

<b>Skoglund v New York Police Dept.</b>
2022 NY Slip Op 32732(U)
April 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 519155/2021
Judge: Consuelo Mallafre Melendez
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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART 25

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ERIC SKOGLUND,

Index No. 519155/2021  
**DECISION AND ORDER**

Petitioner,

-against-

THE NEW YORK POLICE DEPARTMENT,

Respondent.

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**CONSUELO MALLAFRE MELENDEZ, J.:**

The court’s Decision and Order is based upon consideration of the following papers:

CPLR 2219(a) Recitation: Motion Sequence 1, NYSCEF Numbers: **1-21**.

Petitioner brought forth this Petition by Order to Show Cause on July 30, 2021, against Respondent, the New York Police Department (NYPD). Petitioner states that he filed the Petition to ensure that he does not lose his legal rights in relation to an Article 78 action he previously filed on September 20, 2020. In that Article 78 action, Petitioner challenges the results of Respondent’s denial of his FOIL request. At issue in the Article 78 action is whether the action was timely commenced. As of the date of this decision, the Article 78 action is still pending.

Although Petitioner states that this Petition is not a second Article 78 Petition, his request for relief is near identical: that the court set aside and annul the decision of the NYPD dated November 28, 2017, but which Petitioner states he did not receive until June 17, 2020. In addition, Petitioner requests that the court award a money settlement to make him whole. In his moving papers Petitioner primarily reiterates the same facts and claims underlying the Article 78 Petition.

Respondent filed a Cross Motion to Dismiss pursuant to CPLR §§ 7804(f), 3211(a)(2) and 3211(a)(4), arguing that this court lacks subject matter jurisdiction and there is currently pending a separate Article 78 proceeding between both parties.

Pursuant to CPLR §3211(a)(4), a party may move to dismiss an action when there is a pending action against the same parties for the same claims.

“ Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action’ [citations omitted]. ‘A court may dismiss an action pursuant to CPLR 3211 (a) (4) where there is a substantial identity of the parties and causes of action’ [citations omitted]. ‘It is not necessary that the precise legal theories presented in the first action also be presented in the second action’ [citations omitted]. Rather, it is sufficient if the two actions are ‘sufficiently similar’ and that the relief sought is ‘the same or substantially the same’ [citation omitted]. ‘The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs’ ” (*Feldman v. Harari*, 183 A.D.3d 629, 630-631 [2d Dept. 2020] [all internal citations omitted]).

The instant Petition and the previously filed Article 78 action are nearly identical in the arguments, facts alleged and request for relief. This court cannot grant Petitioner any relief on claims that are pending in the Article 78 proceeding. “New York courts generally follow the first-in-time rule, which instructs that ‘the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere’ ” (*L-3 Communications Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 5 [1st Dept. 2007] quoting *City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 58 [1969]). Further, “where another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction” (*White Light Prods. v. On The Scene Prod.*, 231 A.D.2d 90, 93 [1st Dept. 1997] [internal citations omitted]).

Petitioner claims that he discovered a new monitoring device on July 31, 2020, and that the new claims in the current action sound in malicious prosecution and intentional infliction of

emotional distress. However, Petitioner failed to properly state a cause of action for each claim. Petitioner cannot plead the elements for malicious prosecution as he asserts that he has never been arrested and no criminal action was brought against him (see *Broughton v. State of New York*, 37 NY2d 451, 457 [1975], cert denied 423 US 929 [1975] [“the elements of the tort of malicious prosecution are (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice.”]). Petitioner’s claim of intentional infliction of emotional distress is also not properly plead (see *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 [1993] [“The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.”]). Furthermore, adjudication of the intentional infliction of emotional distress claim would require some review of the allegations currently pending in the Article 78 Petition. Notwithstanding the above, a Petition brought by order to show cause is not the proper vehicle in which to bring forth common law claims; they must be brought forth by summons and complaint (see generally CPLR §403 and §304[a]).

With regards to his allegation of a new recording device discovered on July 31, 2020, Petitioner has not filed a new FOIL request. Therefore, any claims for relief sought under CPLR §7801 are premature and dismissed for lack of subject matter jurisdiction. Any other request for relief based on the claims set forth in the pending Article 78 Petition are time-barred under the four-month statute of limitations (see CPLR §217[1]). Finally, there is no legal or factual basis upon which this court may grant Petitioner’s request for monetary relief. Insofar as the claims relate to the FOIL requests, there is no private right to monetary relief. Further, as Petitioner is


pro-se he is also not entitled to attorney's fees. There are otherwise no new or distinct claims upon which this court may grant relief. Therefore, dismissal is warranted under CPLR §3211(a)(4). The court notes Petitioner's request for this court to review evidentiary exhibits, including video footage. However, this court will not consider any substantive evidence as this Petition is dismissed on procedural grounds.

Accordingly, Respondent's Cross Motion to Dismiss this proceeding pursuant to CPLR §§3211(a)(4) is GRANTED. Petitioner's Order to Show Cause is DENIED. The Petition is hereby dismissed.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2022  
Brooklyn, NY

ENTER.

  
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Hon. Consuelo Mallafre Melendez  
J. S. C.