

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3 August Term, 2012

4 (Argued: January 25, 2013 Decided: August 23, 2013)
5

6 Docket No. 12-877-cv

7 -----X

8 DELROY ASKINS,

9 *Plaintiff-Appellant,*

10 v.

11 SERGEANT JOHN DOE # 1, P.O. JOHN DOE # 2,

12 *Defendants,*

13 and

14 THE CITY OF NEW YORK, a municipal entity, NEW YORK CITY
15 POLICE OFFICER SYMON, SHIELD NO. 30264, NEW YORK
16 CITY POLICE OFFICERS JOHN DOES 1-4,

17 *Defendant-Appellees.*

18 ----- X

1 Before: LEVAL, RAGGI, and LIVINGSTON, *Circuit Judges*.

2 Plaintiff Delroy Askins appeals from a judgment of the United States District
3 Court for the Southern District of New York (McMahon, *J.*) dismissing his claims of false
4 arrest and malicious prosecution against defendants the City of New York and New York
5 Police Department officers Sergeant John Doe # 1 and P.O. John Doe # 2. Askins
6 challenges the district court’s denial of his motion for leave to amend his complaint to
7 identify the Doe defendants by name. He argues that the amended complaint would have
8 related back to the original complaint under Federal Rule of Civil Procedure 15(c),
9 rendering his claims against the officers timely. He also contends that the district court
10 erred in dismissing his claims for municipal liability against the City of New York. The
11 Court of Appeals (Leval, *J.*) concludes that (1) Askins waived any argument that an
12 amendment naming the Doe defendants would relate back to the original complaint by
13 failing to raise that argument before the district court, but (2) the district court did err in
14 dismissing Askins’s municipal liability claims. Accordingly, the judgment of the district
15 court is **AFFIRMED** in part and **VACATED** in part, and the case is **REMANDED** to the
16 district court for further proceedings.

17 Scott A. Korenbaum, Stecklow Cohen &
18 Thompson, New York, NY, for *Plaintiff-*
19 *Appellant*.

20 Kathy H. Chang, Assistant Corporation Counsel
21 (Larry A. Sonnenshein, Assistant Corporation
22 Counsel, *on the brief*), for Michael A. Cardozo,
23 Corporation Counsel of the City of New York,
24 for *Defendant-Appellees*.

25 LEVAL, *Circuit Judge*:

26 Plaintiff Delroy Askins appeals from the judgment of the United States District
27 Court for the Southern District of New York (McMahon, *J.*) dismissing his claims of
28 constitutional torts involving arrest without probable cause and malicious prosecution in
29 violation of 42 U.S.C. § 1983. The complaint named as defendants the City of New York,
30 New York Police Officer Symon, and additional police officers whose names were

1 unknown to the plaintiff, identified in the complaint as Sergeant John Doe and Officer
2 John Doe. Only the City and Officer Symon were served with process. The district court
3 dismissed the complaint against Officer Symon on the basis of qualified immunity
4 because, in arresting plaintiff, Symon was merely carrying out instructions received from
5 other officers and could not have known whether there was a proper basis for the arrest.
6 No appeal is taken from the dismissal of the case against Symon. As for the suit against
7 the unidentified police officers, who had not been served with process, the court ruled that
8 the suit was irremediably untimely, because the three-year limitations period had passed,
9 and, under Federal Rule of Civil Procedure 15(c), subsequent amendment of the
10 complaint to name them properly would not relate back to the time of the original
11 complaint. As for the suit against the City, the court ruled that municipal liability could
12 not be established where the plaintiff failed to establish the liability of any individual
13 defendant who acted on the City's behalf. The plaintiff contests the court's rulings with
14 respect to the John Doe defendants and the City.

15 With respect to the timeliness of the plaintiff's suit against the John Doe officers,
16 we conclude that Askins waived the arguments he advances on this appeal by failing to
17 raise them in the trial court. However, we agree with Askins that the dismissal of his
18 claims against the City of New York was error. We therefore vacate the judgment in favor
19 of the City and remand those claims for further consideration.

