

32 Misc.3d 1246(A)

Unreported Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME.

THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.

Kenneth FELDER, Plaintiff,

v.

The CITY OF NEW YORK, Detective Stefano Braccini and Detective Peter Nugnes, and  
“John Does”, each agents and employees of, Defendants City of New York and New  
York City Police Department, in their individual and official capacities, Defendants.

No. 114742/07. | Sept. 13, 2011.

### Attorneys and Law Firms

Patricia A. Rooney, Esq., Gregory R. LaMarca, P.C., Massapequa, for plaintiffs.

Elizabeth Gallay, ACC, Michael A. Cardozo, Corporation Counsel, New York, for defendants.

### Opinion

BARBARA JAFFE, J.

\*1 By notice of motion dated September 17, 2010, defendants move pursuant to CPLR 3212 for an order granting summary dismissal of the complaint. By amended notice of motion dated December 9, 2010, defendants also move pursuant to CPLR 3211 for an order dismissing plaintiff's claims of assault and battery and a violation of his state constitutional rights. Plaintiff opposes both motions.

### I. BACKGROUND

On February 26, 1994, Dario Estrella was murdered in Manhattan. (Affirmation of Elizabeth Gallay, ACC, dated Sept. 17, 2010 [Gallay Aff.], Exh. I). On May 31, 1994, while plaintiff was in police custody on an unrelated robbery charge, he was interviewed by New York City Police Department (N.Y.PD) detectives concerning information that he had regarding the Estrella murder, although he denied having been present at the scene of the crime. (*Id.*, Exhs.I, L). Plaintiff subsequently pleaded guilty to the robbery charge. (*Id.*).

In 1998, the NYPD's Cold Case Squad, led by defendants Nugnes and Braccini (detectives), reopened the Estrella murder investigation, and located plaintiff in a Georgia prison, where he was serving time for an aggravated assault charge, and on March 1, 1999, the detectives interviewed plaintiff. (*Id.*, Exhs.I, N). During the interview, plaintiff placed himself at the scene of the murder, at which point the detectives stopped the interview and consulted with an attorney at the Manhattan District Attorney's Office (DANY), who advised them to read plaintiff his *Miranda* rights. (*Id.*, Exhs.E, I, M, N). Plaintiff waived his rights and the interview continued. (*Id.*, Exhs.E, F, O). Plaintiff alleges that during the interview, the detectives threatened, physically assaulted, and lied to him in order to coerce him into making a false and incriminating statement. (Affirmation of Patricia A. Rooney, Esq., dated Jan. 24, 2011 [Rooney Aff.] ).

On January 5, 2000, the detectives returned to Georgia to continue the interview. They brought with them the statement of an alleged accomplice to the murder, who implicated himself and plaintiff in the murder. (Galley Aff., Exhs. E, F, Q). They again

advised plaintiff of his *Miranda* rights and he again waived them, and the interview continued. (*Id.*, Exhs.E, I, M, O, P, R). Plaintiff alleges that he was again threatened and physically assaulted by the detectives. (Rooney Aff.).

On January 10, 2000, a grand jury indicted plaintiff on charges of second-degree murder and first-degree robbery in connection with the Estrella murder. (Galley Aff., Exhs. S, T). The same day, a warrant issued for plaintiff's arrest, and plaintiff was arrested in Georgia on January 11, 2000. (*Id.*, Exhs.T, U, V). He waived his right to an extradition hearing and on January 11, 2000, was transported to New York. (*Id.*, Exhs.D, I, T, W).

On December 13 and 15, 2000, a *Huntley* hearing was held, and on May 16, 2001, a decision rendered, whereby plaintiff's statements were suppressed pursuant to the judge's findings that plaintiff's constitutional right to counsel had been violated by the detectives' failure to contact the attorney who had represented plaintiff on his 1994 robbery charge and arrange for his presence during their interviews of plaintiff in Georgia. (*Id.*, Exh. A).

\*2 DANY appealed the decision while plaintiff remained in custody. (*Id.*, Exhs.D, I). On January 28, 2003, the decision was affirmed and on January 31, 2003, the charges against plaintiff were dismissed. (*Id.*, Exh. I).

On April 23, 2003, plaintiff filed a notice of claim, alleging claims for false arrest, false imprisonment, malicious prosecution, abuse of process, intentional infliction of emotional distress, violations of his civil and constitutional rights, and negligent hiring and supervision. (*Id.*, Exh. A). On September 24, 2003, plaintiff testified at a 50-h hearing. (Affirmation of Patricia A. Rooney, Esq., dated Jan. 24, 2011 [Rooney Jan. Aff.], Exh. 7).

On April 2, 2004, plaintiff filed an action against defendants in federal court, asserting claims for false arrest, malicious prosecution, denial of his rights to counsel, due process, and equal protection of the law, a *Monell* claim against City, and similar state law claims (federal action). (Galley Aff., Exh. B).

