Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Submitted - March 5, 2007

ROBERT W. SCHMIDT, J.P.
ROBERT A. SPOLZINO
ANITA R. FLORIO
PETER B. SKELOS, JJ.

2006-03508 DECISION & ORDER

Larry Hernandez, appellant, v State of
New York, respondent.

(Claim No. M-70974)

Kuharski Levitz & Giovinazzo, New York, N.Y. (Lonny R. Levitz and Christopher L. Stanley of counsel), for appellant.

Andrew M. Cuomo, Attorney General, Albany, N.Y. (Patrick Barnett-Mulligan and Julie S. Mereson of counsel), for respondent.

In a claim to recover damages for assault, the claimant appeals from an order of the Court of Claims (Scuccimarra, J.), dated February 9, 2006, which denied his motion pursuant to Court of Claims Act § 10(6) for leave to file a late notice of claim against the Attorney General.

ORDERED that the order is affirmed, with costs.

Pursuant to Court of Claims Act § 10(6), the Court of Claims may, in its discretion, permit a claimant to file a late notice of claim against the Attorney General "at any time before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules." Here, contrary to the claimant's contention, the Court of Claims correctly concluded that the claim to recover damages for assault sounded in intentional tort, not negligence, since no cause of action to recover damages for negligent assault exists in New York (*see Allstate Ins. Co. v Schimmel,* 22 AD3d 616; *Schetzen v Robotsis,* 273 AD2d 220, 221; *Wrase v Bosco,* 271 AD2d 440, 441). Thus, when the claimant moved by notice of motion dated November 21, 2005, for leave to file a late notice of claim against the Attorney General pursuant to

Court of Claims Act § 10(6), his claim regarding an incident that occurred on May 22, 2004, already was time barred by a one-year limitations period (*see* CPLR 215[3]). Accordingly, the Court of Claims properly denied the claimant's motion.

The claimant's remaining contentions are without merit.

SCHMIDT, J.P., SPOLZINO, FLORIO and SKELOS, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court