SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART**

Justice

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CRYSTAL POPE,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT OFFICERS JOHN DOES 1,2,3, ETC. (THE NAME JOHN DOE BEING FICTITIOUS AS THE TRUE NAMES OF SAID OFFICERS ARE CURRENTLY NOT KNOWN), ALL OF WHOM ARE SUED IN THEIR INDIVIDUAL CAPACITIES,

Defendant.

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INDEX NO. 150892/2022

MOTION DATE 01/05/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

This action arises from the alleged civil rights violations of plaintiff Crystal Pope ("plaintiff"), on April 4, 2020, by defendants, the City of New York and New York City Police Department Officers John Doe 1, 2, and 3 (names unknown). Plaintiff is alleging violations of her constitutional rights under both 42 U.S.C. § 1983 and the New York State Constitution. Plaintiff is also alleging New York State Law claims of assault and battery, negligence, negligent hiring, training, and supervision.

Plaintiff now moves pursuant to CPLR §§ 1002(b), 1003, 3025(b), and 305(c), to amend the complaint and caption as well as to add defendants John Does 1, 2, and 3 true names, Officer Chardy Alberto (Shield No. 21159) and Officer Michael Duchatellier (Shield No. 18345), as party-defendants. In the alternative, plaintiff seeks leave to substitute the proposed individual defendants in place of John Does 1, 2, and 3, under

CPLR § 1024. Plaintiff is relying on the relation-back doctrine to support her claims. The City has opposed this motion and plaintiff submits a reply.

State law claims have a statute of limitations of one year and 90 days and begin to accrue the date the action occurred. Here, the incident occurred, and the period began to run, on April 4, 2020. Pursuant to Executive Order 202.8, the statute of limitations was tolled from March 20, 2020, until November 3, 2020. Therefore, the statute of limitations period on plaintiff's state law claims expired on or around February 3, 2022. The notice of claim and the original summons and complaint were both timely as they were filed within 1 year and 90 days of the expiration of the toll. The pending motion was filed on January 5, 2023, less than a year after the statute of limitations expired.

Discussion:

CPLR § 305(c):

Plaintiff's motion seeks to amend the summons pursuant to CPLR § 305(c). Plaintiff alleges that an amendment to correct a misnomer or description under CPLR § 305(c) may be permitted, even after the expiration of the relevant Statute of Limitations, provided that jurisdiction was timely obtained over the intended defendant and the intended defendant was fairly apprised of the action against it such that it is not prejudiced by the amendment (*See Gennosa v Twinco Services, Inc.,* 699 NYS2d 459, 460 [2d Dept 1999], accord *Cutting Edge, Inc. v Santora*, 771 NYS2d 462, 463 [4th Dept 2004]).

The plaintiff timely filed the notice of claim, as well as the original summons and complaint. Therefore, there was jurisdiction over the City. Further, there is no prejudice

as the allegations in the original complaint were sufficient to adequately apprise the City defendant of the action. The summons may therefore be amended.

CPLR §§ 3025(b), 306(f):

Plaintiff's motion further seeks to amend the complaint and caption to add Officers Chardy Alberto (Shield No. 21159) and Michael Duchatellier (Shield No. 18345) as named defendants, pursuant to CPLR § 3025(b). In the amended complaint, plaintiff wishes to assert federal and state law claims against these individual defendants. The standard for granting leave to amend is a liberal one, "motions for leave to amend pleadings should be freely granted... absent prejudice or surprise resulting therefrom..., unless the proposed amendment is palpably insufficient or patently devoid of merit..." (*MBIA Ins. Corp. v Greystone & Co.,* 74 AD3d 499, 901 NYS2d 522 [2010]). Plaintiff need not establish the merit of the proposed claim but merely show that it is not palpably insufficient or clearly devoid of merit (*Miller v Cohen*, 93 AD3d 424, 425, 939 NYS2d 424 [2012]). The City, in opposing the amendment, "must overcome a heavy presumption of validity in favor of [permitting amendment]" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Plaintiff alleges the federal claims they wish to assert against Alberto and Duchatellier are meritorious. In the amended complaint, plaintiff alleges violations of 42 U.S.C. § 1983 and state laws by the new individual defendants. The elements of a § 1983 claim are (1) the party against whom the claim is brought acted under the color of state law, and (2) a deprivation of a constitutional right (*Eckardt v City of White Plains,* 87 AD3d 1049, 1051-1052 [2d Dept 2011]; *Wilner v Vil. of Roslyn,* 99 AD3d 702, 704 [2d Dept 2012] [citations omitted]). Plaintiff has alleged that the parties they seek to add

were officers acting in the course of their employment with the NYPD. Further, the plaintiff has alleged that the incident occurred when the officers were on duty, and these named officers violated her constitutional rights in spraying her with pepper spray. Plaintiff asserts that this motion was made within the statutory period.

Plaintiff sufficiently demonstrated that the proposed federal claims against the individuals are neither palpably insufficient nor patently devoid of merit. Further, defendant has not opposed the amendment as to any federal claims.

Defendant opposes the inclusion of the individuals on the basis that the statute of limitations has expired for all state law claims that plaintiff now wishes to assert against them. The City contends that as the proposed state law claims are time-barred, the amendment lacks merit, and plaintiff should not be granted leave to amend pursuant to CPLR § 3025(b).

Although the statute of limitations has expired on the state law claims, plaintiff relies on the relation-back doctrine, codified in CPLR § 203(f), to add these new claims. The relation-back doctrine provides that a party can be added to an action and the claim deemed timely interposed, even after the statute of limitations expires, if the new claim relates back to the allegations of the original complaint (*Pendleton v City of New York*, 44 AD3d 733, 737, 843 NYS2d 648, 653 [2007]). For the claims to relate back, three conditions must be satisfied: (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant... (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Mondello v N.Y. Blood Ctr.*, 80 NY2d 219, 226 [1992]).

Plaintiff has satisfied the first prong as they have alleged, and defendant has conceded, the new state law claims against Alberto and Duchatellier involve the same conduct and arose out of the same transaction as alleged in the original complaint.

As to the second prong, plaintiff alleges that the City and the officers are united in interest as the officers are employees of the NYPD. Plaintiff asserts that the officers and City are united in interest under a theory of respondeat superior (*Cartagena v The City of New York,* 2020 NY Slip Op 32002[U], 4 [Sup Ct NY County 2020], quoting *Lepore v Town of Greenburgh,* 120 AD3d 1202, 1204 [2d Dept 2014] [municipalities may be liable, under the doctrine of respondeat superior, for the common law torts, such as false arrest, malicious prosecution, assault, and battery, committed by their employees]). Unity of interest may be determined by reviewing the nature of the claim and the jural relationship of the parties (*Connell v Hayden,* 83 AD2d 30, 44, 443 NYS2d 383 [2d Dept 1981]). Finally, plaintiff asserts that the City's indemnification argument is of no moment (*See Vazquez v City of New York,* 217 AD2d 614 [2d Dept 1995] [finding that Corporation Counsel's refusal to represent an officer did not, as a matter of law, require a finding that the officer and the City were not united in interest]).

The City alleges that there is no unity of interest with proposed defendants Alberto and Duchatellier. The City alleges that though unity of interest may be based on a theory of vicarious liability, it does not automatically establish it (*Ragland v City of New York,* 45 Misc 3d 1218[A], at 7 [Sup Ct Bronx County, 2014, Hon. Mitchell Danziger]). The City relies on General Municipal Law 50-k(3), that allows the City to disassociate from the employee's behavior and to refuse representation and indemnification (*Id.*). The City alleges that the court must consider the jural relationship

between the parties, as well as, whether the parties could potentially assert different defenses (*Connell v Hayden,* 83 AD2d 30 [2d Dep't, 1981]).

The City and the proposed defendants are united in interest, as the officers were on duty as NYPD officers and the City's employees, when the incident occurred. The plaintiff has demonstrated that the individuals involved in the accident were acting as City employees and therefore, the City may be responsible. The fact that the City may decide to indemnify or disassociate from the individuals, has the potential to obviate the unity. However, established at present, the City may be vicariously liable for their officer employees.

As to the third prong, plaintiff alleges that but for an excusable mistake, lack of knowledge of the true identities of the officers, Alberto and Duchatellier would have known the action was brought against them. Plaintiff asserts that at the time of commencement, she was unaware of the officers' identities. Plaintiff contends that this satisfies the mistake element. Plaintiffs no longer need to show an excusable mistake, but only must show a mistake about the identities of the parties (*Buran v Coupal*, 87 NY2d 173, 178, [1995]). Plaintiff alleges that the officers should have known that their actions on that day could lead to a lawsuit and the officers were on notice of their liability as plaintiff filed a CCRB complaint against them (*Bostic v City of New York*, 2019 NY Slip Op 30991[U], 3 [Sup Ct NY County 2019]; ["[a]rrest, and in particular an arrest of a violent nature, along with the commencement of proceedings puts the City and consequently, proposed officers on notice to a potential suit"]).

The City contends that there was no evidence to support the notion that either officer knew, or should have known, they would have been named as a defendant if not

for the mistake by plaintiff. The City alleges that the officer's mere involvement in the subject incident does not create notice that an action would be brought against them (*Caselli v City of New York,* 105 AD2d 251 [2d Dep't 1984]). The City further notes that this prong requires notice to the new party, not the current party (*Shapiro v Good Samaritan Regional Hospital Medical Center*, 42 AD 3d 443, 444 [2d Dep't 2007]).

The plaintiff has satisfied the third prong as she has established that she did not know the identities of the officers at the time the complaint was filed. The officers could have anticipated being named in this action as plaintiff had filed a CCRB complaint about the incident after it transpired. The complaint contained allegations about the circumstances and events that transpired during the incident that were sufficient to indicate to the officers that this action was about them. Further, the City knew the identities of the officers as they had access to the body-camera footage.

Finally, plaintiff alleges that the defendant would not be surprised or prejudiced by the addition of the claims because they know the identities of the officers from the CCRB investigation and have access to the body-worn camera video. Prejudice is more than the mere exposure of the party to greater liability, there must be some indication that the party has been hindered in the preparation of the case or prevented from taking some measure in support of its position (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411, 23 NE3d 1008, 1013 [2014]; quoting *Loomis v Civetta Corinno Constr. Corp.,* 54 NY2d 18, 23, 444 NYS2d 571, 429 NE2d 90 [1981]). Further, the burden for establishing prejudice is on the party opposing the amendment (*Id.*).

The City alleges making a late motion and seeking to assert time-barred claims is inherently prejudicial. The City contends that the plaintiff made this motion almost a year

after the statute of limitations expired. The defendant alleges, "a failure to adequately explain the delay in seeking to amend the pleadings, if coupled with prejudice, will generally warrant denial of a motion to amend a pleading" (*Ragland v City of New York,* 45 Misc 3d 1218[A], at 7 [Sup Ct Bronx County, 2014, Hon. Mitchell Danziger]).

The City has failed to meet the burden of establishing the inclusion of the individual defendants would prejudice them in either the preparation of their case or from taking a measure in support of their position. Additionally, the defendant has failed to establish their prejudice because of the plaintiff's late motion. The court is governed by a liberal standard under § 3025(b), and the court may grant leave to amend pleadings "at any time" (CPLR § 3025[b]). Therefore, the motion to amend the complaint to include the names of the individual officers is granted.

CPLR § 1024:

Plaintiff's alternative request under CPLR § 1024, seeking leave to substitute the proposed individual defendants in place of the "John Doe" designations, is without merit as the plaintiff is unable to show diligent inquiries to determine the name of the individual defendants before the end of the statutory period (*See Tucker v Lorieo*, 291 AD2d 261, 738 NYS2d 33 [2002] [A plaintiff must demonstrate a diligent effort, prior to the statute of limitations, to identify the unknown defendants]).

Conclusion:

For the reasons set forth hereinabove, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in this action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with a notice of entry; and it is further

ORDERED that the action shall bear the following caption:

CRYSTAL POPE, Plaintiff, -against- THE CITY OF NEW YORK, New York City Police Department Officer Chardy Alberto (Shield No. 21159), New York City Police Department Officer Michael Duchatellier (Shield No. 18345) both of whom are sued in their individual capacities. Defendants.

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the Court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the Court's website), and it is further

ORDERED that the defendants shall have 20 days from service of a copy of this order with notice of entry upon them to answer or otherwise respond to the amended complaint.

This constitutes the decision and order of the court.

3/20/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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