

Vazquez v City of New York

2007 NY Slip Op 31263(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0124153/1999

Judge: Karen S. Smith

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. KAREN SMITH**

PART 62

Justice

Index Number : 124153/1999

VAZQUEZ, SANTA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

3

* INDEX NO. _____

MOTION DATE 3/22/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion ~~to~~ for summary judgment dismiss the Complaint and all cross claims

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached memorandum decision and order*

FILED

MAY 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

MAY 16 2007

IAS MOTION
SUPPORT OFFICE

Parties are reminded that this matter is currently scheduled for an appearance in Mediation Part 1 on 5/22/07

Dated: 5/9/07

KSS
HON. KAREN SMITH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MDAJ

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
SANTA VAZQUEZ, individually and as Mother and
Natural Guardian on behalf of BRYAN VAZQUEZ,
KARLA CALDERON and CHRISTOPHER HUERTA

Plaintiffs,
-against-

Index no.: 124153/1999
Motion seq.: 001
Motion date: 02/27/2007

DECISION AND ORDER

THE CITY OF NEW YORK, ADMINISTRATION FOR
CHILDREN'S SERVICES and SHELTERING ARMS
CHILDREN'S SERVICES,
Defendants.

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Defendant, Sheltering Arms Children's Services' motion for summary judgment
dismissing the complaint and all cross-claims asserted against it in this action is granted.

Plaintiffs brought this action seeking monetary damages for allegedly permanent personal
injuries sustained by the plaintiffs. The complaint alleges that, on September 18, 1998, the
defendant, Sheltering Arms Children's Services (hereafter referred to as "SACS", "wrongfully
and negligently" (Complaint, Paragraph 7) removed the infant plaintiffs from a foster home in
which they had been placed while in temporary foster care.

At the time of the alleged occurrence, SACS was under contract with the defendant, City
of New York Administration for Children's Services (hereafter referred to as "ACS"), to
administer foster care services. None of the parties disputes that, at the time of the alleged
occurrence, the three infant plaintiffs were in the custody of the Commissioner of Social Services
pursuant to Article 10 of the Family Court Act (see Exhibit H to SACS's moving papers). The

complaint further alleges; “[a]s a direct and proximate result of the gross and culpable misfeasance, malfeasance, and nonfeasance of the defendants, plaintiff has suffered grievous permanent personal injuries” (Complaint, Paragraph 9) and; “[a]s a direct and proximate result of the gross and culpable misfeasance, malfeasance and nonfeasance of the defendants, plaintiffs have been deprived of certain fundamental rights without due process of law, under color of state law” (Complaint, Paragraph 10). The complaint does not specify the nature of the alleged “grievous permanent personal injuries”.

SACS now moves for summary judgment dismissing the complaint and all cross-claims against it contending that, on September 18, 1998, when the infant plaintiffs were removed from the foster home, SACS had and breached no legal duty to the plaintiffs. In its motion papers, SACS argues that the foster home from which the infant plaintiffs were removed was overcrowded, beyond the allowable limits set forth by regulation for the health and safety of individuals in foster care, and dangerous to the safety of the infant plaintiffs. SACS’s motion papers also include the affidavit of SACS’s caseworker assigned to the infant plaintiffs. In her affidavit, the caseworker states that she; “... neither observed, nor became aware of any injury - physical, emotional or otherwise - to any of the Plaintiffs in this lawsuit as a result of any action, or inaction, of Sheltering Arms” (Supporting Affidavit of Lourdes Herrera, Paragraph 23). Therefore, SACS argues that, even if one were to assume *arguendo* a legal duty existed and had been breached, the plaintiffs have suffered no cognizable injuries which may be compensated by monetary damages and have proffered no intention to offer expert testimony to support a conclusion that the plaintiffs have suffered any permanent injuries.

Plaintiffs oppose the motion arguing; 1) that an emergency must exist before the State can interfere with a family unit, 2) a question of fact exists as to whether or not an emergency

* 4]
situation existed when the infant plaintiffs were removed from the foster home, 3) the court cannot dismiss the action based upon SACS' allegation that the children did not sustain an injury as a matter of law and 4) a jury may, based upon common knowledge, determine that the infant plaintiffs have sustained emotional injuries without the necessity of an expert witness.

