim is sufficient, as it “describes the claim with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claims.” *Harrison v City of New York*, 197 AD3d 630, 631 (2d Dept 2021) (internal quotation marks and citation omitted).

“A cause of action for malicious prosecution accrues when the criminal proceeding terminates favorably to the plaintiff.” *Bumbury v City of New York*, 62 AD3d 621, 621 (1st Dept 2009). The statute of limitations for plaintiff’s malicious prosecution claim began to run when plaintiff’s conviction was vacated on January 18, 2018. As mentioned, plaintiff filed his notice of claim on March 16, 2018, less than 90 days after. Therefore, contrary to defendants’ contentions, plaintiff’s notice of claim was timely for this claim.<sup>2</sup>

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<sup>2</sup> In *Thompson v. Clark*, 142 Sup. Ct. 1332 (2022), the United States Supreme Court ruled that claims for malicious prosecution can be brought absent a favorable determination of the underlying offense. Rather “A plaintiff need only show that his prosecution ended without a conviction.”

As discussed, pursuant to GML § 50-i (1) (c), plaintiff had one year and ninety days to file a complaint alleging a claim for malicious prosecution. Although plaintiff filed his complaint within this time frame, it did not contain a cause of action alleging malicious prosecution. Plaintiff requests that the court apply the “relation-back” doctrine, as the malicious prosecution claim relates back to the original complaint. “The relation-back doctrine [is] codified in CPLR 203(f) . . .” *O’Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 86 (1st Dept 2017). It states that “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading.” CPLR 203 (f).

“The Court of Appeals has recognized that a more relaxed standard applies where a plaintiff seeks to use the relation-back doctrine by adding a new claim against a defendant who is already a party to litigation as opposed to adding a new defendant.” *O’Halloran v Metropolitan Transp. Auth.*, 154 AD3d at 86 (citation omitted). “[T]he relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted.” *Id.* at 87.

This court finds that the relation-back doctrine is applicable here, because defendants had notice of the “transactions [or] occurrences” with respect to the claim alleging malicious prosecution. Plaintiff submitted a timely notice of claim for this claim and the original pleading included numerous factual allegations describing the events leading up to, and including, the vacatur of plaintiff’s conviction. Further, courts have found that “the salient inquiry [when applying the relation-back doctrine] is not whether defendant had notice of the claim, but whether, as the

statute provides, the original pleading gives notice of the transactions, occurrences . . . to be proved pursuant to the amended pleading.” *Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 (1st Dept 2013) (internal quotation marks omitted). Here, the cause of action alleging malicious prosecution is based on the same conduct as the facts alleged in the original complaint. Accordingly, that branch of plaintiff’s cross-motion seeking leave to amend the complaint to include a claim for malicious prosecution, is granted.

Plaintiff also seeks to amend the caption of the complaint to correct spelling and punctuation errors and to remove the John Doe defendants. CPLR 305 (c) sets forth that, “[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.” Courts have held that “[s]uch amendment of a summons is justified where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it.” *Medina v City of New York*, 167 AD2d 268, 269-270 (1st Dept 1990). Here, the record indicates that defendants were properly served and they will not sustain any prejudice due to the misnomers. Accordingly, this branch of plaintiff’s cross-motion is granted.

Plaintiff also requests that the notice of claim as to his false arrest claim be deemed timely, *nunc pro tunc*. Claims for false arrest start to accrue when a plaintiff is released from custody.<sup>3</sup> See e.g. *Makropoulos v City of New York*, 187 AD3d 885, 887 (2d Dept 2020) (internal quotation marks and citations omitted) (“The 90-day period for serving a notice of claim . . . for false arrest and false imprisonment commences upon the claimant’s release from custody. Here, as the plaintiff was released on bail on August 16, 2012 . . . the plaintiff’s notice of claim served upon the defendant in September 2013, was [untimely]. . .”) (emphasis added).

Unfortunately, where, like here, a plaintiff moves for relief to file a late notice of claim “after the 1-year-and-90-day period has expired, the Supreme Court is without authority to grant it.” *Royal Daycare Ctr., LLC v PB 2180 Pitkin Ave, LLC*, 180 AD3d 1097, 1098 (2d Dept 2020).

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<sup>3</sup> This court notes the unfortunate collateral consequence presented here, which is the subject of legislative reform. Here, plaintiff, who was physically released from prison on June 29, 2017, would have been in a better position had he not posted bail and had instead remained in custody. In order to preserve his claim for false arrest and to stop the 90-day period from accruing, plaintiff would have had to forgo his liberty interest and remain in custody (at least until January 18, 2018 when the indictment against him was dismissed and the conviction vacated).

**CONCLUSION**

Accordingly, it is hereby

**ORDERED** that defendants the City of New York, NYPD Undercover Officer C00339 (UC39), NYPD Undercover Officer C0076 (UC76), NYPD Detective Oscar Fernandez, NYPD Detective Jamel Hairson, and NYPD Detective Christopher Heredia's motion for an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing the complaint is granted to the extent that the causes of action alleging violations of the New York State Constitution, negligence, infliction of emotional distress, assault/battery, false arrest/imprisonment, failure to train and respondeat superior, are dismissed; and it is further

**ORDERED** that plaintiff's cross-motion is granted to the extent that plaintiff is granted leave to serve an amended complaint asserting a cause of action for malicious prosecution and the cross-motion is further granted to the extent of amending the caption to correct the typographical errors and to remove the John Doe defendants, and the cross-motion is otherwise denied; and it is further

**ORDERED** that plaintiff shall file and serve an amended complaint in accordance with this decision and order within 30 days after service of this order with notice of entry; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: August 3, 2022

ENTER:



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HON. J. MACHELLE SWEETING, J.S.C.