1 **BACKGROUND**

2 The facts as alleged in the complaint are as follows. On February 13, 2007, Askins
3 entered an apartment building at Park Avenue and 124th Street in Manhattan. Askins is
4 paraplegic and uses a wheelchair. Upon entering the apartment building, he hoisted
5 himself out of his wheelchair and started to pull himself up a flight of stairs. While he was
6 going up the stairs, two uniformed police officers, who did not identify themselves by
7 name, approached him. Askins believed that one of the officers appeared to outrank the
8 other. In this litigation he has identified the ranking officer as Sergeant John Doe and the
9 other as Officer John Doe. The officers immediately began to search his wheelchair and
10 backpack. Sergeant Doe spotted a blue rubber cap attached to the catheter waste bags
11 affixed to Askins’s wheelchair and incorrectly believed it was a crack pipe. A continued
12 search of Askins’s belongings turned up a kitchen knife. A third officer, Police Officer
13 Symon, arrived and arrested Askins, who was then arraigned for criminal possession of a
14 controlled substance in the seventh degree and criminal trespass in the third degree. All
15 charges against him were dismissed on May 25, 2007.

16 Nearly three years later, on February 9, 2010, Askins, proceeding *pro se* at the
17 time, filed the initial complaint in this suit. The complaint was served on the City on May
18 12, 2010, and on Officer Symon on July 21, 2010. Against the police officers, the
19 complaint asserted claims of constitutional torts relating to false arrest and malicious
20 prosecution. Against the City, the complaint asserted a claim of municipal liability
21 pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), resulting from

1 the torts committed by the police officers. Askins served interrogatories on the City
2 requesting the identities of the Doe defendants. The City returned them, unanswered,
3 asserting that they were premature because Federal Rule of Civil Procedure 26(d) forbids
4 seeking discovery before the parties have conferred as provided in Rule 26(f).

5 The City and Officer Symon then noticed a motion for summary judgment on the
6 basis of, *inter alia*, qualified immunity. After completion of the summary judgment
7 briefing, but prior to the district court's ruling, Askins obtained counsel. On May 2, 2011,
8 his counsel requested leave to file an amended complaint and asked the district court to
9 defer ruling on the summary judgment motions until he took discovery. With respect to
10 discovery, the judge denied the request, referring to her individual rules, which provided:
11 "As soon as a notice of motion raising the issue of qualified immunity is filed, all
12 discovery is stayed, except for the plaintiff's deposition." *Askins v. City of New York*, No.
13 12-877 Joint Appendix ("JA") 52. With respect to the request for leave to amend the
14 complaint, the court granted the motion, authorizing the filing of an amended pleading
15 "within 10 days." JA 129. The amended complaint, which counsel timely filed on May
16 13, 2011, expanded on the municipal liability claims by asserting that the constitutional
17 violations committed by the officers were pursuant to custom and policy established by
18 the City, as required by *Monell*. The amended complaint did not identify the Doe
19 defendants by name and did not significantly alter the allegations against the individual
20 officers.

1 On February 6, 2012, nearly five years after Askins’s claims arose, the district
2 court granted defendants’ motions for summary judgment, dismissing all the claims. The
3 court ruled that Officer Symon was entitled to qualified immunity because he had no pre-
4 arrest participation in the facts and arrested Askins in reasonable reliance on his fellow
5 officers’ representations that probable cause existed for the arrest. As noted, Askins does
6 not appeal this portion of the district court’s ruling.

7 The trial court further held that any amendment of the complaint to identify
8 Sergeant Doe and Officer Doe by name would be futile because the three-year limitations
9 period on Askins’s claims had expired since the filing of the original complaint, and any
10 amended complaint identifying the Doe defendants by name would not relate back to that
11 original complaint under Federal Rule of Civil Procedure 15(c), because failure to name
12 unidentified officers is not a “mistake.” Fed. R. Civ. P. 15(c)(1).

13 The court then turned to the claim of municipal liability. The court ruled that
14 counsel’s amendment of the initial *pro se* complaint was “futile.” Assuming without
15 deciding that the amended pleading successfully asserted municipal policies and customs
16 that could render the City liable for the torts of its officers, the court nonetheless ruled
17 that the City could not be liable where the plaintiff was unable to establish a violation of
18 his rights because all of the alleged violations against individual officers were either time-
19 barred or barred by the doctrine of qualified immunity.

1 **DISCUSSION**

2 **I. Denial of Leave to Amend the Complaint to Name the Doe Defendants**

3 When a “denial of leave to amend is based on a legal interpretation, such as a
4 determination that amendment would be futile, a reviewing court conducts a *de novo*
5 review.” *Hutchinson v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011).

