

Smith v City of New York
2023 NY Slip Op 35030(U)
April 11, 2023
Supreme Court, Bronx County
Docket Number: Index No. 807276/2021E
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33

-----X
JOHNTE SMITH

Index No. 807276/2021E

-against-

Hon. Mitchell J. Danziger

THE CITY OF NEW YORK, et. al.,

Justice Supreme Court

-----X
The following papers were read on this motion (Seq. No. 3) for leave to amend noticed for September 15, 2022 and submitted on January 19, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 34-39
Notice of Cross-Motion, Affirmation in Support and Opposition and Exhibits	NYSCEF Doc. # 41-45
Affirmation in Opposition to Cross-Motion and in Further Support and Exhibits	NYSCEF Doc. # 47-56
Affirmation in Reply and Exhibit	NYSCEF Doc. # 67-68

Plaintiff moves for an order pursuant to CPLR §3025 granting leave to serve a Supplemental Summons and Second Amended Complaint; pursuant to CPLR §3126, striking the Answer of the defendants due to their failure to provide discovery and submit to depositions as directed by Court Orders dated 9/22/21, 2/23/22, and 7/27/22; or in the alternative; pursuant to CPLR §3126 precluding defendants from introducing evidence at trial; pursuant to CPLR §3124 to compel defendants to comply with the abovementioned Court Orders. Defendant, City of New York (“City”) cross-moves for an order pursuant to CPLR §3025(b) permitting the amendment of their Answer to assert an additional Affirmative Defense on behalf of the City; compelling plaintiff to accept the Amended Answer and deeming it timely served *nunc pro tunc*. The City further moves for an order pursuant to CPLR §3212, dismissing plaintiff’s complaint because plaintiff released the City defendants from the claims he brought herein. The motion and cross-motion are resolved as follows:

This is an action (referred to as “Action 1”) to recover damages for false imprisonment, malicious prosecution, negligent hiring and retention, assault, battery, claims pursuant to 42 U.S.C. §1983, arising from an incident that took place on May 5, 2020, in the vicinity of Davidson Avenue and West 176th Street, Bronx, New York.

On or about May 23, 2022, plaintiff, Johnte Smith, settled a separate matter bearing index number 801965/2021 (hereinafter referred to as “Action 2”). Mr. Smith was represented by the same counsel in Action 1 as Action 2. Plaintiff and his counsel along with the City, settled Action 2 and executed settlement documents which included a Stipulation of Settlement signed by counsel for plaintiff and a General Release signed by plaintiff himself.

The City of New York now moves to amend their Answer to assert as an affirmative defense the General Release. Upon the granting of the amendment, the City moves for plaintiff to be compelled to accept the proposed Amended Answer and for the Court to deem the Amended Answer timely served *nunc pro tunc*. The City further moves for summary judgment on the grounds that the General Release signed by plaintiff did not carve out or list as an exception Action 1 and as such, Action 1 must be dismissed. Specifically, the General Release states: “List below the exclusion of other actions or claims from this release. Do not insert the subject action. All outstanding actions or claims are included in this release unless excluded specifically by name below. Leave the spaces below blank if not applicable.” Here, it is undisputed that plaintiff did not list Action 1 in said General Release which pertained to the settlement of Action 2.

The City’s Cross- Motion:

The portion of the defendants’ motion seeking leave to amend their answer to include an affirmative defense for General Release is granted. A party may amend his pleadings at any time by leave of court and leave of court, “shall be freely given upon such terms as may be just.” (CPLR §3025[b]). Where there is nothing in the record indicative of prejudice or surprise to plaintiff, it would be an abuse of discretion to deny the application. (*McCaskey, Davies and Associates, Inc. v. New York City Health & Hosps. Corp.*, 59 N.Y. 2d 755, 757 [1983]). Further, in regard to proposed affirmative defenses, “the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every possible inference.” (*Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D. 3d 880, 882 [2d Dept. 2011]). Plaintiff has not made a showing of prejudice. Prejudice requires some indication that the opposing party has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position. (*Loomis v. Civetta Corrino Const. Corp.*, 54 N.Y.2d 18 [1981]). Further, the Court grants the portion of the City’s motion seeing to compel plaintiff to accept the City’s proposed Amended Answer. The City’s Amended Answer is deemed timely served, *nunc pro tunc*.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent

who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). However, to defeat a motion for summary judgment, the non-moving party must establish the existence of triable issues of fact that are, “real, not feigned since a sham or frivolous issue will not preclude summary relief. (*Kornfeld v. NRX Technologies, Inc.* 93 A.D.2d 772 [1st Dept., 1983]). “It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff.” (*Pulka v. Edelman*, 40 N.Y.2d 781, 781 [1976]). “In the absence of a duty, there is no breach and without a breach there is no liability. (*Id.*, see also, *Daubert v. Flyte Time Regency Limousine*, 1 A.D. 3d 396, 396 [2d Dept., 2003]).

The City submits that the General Release for the settlement of Action 2 is valid, clear, and unambiguous on its face, which was knowingly and voluntarily entered into and should be enforced as a private agreement between the parties. The release is binding unless it is shown that it was procured by fraud, duress, overreaching, illegality, or mutual mistake. (*Allen v. Riese Org. Inc.*, 106 A.D.3d 514 [1st Dept. 2013]). The City argues that pursuant to Court of Appeals holding in *Oxford Commercial Corp. v. Landauhe*, 12 N.Y.2d 362 [1963], that if a written agreement contains no obvious or latent ambiguities, neither the parties nor their privies may testify to what the parties meant but failed to state. The parties are bound by the four corners of the release. (*Id.*). The City avers that the Court cannot consider extrinsic evidence in this case, such as the intent of the parties because the release was unambiguous. The City contends that the General Release for Action 2 that plaintiff executed on May 23, 2022, and was tendered to the City on May 23, 2022, serves as an agreement to settle, and release the City from liability on “all of plaintiff’s existing and or any potential claims as of May 23, 2022, the date of the release” including Action 1. The City avers that the plaintiff knowingly left the paragraph blank wherein he was to list any other pending actions or claims that should be excluded from the release. As such, the City submits that plaintiff “unambiguously” and “knowingly” released all of claims in this lawsuit by settling Action 2.

Plaintiff opposes the City’s cross-motion. Plaintiff argues that the General Release is facially inapplicable to this matter. Plaintiff points to the case of *Saddam v. City of New York*, 2019 WL 4929570 [Sup. Ct., Bx County, 2019], wherein this Court rejected the City’s attempt to use a release in one action as a bar to a separate claim that plaintiff has against the City in a different action, where, like here, it was crystal clear that the parties had no intention of settling two claims.

Action 1 which stems from plaintiff's arrest on May 5, 2020, bears index number 807276/2021E. The New York City Law Department assigned its own identification number to this case 2021-009723. Action 2 stems from plaintiff's arrest on May 19, 2020. Action 2 bears index number 801965/2021E. The Law Department assigned case number 2021-005234 to that matter. Action 2 involved plaintiff and co-plaintiff Sheldon Moore.

It is undisputed that Action 2 involving plaintiff and co-plaintiff Sheldon Moore identified by Law Department number 2021-005234 was the matter that was scheduled for a settlement conference for April 4, 2022. All parties agree that the communications, by email and by phone, between the parties, involved only Action 2. At no time was Action 1 referenced, discussed, negotiated, or contemplated. The parties to Action 2 reached their settlement agreement on May 23, 2022. The City offered \$30,000 to plaintiff and \$30,000 to co-plaintiff, Mr. Moore. The plaintiffs accepted the City's offers. All of the settlement documents or closing papers referenced the caption and index number for Action 2, only. Despite knowing that Action 1 existed, the City did not reference the index number or caption for Action 1 in any document or communication between the parties. As a matter of fact, to the contrary, the email that was sent from the City to plaintiff's counsel which contained the settlement documents/closing papers for Action 2 stated: "THIS EMAIL RELATES ONLY TO SETTLEMENT OF THE ABOVE SUBJECT MATTER- do not use the attached documents for any other settlement." The email subject line referenced Action 2, as did all communications sent after the settlement was achieved. At no time was Action 1 mentioned.

It is undisputed that the parties negotiated and settled Action 2. Action 1 was not contemplated in the City's settlement offer of \$30,000 for Action 2. The plaintiff himself executed the General Release for Action 2. The defendants knew that plaintiff was not compromising any other action in this settlement. The stipulation of settlement in this matter which references Action 2 only, indicates that the document shall not be admissible in any other litigation or settlement negotiation.

"A release is a contract, and its construction is governed by contract law." (*Schiller v. Guthrie*, 102 A.D.3d 852 [2013]). "Generally, a valid release constitutes a complete bar to an action on a claim that is the subject of the release." (*Nucci v. Nucci*, 118 A.D.3d 762 [2nd Dept. 2014]). "If the language of the release is clear and unambiguous, the signing of a release is a jural act binding on the parties." (*Id.*). A valid general release will apply not only to known claims, but "may encompass unknown claims, ... if the parties so intend and the agreement is 'fairly and knowingly made'." (*Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269 [2011]). "'However, a release may not be read to cover matters which the parties did not intend to cover'." (*Nucci v. Nucci*, 118 A.D.3d 762 [2nd Dept. 2014]). In *Cahill v. Regan*, 5 N.Y.2d 292, [1959], the Court of Appeals held that "although the effect of a general release, in the absence of fraud or

mutual mistake, cannot be limited or curtailed, its meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not intend to cover.”

Here, it is clear that neither party intended to settle both of plaintiff’s lawsuits when the parties were negotiating Action 2. The parties knew they were settling one case, Action 2. The plaintiff himself executed the general release, not his counsel. Despite counsel notarizing the document, the Court cannot find that the plaintiff knowingly intended to sign away his rights to pursue Action 1 by signing the General Release in Action 2. The attorneys on the matter intended to only settle the Action 2, which was repeatedly identified by caption, index number, via the parties, and by Law Department number, as the case being settled by all parties in all correspondences between the parties and documents exchanged by the parties. As such, the Court finds that the General Release pertains only to Action 2, the only matter settled on May 23, 2022. Accordingly, the portion of the City’s motion seeking summary judgment based upon the General Release executed in Action 2, is denied.

Plaintiff’s Motion:

Plaintiff seeks to supplement his summons and amend his complaint to add Police Officer Brandan Thompson (Shield No. 21768) as a party to the action in place of a “John Doe” pursuant to CPLR §3025. The City opposes plaintiff’s application on the grounds that: 1) the statute of limitations has expired as to all of plaintiff’s state law claims and plaintiff has failed to show due diligence in timely obtaining this officer’s identity; and 2) the relation back doctrine does not apply here, because the proposed defendants are not united in interest and the proposed newly named defendants did not know or should have known that an action would be brought against him.

A plaintiff must make “genuine efforts to ascertain the defendants’ identities prior to the running of the Statute of Limitations.” (*Tucker v. Loreoi*, 291 A.D.2d 261[1st Dept., 2002]). Indeed, due diligence has been established where a plaintiff demonstrates that he or she engaged in pre-action discovery and did more than serve one discovery demand. (see generally: *Henderson-Jones v. City of New York*, 87 A.D.3d 498 [1st Dept. 2011]; *Tucker v. Lorieo*, 291 A.D.2d 261 [1st Dept. 2002]; *Temple v. New York Community Hosp. of Brooklyn*, 89 A.D. 3d 926 [2d Dept. 2011], *Holmes v. City of new York*, 132 A.D. 3d 952 [2d Dept. 2015]). Here, plaintiff does not detail any efforts made to obtain the identity of the officer he seeks to add. As a result, plaintiff’s has not shown due diligence.

Plaintiff has failed to establish that the “relation back doctrine” set forth by CPLR §203(f) applies here as to permit the amendment of these claims. In order for the relation back doctrine set forth by CPLR §203(f) to

apply to plaintiff's claims, plaintiff must establish that, "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with such notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the of the delayed assertion of those claims against him or her, and (3) the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against the new party" (*Buran v. Coupal*, 87 N.Y.2d 173 [1995]).

Initially, the Court finds that the claims against the individual officers arise out of the same conduct set forth against the original defendants in the original complaint. Therefore, the first prong of the relation back doctrine has been satisfied. However, the second prong of "unity of interest" has not been met. Parties are united in interest when "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." (*Higgins v. City of New York*, 144 Ad3d 511, 513 [1st Dep't., 2016]). Since it is well-settled that the City cannot be held vicariously liable for its employees' violations of 42 U.S.C. 1983 (*Higgins* at 513), plaintiff cannot establish that the proposed individual officers are united in interest. Further, unity of interest between police officers and the City is a factual determination because of GML §50-k(3), which allows the City to disassociate itself from its employee's behavior. (*Ragland v. City of New York*, 45 Misc. 3d 12318(A) at 17-18, Sup Ct Bronx County, 2014).

As such, the portion of the plaintiff's motion seeking to amend his pleadings to add Police Officer Brandan Thompson to plaintiff's state law claims, is denied. The portion of the plaintiff's motion seeking to add Police Officer Brandan Thompson to plaintiff's federal claims is granted, as the statute of limitations has not expired for plaintiff's federal claims. Plaintiff is permitted to supplement his summons and amend his complaint to add Police Officer Brandan Thompson to his federal claims only.

With regard to the portion of plaintiff's motion seeking Court ordered discovery. The defendants are directed to provide plaintiff with 1) video footage; 2) memo book entries for the incident in question; 3) 911 tapes/calls; 4) Sprint printout; 5) Radio transmissions; and 6) all body camera footage, within 60 days of this order. The parties are directed to hold depositions on or before 7/31/23.

Accordingly, plaintiff's motion is granted in part and the City's motion is granted in part. The plaintiff is directed to serve his supplemental summons and amended complaint within 30 days of this order.

This constitutes the decision and order of the Court.

Dated: 4/11/23

Hon. 
Mitchell J. Danziger, J.S.C.

-
- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT