KeyCite Yellow Flag - Negative Treatment
Disagreed With by Blake v. City of New York, N.Y.A.D. 2 Dept., March 29, 2017

134 A.D.3d 599
Supreme Court, Appellate Division, First Department, New York.

Jose ALVAREZ, et al.,
Plaintiffs–Appellants,
v.
CITY OF NEW YORK, et al.,
Defendants–Respondents.

Dec. 29, 2015.

Attorneys and Law Firms

Bader Yakaitis & Nonnenmacher, LLP, New York (Jesse M. Young of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

Opinion

***599** Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 27, 2014, which granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

GONZALEZ, P.J. and SWEENY, J. concur in a separate memorandum by SWEENY, J.; MAZZARELLI, J. concurs in a separate memorandum; and RICHTER and MANZANET–DANIELS, JJ. dissent in a memorandum by MANZANET–DANIELS, J. as follows:

SWEENY, J. (concurring).

Plaintiff Jose Alvarez alleges that, at approximately 7:30 p.m. on April 30, 2008, he was falsely arrested by members of the New York City Police Department (NYPD). In his notice of claim, filed against defendant City of New York and "the New York City Police Department" in June 2008, Alvarez alleged, inter alia, that he was the subject of "[a]ssault, battery, excessive force, police brutality, false imprisonment, [and] false arrest." His notice of claim, as well as those filed on behalf of the other family member plaintiffs, did not specifically name any members of the NYPD responsible for these alleged acts, nor did they ***600** contain a generic reference to individual officers such as "Police Officer John Doe" or any similar language indicating that plaintiffs were making a claim against any police officers individually.

In September 2008, plaintiffs commenced the present action against the City, NYPD and "Police Officer John Doe a/k/a Officer Green and Police Officer John Doe Badge Number 14007." An amended complaint was filed on March 28, 2011 to add four additional named police officers as defendants. Neither the complaint nor the amended complaint allege that any of the officers acted in other than their official capacities, which allegation would obviate the need to file a notice of claim against them (*Gorgone v. Capozzi,* 238 A.D.2d 308, 310, 656 N.Y.S.2d 49 [2d Dept.1997], *lv. denied* 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653 [2000]). To the contrary, the pleadings contained specific allegations that the police officers acted wholly within their official capacities.

In early 2012, defendants moved to dismiss certain claims. By order entered July 17, 2013, the motion court, inter alia, dismissed the claims against the NYPD on the ground it is a "non-suable entity."

In September 2013, the individual police officer defendants moved pursuant to CPLR 3211(a)(7) to dismiss the state law claims against them, arguing that they had not been named in the notice of claim. Plaintiffs opposed, arguing, inter alia, that the plain language of General Municipal Law § 50–e, strictly construed, does not require individual municipal employees to be specifically identified in a notice of claim in order to be named as individual defendants in the subsequent action. The motion court, relying on the decisions in *Tannenbaum v. City of New York,* 30 A.D.3d 357, 819 N.Y.S.2d 4 (1st Dept.2006) ****363** and *Matter of Rattner v. Planning Commn. of Vil. of Pleasantville,* 156 A.D.2d 521, 526, 548 N.Y.S.2d 943 (2d Dept.1989), *lv. dismissed* 75 N.Y.2d 897, 554 N.Y.S.2d 831, 553 N.E.2d 1341 (1990), granted defendants' motion, noting that, since the amended complaint alleged that the individual defendants were liable for the conduct undertaken in their official capacities, such claims had to be dismissed where they were not specifically named in the notice of claim.

The dissent would now reinstate the state law claims against the individual defendants, contending that the failure to specifically identify the police officers in the

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notice of claim is not a condition precedent to commencing an action against them. In order to reach this result, the dissent rejects our holdings in *Tannenbaum* and *Cleghorne v. City of New York,* 99 A.D.3d 443, 446, 952 N.Y.S.2d 114 (1st Dept.2012) and makes an unwarranted interpretation of General Municipal Law § 50–e(1)(b) and (2). ***601** The facts of this case, as well as the precedents cited by the dissent in support of their position, do not warrant a departure from our prior precedents.

The dissent cites *Brown v. City of New York,* 95 N.Y.2d 389, 718 N.Y.S.2d 4, 740 N.E.2d 1078 (2000) in support of its position. However, *Brown* is not inconsistent with *Tannenbaum.* The issue in *Brown* concerned the adequacy of the notice of claim in a trip and fall personal injury case. The plaintiff's notice of claim alleged that he sustained injuries "after tripping on a broken and defective portion of *sidewalk* and curb, located on West 33rd Street, approximately 65 feet and 7 inches south of the southwest corner of Mermaid Avenue and West 33rd Street, and 8 feet and 4 inches east from the lot line on the west side of West 33rd Street" (*id.* at 391, 718 N.Y.S.2d 4, 740 N.E.2d 1078). The photographs accompanying the notice of claim referenced the "*aforesaid defective sidewalk* and curb" (*id.* at 392, 718 N.Y.S.2d 4, 740 N.E.2d 1078) and each contained a circle drawn around the curb and a small section of the sidewalk. The plaintiff testified at his 50–h hearing, deposition and trial, that he fell on the sidewalk and never reached the curb. The defendant City had prior written notice of the sidewalk condition but not the alleged defects in the curb.

After a verdict in favor of the plaintiff, wherein the jury specifically found he had fallen on the sidewalk, the City moved to set aside the verdict alleging, inter alia, that the notice of claim was defective because the photos had circled the curb, not the sidewalk. The trial court agreed and the Second Department affirmed. The Court of Appeals reversed.

The Court held that "[t]he test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the city to investigate. Nothing more may be required' " (95 N.Y.2d at 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078) (internal quotation marks omitted). The Court further stated that a court reviewing the sufficiency of a notice of claim "should focus on the purpose served by a Notice of Claim: whether based on the claimant's description, municipal authorities can locate the place, fix the time and understand the nature of the accident" (*id.*). The plaintiff's repeated references in the notice of claim was sufficient to put the City on notice that it was not only the curb, but the adjacent sidewalk that caused his injuries, giving it sufficient notice to commence and timely investigate the allegations and assess its liability. On particular note in *Brown* is the fact that no individual defendants were named in the action.

The reasoning in ****364** *Pierce v. Hickey,* 129 A.D.3d 1287, 11 N.Y.S.3d 321 (3d Dept.2015), cited by the dissent, is neither applicable to the facts of our case, nor persuasive in its own right. The defendant Hickey ***602** was a machine equipment operator employed by the defendant County of Schoharie. On the day of the incident in question, he was tasked with transporting open containers of storm debris, collected as part of the cleanup after Tropical Storm Lee, from a DPW garage to a disposal station. As the plaintiff's vehicle approached his truck from the opposite direction, Hickey, looking in his side view mirrors, noticed debris, including building material, was strewn across the highway. As the plaintiff passed Hickey's truck, a large piece of wood struck her as it flew through her open driver's side window, causing her to sustain injury. Plaintiff filed a notice of claim against the county but did not individually name Hickey as a defendant. Subsequently, she commenced a personal injury action against Hickey individually and the county. Hickey moved to dismiss on the ground that he had not been named in the notice of claim.

The Third Department affirmed the motion court's denial of Hickey's motion, holding that "plaintiff was not required to individually list Hickey on the underlying notice of claim" (129 A.D.3d at 1288, 11 N.Y.S.3d 321). As relevant to our case, the Court held that General Municipal Law 50–e(2) does not require that an individual municipal employee be named in the notice of claim, reasoning that "the purpose underlying the notice of claim requirement—to provide a municipality with sufficient information to enable it to promptly investigate the subject claim and ascertain its potential exposure liability (*see Brown v. City of New York,* 95 N.Y.2d 389, 394, 718 N.Y.S.2d 4, 740 N.E.2d 1078 [2000])—'may be served without requiring a plaintiff to name the individual agents, officers of employees in the notice of claim' (*Goodwin v. Pretorius,* 105 A.D.3d 207, 216, 962 N.Y.S.2d 539 [2013])' " (*Pierce* at 1289, 11 N.Y.S.3d 321).

This is not the situation before us. Indeed, in *Pierce,* the plaintiff knew the name of the individual who was the driving the truck from the outset of the case. No reason was given as to why he was not named in the notice of claim, either at the time it was originally filed, or in a timely filed amended notice of claim. Nevertheless, the county defendant was able to promptly investigate and evaluate the claim as well as its employee's conduct. The Court obviously arrived at its decision relying on the

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rationale set forth in *Goodwin,* because, as discussed above, *Brown* does not require such a result.

Goodwin is also distinguishable from our case. *Goodwin* involved a medical malpractice claim against a county medical facility. The notice of claim named the medical facility as the sole defendant. An action was subsequently commenced against the medical center and five named employee medical providers, ***603** who subsequently moved to dismiss on the ground that they had not been named in the notice of claim. The motion court denied the motion and the Appellate Division, Fourth Department affirmed.

The Court reasoned that, in a medical malpractice action, it is difficult to identify, let alone name, particular defendants within the 90–day time frame to file a notice of claim. It overruled its prior decision in *Rew v. County of Niagara,* 73 A.D.3d 1463, 1464, 901 N.Y.S.2d 442 (2010) to the extent that it required *service* of a notice of claim upon individual defendants, which the defendants conceded and which is not an issue here. The Court also traced the precedents requiring that individual defendants be named in a notice of claim back to ****365** *White v. Averill Park Cent. Sch. Dist.,* 195 Misc.2d 409, 411, 759 N.Y.S.2d 641 (Sup.Ct., Rensselaer County 2003), noting that the court in *White* cited no precedent for its conclusion. The *Goodwin* Court acknowledged our decision in *Tannenbaum* and numerous other state and federal decisions which held that the failure of a plaintiff to name individual defendants in a notice of claim required dismissal of a subsequent action against them. It also acknowledged that "[w]here the governmental entity would be required to indemnify the individual employees named in a lawsuit, that governmental entity must be afforded the same opportunity to investigate the claim made against the individuals" (105 A.D.3d at 212, 962 N.Y.S.2d 539). Nevertheless, the Court held that specific individual municipal employees need not be named in a notice of claim as a condition precedent to commencing an action against them. It did not explain how a municipality can undertake an adequate and timely investigation of the "claim made against the individuals" where those individuals are not named in a notice of claim, but rather become defendants in an action commenced at a much later date, some, as in our case, named in an amended complaint filed long after the incident occurred. The problems with attempting to conduct such an investigation and assess the merits of the claims against the individual defendants, as required by *Brown* are manifest, as will be discussed herein.

Of further note is the *Goodwin* Court's discussion regarding service of a notice of claim upon municipal employees, which the dissent adopts in its writing. The *Goodwin* Court attempted to buttress its argument by noting, correctly, that GML 50–e(1)(b) provides that service of a notice of claim upon the employee is not a condition precedent to commencing an action against that employee if the municipality has been served with a proper notice of claim. The Court reasoned that the legislature, by obviating the need for service, ***604** could easily have made the naming of individuals in a notice of claim a requirement and, since it did not, it must have intended that they need not be named. This of course, leads to the question: how can service of the notice of claim upon the municipality be sufficient service upon an individual not named in such notice? Since the statute waives the requirement of *service* on the individual employee of the municipality, does it not reasonably follow that one must be named in the notice of claim, for service upon the municipality to constitute service on that individual? The *Goodwin* Court and the dissent are silent in this regard. In fact, the statute only excuses *failure to serve* the notice of claim on an individual defendant; it does not condone the *failure to name* him or her (*see DC v. Valley Cent. Sch. Dist.,* 2.011 WL 3480389, *2, 2011 U.S. Dist. LEXIS 90260 *7 [S.D.N.Y.2011]).

Far more compelling than *Pierce* of *Goodwin* is the reasoning in *White.* There, the plaintiff brought an action against a school district and some of its employees to recover damages for a student-on-student hazing incident. A notice of claim had only been filed against the school district. The individual defendants (coaches, athletic director, principal, superintendent and assistant superintendent) moved to dismiss the complaint against them on the ground that they were not named in the notice of claim. As with our case, the complaint in *White* did not allege any of the individual defendants acted outside of the scope of employment or state a cause of action in their individual capacities, which would thus obviate the need to file a notice of claim. The court correctly reasoned that GML 50–e "makes no provision for directing the notice of claim at one entity and then prosecuting an action against another. It certainly does not authorize actions against individuals who ****366** have not been individually named in a notice of claim" (195 Misc.2d at 411, 759 N.Y.S.2d 641). The court also noted the exception as to *service* of the notice of claim upon individual defendants as discussed above, but rejected that as a ground for failure to name the individual defendants.

In assessing the sufficiency of the notice of claim the court in *White* found that it must be "judged by whether it includes enough information to enable the municipality to adequately investigate the claim," and significantly, to also "assess the merits of the claim" (*id.*). This is

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consistent with the holding in *Brown,* as well as *Tannenbaum* and its prodigy. The ability to "assess the merits of the claim" is one of the key reasons for the requirement of a notice of claim. The court rejected plaintiff's argument that where a municipality does, in fact, ***605** conduct an investigation that may involve some of the individuals later named in the action, the requirements of GML 50–e will be met. Notably, this very argument is made by the dissent in stating that "in cases of alleged false arrest, it would appear that the municipal defendant is uniquely positioned to know the facts of any such claim—at a minimum, which officers were on duty and in the vicinity." The same argument holds true for a plaintiff: he or she, during the course of the criminal proceedings leading up to a dismissal of any charges would know, at a minimum, the names and badge numbers of the arresting officers, thus making it simple to name those officers in a notice of claim. Indeed, at a bare minimum, the notice of claim must use the "Police Officer John Doe" or similar language, such as used in the complaint herein, to put the municipality on notice that its employees will be sued in their personal capacities, thus meeting the statute's notice requirements. The *White* court properly held that the municipality's "efforts to investigate the plaintiffs' claims cannot serve as a substitute for compliance with ... § 50–e. Similarly, the fact that the individuals' liability would be covered by the school district cannot supplement an inadequate notice of claim." (195 Misc.2d at 412, 759 N.Y.S.2d 641).

Unlike the prior cases discussed herein, *Tannenbaum* involved claims similar to those presented in the case before us, and considered the concerns raised by the dissent. The plaintiff was arrested in January 1999. After filing a notice of claim naming, inter alia, the City of New York and an individual NYPD detective who was involved in his case, he commenced an action in December 1999 against those defendants. In February 2000, the plaintiff was acquitted of all charges and he filed a second notice of claim against the City, the NYPD, and the same detective. He also added as defendants Bronx County D.A. Johnson and a named Bronx County ADA. In January 2001, the plaintiff commenced a second action against those defendants. He subsequently amended his complaint in the second action to add as defendants two additional Bronx County ADAs (the prosecutor defendants) who were not named in either notice of claim. Ultimately, the prosecutor defendants moved to dismiss the amended complaint on the ground, inter alia, that the plaintiff had failed to name them in the notice of claim. The motion court granted the motion and, citing *White* and *Rattner,* we affirmed that portion of the decision with respect to the dismissal of the state law claims against the prosecutor defendants (*Tannenbaum* at 358, 819 N.Y.S.2d 4).

