SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46M**

Justice

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BRIAN THOMPSON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NYPD DETECTIVE RASHIED MCINTYRE, NYPD DETECTIVE JOHN KATEHIS, NYPD DETECTIVE QUINN SEALEY, FORMER DISTRICT ATTORNEY FOR NEW YORK COUNTY CYRUS VANCE, JR, DISTRICT ATTORNEY FOR NEW YORK COUNTY ALVIN BRAGG

Defendant.

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INDEX NO. 153948/2022

MOTION DATE 04/13/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 8, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS.

In this pre-answer motion to dismiss, pursuant to CPLR 3211 (a)(7), defendants Alvin J. Bragg, District Attorney for the County of New York and Cyrus R. Vance, Jr., the former District Attorney for the County of New York (hereinafter the D.A. defendants, movants or the moving defendants) seek to dismiss the complaint for failure to state a cause of action on the grounds that the D.A. defendants are not liable for any wrongdoing as alleged by plaintiff.

I. Background

A. Underlying Claims

In this action sounding in tort and civil rights, plaintiff Brian Thompson (hereinafter Mr. Thompson or plaintiff) seeks damages for abuse of process, false arrest, false imprisonment, malicious prosecution, excessive force, civil rights violations, and emotional and physical damages.

Plaintiff's claims arise out of his arrest on or about December 3, 2020 by New York Police Department (NYPD) officers for the alleged possession of a controlled substance.

While in custody, plaintiff alleges that he was subjected to a cavity search by defendants members of the NYPD. He states that he was arraigned on December 5, 2020 on a felony complaint in the Criminal Court of the City of New York, County of New York. Bail was set at the arraignment. As he was unable to post bail, Mr. Thompson was sent to Rikers Island for pre-trial incarceration. He asserts that he spent more than two months at Rikers Island in deplorable and inhumane conditions where he became seriously ill during that period.

Plaintiff commenced the instant civil proceeding by filing a Summons and Verified Complaint on May 6, 2022 seeking money damages in connection with his arrest by New York City Police Department ("NYPD") Detectives Rashied McIntyre, John Katehis and Quinn Sealey and prosecution by the D.A. defendants and the City of New York.

In particular, plaintiff's verified complaint alleges five causes of action. Plaintiff makes the following claims pursuant to 42 USC § 1983: false arrest against the individual defendants (first cause of action); deprivation of fair trial rights, abuse of process, fabrication of evidence and malicious prosecution for defendants' violations of plaintiff's rights protected under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (second cause of action); excessive force against the individual defendants (third cause of action) and under *Monell v Department of Social Services of City of New York*, 436 US 658 [1978] (*Monell*) (fourth cause of action). Finally, plaintiff alleges violations of the New York State Constitution and New York State law by individual and municipal defendants (fifth cause of action).

On October 7, 2022, the court (Hon. Lyle E. Frank) issued an order granting plaintiff's order to show cause seeking to extend his time to serve the defendants with the Summons and Complaint (NYSCEF Doc. No. 5).

Defendant, City of New York, interposed an Answer on January 4, 2023, and an Amended Answer on behalf of The City of New York, NYPD Detectives Rashied McIntyre and John Katehis on March 24, 2023 (NYSCEF Doc. Nos. 7 and 14).

B. Brief Procedural History

On February 4, 2022, the New York County Supreme Court – Criminal Term issued a decision and order granting Mr. Thompson's motion to dismiss the indictment pursuant to Criminal Procedure Law (CPL) §§ 210.20(1) and 30.30 (*The People of the State of New York v Brian Thompson*, index No. 1806/2020; NYSCEF Doc. No. 10).

On April 23, 2022, Mr. Thompson filed a Notice of Claim with the Office of the New York City Comptroller.

On April 28, 2022, Mr. Thompson filed a Petition, pursuant to General Municipal Law (GML) § 50-(e), seeking to commence an action against respondent, The City of New York, for, inter alia, false arrest and malicious prosecution arising out of his arrest on or about December 5, 2020 and the dismissal of criminal charges against him on February 8, 2022 (*Brian Thompson v The City of New York*, index No. 153707/2022; NYSCEF Doc. No. 18). On July 1, 2022, the court (Hon. Judy H. Kim) granted Mr. Thompson's motion to serve a late Notice of Claim without opposition (NYSCEF Doc. No. 19).

Plaintiff appeared for his 50-h examination on September 21, 2022 and was questioned related to the Notice of Claim (NYSCEF Doc. No. 20).

At the 50-h hearing held, plaintiff related that he was arrested while visiting his friend's apartment and that the charges against him were for possession of drugs with intent to sell (NYSCEF Doc. No. 20 at 29). He alleged that he was not able to make bail and was incarcerated at Rikers Island where he contracted COVID twice in or about late December 2020 or January of 2021 (*id*. at 40-42 and 45). He reported that he was released on February 8, 2021 (*id*. at 44). He further related that all charges were dismissed on about March or April of 2021 (*id*. at 50). He stated that he was diagnosed with long-term COVID by his doctor as he has been forgetful and

experiencing headaches (*id*. at 52-53). He also complained about being strip-searched at the precinct during his arrest (*id*. at 57). In addition to his physical injuries, he is also claimed psychological, mental and emotional injuries as a result of catching COVID twice and nearly dying from it during his incarceration while being arrested for something he states he never did (*id*. at 58). He claimed being fearful of the police (*id*. at 59). He also stated that he lost property, including keys, glasses, cologne, gifts for his grandkids and an Android phone as a result of the arrest (*id*. at 60-62).

II. Legal Standard

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR 3026). The question before this court is whether plaintiff's "pleading fails to state a cause of action" against the D.A. defendants (CPLR 3211[a][7]). In making this inquiry, the court is generally required to assume the truth of the factual allegations set forth in plaintiff's complaint (*Leon*, 84 NY2d at 87-88) drawing all reasonable inferences that flow therefrom in favor of the plaintiff (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *see also* CPLR 3026).

A. Plaintiff's Request for Discovery

At the outset, the court is not persuaded by plaintiff's reliance on CPLR 3211(d) in support of his argument that the D.A. defendants should not be granted dismissal because the facts essential to justify opposition may exist but cannot be stated.[1] He seeks either the dismissal of the D.A. defendants' motion or a stay thereof (NYSCEF Doc. No. 16, ¶¶ 53-61). In their reply, the D.A.

[1] Plaintiff seeks the following disclosures from the D.A. defendants:

> "training materials related to bail eligibility, including, training materials related to bail eligibility under CPL § 510.10 and the 2004 and 2009 Drug Law Reform Acts ([DLRA] L 2004, ch 738; L 2009, ch 56. Additionally, Plaintiff training materials related to the interplay between these two statues [sic], inclusive of any sentencing training materials based on the 'persistent felony offender' status that DA DEFENDANTS asserted, wrongly, governed the Plaintiff's sentencing and was used in their bail request"

(NYSCEF Doc. No. 16, ¶ 56).

defendants stress that there are no facts that can be gleaned in discovery proceedings about their training procedures that would rectify plaintiff's legal inability to proceed against them under *Monell* or the theory of vicarious liability or in light of their entitlement to absolute immunity (NYSCEF Doc. No. 24 at 9).

Plaintiff's request for discovery under the circumstances is denied for the following reasons. Where the allegations are vague and conclusory, as demonstrated in the discussion below, the complaint is susceptible to a dismissal for failure to state a cause of action (*HT Capital Advisors, L.L.C. v Optical Resources Group*, 276 AD2d 420, 420 [1st Dept 2000] quoting *Weimer v City of Johnstown*, 249 AD2d 608, 610 [3d Dept 1998], *lv denied* 92 NY2d 806 [1998] ["Although plaintiff asserts that discovery will permit it to substantiate its claims, its 'vague and conclusory allegations and expressions of hope that discovery, if and when conducted, might provide some factual support for [his cause of action under 42 USC § 1983] provide an insufficient basis for failing to dismiss a patently defective cause of action'"]).

B. Compliance with Uniform Civil Rule § 202.8-a [Motion in General]

Next, the Court turns to plaintiff's argument that the D.A. defendants failed to attach the pleadings and relevant court orders to their motion rendering same defective, pursuant to 22 NYCRR § 202.8-a and requiring the dismissal of the motion (NYSCEF Doc. No. 16 at 2-3). In reply, the D.A. defendants state that plaintiff rendered his argument moot by attaching the pleadings to his opposition (NYSCEF Doc. No. 24 at 2-3). In addition, the moving defendants point out that plaintiff did not cite any authority which directs the court to deny the motion on that basis. Furthermore, they request that the court disregard this oversight by invoking CPLR 2001 and by highlighting that the pleadings are on NYSCEF and that they also submitted the Summons and Complaint with their reply. In the alternative, they seek permission to submit an amended motion to dismiss with the pleadings attached.

The Court exercises its discretion under CPLR 2001 to overlook this error and will rule on the merits of the motion to dismiss.

As mentioned by movants, this action was electronically filed on NYSCEF and copies of the pleadings and relevant court orders are available there. Rather than denying the motion without prejudice, only to have it refiled with a copy of the pleadings and court orders attached as an exhibit, this omission is hereby overlooked as the record before the court is sufficiently complete (*see Breytman v Olinville Realty, LLC*, 46 AD3d 484, 485 [1st Dept 2007] citing *Welch v Hauck*, 18 AD3d 1096, 1098 [3d Dept 2005] holding that "[a]lthough we recognize that such proffer is required by CPLR 3211 (b), such a procedural defect may be overlooked if the record is 'sufficiently complete'" (internal quotation marks and citations omitted); *Avalon Gardens Rehabilitation & Health Care Ctr, LLC v Morsello*, 97 AD3d 611, 612 [2d Dept 2012] citing inter alia CPLR 2001 [Mistakes, omissions, defects and irregularities]; *see also General Motors Acceptance Corp. v Albany Water Bd.*, 187 AD2d 894 [3d Dept 1992]:

> ["We note that inasmuch as neither defendants' motion nor plaintiff's cross motion for summary judgment was supported by a copy of the pleadings (see, CPLR 3212 [b]), both motions were procedurally defective and could have been dismissed by Supreme Court on that basis (see, *Mathiesen v Mead*, 168 AD2d 736, 737). None of the parties raise this issue on appeal, however, and because the record before us is sufficiently complete, we will decide these appeals on the merits"]).

Indeed, the omission has been corrected by both parties by the attachment of a copy of the summons and complaint as Exhibit B to the D.A. defendants' attorney's affirmation in reply and by plaintiff's submission of same as well as all other relevant documents in opposition to the motion.

Further, it is appropriate here to disregard the mistake as it cannot be said that a substantial right of plaintiff's has been prejudiced due to the D.A. defendants' failure to attach a copy of the pleadings and relevant court orders to their moving papers (*see generally Patrician Plastic Corp v Bernadel Realty Corp*, 25 NY2d 599 [1970]). This is consistent with the court's overall mandate

to decide matters "on their merits whenever possible" (*Jenkins v City of New York*, 13 AD3d 342, 342 [2d Dept 2004]).

III. Pleading Requirements Pursuant to GML §§ 50-e and 50-i

A. Contentions

The D.A. defendants argue that plaintiff failed to demonstrate that he complied with statutory requirements governing claims against a municipality or its employees, including the District Attorney. They claim that plaintiff failed to demonstrate that he filed a timely Notice of Claim and failed to make the proper allegations as to the Notice of Claim in his Verified Complaint.

They contend that GML §§ 50-e [Notice of Claim] and 50-i [Presentation of tort claims; commencement of actions] require a plaintiff to file a Notice of Claim within 90 days "after the claim arises," and that a plaintiff must commence suit within 1 year and 90 days "after the happening of the event upon which the claim is based" (*see* NY County Law §52[1]).

In addition, they claim that plaintiff may not prosecute this action because he failed to comply with the requirement, pursuant to GML **§** 50-i (1), that the verified complaint allege "that at least thirty days have elapsed since the service of [a notice of claim] … and that adjustment or payment thereof has been neglected or refused."

The D.A. defendants point out that plaintiff claims that he filed a Notice of Claim on April 23, 2022, but then asserts, without further explanation or documentation, that on April 28, 2022, he filed "a petition asking this Court to deem the previously filed Notice of Claim timely in its entirety" and further that on May 17, 2022, there was to be a "hearing as to the timeliness of any claims raised outside of the 90-day period since the dismissal of [plaintiff's] criminal case" (Verified Complaint at 4-5).

They assert that although plaintiff did not serve the verified complaint on the defendants until October 2022, plaintiff did not amend the complaint to include the court's findings in response to plaintiff's petition at the hearing.

In opposition, plaintiff argues that, although he filed a petition to file a late notice of claim, the portion of plaintiff's claims asserted as against the D.A. defendants were timely.

He points out that he was granted leave to file a late notice of claim and to serve the instant summons and complaint, pursuant to orders granted by the court (NYSCEF Doc. Nos. 19 [decision and order on motion seq. No. 001] and 20 [transcript of 50-h hearing of Brian Thompson]).

Plaintiff proceeds to distinguish the cases cited by the D.A. defendants to support their argument from the underlying case including by highlighting that the above-referenced petition was granted and that a 50-h hearing was held thus providing additional notice to the D.A. defendants.

In reply, the D.A. defendants focus on GML § 50-i and stress that plaintiff provided for the first time in his opposition papers proof that he was granted permission from the court to file and serve a late notice of claim on the City. They argue that supplying this information in response to a motion to dismiss does not suffice to amend the deficiency in failing to make the proper assertions as to the Notice of Claim in his Verified Complaint.

The D.A. defendants reiterate that plaintiff's Verified Complaint alleged that a notice of claim was filed but left open the issue as to whether it would be accepted and said nothing about whether the 30 days had elapsed since the completed service of that notice and whether adjustment or payment had been refused. They argue that this defect can only be cured by amending the verified complaint. However, plaintiff failed to amend the complaint and as a result, the verified complaint should be dismissed.

B. Analysis

Timely service of a notice of claim, pursuant to GML§ 50-e, is a condition precedent to maintaining a lawsuit against a public corporation (*Davidson v Bronx Mun. Hosp*., 64 NY2d 59, 61 [1984]). The Appellate Division, First Department has held that, for the purposes of GML §50-k, "the District Attorney of the county of New York is considered a city employee" (*Slemish Corp., S.A. v Morgenthau*, 192 AD3d 465, 467 [1st Dept 2021]), and pursuant to County Law § 52, "a notice of claim is required before filing an action against the office of a District Attorney in the City of New York" (*id*., at 468 citing *Drakeford v Brooklyn Dist. Attorney*, 266 AD2d 134 [1st Dept 1999], lv dismissed 95 NY2d 877 [2000]).

Furthermore, the claimant must plead in his complaint that "he has served a notice of claim, but must also allege that the notice was served at least 30 days prior to commencement of the action and that in that time defendants neglected to or refused to adjust or to satisfy the claim" (*Davidson*, 64 NY2d at 61-62).

The notice of claim requirement is statutorily imposed. The complaint must include allegations pertaining to the facts of the notice of claim, its service and filing, which constitute an element of the substantive cause of action (*see Ragosto v Triborough Bridge & Tunnel Auth.*, 173 Misc2d 560, 561 [1st Dept 1997], quoting *Jackson v Police Dept. of City of N.Y*., 119 AD2d 551, 552 [2d Dept 1986]). A complaint which fails to allege compliance therewith is legally insufficient and must be dismissed for failure to state a cause of action (*Nu-Life Const. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106 [1st Dept 1994]; *Reaves v City of New York*, 177 AD2d 437, 437 [1st Dept 1991]).

It is undisputed that, on July 1, 2022, a decision and order was issued granting Mr. Thompson's motion to serve a late notice of claim without opposition in *Thompson v The City of New York*, index No. 153707/2022 (NYSCEF Doc. No. 18 and NYSCEF Doc. No. 19).

According to the decision, the court [Hon. Judy Kim] found that Mr. Thompson filed the notice of claim on April 23, 2022 and the petition on April 28, 2022, and deemed the notice of claim timely filed nunc pro tunc (*id*.). The court also ordered that "in the event a lawsuit arising from this notice of claim is filed, the Petitioner shall commence an action and purchase a new index number" (NYSCEF Doc. No. 19 at 1).

