

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 17-01159

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

LATOYIA BAITY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO AND THOMAS LEATHERBARROW,
DEFENDANTS-RESPONDENTS.

FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered February 18, 2015. The order, *inter alia*, granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action asserting various tort claims under state law against defendants as a result of being arrested, detained, and then released on August 7, 2006 without charges being filed. Plaintiff timely served a notice of claim against defendant City of Buffalo, and commenced this action against defendants on July 15, 2008. Plaintiff appeals from an order that, *inter alia*, granted defendants' motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint as time-barred. We affirm.

We reject plaintiff's contention that defendants waived their statute of limitations defense because their motion was made more than 60 days after interposing their answer. The 60-day waiver rule does not apply to motions to dismiss based on the statute of limitations (*see* Siegel, NY Prac § 111 at 208-209 [5th ed 2011]; *see also* *Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327 [2011]).

We reject plaintiff's further contention that a three-year statute of limitations applies to the claims she asserts under New York's "constitutional tort law." General Municipal Law § 50-i (1) (c) provides that any action for personal injury against a municipality shall be commenced within one year and 90 days after the happening of the event upon which the claim is based (*see* *Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]). General

Municipal Law § 50-i (2) further provides that the limitations period is applicable "notwithstanding any inconsistent provisions of law" (see generally *Wright v City of Newburgh*, 259 AD2d 485, 486 [2d Dept 1999]). We therefore conclude that Supreme Court properly applied the limitations period under General Municipal Law § 50-i (1) (c) in dismissing the complaint as time-barred (see *Drake v City of Rochester*, 96 Misc 2d 86, 93-94 [Sup Ct, Monroe County 1978], *affd for reasons stated* 74 AD2d 996 [4th Dept 1980]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court