After plaintiff and City filed motions for summary judgment in that action, by decision and order dated August 7, 2007, the judge, without hearing oral argument, dismissed plaintiff's claims for abuse of process, defamation, intentional infliction of emotional distress, negligence, *prima facie* tort, vicarious liability of the City for the detectives' actions, and negligent hiring and retention. (*Id.*, Exh. G). However, after oral argument was held, by order dated August 13, 2007 plaintiff's motion was denied, and City's motion granted to the extent of dismissing plaintiff's federal claims and claims for false arrest and malicious prosecution, with the judge observing that "false arrest and malicious prosecution claims are substantially the same" under federal and state law. The August 7 order was vacated, and the court declined to exercise pendent jurisdiction over plaintiff's remaining state law claims. (*Id.*, Exh. H).

On November 2, 2007, plaintiff filed a summons and complaint in the instant action, alleging causes of action for violations of his state constitutional rights, arrest and battery, false arrest, false imprisonment, malicious prosecution, abuse of process, defamation, intentional infliction of emotional distress, negligence, *prima facie* tort, vicarious liability, and negligent hiring and retention; the text of the complaint is identical to plaintiff's federal complaint except for the absence of his federal constitutional claims. (*Id.*, Exh. I). On February 7, 2008, City served its answer. (*Id.*, Exh. J).

## ***II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT***

### ***A. Res judicata and collateral estoppel***

#### ***I. Contentions***

Defendants argue that the dismissal of plaintiff's false arrest, false imprisonment, and malicious prosecution claims in the federal action precludes plaintiff from asserting those claims here. They also contend that as plaintiff's state constitutional claims are co-extensive with his federal claims, dismissal of the federal claims requires dismissal of the state claims. (Galley Aff.).

\*3 Plaintiff maintains that as the federal court declined to exercise jurisdiction over certain state law claims, he may assert them here, and that the dismissal of his federal constitutional claims is not dispositive of his state claims. (Rooney Aff.).

## 2. Analysis

As the federal court dismissed on the merits plaintiff's false arrest/imprisonment and malicious prosecution claims, plaintiff may not re-assert them here. However, as the court dismissed the remaining state law claims for lack of subject matter jurisdiction, plaintiff is not estopped from raising those claims in this action. (*McLearn v. Cowen & Co.*, 60 N.Y.2d 686 [1983]; *Urlie v. Ins. Co. of State of Pennsylvania*, 259 A.D.2d 1 [1st Dept 1999], *lv denied* 94 N.Y.2d 763 [2000] [state law action barred by dismissal of claim in federal action unless federal court declined to exercise jurisdiction over state law claims]; *Browning Ave. Realty Corp. v. Rubin*, 207 A.D.2d 263 [1st Dept 1994], *lv denied* 85 N.Y.2d 804 [1995] ["res judicata will not bar a State action where it is clear that the pretrial dismissal of the Federal cause of action did not include adjudication of a pendent State claim on its merits"] ).

Dismissal of plaintiff's federal equal protection claim requires dismissal of his corresponding state law equal protection claim, as coverage under the federal and state constitutions are coextensive. (*Murray v. City of NY*, 51 AD3d 502 [1st Dept 2008], *lv denied* 11 NY3d 703; *Manshul Constr. Corp. v. New York School Constr. Auth.*, 192 A.D.2d 659 [2d Dept 1993]; *cf Stylianou v. Inc. Vil. of Old Field*, 23 AD3d 454 [2d Dept 2005] ).

Although defendants cite no authority for the proposition that the dismissal of claims alleging violations of plaintiff's rights to due process and against self-incrimination under the federal constitution mandates dismissal of these claims under the New York State Constitution, which provides greater protection for those rights than the federal constitution (*see People v. LaValle*, 3 NY3d 88 [2004] [due process]; *Hernandez v. Robles*, 26 AD3d 98 [1st Dept 2005] [same]; *People v. Henriquez*, 3 NY3d 210 [2004] [right to counsel] ), there is no authority in New York for the proposition that the violation of the right against self-incrimination and/or right to counsel gives rise to a civil tort claim (*see Faccio v. Eggleston*, 2011 WL 3666588 [ND N.Y.2011] [dismissing civil claim for *Miranda* violations as remedy for violations is exclusion from evidence of self-incriminating statements and not damages]; *Jermosen v. Coughlin*, 877 F Supp 864 [SD N.Y.1995] [same] ).

Accordingly, plaintiff's false arrest/imprisonment, malicious prosecution, and state equal protection and right to counsel claims are dismissed.

## B. Summary judgment on remaining claims

### 1. Assault and battery

As plaintiff testified that the detectives physically assaulted him during their interviews, triable issues exist as to this claim.

### 2. Qualified immunity for the detectives

\*4 "To be entitled to qualified immunity, it must be established that it was objectively reasonable for the police officer involved to believe that his or her conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether his or her conduct was proper." (*Delgado v. City of New York*, 86 AD3d 502 [1st Dept 2011] ). Here, as plaintiff alleges that the detectives assaulted him and coerced him into confessing to the Estrella murder, he has raised triable issues as to whether the detectives' conduct was reasonable or appropriate. (*See eg Hayes v. City of Amsterdam*, 2 AD3d 1139

[3d Dept 2003] [as there was factual dispute as to whether officers' conduct was reasonable or proper, summary judgment on officers' qualified immunity defense inappropriate] ).

### ***3. Abuse of process***

To establish a claim for abuse of process, a plaintiff must demonstrate: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective. (*Curiano v. Suozzi*, 63 N.Y.2d 113 [1984] ). Here, the only pertinent process is the grand jury indictment, and plaintiff offers no evidence of any impropriety in its use. (*See Curiano*, 63 N.Y.2d at 117 [abuse of process claim dismissed as plaintiff did not allege that defendants improperly used summons after it was issued but only that they acted maliciously in bringing action] ). Nor does plaintiff offer any evidence that defendants used the indictment to obtain a collateral objective. (*See eg Ettienne v. Hochman*, 83 AD3d 888 [2d Dept 2011] [no evidence that notice of pendency was filed in order to obtain collateral objective, even though court later vacated notice] ).

### ***4. Claims against City***

Plaintiff's allegation that City negligently hired, trained and/or supervised the detectives and that such negligence led to his injuries is insufficiently speculative, and in any event, City has answered for the detectives and admits that they were acting within the scope of their employment. (*See Ashley v. City of New York*, 7 AD3d 742 [2d Dept 2004] [as City defendants conceded that police officers were acting within scope of employment, court should have dismissed negligent hiring and retention claims against them]; *Karoon v. New York City Tr. Auth.*, 241 A.D.2d 323 [1st Dept 1997] [negligent hiring, retention and training claims dismissed as employee was acting within scope of employment]; *see also Griffin v. City of New York*, 67 AD3d 550 [1st Dept 2009] [court properly declined to charge jury on claim against City for negligent retention and supervision of detective as City had stipulated it was responsible for detective's actions] ).

### ***5. Punitive damages***

Although it is conceded that plaintiff may not recover punitive damages against City, plaintiff's allegations against the individual defendants raise triable issues as to whether punitive damages may be awarded against them. (*See Carney v. City of Utica*, 148 A.D.2d 927 [4th Dept 1989] [reinstating punitive damages claim against individual police officers]; *see also Ferguson v. City of New York*, 73 AD3d 649 [1st Dept 2010] [punitive damages properly awarded against officer based on finding that officer used excessive force against plaintiff] ).

### ***6. Remaining claims***

\*5 As plaintiff does not oppose the dismissal of his claims for defamation, intentional infliction of emotional distress, negligence, and *prima facie* tort, they are dismissed.

## ***III. DEFENDANTS' MOTION TO DISMISS***

As plaintiff's state constitutional right to counsel claim is dismissed (*see supra*, II.A.), this aspect of defendants' motion to dismiss need not be addressed.

Defendants argue that plaintiff's assault and battery claim is time-barred as it was not included in plaintiff's notice of claim and the statute of limitations for the claim has expired. (Affirmation of Cathy J. Neustein, ACC, dated Dec. 3, 2010). Plaintiff contends that his testimony at the 50-h hearing sufficiently put defendants on notice of his assault and battery claim, and that the statute of limitations had not expired by the time that he commenced the federal action in April 2004 as he alleged in the notice that he was assaulted and battered during his incarceration up until January 2003. (Rooney Jan. Aff.). In reply, defendants deny that plaintiff may assert a new theory of liability not contained in his notice of claim or correct the absence of such a claim based on 50-h testimony, and observe that plaintiff did not mention in the notice of claim any injuries allegedly sustained by him while he was incarcerated. (Reply Affirmation, dated Mar. 22, 2011).

As it is undisputed that plaintiff did not set forth an assault and battery claim in his notice of claim, and as 50-h hearing testimony does not cure the omission of a theory of liability in a notice, the claim is dismissed. (*See Scott v. City of New York*, 40 AD3d 408 [1st Dept 2007] [court should have dismissed false arrest and malicious prosecution claims as they were not contained in plaintiff's notice of claim]; *Shavulskaya v. New York City Tr. Auth.*, 41 AD3d 462 [2d Dept 2007] [motion to dismiss should have been granted as notice of claim set forth different theories of liability than those advanced by plaintiff at 50-h hearing and in complaint]; *Figueroa v. New York City Hous. Auth.*, 271 A.D.2d 238 [1st Dept 2000] [while evidence given at 50-h hearing may cure deficiency in notice of claim, it may not be used to amend theory of liability in claim]; *Mazzilli v. City of New York*, 154 A.D.2d 355 [2d Dept 1989] [plaintiff could not assert claim not set forth in notice of claim] ).

Moreover, plaintiff set forth in the notice no allegation related to his incarceration, and thus, there is no ground upon which to find that the statute of limitations for the claim has not expired.

#### ***IV. CONCLUSION***

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted to the extent of dismissing the following claims against them: false arrest/imprisonment, malicious prosecution, assault and battery, violations of the rights to equal protection and counsel under the New York State Constitution, abuse of process, vicarious liability against City, defamation, intentional infliction of emotional distress, negligence, and *prima facie* tort.

#### **Parallel Citations**

32 Misc.3d 1246(A), 938 N.Y.S.2d 226 (Table), 2011 WL 4424779 (N.Y.Sup.), 2011 N.Y. Slip Op. 51734(U)