Plaintiff filed the underlying summons and complaint on May 6, 2022. In the complaint, he alleges that the "hearing as to the timeliness of any claims raised outside of the 90-day period since the dismissal of Mr. Thompson's criminal case is scheduled for May 17, 2022 on the motion" (Complaint, ¶ 14). The judicial record indicates that Mr. Thompson's order to show cause was scheduled to be held on that date according to the signed OSC (*Thompson v The City of New York*, index No. 153707/2022; NYSCEF Doc. No. 18 at 23-24).

Although the 50-h hearing was held after the summons and complaint was filed and served, plaintiff neither amended his complaint nor cross-moved to amend the complaint to conform the pleadings to the proof (compare *Runyan v Board of Educ*., 121 AD2d 708, 709 [2d Dept 1986]).

Although the failure to allege in the complaint that he complied with GML is a procedural defect which can be ordinarily corrected by amendment of the pleading, no such amendment was filed. As a result, those claims pertaining to common law and statutory based torts[2] against the D.A. defendants are hereby dismissed without prejudice to the timely commencement of a new

[2] To the extent that plaintiff's claims seeking damages for assault, battery, conversion, false imprisonment and unreasonable detention, negligent hiring, training and supervision, denial of medical care, excessive detention, fabrication of evidence and malicious prosecution are asserted against the DA defendants (verified complaint, fifth cause of action).

action against the D.A. defendants in compliance with CPLR 205 (*see McKune v City of New York*, 19 AD3d 308, 310 [1st Dept 2005]; *Meyer v County of Suffolk*, 90 AD3d 720, 722 [2d Dept 2011] [dismissal of tort claims for failure to comply with GML §50-e]; *Matter of Shannon v Westchester County Health Care Corp*., 76 AD3d 680 [2d Dept 2010]). Notwithstanding the foregoing, plaintiff is allowed to replead within 20 days of service of this decision and order by the moving defendants on plaintiff (*see Commissioners of State Ins. Fund v Board of Educ*. *Arlington Cent. School Dist. No. 1*, 301 AD2d 555, 556 [2d Dept 2003]).

However, those claims seeking to recover for state and federal civil and constitutional rights violations, including pursuant to 42 USC §1983, are not subject to the aforementioned pleading requirements and therefore stand (*Liu v New York City Police Dept*., 216 AD2d 67, 68 [1st Dept 1995] [citations omitted] ["actions against the municipality to recover for Federal and State civil rights violations are not subject to the notice of claim requirements in General Municipal Law § 50-i"]).

IV. Civil Rights Claims, Pursuant to 42 USC § 1983

A. Pertinent Allegations of the Complaint

The crux of plaintiff's allegations under 42 USC § 1983 is contained in the complaint's first cause of action [42 USC § 1983 False Arrest Claim Against the Individual Defendants] and second cause of action [Deprivation of Fair Trial Rights, Abuse of Process, Fabrication of Evidence, and Malicious Prosecution Pursuant to 42 USC § 1983 for Defendants 'Violations of Plaintiff's Rights Protected Under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution].

In essence, plaintiff alleges that during the course of his arrest, detention and prosecution, his constitutional rights to freedom from the deprivation of liberty without due process of law were violated.

Plaintiff's argument appears to focus on the allegations that he was falsely charged with two counts of criminal possession of a controlled substance under Penal Law §220 and that these charges were not eligible for bail, pursuant to CPL § 510.10 (Complaint, ¶¶ 23-25). He asserts that, although he had two prior prison sentences, the charges against him did not confer "persistent felony offender" status upon him, pursuant to the 2004 and 2009 Drug Law Reform Acts (*id*., ¶ 26).

Notwithstanding this ineligibility, he alleges that the Assistant District Attorneys (ADAs), employees under the management of the D.A. defendants, sought unaffordable bail and repeatedly misrepresented plaintiff's bail eligibility during the pendency of the case (*id*., ¶ 27). In addition, they failed to submit a "persistent felony offender" report to substantiate their claims (*id*., ¶ 28-30).

Plaintiff claims that the D.A. defendants "ha[ve] a policy and practice of making bail requests without any intention of ultimately providing the required 'persistent felony offender' report" (*id*., ¶ 31). He asserts that bail was set illegally "in accordance with and wrongful reliance upon the assistants' request for the court to apply the discretionary persistent felony offender exception in CPL § 510.10(4)(s), in violation of CPL § 510.10 and other rights" (*id*., ¶ 32). He adds that "[i]n addition to the assertions made at arraignments, other Manhattan DA employees, one of whom is believed to be Assistant District Attorney Veronika Alayeva, would again wrongly oppose Mr. Thompson's release multiple times from December of 2020 through February of 2021

by falsely claiming that Mr. Thompson's prior sentences rendered the instant case bail eligible" (*id*., ¶ 34).

He further alleges that the protracted prosecution which lasted for a full year implicates the "Manhattan DA's failure to train Assistant District Attorneys on issues and policy matters such as fabricated evidence and bail eligibility determinations, including such failures by former Manhattan DA Cyrus Vance, Jr., and current Manhattan DA Alvin Bragg, whose tenure began more than one month prior to the dismissal of Mr. Thompson's charges" (*id*., ¶ 43).

Plaintiff characterizes the Manhattan District Attorney's official policy executed by the "individual members of the Manhattan District Attorney's Office making the requests for bail" as a "'shoot first, aim never' approach where the office did not "(1) change their position on bail *or* (2) produce the legally required 'persistent felony offender' report" (*id*., ¶¶ 54-56) [emphasis in the original]).

B. Contentions

The D.A. defendants address plaintiff's claims of malicious prosecution. They point out that plaintiff asserts that his due process rights were violated by prosecution of the criminal charges against him and imposition of bail in the early stages of the case in the verified complaint's second and fifth causes of action (Verified Complaint at 11-12 and 18).

They argue that prosecutors enjoy absolute immunity for their acts committed in the course of prosecuting a criminal case. In support of their argument, they cite several cases providing, respectively, that prosecutors are entitled to immunity from civil suits for the performance of their official duties, from claims arising out of the scope of a prosecution, from official acts performed in the investigation and prosecution of criminal charges and even from claims that they relied on false evidence to prosecute an accused offender.

The D.A. defendants argue that they are immune from claims stemming from their alleged failure to thoroughly investigate the criminal matter, as alleged here. They claim that they, as well as the Assistant District Attorneys who directly handled plaintiff's prosecution, are also immune from claims that they relied upon false evidence to prosecute an accused offender. They conclude that they are absolutely immune from civil liability under any plausible interpretation of the verified complaint and, as such, plaintiff's claims must be dismissed.

Movants further argue that the verified complaint should be dismissed to the extent that it is a civil rights action against the D.A. defendants in their individual capacity, pursuant to 42 USC § 1983, as they claim that it fails to allege personal involvement on the part of any of the D.A. defendants in the alleged tortious acts.

They cite case law for the proposition that, to be held liable, the standard focuses on what the supervisor was alleged to have done or caused to be done with the requisite mens rea to result in the purported injury.

Furthermore, they quote excerpts from paragraphs of the verified complaint which refer to "employees under the management of the Manhattan District Attorney" (Verified Complaint, ¶ 27), ADAs at arraignments and "other Manhattan DA employees, one of whom is believed to be Assistant District Attorney Veronika Alayeva" (*id*., ¶34) and "the City of New York and the NYPD, the DOC, and the Manhattan District Attorneys" (*id*., ¶84) allegedly engaging in improper acts to demonstrate that plaintiff did not specifically allege that the D.A. defendants directly handled the prosecution of plaintiff's case.

Rather, they point out that plaintiff asserted that the prosecution of his criminal case "implicates the Manhattan DA's failure to train Assistant District Attorneys on issues and policy matters such as fabricated evidence and bail eligibility determinations" (Verified Complaint, ¶43).[3]

They conclude that plaintiff failed to allege the D.A. defendants 'personal involvement in alleged constitutional deprivations as required under case law. As a result, they argue that any civil rights action against the D.A. defendants in their individual capacities, pursuant to 42 USC § 1983 should be dismissed in its entirety.

