SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT **PART** 5

Justice

Index Number : 151928/2012
NANCE, NEJDRA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, **were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7-2-13

JUL 10 2013

_____, **J.S.C.**

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

NEJDRA NANCE a/k/a CARLINA WHITE,

Plaintiff,

-against-

THE CITY OF NEW YORK, NYC HEALTH and HOSPITAL CORP., and HARLEM HOSPITAL CENTER,

Defendants.

----------X

DECISION/ORDER
Index No. 151928/2012
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	5
REPLYING AFFIDAVITS	
EXHIBITS	
OTHER (X-Motion)	4

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move pursuant to CPLR§ 3211(b)(5),for an Order dismissing the action, which is being made in lieu of serving an Answer to plaintiff's complaint. Plaintiff cross-moves for an Order pursuant to General Municipal Law §50-e(6) to make and serve on defendants, an amended Notice of Claim, denying defendants' motion.

After a review of the papers presented, all relevant statutes and case law, the Court grants the motion and denies the cross-motion.

Factual and procedural background:

The instant suit emanates from an incident occurring on August 4, 1987, when plaintiff, then a three week old infant known as Carlina White, was kidnapped from Harlem Hospital in the County of New York. Thereafter on October 30, 1987, plaintiff's biological parents, Carl Tyson and Joy White, served a Notice of Claim on the Comptroller of the City of New York and Health and Hospitals Corporation, ("HHC"). Said Notice of Claim contained allegations of negligence, medical malpractice and federal civil rights violations in connection with said kidnapping. It also alleged that Carlina White suffered personal physical injuries, as well as emotional pain and suffering.

On October 24, 1988, Tyson and White filed a Complaint on behalf of plaintiff and themselves in the United States District Court, Southern District of New York, against HHC, Harlem Hospital and several officers and employees. The Complaint essentially reiterated the allegations contained in the Notice of Claim, but also contained the additional claims of civil rights violations, loss of services, pain, suffering and emotional distress for both Tyson and White. The federal case was subsequently litigated through the submission of a summary judgment motion.

On December 17, 1992, an Order of Settlement was entered into, signed by the Hon. Leonard B. Sand and filed with the United States District Court, Southern District of New York. The Order stated that in the action, the interests of the missing infant plaintiff were well represented by her biological parents, and that said settlement was in the infant plaintiff's best interests. Specifically, said Order provided for a total monetary settlement in the amount of $750,000.00 to be divided three ways after the initial payment of a $262,070.15 legal fee to the biological parents' attorney, Richard L. Wertis, Esq., was subtracted. The biological parents each individually received one-third of the remaining amount of $487,029.84. The final one-third amount of $162, 643.28, was

allocated to a trust fund established for plaintiff's use and benefit. The trust was to be held by Mr. Wertis until July 15,2008, plaintiff's twenty-first birthday. At that time, it was to be distributed to plaintiff or her guardian in the event she was located by that date. If plaintiff was not located, the trust would terminate on her twenty-first birthday and the funds would be distributed to her biological parents equally. Said Order further provided that if plaintiff was located at any time, the Comptroller of the City of New York would be responsible for paying the reasonable costs of her education through college, in addition to any medical and psychological treatment.

On October 31, 2003, when plaintiff was sixteen years of age and had still not been located, Tyson and White filed a motion to terminate the trust and accelerate payment to them, or alternatively, to permit them to institute a proceeding in New York Surrogate's Court to have plaintiff declared deceased, and to distribute the trust assets. In response, the court appointed Emily Ruben, Esq. of the Legal Aid Society, as *guardian ad litem* for plaintiff. Ms. Ruben opposed the motion, which was ultimately denied on January 22, 2004.

It was subsequently determined that plaintiff was raised in Bridgeport, Connecticut by Anne Pettway, the woman who actually kidnapped her. At the hearing pursuant to General Municipal §50-h, plaintiff testified that Pettway was never abusive to her; that she had a relationship with Pettway's extended family; that she had established and maintained friendships; and had attended school. It was only when she turned sixteen years of age and was contemplating pre-natal care, that she asked Pettway for her birth certificate and other identifying documents. At that time, Pettway was apparently compelled to inform plaintiff that she was not plaintiff's biological mother. However, she also claimed that plaintiff had been left in her care as a newborn.