6 However, “[i]t is a well-established general rule that an appellate court will not consider
7 an issue raised for the first time on appeal.” *In re Nortel Networks Corp. Sec. Litig.*, 539
8 F.3d 129, 132 (2d Cir. 2008) (internal quotation marks omitted); *see also Wal-Mart*
9 *Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) (“The law in this
10 Circuit is clear that where a party has shifted his position on appeal and advances
11 arguments available but not pressed below, . . . waiver will bar raising the issue on
12 appeal.” (internal quotation marks and citation omitted)).

13 In this case, Askins waived any argument that an amended complaint naming the
14 Doe defendants would relate back to the original complaint. He failed to make any such
15 argument in opposition to the defendants’ motion for summary judgment. Furthermore, in
16 a May 20, 2011 letter, Askins’s counsel wrote to the court that he was “uncertain whether
17 any form of tolling or estoppel would be available to hale the ‘John Doe’ Defendant
18 Officers into the litigation at this late date.” JA 169. It is clear that Askins had the
19 opportunity in the District Court to argue that a new complaint naming the Doe
20 defendants would relate back. For whatever reason, he did not make that argument.
21 Askins does not argue that the district court otherwise erred by subsequently dismissing

1 the claims against the Doe defendants, and because his argument that an amended
2 complaint naming the Doe defendants would relate back to the original complaint was not
3 raised before the trial court, it is deemed to have been waived.

4 **II. Dismissal of the Municipal Liability Claims**

5 “We review *de novo* the dismissal of a complaint under Federal Rule of Civil
6 Procedure 12(b)(6), accepting all factual allegations as true and drawing all reasonable
7 inferences in favor of the plaintiff.” *N.J. Carpenters Health Fund v. Royal Bank of Scot.*
8 *Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013) (internal quotation marks and alterations
9 omitted).

10 In dismissing Askins’s claim against the City, the district court relied on the
11 proposition “that the City cannot be liable under *Monell* where Plaintiff cannot establish a
12 violation of his constitutional rights.” JA 189. The court explained: “All of the alleged
13 constitutional violations in this case are either time-barred or barred by the doctrine of
14 qualified immunity. Therefore, it cannot be said that any allegedly illegal City policy
15 caused Plaintiff a constitutional remediable injury, and no *Monell* claim lies against the
16 City.” JA 186.

17 This conclusion reflects a misunderstanding of the relationship between the
18 liability of individual actors and municipal liability for purposes of *Monell*. The court was
19 entirely correct in stating that the City “cannot be liable under *Monell* where Plaintiff
20 cannot establish a violation of his constitutional rights.” JA 189. Unless a plaintiff shows
21 that he has been the victim of a federal law tort committed by persons for whose conduct

1 the municipality can be responsible, there is no basis for holding the municipality liable.
2 *Monell* does not create a stand-alone cause of action under which a plaintiff may sue over
3 a governmental policy, regardless of whether he suffered the infliction of a tort resulting
4 from the policy. Liability under section 1983 is imposed on the municipality when it has
5 promulgated a custom or policy that violates federal law and, pursuant to that policy, a
6 municipal actor has torturously injured the plaintiff. *See Segal v. City of New York*, 459
7 F.3d 207, 219 (2d Cir. 2006) (“*Monell* does not provide a separate cause of action for the
8 failure by the government to train its employees; it *extends* liability to a municipal
9 organization where that organization’s failure to train, or the policies or customs that it
10 has sanctioned, led to an independent constitutional violation.”). Establishing the liability
11 of the municipality requires a showing that the plaintiff suffered a tort in violation of
12 federal law committed by the municipal actors and, in addition, that their commission of
13 the tort resulted from a custom or policy of the municipality. *Monell*, 436 U.S. at 690-91;
14 *see also Jones v. Town of E. Haven*, 691 F.3d 72, 80 (2d Cir. 2012).

15 It does not follow, however, that the plaintiff must obtain a *judgment* against the
16 individual tortfeasors in order to establish the liability of the municipality. It suffices to
17 plead and prove against the municipality that municipal actors committed the tort against
18 the plaintiff and that the tort resulted from a policy or custom of the municipality. In fact,
19 the plaintiff need not sue the individual tortfeasors at all, but may proceed solely against
20 the municipality. *See Wilson v. Town of Mendon*, 294 F.3d 1, 7 (1st Cir. 2002) (“There is,
21 however, nothing to prevent a plaintiff from foregoing the naming of an individual officer

1 as a defendant and proceeding directly to trial against the municipality.”); *Peterson v.*
2 *City of Fort Worth*, 588 F.3d 838, 842 (5th Cir. 2009) (plaintiff brought claim for
3 unlawful detention and excessive force against municipality directly under a theory of
4 *Monell* liability, and did not sue any individual officers).