The D.A. defendants also turn their attention to plaintiff's claim of abuse of process (Verified Complaint at 11-12 [second cause of action]). They state that although plaintiff seems to direct this claim against the police officer defendants, rather than the D.A. defendants, they recognize that the court must determine whether the facts alleged fit within any cognizable legal theory.

They assert that, according to *Curiano v Suozzi*, there are three elements which constitute the common law tort of abuse of process, namely, (1) regularly issued process, either criminal or civil; (2) an intent to harm without excuse or justification and (3) use of process in a perverted manner to obtain a collateral objective (63 NY2d 113, 116 [1984]).

The D.A. defendants claim that plaintiff failed to allege or demonstrate the third element. They point out that plaintiff specifies only that the "individual NYPD Defendants" allegedly "willfully and intentionally fabricated evidence" and then "forwarded these materially false claims to the New York County District Attorney's Office" (Verified Complaint at 11).

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[3] The D.A. Defendants mistakenly refer to p. 7 as they cite an excerpt from ¶ 43 which is on p. 8 of the verified complaint and is quoted below in full:

> "43. This protracted prosecution on false allegations further implicates the Manhattan DA's failure to train Assistant District Attorneys on issues and policy matters such as fabricated evidence and bail eligibility determinations, including such failures by former Manhattan DA Cyrus Vance, Jr., and current Manhattan DA Alvin Bragg, whose tenure began more than one month prior to the dismissal of Mr. Thompson's charges"

They point out that plaintiff does not claim that the D.A. defendants falsified evidence or took any other specific action to harm him or utilized the criminal process, once obtained to improper effect (*Curiano*, 63 NY2d at 117). They underscore that the verified complaint is silent regarding how the D.A. defendants weaponized the prosecution in service of an improper collateral objective. As such, they claim that any combination of allegations that could be construed as a claim for malicious abuse of process fails as a matter of law.

In opposition, plaintiff refers the court to paragraphs 23-34 of his verified complaint wherein he outlines how the D.A. defendants repeatedly misapplied, misinterpreted, and misrepresented his bail eligibility status to the court and requested bail be set based on the misapplication, misinterpretation, and misrepresentation of his bail eligibility. He points out that he amplified his allegations with factual assertions and legal authority (verified complaint, ¶ 26).

In particular, plaintiff cites Criminal Procedure Law (CPL) § 510.10(4)(s) which he claims the D.A. defendants incorrectly relied upon. He specifies that the D.A. defendants should have applied the 2004 and 2009 Drug Law Reform Act (DRLA) (L 2004, ch. 738; L 2009, ch. 56) when assessing plaintiff's bail eligibility.

Plaintiff states that he asserted with specificity in his verified complaint that the D.A. defendants opposed his release multiple times through December 2020 and January 2021 up until he was released in February 2021 (verified complaint, ¶¶ 32-34).

He clarifies that, as a matter of law, and as asserted in his complaint, the charges that he was accused of are not bail eligible, and no request for bail, in any amount, should have been put forth by the D.A. defendants.

He points out that, in his complaint, he asserted that the D.A. defendants are policymakers holding a managerial role with responsibility to train their employees on the laws, policies,

procedures and practices in which they engage. He stresses that he specifically asserted the critical nature of the D.A. defendants 'responsibility where a person is wrongly presented to the court as bail eligible. He adds that the D.A. defendants took no action to correct the record (verified complaint, ¶¶ 6, 26 - 27, 31-34, 42 - 43, 54 - 56, 73 -74, 90, 91, 97, and 102-108).

In reply, the D.A. defendants reiterate that, under New York law, prosecutors are afforded absolute immunity for their acts committed in the course of prosecuting a criminal action. They stress that prosecutors receive absolute immunity from civil claims arising out of the scope of a prosecution and as quasi-judicial officers on behalf of the State in criminal matters, they are protected by absolute immunity when they are lawfully carrying out duties that are judicial in nature (*see* County Law 700 [1]).

They stress that the prosecution of a crime by a prosecutor is a quasi-judicial function and thus the doctrine of absolute prosecutorial immunity bars suit against prosecutors for damages arising from acts or omissions during a prosecution including the decision to initiate, decline or pursue prosecution of a crime.

The D.A. defendants claim that plaintiff alleges no fact which constitute conduct attributable to the D.A. defendants. As such, those claims must fail.

C. Analysis

The branch of the motion seeking to dismiss plaintiff's cause of action, pursuant to 42 USC §1983, against the D.A. defendants is granted insofar as the complaint fails to state a cause of action under that provision.

Furthermore, if plaintiff's civil rights claim could plausibly be construed as attacking conduct undertaken by any of the D.A. defendants' subordinate prosecutors, plaintiff would still not have a viable claim against the D.A. defendants.

1. Standard of Law

Section 1983 of the USCA [Civil action for deprivation of rights] provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia"

2. Analysis

To begin, plaintiff's complaint does not indicate whether he is seeking to assert his claim against the D.A. defendants in their personal or official capacity, or both (*see* generally *Kentucky v Graham*, 473 U.S. 159, 165-67 [1985]). New York jurisprudence distinguishes between challenges to the District Attorney in their capacity as official policy maker for the County or supervisor and trainer of the A.D.A.s who prosecute cases on their behalf and on the other hand in their personal involvement in the alleged violations of plaintiff's civil rights (*Crawford v New York County Dist. Attorney*, 99 AD3d 600, 601 [1st Dept 2012]).

a. Official Capacity Claims

Insofar as plaintiff asserted claims against the D.A. defendants in their official capacity, they should be dismissed on absolute immunity grounds for the following reasons.

To the extent discernible, plaintiff appears to be suing the D.A. defendants in their official capacity as policy makers for New York County and as supervisors and trainers of the A.D.A.s

who prosecuted the criminal action on their behalf. In particular, plaintiff seems to allege that the D.A. defendants adopted a policy or custom seeking bail without any intention of ultimately providing the required "persistent felony offender" report in contravention of bail eligibility laws leading to a protracted and malicious prosecution and that this policy resulted in the violation of plaintiff's constitutional rights.

"The entitlement of a prosecutor to absolute immunity from a claim for damages against him in his individual capacity on account of his official actions depends principally on the nature of the function performed, not on the office itself" (*Ying Jing Gan v City of New York*, 996 F2d 522, 530 [2d Cir 1993]).

Prosecutors are afforded absolute immunity from liability with respect to claims relating to quasi-judicial activity whereas they are accorded qualified immunity in connection with investigatory activity:

> "Where the prosecutorial activities are "intimately associated with the judicial phase of the criminal process," e.g., the "initiat[ion of] a prosecution," the prosecutor is entitled to absolute immunity from liability under section 1983. (*Id*., at 530 quoting *Imbler v. Pachtman*, 424 U.S. 409, 430, 431, 96 S.Ct. 984, 995, 996, 47 L.Ed.2d 128.) However, prosecutorial activities that are characterized as administrative or investigative, such as the issuance of grand jury subpoenas, merit less protection. (*Ying Jing Gan v. The City of New York*, supra, 996 F.2d at 528.) Thus, prosecutors acting in an "investigative" or "administrative" capacity are entitled only to qualified immunity. (*Barr v. Abrams*, 810 F.2d 358, 361 [2d Cir.1987].) The Supreme Court adhered to this "functional" approach in *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1943, 114 L.Ed.2d 547, where it held, quoting *Imbler*, 424 U.S. at 430, 96 S.Ct. at 995, that "advising the police in the investigative phase of a criminal case is [not] so 'intimately associated with the judicial phase of the criminal process' [citation omitted] that it qualifies for absolute immunity", and, most recently, in *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), where the court held that when prosecutors are conducting "investigative work * * * in order to decide whether a suspect may be arrested" they

> should not be endowed with absolute immunity (at ——, 113 S.Ct. at 2617)"

(*Rodrigues v City of New York*, 193 AD2d 79, 85 [1st Dept 1993] quoting *Ying Jing Gan*, 996 F2d at 530 [2d Cir 1993]; *see also Giraldo v Kessler*, 694 F3d 161, 165 [2d Cir 2012]).

Indeed, a district attorney is often regarded as a quasi-judicial officer who is entitled to immunity from civil suits predicated on 42 USC 1983 for the performance of official functions requiring the knowledge of the law (*Savane v District Attorney of N.Y. County*, 148 AD3d 591, 592 [1st Dept 2017] citing *Van de Kamp v Goldstein*, 555 US 335 [2009] ["Defendant District Attorney was entitled to absolute immunity as a defense to plaintiff's claims under 42 U.S.C. § 1983 alleging his liability as a policy maker, and in his management capacity in the District Attorney's Office"]; *see also Crawford*, 99 AD3d at 601-602 citing *Van de Kamp*, 555 US at 344 ["To the extent plaintiff alleges that the District Attorney discourages ADAs from being respectful of individuals' constitutional rights when prosecuting gun possession cases, the allegation is unavailing because that managerial act, although administrative in nature, is subject to absolute immunity, since it has an intimate connection with prosecutorial activity"]).

In view of the foregoing, plaintiff's claim relating to whether or not to institute a prosecution, and if so on what charges focuses squarely on prosecutorial decisions for which the D.A. defendants are protected (*see e.g. Imbler v Pachtman*, 424 US at 431 [prosecutorial decisions with regard to the initiation of a prosecution and the performance of litigation-related duties are decisions as to which the prosecutors are entitled to absolute immunity]. Similarly, any actions taken by the D.A. defendants in connection with the bail application are also shielded by absolute immunity (*Pinaud v County of Suffolk*, 52 F3d 1139, 1149 [2d Cir 1995] ["actions in connection with a bail application are best understood as components of the initiation and presentation of a prosecution, and therefore are protected by absolute immunity"]; *Riddick v City of New York*, 21

Misc3d 1138 [A], 2004 NY Slip Op 51945 [U] [Bronx County, 2004 (Stinson, J.)] ["While a prosecutor can make a recommendation as to bail, the amount of bail is set by the court. There is no theory of liability under which the municipality of Mount Vernon or its police department could be held responsible either for the charges decided upon by the prosecutor or for the bail set by the court"].

As such, the D.A. defendants are entitled to absolute immunity as a policymakers and in their management capacity in the District Attorney's office thereby barring plaintiff's claims against them under state law or § 1983 for false arrest, malicious prosecution, abuse of process, denial of due process, and unreasonably prolonged detention (*Savane,* 148 AD3d at 592).

b. Individual Capacity Claims

It is well established that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983" (*Colon v Coughlin*, 58 F3d 865, 873 [2d Cir 1995] [quoting *Wright v Smith*, 21 F3d 496, 501 [2d Cir 1994] [further citation omitted]).

To maintain an action involving the D.A. defendants, the complaint must contain specific factual allegations indicating that "each of the individual defendants was personally involved in the deprivation of the plaintiff's constitutional rights; mere bald assertions and conclusions of law do not suffice" (*Williams v Rodriguez*, 184 AD3d 699, 701 [2d Dept 2020] [internal quotation marks and citation omitted]; *Johnson v Collyer*, 191 AD3d 1192 [3d Dept 2021]).

According to the *Iqbal* standard, it is well settled that, to establish the personal involvement of a government official, a plaintiff must plead that the government official's specific actions violated the Constitution (*Ashcroft v Iqbal*, 556 US 662 [2009]).

Specifically, a plaintiff must plead the requisite mens rea, i.e. that the official had "subjective knowledge" of the purported injury or constitutional violation (*see Tangreti v Bachmann*, 983 F3d 609, 616 [2d Cir 2020]). Personal involvement of a supervisory official can be shown by evidence that:

> "(1)the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of [plaintiff] by failing to act on information indicating that unconstitutional acts were occurring"

(*Calderon v Morgenthau*, No. 04 Civ. 8905(NRB), 2005 WL 1668617, 2005 US Dist LEXIS 14270 [SDNY 2005] quoting *Colon v Coughlin*, 58 F3d 865, 873 [2d Cir 1995] [dismissing plaintiff's complaint alleging false arrest and malicious prosecution in violation of 42 USC § 1983 holding that plaintiff did not claim any personal involvement by D.A. Morgenthau in his arrest or prosecution in any manner]; *see also Rodriguez v City of New York*, 649 F Supp 2d 301, 305-306 [SDNY 2009] [dismissing plaintiff's false arrest claim because plaintiff did not allege that D.A. Morgenthau was personally involved in his arrest or that he directed any police officer or A.D.A. to take him into custody).

However, plaintiff's complaint, even when liberally construed (*see Skibinsky v. State Farm Fire & Cas. Co*., 6 AD3d 975, 976 [2004]), fails to include allegations of personal involvement by any of the individual defendants (*Shmueli v New York City Police Dept*., 295 AD2d 271, 271 [1st Dept 2002] ["Plaintiff's claim against District Attorney Morgenthau predicated on 42 USC § 1983 was also properly dismissed, since plaintiff has failed to allege direct participation by him in the alleged wrongful acts, a failure by him to remedy a wrong after discovering it, a policy or custom

in the District Attorney's office which encouraged or permitted the alleged wrongful acts, or gross negligence in District Attorney Morgenthau's supervision of his subordinates"]).

Here, because plaintiff's complaint does not allege that former D.A. Vance and D.A Bragg were personally involved in plaintiff's arrest and prosecution, it is obvious that plaintiff has failed to state a viable federal civil rights claim against the D.A. defendants (*Thomas v Tarpley*, 268 AD2d 258, 259 [1st Dept 2000] [affirming dismissal of § 1983 claim where "there is no indication that defendants-respondents were personally and directly involved" in the alleged constitutional deprivation]; *see also Katz v Morgenthau*, 709 F Supp 1219, 1233-34 [SDNY 1989], *affd in part, revd in part*, 892 F2d 20 [2d Cir 1989] [dismising § 1983 false arrest claim against D.A. Morgenthau "for lack of specificity" noting that when advancing a claim the "plaintiff's 'allegations should be specific as to what the prosecutor did so that it will be apparent from the face of the complaint that the actions complained of were improper and the injury suffered was of constitutional proportion'" [citations omitted]; *see generally Adams v Galletta*, 966 F Supp 210, 212 [SDNY 1997] ["A complaint is fatally defective on its face if it fails to allege that the defendants were directly and personally responsible for the purported unlawful conduct"]).

Plaintiff argues that, in view of his allegations surrounding the bail sought in his action, it can be concluded that the D.A. defendants had an unlawful bail policy. Here, plaintiff's argument is that because he has identified one isolated incident of misconduct by the A.D.A.s handling his case, it can be reasonably inferred that the D.A. defendants adopted a general policy sanctioning the wrongful prosecution of innocent persons.

To the contrary, and as settled by case law, "[t]he mere assertion, however, that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference" (*Dwares v City of New York*, 985 F2d 94,

100 [2d Cir 1993]; *see also Macky v Property Clerk of New York City Police Dept*, 26 F Supp 2d 585, 590 (SDNY 1998] ["Conclusory allegations of policy, custom or practice will not suffice"]).

Indeed, "proof of a single incident of objectionable conduct" by actors below the policy-making level "is insufficient to establish the existence of a policy or custom for § 1983 purposes" (*Dillon v Perales*, 181 A.D2d 619, 620 [1st Dept 1992]). Rather, a plaintiff must show a pattern of such misconduct to support the inference that such a policy exists (*see Vargas v 1387 Grand Concourse Realty Corp*, 288 AD2d 24 [1st Dept 2001]; *Jackson v Police Dept of City of NY*, 192 AD2d 641, 642 [2d Dept 1986]; *see also Carter v City of Philadelphia*, 181 F3d 339, 357 [3d Cir 1999] [a "history of conduct" tolerated by a municipal prosecutor can support the inference of a municipal policy or custom]).

Here, plaintiff has not alleged that the D.A. defendants or any of their A.D.A.s have engaged in other acts of malfeasance similar to those outlined in his complaint, and he has thus not alleged sufficient facts to support the inference of an unconstitutional policy adopted by the D.A. defendants (*see Dwares v City of New York*, 985 F2d at 100; *Dillon v Perales*, 181 AD2d at 620; *Simpson v New York City Transit Auth*., 112 AD2d 89, 91 [1st Dept]), *aff'd* 66 NY2d 1010 [1985]).

As such, it is clear that "[plaintiff's broad and conclusory statements, coupled with his failure to allege facts of the alleged offending conduct, are insufficient to state a claim under section 1983" (*Pang Hung Leung v City of New York*, 216 AD2d 10, 11 [1st Dept 1995]; *see also Ying Jing Gan*, 996 F2d at 522, 536 [affirming dismissal of § 1983 claim against D.A. Morgenthau where the plaintiffs "failed . . . to allege any facts to support their contention that the challenged actions were in any way related to a custom or policy promulgated by the New York County District Attorney's Office"]; *Covington v City of New York,* 916 F Supp 282, 289-90 [SDNY 1996]

[plaintiff "ha[d] not asserted a single concrete fact from which the Court can conclude that District Attorney Morgenthau either had unconstitutional office policies or failed to adequately train his ADAs"]).

Next, while plaintiff attempts to paint the D.A. defendants as negligent in their management of the A.D.A.s and other subordinates who caused the alleged deprivation of his constitutional rights, he did not identify in either his complaint or an affidavit, any other instance of such misconduct by an A.D.A. employed by the D.A. defendants.

Thus, an allegation of grossly negligent supervision based on an isolated instance is insufficient to establish any personal involvement of the D.A. defendants to support a claim under 42 USC 1983 (*Sarus v Rotundo*, 831 F2d 397, 402 [2d Cir 1987] quoting *Turpin v Mailet,* 619 F2d 196, 202 [2d Cir 1980] *cert denied* 449 US 1016 [1980] ["absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct," a finding of gross supervisory negligence may not "be inferred from a single incident of illegality"]).

Plaintiff has failed to allege any such pattern of supervisory inattention, and the isolated incidence of prosecutorial misconduct alleged by plaintiff is simply insufficient to support an inference that the D.A. defendants were grossly negligent in supervising his A.D.A.s and other subordinates (*see Cerbone v County of Westchester,* 508 F Supp 780, 783-84 [SDNY 1981] [plaintiff's allegation that a District Attorney "maliciously prosecuted him, suborned perjury before the grand jury that indicted him, inadequately instructed that grand jury and suppressed evidence at his trial" established at most an isolated constitutional violation, and thus was insufficient to establish gross negligence on the part of the supervising municipal authority]).

In conclusion, plaintiff has not alleged that the D.A. defendants were personally involved in plaintiff's arrest and prosecution, they cannot be held liable under plaintiff's federal civil rights claims for false arrest, false imprisonment, malicious prosecution and negligence.

V. Respondeat Superior or Vicarious Liability Allegations

A. Contentions

The movants argue that the complaint, and more specifically plaintiff's fifth cause of action (verified complaint at 15-19) is fatally defective insofar as it purports to assert a claim for vicarious liability under state law.

The D.A. defendants contend that plaintiff avers no facts to support an inference that former D.A. Vance or D.A. Bragg, as his successor in office "encouraged or permitted the alleged wrongful acts, or gross negligence in [the District Attorney's] supervision of his subordinates" as case law would require according to *Shmueli v New York City Police* (295 AD2d at 271).

In addition, they seek dismissal of that claim by relying on County Law § 941 and on Public Officers Law § 2 in conjunction with County Law § 54, which they claim applies to the five counties of the City of New York and which provides that "[n]o head of any agency ... or office of a county shall be liable to respond in damages ... for any act or omission of any employee ... employed within the agency ... or office of which he is such head."

In opposition, plaintiff alleges that the D.A. defendants did not meet their burden to dismiss his claims based on violations of New York State laws (NYSCEF Doc. No. 16 at 11-12). He argues that the D.A. defendants are liable through the common law doctrine of respondeat superior, the common law allegations of negligent hiring, training and supervision and violations of the New York State Constitution.

Turning to his claim of negligent hiring, training and supervision, plaintiff asserts that the D.A. defendants' failure to act and properly train their employees falls squarely within the exception of NY County Law §54 and that therefore his allegations are not barred.

He further states that he did not assert the claim of malicious prosecution against the D.A. defendants.

In any event, he argues that the moving defendants' arguments based on NY County Law §54 are conclusionary and do not meet the burden required to grant a motion, pursuant to CPLR 3211 (a)(7).

In reply, the moving defendants point out that, in his Complaint, plaintiff expressly mentions the theory of respondeat superior only against the City. He does not rely on that theory against the D.A. defendants in his pleadings and he invokes it for the first time against movants in his opposition papers (NYSCEF Doc. No. 24 at 5-8). Furthermore, they highlight that his state law claims only mention a broad allegation of "failure to train" the A.D.A.s who handled the criminal case.

They stress that, according to County Law § 54 and case law, the New York District Attorney cannot be held liable under a theory of respondeat superior for any alleged "failure to train."

Movants also contend that it appears that plaintiff is attempting to convince the court that his *Monell* claim for "failure to train" should not be considered under *Monell*, but under a different and novel theory of direct liability. However, they point out that under, County Law § 54, such state law tort claims regarding a county official lie against the county, not directly against the official.

Furthermore, they highlight that the state law claims should be dismissed as plaintiff did not specify which claims he raises against which defendants.

B. Analysis

To the extent that plaintiff is attempting to hold the D.A. defendants liable for the acts of subordinate prosecutors, including Veronika Alayeva (verified complaint at 7), the court notes that plaintiff has not named A.D.A. Alaveva as a defendant in this lawsuit.

At the outset, plaintiff fails to provide any explanation or provide any authority as to why his common law tort of negligent hiring, training and supervision falls within an exception of County Law § 54.

It is well settled that County Law § 54 [Personal liability of heads of agencies] abrogates vicarious liability for the head of any county "agency" or "office" based upon the acts or omissions of an employee of that "agency" or "office." That statute provides in pertinent part:

> "No head of any agency, department, bureau, or office of a county shall be liable to respond in damages to the county or to any other person for any act or omission of any employee of the county employed within the agency, department, bureau, or office of which he is such head"

County Law § 54 is applicable to the counties within the City of New York according to County Law § 941 [Liability for torts]. As the elected District Attorneys of New York County, it is beyond question that the D.A. defendants qualify as the heads of that county office (*see* Public Officers Law § 2; *Fisher v State*, 23 Misc2d 935 (Ct Cl 1959), *affd*, 13 AD2d 608 [3d Dept], *affd*, 10 NY2d 60 [1961]).

And, of course, it has already been established that, under 42 USC §1983, the D.A. defendants cannot be subjected to liability for the acts of their subordinates on the theory of respondeat superior (*see Monell v Department of Social Servs*., 436 US at 691; *Liu v New York*

City Police Dept., 216 AD2d 67, 68 [1st Dept 1995]; *Jackson v Police Dept of City of NY*, 192 AD2d 641, 642 [2d Dept 1993]).

Thus, New York law precludes the D.A. defendants (as opposed to the City of New York) from being held liable under any theory of vicarious tort liability (*see Barr v County of Albany*, 50 N.Y2d 247, 257 [1980] [sheriff cannot be held vicariously liable for acts of his deputies]; *Bardi v Warren County Sheriff's Dept*., 194 AD2d 21, 24 [3d Dept 1993] citing *Barr, supra* and New York County Law § 54*)*; *see also Tucker v City of New York*, 184 Misc2d 491, 492 [Sup Ct, N.Y. County 2000 (Stallman, J.)] [relying on County Law § 54 to dismiss respondeat superior claims brought against D.A. Morgenthau and finding that "County Law § 54 accordingly bars the naming of a District Attorney, whether by individual name or by title, as a defendant in a negligence action based on the acts of his office"]).

Since respondeat superior liability is neither available in tort actions, nor in those actions brought under 42 USC § 1983, plaintiff's failure to allege any personal involvement by the D.A. defendants in the underlying conduct also rendered his civil rights claim facially deficient. Furthermore, because plaintiff failed to comply with GML §§ 50-e and 50-i, the causes of action sounding in statutory and common law tort, in addition to having been insufficiently pleaded, are barred by GML §§ 50-e and 50-i. However, those claims survive as against the City (*see Reyes v City of New York*, 992 F Supp 2d 290, 299 [SDNY 2014] [allowing state law claims to proceed against municipality due to potential for vicarious liability for actions of police officers]).