Underlying our decision in *Tannenbaum* was the purpose of ***606** requiring a notice of claim as a precondition to commencing a suit against a municipality, which is, as stated by the *Brown* Court, "[t]o enable the authorities to investigate, collect evidence ****367** and evaluate the merit of a claim" (95 N.Y.2d at 392, 718 N.Y.S.2d 4, 740 N.E.2d 1078). Certainly, the City was provided with the information necessary to investigate and evaluate the claims against the named defendants in *Tannenbaum's* second notice of claim. However, the commencement of an action over 11 months after a notice of claim had been filed, against two additional ADAs, who were entitled to indemnification from the City (Administrative Code of City of New York § 7–110; GML 50–k) deprived the City of the opportunity to investigate or assess the potential merit of the claim against them. This, of course, defeats the purpose of GML § 50–e and does not pass the sufficiency test set forth in *Brown* and we ruled accordingly.

The dissent would now set aside *Tannenbaum* on similar facts. Plaintiffs here did not put the City on notice that it would seek to impose liability upon specific employees of the NYPD. Indeed, as the action progressed, more and more police officers were added as individual defendants, the last of which over three years removed from the incident in question, thus rendering a timely investigation into and assessment of the claims impossible. To permit such a result raises questions of fundamental fairness for the individual defendants, since they were not put on notice, even in a generic way by way of "Police Officer John Doe" or similar language, that they were going to become defendants. Moreover, the prejudice accruing to both the municipal and individual defendants from such a delay is obvious, since memories fade over time, records that could have easily been obtained early on may have been archived, lost or discarded, and witnesses may have relocated, just to name a few of the potential obstacles. Delay in investigating and evaluating a claim defeats the purpose of GML § 50–e.

We are not suggesting that we should apply the doctrine of stare decisis in a slavish manner by following precedent which may have become obsolete or overcome by events. We agree with the dissent that in such cases, "we must not be loath to depart from precedent." However, this is not such a case. The rationale set out in *Pierce* and *Goodwin* is not so compelling as to warrant abandonment of our own precedents in *Tannenbaum* and *Cleghorne,* as well as that of the Second Department in *Rattner.* Indeed, at least one Federal court has affirmatively rejected *Goodwin* in favor of our decision in

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Tannenbaum (see ***607** *DiRuzza v. Village of Mamaroneck, N.Y.,* 2014 WL 6670101, 2014 U.S. Dist LEXIS 166208 [S.D.N.Y.2014]).

The motion court's order should therefore be affirmed.

MAZZARELLI, J. (concurring).

I concur, but strictly on constraint of *Tannenbaum v. City of New York,* 30 A.D.3d 357, 819 N.Y.S.2d 4 (1st Dept.2006). While the dissent's argument is compelling that the statutory language in General Municipal Law § 50–e(1)(b) and (2) does not require naming individual municipal actors as a condition precedent to commencing an action against them, this Court has already held that it does. There is no discernible difference between the facts presented here and the facts presented in *Tannenbaum.* Accordingly, I am constrained to affirm.

MANZANET–DANIELS, J. (dissenting).

The issue in this case is whether the relevant provisions of the General Municipal Law governing the sufficiency of notices of claim oblige a plaintiff to name individual defendants in the notice of ****368** claim. I believe that neither the express language of the statute nor our precedent compels this result. I therefore dissent.

Plaintiff alleges that he was falsely arrested on April 30, 2008, at approximately 7:30 p.m. in front of 1459 Wythe Place in the Bronx. He filed a notice of claim against the City and the "New York City Police Department" alleging "[a]ssault, battery, excessive force, police brutality, false imprisonment, false arrest, negligence, abuse of process, violation of Civil Rights, violation of claimant's Civil Rights under 42 U.S.C. Section 1983 and negligent retention and hiring, loss of services, loss of earnings and attorneys' fees."

In September 2008, plaintiff commenced the instant action for false arrest, false imprisonment, and malicious prosecution, against the City, the Police Department, and "Police Officer John Doe A/K/A Officer Green and Police Officer John Doe Badge Number 14007." The complaint was amended to add, inter alia, additional defendants Sergeants Keri Thompson and Natel, and Police Officers John Stollenborg and Ryan Weiss.

In September 2013, defendants moved to dismiss the state law claims against the individual defendants pursuant to CPLR 3211(a)(7), arguing that the individual defendants were not identified in the notice of claim. The court granted the City's motion for summary judgment to the extent it sought dismissal of all claims against the individual defendants, and also, sua sponte, dismissed the action as against the City itself on the ground the City could not be held vicariously liable for the actions ***608** of its individual employees/agents (i.e., police officers) once the action was dismissed as against the individual employees.

On appeal, plaintiff argues that the naming of individual officers in the notice of claim is not mandated by the statute. I am compelled to agree.

Section 50–e(2) of the General Municipal Law, governing the contents of the notice of claim, nowhere requires the naming of individual defendants in the notice of claim. The statute requires only the following to be enumerated: (1) the name and address of each claimant and his or her attorney, if any; (2) the nature of the claim; (3) the time, place and manner in which the claim arose; and (4) an itemization of damages or injuries claimed to have been sustained as far as practicable.

Moreover, the § 50–e notice of claim service requirements make plain that direct service of a notice of claim upon a culpable individual municipal actor is not required. General Municipal Law § 50–e(1)(b), explicitly provides that an individual municipal actor need not be served with a notice of claim as a precondition to commencing a subsequent action against such individual actor. The same subsection provides that a municipality need be served with a notice of claim only if the municipality would be obligated to indemnify a claimant for the alleged tortious actions of the individual actor.

Justice Sweeny's argument that naming of individual actors is required by the statute because the statute dispenses with service upon those actors is circular. One could just as easily make the counterargument that the statute dispenses with service on individual actors because the statute does not require that they be named in the notice of claim.

The Court of Appeals, in construing section 50–e, has stated that the purpose of a notice of claim is to provide the municipality an opportunity to collect sufficient evidence promptly in order to properly assess the merits of a claim (*see Brown v. City of New York,* 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078 [2000]). The ****369** test of the sufficiency of a notice of claim is merely "whether it includes information sufficient to enable the city to investigate. Nothing more may be required" (*id.*

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[internal quotation marks and citation omitted]).

In determining whether the requirements of General Municipal Law § 50–e have been met, courts should evaluate "whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident" (*id.*).

In this case, it is not seriously alleged that the failure to ***609** name the individual defendants in the notice of claim hampered the investigation of plaintiff's claim or prevented the municipal defendant from ascertaining the time, place and nature of the accident. Indeed, in cases of alleged false arrest, it would appear that the municipal defendant is uniquely positioned to know the facts of any such claim—at a minimum, which officers were on duty and in the vicinity. These officers are employees of the municipal defendant and presumably available for interviews. Plaintiff, the alleged victim, is in no better position to ascertain the identities of the officers alleged to have used excessive force in falsely arresting him. In many cases, the officer filling out the arrest paperwork is not the officer or officers who actually effectuated the arrest, but one who may have later appeared on the scene.

Justice Sweeny's argument that "John Doe" language in the notice of claim would suffice to put the municipality on notice is difficult to apprehend. "John Doe" language will not enable the municipality to better identify the arresting officers in the unlikely event the City is unaware of their identities. A claim for false arrest, by definition, presupposes that an arrest has been effectuated by one or more members of the department. Having been apprised of the time, place and manner of the claim, the department is in the best position to identify the officers involved.

Justice Sweeny, in reaching his result, relies entirely on the earlier decisions in *Cleghorne v. City of New York,* 99 A.D.3d 443, 446, 952 N.Y.S.2d 114 (1st Dept.2012) and *Tannenbaum v. City of New York,* 30 A.D.3d 357, 358, 819 N.Y.S.2d 4 (1st Dept.2006). *Cleghorne* follows *Tannenbaum* without discussion (indeed, it cites as authority § 50–e, which imposes no such requirement). The decision in *Tannenbaum* is devoid of any reasoning whatsoever, and cites as its sole authority a lower court decision in *White v. Averill Park Cent. School Dist.,* 195 Misc.2d 409, 759 N.Y.S.2d 641 (Sup.Ct., Rensselaer County 2003). *Tannenbaum,* moreover, involved not the failure to name individual police officers implicated in a false arrest but the failure to name assistant district attorneys in a notice of claim.

The Third and Fourth Departments have recognized the flaw in *Tannenbaum* 's reasoning, and the Fourth Department has explicitly overruled its earlier precedent to the extent it adhered to the flawed rationale of *Tannenbaum.* Our sister courts have reasoned, correctly in my view, that the "underlying purpose of [§ 50–e] may be served [i.e., the ability of a municipality to conduct an adequate and timely investigation] without requiring a plaintiff to name the individual agents, officers ***610** or employees in the notice of claim," expressly rejecting the reasoning of prior cases that purported to have imposed such a requirement (*Goodwin v. Pretorius,* 105 A.D.3d 207, 216, 962 N.Y.S.2d 539 [4th Dept.2013]; *see e.g. Pierce v. Hickey,* 129 A.D.3d 1287, 11 N.Y.S.3d 321 [3d Dept.2015]; *Bailey v. City of New York,* 79 F.Supp.3d 424, 453 [E.D.N.Y.2015]; *Chamberlain v. City of White Plains,* 986F.Supp.2d ****370** 363, 397 [S.D.N.Y.2013]). We should do the same.

While I understand concurrences' fidelity to *Tannenbaum,* we must not be loath to depart from precedent where it cannot be reconciled with the plain meaning and purpose of a statute. The decisions in *Tannenbaum* and *Cleghorne* imposed a requirement for notices of claim that went beyond those enumerated by the General Municipal Law. The requirements for notices of claim are in derogation of a plaintiff's rights and must therefore be strictly construed. Certainly, we ought not to impose judicially a requirement that is nowhere to be found in the statute. It is well settled that "where as here the statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York,* 41 N.Y.2d 205, 208–209, 391 N.Y.S.2d 544, 359 N.E.2d 1338 [1976] [internal quotation marks omitted]).

GONZALEZ, P.J., MAZZARELLI, SWEENY, RICHTER, MANZANET–DANIELS, JJ., concur.

All Citations

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Goodwin v. Pretorius, N.Y.A.D. 4 Dept., March 22, 2013

99 A.D.3d 443
Supreme Court, Appellate Division, First Department, New York.

Wayne CLEGHORNE, et al.,
Plaintiffs–Respondents,
v.
The CITY OF NEW YORK, et al.,
Defendants–Appellants.

Oct. 4, 2012.

Synopsis
Background: Teacher allegedly exposed to allergens at school sued the board of education, city and two principals for negligence, public and private nuisance, and regulatory violations. The Supreme Court, Bronx County, Larry S. Schachner, J., denied a defense motion for summary judgment, and defendants appealed.

[Holding:] The Supreme Court, Appellate Division, held that the teacher failed to establish causation.

Reversed.

West Headnotes (4)

[1] **Municipal Corporations** Health and education

City was not a proper party to an action brought by a teacher allegedly injured by exposure to allergens at school.

[2] **Education** Notice, Demand, or Presentation of Claim

Action brought by a teacher allegedly injured by exposure to allergens at a school could not proceed against individual principals who were not named in a notice of claim. McKinney's General Municipal Law § 50–e.

17 Cases that cite this headnote

[3] **Judgment** Torts

Teacher allegedly injured by exposure to allergens at school failed, on motion for summary judgment, to establish causation in support of claims for negligence, public and private nuisance, and regulatory violations against board of education; the only "method" the teacher's expert used was to accept, at face value, anecdotal allegations of the teacher's uncorroborated affidavit that she was exposed to dust, bugs, rodent droppings and carcasses in unspecified quantities, and began experiencing asthma as a result, the expert did not provide any scientific measurement, the teacher offered no other evidence concerning the level of allergens or toxins present in the school, and the expert did not posit the level of exposure necessary for the causation of injury.

3 Cases that cite this headnote

[4] **Evidence** Medical testimony
Evidence Experiments and results thereof

In an action brought by a plaintiff claiming injury from exposure to a specific toxin or allergen, while the level of exposure need not always be quantified precisely, it is necessary that whatever methods an expert uses to establish causation be generally accepted in the medical community; such methods include mathematical modeling or comparing plaintiff's exposure level to those of study subjects whose exposure levels were precisely determined.

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4 Cases that cite this headnote

Attorneys and Law Firms

**115 Willkie Farr & Gallagher LLP, New York (Thomas H. Golden of counsel), for appellants.

Scaffidi & Associates, New York (Anthony J. Scaffidi of counsel), for respondents.

TOM, J.P., FRIEDMAN, CATTERSON, ACOSTA, FREEDMAN, JJ.

Opinion

*444 Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 17, 2011, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action arising from a teacher's alleged exposure to allergens at school, the record reflects the following: Wayne Cleghorne was a school teacher employed by the New School for Arts and Sciences (New School). On August 28, 2000, the New School relocated to 730 Bryant Avenue in the Bronx. Shortly after the move, Cleghorne claims she developed respiratory problems while cleaning her classroom and storage area at the new location. In November of 2000, Cleghorne was diagnosed with asthma. On November 30, 2000, her family practitioner diagnosed her with bronchitis, and she did not work for approximately a month.

Cleghorne returned to work in early January 2001, but had an asthma attack at the New School on February 2, 2001, and was hospitalized for a week. Cleghorne and her husband filed a notice of claim against the City alleging that her asthma was caused by conditions at the New School and seeking damages.

At the General Municipal Law § 50–h examination on September 26, 2001, Cleghorne stated that while cleaning her classroom and a storage room in the new building, she developed a persistent cough, and that subsequently her condition deteriorated. She described the events leading to her admission to the hospital, and stated that after discharge, she contacted a physician for asthma treatment. He referred her to an allergist. Cleghorne stated that she received weekly medical treatment following the February 1, 2001 incident, suffered many relapses, and was occasionally **116 confined to home for "[a] few months" and bed "[m]any times."

On October 15, 2001, plaintiffs commenced this action against the Board of Education, the City of New York, and two principals of the New School individually, for negligence, public and private nuisance, violation of OSHA regulations, and violations of the New York City Administrative Code and other statutes. On August 6, 2010, defendants moved for summary judgment dismissing the complaint. Defendants argued that Cleghorne did not develop asthma as a result of her exposure to toxins at the New School, but rather that she had an existing asthmatic condition. In support of their motion, defendants provided the expert report of Dr. Jack J. Adler, a pulmonologist *445 who had conducted an examination of Cleghorne and reviewed her medical records. He noted that in 1994 Cleghorne experienced difficulty breathing after a fan blew cold air on her in her classroom, and that since 1995, she experienced dyspnea, or shortness of breath, on exertion, a condition commonly associated with asthma.

Dr. Adler concluded that plaintiff had developed asthma prior to moving to the new school location and that "environmental contaminants" at the school did not cause the condition. Dr. Adler explained that Cleghorne has "atopic or allergic asthma" and is "allergic to several common allergens, including tree and ragweed pollen, dust mites, dogs, cats, cockroaches ... mold spores ... and mouse and rat antigens ... none of which are exclusive to the New School." Because these environmental contaminants "are extremely prevalent," she would likely have "similar symptoms in any other urban environment." Dr. Adler concluded that, while working at the New School, Cleghorne was simply experiencing asthmatic symptoms triggered by common allergens.

On October 4, 2010, plaintiffs cross-moved for summary judgment and sought denial of defendants' summary judgment motion. In support, plaintiffs submitted the affidavit of their expert, Dr. Hugh Cassiere, and an affidavit from Cleghorne that provided more detail concerning the conditions in the school.

In the affidavit, Cleghorne stated that when the school moved to the new location, she spent several hours a day during the week before the school opened cleaning up dust, dirt, rodent droppings and carcasses, cobwebs, dead insects, mildew and mold. Cleghorne further stated that

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after classes began, she cleaned her classroom twice daily. Cleghorne described her symptoms and medical treatment consistent with her § 50–h testimony.

Plaintiffs' expert, Dr. Cassiere, opined that Cleghorne did not have asthma prior to 2000, but rather suffered from a respiratory condition described as asymptomatic "airway hyper responsiveness" (AHR). Crediting Cleghorne's account of her exposure at the school, Cassiere concluded that Cleghorne's asthma was caused in 2000 by "high-level exposure to, and daily inhalation of dust, dirt, rodents, rodent dander, mold, mildew, cockroaches, and bug carcasses."

In reply, defendants asked the motion court, inter alia, to exclude Cassiere's report on the basis that his opinion on causation and the methodology used to form that opinion was not generally accepted in the medical community. Alternatively, defendants asked the court to conduct a *Frye* hearing.

***446** In support, defendants submitted another affidavit from Dr. Adler, which asserted that Cassiere's theory of causation and his methodology were not generally accepted in the medical community because it made a "false distinction between AHR and asthma ****117** ," and that it is not possible to diagnose AHR without pulmonary testing. Defendants also asserted that Cleghorne had not shown what levels of allergens or toxins she was exposed to, much less that the alleged level of exposure was sufficient to cause asthma.

Plaintiffs, in reply submitted another affidavit from Cassiere wherein he listed studies purporting to show that it is generally accepted that AHR and asthma are separate conditions, but that AHR can develop into asthma under conditions such as those to which Cleghorne was allegedly exposed at the school. The motion court denied both motions, finding that there were triable issues as to causation and as to the safety of Cleghorne's work environment.

[1] [2] For the reasons set forth below, the motion court should have dismissed the complaint in its entirety. Initially, we note that the complaint must be dismissed as against the City of New York because the City is not a proper party to this action (*see Flores v. City of New York,* 62 A.D.3d 506, 878 N.Y.S.2d 728 [1st Dept.2009]). Furthermore, the action cannot proceed against the individual defendants because they were not named in the notice of claim (*see* General Municipal Law § 50–e; *Tannenbaum v. City of New York,* 30 A.D.3d 357, 358, 819 N.Y.S.2d 4 [1st Dept.2006]).

[3] [4] Plaintiff's claims against the remaining defendant, Board of Education of the City of New York, also fail. Even if this Court were to accept that plaintiff developed asthma only after starting work at the New School in 2000, and that AHR is a separate condition, plaintiff is still obliged to show specific causation. Namely, plaintiff must at least raise a triable issue of fact as to her exposure to a specific toxin or allergen; quantify the level of exposure to some degree; and posit that such level of exposure was sufficient to produce the alleged injuries (*Parker v. Mobil Oil Corp.,* 7 N.Y.3d 434, 448–449, 824 N.Y.S.2d 584, 857 N.E.2d 1114 [2006]). While *Parker* recognizes that the level of exposure need not always be quantified "precisely," it is still necessary that "whatever methods an expert uses to establish causation [they be] generally accepted in the [medical] community" (*id.* at 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114). Such methods include "mathematical modeling or comparing plaintiff's exposure level to those of study subjects whose exposure levels were precisely determined" (*Todman v. Yoshida,* 63 A.D.3d 606, 881 N.Y.S.2d 422 [1st Dept.2009]).

Here, the only "method" plaintiffs' expert used to establish ***447** specific causation was to accept, at face value, the anecdotal allegations of plaintiff's uncorroborated affidavit that she was exposed to dust, bugs, rodent droppings and carcasses in unspecified quantities, and began experiencing asthma, purportedly for the first time, as a result.

Cleghorne stated in her affidavit—dated more than nine years after the relevant events—that "[t]he premises ... were replete with rodents, rodent carcasses, rodent droppings, cobwebs, cockroaches, cockroach and other bug carcasses, mildew, thick-black dust, and excessive dirt." She also stated that "numerous ceiling tiles were water-damaged and broken; there was mold on the ceiling tiles by the vents, mold on the walls, and mold in the closets." Cleghorne further stated that once school began, "[e]very morning [she] cleaned cobwebs, bug carcasses, mildew, and mold in [her] classroom as well as wiped dust ... and dirt from the vents along the windowsills [and that] [o]n almost a daily basis, [she] wiped rodent droppings from along the vents of the classroom's windowsill."

****118** Plaintiffs' expert, based only on this affidavit, characterized Cleghorne's exposure as "high-level." This was an insufficient basis for his theory, given that "replete" is a meaningless and vague quantifying adjective (*see e.g. Martins v. Little 40 Worth Assoc., Inc.,* 72 A.D.3d 483, 899 N.Y.S.2d 30 [1st Dept.2010] [expert's calculation of the level of exposure was based on assumptions not supported by the record]). Plaintiffs'

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expert did not provide any scientific measurement or employ any accepted method of extrapolating such a measurement, and plaintiffs offered no other evidence concerning the level of allergens or toxins present in the school. Although plaintiffs' expert cited six studies in support of his theory of causation, he failed to compare Cleghorne's exposure level to those of the study subjects. Nor could he have since the studies listed common allergens, but did not differentiate between them or provide exposure levels.[1]

Nor did plaintiffs' expert posit the level of exposure necessary for the causation of injury. In *Fraser v. 301–52 Townhouse Corp.*, 57 A.D.3d 416, 870 N.Y.S.2d 266 [1st Dept.2008], *lv. dismissed* 12 N.Y.3d 847, 881 N.Y.S.2d 391, 909 N.E.2d 84 [2009], we granted defendant's motion for summary judgment dismissing plaintiff's personal injury claims because, inter alia, plaintiff failed to present any evidence supporting specific causation. ***448** We found that plaintiff failed to show that he was exposed to a level of mold sufficient to cause his alleged injury. We further found that plaintiff's expert failed to specify the threshold level of exposure to dampness or mold that would cause the plaintiff's health problems (*id.* at 419, 870 N.Y.S.2d 266). Here too, plaintiffs offer no quantification whatsoever of the level of Cleghorne's allergen exposure, nor does plaintiffs' expert specify what level of any of the allergens would cause AHR to progress to chronic asthma (*see e.g. Smolowitz v. Sherwin–Williams Co.*, 2008 WL 4862981, 2008 U.S. Dist. LEXIS 91019 [E.D.N.Y.2008] [complaint dismissed because plaintiff's expert failed to quantify the amount of the toxin to which plaintiff was allegedly exposed or that *limited* exposure can cause the plaintiff's disease]).

We have considered plaintiffs' remaining arguments and find them unavailing.

All Citations

99 A.D.3d 443, 952 N.Y.S.2d 114, 285 Ed. Law Rep. 483, 2012 N.Y. Slip Op. 06648

Footnotes

1 One study referenced allergens including dust, housedust mite, animal danders, tree pollen, grass pollen and molds. Another referenced dust, mold, furred animals, cockroaches and pollens. One study stated that "constrictor agonists" were administered to its subjects to study airway response, but did not specify what they were. The last study examined the effects of exposure to quartz, asbestos, dust & fumes, but not allergens.

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KeyCite Red Flag - Severe Negative Treatment
Abrogated by Kapon v. Koch, N.Y., April 3, 2014

30 A.D.3d 357
Supreme Court, Appellate Division, First Department, New York.

Howard TANNENBAUM,
Plaintiff–Appellant,
v.
The CITY OF NEW YORK, et al.,
Defendants–Respondents,
Sylvia Jones, et al., Defendants.
Howard Tannenbaum,
Plaintiff–Appellant,
v.
The City of New York, et al.,
Defendants–Respondents,
Sylvia Jones, et al., Defendants.
Judge Harold Adler, Nonparty.

June 29, 2006.

Synopsis
Background: In action alleging tort and federal civil rights claims against public officers and district attorneys, the Supreme Court, Bronx County, Albert Lorenzo, J., granted motion to dismiss claims against officers, denied plaintiff's request to depose nonparty judge, and dismissed state law claims against district attorneys. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] notice of claim was required to pursue tort claims against public officers;

[2] notice of claim was not required to pursue federal civil rights claims against public officers;

[3] district attorneys were entitled to immunity from civil claims arising out of their performance of quasi-judicial functions in prosecuting crimes;

[4] trial court properly exercised its discretion in denying request to depose nonparty judge;

[5] trial court did not improvidently exercise its discretion in denying plaintiff's request to audiotape deposition testimony.

Affirmed as modified.

West Headnotes (5)

[1] **Municipal Corporations** Requirement as mandatory or condition precedent

Notice of claim was required to maintain tort claims against public officers. McKinney's General Municipal Law § 50–e.

28 Cases that cite this headnote

[2] **Municipal Corporations** Applicability in particular cases

Notice of claim was not required to pursue federal civil rights claims against public officers. McKinney's General Municipal Law § 50–e.

16 Cases that cite this headnote

[3] **District and Prosecuting Attorneys** Liabilities for official acts, negligence, or misconduct

District attorneys are entitled to immunity from civil claims arising out of their performance of quasi-judicial functions in prosecuting crimes.

[4] **Pretrial Procedure** Non-party witnesses in general; experts

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Trial court properly exercised its discretion in denying request to depose nonparty judge, absent showing of special circumstances or that information sought was relevant and could not be obtained from other sources. McKinney's CPLR 3101(a)(4).

6 Cases that cite this headnote

[5] **Pretrial Procedure** Record of testimony; furnishing copies

Trial court did not improvidently exercise its discretion in denying plaintiff's request to audiotape deposition testimony as note-taking device in addition to presence of stenographer, absent showing of necessity.

Attorneys and Law Firms

**5 Howard Tannenbaum, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

TOM, J.P., MAZZARELLI, MARLOW, NARDELLI, SWEENY, JJ.

Opinion

*358 Order, Supreme Court, Bronx County (Albert Lorenzo, J.), entered September 1, 2004, which, upon plaintiff's motion for reargument, adhered to that part of an order, same court and Justice, entered on or about January 7, 2003, which had granted defendants' cross motion to dismiss all claims against defendants Bonavoglia and Ortolano for failure to name them in the notice of claim, denied plaintiff's request to depose nonparty Judge Adler, and dismissed state law claims against defendants Johnson and Thomas based on immunity, but modified the earlier order to provide plaintiff an inquest and assessment of damages as to the Jones defendants who had defaulted in the second of these consolidated actions, unanimously modified, on the law, the federal civil rights claims against defendants Bonavoglia and Ortolano reinstated, without prejudice to renewal of the motion to dismiss upon completion of discovery, and otherwise affirmed, without costs.

[1] [2] General Municipal Law § 50–e makes unauthorized an action against individuals who have not been named in a notice of claim (*see White v. Averill Park Cent. School Dist.*, 195 Misc.2d 409, 411, 759 N.Y.S.2d 641 [2003]), thus warranting dismissal of the state claims against Bonavoglia and Ortolano (*see Matter of Rattner v. Planning Commn. of Vil. of Pleasantville*, 156 A.D.2d 521, 526, 548 N.Y.S.2d 943 [1989], *lv. dismissed* 75 N.Y.2d 897, 554 N.Y.S.2d 831, 553 N.E.2d 1341 [1990]). However, as the notice requirements of this statute apply only to tort and negligence **6 actions and not to civil rights actions, the court erred in dismissing the claims alleging federal civil rights violations against said parties (*see Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 [1988]). Such claims should be reinstated without prejudice to renewing the dismissal motion after discovery.

[3] District attorneys are entitled to immunity from civil claims arising out of their performance of quasi-judicial functions in prosecuting crimes (*see Moore v. Dormin*, 252 A.D.2d 421, 676 N.Y.S.2d 90 [1998], *lv. denied* 92 N.Y.2d 816, 684 N.Y.S.2d 187, 706 N.E.2d 1211 [1998]). The court thus properly dismissed the claims against defendants Johnson and Thomas that were not based on alleged violations of federal law.

[4] [5] The court properly exercised its discretion in denying the request to depose nonparty Judge Adler, since plaintiff failed to show special circumstances or that the information sought was *359 relevant and could not be obtained from other sources (*see* CPLR 3101[a][4]; *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 533 N.Y.S.2d 915 [1988]). Nor did the court improvidently exercise its discretion in denying plaintiff's request for audiotaping deposition testimony as a note-taking device in addition to the presence of a stenographer, as there was no showing of necessity (*see Jones v. Maples*, 257 A.D.2d 53, 691 N.Y.S.2d 429 [1999]). This would affect the deponent's right to examine the deposition transcript for the purpose of making corrections (*see* CPLR 3116[a]).

We have considered plaintiff's remaining arguments and find them without merit.

All Citations

30 A.D.3d 357, 819 N.Y.S.2d 4, 2006 N.Y. Slip Op.

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KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by Flowers v. City of New York, N.Y.Sup., August 5, 2016

105 A.D.3d 207
Supreme Court, Appellate Division, Fourth Department, New York.

Robette GOODWIN, as Administratrix of the Estate of Charlene E. Clinton, Deceased, Plaintiff–Respondent,
v.
Richard W. PRETORIUS, M.D., et al., Defendants,
Rizwana Lilani, M.D., Andrew Bognanno, M.D., Leizl F. Sapico, M.D., Clement Ayanbadejo, M.D., and Venkata Puppala, M.D., Defendants–Appellants.

March 22, 2013.

Synopsis
Background: Estate administratrix brought action against county hospital and several doctors employed at hospital, alleging medical malpractice and wrongful death. The Supreme Court, Erie County, John M. Curran, J., denied defendants' motion to dismiss suit as against those doctors who were allegedly neither served with notice of claim nor named in notice. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, Scudder, J., held that:

[1] notice of claim statute did not require service of notice on individual doctors, and

[2] notice of claim statute did not require notice to name individual doctors, abrogating *Rew v. County of Niagara*, 73 A.D.3d 1463, 900 N.Y.S.2d 234, and *Cropsey v. County of Orleans Indus. Dev. Agency*, 66 A.D.3d 1361, 886 N.Y.S.2d 290.