5 Where the plaintiff does proceed against both the municipal actors alleged to have
6 inflicted the tort and the municipality that promulgated the offensive policy, the plaintiff’s
7 failure to secure a judgment against the individual actors would, indeed, preclude a
8 judgment against the municipality *if* the ruling in favor of the individual defendants
9 resulted from the plaintiff’s failure to show that they committed the alleged tort. But
10 where the plaintiff has brought a timely suit against the municipality and has properly
11 pleaded and proved that he was the victim of the federal law tort committed by municipal
12 actors and that the tort resulted from an illegal policy or custom of the municipality, the
13 fact that the suit against the municipal actors was untimely, or that the plaintiff settled
14 with them, or abandoned the suit against them, is irrelevant to the liability of the
15 municipality.

16 By the same token, the entitlement of the individual municipal actors to qualified
17 immunity because at the time of their actions there was no clear law or precedent warning
18 them that their conduct would violate federal law is also irrelevant to the liability of the
19 municipality. Qualified immunity is a defense available only to individuals sued in their
20 individual capacity. “[M]unicipalities have no immunity from damages for liability
21 flowing from their constitutional violations.” *Lore v. City of Syracuse*, 670 F.3d 127, 164

1 (2d Cir. 2012) (quoting *Owen v. City of Independence*, 445 U.S. 622, 657 (1980)); *see*
2 *also Vives v. City of New York*, 524 F.3d 346, 350 (2d Cir. 2008) (noting that “a
3 municipality may not assert qualified immunity based on its good faith belief that its
4 actions or policies are constitutional”). The doctrine that confers qualified immunity on
5 individual state or municipal actors is designed to ensure that the persons carrying out
6 governmental responsibilities will perform their duties boldly and energetically without
7 having to worry that their actions, which they reasonably believed to be lawful at the
8 time, will later subject them to liability on the basis of subsequently developed legal
9 doctrine. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (the doctrine of qualified
10 immunity furthers “the need to protect officials who are required to exercise their
11 discretion and the related public interest in encouraging the vigorous exercise of official
12 authority” (internal quotation marks omitted)). That policy, however, has no bearing on
13 the liability of municipalities. Municipalities are held liable if they adopt customs or
14 policies that violate federal law and result in tortious violation of a plaintiff’s rights,
15 regardless of whether it was clear at the time of the adoption of the policy or at the time
16 of the tortious conduct that such conduct would violate the plaintiff’s rights. *See Owen*,
17 445 U.S. at 656-57. To rule, as the district court did, that the City of New York escapes
18 liability for the tortious conduct of its police officers because the individual officers are
19 entitled to qualified immunity would effectively extend the defense of qualified immunity
20 to municipalities, contravening the Supreme Court’s holding in *Owen*.

1 The district court did not rule that Askins failed in his amended complaint to allege
2 that he was the victim of a constitutional tort committed by municipal actors, or that he
3 failed to allege that the tort resulted from an unconstitutional custom or policy of the City,
4 or that the suit against the City was untimely or otherwise defective. So far as the court
5 has ruled up to now with respect to the suit against the City, the court has identified no
6 deficiency in the plaintiff’s amended pleading.¹ Accordingly, there was no basis for
7 dismissing the complaint against the City.

8 We hold that Askins’s claims of municipal liability against the City should not
9 have been dismissed by reason of Officer Symon’s entitlement to qualified immunity and
10 the untimeliness of Askins’s suit against the Doe defendants. We remand for further
11 proceedings relating to the claims against the City. In dismissing the claims against the
12 City, the court assumed without deciding that the amended complaint filed by counsel
13 adequately alleged that Askins’s injury resulted from an unconstitutional municipal policy
14 or custom. The court may, of course, return to the question whether the amended
15 complaint appropriately pleads that the torts of the police officers resulted from a custom
16 or policy of the City.

¹ In its final ruling dismissing the action, the court described the amended complaint submitted by counsel as a “*proposed* amended complaint.” This overlooked the fact that the court, by summary endorsement, had previously authorized counsel to file an amended complaint within ten days and counsel had done so in a timely fashion. On remand, the amended complaint filed on May 13, 2011, should be viewed as the duly filed operative complaint in the action.

CONCLUSION

1
2
3
4

The judgment dismissing the claims against the City is hereby **VACATED**, and this matter is **REMANDED** to the trial court for further proceedings. In all other respects, the judgment is **AFFIRMED**.