Galindo v City of New York

2023 NY Slip Op 32734(U)

August 7, 2023

Supreme Court, New York County

Docket Number: Index No. 152157/2021

Judge: Nicholas W. Moyne

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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JOVAN GALINDO,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONOR DOHERTY, RYAN MCHALE

Defendant.

----------X

INDEX NO. 152157/2021

MOTION DATE 03/29/2023, 04/14/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 25, 28, 29, 30, 31, 32, 40, 41, 42, 43

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 26, 33, 34, 35, 36, 37

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

Motion Sequence 001 and Motion Sequence 002 are consolidated herein for disposition.

This is an action by plaintiff, Jovan Galindo ("plaintiff"), to recover for damages allegedly sustained on January 30, 2020, when he was allegedly falsely arrested, falsely imprisoned, assaulted, battered, subjected to excessive force, and maliciously prosecuted by police officers inside the Fulton Street subway station in Manhattan.

Motion Sequence 001 is a motion by defendants Police Officer Conor Doherty ("Doherty") and Police Officer Ryan McHale ("McHale") (collectively "officers" or "MTA defendants"), pursuant to CPLR § 3211(a)(8), to dismiss the complaint for lack of personal jurisdiction. Plaintiff cross-moves, seeking an order granting an extension of time to serve the complaint upon defendants Doherty and McHale, pursuant to CPLR § 306-b. For the reasons set

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forth herein below, the MTA defendants' motion is denied, and the plaintiff's cross-motion is granted.

Motion Sequence 002 is a motion by defendant The City of New York ("the City"), pursuant to CPLR 3211(a)(7), to dismiss the complaint in its entirety for failure to state a cause of action. For the reasons set forth below, The City of New York's motion to dismiss is granted.

Procedural History:

Plaintiff served a Notice of Claim upon the City on or about July 16, 2020, and appeared for a General Municipal Law 50-h examination held by the City on February 8, 2021. This action was commenced by filing a Summons and Complaint on or about March 3, 2021. The City joined issue by service of its answer on May 20, 2021.

The complaint named The City of New York and P.O. Conor Doherty and P.O. Ryan McHale individually, as defendants. The complaint asserts that McHale and Doherty, acting in the scope of their employment as police officers with the City, falsely arrested and imprisoned, assaulted, battered, utilized excessive force, and maliciously prosecuted the plaintiff. Plaintiff's complaint alleges that the City was negligent in its' operation, maintenance, and control of the New York City Police Department and the police officers thereof. As discussed more fully below, P.O. Doherty and P.O. McHale were not employed by the NYPD, but rather were employees of the Metropolitan Transportation Authority Police Department ("MTAPD").

On May 19, 2021, plaintiff's prior counsel attempted to serve McHale and Doherty by sending an electronic copy of the Summons and Complaint to the Chief of Staff in the General Counsel's Office at the Metropolitan Transportation Authority ("MTA") via email, asking them to accept service on behalf of McHale and Doherty (NYSCEF Doc. No. 11). On July 12, 2021, Associate Counsel of the MTA, Jason Barnes ("Barnes"), notified plaintiff's prior counsel via

email that the MTA could not accept service on behalf of officers named in their individual capacity (NYSCEF Doc. No. 12). Barnes included that he would try to find their assigned districts and addresses so that they may be served by personal delivery (*Id.*), impliedly indicating that P.O. Doherty and P.O. McHale were employed by the MTA.

On July 13, 2021, Barnes emailed plaintiff's prior counsel with Doherty and McHale's assigned districts and their weekly schedules (NYSCEF Doc. No. 13). Barnes also included instructions or suggestions on how to best serve the officers (*Id.*). Plaintiff's prior counsel purportedly mailed copies of the Summons and Complaint to the officers' district offices but neither officer was personally served with the papers (*Id.*)

Subsequently, the Subin Firm took over the case from plaintiff's prior counsel in May of 2022. Eric D. Subin, Esq. ("Subin"), in his affidavit, contends that obtaining the file from prior counsel was difficult; it was not transferred until July 2022, and was not open in their system until August 2022 (NYSCEF Doc. No. 30). Subin alleges that the firm was unaware of any email exchange between Lee and Barnes and was never informed of any potential problems regarding service of process with the officers (*Id.*). Subin further affirmed that it was his understanding that the action had been commenced against the proper parties and the defendants were properly served (*Id.*).

The MTA defendants filed their motion to dismiss on March 28, 2023. Subsequently, the City filed its' motion on April 11, 2023.

Motion Sequence 001:

The MTA defendants now move to dismiss the complaint in its entirety, pursuant to CPLR § 3211(a)(8), for lack of personal jurisdiction due to the plaintiff's failure to effectuate

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proper service. Plaintiff cross-moves, seeking an order, pursuant to CPLR § 306-b, for an extension of time by which to properly serve the MTA defendants.