Affirmed.

West Headnotes (6)

[1] **Counties** Notice, Demand, or Presentation of Claim
Health Notice

Statute requiring notice of claim for suits alleging negligence or malfeasance of public officers did not require estate administratrix to serve such notice on doctors employed at county hospital in suit alleging medical malpractice and wrongful death; administratrix served notice of claim on hospital, as public corporation, according to statute's requirements, and statute unambiguously stated that service upon employees of such public corporations was not condition precedent to commencing suit against those employees. McKinney's General Municipal Law § 50–e(1)(b); McKinney's Public Authorities Law § 3641(1)(a).

11 Cases that cite this headnote

[2] **Counties** Form and sufficiency
Health Notice

In addition to information unambiguously required by notice of claim statute, estate administratrix was not further required to name individual doctors in notice of claim she served on county hospital before proceeding with suit for medical malpractice and wrongful death; underlying purpose of statute, to provide public corporation with sufficient information to investigate plaintiff's allegations, was served without requiring administratrix to name individual doctors in notice of claim; abrogating *Rew v. County of Niagara*, 73 A.D.3d 1463, 900 N.Y.S.2d 234, and *Cropsey v. County of Orleans Indus. Dev. Agency*, 66 A.D.3d 1361, 886 N.Y.S.2d 290. McKinney's General Municipal Law § 50–e(2).

34 Cases that cite this headnote

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[3] **Courts** Previous Decisions as Controlling or as Precedents

While stare decisis is the preferred course, that doctrine does not enjoin departure from precedent or preclude the overruling of earlier decisions.

[4] **Courts** Previous Decisions as Controlling or as Precedents

Generally, precedents involving statutory interpretation are entitled to great stability.

1 Cases that cite this headnote

[5] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Where a statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.

2 Cases that cite this headnote

[6] **Municipal Corporations** Notice or Presentation of Claims for Injury

Inasmuch as the notice of claim requirements before bringing a suit alleging negligence or malfeasance of public officers are in derogation of the plaintiff's common–law rights, the statute creating that requirement should be strictly construed in the plaintiff's favor. McKinney's General Municipal Law § 50–e.

15 Cases that cite this headnote

Attorneys and Law Firms

****540** Ricotta & Visco, Attorneys & Counselors at Law, Buffalo (K. John Bland of Counsel), for Defendants–Appellants.

Lipsitz Green Scime Cambria LLP, Buffalo (John A. Collins of Counsel), for Plaintiff–Respondent.

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

SCUDDER, P.J.

I

***208** In May 2009 Charlene E. Clinton (decedent) sought treatment ***209** at defendant Erie County Medical Center Corporation ****541** (ECMCC). She was admitted to ECMCC on May 7, 2009 and was discharged on May 12, 2009. Approximately five days later, decedent was transported by ambulance to ECMCC, and she died the next day. In August 2009, plaintiff served a notice of claim on ECMCC only, naming ECMCC as the sole defendant. Plaintiff thereafter commenced this action against, inter alia, Rizwana Lilani, M.D., Andrew Bognanno, M.D., Leizl F. Sapico, M.D., Clement Ayanbadejo, M.D., and Venkata Puppala, M.D. (collectively, Employee Defendants) and ECMCC (collectively, defendants). Defendants thereafter moved to dismiss the complaint against the Employee Defendants on the grounds that the Employee Defendants were neither served with the notice of claim nor named in the notice of claim (*see generally* General Municipal Law § 50–e). Supreme Court denied the motion and, for the reasons that follow, we conclude that the order should be affirmed.

II

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[1] First, as defendants correctly conceded at oral argument of this appeal, General Municipal Law § 50–e does not require service of a notice of claim on the Employee Defendants as a condition precedent to the commencement of this action. ECMCC is a public benefit corporation (*see* Public Authorities Law § 3628 *et seq.*) and, therefore, it is undisputed that the provisions of General Municipal Law § 50–e apply (*see* Public Authorities Law § 3641[1][a]; *see e.g. Stanfield v. Nohejl,* 182 A.D.2d 1138, 1138, 586 N.Y.S.2d 765). General Municipal Law § 50–e (1)(b) provides, in pertinent part, that

> "[s]ervice of the notice of claim upon an ... employee of a public corporation *shall not* be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim *upon the public corporation* shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law" (emphasis added).

It is undisputed that plaintiff served the notice of claim on ECMCC in accordance with the provisions of section 50–e (1)(b). Inasmuch as the statute unambiguously states that service upon the employees of ECMCC, i.e., the Employee Defendants, ***210** is not a condition precedent to the commencement of an action against the individual employees, there is no merit to defendants' initial contention on their motion that the failure to serve the Employee Defendants with the notice of claim requires dismissal of the complaint against them (*see generally* Public Authorities Law § 3641[1][a]; *Schiavone v. County of Nassau,* 51 A.D.2d 980, 981, 380 N.Y.S.2d 711, *affd.* 41 N.Y.2d 844, 393 N.Y.S.2d 701, 362 N.E.2d 252; *Sandak v. Tuxedo Union School Dist. No. 3,* 308 N.Y. 226, 230, 124 N.E.2d 295; *Delgado v. Connolly,* 246 A.D.2d 484, 485, 667 N.Y.S.2d 255). We thus note that, to the extent that our prior decision in *Rew v. County of Niagara,* 73 A.D.3d 1463, 1464, 901 N.Y.S.2d 442 suggests that service of a notice of claim upon an employee of a public corporation is a condition precedent to commencement of the action against such employee, that decision is no longer to be followed.

III

Second, defendants contend that, although service of the notice of claim on the Employee Defendants was not required, plaintiff was nevertheless required to name those individual defendants in the notice of claim as a condition precedent to the commencement of an action against ****542** them. Despite precedent supporting that contention, we agree with Supreme Court that there is no such requirement.

The requirements for a notice of claim are found in General Municipal Law § 50–e (2), which states:

> "The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his [or her] attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable ..."

The notice of claim filed by plaintiff against ECMCC contained all of the required information. Defendants correctly contend, however, that precedent from this Department and others requires that all of the Employee Defendants also be named in the notice of claim. While recognizing the importance of stare decisis, we now conclude that our prior cases were wrongly decided.

In both *Rew,* 73 A.D.3d at 1464, 901 N.Y.S.2d 442 and *Cropsey v. County of Orleans Indus. Dev. Agency,* 66 AD3d 1361, 1362, this Court wrote that General Municipal Law § 50–e bars the commencement ***211** of an action against an individual who has not been named in a notice of claim where such notice is required by law. The decision in *Rew* cited only *Cropsey* for that proposition, and the decision in *Cropsey* cited only *Tannenbaum v. City of New York,* 30 A.D.3d 357, 358, 819 N.Y.S.2d 4 in support of its statement to the same effect. In deciding *Tannenbaum,* the First Department cited only *White v. Averill Park Cent. Sch. Dist.,* 195 Misc.2d 409, 411, 759 N.Y.S.2d 641 [Sup. Ct., Rensselaer County 2003] [James B. Canfield, J.] in support of its statement that section 50–e "makes unauthorized an action against individuals who have not been named in a notice of claim" (*Tannenbaum,* 30 A.D.3d at 358, 819 N.Y.S.2d 4).

We can find no cases before *White* with such a holding. Indeed, in *Travelers Indem. Co. v. City of Yonkers,* 142 Misc.2d 334, 336, 537 N.Y.S.2d 429, one of the only reported cases addressing the issue prior to the decision in *White,* the court wrote that it was "not aware of any provision in the General Municipal Law [that] would require the plaintiff to name any officer, appointee or employee in a notice of claim where the municipality was

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so named as a party." Because *White* appears to be the first case to impose such a requirement, we begin our analysis with that case.

The decision in *White* is devoid of any legal authority supporting the Justice's view that individual employees must be named in a notice of claim as a condition precedent to the commencement of an action against them. The Justice who authored the decision in *White* concluded that, without naming the individual employees, the municipality does not have "enough information to enable [it] to adequately investigate the claim" (195 Misc.2d at 411, 759 N.Y.S.2d 641). He thus concluded that "permitting plaintiffs to prosecute causes of action against individuals who were not named in the[ ] notice of claim is contrary both to the letter and the purpose of [General Municipal Law § 50–e]" (*id.* at 412, 759 N.Y.S.2d 641).[1]

****543 *212** Although *White* has been cited in numerous published and unpublished trial level cases, the first Appellate Division case to cite *White* is *Tannenbaum,* 30 A.D.3d at 358, 819 N.Y.S.2d 4. In that case, the First Department wrote:

> "General Municipal Law § 50–e makes unauthorized an action against individuals who have not been named in a notice of claim (*see* [*White,* 195 Misc.2d at 411, 759 N.Y.S.2d 641]), thus warranting dismissal of the state claims against [the individual defendants] (*see Matter of Rattner v. Planning Commn. of Vil. of Pleasantville,* 156 A.D.2d 521, 526, 548 N.Y.S.2d 943 [1989], *lv. dismissed* 75 N.Y.2d 897, 554 N.Y.S.2d 831, 553 N.E.2d 1341 [1990])" (*id.* at 358, 819 N.Y.S.2d 4).

As noted above, the decision in *White* cited no legal authority for its holding and, although the First Department also cited to *Rattner,* 156 A.D.2d at 526, 548 N.Y.S.2d 943,[2] that case does not stand for the proposition that individual employees must be named in a notice of claim. *Rattner* merely held in relevant part that a notice of claim pursuant to General Municipal Law § 50–e is required for actions against individual parties where "it is clear that the [claims] were brought against them in their official capacities" (*id.* at 526, 548 N.Y.S.2d 943). That is because the purpose of a notice of claim is to permit governmental authorities to investigate claims expeditiously (*see Rosenbaum v. City of New York,* 8 N.Y.3d 1, 11, 828 N.Y.S.2d 228, 861 N.E.2d 43; *see generally Sandak,* 308 N.Y. at 232, 124 N.E.2d 295). Where the governmental entity would be required to indemnify the individual employees named in a lawsuit, that governmental entity must be afforded the same opportunity to investigate the claims made against the individuals. Thus, the issue in *Rattner,* 156 A.D.2d at 526, 548 N.Y.S.2d 943 was whether a notice of claim, to be served on the public corporation, was required at all, not whether the notice of claim needed to name the specific individual employees.

The First Department has recently reaffirmed its position in *Tannenbaum,* stating that an action could not proceed against ***213** individual defendants "because they were not named in the notice of claim" (*Cleghorne v. City of New York,* 99 A.D.3d 443, 446, 952 N.Y.S.2d 114). In that decision, the only case cited by the Court was *Tannenbaum.*

IV

Our first foray into the subject matter was our decision in *Cropsey.* In that case the plaintiff appealed from an order that, ****544** inter alia, granted that part of the defendants' motion to dismiss the complaint in its entirety as to an employee of the defendant County of Orleans Industrial Development Agency. In determining that Supreme Court properly granted that part of the motion, we wrote, " 'General Municipal Law § 50–e makes unauthorized an action against individuals who have not been named in a notice of claim' where such a notice of claim is required by law" (*Cropsey,* 66 A.D.3d at 1362, 886 N.Y.S.2d 290, quoting *Tannenbaum,* 30 A.D.3d at 358, 819 N.Y.S.2d 4).

In our next decision addressing the issue, we were called upon to decide whether a trial court properly denied an individual deputy's motion to dismiss the complaint against him (*Rew,* 73 A.D.3d at 1464, 901 N.Y.S.2d 442). We wrote:

> "General Municipal Law § 50–e bars an action against an individual who has not been named in a notice of claim only where such notice is required by law [citing *Cropsey,* 66 A.D.3d at 1362, 886 N.Y.S.2d 290]. The naming of a county employee in the notice of claim, and thus the service of the notice of claim upon the employee, 'is not a condition precedent to the commencement of an action against such person unless the county is required to indemnify such person' " (*id.* at 1464, 901 N.Y.S.2d 442, quoting *Bardi v. Warren County Sheriff's Dept.,* 194 A.D.2d 21, 23–24, 603 N.Y.S.2d 90, citing § 50–e [1] [b]).[3]

We ultimately held in *Rew* that a notice of claim was not required by law because the defendant County of Niagara had no duty to indemnify the individual deputy. The

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conduct of the deputy, as alleged by the plaintiff, " 'amount[ed] to [an] intentional tort[ ]' that [fell] outside the scope of his employment and thus [was] not encompassed within the duty to indemnify" (*id.* at 1464, 901 N.Y.S.2d 442).

***214** There is no doubt that, despite the absence of any statutory provision so holding, numerous cases have held that, where a notice of claim is required by law, a plaintiff must, as a condition precedent to the commencement of an action against individual employees of a public corporation, name those employees in the notice of claim. In support of her position that individual employees need not be named in a notice of claim, plaintiff notes the absence of any such requirement in General Municipal Law § 50–e and quotes from *Schiavone,* 51 A.D.2d at 981, 380 N.Y.S.2d 711 for the proposition that,

> "[o]n a purely practical basis, it is obvious that, uniquely in medical malpractice actions, a potential claimant may be unable to ascertain the perpetrators of the alleged malpractice within the 90–day notice period."

Schiavone dealt with a conflict between County Law former § 52(2), which then required service of the notice of claim on all individual employees as a condition precedent to the commencement of an action, and General Municipal Law § 50–d, which dealt with actions against government-employed physicians and required that service of a notice of claim be made pursuant to General Municipal Law § 50–e, i.e., only upon the municipal corporation (*Schiavone,* 51 A.D.2d at 981, 380 N.Y.S.2d 711). The Second Department determined that the failure to serve a notice of claim on resident physicians did not preclude the subsequent action against them (*id.*). Relying on *Sandak,* the Court wrote that, "[a]s in *Sandak,* the physicians in the instant case allegedly performed the acts complained of; they needed no advance notice, as does a municipality, to investigate facts of which they were unaware or ****545** to obtain information which subsequently might cease to be available" (*id.*).

The underlying issue in *Schiavone* concerned service of the notice of claim on the resident physicians, but the Court's rationale, i.e., recognizing that a plaintiff may not have an opportunity to identify the perpetrators of the tort in such a short period of time, applies equally to whether those individuals must be named in a notice of claim.

V

[2] The question for this Court is whether we should follow our prior decisions, based on the doctrine of stare decisis.

> "The doctrine of stare decisis recognizes that legal questions, once resolved, should not be reexamined every time they are presented ... The doctrine ... ***215** rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes ... Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Matter of Philadelphia Ins. Co. v. [Utica Natl. Ins. Group],* 97 A.D.3d 1153, 1155, 948 N.Y.S.2d 501 [internal quotation marks omitted]).

