

**Bahadur v New York State Dept. of Correctional
Servs.**

2010 NY Slip Op 32221(U)

July 19, 2010

Supreme Court, Queens County

Docket Number: 22641/09

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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GAYATRI BAHADUR, Individually and as Admini-
stratrix of the Estate of PHILLIP KEDARU,
deceased,

Index No.: 22641/09

Plaintiff,

Motion Dated:
May 4, 2010

-against-

Cal. No.: 1

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, MID-STATE CORRECTIONAL FACILITY,
SUPERINTENDENT KENNETH PEARLMAN, ACTING DEPUTY
SUPERINTENDENT A. LABRIOLA, LIEUTENANT GREGORY
LAWRENCE, CORRECTION OFFICER MASCA, ET AL.,

M# 1

Defendants.

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The following papers numbered 1 to 15 read on this motion by defendants (i) to dismiss the complaint as against defendants New York State Department of Correctional Services and Mid-State Correctional Facility on the ground that they cannot be sued in the Supreme Court; (ii) to dismiss the complaint as against defendants Deputy Superintendent for Security Anthony Labriola s/h/a Acting Deputy Superintendent A. Labriola, Lieutenant Gregory Lawrence, Correction Officer Anthony Tanoury s/h/a/ Correction Officer Tamori and Correction Officer Todd Masca s/h/a Correction Officer Masca on the ground that service of process has not been effectuated upon these defendants, or in the alternative, to dismiss the wrongful death cause of action against the individually-named defendants; and cross motion by the plaintiff for an order extending the plaintiff's time to effectuate service of process upon defendants Superintendent Kenneth Pearlman, Acting Deputy Superintendent A. Labriola and Lieutenant Gregory Lawrence and to compel the defendants to provide the current business address or last known residence of defendant Lieutenant Gregory Lawrence.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits 1 - 4

Notice of Cross Motion - Affidavits - Exhibit.... 5 - 8

Affirmations in Opposition - Exhibits	9 - 13
Reply Affirmation	14 - 15

Upon the foregoing papers it is ordered that this motion and cross motion are decided as follows:

This action arises out of the death of plaintiff's decedent, Phillip Kedaru, an inmate at Mid-State Correctional Facility, on August 30, 2007. Plaintiff's decedent was found dead in his cell with a strip of a bed sheet tied around his neck and tied to the cell's door. The complaint alleges that right before the decedent's death, defendant Tamori seized him, placed him in restraints and placed him in solitary confinement. The amended complaint alleges that the defendants violated the decedent's civil rights and seeks to recover damages pursuant to 42 U.S.C. § 1983. The amended complaint also alleges a claim for the decedent's wrongful death. Defendants now move to dismiss the action as set forth above.

Plaintiff does not oppose the branch of the motion to dismiss the complaint as against defendants New York State Department of Correctional Services and Mid-State Correctional Facility on the ground that they cannot be sued in the Supreme Court. Thus, the complaint is dismissed as against State Department of Correctional Services and Mid-State Correctional Facility.

Defendants also seek to dismiss the complaint of defendants Deputy Superintendent for Security Anthony Labriola s/h/a Acting Deputy Superintendent A. Labriola, Lieutenant Gregory Lawrence, Correction Officer Anthony Tanoury s/h/a/ Correction Officer Tamori and Correction Officer Todd Masca s/h/a Correction Officer Masca on the ground that service of process was not properly effectuated upon them. The moving papers, however, do not contain any affidavit from any of the individual defendants stating that they were not served with process. Further, plaintiff submits affidavits of service indicating that defendants Masca and Tamori were served with process via substituted service at their actual place of business pursuant to CPLR 308(2). Such affidavits constitute prima facie evidence of proper service. (Wells Fargo Bank, N.A. v Chaplin, 65 AD3d 588 [2009]; Household Fin. Realty Corp. of New York v Brown, 13 AD3d 340, 340 [2004].) Inasmuch as defendants Masaca and Tamori did not submit their own affidavits challenging service upon them, there is no issue of fact as to the propriety of service upon defendants Masca and Tamori. Thus, the branch of the motion to dismiss the complaint as against defendants Masca and Tamori on the ground of improper service of process is denied.

With respect to defendants Labriola and Lawrence, plaintiff concedes that they, along with defendant Pearlman, were not properly served with process. However, plaintiff cross moves to extend the time to effectuate service of process upon these three defendants pursuant to CPLR 306-b.

CPLR 306-b requires that service of process be made upon the defendant within 120 days after the action was commenced. (Burwell v Yonkers Gen. Hosp., 6 AD3d 478, 480 [2004]) The statute further provides that the time for such service can be extended "upon good cause shown or in the interest of justice." (see Garcia v Simonovsky, 62 AD3d 655, 656 [2009]; Robles v Mirzakhmedov, 34 AD3d 554, 554 [2006].) "Good cause" requires a threshold showing that the plaintiff has made reasonably diligent efforts at service, while the "interest of justice" standard provides a more flexible ground for the exercise of the court's discretion. (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 104 [2001].) Indeed, "[t]he interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." (Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105.)

In determining whether to extend the time for service in the interest of justice, "the court may consider diligence, or lack thereof, along with any relevant factor in making its determination, including but not limited to expiration of the statute of limitations, the meritorious nature of the cause of action, the length of the delay in service, the promptness of a plaintiff's request for an extension of time, and prejudice to the defendant." (Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105-106.)

In the matter at hand, the court finds that plaintiff cannot establish "good cause" to warrant an extension of time to effectuate service upon defendants Pearlman, Labriola and Lawrence. Plaintiff commenced this action on August 21, 2009. Plaintiff submits affidavits of due diligence, which aver that service of process was attempted to be made upon defendants Pearlman, Labriola and Lawrence on December 17, 2009, two days before the 120-day period set forth in CPLR 306-b expired. The service was attempted at the Mid-State Correctional Facility. The affidavit of due diligence states that the Inmate Record Custodian informed the process server that these defendants were no longer affiliated with the Mid-State Correctional Facility. However, the application to extend the time to effectuate service of process was not made (CPLR 2211) until April 7, 2010, almost four months after plaintiff first attempted to serve these defendants and after defendants' motion to dismiss was made. Such action evinces an extreme lack of diligence by the

plaintiff. (Varon v Maimonides Med. Ctr., 67 AD3d 779, 779 [2009]; Baione v Central Suffolk Hosp., 14 AD3d 635, 636 [2005]; Stuart v Gimpel, 2 AD3d 625, 626 [2003].)

The court also finds that the plaintiff cannot establish that the time for service of process should be extended in the interest of justice. In view of the circumstances herein, including the absence of an affidavit of merit from the plaintiff, the lack of diligence shown by the plaintiff and delay in making this application, the court will not extend the time to effectuate service in the interest of justice.

Although this court has found that defendants Masca and Tamori were properly served with process, the court finds that the wrongful death claims against them must be dismissed.

Corrections Law § 24 provides that "1. No civil action shall be brought in any court of this state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee."

2. Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the department shall be brought and maintained in the court of claims as a claim against the state."

Section 24 of the Corrections Law, thus, amounts to a grant of immunity for corrections officers sued in their personal capacities for claims arising out of the discharge of their duties. (May v Donneli, 2009 WL 3049613 [NDNY 2009].) However, the United States Supreme Court, in Haywood v Drown, (___ US ___, 129 S Ct 2108 [2009]), held that when used to relegate to the Court of Claims civil rights actions brought pursuant to 42 U.S.C. §1983, Corrections Law § 24 violates the Supremacy Clause of the Constitution and is, therefore, unconstitutional. The Supreme Court found that such selective treatment of § 1983 claims brought against corrections officers are contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages.

The Supreme Court only found Corrections Law § 24 to be in violation of the Supremacy clause with respect to claims brought under § 1983. However, a claim brought pursuant to state law

does not implicate the Supremacy Clause. Thus, the state law claims herein, for wrongful death, are barred by Corrections Law § 24. (see Blanche v Pirelli, 2009 WL 2499737 [SDNY 2009].)

Accordingly, the branch of the motion by defendants (i) to dismiss the complaint as against defendants New York State Department of Correctional Services and Mid-State Correctional Facility is granted, and the complaint as against defendants New York State Department of Correctional Services and Mid-State Correctional Facility is dismissed.

The branch of the motion to dismiss the complaint as against defendants Deputy Superintendent for Security Anthony Labriola s/h/a Acting Deputy Superintendent A. Labriola and Lieutenant Gregory Lawrence is granted, and the complaint as against defendants Deputy Superintendent for Security Anthony Labriola s/h/a Acting Deputy Superintendent A. Labriola and Lieutenant Gregory Lawrence is dismissed.

The branch of the motion to dismiss the complaint as against defendants Correction Officer Anthony Tanoury s/h/a/ Correction Officer Tamori and Correction Officer Todd Masca s/h/a Correction Officer Masca is granted solely to the extent that the wrongful death claims against defendants Correction Officer Anthony Tanoury s/h/a/ Correction Officer Tamori and Correction Officer Todd Masca s/h/a Correction Officer Masca are dismissed.

The cross motion by the plaintiff is denied in its entirety.

Date: July 19, 2010

AUGUSTUS C. AGATE, J.S.C.