SACS replies that the plaintiffs have offered no evidence in admissible form to raise an issue of fact which requires trial of the instant matter and, therefore its motion for summary judgment dismissing the complaint and all cross-claims against it should be granted.

Social Services Law §383 provides, in pertinent part; "1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof... 2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested ... until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child **and any such authorized agency may in its discretion remove such child from the home where placed or boarded**" (emphasis added).

Social Services Law §400 provides, in part; "1. When any child shall have been placed in ... a family home by a social services official, the social services official may remove such child from such ... family home and make such disposition of such child as is provided by law ... 2. **Any person aggrieved by such decision of a social services official may appeal to the department pursuant to the provisions of section twenty-two of this chapter**" (emphasis added).

It is well settled law that, when an administrative agency exercises its discretion in the course of carrying out its statutorily mandated functions, and the enabling statutes provide a means of administrative review, any person aggrieved by the manner in which that discretion has

been carried out must exhaust his or her administrative remedies before instituting litigation. In the instant matter, there is no indication that the plaintiffs have made any attempt to avail themselves of their administrative remedies. Notwithstanding the fact that plaintiffs have cloaked their claims in the language of negligence, the plaintiffs' claims are grounded in an agency's act of administrative discretion. Plaintiffs, having failed to exhaust their administrative remedies, may not now resort to the courts.

Even if the plaintiffs had met the necessary precondition of exhausting their administrative remedies,; "...a cause of action for intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Sheila C v Maury Povich et al*, 11 AD3d 120 [1st dept 2004], internal quotations and citations omitted).

In the instant matter, SACS has established that its conduct in the instant matter consists of the physical removal of three minor siblings (and the child of one of the minors) from a foster home without providing a hearing prior to the removal based upon its conclusion that the conditions at the foster home constituted an immediate threat to the health and safety of children being removed. SACS has made a *prima facie* showing of these facts by the deposition testimony of SACS representative supported by the affidavit of SACS's case worker assigned to the infant plaintiffs' at the time. In opposition, the plaintiffs have not raised any issue of fact requiring trial. Instead of disputing the facts surrounding SACS's conduct, plaintiffs contend that accuracy or inaccuracy of SACS's conclusion, that an emergency existed when SACS acted, is a material question of fact which must be considered by the jury. Plaintiffs' position is incorrect. Assuming *arguendo* that SACS's conclusion turned out to be incorrect, given the statutory

mandate of providing for the health and safety of minors within the foster care system, when faced with the circumstances and regulations existing at the time SACS removed the infant plaintiffs from their foster care home, it cannot be said that SACS's conduct in doing so was outrageous, extreme, beyond the bounds of decency, atrocious or utterly intolerable in a civilized community. Thus, as a matter of law, the plaintiffs cannot prevail on their complaint based upon the undisputed facts established herein.

Given the determination set forth herein, it is unnecessary for the court to consider the plaintiffs' contention that they may establish their emotional injuries without the aid of expert testimony. Accordingly, it is;

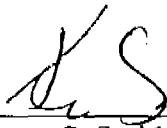
ORDERED that SACS's motion for summary judgment dismissing the complaint herein as against it only and , further, dismissing all cross-claims asserted against it, is granted, and it is further;

ORDERED: that upon the service, upon the Clerk of the Court at 60 Centre Street, New York, New York, of a copy of this order, together with notice of entry hereof and such other forms and fees as the Clerk may reasonably require, the Clerk shall enter judgment herein in favor of SACS to the extent of dismissing the complaint as against SACS only and all cross-claims asserted against SACS and continuing the action as against the remaining defendants.

The foregoing constitutes the decision and order of this court.

Dated: May 9, 2007

ENTER:


Hon. Karen S. Smith, J.S.C.

FILED

MAY 18 2007

NEW YORK
COUNTY CLERK'S OFFICE