VI. *Monell* Claim, Pursuant to 42 USC § 1983 [Fourth Cause of Action]

A. Contentions

The D.A. defendants turn to plaintiff's fourth cause of action, a *Monell* claim, pursuant to 42 USC §1983. They argue that, under New York law, where a plaintiff raises a *Monell* claim

based on practices or "failure to train" subordinates, the District Attorney is acting in an administrative and managerial role and therefore is a municipal policymaker. As such, the D.A. defendants claim that liability lies not with the District Attorney but with the county or in the case of New York City, with the City itself.

In addition, the D.A. defendants argue that the claim also fails as a matter of law for the following reasons. While a local government may be held liable for the constitutional torts committed by its officials according to municipal policy, practice or custom, a plaintiff must assert more than such a custom or policy exists. Indeed, movants cite case law in support of the proposition that, for the policy or custom to be actionable under 42 USC 1983, a plaintiff must demonstrate the municipality's failure to train "amounts to deliberate indifference to the right of those with whom municipal employees will come into contact" (*Moray v City of Yonkers*, 924 F Supp 8, 12 [SDNY 1996] internal quotation marks omitted).

Furthermore, movants claim that a "failure to train" theory cannot be based upon a single alleged error by a prosecutor in one case. They argue that plaintiff pointed to only one potential error of law on the part of the prosecutors directly handling plaintiff's criminal case, specifically, the determination of whether he was eligible for bail (citing verified complaint, ¶ 31),[4] but he did not provide any evidence that such a policy or regular practice exist. Movants assert that plaintiff's claim is conclusory and deliberately ignores the law to the extent that filing a persistent felony offender statement is not actually required for a bail application. They state that it is instead a procedure that is required for determining how a defendant should be sentenced (citing CPL §§ 400.20[3][a] and 400.21[2]). Movants highlight that plaintiff's case never reached the sentencing stage, as such, no persistent felony offender statement was required. They explain in a footnote

[4] ". . .the Manhattan District Attorney has a policy and practice of making bail requests without any intention of ultimately providing the required 'persistent felony offender' report"

that, in criminal cases, bail is set by the court, not by the prosecutor. Thus, they argue that therefore neither the individual prosecutor, nor the D.A. defendants, can be the proximate cause of plaintiff's alleged injury as a matter of law.

In addition, movants argue that plaintiff failed to allege sufficient facts and his verified complaint is based on unsupported legal conclusions. They contend that plaintiff failed to meet the two-prong sufficiency test of a *Monell* claim according to *Ashcroft v Iqbal* (*see* 556 US 662, 663-664 [2009]). First, movants assert that plaintiff does not cite a single instance in his verified complaint where prosecutors "previously failed to make bail requests," or specify any occasion on which prosecutors "failed to dismiss cases based on faulty evidence."

Second, they argue that, even if plaintiff made sufficiently specific factual allegations to meet the first prong under *Ashcroft*, he fails to plausibly state a claim that gives rise to entitlement of relief. Here, movants stress that plaintiff does not allege any direct personal involvement by the D.A. defendants. As a result, they argue that the claim that the D.A. defendants' official capacity is engaged should be dismissed.

In opposition, plaintiff reminds the court that it must accord him every possible favorable inference. He points out that the D.A. defendants asserted that they are immune to plaintiff's claims against them. However, he stresses that the D.A. defendants acknowledged and that the case law is clear that a municipal defendant may be held liable for their tortious actions of failure to train under *Monell*.

He stresses that he has sufficiently alleged in his complaint that the D.A. defendants failed to train their employees and that this constituted a deliberate indifference to his constitutional rights. Plaintiff argues that he satisfied all three prongs under *Walker v City of New York* (*see* 974 F2d 293 [2d Cir 1992]).

First, in support of his argument, he argues that paragraphs 6, 7, 81 and 82 of the verified complaint sufficiently allege that the D.A. defendants are policy makers, holding managerial roles, responsible in training Assistant District Attorneys on the laws, policies, procedures and practices in which they engage and specifically that the situation of wrongly presenting someone, such as plaintiff here, to the court as bail eligible would likely result in constitutional violations. He points out that making bail applications is a daily occurrence for Assistant District Attorneys and as such, the D.A. defendants certainly knew that their employees would confront a situation related to bail eligibility.

Second, he turns to paragraphs 24-34 of the verified complaint wherein he claims he sufficiently alleged that the D.A. defendants repeatedly misapplied, misinterpreted, and misrepresented his bail eligibility to the court. He stresses that he was not eligible for bail according to the law and that this also constitutes a factual allegation. He argues that this is the exact kind of situation that further training could have prevented. He states that proper training related to bail eligibility and how a "persistent felony offender" status is affected by the 2004 and 2009 DLRA would have made the decision to request bail moot because plaintiff was not eligible for bail. He claims that proper training on bail eligibility would have obviated the need for any determination or decision making to request bail whatsoever. He adds that he sufficiently alleged that the D.A. defendants repeatedly opposed his release and even took affirmative steps to ensure plaintiff remained incarcerated pre-trial, such as presenting this case to a Grand Jury prior to his CPL § 180.80 deadline.

Finally, turning to paragraph 81 of the verified complaint, plaintiff argues that he sufficiently alleged that the D.A. defendants 'failure to train on the subject issues of bail eligibility "carried a significant likelihood of infringing upon a person's constitutional rights." He claims that

it is clear that an Assistant District Attorney's inability to evaluate bail eligibility correctly can and will cause constitutional violations as it did in the case at bar.

In reply, the D.A defendants contend that plaintiff did not rebut their assertion that, under *Monell*, the District Attorney's alleged practices or "failure to train" subordinates constitutes acting in an administrative and managerial role and therefore as a municipal policymaker. They reiterate that as such, any liability lies with the City of New York.

They point out that plaintiff, instead, only argued at length that municipalities can be held liable for *Monell* claims of a failure to properly train employees, if the facts so warrant. However, movants point out that the D.A. defendants are not a municipality. They contend that plaintiff is suing them directly and as individual defendants, presumably in their official capacity, which the above-listed cases demonstrate cannot survive as a viable claim. They stress that plaintiff did not cite any cases suggesting otherwise and only cited cases that proceeded on *Monell* claims against cities.

B. Analysis

In his opposition, plaintiff argues that he "asserts two causes of action against the D.A. defendants: 1) 42 U.S.C. §1983 *Monell* claim and 2) Violations of New York State Laws: i) Negligent hiring, training and supervision and ii) violations of Article §§ 6, 8, 9, 11, and 12 of the New York State Constitution" (Affirmation in Opposition, ¶ 6 [emphasis in the original]; NYSCEF Doc. No. 16 at 2).

Thus, plaintiff further pursues his *Monell* claim although the underlying motion seeks to dismiss those claims filed against the D.A. defendants. While both sides extensively brief this question, this claim is beyond the scope of this motion for the following reasons and cannot be sustained against the D.A. defendants.

The *Monell* doctrine provides that:

> "although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels"

(*Monell v Department of Social Services*, 436 US at 690-691).

Thus, a local government's liability under 42 USC § 1983 may be triggered by the conduct of certain high-ranking policymakers who caused a constitutional deprivation to a plaintiff's rights (*Board of County Com'rs of Bryan County, Okl. v Brown*, 520 US 397 [1997] [holding the county liable where the sheriff's hiring decision was made with deliberate indifference to the rights of citizens]; *Walker v City of New York*, 974 F2d 293, 301 [2d Cir 1992] [finding that the District Attorney is a municipal policymaker for the purposes of the office's management and in particular for the decision not to supervise or train assistant district attorneys and holding inter alia that the City could be held liable under 42 USC § 1983 based on plaintiff's allegations of the municipality's deliberate indifference to train by the municipality its A.D.A.s on *Brady* and perjury issues]).

In other words, "[i]n contrast to the immunity inquiry, *Monell* addresses not whether certain functions can open individuals to liability, but simply which governmental entity (the state or the municipality) is responsible for a given function" (*Bellamy v City of New York*, 914 F3d 727, 760 [2d Cir 2019]).

