

## *DeLoache v. City of New York*

Supreme Court of New York, Queens County

September 4, 2020, Decided; September 8, 2020, Filed

Index No. 703576/2018

### Reporter

2020 N.Y. Misc. LEXIS 13895 \*

SHEENA DELOACHE, Plaintiff, v. THE CITY OF NEW YORK, P.O. JOHN DOE (ARRESTING OFFICER OF PLAINTIFF ON MARCH 8, 2015, GARY ROSE, (NEW YORK CITY MARSHAL #81) AND KEN BEN 2 LTD. d/b/a KEN BEN INDUSTRIES, Defendants.

### Core Terms

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cause of action, color of state law, private entity, motion to dismiss, private conduct, sufficient evidence, purposes, Rights, nexus

**Judges:** [\*1] Present: HONORABLE JOSEPH J. ESPOSITO, J.S.C.

**Opinion by:** JOSEPH J. ESPOSITO

### Opinion

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Upon the foregoing papers, the motion to dismiss pursuant to CPLR 93211 (a)(5) is granted.

Defendant argues that plaintiffs causes of action are time barred and should be dismissed as a matter of law. Defendant further contends that plaintiff does not specifically assert any causes of action against moving defendant. Specific to the fourth cause of action, defendant states that it is a private entity and not a state action and therefore, not subject to 42 USC 91983.

Plaintiff, in opposition, states that they take no position regarding defendant's motion to dismiss the first, second and third causes of action. However, they oppose defendants request to dismiss the fourth cause of action, Deprivation of Civil Rights under 42 USC 91983. Plaintiff states that although 91983 does not apply to private entities, exceptions exist where liability may exist. "A private entity acts under color of state law for purposes of 91983 when there is a sufficiently close nexus between the State and the private conduct (*McGuganvAldana-Bernier*, 752 F3d 224 [2d Cir 2014]).

To state a claim under 42 USC S1983, a plaintiff must allege that defendants violated plaintiffs federal rights while acting under color of state law. A private entity [\*2] acts under color of state law for purposes of S 1983 when (1) the state compelled the conduct; (2) there is a sufficiently close nexus between the state and the private conduct; or (3) the private conduct consisted of activity that has traditionally been the exclusive prerogative of the state. The fundamental question under each test is whether the private entity's challenged actions are fairly attributable to the state (*Id*). Applying the above well-settled principles of [42 USC S 1983](#) claims and CPLR S3211 (a)(5) motion to dismiss, the Court finds that the plaintiff failed to provide sufficient evidence to show whether the statute of limitations has been tolled or was otherwise, inapplicable; or whether the action was actually

commenced within the applicable time period. Furthermore, plaintiff failed to proffer sufficient evidence which shows that Ken Ben 2 Ltd. was acting under the color of state law.

Therefore, it is ORDERED that defendant's motion to dismiss pursuant to CPLR §3211 (a)(5) is granted and plaintiff's complaint is dismissed against defendant, Ken Ben 2 Ltd. d/b/a Ken Ben Industries, only.

The foregoing constitutes the decision and order of this court.

Dated: September 4th, 2020

/s/ [\*3] Joseph J. Esposito

JOSEPH J. ESPOSITO, J.S.C.

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