CPLR 3211 § (a)(8) provides that a party may move to dismiss when the Court lacks "jurisdiction of the person of the defendant." As plaintiff commenced this suit against the officers in their individual capacity, service must be completed in accordance with the methods provided in CPLR § 308, which provides, in pertinent part, that personal service shall be made by any of the following methods: (1) by delivering the summons within the state to the person to be served; or (2) by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place, or the usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or to the person to be served at his or her actual place of business, with such delivery and mailing to be effected within twenty days of each other. "The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (*Bushell v City of New York*, 172 AD3d 1156, 1157 [2d Dept 2019]; *see also Forrester v Luisa*, 52 AD3d 324 [1st Dept 2008] [Plaintiff failed to carry his burden of demonstrating, by a preponderance of the evidence, that service was properly made]).

The MTA defendants argue that the officers were never properly served with the Summons and Complaint for this action. Service on the officers was first attempted by plaintiff's prior counsel emailing a copy of the Summons and Complaint to the Chief of Staff in the MTA's General Counsel Office (NYSCEF Doc. No. 10). Upon indication by the MTA that this was not the proper avenue, plaintiff's prior counsel then attempted service by mailing copies to the officer's MTAPD district offices (*Id.*). However, there is no indication that the

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requirement of personal delivery was ever completed (*see Dorfman v Leidner*, 76 NY2d 956, 959 [1990]). Barnes affirmed that to the best of his knowledge neither McHale or Doherty received personal service and the parties who received, on McHale and Doherty's behalf, the copies of the Summons and Complaint that were mailed to the district offices, relayed that they were unaware that a copy was ever personally delivered to these work locations (NYSCEF Doc. No. 10). Further, there is no affidavit of service for either of the MTA defendants. While service was attempted by plaintiff's prior counsel, it was not completed in conformity with the statutory requirements. Accordingly, the court does not have personal jurisdiction over Officers Doherty or McHale.

Plaintiff cross-moves, requesting an extension of time to serve the complaint on the officers, pursuant to CPLR § 306-b. CPLR § 306-b, prescribes that service of the summons and complaint shall be made within 120 days after the commencement of the action; if service is not made upon a defendant within the 120 days, the court, upon motion, shall dismiss without prejudice or may extend the time for service upon good cause shown or in the interest of justice (CPLR § 306-b). Good cause and in the interest of justice are two separate standards, with the latter being a "more flexible" and "broader standard," "to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104, 105 [2001]). The interest of justice standard requires careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties (*Id.*).

The plaintiff is requesting that the court grant an extension of time to allow service on the MTA defendants in the interest of justice. Under the interest of justice standard, "the court *may* consider diligence, or lack thereof, along with any other relevant factor in making its

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determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012], quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105, 106 [2001][emphasis added]). The court may consider any factor relevant to the exercise of its discretion and no one factor is determinative (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 106 [2001]).

It is clear that plaintiff's prior counsel attempted, albeit unsuccessfully, to serve the officers within the 120-day period. The MTA defendants correctly point out that plaintiff's request for an extension was not prompt as it was not made until after the motion to dismiss, and there was a substantial delay from the expiration of the period to serve and plaintiff's counsel now making the request (*see Johnson v Concourse Vil., Inc.*, 69 AD3d 410, 411 [1st Dept 2010]; *Estate of Jervis v Teachers Ins. and Annuity Ass'n*, 279 AD2d 367, 368 [1st Dept 2001]).

However, no one factor is determinative, and plaintiff's current counsel has offered an explanation for the delay; they were unaware of the improper service as they were not alerted by prior counsel when taking over the case and were not privy to the emails between the MTA and prior counsel (*see generally Pecker Iron Works, Inc. v Namasco Corp.*, 37 AD3d 367, 368 [1st Dept 2007]; *Nationstar Mtge. LLC v McCallum*, 191 AD3d 480, 481 [1st Dept 2021]). Further, considering that the underlying action was timely commenced, and the Statute of Limitations has now expired, denying the extension and dismissing the action without prejudice would constitute dismissal of the action altogether (*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]). Considering the standard on a motion to dismiss, and absent the completion of any discovery in this matter, the plaintiff has established that his claims against the officers are of a meritorious

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nature (*Leon v Martinez, 84 NY2d 83, 87 [1994]; EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Little v City of New York*, 487 F Supp 2d 426, 438 [SDNY 2007]).

The MTA defendants have failed to demonstrate a substantial prejudice, either that they would be hindered in the preparation of their case or prevented from taking some measure in support of their position, resulting from the failure to properly serve or by allowing the extension of time (*see generally Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981]; *Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009]). As repeatedly mentioned, there was some notice of the action, evidenced by the email communications and by the copies of the Complaint and Summons having been mailed to the officers' district offices and relayed to them. In the alternative, plaintiff has demonstrated that he would be severely prejudiced and would be deprived of any opportunity to recover for his injuries. Considering the factual setting, and after a balancing of the competing interests, the MTA's motion to dismiss is denied and plaintiff's cross-motion for an extension of time in the interest of justice is granted.