[3] While stare decisis is the preferred course, that doctrine "does not enjoin departure from precedent or preclude the overruling of earlier decisions" (*Matter of Simonson v. Cahn,* 27 N.Y.2d 1, 3, 313 N.Y.S.2d 97, 261 N.E.2d 246; *see Dufel v. Green,* 198 A.D.2d 640, 640–641, 603 N.Y.S.2d 624, *affd.* 84 N.Y.2d 795, 622 N.Y.S.2d 900, 647 N.E.2d 105). We previously wrote that,

> "[i]n our view, '[a]lthough due deference should be accorded the doctrine of stare decisis in order to promote consistency and stability in the decisional law, we should not blindly follow an earlier ruling [that] has been demonstrated to be unsound simply out of respect for that doctrine' ... '[T]he doctrine of [stare decisis], like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question' " (*Kash v. Jewish Home & Infirmary of Rochester, N.Y., Inc.,* 61 A.D.3d 146, 150, 873 N.Y.S.2d 819; *see Rumsey v. New York & New England R.R. Co.,* 133 N.Y. 79, 85, 30 N.E. 654; *see also Matter of Eckart,* 39 N.Y.2d 493, 498–499, 384 N.Y.S.2d 429, 348 N.E.2d 905).

[4] [5] [6] Although "[p]recedents involving statutory interpretation are entitled to great stability" (*People v. Hobson,* 39 N.Y.2d 479, 489, 384 N.Y.S.2d 419, 348 N.E.2d 894; *see Matter of Chalachan v. City of Binghamton,* 81 A.D.2d 973, 974, 439 N.Y.S.2d 754, *affd.* 55 N.Y.2d 989, 449 N.Y.S.2d 187, 434 N.E.2d 256), we conclude that the courts have misapplied or misunderstood the law in creating, by judicial fiat, a

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requirement for notices of claim that goes beyond those requirements set forth in the statute. If the legislature had intended that there be a requirement that the individual employees be named in the notices of claim, it could ***216** easily have created such a requirement. Indeed, the absence of such a requirement has previously been noted (*see Verponi v. City of New York,* 31 Misc.3d 1230[A], 2011 N.Y. Slip. Op. 50908 [U], *5, 2011 WL 1991719). It is a well-settled rule of statutory construction ****546** that, "where as here the statute describes the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' " (*Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York,* 41 N.Y.2d 205, 208–209, 391 N.Y.S.2d 544, 359 N.E.2d 1338, quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 240). Inasmuch as the notice of claim requirements are "in derogation of [a] plaintiff's common-law rights," the statute creating such a requirement should be strictly construed in the plaintiff's favor (*Sandak,* 308 N.Y. at 230, 124 N.E.2d 295).

Finally, as the Court of Appeals has often stated:

> "The test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the [municipality] to investigate' ... 'Nothing more may be required' ... Thus, in determining compliance with the requirements of General Municipal Law § 50–e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident" (*Brown v. City of New York,* 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078; *see e.g. Rosenbaum,* 8 N.Y.3d at 10–11, 828 N.Y.S.2d 228, 861 N.E.2d 43; *O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 358, 445 N.Y.S.2d 687, 429 N.E.2d 1158).

The underlying purpose of the statute may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim. We share the concern enunciated in *Schiavone,* 51 A.D.2d at 981, 380 N.Y.S.2d 711 that plaintiffs may not be able to meet that judicially-created requirement.

VI

Therefore, to the extent that our decisions in *Rew,* 73 A.D.3d at 1464, 901 N.Y.S.2d 442 and *Cropsey,* 66 A.D.3d at 1362, 886 N.Y.S.2d 290 held that General Municipal Law § 50–e bars an action against individuals who have not been named in a notice of claim, where such a notice is required by law, those cases are no longer to be followed. Accordingly, we conclude that the order denying defendants' motion to dismiss the complaint against the Employee Defendants should be affirmed.

***217** In view of our determination that the order should be affirmed, we do not address plaintiff's remaining contention.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

All Citations

105 A.D.3d 207, 962 N.Y.S.2d 539, 2013 N.Y. Slip Op. 01931

Footnotes

1 *White* and, subsequently, *Tannenbaum* have been followed by other trial level cases (*see e.g. Almas v. Loza,* 2011 N.Y. Slip Op. 32721[U], 2011 WL 5118136 [Sup. Ct., N.Y. County]; *Guzman v. City of New York,* 2011 N.Y. Slip Op. 30797[U], 2011 WL 1360334 [Sup. Ct., N.Y. County]; *Martire v. City of New York,* 2009 N.Y. Slip Op. 31648[U], 2009 WL 2350276 [Sup. Ct., N.Y. County]; *Gray v. City of New York,* 2006 N.Y. Slip Op. 30417[U], 2006 WL 6092934 [Sup. Ct., N.Y. County], *adhered to on rearg.* 2007 N.Y. Slip Op. 34198[U], 2007 WL 4639437 [Sup. Ct., N.Y. County]; *T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.,* 2012 WL 5992748, *8 [S.D.N.Y.]; *Edwards v. Jericho Union Free School Dist.,* 904 F.Supp.2d 294, 2012 WL 5817281, *9 [E.D.N.Y.]; *Alexander v. Westbury Union Free Sch. Dist.,* 829 F.Supp.2d 89, 110 [E.D.N.Y.2011]; *Dilworth v. Goldberg, M.D.,* 2011 WL 4526555, *6 [S.D.N.Y.]; *DC v. Valley Cent. Sch. Dist.,* 2011 WL 3480389, *1 [S.D.N.Y.]; *Schafer v. Hicksville Union Free Sch. Dist.,* 2011 WL 1322903, *11 [E.D.N.Y.]).

2 In their reply brief, defendants contend that, because the Court of Appeals dismissed the plaintiff's application for leave to appeal, they thus affirmed the appellate court's order. That contention lacks merit because a denial or dismissal of an application for leave to appeal is not the equivalent of an affirmance (*see e.g. Matter of Conservative Party of State of N.Y. v. New York State Bd. of Elections,* 88 N.Y.2d 998, 998, 648 N.Y.S.2d 868, 671 N.E.2d 1265; *Parillo v. Salvador,* 276 A.D.2d 1000, 1001, 714 N.Y.S.2d

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812, *lv. denied* 96 N.Y.2d 702, 722 N.Y.S.2d 794, 745 N.E.2d 1016; *Matter of Quirk v. Evans,* 116 Misc.2d 554, 556, 455 N.Y.S.2d 918).

3 We have previously addressed the erroneous statement regarding service, *supra*.

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Burch v. City of New York, E.D.N.Y., April 22, 2016

129 A.D.3d 1287
Supreme Court, Appellate Division, Third Department, New York.

Lenora PIERCE, Appellant–Respondent,
v.
Steven W. HICKEY et al., Respondents–Appellants.

June 11, 2015.

Synopsis
Background: Motorist brought personal injury action against county and county employee, seeking to recover damages for injuries she sustained when storm debris being transported by employee fell off of his truck and struck motorist in the head. The Supreme Court, Schoharie County, Connolly, J., denied motorist's and defendants' cross-motions for summary judgment, and they appealed.

Holdings: The Supreme Court, Appellate Division, Egan Jr., J., held that:

[1] motorist was not required to individually list employee on underlying notice of claim;

[2] county was not entitled to immunity; and

[3] defendants' failure to cover open truck constituted negligence per se.

Affirmed as modified.

West Headnotes (5)

[1] Automobiles Notice of claim for injury

Motorist was not required to individually list county employee on underlying notice of claim in order to bring claims against employee, in personal injury action against county and employee, seeking to recover damages for injuries she sustained when storm debris fell off of employee's truck and struck motorist in the head. McKinney's County Law § 52; McKinney's General Municipal Law § 50–e(2).

11 Cases that cite this headnote

[2] Automobiles Counties

In motorist's personal injury action, seeking to recover damages for injuries she sustained when she was struck in the head by storm debris that had fallen off of county employee's truck, county was not entitled to immunity under statute shielding political subdivisions from liability for any claim based upon exercise, performance, or failure to perform a discretionary function or duty; even if county made valid determination that removal of storm debris was a priority and that transporting such debris in open containers was the most efficient way to do so, it did not obviate the need to comply with provision of Vehicle and Traffic Law which required top of open truck to be secured with a cover. McKinney's Executive Law § 25(5); McKinney's Vehicle and Traffic Law § 380–a(1).

[3] Automobiles Requirements of statutes and ordinances in general

An unexcused violation of a provision of the Vehicle and Traffic Law constitutes negligence per se. McKinney's Vehicle and Traffic Law § 100 et seq.

[4] Judgment Torts

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On a motion for summary judgment in the context of a personal injury action involving an alleged violation of the Vehicle and Traffic Law, injured plaintiff first must demonstrate, among other things, that the defendant operated his or her vehicle in violation of the Vehicle and Traffic Law; assuming such a showing has been made, the burden then shifts to the defendant to tender sufficient admissible proof to raise a question of fact as to whether his or her violation of the relevant statute either did not actually occur or was excused. McKinney's Vehicle and Traffic Law § 100 et seq.

[5] **Automobiles**—Articles projecting, falling, or thrown from vehicle

Failure by county and county employee to cover open container on truck that was transporting storm debris, which resulted in motorist sustaining injuries when debris fell off of truck and struck her in the head, constituted negligence per se, absent showing that debris was arranged so that no loose substance could fall from the truck, such that cover was not required under Vehicle and Traffic Law. McKinney's Vehicle and Traffic Law § 380–a(1).

Attorneys and Law Firms

****322** Kenneth Goldblatt, Mohegan Lake (Lee Greenstein, Delmar, of counsel), for appellant-respondent.

Murphy, Burns, Barber & Murphy, LLP, Albany (James J. Burns of counsel), for respondents-appellants.

Before: LAHTINEN, J.P., GARRY, EGAN JR. and ROSE, JJ.

Opinion

EGAN JR., J.

***1288** Cross appeals from an order of the Supreme Court (Connolly, J.), entered September 26, 2014 in Schoharie County, which, among other things, denied plaintiff's motion for partial summary judgment.

On or about August 28, 2011, Hurricane Irene caused extensive flooding to homes, businesses and buildings located in and throughout, among other places, Schoharie County. A local state of emergency was declared and cleanup measures ensued. Thereafter, on or about September 7, 2011, Tropical Storm Lee struck Schoharie County, bringing with it additional rain and flooding and generating additional storm debris.

At all times relevant here, defendant Steven W. Hickey was a machine equipment operator employed by defendant County of Schoharie in its Department of Public Works (hereinafter DPW). On September 13, 2011, Hickey, who normally drove a closed container recycling truck for the County, was tasked with transporting open containers of storm debris—specifically, building debris from the DPW garage—on a truck to a nearby regional transfer station for disposal. As Hickey proceeded north on State Route 30A in the Town of Schoharie, Schoharie County, a pickup truck operated by plaintiff approached from the opposite direction. When the two vehicles were roughly parallel to one another, Hickey observed—through the driver's mirror—"something come off the truck." Hickey slowed his vehicle and came to a stop, whereupon he ****323** noticed various building materials—sheetrock, plywood and sections of two-by-fours—and other flood debris scattered across the pavement. One of those items of debris, variously described by plaintiff as "an honest to goodness piece of lumber" and "a really big board," flew through plaintiff's open driver's-side window and struck her in the head just behind her left ear.

Plaintiff thereafter commenced this personal injury action against defendants. Following joinder of issue and discovery, plaintiff moved for summary judgment on the issue of liability, contending that defendants failed to secure the top of the open container with some type of cover as required by Vehicle and Traffic Law § 380–a(1). Defendants then cross-moved for summary judgment dismissing the complaint, arguing, among other things, that they were immune from liability under Executive Law § 25(5). Supreme Court denied the parties' respective motions, prompting these appeals.

[1] Turning first to defendants' cross appeal, Supreme Court correctly concluded that plaintiff was not required to individually list Hickey on the underlying notice of claim. Simply put, neither County Law § 52 nor the

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provisions of ***1289** General Municipal Law §§ 50–e(2) and 50–i(2) require that an individual municipal employee be named in the notice of claim. Notably, the purpose underlying the notice of claim requirement—to provide a municipality with sufficient information to enable it to promptly investigate the subject claim and ascertain its potential exposure to liability (*see Brown v. City of New York,* 95 N.Y.2d 389, 394, 718 N.Y.S.2d 4, 740 N.E.2d 1078 [2000])—"may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim" (*Goodwin v. Pretorius,* 105 A.D.3d 207, 216, 962 N.Y.S.2d 539 [2013]). Thus, dismissal of the complaint against Hickey upon this ground was not warranted.

[2] Defendants' assertion that they are entitled to immunity under Executive Law § 25(5) is equally unavailing. Executive Law § 25 governs a municipality's allocation and use of governmental resources, e.g., equipment, supplies and/or personnel, upon the threat or occurrence of a local disaster. To that end, the statute provides that "[a] political subdivision shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee carrying out the provisions of this section" (Executive Law § 25 [5]). Citing, among other things, the looming public health crisis allegedly brought about by the large volume of debris generated in the wake of Hurricane Irene and Tropical Storm Lee, defendants contend that they cannot be held liable for the manner in which they elected to transport debris from the DPW garage on the date of plaintiff's accident.

As a starting point, we do not interpret Executive Law § 25 as being subject to the temporal limitations set forth in Executive Law § 24. Executive Law § 25 addresses the use and allocation of local government resources in response to the threat or occurrence of a disaster; the statute is silent as to the time frame within which such aid or resources may be accepted, allocated and/or rendered. Accordingly, we do not find that a municipality's powers under Executive Law § 25 may only be exercised during a declared state of emergency or in conjunction with a local emergency order (*see* Executive Law § 24[1], [2]).[1] This conclusion, however, is of little aid to defendants.

****324** Executive Law § 25(1) provides that, "[u]pon the threat or ***1290** occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his [or her] political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom." To be sure, this statute, which vests a political subdivision's chief executive "with the power to *respond* to a local disaster or the immediate threat of a disaster, ... reflects an awareness by the ... Legislature that in emergency situations prompt and immediate unilateral action is necessary to preserve and protect life and property" (*Matter of Prospect v. Cohalan,* 109 A.D.2d 210, 217–218, 490 N.Y.S.2d 795 [1985], *affd.* 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209 [1985] [citations omitted]). Consistent with that awareness, the statute further provides, as noted previously, that "[a] political subdivision shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee in carrying out the provisions of this section" (Executive Law § 25[5]).

In our view, the scope of the immunity conferred by Executive Law § 25 is clear. When faced with a disaster, a political subdivision's chief executive may, for example, decide where to set up a makeshift hospital or aid station, prioritize and determine which streets to clear or allocate supplies and personnel as he or she sees fit, and such discretionary determinations, in turn, will not serve as a basis upon which to expose the political subdivision to liability. In other words, a disgruntled homeowner who is confronted with a flooded basement and is living on an impassable residential street cannot seek to hold a locality liable for damages simply because its chief executive deemed it more important to first clear a path to the local hospital or to pump out the holding cells in the local police station. That said, the immunity conferred by Executive Law § 25(5) does not, to our analysis, grant a political subdivision carte blanche to perform a discretionary function in any manner that it sees fit—particularly in a manner that poses a danger to the traveling public. Here, a valid—and discretionary—determination may well have been made that the removal of storm debris from, among other locations, the DPW garage was a priority and, further, that transporting such debris in open containers was the most efficient and expeditious ***1291** way to do so. The discretionary nature of these broad, resource-based decisions, however, did not obviate the need for defendants to comply with the provisions of Vehicle and Traffic Law § 380–a(1) in terms of the actual transport of such debris. As the immunity conferred by Executive Law § 25(5) does not, in our view, extend to the particular facts of this case, Supreme Court properly denied defendants' cross motion for summary judgment dismissing plaintiff's complaint.

****325** [3] As for plaintiff's motion for summary judgment

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on the issue of liability, the case law makes clear that the unexcused violation of a provision of the Vehicle and Traffic Law constitutes negligence per se (*see McLeod v. Taccone,* 122 A.D.3d 1410, 1411, 997 N.Y.S.2d 555 [2014]; *Hazelton v. D.A. Lajeunesse Bldg. & Remodeling, Inc.,* 38 A.D.3d 1071, 1072, 832 N.Y.S.2d 114 [2007]; *Baker v. Joyal,* 4 A.D.3d 596, 597, 771 N.Y.S.2d 269 [2004], *lv. denied* 2 N.Y.3d 706, 781 N.Y.S.2d 287, 814 N.E.2d 459 [2004]). Here, plaintiff alleged that defendants violated Vehicle and Traffic Law § 380–a (1), which provides that "[i]t shall be unlawful to operate on any public highway any open truck or trailer being utilized for the transportation of any loose substances, unless said truck or trailer has a cover, tarpaulin or other device of a type and specification ... which completely closes in the opening on ... said truck or trailer while said truck or trailer shall be so operated, so as to prevent the falling of any such substances therefrom. However, if the load is arranged so that no loose substance can fall from or blow out of such truck, the covering is not necessary."[2]

[4] On a motion for summary judgment in the context of a personal injury action, the injured plaintiff first must demonstrate, among other things, that the defendant operated his or her vehicle in violation of the Vehicle and Traffic Law; assuming such a showing has been made, the burden then shifts to the defendant to tender sufficient admissible proof to raise a question of fact as to whether his or her violation of the relevant statute either did not actually occur or was excused (*see* ***1292** *e.g. Hazelton v. D.A. Lajeunesse Bldg. & Remodeling, Inc.,* 38 A.D.3d at 1071–1072, 832 N.Y.S.2d 114; *Lowell v. Peters,* 3 A.D.3d 778, 780, 770 N.Y.S.2d 796 [2004]; *Luck v. Tellier,* 222 A.D.2d 783, 784–785, 634 N.Y.S.2d 814 [1995]; *McGraw v. Ranieri,* 202 A.D.2d 725, 726–727, 608 N.Y.S.2d 577 [1994]). Here, Vehicle and Traffic Law § 380–a(1) contains, to our reading, both an initial requirement—that a cover be utilized—as well as an exception/excuse for noncompliance—namely, that the load was arranged in such a fashion that no cover was necessary. Supreme Court interpreted this poorly written statute as imposing upon plaintiff the obligation to prove both that a cover was not used *and,* due to the manner in which the load was arranged, that a cover was in fact actually necessary.

[5] We disagree. In our view, in order to discharge her initial burden on her motion for summary judgment, plaintiff need only have shown that defendants failed to utilize a cover; at that point, the burden shifted to defendants to demonstrate that no statutory violation actually occurred because the load was arranged in such a manner that no cover was necessary. To hold otherwise would place a nearly insurmountable burden upon plaintiff, as the manner in which the container was loaded and the contents were arranged inevitably lies within the exclusive knowledge of defendants.

****326** Here, in support of her motion for summary judgment, plaintiff tendered, among other things, portions of Hickey's examination before trial testimony, wherein Hickey readily admitted—and defendants do not otherwise dispute—that the open container that Hickey was transporting on the day in question was not covered in any fashion. Such proof, in our view, was sufficient to demonstrate defendants' violation of Vehicle and Traffic Law § 380–a(1) in the first instance,[3] thereby shifting the burden to defendants to tender sufficient proof in admissible form to establish, insofar as is relevant here, that the load was arranged in such a fashion that no cover was required. This defendants failed to do. Hickey testified that the open container already was loaded upon his arrival at the DPW ***1293** garage and that he had no idea when—or by whom—the container had been loaded. Noticeably absent from the record is an affidavit from the County employee who loaded the container in question or, at the very least, an affidavit from someone who could attest to the general procedures and protocols followed in the loading of debris into such containers. As the record is entirely lacking in proof as to the manner in which the container was loaded and/or the debris deposited therein was arranged, it necessarily follows that defendants fell short of raising a question of fact as to the necessity for the otherwise statutorily required cover. Accordingly, plaintiff is entitled to summary judgment as to liability. The parties' remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as denied plaintiff's motion for summary judgment as to liability; said motion granted; and, as so modified, affirmed.

LAHTINEN, J.P., GARRY and ROSE, JJ., concur.

All Citations

129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. Slip Op. 04914

Footnotes

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1 Although we agree with defendants that the immunity set forth in Executive Law § 25(5) is not subject to the time limitations embodied in Executive Law § 24, we cannot help but note that, at the time of plaintiff's accident, defendants were not actively engaged in an effort to protect life and property; they were removing storm debris from the DPW garage. While this indeed may have been a necessary task and an important part of an overall effort to clean up the community and restore a full range of services to the County's residents, the immediate threat posed by Hurricane Irene and Tropical Storm Lee and the corresponding urgency associated with formulating an appropriate response thereto certainly had passed by the day of plaintiff's accident.

2 The legislative history underlying Vehicle and Traffic Law § 380–a reflects that it was enacted to prevent the very hazard encountered by plaintiff here, i.e., flying or falling debris capable of causing personal injury or property damage (*see* Sponsor's Mem., Bill Jacket, L. 1975, ch. 418, § 1). Notably, in a letter of support characterizing the bill as "a welcomed advancement in highway safety control," the State Police observed that "a piece of gravel falling from a truck going 55 [miles per hour] and spilling onto a vehicle going a similar speed in the opposite direction has the potential force of a discharged bullet" (State Police Mem. in Support, Bill Jacket, L. 1975, ch. 418, § 1). For his part, Hickey readily acknowledged that the use of a cover was considered to be a safety measure, stating, "I would have used [a cover] if I had one ... [b]ecause it would have been safer."

3 Even assuming that plaintiff was required to make a threshold showing that—due to the manner in which the debris was loaded/arranged—a cover indeed was necessary, we would find that plaintiff made such a showing here. Hickey admitted that he looked into the top of the open container prior to leaving the DPW garage on the day in question and that such container was "loaded right up to the top." As noted previously, Hickey also testified that he saw debris fly off the truck and thereafter observed debris scattered across the roadway. Under these circumstances, we would have no trouble concluding that plaintiff made a prima facie showing that a cover was required to protect the traveling public from the obvious hazard posed by falling and/or flying debris.

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Declined to Extend by Wiggins v. City of New York, N.Y.Sup., July 31, 2020

148 A.D.3d 1101
Supreme Court, Appellate Division, Second Department, New York.

Tyrone BLAKE, et al.,
respondents-appellants,
v.
CITY OF NEW YORK, et al.,
appellants-respondents.

March 29, 2017.

Synopsis
Background: Arrestees brought cause of action against municipality, individual municipal police officers, and district and assistant district attorneys to recover for alleged violation of their civil rights, as well as on common law false arrest and malicious prosecution theories. The Supreme Court, Queens County, Flug, J., 43 Misc.3d 1212(A), 990 N.Y.S.2d 436, 2014 WL 1419335, denied defendants' motion to dismiss certain causes of action, denied, as premature, defendants' motion for summary judgment on other claims, and granted arrestees' cross-motion to compel compliance with certain discovery demands, and appeal was taken.

Holdings: The Supreme Court, Appellate Division, held that:

[1] district attorney and assistant district attorney were absolutely immune on malicious prosecution claims arising out of their activities in processing criminal charges after the plaintiffs' arrest;

[2] notice of claim was not a condition precedent to maintaining cause of action under § 1983;

[3] arrestee's failure to name, in his notice of claim, the individual municipal police officers who had allegedly violated his rights by falsely arresting him did not prevent arrestee from subsequently maintaining action against these officers for false arrest and malicious prosecution; and

[4] police officers' motion for summary judgment dismissing arrestees' remaining malicious prosecution and false arrest causes of action was premature.

Modified and affirmed as modified.

West Headnotes (10)

[1] **Civil Rights**🔑Acts of officers and employees in general; vicarious liability and respondeat superior in general

Municipality may not be held liable in cause of action under § 1983 solely on theory of respondeat superior. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[2] **Civil Rights**🔑Governmental Ordinance, Policy, Practice, or Custom

To hold a municipality liable under § 1983 for conduct of employees below the policymaking level, plaintiff must show that violation of his or her constitutional rights resulted from municipal custom or policy. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[3] **District and Prosecuting Attorneys**🔑Liabilities for official acts, negligence, or misconduct

Prosecutor is entitled to absolute immunity for actions taken within scope of his or her official duties in initiating and pursuing a criminal prosecution and in presenting the People's case, but is entitled only to qualified immunity when acting in investigatory capacity.

4 Cases that cite this headnote

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[4] **District and Prosecuting Attorneys**➤Liabilities for official acts, negligence, or misconduct

District attorney and assistant district attorney were absolutely immune on malicious prosecution claims arising out of their activities in processing criminal charges after the plaintiffs' arrest, based upon evidence that had been assembled, not by district attorney or assistant district attorney, but by police.

1 Cases that cite this headnote

[5] **Municipal Corporations**➤Requirement as mandatory or condition precedent

Notice of claim was not a condition precedent to maintaining cause of action under § 1983, so that plaintiff's failure to name municipal police officers in his notice of claim did not warrant dismissal of his § 1983 claims against these officers. 42 U.S.C.A. § 1983.

9 Cases that cite this headnote

[6] **Municipal Corporations**➤Necessity and purpose

Purpose of notice of claim requirement of General Municipal Law is to notify municipality, and not individual municipal employees named as defendants, so that arrestee's failure to name, in his notice of claim, the individual municipal police officers who had allegedly violated his rights by falsely arresting him did not prevent arrestee from subsequently maintaining action against these officers for false arrest and malicious prosecution. McKinney's General Municipal Law § 50–e.

9 Cases that cite this headnote

[7] **Arrest**➤Identification or description of offender or vehicle

Municipal police officers named as defendants in civil rights and common law false arrest action made prima facie showing that they had probable cause to make arrests, and thus were not liable to arrestees under § 1983 or on common law false arrest theory, based on complainant's eyewitness identification of arrestees as his assailants. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[8] **Malicious Prosecution**➤Finding of grand jury

Grand jury's indictment resulted in presumption that there was probable cause to believe that indictees had committed a crime and prevented indictees from pursuing a malicious prosecution claim against municipal police officers absent a showing either that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures, or that indictment was procured by fraud, perjury, suppression of evidence or other police conduct undertaken in bad faith.

2 Cases that cite this headnote

[9] **Judgment**➤Matters Affecting Right to Judgment

When facts essential to justify opposition to motion for summary judgment are exclusively within knowledge and control of movant, summary judgment may be denied, especially where the opposing party has not had reasonable opportunity for disclosure prior to the making of motion. McKinney's CPLR 3212(f).

1 Cases that cite this headnote

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[10] **Judgment** Hearing and determination

Municipal police officers' motion for summary judgment dismissing arrestees' remaining malicious prosecution and false arrest causes of action was premature, where arrestees had not yet had opportunity for discovery, and facts necessary to overcome officers' prima facie showing of existence of probable cause was within knowledge and control of officers. McKinney's CPLR 3212(f).

1 Cases that cite this headnote

Attorneys and Law Firms

****542** Zachary W. Carter, Corporation Counsel, New York, NY (Pamela Seider Dolgow, Alison E. Estess, and Kathy Chang Park of counsel), for appellants-respondents.

Rubert & Gross, P.C., New York, NY (Soledad Rubert of counsel), for respondents-appellants.

MARK C. DILLON, J.P., SYLVIA O. HINDS–RADIX, JOSEPH J. MALTESE, and BETSY BARROS, JJ.

Opinion

***1102** In a consolidated action, inter alia, to recover damages for false arrest, malicious prosecution, and civil rights violations pursuant to 42 U.S.C. § 1983, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Flug, J.), entered April 25, 2014, as denied those branches of their motion which were pursuant to CPLR 3211(a)(7) to dismiss the fourth cause of action of the plaintiff Dwayne Johnson and the plaintiffs' ninth, tenth, and eleventh causes of action in their entirety, denied, as premature, those branches of their motion which were for summary judgment dismissing the plaintiffs' second, third, fourth, ninth, tenth, and eleventh causes of action in their entirety, and granted that branch of the plaintiffs' cross motion which was to compel them to comply with certain discovery demands, and the plaintiffs cross-appeal from so much of the same order as granted those branches of the defendants' motion which were pursuant to CPLR 3211(a)(7) to dismiss the second and third causes of action of the plaintiff Tyrone Blake insofar as asserted against the defendants Sgt. James Hanrahan, Sgt. Sean O'Hara, and Lt. Mic Miltenberg, and the fourth cause of action of the plaintiff Tyrone Blake.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof denying those branches of the defendants' motion which were for summary judgment dismissing the plaintiffs' fourth causes of action and the plaintiffs' ninth and tenth causes of action insofar as asserted against the defendants Richard A. Brown and Brian F. Allen on the ground of absolute immunity, and substituting therefor a provision granting those branches of the motion, (2) by deleting the provision thereof granting that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the fourth cause of action of the plaintiff Tyrone Blake, and substituting therefor a provision denying that branch of the motion as academic, and (3) by deleting the provision thereof granting those branches of the defendants' motion which were pursuant to CPLR 3211(a)(7) to dismiss the second and third causes of action of the plaintiff Tyrone Blake insofar as asserted against the defendants Sgt. James Hanrahan, Sgt. Sean O'Hara, and Lt. Mic Miltenberg, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The plaintiffs, Tyrone Blake and Dwayne Johnson, were arrested and indicted for their alleged role in a shooting incident that took place on October 6, 2008, in Queens County. Although ***1103** the complainant initially told the police that he could not identify the perpetrators because they wore face masks that only revealed ****543** their eyes, he later identified the plaintiffs as his assailants in two separate photographic arrays shown to him by the police. The defendant Det. John Roberts created the photographic arrays based upon information given to him by a suspect arrested in connection with a different incident. This informant later denied ever making a statement to the police regarding the plaintiffs' involvement in the shooting. The plaintiffs were incarcerated for approximately 16 months while the charges were pending. The charges were ultimately dismissed because the complainant refused to testify at their trial.

The plaintiffs each commenced a separate action against the same defendants—the City of New York, five individual police officers, and Queens County District Attorney Richard A. Brown and Assistant District Attorney Brian F. Allen (hereinafter together the District

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Attorney defendants)—asserting the same 12 causes of action to recover damages for, inter alia, false arrest, malicious prosecution, and civil rights violations pursuant to 42 U.S.C. § 1983. The two actions were subsequently consolidated. Thereafter, the defendants moved pursuant to CPLR 3211(a)(7) to dismiss the complaints or, in the alternative, for summary judgment dismissing the complaints, and the plaintiffs cross-moved, inter alia, to compel the defendants to comply with certain discovery demands. In the order appealed from, the Supreme Court, inter alia, granted those branches of the defendants' motion which were to dismiss Blake's causes of action alleging common-law false arrest and malicious prosecution insofar as asserted against the defendants Sgt. James Hanrahan, Sgt. Sean O'Hara, and Lt. Mic Miltenberg, and Blake's cause of action alleging common-law malicious prosecution against the District Attorney defendants, for failure to name these defendants in his notice of claim. The court denied those branches of the defendants' motion which were to dismiss the plaintiffs' remaining causes of action alleging malicious prosecution against the District Attorney defendants on the ground of absolute immunity. The court also denied those branches of the defendants' motion which were to dismiss or, alternatively, for summary judgment dismissing the plaintiffs' remaining causes of action alleging common-law false arrest and malicious prosecution and their causes of action alleging violations of 42 U.S.C. § 1983 predicated on false arrest and malicious prosecution, and it granted that branch of the plaintiffs' cross motion which was to compel the defendants to comply with certain discovery demands (*see Blake v. City of* ***1104** *New York,* 43 Misc.3d 1212 [A], 2014 N.Y. Slip Op. 50583[U], 2014 WL 1419335 [Sup. Ct., Queens County]).

[1] [2] When dismissal is sought pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez,* 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Breytman v. Olinville Realty, LLC,* 54 A.D.3d 703, 703–704, 864 N.Y.S.2d 70). A municipality may not be held liable pursuant to 42 U.S.C. § 1983 solely on a theory of respondent superior (*see Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611). "To hold a municipality liable under section 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy" (*Vargas v. City of New York,* 105 A.D.3d 834, 837, 963 N.Y.S.2d 278, citing *Monell v. New York City Dept.* ****544** *of Social Servs.,* 436 U.S. at 694, 98 S.Ct. 2018, 56 L.Ed.2d 611; *see Elie v. City of New York,* 92 A.D.3d 716, 717, 938 N.Y.S.2d 595).

Here, despite the defendants' contentions to the contrary, the allegations in the complaints sufficiently allege that the City maintained a policy or custom that caused the plaintiffs to be subjected to a denial of their constitutional rights (*see Monell v. New York City Dept. of Social Servs.,* 436 U.S. at 694, 98 S.Ct. 2018, 56 L.Ed.2d 611; *Vargas v. City of New York,* 105 A.D.3d at 836, 963 N.Y.S.2d 278; *Elie v. City of New York,* 92 A.D.3d at 717, 938 N.Y.S.2d 595; *Jackson v. Police Dept. of City of N.Y.,* 192 A.D.2d 641, 596 N.Y.S.2d 457; *see generally Pendleton v. City of New York,* 44 A.D.3d 733, 737, 843 N.Y.S.2d 648). Accordingly, the complaints state a cause of action against the City to recover damages for a violation of 42 U.S.C. § 1983, and the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss those causes of action.

[3] [4] "[A]prosecutor is entitled to absolute immunity for actions taken within the scope of his or her official duties in initiating and pursuing a criminal prosecution and in presenting the People's case," but a prosecutor is entitled only to qualified immunity when acting in an investigatory capacity (*Spinner v. County of Nassau,* 103 A.D.3d 875, 877, 962 N.Y.S.2d 222; *see Johnson v. Kings County Dist. Attorney's Off.,* 308 A.D.2d 278, 285, 763 N.Y.S.2d 635). Here, the complaints allege activities in processing criminal charges after the plaintiffs' arrest by police based upon evidence assembled by police. Therefore, the District Attorney defendants are entitled to absolute immunity (*see Dann v. Auburn Police Dept.,* 138 A.D.3d 1468, 1469, 31 N.Y.S.3d 335). Accordingly, ***1105** the Supreme Court should have awarded the defendants summary judgment dismissing the plaintiffs' fourth causes of action, alleging common-law malicious prosecution against the District Attorney defendants, and the plaintiffs' ninth and tenth causes of action, alleging civil rights violations pursuant to 42 U.S.C. § 1983, insofar as asserted against the District Attorney defendants, on the basis of absolute immunity (*see Spinner v. County of Nassau,* 103 A.D.3d at 877, 962 N.Y.S.2d 222; *Johnson v. Kings County Dist. Attorney's Off.,* 308 A.D.2d at 285, 763 N.Y.S.2d 635). Inasmuch as the court should have awarded summary judgment dismissing Blake's fourth cause of action on the ground of absolute immunity, that branch of the defendants' motion which was to dismiss that cause of action pursuant to CPLR 3211(a)(7) was rendered academic.

[5] Blake's failure to name Hanrahan, O'Hara, and

Miltenberg in his notice of claim did not warrant dismissal of his ninth and tenth causes of action, alleging civil rights violations pursuant to 42 U.S.C. § 1983, insofar as asserted against them, since a notice of claim is not a condition precedent to maintaining a cause of action pursuant to 42 U.S.C. § 1983 (*see Vargas v. City of New York,* 105 A.D.3d at 836, 963 N.Y.S.2d 278). Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were to dismiss Blake's ninth and tenth causes of action insofar as asserted against those individual defendants.

[6] Furthermore, Blake's failure to name Hanrahan, O'Hara, and Miltenberg in his notice of claim did not warrant dismissal of his second and third causes of action, alleging common-law false arrest and malicious prosecution, respectively, insofar as asserted against those individuals.

****545** We recognize that there is a split in appellate authority on the issue of whether a plaintiff is required to name individual municipal employees in a notice of claim in order to maintain a subsequent action against those employees. The Appellate Division, First Department, has held that "General Municipal Law § 50–e makes unauthorized an action against individuals who have not been named in a notice of claim" (*Tannenbaum v. City of New York,* 30 A.D.3d 357, 358, 819 N.Y.S.2d 4, citing *White v. Averill Park Cent. School Dist.,* 195 Misc.2d 409, 411, 759 N.Y.S.2d 641 [Sup. Ct., Rensselaer County]). In *Alvarez v. City of New York,* 134 A.D.3d 599, 22 N.Y.S.3d 362, the First Department explained in a plurality opinion that its rationale for so holding is that a notice of claim which does not put the municipality on notice that it will seek to impose liability upon specific employees in their individual capacities is insufficient to allow the municipality to make a timely investigation into and assessment of the merits of the ***1106** claim against those employees. The plurality opinion in that case stated that the names of individual employees, if unknown, should still be named as John or Jane Does to enable the municipality to properly investigate the claims and to put individual defendants on notice that they will be sued. However, the purpose of the notice of claim requirement is to notify the municipality, not the individual defendants (*see Zwecker v. Clinch,* 279 A.D.2d 572, 573, 720 N.Y.S.2d 150).

In contrast, the Appellate Division, Fourth Department, has held that naming individual municipal employees in a notice of claim is not a condition precedent to joining those individuals as defendants in the action (*see Goodwin v. Pretorius,* 105 A.D.3d 207, 962 N.Y.S.2d 539). In *Goodwin,* the Fourth Department noted that General Municipal Law § 50–e(2), which sets forth the requirements for a notice of claim, does not include a requirement that specific individual employees be named, and concluded that "[t]he underlying purpose of the statute may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim" (*id.* at 216, 962 N.Y.S.2d 539). In *Pierce v. Hickey,* 129 A.D.3d 1287, 1289, 11 N.Y.S.3d 321, the Appellate Division, Third Department, followed *Goodwin,* stating that there was no requirement that "an individual municipal employee be named in the notice of claim."

We agree with the Third and Fourth Departments. General Municipal Law § 50–e(2) requires that "[t]he notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable." Listing the names of the individuals who allegedly committed the wrongdoing is not required (*see Scott v. City of New Rochelle,* 44 Misc.3d 366, 377–378, 986 N.Y.S.2d 819 [Sup. Ct., Westchester County]). Accordingly, the Supreme Court should not have granted dismissal of Blake's second and third causes of action, alleging common-law false arrest and malicious prosecution, respectively, insofar as asserted against Hanrahan, O'Hara, and Miltenberg for failure to name these defendants in his notice of claim.

[7] [8] The defendants established their prima facie entitlement to judgment as a matter of law dismissing the plaintiffs' second causes of action, alleging common-law false arrest, and so much of their ninth and tenth causes of action, alleging civil rights violations pursuant to ****546** 42 U.S.C. § 1983, as is predicated on allegations of false arrest, based upon the complainant's ***1107** identification of the plaintiffs as his assailants (*see Combs v. City of New York,* 130 A.D.3d 862, 863, 15 N.Y.S.3d 67; *MacDonald v. Town of Greenburgh,* 112 A.D.3d 586, 586, 976 N.Y.S.2d 189; *Holland v. City of Poughkeepsie,* 90 A.D.3d 841, 845, 935 N.Y.S.2d 583). Similarly, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the plaintiffs' third causes of action, alleging common-law malicious prosecution, and so much of their ninth and tenth causes of action as is predicated on allegations of malicious prosecution, since the grand jury's indictment of the plaintiffs established a presumption of probable cause that the plaintiffs committed a crime (*see Colon v. City of New York,* 60 N.Y.2d 78, 82–84, 468 N.Y.S.2d 453, 455 N.E.2d 1248; *De Lourdes Torres v. Jones,* 120 A.D.3d

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572, 574, 992 N.Y.S.2d 39, *mod.* 26 N.Y.3d 742, 27 N.Y.S.3d 468, 47 N.E.3d 747). To overcome that presumption, the plaintiffs were required to provide evidence proving either "that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures" (*De Lourdes Torres v. Jones,* 120 A.D.3d at 574, 992 N.Y.S.2d 39 [internal quotation marks omitted]), or "that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" (*Colon v. City of New York,* 60 N.Y.2d at 83, 468 N.Y.S.2d 453, 455 N.E.2d 1248; *see De Lourdes Torres v. Jones,* 120 A.D.3d at 574, 992 N.Y.S.2d 39; *O'Donnell v. County of Nassau,* 7 A.D.3d 590, 591, 775 N.Y.S.2d 902).

[9] [10] In opposition to the defendants' prima facie showing, the plaintiffs contended that the reliability of the identifications and the reasonableness of the reliance by the police on them was called into question by the complainant's initial statements that he could not identify the perpetrators, and they could not rebut the presumption of probable cause because they have been unable to depose any of the defendants. Pursuant to CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Baron v. Incorporated Vil. of Freeport,* 143 A.D.2d 792, 792–793, 533 N.Y.S.2d 143 [citation omitted]). Here, the plaintiffs showed that they have not yet had an adequate opportunity to complete discovery relevant to their remaining causes of action alleging malicious prosecution and false arrest. Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were for summary judgment dismissing the plaintiffs' remaining malicious prosecution and false arrest causes of action as premature. Further, the defendants' argument that summary judgment ***1108** should have been granted dismissing the plaintiffs' remaining causes of action alleging violations of 42 U.S.C. § 1983 based upon the doctrine of qualified immunity is without merit, since summary judgment on that issue is also premature.

The defendants' remaining contentions are without merit.

All Citations

148 A.D.3d 1101, 51 N.Y.S.3d 540, 2017 N.Y. Slip Op. 02399

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153 A.D.3d 1301
Supreme Court, Appellate Division, Second Department, New York.

Clifton WILLIAMS, appellant,
v.
CITY OF NEW YORK, et al., respondents.

Sept. 13, 2017.

Synopsis
Background: Arrestee brought action against city and a detective, alleging false arrest, false imprisonment, and malicious prosecution, as well as § 1983 claims. The Supreme Court, Queens County, Flug, J., granted defendants' motion for summary judgment. Arrestee appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court erred in determining that eyewitness's affidavit raised new theory of liability for first time in opposition to summary judgment;

[2] issue of material fact existed as to whether police and assistant district attorney coerced a false identification;

[3] arrestee's failure to name detective in notice of claim form did not warrant dismissal of claims against detective;

[4] claims of false arrest and false imprisonment against city and detective accrued when arrestee was released from confinement; and

[5] malicious prosecution claim accrued when underlying criminal proceeding against arrestee was terminated.

Affirmed as modified.

West Headnotes (12)

[1] Civil Rights Arrest and detention

Civil Rights Criminal prosecutions
False Imprisonment Probable cause
Malicious Prosecution Necessity

The existence of probable cause constitutes a complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution and causes of action asserted pursuant to § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law that are the federal-law equivalents of state common-law false arrest and malicious prosecution causes of action. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[2] False Imprisonment Presumptions and burden of proof

While an indictment creates a presumption of probable cause, as would preclude a claim for false arrest, such presumption may be overcome by evidence establishing either that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures or that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith. U.S.C.A. Const.Amend. 4.

[3] Judgment Motion or Other Application

Trial court erred in determining that eyewitness's summary judgment affidavit raised new theory of liability for first time in arrestee's opposition to summary judgment on his claims of false arrest and malicious prosecution, where affidavit supported arrestee's allegations of lack of probable cause by asserting that police and assistant district attorney coerced him to make false identification of arrestee. U.S.C.A. Const.Amend. 4.

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[4] **Judgment** Tort cases in general

Genuine issue of material fact existed as to whether police and assistant district attorney coerced a false identification from eyewitness, and thus lacked probable cause to arrest, detain, and prosecute arrestee, precluding summary judgment in favor of city and detective in arrestee's claims of false arrest, false imprisonment, and malicious prosecution. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[5] **Judgment** Public officers and employees, cases involving

Genuine issue of material fact existed as to whether detective's evaluation of probable cause was objectively reasonable, precluding summary judgment in favor of detective on qualified immunity grounds, in arrestee's lawsuit alleging false arrest, false imprisonment, and malicious prosecution. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[6] **Municipal Corporations** Form and sufficiency

Arrestee's failure to name detective in notice of claim form against city did not warrant dismissal of his claims against detective for false arrest, false imprisonment, and malicious prosecution, since notice statute did not require notice of claim to list names of individuals who allegedly committed the wrongdoing. McKinney's General Municipal Law § 50–e(2).

1 Cases that cite this headnote

[7] **Municipal Corporations** Necessity and purpose

The purpose underlying the notice of claim requirement is to provide a municipality with sufficient information to enable it to promptly investigate the claim and ascertain its potential exposure to liability. McKinney's General Municipal Law § 50–e(1)(a).

1 Cases that cite this headnote

[8] **Limitation of Actions** Torts

Arrestee's common-law claims of false arrest and false imprisonment against city and detective accrued, and one year and 90 days statute of limitations began to run, when arrestee was released from confinement. McKinney's General Municipal Law § 50–i(1)(c).

3 Cases that cite this headnote

[9] **Limitation of Actions** Torts

Arrestee's common-law claim of malicious prosecution against city and detective accrued, and one year and 90 days statute of limitations began to run, when underlying criminal proceeding against him was terminated. McKinney's General Municipal Law § 50–i(1)(c).

3 Cases that cite this headnote

[10] **Limitation of Actions** Civil rights

Cause of action for civil rights violations pursuant to § 1983 accrues, and three-year statute of limitations begins to run, when the plaintiff knows or has reason to know of the injury which is the basis of his or her action. 42

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U.S.C.A. § 1983.

[11] Limitation of Actions Civil rights

Arrestee's § 1983 claims against city and detective arising from his arrest and prosecution accrued, and three-year limitations period began to run, under discovery rule, when arrestee was released from confinement. 42 U.S.C.A. § 1983.

[12] Appeal and Error Asserting conditions precedent to bringing suit

Issue of whether plaintiff timely filed notice of claim against city, which was raised for first time on appeal, was not properly before appellate court. McKinney's General Municipal Law § 50–e(1)(a).

1 Cases that cite this headnote

Attorneys and Law Firms

****403** Miller & Miller, Brooklyn, N.Y. (Andrew R. Miller of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York, N.Y. (Scott Shorr and Kathy Chang Park of counsel), for respondents.

RUTH C. BALKIN, J.P., JEFFREY A. COHEN, SYLVIA O. HINDS–RADIX, and JOSEPH J. MALTESE, JJ.

Opinion

***1301** In an action, inter alia, to recover damages for false arrest and malicious prosecution, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Flug, J.), entered May 7, 2015, as granted those branches of the defendants' motion which were for summary judgment dismissing the state common-law causes of action alleging false arrest, false imprisonment, and malicious prosecution, and the cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting those branches of the defendants' motion which were for summary judgment dismissing the state common-law cause of action alleging malicious prosecution and the cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

On April 23, 2008, the plaintiff was arrested by the New York City Police Department and detained at Rikers Island after a single eyewitness identified him as a shooter involved in a gunfight in South Jamaica, Queens. The eyewitness identified the plaintiff in both a statement to a detective and in testimony before a grand jury. The plaintiff was indicted on charges of criminal possession of a weapon in the second degree (two counts) and related crimes.

On December 11, 2009, after almost 20 months in jail, the plaintiff was released on his own recognizance. On June 30, 2010, the People moved to dismiss the charges against him because they were unable to locate the eyewitness after the eyewitness testified at the grand jury. On July 28, 2010, the charges were dismissed.

***1302** In September 2011, the plaintiff commenced this action against the City of New York and Detective Michael Failla of the New York City Police Department, asserting, inter alia, state common-law causes of action alleging false arrest, false imprisonment, and malicious prosecution, as well as a cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983.

The defendants moved for summary judgment dismissing the complaint. Among other things, the defendants argued that the state common-law causes of action alleging false arrest, false imprisonment, and malicious prosecution, and the cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983 must be dismissed because the eyewitness's ****404** identification statement to police and his grand jury testimony provided the defendants with probable cause to arrest, detain, and prosecute the plaintiff.

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In opposition, the plaintiff submitted a sworn affidavit from the eyewitness, dated September 9, 2011. The eyewitness averred that his statement and grand jury testimony had been fabricated and that this fabrication resulted from coercion by the police and an unnamed assistant district attorney (hereinafter ADA).

The Supreme Court granted the defendants' motion for summary judgment dismissing the complaint in its entirety, concluding that the defendants established, prima facie, their entitlement to judgment as a matter of law and that the plaintiff failed to raise a triable issue of fact as to whether they lacked probable cause for his arrest, detention, and prosecution. As pertinent to this appeal, the court concluded that the eyewitness's affidavit improperly raised a new theory of liability and, in any event, was insufficient because it presented feigned issues of fact. The court's determination left unresolved certain alternative contentions raised by the defendants in support of their summary judgment motion.

The plaintiff appeals from so much of the order as granted those branches of the defendants' motion which were for summary judgment dismissing the state common-law causes of action alleging false arrest, false imprisonment, and malicious prosecution, and the cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983. We modify.

[1] [2] "The existence of probable cause constitutes a complete defense to causes of action alleging false arrest, false imprisonment, and malicious prosecution" (*Paulos v. City of New York,* 122 A.D.3d 815, 817, 997 N.Y.S.2d 452; *see Shaw v. City of New York,* 139 A.D.3d 698, 699, 31 N.Y.S.3d 155; ***1303** *Batten v. City of New York,* 133 A.D.3d 803, 805, 20 N.Y.S.3d 160), and this includes "causes of action asserted pursuant to 42 U.S.C. § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law that are the federal-law equivalents of state common-law false arrest and malicious prosecution causes of action" (*Paulos v. City of New York,* 122 A.D.3d at 817, 997 N.Y.S.2d 452, citing, inter alia, *Betts v. Shearman,* 751 F.3d 78, 82 [2d Cir.]). While an indictment creates a presumption of probable cause, such presumption may be overcome by evidence establishing either " 'that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures' " (*Blake v. City of New York,* 148 A.D.3d 1101, 1107, 51 N.Y.S.3d 540, quoting *De Lourdes Torres v. Jones,* 120 A.D.3d 572, 574, 992 N.Y.S.2d 39, *mod.* 26 N.Y.3d 742, 27 N.Y.S.3d 468, 47 N.E.3d 747), or "that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" (*Colon v. City of New York,* 60 N.Y.2d 78, 83, 468 N.Y.S.2d 453, 455 N.E.2d 1248; *see Washington–Herrera v. Town of Greenburgh,* 101 A.D.3d 986, 989, 956 N.Y.S.2d 487; *O'Donnell v. County of Nassau,* 7 A.D.3d 590, 591, 775 N.Y.S.2d 902).

[3] Here, contrary to the Supreme Court's determination, the eyewitness's affidavit did not raise a new theory of liability (*see generally Mezger v. Wyndham Homes, Inc.,* 81 A.D.3d 795, 796, 916 N.Y.S.2d 641). The complaint alleged that the defendants arrested, detained, and prosecuted the plaintiff without probable cause and that they knew that the criminal complaint contained falsehoods. The eyewitness's affidavit, rather than raising a new theory of liability, supported these ****405** allegations by asserting that police and an ADA coerced the eyewitness to make a false identification of the plaintiff. Therefore, the court erred in concluding that the affidavit impermissibly asserted a new theory of liability for the first time in opposition to the defendants' summary judgment motion (*cf. Hubbard v. City of New York,* 84 A.D.3d 1313, 1314, 924 N.Y.S.2d 533; *Araujo v. Brooklyn Martial Arts Academy,* 304 A.D.2d 779, 780, 758 N.Y.S.2d 401; *Winters v. St. Vincent's Med. Ctr. of Richmond,* 273 A.D.2d 465, 711 N.Y.S.2d 892).

Further, contrary to the Supreme Court's determination, the eyewitness's affidavit did not present feigned issues of fact. The eyewitness did not give any prior testimony in this action (*cf. Paulos v. City of New York,* 122 A.D.3d at 817, 997 N.Y.S.2d 452; *Capasso v. Capasso,* 84 A.D.3d 997, 998, 923 N.Y.S.2d 199). Moreover, his affidavit did not contradict the plaintiff's prior testimony, including the plaintiff's deposition testimony that the eyewitness was "scared" when the police talked to him about the shooting. Accordingly, the court erred in determining that the affidavit presented feigned issues of fact (*cf.* ***1304** *Paulos v. City of New York,* 122 A.D.3d at 817, 997 N.Y.S.2d 452; *Keizer v. SCO Family of Servs.,* 120 A.D.3d 475, 477, 991 N.Y.S.2d 103).

[4] Considering all the evidence, including the eyewitness's affidavit, in the light most favorable to the plaintiff (*see Santelises v. Town of Huntington,* 124 A.D.3d 863, 865, 2 N.Y.S.3d 574), we conclude that he raised a triable issue of fact as to whether the defendants had probable cause to arrest, detain, and prosecute him. Specifically, the eyewitness's affidavit raised an issue of fact as to whether the police and the ADA coerced a false identification of the plaintiff or otherwise acted in bad faith (*see Colon v. City of New York,* 60 N.Y.2d at 82–83, 468 N.Y.S.2d 453, 455 N.E.2d 1248; *cf. Paulos v. City of New York,* 122 A.D.3d at 817, 997 N.Y.S.2d 452).

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The defendants also assert several alternative grounds for affirmance that the Supreme Court did not address because of its erroneous determination that the eyewitness's affidavit failed to raise a triable issue of fact regarding probable cause (*see generally Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 470 N.Y.S.2d 564, 458 N.E.2d 1241; *Smith v. New York City Hous. Auth.*, 124 A.D.3d 625, 626, 1 N.Y.S.3d 296).

[5] Contrary to the defendants' contention, in opposition to their prima facie showing, the plaintiff raised a triable issue of fact as to whether Detective Failla's evaluation of probable cause was objectively reasonable, thus precluding an award of summary judgment in Detective Failla's favor on the ground of qualified immunity (*see Holland v. City of Poughkeepsie*, 90 A.D.3d 841, 845–846, 935 N.Y.S.2d 583; *Doyle v. Rondout Val. Cent. School Dist.*, 3 A.D.3d 669, 671, 770 N.Y.S.2d 480).

[6] [7] The defendants' contention that the state common-law causes of action alleging false arrest, false imprisonment, and malicious prosecution must be dismissed insofar as asserted against Detective Failla because the plaintiff failed to name him in the notice of claim is unavailing. A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality (*see* General Municipal Law § 50–e[1][a]; *Se Dae Yang v. New York City Health & Hosps. Corp.*, 140 A.D.3d 1051, 1052, 35 N.Y.S.3d 350). The purpose underlying the notice of claim requirement is to provide a municipality with sufficient information to enable it to promptly investigate the claim and ascertain its potential exposure to liability (*see Brown v. City of New* ****406** *York*, 95 N.Y.2d 389, 393–394, 718 N.Y.S.2d 4, 740 N.E.2d 1078). General Municipal Law § 50–e(2) sets forth the criteria for the contents of a notice of claim. While we acknowledge a split in appellate authority on the issue, we have held that the plain language of General Municipal Law § 50–e(2) does not require a notice of claim to "[list] the names of the individuals who allegedly committed ***1305** the wrongdoing" (*Blake v. City of New York*, 148 A.D.3d at 1106, 51 N.Y.S.3d 540; *compare Pierce v. Hickey*, 129 A.D.3d 1287, 1289, 11 N.Y.S.3d 321, *with Alvarez v. City of New York*, 134 A.D.3d 599, 22 N.Y.S.3d 362, *and Tannenbaum v. City of New York*, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4).

[8] However, the defendants correctly contend that they were entitled to dismissal of the state common-law causes of action alleging false arrest and false imprisonment on the ground that they are time-barred. General Municipal Law § 50–i(1)(c) provides, in pertinent part, that no personal injury action shall be prosecuted or maintained against a city unless it is commenced within one year and 90 days after the happening of the event upon which the claim is based. Although causes of action to recover damages for intentional torts, such as false arrest and false imprisonment, are generally subject to a one-year period of limitations (*see* CPLR 215[3]), intentional tort causes of action asserted against municipal defendants must be commenced within the one–year–and–90–day statute of limitations contained in General Municipal Law § 50–i, which "takes precedence over the one-year period of limitations provided for in CPLR 215" (*Estate of Adkins v. County of Nassau*, 141 A.D.2d 603, 603, 529 N.Y.S.2d 524; *see Bosone v. County of Suffolk*, 274 A.D.2d 532, 533, 712 N.Y.S.2d 128; *Wright v. City of Newburgh*, 259 A.D.2d 485, 486, 686 N.Y.S.2d 74; *see also Ruggiero v. Phillips*, 292 A.D.2d 41, 44, 739 N.Y.S.2d 797). Here, the state common-law causes of action alleging false arrest and false imprisonment accrued upon the plaintiff's release from confinement at Rikers Island on December 11, 2009 (*see Williams v. CVS Pharmacy, Inc.*, 126 A.D.3d 890, 891, 6 N.Y.S.3d 78; *Bellissimo v. Mitchell*, 122 A.D.3d 560, 560, 995 N.Y.S.2d 603). The plaintiff did not file and serve his complaint until September 20, 2011. This was well beyond the one–year–and–90–day statute of limitations (*see Bellissimo v. Mitchell*, 122 A.D.3d at 560, 995 N.Y.S.2d 603; *Bonanno v. City of Rye*, 280 A.D.2d 630, 721 N.Y.S.2d 98; *Smith v. City of New York*, 388 F.Supp.2d 179, 184 [S.D.N.Y.]; *cf. Clark v. City of Ithaca*, 235 A.D.2d 746, 652 N.Y.S.2d 819).

[9] [10] [11] However, unlike the state common-law causes of action alleging false arrest and false imprisonment, the state common-law cause of action alleging malicious prosecution was not time-barred because the statute of limitations for that cause of action did not begin to run until the favorable termination of the underlying criminal proceeding on July 28, 2010 (*see Williams v. CVS Pharmacy, Inc.*, 126 A.D.3d at 891, 6 N.Y.S.3d 78). The cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983 is not time-barred because the statute of limitations for a cause of action pursuant to 42 U.S.C. § 1983 is three years (*see Owens v. Okure*, 488 U.S. 235, 251, 109 S.Ct. 573, 102 L.Ed.2d 594; *Rimany v. Town of* ***1306** *Dover*, 72 A.D.3d 918, 921, 904 N.Y.S.2d 422), and the cause of action "accrues when the plaintiff knows or has reason to know of the injury which is the basis of his or her action" (*Rimany v. Town of Dover*, 72 A.D.3d at 921, 904 N.Y.S.2d 422; *see Pearl v. City of Long Beach*, 296 F.3d 76, 80 [2d Cir.]; *see also Wallace v. Kato*, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973). ****407** Here, the causes of action alleging civil rights violations pursuant to 42 U.S.C. § 1983 accrued, at the earliest, on December 11, 2009, less than two years prior to the commencement of this action.

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[12] The defendants' contention that the plaintiff failed to file a timely notice of claim (*see* General Municipal Law § 50–e[1][a]) is improperly raised for the first time on appeal, and therefore, is not properly before this Court (*see Johnson v. City of New York,* 148 A.D.3d 1126, 1127, 50 N.Y.S.3d 461; *Robles v. Brooklyn Queens Nursing Home, Inc.,* 131 A.D.3d 1032, 1033, 16 N.Y.S.3d 275).

Accordingly, those branches of the defendants' motion which were for summary judgment dismissing the state common-law causes of action alleging false arrest and false imprisonment were properly granted, but on grounds different than those relied upon by the Supreme Court, and those branches which were for summary judgment dismissing the state common-law cause of action alleging malicious prosecution and the cause of action alleging civil rights violations pursuant to 42 U.S.C. § 1983 should have been denied.

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