Accordingly, insofar as plaintiff is lodging a *Monell* claim against the D.A. defendants, it must be dismissed as against them because it is improperly pleaded (*see Ramos v City of New York*, 285 AD2d 284, 302 [1st Dept 2001):

> "when a municipal employee acts in violation of a person's Federal civil rights pursuant to municipal policy or custom, a different issue is presented. The issue is not whether the employee acted improperly, but whether the municipality acted improperly (*Walker v City of New York*, 974 F2d 293, 296 *cert denied* 507 US 961 [applying, *Monell*, *supra*]). Then, the municipality may be exposed to section 1983 liability (see, *Monell, supra*)])").

VII. New York State Constitution Claims (Fifth Cause of Action [Violations of New York State Law by Individual and Municipal Defendants Pursuant to the New York State Constitution and New York State Law)

In his fifth cause of action, plaintiff claims violations by individual and municipal defendants pursuant to the New York State Constitution and New York State Law, under the respondeat superior liability theory (*id*., ¶¶ 90-91); negligent hiring, training and supervision of "police officials" by defendant City of New York (*id*, ¶ 97); malicious prosecution and violations of his rights, pursuant to NY Const Art I [Bill of Rights], §§ 6, 8, 9, 11, and 12 of the New York State Constitution, which caused him physical and emotional harm (*id*, ¶¶ 102-108).

In his opposition papers, plaintiff points out that the moving papers are silent as to his claims, pursuant to NY Const Art I, §§ 6, 8, 9, 11, and 12 aside from general immunity arguments (NYSCEF Doc. No. 16 at 11-12). As such, plaintiff argues that plaintiff's claims must survive this motion and the D.A. defendants must interpose an answer as to same.

In reply, movants dispute plaintiff's contention that they did not address his state law allegations and refer the court to page 12 of their motion where they challenged plaintiff's reliance on the theory of vicarious liability. They stress that the verified complaint does not provide an explanation as to how the facts alleged should apply to the purported violations under the New York State Constitution. Neither does it specify which of the plaintiff's claims apply to which defendant and under what theory. They reiterate that plaintiff did not allege any personal involvement of the D.A. defendants as to any of his claims, including purported violations of

various sections of the New York State Constitution and instead, only claimed a "failure to train," and thus, the only theory under which plaintiff could proceed is a *Monell* claim. However, they maintain that New York State law does not allow for such a claim to proceed directly against the head of a county agency.

The Court finds that plaintiff did not substantiate the basis for those allegations based on the New York State Constitution, which in any event, cannot be sustained against the D.A. defendants for the following reasons.

Plaintiff has failed to allege how alternative remedies under common, statutory or federal law are unavailable to redress the underlying wrongs (*see Donas v City of New York*, 2008 NY Slip Op. 30241(U) [Sup Ct, New York Co [Jan. 21, 2008 (Feinman, J.)], *affd*, 62 AD3d 504 [1st Dept 2009] ["Although in *Brown v State of New York*, a civil damage remedy was recognized for a violation of a State constitutional provision, it is only applicable in circumstances where the alleged violation does not fit within the definition of any common-law tort remedy (89 NY2d 172, 188, et seq. [1996] [implying a damage remedy was consistent with the purposes of the Constitutional clauses that had allegedly been violated, where neither injunctive or declaratory relief was available]"; *see also Rodriguez v City of New York*, 623 F Supp 3d 225, 259 [SDNY 2022]:

> "If a claimant fails to establish 'how money damages are appropriate to ensure full realization of her asserted constitutional rights,' dismissal of the Constitutional claim is appropriate. Id. at 84, 735 N.Y.S.2d 868, 761 N.E.2d 560.
>
> Since then, New York courts have repeatedly found that Constitutional claims need not be recognized where it is 'neither necessary nor appropriate to ensure the full realization of [plaintiff's] rights' to do so because 'the alleged wrongs could have been redressed by an alternative remedy, namely, timely interposed common-law tort claims.' See *Lyles v. State*, 2 A.D.3d 694, 695-696, 770 N.Y.S.2d 81 (2d Dept. 2003), *aff'd* 3 N.Y.3d 396, 787

> N.Y.S.2d 216, 820 N.E.2d 860 (2004); *Donas v. City of New York*, 2008 N.Y. Slip Op. 30241(U), 2008 WL 293038 (Sup. Ct. N.Y. Co. Jan. 21, 2008), *aff'd*, 62 A.D.3d 504, 878 N.Y.S.2d 360 (1st Dep't 2009); *Townes v. New York State Metropolitan Transp. Auth*., 2011 N.Y. Slip Op. 32487(U), 2011 WL 4443604 (Sup. Ct. Nassau Co. Sept. 14, 2011) ("Where there exist alternative statutory or common-law remedies, it has been held improper to find a State constitutional claim."). The same is true where "'the plaintiff has an alternative remedy under § 1983 for violations of parallel provisions of the U.S. Constitution.'" *Buari v. City of New York*, 530 F.Supp.3d 356, 409–10 (S.D.N.Y. 2021) (quoting *Alwan v. City of New York*, 311 F. Supp. 3d 570, 586 (E.D.N.Y. 2018) (citing cases))"

Here, plaintiff's claims based on New York State Constitution Article I, Sections 6 [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law], 11 [Equal protection of laws; discrimination in civil rights prohibited] and 12 [Security against unreasonable searches, seizures and interceptions] have an equivalent in statutory, common law and/or federal law.

As discussed earlier, plaintiff had alternative remedies, which he asserted in his Complaint. Those remedies were dismissed as against the D.A. defendants. As such, plaintiff cannot maintain his state constitutional or statutory claims against the D.A. defendants because common law tort claims and 42 USC 1983 provide an adequate remedy (*see e.g. Martinez v City of Schenectady*, 97 NY2d 78, 83 [2001] [plaintiff failed to state a claim for a constitutional tort, pursuant to NY Const Art. I, §§ 1, 11 and 12]; *Berrio v City of New York*, 212 AD3d 569, 569-570 [1st Dept 2023] ["Plaintiff has no private right of action to recover damages for violations of the New York State Constitution, as the alleged wrongs could be redressed by her common-law claim for false imprisonment"]; *Buari*, 530 F Supp 3d at 409, citing *Lee v Corneil*, 2016 WL 1322444, 2016 US Dist LEXI 44660 [SDNY 2016] ["finding no private

right of action for due process claim under New York State Constitution because Section 1983 provides adequate remedy"]).

As to NYS Const Article I, Sections 8 [Freedom of speech and press; criminal prosecutions for libel] and 9 [Right to assemble and petition; judicial divorces; gambling, except pari-mutuel betting, prohibited], plaintiff simply does not submit any facts in support of violations, pursuant to these provisions or attribute them to any specific defendant. Vague and generalized allegations of tortious behavior where multiple defendants are involved, do not meet the statutory pleading requirements, pursuant to CPLR 3013 [Particularity of statements generally] (*Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co*., 84 AD2d 736, 736 [1st Dept 1981] ["[Each] defendant is entitled to notice of 'the material elements of each cause of action.' (CPLR 3013.)"]).

Furthermore, even assuming arguendo that there is any merit to plaintiff's argument that his claims can be also brought as violations of the New York State Constitution, plaintiff does not allege any facts in support of such violations sufficient to state a claim.

Accordingly, plaintiff's claims under state statutory and constitutional law are dismissed.

VIII. Conclusion

It is hereby

ORDERED that the motion of defendants Former District Attorney for New York County Cyrus Vance, Jr. and District Attorney for New York County Alvin Bragg to dismiss the complaint herein is granted and the complaint is dismissed as against said defendants; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint in which the allegations pertaining to the notice of claim shall be repleaded in compliance with GML §§50-e and 50-i; and it is further

ORDERED that the amended complaint shall be served and filed within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the fifth cause of action shall be dismissed; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties 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 the action is severed and continued against the remaining defendants; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

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 counsel are directed to meet and confer and jointly submit to the Court a proposed preliminary conference order via email to jmdorman@nycourts.gov by February 16, 2024 or let the Court know why such an order cannot be entered into and request a conference.

This constitutes the decision and order of the Court.

12/19/2023
DATE

RICHARD LATIN, J.S.C.

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