Motion Sequence 002:

The City moves, pursuant to CPLR § 3211(a)(7), to dismiss the complaint in its entirety for failure to state a cause of action. The City alleges that dismissal is warranted as the City does not employ, train, hire, retain, supervise, or make policy for the officers allegedly involved in the action. Further, the City alleges that a claim of general negligence stemming from an arrest is not a cognizable cause of action. The plaintiff opposes the motion, alleging that the City should be equitably estopped from claiming it is an improper party in this suit.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, accord plaintiffs the benefit of every favorable inference, and determine whether the facts alleged fit within any cognizable

legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The City contends that the complaint should be dismissed against them as it is a separate entity from the Metropolitan Transit Authority and is not responsible for the actions of MTA employees. The MTA is a public benefit corporation created by, and organized under, the New York State Public Authorities Law (*see* NY Pub. Auth. Law § 1263 *et seq*). The MTA Police Department ("MTAPD") is the uniformed police force created and maintained by the MTA (NY Pub. Auth. Law § 1266-h; [the authority is authorized and empowered to provide and maintain an authority police department and uniformed authority police force]).

The plaintiff's claims against the City are premised on the conduct of McHale and Doherty allegedly undertaken while "acting in the scope of their employment as police officers for the City of New York" (Verified Complaint ¶ 4, 5). As highlighted in the email correspondence between the MTA General Counsel and plaintiff's prior counsel, demonstrated further by the attempted service at the officers' MTAPD district offices, and generally conceded by the parties, the officers were employees of the MTAPD. Considering that the officers are not employees of the City, the City cannot be held vicariously liable for the conduct that allegedly occurred while acting in the scope of their employment.

Additionally, the City properly asserts that the plaintiff is unable to recover under general negligence principles for alleged damages stemming from an arrest (*Ferguson v Dollar Rent A Car, Inc.*, 102 AD3d 600, 601 [1st Dept 2013]; *Simon v State of New York*, 12 AD3d 171 [1st Dept 2004]; *Boose v City of Rochester*, 71 AD2d 59, 62 [4th Dept 1979]).

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In opposition, the plaintiff alleges that in light of its' conduct thus far, the City should be equitably estopped from claiming it is not the proper defendant in this action. The doctrine of equitable estoppel applies "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and changes his position to his detriment or prejudice" (*Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]). The doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances (*Luka v New York City Tr. Auth.*, 100 AD2d 323, 325 [1st Dept 1984], *affd,* 63 NY2d 667 [1984]).

Plaintiff cannot be said to have relied upon the City's conduct in failing to inform the plaintiff that the City was not the proper party until filing the instant motion. The plaintiff's prior counsel was notified, before the statute of limitations expired, that the officers were members of the MTAPD[1]. As previously established, plaintiff's prior counsel was aware of this fact as they attempted service on the officers on more than one occasion. Plaintiff's prior counsel, possessing this knowledge, could have sought leave to file a late notice of claim upon the MTA prior to the statute of limitations but failed to do so (*see Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Further, considering that no Notice of a Change of Attorney was filed, the plaintiff failed to alert the parties of a change in representation and afford the City an opportunity to notify the new counsel of anything (CPLR § 321). Therefore, it cannot be said that the actions of the City misled or discouraged the plaintiff from serving the proper party or induced reliance to plaintiff's detriment (*see generally Collins v Manhattan & Bronx Surface Tr. Operating Auth.*, 192 AD2d 464, 464 [1st Dept 1993] [Plaintiff's delay in serving a notice of

[1] Plaintiff's cause of action accrued on January 30, 2020, and the MTA's General Counsel informed prior counsel that the officers were MTAPD employees via email on July 12 and 13th of 2021, within the statutory period by which a party may seek leave to file a late notice of claim (*see Pierson v City of New York*, 56 NY2d 950, 954 [1982]; *see also* General Municipal Law § 50-e[5]).

claim on the proper party was due to his own inattention]). Accordingly, the City's motion to dismiss is granted.

For the reasons set forth hereinabove, it is hereby

ORDERED that the motion to dismiss by defendant The City of New York is granted, and the complaint is dismissed in its entirety as against said defendant; the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that, as the City of New York is no longer a defendant and no party is represented by corporation counsel, this case is referred to the Trial Support Office for reassignment to a General IAS Part; and it is further

ORDERED that the motion to dismiss by defendants Police Officer Conor Doherty and Police Officer Ryan McHale, is denied without prejudice; and it is further

ORDERED that the cross-motion of plaintiff for an extension of time to serve the summons and complaint upon defendants Doherty and McHale is granted; and it is further

ORDERED that movant shall, within 30 days from service of a copy of this order with notice of entry, in accordance with the Civil Practice Law and Rules, serve the summons and complaint upon said defendants and file with the County Clerk with proof of service; and it is further

ORDERED that movant shall, within said 30-day period, serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the changes herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse*

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and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website].

This constitutes the decision and order of the court.

Motion Sequence 001

8/07/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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

Motion Sequence 002

8/7/2023
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:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE