

Oquendo v City of New York

2011 NY Slip Op 33850(U)

June 30, 2011

Sup Ct, Bronx County

Docket Number: 24564/05

Judge: Larry S. Schachner

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-3**

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ROSABEL OQUENDO,	:	Index No. 24564/05
	:	
Plaintiffs,	:	DECISION/ORDER
	:	
- against -	:	
	:	Hon. Larry S. Schachner
THE CITY OF NEW YORK,	:	Justice, Supreme Court
	:	
Defendants.	:	

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Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion for renewal:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Affirmation in Opposition and Exhibits Annexed	2
Reply Affirmation	3

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on January 27, 2005, when plaintiff slipped and fell on snow or ice in the schoolyard located at Twin Parks Upper School in Bronx County.

Plaintiff now moves to renew the decisions of the undersigned, dated February 1, 2010 and July 28, 2010, which granted defendant City of New York's (City) motion to dismiss and denied plaintiff's cross motion for the court to apply the doctrine of estoppel.

A motion for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (2), (3).

In support of its renewal motion plaintiff submits "newly discovered" Department of

Education Audit Reports issued to the Citizens of the City of New York in 2003 by then New York City Comptroller William S. Thompson. Plaintiff contends that these reports highlight the confusion created by and existing among the defendant's various agencies in the wake of the passage of the School Governance Reform Act and moves for reconsideration of the applicability of the doctrine of estoppel to preclude the defendant from escaping liability for claims which were filed against it under the mistaken belief that the so called Department of Education was a mayoral agency. Plaintiff argues, *inter alia*, that these reports indicate that the New York City Comptroller was among those confused by the manner in which the 2002 Act was implemented. Moreover, plaintiff claims to have detrimentally relied on the various forms of mis-information when she filed her notice of claim only against the City. Plaintiff's counsel's justification for not presenting these audit reports on the prior motion was that "it was not readily apparent that such glaring proof of the extent of the confusion created in the wake of the Act's passage even existed." Thus, in the interest of justice, the court grants plaintiff's application for renewal of the City's underlying motion to dismiss and plaintiff's cross motion to apply the doctrine of equitable estoppel in light of plaintiff's "newly discovered" documentation.

Notwithstanding, the court finds plaintiff's equitable estoppel argument unavailing as plaintiff has failed to make the requisite showing. The doctrine of equitable estoppel is only applicable "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice." *Delacruz v Metro. Transp. Auth.*, 45 AD3d 482 (1st Dept 2007) (citation omitted). Moreover, it should only be used sparingly and under exceptional circumstances. *id.* (citation omitted). In addition, "due diligence on the part of the plaintiff in bringing [her] action is an

essential element for the applicability of the doctrine of equitable estoppel, to be demonstrated by the plaintiff when [s]he seeks the shelter of the doctrine.” *Simcuski v Sacli*, 44 NY2d 442, 450 (1978) (citation omitted).

In the instant matter, plaintiff served a notice of claim on the City on or about March 23, 2005. Plaintiff commenced this action by filing a summons and complaint on or about December 5, 2005. The City joined issue by service of its answer on January 17, 2006. The City, in its answer, admitted that it owned the premises identified in the complaint, but denied, among other things, that it controlled, maintained, or managed the subject premises, or that it had a duty to keep the parking lot free of snow and ice. Once the City served its answer, those specific denials of plaintiff’s allegations were sufficient to put plaintiff on notice that she had sued the wrong party. Moreover, the City’s answer was served within the time in which plaintiff could have moved to file a late notice of claim.

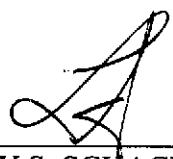
However, in the instant action, plaintiff has failed to show that she intended to move to file a late notice of claim against the Department of Education or to amend her notice of claim to include the Department of Education before the one year and 90 day statute of limitations expired, on or about April 27, 2006, but refrained from doing so due to her reliance on the wrongful or negligent conduct of the City. In other words, plaintiff failed to show that she changed her position to her detriment in reliance on defendant’s wrongful conduct. Plaintiff’s contention that she detrimentally relied on, among other things, general information, press releases, public statements, and political rhetoric of the Mayor and his aides, despite the specific denials and relevant information provided in the City’s answer, and which notice was sufficient for plaintiff to move to file a late notice of claim, is without merit. *See generally, Flores v City*

of *New York*, 62 AD3d 506 (1st Dept 2009) (City not equitably estopped from claiming it was not a proper party where City's answer denied that it operated, maintained or managed the school at issue and plaintiff failed to make the requisite showing).

Therefore, in light of the City's answer, plaintiff has failed to show any wrongful or negligent conduct on the part of the City or any detrimental reliance thereon. Thus, the doctrine of equitable estoppel is inapplicable to the case at bar.

Accordingly, the City's motion to dismiss is granted and plaintiff's cross motion to apply the doctrine of estoppel is denied.

This constitutes the decision and order of the court.



LARRY S. SCHACHNER, J.S.C.

Dated: June 30, 2011