

Feifei Gu v Henry

2023 NY Slip Op 32607(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 101237/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

FEIFEI GU,

Plaintiff,

- v -

JAVON HENRY, LISA FRANCHINI, NEW YORK COUNTY
DISTRICT ATTORNEY'S OFFICE WITNESS AID SERVICE
UNIT,

Defendant.

-----X

INDEX NO. 101237/2022
MOTION DATE 02/27/2023
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 21, 22, 23, 30

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument which took place on May 16, 2023, with Plaintiff Feifei Gu ("Plaintiff") appearing *pro se*, and Victor Olds, Esq. appearing for Defendants Javon Henry, Lisa Franchini, and New York County District Attorney's Office Witness Aid Service Unit (together "Defendants"), Defendants' motion to dismiss Plaintiff's Complaint is granted.

I. Background

Plaintiff commenced this action against Defendants by filing a Summons and Complaint with the Court on December 23, 2022 (NYSCEF Doc. 1). Plaintiff's Complaint consists of five (5) causes of action, which are denominated as follows: First Cause of Action: Prosecutorial Misconduct; Second Cause of Action: Violation of Crime Victim's Bill of Rights; Third Cause of Action: Violation of Civil Rights and Human Rights; Fourth Cause of Action: Ethical Violation; and Fifth Cause of Action: Emotional Distress (NYSCEF Doc. 20). Plaintiff's Complaint also seeks monetary damages in the amount of \$100,000,000.00, and the re-opening

of *People v. Daby Keita* (Docket #CR-013099-20NY), which was dismissed prior to the commencement of this action. Each of Plaintiff's causes of action against Defendants are derived from Plaintiff's displeasure with the manner in which the District Attorney's Office, acting through Defendants, exercised its prosecutorial function in handling the underlying case of *People v. Daby Kieta*, in which Plaintiff was the complaining alleged victim.

On February 27, 2023, Defendants filed the instant motion, pursuant to CPLR 3211(a)(7), for an order dismissing Plaintiff's Verified Complaint against them for failure to state a cause of action. Defendants filed an Affirmation (NYSCEF Doc. 7) and Memorandum of Law (NYSCEF Doc. 8) in support of their motion on February 27, 2023. Defendants argue that dismissal of Plaintiff's complaint is required for failure to state a claim because: (1) Plaintiff's claims are procedurally barred for failure to file a timely notice of claim; (2) the District Attorney's Office's Witness Services Unit is a Non-Suable Entity; (3) Plaintiff Lacks Standing to Assert a Prosecutorial Misconduct Claim; and (4) Defendants are entitled to absolute immunity from Plaintiff's claims (NYSCEF Doc. 8).

On March 5, 2023, Plaintiff filed an Affidavit in opposition to Defendants' motion to dismiss (NYSCEF Doc. 23). In her opposition, Plaintiff argues: (1) that Defendants' motion to dismiss should be deemed void because the instant case has not been commenced by Plaintiff; (2) that Defendants' motion to dismiss is defective because service of the motion and supporting papers was not timely; (3) that the Affidavit of Service provided by Victor Olds is insufficient because it was not uploaded to NYSCEF; and (4) that because Victor Olds failed to comply with the requirements set forth in CPLR 2214(b), Plaintiff's answering papers are not subject to CPLR 2214(b) (*Id.*).

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). Likewise, a Court need not accept as true factual claims that are either inherently incredible or totally contradicted by the documentary evidence (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). However, an unartfully pled Complaint may be amplified on a pre-answer motion to dismiss by affidavits and other evidence evidencing potentially meritorious claims (*Ninth Space LLC v Goldman*, 192 AD3d 594 [1st Dept 2021]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

B. Defendants' Motion to Dismiss Plaintiff's Complaint

i. Plaintiff's Failure to File a Timely Notice of Claim

Section 50-k of the General Municipal Law entitled "Civil Actions Against Employees of the City of New York" states that:

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[n]o action or proceeding instituted hereunder, other than one instituted pursuant to sections nineteen hundred eighty-one through nineteen hundred eighty-eight of title forty-two of the United States code shall be prosecuted or maintained against the city or any agency or an employee unless notice of claim shall have been made and served upon the city in compliance with section fifty-e of this chapter and within ninety days after the claim arises.

Sections 50-e of the General Municipal Law states that in any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action, the notice of claim must be served within ninety days after the claim arises (GML § 50-e). The Appellate Division, First Department has held that “a notice of claim is required before filing an action against the office of a District Attorney in the City of New York” (*Slemish Corp. v. Morgenthau*, 192 AD3d 465, 467-68 [1st Dept 2021] (citing *Drakeford v. Brooklyn District Attorney*, 266 AD2d 134 [1st Dept 1999])). Further, it has been held that a complaint should be dismissed where a required notice of claim has not been timely served (*see Adkins v New York* 51AD2d 944, 945 [1st Dept 1976])).

Based on the Court’s docket entries, Plaintiff never filed a notice of claim at any time (NYSCEF Doc. 1). Moreover, nowhere in Plaintiff’s opposition papers does she allege that she complied with the notice of claim requirements. Because Plaintiff failed to timely file a notice of claim, as required by General Municipal Law §§ 50-k and 50-e, dismissal of Plaintiff’s Complaint, with prejudice, is proper (*Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61 [1984])¹.

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Accordingly, it is hereby,

¹ Dismissing this matter with prejudice for failure to timely file a notice of claim, the Court need not address Defendants’ remaining arguments.

Accordingly, it is hereby,

ORDERED that Defendants Javon Henry, Lisa Franchini, and New York County District Attorney's Office Witness Aid Service Unit's motion to dismiss Plaintiff Feifei Gu's Complaint is granted, and Plaintiff's Complaint is dismissed in its entirety; and it is further

ORDERED that within 10 (10) days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>7/28/2023</u>			<u>Mary V. Rosado</u>
DATE			HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE