

Bierria v The State of New York
2009 NY Slip Op 33442(U)
September 15, 2009
Court of Claims
Docket Number: M-76474
Judge: Catherine C. Schaewe
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BIERRIA v. THE STATE OF NEW YORK, # 2009-044-552, Claim No. 115564, Motion No. M-76474**Case information**

UID:	2009-044-552
Claimant(s):	SHARON BIERRIA, as Proposed Administratrix of the Estate of TYSHAWN BIERRIA
Claimant short name:	BIERRIA
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	The Court has, sua sponte, amended the caption to reflect the State of New York as the sole proper defendant.
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	115564
Motion number(s):	M-76474
Cross-motion number(s):	
Judge:	CATHERINE C. SCHAEWE
Claimant's attorney:	DAVID P. KOWNACKI, P.C. BY: Andrew D. Leftt, Esq., of counsel
Defendant's attorney:	HON. ANDREW M. CUOMO, ATTORNEY GENERAL BY: Carol A. Cocchiola, Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	September 15, 2009
City:	Binghamton
Comments:	

Official citation:**Appellate results:****See also
(multicaptioned case)****Decision**

On July 23, 2008, claimant filed a document entitled "Notice of Claim" to recover for the personal injuries suffered by her son (Decedent), as well as his wrongful death due to the alleged negligence of defendant State of New York (defendant). Defendant answered and asserted several affirmative defenses. On August 27, 2008, claimant filed and served an "Amended Notice of Claim." Defendant filed and served an answer to the "Amended Notice of Claim," and again asserted several affirmative defenses. Claimant now moves for various relief, including permission to file and serve a late claim. Defendant opposes the motion.

As an initial matter, claimant argues that the "Notice of Claim" was intended to be a notice of intention to file a claim (Notice of Intention) and should be treated as such. The Court notes that claimants in the Court of Claims often inappropriately use the terms "Notice of Claim" and "Claim" interchangeably, even though the Court of Claims Act contains no reference to any document entitled "Notice of Claim." While counsel for claimant served a copy of the "Notice of Claim" upon the Attorney General's Office in the same manner as a Notice of Intention, he also filed a copy of the "Notice of Claim" with the Clerk of the Court and paid the \$50 filing fee,⁽²⁾ both of which are required only for filing a claim (see Court of Claims Act §§ 10, 11-a [1]). Accordingly, the Court finds that the "Notice of Claim" in this instance was properly treated as a claim by both the Clerk of the Court - who filed it and assigned it Claim No. 115564 - and by the Attorney General's Office - which promptly served and filed an answer. The Court will hereinafter refer to the "Notice of Claim" as Claim No. 115564.

At the time Claim No. 115564 was filed and served, claimant had not been issued Letters of Administration, and was therefore not yet the personal representative of Decedent's estate.⁽³⁾ Once the Letters of Administration were issued, claimant filed and served an "Amended Notice of Claim" (the Amended Claim), which refers to claimant as Administratrix of the estate.

Defendant argues that claimant did not have standing to bring a cause of action for either negligence or wrongful death at the time Claim No. 115564 was filed. Although it does not specifically move to dismiss Claim No. 115564, defendant properly asserted in its Verified Answer that claimant lacked the capacity to sue, and that therefore the Court lacks jurisdiction over this matter. "Because suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (*Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724 [1992]). Accordingly, a claimant who has not met the strict requirements of Court of Claims Act §§ 10 and 11 has not properly commenced an action (*Lichtenstein v State of New York*, 93 NY2d 911, 913 [1999]).

Court of Claims Act § 10 (2) and (3) require that an executor or administrator must be formally appointed before the commencement of an action against the State (*id.*). Given that claimant commenced this action prior to her appointment as Administratrix, she did not meet the strict

requirements of Court of Claims Act § 10 (2) and (3), and the Court therefore lacks jurisdiction over this matter (*id.*; *Finnerty v New York State Thruway Auth.*, 75 NY2d 721 [1989]). Accordingly, Claim No. 115564 is hereby dismissed, sua sponte.⁽⁴⁾

The Court must therefore address claimant's motion for permission to file and serve a late claim. A motion seeking permission to file and serve a late claim must be brought within the statute of limitations period attributable to the underlying cause of action (Court of Claims Act

§ 10 [6]). Claimant's cause of action for negligence accrued on April 27, 2008 when Decedent was injured, allegedly as the result of defendant's negligence in providing security and obtaining timely emergency medical treatment on the campus of the State University of New York at Delhi (SUNY Delhi). Claimant's wrongful death claim accrued on May 1, 2008, when Decedent apparently died from his injuries. The applicable statute of limitations for a negligence cause of action is three years from the date of accrual (*see CPLR 214 [5]*), while the statute of limitations for a wrongful death cause of action is two years from the date of the decedent's death (EPTL

5-4.1 [1]). Accordingly, this motion, mailed on March 9, 2009, is timely with respect to both causes of action (*see Matter of Unigard Ins. Group v State of New York*, 286 AD2d 58 [2001]).

Having determined that the motion is timely, the Court turns to a consideration of the merits of the motion itself. The factors that the Court must consider under Court of Claims Act

§ 10 (6) in determining a motion to permit a late filing of a claim are whether:

- 1) the delay in filing the claim was excusable;
- 2) defendant had notice of the essential facts constituting the claim;
- 3) defendant had an opportunity to investigate the circumstances underlying the claim;
- 4) the claim appears to be meritorious;
- 5) the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to defendant; and
- 6) claimant has any other available remedy.

Claimant asserts that because Surrogate's Court had not issued Letters of Administration prior to service of the claim, the delay in filing a claim for wrongful death is justified. Further, claimant contends that as a proposed administratrix, she properly filed the claim for conscious pain and suffering. While any interested person could have properly served a notice of intention to file a claim for either pain and suffering or wrongful death (*see Tooks v State of New York*, 40 AD3d 1347 [2007], *lv denied* 9 NY3d 814 [2007]), "a duly appointed personal representative in receipt of letters of administration" is the only proper claimant who could file a claim for these causes of action (*Lichtenstein v State of New York*, *supra* at 913). Neither ignorance of the law (*Matter of E.K. v State of New York*, 235 AD2d 540, 541 [1997], *lv denied* 89 NY2d 815 [1997]; *Sevillia v State of New York*, 91 AD2d 792 [1982]) nor law office failure are adequate excuses for failing to comply with the filing or service requirements of Court of Claims Act § 10 (*see Matter of Sandlin v State of New York*, 294 AD2d 723 [2002], *lv dismissed* 99 NY2d 589 [2003];

Nyberg v State of New York, 154 Misc 2d 199, 200 [1992]). Accordingly, this factor weighs against claimant.

The three factors of notice of the essential facts, an opportunity to investigate and the lack of substantial prejudice are frequently analyzed together since they involve similar considerations. Claimant argues that defendant received actual notice of the facts and had an opportunity to investigate the matter as "[Decedent] was in the care of, under the direction of, and in the presence of, many employees, servants and/or agents of the STATE and while on [the campus],"⁽⁵⁾ and that both the State Police and SUNY Police (Campus Police) were on the scene immediately after the incident. As defendant correctly contends, the mere filing of a Police Report does not always constitute notice to the State (see e.g. *Rizzo v State of New York*, 2 Misc 3d 829 [2003]). However, as claimant aptly asserts, receipt of Claim No. 115564 by the Attorney General's Office on July 23, 2008, within 90 days of accrual (notwithstanding claimant's lack of legal capacity at that time) provided defendant with notice of the essential facts of the incident. Further, defendant candidly admits that it now has an opportunity to investigate the underlying facts of the claim. Moreover, defendant does not assert, and the Court does not discern, any substantial prejudice to defendant in defending this potential claim. Thus, the factors of notice, an opportunity to investigate, and the lack of substantial prejudice all weigh in favor of claimant.

Another factor to be considered is whether claimant has any other available remedy. Claimant admits that a "notice of claim" was served upon municipal defendants such as the County of Delaware, and the Town and Village of Delhi. Claimant notes that because of "the arduous requirements of proving a 'special relationship',"⁽⁶⁾ any cause of action against the municipal defendants is tenuous. Notwithstanding any difficulty in pursuing an action against the municipal defendants, claimant clearly has a cause of action against the perpetrator of the assault upon Decedent. Because claimant has another available remedy, this factor weighs against claimant.

The issue of whether the proposed claim appears meritorious is the most crucial component in determining a motion under Court of Claims Act § 10 (6), since it would be futile to permit a meritless claim to proceed (*Matter of Santana v New York State Thruway Auth.*,

92 Misc 2d 1, 10 [1977]). In order to establish a meritorious claim, a claimant must demonstrate that the proposed claim is not patently groundless, frivolous, or legally defective, and that there is reasonable cause to believe that a valid claim exists (*id.* at 11). There is a heavier burden on a party moving for permission to file a late claim than on a claimant who has complied with the provisions of the Court of Claims Act (see *id.* at 11-12; see also *Nyberg v State of New York*, *supra*).

