

**Occhigrosso v State of New York**

2010 NY Slip Op 33834(U)

July 6, 2010

Sup Ct, Suffolk County

Docket Number: 10194/2009

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
 JEAN OCCHIGROSSO and JEAN'S GROUP  
 FAMILY DAY CARE,

Plaintiff,

-against-

STATE OF NEW YORK, NEW YORK STATE  
 DEPARTMENT OF HEALTH, NEW YORK  
 STATE DEPARTMENT OF FAMILY  
 ASSISTANCE, NEW YORK STATE OFFICE  
 OF CHILDREN AND FAMILY SERVICES,  
 NEW YORK STATE BUREAU OF EARLY  
 CHILDHOOD SERVICES, TANA A.  
 STROME, ESQ., ADMINISTRATIVE LAW  
 JUDGE DEBRA A. CUBBEDGE, and CRAIG  
 T. HASSEL, ROBIN BELLER and LOIS  
 LONG, individually and in their official  
 capacities,

Defendants.

ORIG. RETURN DATE: MAY 26, 2009  
 FINAL SUBMISSION DATE: FEBRUARY 4, 2010  
 MTN. SEQ. #: 001  
 MOTION: MG

**PLTF'S/PET'S ATTORNEY:**

STANLEY E. ORZECOWSKI, ESQ.  
 195 EAST MAIN STREET  
 SMITHTOWN, NEW YORK 11787  
 631-862-7500

**DEFT'S/RESP ATTORNEY:**

ANDREW M. CUOMO  
 ATTORNEY GENERAL OF THE  
 STATE OF NEW YORK  
 BY: LORI L. PACK, ESQ.  
 ASSISTANT ATTORNEY GENERAL  
 300 MOTOR PARKWAY - SUITE 205  
 HAUPPAUGE, NEW YORK 11788  
 631-231-2424

Upon the following papers numbered 1 to 7 read on this motion \_\_\_\_\_  
TO DISMISS

\_\_\_\_\_  
 Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers  
4, 5; Reply Affirmation and supporting papers 6, 7; it is,

**ORDERED** that this motion by defendants STATE OF NEW YORK,  
 NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE  
 DEPARTMENT OF FAMILY ASSISTANCE, NEW YORK STATE OFFICE OF  
 CHILDREN AND FAMILY SERVICES, NEW YORK STATE BUREAU OF EARLY

CHILDHOOD SERVICES, TANA A. STROME, ESQ., ADMINISTRATIVE LAW JUDGE DEBRA A. CUBBEDGE, CRAIG T. HASSEL, and ROBIN BELLER ("State Defendants") for an Order, pursuant to CPLR 3211, dismissing the instant action, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received opposition to the instant application from plaintiffs, and a reply thereto. Plaintiffs have also submitted a sur-reply affirmation in opposition that has not been considered by the Court.

Plaintiffs commenced this action on March 20, 2009, alleging causes of action sounding negligence, intentional and negligent infliction of emotional distress, and violation of 42 USC § 1983, among others, based upon the alleged conduct of the State Defendants in inspecting and supervising the day care facility of plaintiff JEAN OCCHIGROSSO ("plaintiff"), which ultimately led to the suspension and revocation of plaintiff's license to provide group family day care services to families and children.

On or about April 19, 2007, plaintiffs commenced a prior action in the New York State Court of Claims, asserting essentially the same causes of action asserted herein. By decision and Order dated September 26, 2008 (Lack, J.), the Court dismissed the claim in its entirety, finding that although the claimants couched their causes of action in a way to recover money damages, the Court would have to review and/or relitigate the findings previously made by the Administrative Law Judge, which it was without the jurisdiction to do. The Court held that those determinations are more appropriately decided by an Article 78 proceeding in Supreme Court.

After commencement of the Court of Claims action and prior to the aforementioned decision and Order dismissing that action, plaintiffs commenced an Article 78 proceeding in Supreme Court on February 15, 2008, to vacate, set aside, reverse and rescind in all respects the findings of fact, conclusions of law, and the Decision After Hearing of John Franklin Udochi, Bureau of Special Hearings, dated October 16, 2007, rendered after a hearing before Administrative Law Judge Debra A. Cubbedge, which affirmed the determination of defendant NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES to suspend and revoke plaintiff's license. By Order dated October 27, 2008, this Court transferred the Article 78 petition to the Appellate Division, Second Judicial Department for disposition, pursuant to CPLR 7804 (g), after determining the threshold jurisdictional issues.

The instant motion to dismiss was filed after the transfer to the Second Department but before a decision was rendered by that Court on the petition. Subsequent to the submission of the motion to dismiss, the Second Department rendered a decision and judgment, dated April 27, 2010, which confirmed the determination of John Franklin Udochi, dated October 16, 2007, to suspend and revoke plaintiff's day care license (*Matter of Occhiogrosso v New York State Off. of Children and Family Servs.*, 72 AD3d 1092 [2010]). The Second Department found that the determination under review was supported by substantial evidence in the record; that the penalty imposed was not so disproportionate to the offenses as to be shocking to one's sense of fairness; and that [plaintiffs'] remaining contentions were without merit (*id.*).

The State Defendants now argue that plaintiff merely commenced the instant action to preserve her rights to renew her tort claims if she obtained a favorable determination in the Article 78 action, and that *res judicata* and collateral estoppel act as a bar to this action. Indeed, in opposition hereto, as well as at paragraph 38 of the within verified complaint dated March 20, 2009, plaintiffs acknowledge that "in the expectation of a favorable determination of the Article 78 Proceeding, and so as to further preserve and protect the plaintiffs' rights, claims and causes and (sic) action against the named defendants herein, the plaintiffs now commence this action, pursuant to the provisions of CPRL (sic) §205(a)." Moreover, the State Defendants argue that plaintiffs' causes of action for intentional and negligent infliction of emotional distress, and *prima facie* tort do not lie against the State Defendants.

In New York, *res judicata*, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if (i) there is a judgment on the merits rendered by a court of competent jurisdiction; and (ii) the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was (*Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105 [2008]; *Sainval v City of New York*, 57 AD3d 508 [2008]).

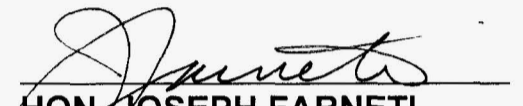
Here, the aforementioned prior action and special proceeding concern the same set of facts relative to the suspension and revocation of plaintiff's day care license; the prior action was dismissed by Order dated September 26, 2008 (Lack, J.) for lack of subject matter jurisdiction; and now a determination on the merits was made by the Second Department in the Article 78 proceeding confirming the determination to suspend and revoke Ms. Occhiogrosso's day care license. As discussed, the Second Department found

substantial evidence in the record for such a determination. Accordingly, it appears that the doctrine of *res judicata* acts as a bar to the instant action (see generally *Matter of Josey v Goord*, 9 NY3d 386 [2007]).

In view of the foregoing, the State Defendants' motion to dismiss the instant action is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 6, 2010

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court