

Pryor v Serrano

2007 NY Slip Op 33196(U)

October 4, 2007

Supreme Court, Greene County

Docket Number: 0010617/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

NICHOLAS PRYOR, by and through his Mother
and Natural Guardian, NICOLE SIANOS, and
NICOLE SIANOS, Individually, CHRISTOPHER
D. OATHOUT, DEVIN JOHNSON, by and through
his Mother and Natural Guardian, KAREN PAGAN,
and KAREN PAGAN, Individually,

Plaintiffs,

-against-

Index No.: 01-0617
RJI No.: 19-01-9833

JOSE SERRANO, COUNTY OF GREENE, and
COUNTY OF GREENE DEPARTMENT OF
SOCIAL SERVICES, "JOHN DOE" and "JANE
DOE", said names being fictitious and unknown
to the plaintiffs but intended to be employees of
the County of Greene and/or the Greene County
Department of Social Services,

Defendants.

LORETTA KUDLACK, Individually and as
Administratrix of the Estate of GARY WILGUS, JR.,
and EMANUEL RIVERA, by and through his
Mother and Natural Guardian, NORMA AGOSTO,

Plaintiffs,

-against-

Index No.: 01-0750
RJI No.: 19-01-9838

JOSE SERRANO, COUNTY OF GREENE, and
COUNTY OF GREENE DEPARTMENT OF
SOCIAL SERVICES, GREENE COUNTY SHERIFF'S
DEPARTMENT, "JOHN DOE" and "JANE
DOE", said names being fictitious and unknown
to the plaintiffs but intended to be employees of
the County of Greene and/or the Greene County
Department of Social Services,

Defendants.

In the Matter of the Claim of BRANDON LEONARD,
by and through his Mother and Natural Guardian,
GAIL LEONARD, and GAIL LEONARD, Individually,

Plaintiffs,

-against-

Index No.: 02-0208
RJI No.: 19-02-0112

JOSE SERRANO, COUNTY OF GREENE, and
COUNTY OF GREENE DEPARTMENT OF
SOCIAL SERVICES, GREENE COUNTY SHERIFF’S
DEPARTMENT, “JOHN DOE” and “JANE
DOE”, said names being fictitious and unknown
to the plaintiffs but intended to be employees of
the County of Greene and/or the Greene County
Department of Social Services,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiffs in the above actions have moved for consolidation, or in the alternative for an order joining them for trial. The Greene County defendants have moved to sever the claims of plaintiff Oathout to provide for a separate trial.

“[C]onsolidation is generally favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right’ (Amtorg Trading Corp. v Broadway & 56th St. Assoc., 191 AD2d 212, 213 [1993]). The burden of demonstrating prejudice to a substantial right is on the party opposing consolidation (Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 74 [2002]).” (Amcan Holdings, Inc. v Torys LLP, 32 AD3d 337, 339 [1st Dept 2006]).

The actions all involve claims of sexual abuse by defendant Serrano, a foster parent for the County of Greene. Many of the infant plaintiffs were in the Serrano house at the same time and will be called as witnesses in all three actions. The issue of when the County had or should have had notice of the wrongful conduct of Mr. Serrano is the same in essentially all of the actions, although its impact on each plaintiffs’ claims differ.

Moreover, plaintiffs' expert witness testimony as to the nature of the infant plaintiffs' injuries will be substantially the same. The trials are expected to be lengthy and fairly complex. Requiring separate trials would involve significant duplication of effort by the Court and the attorneys involved, as well as significant expense for the experts' testimony. Plaintiffs have certainly shown that consolidation is appropriate.

Defendants in opposition to the motion to consolidate contend that consolidation of all of the claims would lead to jury confusion in that they would not be able to keep track of all of the different issues concerning the ten different plaintiffs, as well as speculation that the jury might be confused by claims of a non-party witness who also resided in the house during the relevant times. Such arguments ignore the fact that the first action already contains six different plaintiffs, with four infants and two parents asserting derivative causes of action. Adding three more infant plaintiffs and one additional parent would not materially alter the complexity of the case. Moreover, any possible confusion could clearly be addressed in the Court's charge to the jury and in summation. The general claims of confusion therefore appear to be speculative and fail to establish a likelihood of prejudice. When compared with the certainty of additional expense, the use of scarce judicial resources and the impact of requiring the infant plaintiffs to repeatedly testify to such disturbing issues, such contention does not warrant denial of consolidation.

Defendants also contend that as plaintiffs, the witnesses could not be sequestered

during the trial, thereby allowing their testimony to be refined and colored by hearing other portions of the trial. Again, such argument disregards the fact that there are already four infant plaintiffs in the first action who in the absence of a severance would be entitled to be present. Defendants have only moved for a severance with respect to one of the plaintiffs. The addition of three more infant plaintiffs would not make an appreciable difference. Furthermore, the infant plaintiffs have already given considerable testimony at the criminal trial of Mr. Serrano and have appeared for numerous hearings and depositions in these actions. The likelihood of significant coloration of their testimony seems remote.

Finally, defendants contend that consolidation would bolster the claims of the individual plaintiffs. If such bolstering were shown, consolidation would be inappropriate (see Tarshish v Associated Dry Goods Corp., 232 AD2d 246, 247 [1st Dept 1996]; Bradford v Coleman Catholic High School, 110 AD2d 965, 966 [3d Dept 1985]). However, as noted above, many of the infant plaintiffs were present in the home at the same time and will be witnesses in each of the trials, if not consolidated. Again, the first action already contains many infant plaintiffs' claims and the addition of three more will not materially alter the complexion of the case. As such, it does not appear that consolidation will bolster any of the separate claims.

Defendants have therefore failed to show any prejudice from consolidation of the three actions. Accordingly, consolidation is warranted.

The Court finds that the circumstances of plaintiff Oathout's claims involve different considerations. Plaintiff Oathout was denied leave to serve a late notice of claim, and as such he is limited to causes of action pursuant to 42 USC § 1983. In order to recover he must meet a significantly higher standard of proof than ordinary negligence. Rather he must show deliberate indifference to a known substantial risk of serious harm (see Schulik v County of Monroe, 202 AD2d 960, 961-962 [4th Dept 1994]). It further appears that plaintiff Oathout was the first foster child to report any sexual abuse. The remaining infant plaintiffs resided in the home after plaintiff Oathout. There are therefore significant differences in the nature of proof of notice to the County defendants necessary to impose liability. It appears that under such circumstances, jury confusion is much more likely (see Gittino v LCA Vision, 301 AD2d 847 [3d Dept 2003]), as is the possibility of bolstering or a sympathy verdict based upon subsequent actions of the County. It is therefore determined that a severance is appropriate with respect to the claims of plaintiff Oathout.

Accordingly it is

ORDERED that plaintiffs' motion for consolidation is hereby granted, and it is further

ORDERED that defendants' cross-motion for a severance is hereby granted to the extent that the claims of plaintiff Oathout shall be tried separately, and it is further

ORDERED that the caption shall henceforth read

NICHOLAS PRYOR, by and through his Mother and Natural Guardian, NICOLE SIANOS, and NICOLE SIANOS, Individually, CHRISTOPHER D. OATHOUT, DEVIN JOHNSON, by and through his Mother and Natural Guardian, KAREN PAGAN, and KAREN PAGAN, Individually, and LORETTA KUDLACK, Individually and as Administratrix of the Estate of GARY WILGUS, JR., and EMANUEL RIVERA, by and through his Mother and Natural Guardian, NORMA AGOSTO, and BRANDON LEONARD, by and through his Mother and Natural Guardian, GAIL LEONARD, and GAIL LEONARD, Individually,

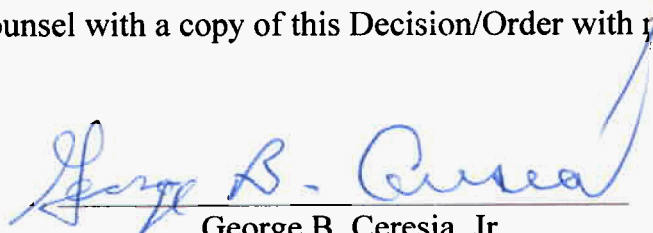
-against-

JOSE SERRANO, COUNTY OF GREENE, and COUNTY OF GREENE DEPARTMENT OF SOCIAL SERVICES, GREENE COUNTY SHERIFF'S DEPARTMENT, "JOHN DOE" and "JANE DOE", said names being fictitious and unknown to the plaintiffs but intended to be employees of the County of Greene and/or the Greene County Department of Social Services,

under Index Number 01-0617 and RJI Number 19-01-9833.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiffs who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
October 4, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated June 7, 2007;

Affidavit of April M. Wilson, Esq. sworn to June 8, 2007 with Exhibits A-J annexed;

Memorandum of Law dated June 8, 2007;

Notice of Cross-Motion dated July 3, 2007; Affirmation of Christina M. Bookless, Esq. dated July 3, 2007 with Exhibits A-V annexed;

Affidavit of Crystal R. Mennillo, Esq. sworn to July 5, 2007 with Exhibits A-I annexed;

Memorandum of Law dated July 5, 2007;

Affirmation of April M. Wilson, Esq., undated with Exhibits A-C annexed;

Reply Affirmation of Christina M. Bookless, Esq. dated July 20, 2007 with Exhibit A annexed.