Claimant alleges that defendant allowed the SUNY Delhi Campus to be in a dangerous and unsecure condition, and further contends that the first SUNY Police Officer (the Officer) to arrive on the scene of the incident owed a duty to Decedent to be appropriately trained and to render or facilitate the rendering of non-negligent emergency care. Claimant asserts that affidavits from two witnesses establish that the Officer, among other things, failed to render medical attention or facilitate the arrival of emergency medical assistance; that he was inadequately equipped and trained to handle the situation, and affirmatively prevented others (bystanders) from transporting Decedent to a medical facility.⁽⁷⁾

Conversely, defendant contends that even though the State owns the SUNY Delhi Campus, claimant's allegation of negligence is essentially an allegation that defendant failed to provide adequate police

protection, which constitutes a governmental function immune from suit. Defendant asserts that in order to establish merit, claimant must set forth the existence of a special duty between defendant and Decedent, and she has failed to do so in this case.

In the ownership of property, the State may be acting in a proprietary capacity, i.e. one traditionally performed by private entities (such as landlords), or a governmental capacity, i.e. one undertaken for the general safety and well-being of the public (*Miller v State of New York*, 62 NY2d 506 [1984]; see also *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997]), or somewhere along the continuum between the two. In its performance of a governmental function, the State "remains immune from negligence claims arising out of governmental functions such as police protection unless a special relationship with a person creates a specific duty to protect, and that person relies on performance of that duty" (*Price v New York City Hous. Auth.*, 92 NY2d 553, 557 - 558 [1998]). "When the liability of a governmental entity is at issue, '[i]t is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability' " (*Miller v State of New York*, supra at 513, quoting *Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175, 182 [1982]).

Defendant's conduct complained of in this claim is that:

there was insufficient, improperly trained security on campus and significant delays in providing emergency medical care. As a result of this negligence [Decedent] died on May 1, 2008.

...

[Specifically, the] claim arises from the acts or omissions of the defendant . . . as follows . . . the negligence and carelessness of [defendant] . . . in the ownership, management, training, operation, supervision, control, security and inspection of the SUNY campus at Delhi . . . in causing, permitting and allowing the . . . area to become and remain in a dangerous and unsecure condition that constituted a dangerous security risk to the students and specifically [Decedent], in failing to adequately protect . . . [Decedent] . . . in failing to remedy and otherwise correct said dangerous and unsecure situation and condition . . . in failing to take and execute appropriate safety measures at or about the area . . . in failing to provide adequate security to the students on premises . . . in failing to understand, recognize, appreciate the nature of the necessary security for a "special event"; allowing strangers and unauthorized individuals free access to private property and secure areas; in failing to patrol, post guards, check identification, search for weapons, search for known criminals . . . in failing to recognize the need for additional security and react accordingly; in failing to respond in a timely manner despite a promise to do so . . . in failing to have medical staff at hand; in failing to have any emergency plan despite knowing a "special event" was taking place; in failing to adequately hire, train and equip the staff at SUNY, including the SUNY police, to handle a medical emergency; in failing to act despite knowing of a delay in emergency ambulance response; in failing to protect [Decedent] despite a promise to do so . . . in failing to act despite direct contact from [Decedent], his agents or representatives; in failing to act despite knowing claimant justifiably relied on defendant's affirmative undertakings of action; in failing to act as a reasonable and prudent landlord; in failing to provide minimal security under the circumstances. ⁽⁸⁾

In support of this motion, claimant also submits an affidavit from Wade Cress, a student who was on campus at the time of the incident. Cress stated that approximately eight males were fighting, and he (Cress) observed Decedent stagger out from behind a car, bleeding from his chest. Cress indicated that

he tried to help Decedent stand and walk, but eventually Decedent laid down on the ground. Cress stated that "Joseph" (presumably Joseph Yzquierdo, another student on campus, based on the documents submitted) called 911 from his cell phone, and it took 7 to 10 minutes for the Officer to respond. Cress said that the Officer "just shinned [sic] his flashlight, he never did anything to help [Decedent]." ⁽⁹⁾ He also indicated that it took 25 to 30 minutes for an ambulance to arrive at the scene. According to Cress, the EMTs (presumably Emergency Medical Technicians) gave Decedent oxygen and also put some liquid on his chest. The ambulance was allegedly at the scene for 10 minutes. Cress asserted that it took a long time to get help for Decedent.

Joseph Yzquierdo, a student who was at the scene, also provided an affidavit. Yzquierdo stated that seven to eight people were fighting, and he saw Decedent go behind a parked car with another person. Yzquierdo said that the next time he saw Decedent, he was hurt and his shirt was red. Yzquierdo and Cress helped Decedent walk 15 to 20 steps and then laid him down on the ground. Yzquierdo called 911, and indicated that approximately 10 to 15 minutes later, the Officer arrived at the scene. Although he could not hear what the Officer was saying, Yzquierdo saw the Officer use the radio. He indicated that the Officer did not do anything but shine a flashlight on Decedent. Yzquierdo stated that several people asked the Officer at different times if they could drive Decedent to the hospital, but the Officer responded that they should not touch Decedent because "help [was] on the way." ⁽¹⁰⁾ Yzquierdo indicated that it took approximately 30 minutes for an ambulance to arrive and it was only at the scene for 5 to 10 minutes. He said the EMTs gave Decedent oxygen. Yzquierdo stated that the Officer did not appear to know what to do in the situation.

Notwithstanding defendant's ownership of the property where Decedent was assaulted, in this instance, the alleged negligent conduct is clearly the State's failure to have adequate, properly trained security on the campus, and to timely provide appropriate emergency medical care. These allegations constitute an argument that defendant failed to provide adequate police protection, which clearly involves the performance of a governmental function (*see e.g. Miller v State of New York, supra*). Because the alleged negligent conduct falls within the State's governmental function, claimant's causes of action depend upon the existence of a "special duty" owed by defendant to Decedent as the injured party, rather than a duty to the general public (*id.*; *see also Bonner v City of New York*, 73 NY2d 930 [1989]; *Cuffy v City of New York*, 69 NY2d 255 [1987]; *McEnaney v State of New York*, 267 AD2d 748 [1999]). The elements of this special duty or special relationship are: (1) an assumption by the government body, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the government body's agents that inaction could lead to harm; (3) some form of direct contact between the government body's agents and the injured party; and (4) that party's justifiable reliance on the government body's affirmative undertaking (*Cuffy v City of New York, supra* at 260; *McEnaney v State of New York, supra* at 749; *see also Sorichetti v City of New York*, 65 NY2d 461 [1985]; *De Long v County of Erie*, 60 NY2d 296 [1983]).

Claimant conclusorily alleges that defendant failed to respond or act in a timely manner and protect Decedent despite both a promise to do so and direct contact with Decedent, his agents or representatives, even though Decedent justifiably relied on defendant's affirmative undertakings of action. However, claimant has failed to provide any factual basis to support these allegations. The Officer's mere arrival at the scene might support an inference of direct contact. However, accepting claimant's allegations as true, the only action the Officer took was to shine his flashlight on Decedent and indicate that help was on the way. There is no evidence that the Officer made any promises or

assurances to Decedent, nor is there any evidence of reliance on any such assurances by Decedent. There are no facts alleged which could be construed to show that the State assumed any affirmative duty upon which Decedent might have justifiably relied and there is thus no legal basis for liability (see *Doe v Town of Hempstead Bd. of Educ.*, 18 AD3d 600 [2005]; see also *Sostre v City of N.Y. Hous. Auth.*, 150 AD2d 766 [1989]).⁽¹¹⁾ In short, the defendant in this matter owed no greater duty to Decedent than to any other student or member of the public entering the SUNY Delhi Campus that day, and is thus entitled to immunity for its actions.

Additionally, claimant has not set forth any evidence that the Officer was required to provide medical assistance himself or that he violated any regulations or protocol (see e.g. *Tessier v State of New York*, Ct Cl, May 5, 2005, Fitzpatrick, J., Claim No. 109692, Motion No. M-69090, Cross Motion No. CM-69544 [UID # 2005-018-467]). Accordingly, the discretionary actions of the Officer upon his arrival at the scene are not actionable. Therefore, the all important factor of merit weighs against claimant.

Three of the six statutory factors, including the crucial factor of merit weigh against claimant. Claimant's motion for permission to file and serve a late claim is therefore denied.

In conclusion, claimant's lack of standing at the time she filed and served Claim No. 115564 is jurisdictionally fatal. Accordingly, Claim No. 115564 is sua sponte dismissed, in its entirety.⁽¹²⁾ Claimant's motion for leave to file and serve a late claim is denied.

September 15, 2009

Binghamton, New York

CATHERINE C. SCHAEWE

Judge of the Court of Claims

The following papers were read on claimant's motion:

- 1) Notice of Motion filed on March 19, 2009; Affidavit of Andrew D. Leftt, Esq., sworn to on March 9, 2009, and attached Exhibits A through I.⁽¹³⁾
- 2) Affirmation in Opposition of Carol A. Cocchiola, Assistant Attorney General, dated April 15, 2009, and attached Exhibit A.
- 3) Affidavit in Reply of Andrew D. Leftt, Esq., sworn to on May 6, 2009.

Filed papers: Claim filed on July 23, 2008; Amended Claim filed on August 27, 2008; Verified Answer filed on August 29, 2008; Verified Answer to Amended Claim filed on October 2, 2008.

2. The Court notes that the "Notice of Claim" was accompanied by payment of the \$50 filing fee, which was made by completion of a credit card authorization which specifically indicated that it was "FOR CLAIM FILINGS ONLY."

3. The Court notes that in the caption of Claim No. 115564, claimant designated herself as "Proposed Administratrix."

4. The Court further notes that claimant's amendment of Claim No. 115564 after her appointment as Administratrix is insufficient to cure the initial jurisdictional defect (*see Manshul Constr. v State Ins. Fund*, 118 AD2d 983, 985 [1986]; *Grande v State of New York*, 160 Misc 2d 383, 386 [1994]; *see also Thomas v State of New York*, 57 AD3d 969, 970 [2008]; *Cotto v State of New York*, Ct Cl, July 14, 2009, DeBow, J., Claim No. 116586, Motion No. M-76609 [[UID #2009-038-555](#)]).

5. Claimant's Motion for Permission to File a Late Claim, Affidavit of Andrew D. Leftt, Esq., in Support of the Motion, sworn to Mar. 9, 2009, ¶ 13.

6. Claimant's Motion for Permission to File a Late Claim, Affidavit of Andrew D. Leftt, Esq., in Support of the Motion, sworn to Mar. 9, 2009, ¶ 35.

7. Claimant also argues that because defendant is in the sole possession of certain evidence such as investigative files and reports, 911 transcripts, and witness statements, the State's refusal to remit such documentation is thwarting claimant's effort to set forth a meritorious case. However, claimant's purported request for disclosure from defendant as well as various municipal entities (Claimant's Motion for Permission to File and Serve a Late Claim, Exhibit H) is in essence a request for information pursuant to the Freedom of Information Law (FOIL) (Public Officers Law Article 6). Claimant's remedy for the alleged failure to provide information in this instance is an administrative appeal (Public Officers Law § 89 [4] [a]), and if necessary, to commence a CPLR Article 78 proceeding in Supreme Court (Public Officers Law § 89 [4] [b]), rather than a motion to compel disclosure in the Court of Claims.

8. Claimant's Motion for Permission to File and Serve a Late Claim, Exhibit G, ¶¶ 8-9.

9. Claimant's Motion for Permission to File and Serve a Late Claim, Exhibit A, at 3.

10. Claimant's Motion for Permission to File and Serve a Late Claim, Exhibit A, at 9.

11. Moreover, it is undisputed that the ambulance personnel responded to the scene and transported Decedent to a hospital.

12. As set forth previously in this Decision and Order, claimant actually served FOIL requests on various entities, enforcement of which cannot be obtained through a motion to compel disclosure. Therefore, to the extent that claimant sought to compel disclosure in this motion, it is denied. Even if the motion were appropriate, in light of the dismissal of Claim No. 115564, that portion of claimant's motion to compel disclosure would be denied as moot. Further, because claimant had not conferred with the Court concerning the requested disclosure prior to filing a motion, this portion of the motion seeking disclosure would be premature (Uniform Rules for the Court of Claims [22 NYCRR] § 206.8 [b]) .

13. Two additional copies of the Notice of Motion (and attached exhibits) dated March 17, 2009, and submitted to the Court on March 20, 2009 and March 25, 2009, were considered as amended versions of Motion No. M-76474. The amendments concerned only the return date of the motion without affecting the merits. Thus, the Court did not consider the duplicate copies.