The Connecticut Department of Children and Families ("DCF"), issued plaintiff a Social Security number and birth certificate. DCF also began sending plaintiff stipends which continued until she turned twenty one years of age in 2008. Plaintiff graduated from High School in June 2005,shortly after the birth of her daughter. She then obtained employment as a receptionist and eventually moved out of Pettway's house. During this time, she began an intensive internet search to the hope of determining her true origins.

In 2010, plaintiff and her daughter moved to Snellville, Georgia. She initially lived with a relative of Pettway, then moved into her own apartment after securing a position at a hair salon. In December 2010, after discovering a photograph of a missing child who had been abducted in 1987, and who strongly resembled her own daughter, plaintiff contacted the National Center for Missing and Exploited Children ("NCMEC"), based on her suspicion that she was in fact, that infant. Consequently, she ceased all communication with Pettway in December 2010. During the first week of January 2011, NCMEC facilitated contact between plaintiff and White via telephone. Plaintiff flew to New York to meet with both Tyson and White, prior to receiving DNA confirmation that they were her biological parents. Upon her return, the New York Police Department informed her that DNA samples confirmed that White and Tyson were indeed her biological parents. Unfortunately, plaintiff and White encountered difficulty in establishing a relationship, and their efforts were further impeded by the eventual media attention they began receiving.

When plaintiff inquired about the trust money left for her benefit, White informed her that the money no longer existed. In January 2011, plaintiff sought psychological counseling and was ultimately diagnosed as suffering from depression. On March 10, 2011, plaintiff served a Notice of Claim on defendants, alleging negligence with respect to her kidnapping. The Notice of Claim stated

that the claim arose on December 20, 2010, when plaintiff actually "discovered the injury" (see Exhibit "G"). On May 23, 2012, plaintiff served a summons with notice on defendants (Exhibit "H"). In response, defendants served a notice of appearance and demand for complaint on June 12, 2012. On August 6, 2012, plaintiff served a complaint containing allegations of negligence on the part of defendants.

Said complaint states that plaintiff's claim did not arise on the day which, according to the Notice of Claim, she "discovered the injury," December 20, 2010. Rather, the complaint alleges that the claim actually arose on January 18, 2011, the date NCMEC "notified Plaintiff that her DNA confirmed that she is in fact the missing child, Carlina White." Additionally, plaintiff alleges that when the federal case settled in 1992, the parties could not have measured what type of injuries she would have if she was found twenty-four years after abduction (see Exhibit "J"). By stipulation dated August 21, 2012, defendants' time to respond to plaintiff's complaint was extended to September 10, 2012.

Positions of the parties:

Defendants argue that plaintiff's action must be dismissed because it is barred by the doctrine of res judicata. They argue that plaintiff's claims of negligence have previously been litigated and settled on her behalf in the federal case, and that "the fact that a settlement, as opposed to a judgment, brought the federal case to a conclusion is not fatal to an application of res judicata herein." (See Notice of Motion, p:9, ¶ 20). Defendants remind the Court that when Tyson and White commenced the federal case in 1988, they did so also on behalf of plaintiff.

Plaintiff 's counsel, Eugene Byers, Esq., argues that plaintiff first moved this Court for an Order granting her leave to amend her Notice of Claim, because when she initially consulted with

his office, she informed him in error, that she had received DNA confirmation that she was in fact, Carlina White. However, some months later, she informed counsel that she had made an error in that the actual date of DNA confirmation was January 18, 2011. Therefore, Mr. Byers argues that plaintiff, pursuant to GML §50-5(6), is entitled to amend her notice of claim, in that said error was made in good faith. (See Cross-Motion, pp. 2-3, ¶ 5-6]). Mr. Byers also argues that defendants erroneously contend that she failed to commence the instant action within the statutorily mandated one year and ninety days following discovery of the injury. While defendants assert that plaintiff commenced the instant action on May 23, 2012, Mr. Byers asserts that his "confirmation concerning the e-filing (electronic filing), of the case reflects a filing date of April 18, 2012. He also argues that the date that plaintiff obtained conclusive results of the DNA testing should be deemed the date the cause of action or harm was actually discovered.

Mr. Byers argues that "no cause of action for negligence arises until actual damages for said negligence are sustained." (*Id.* p. 4, ¶8]). Thus, actual damages manifested themselves when plaintiff received the DNA results, because it was at that time that she incurred injury, and when her claim accrued. (*Id.* ¶ 8). Plaintiff also argues that she is entitled to the benefit of the "infancy toll," in that she was under the age of eighteen years of age when her cause of action accrued. She asserts that said statute of limitations is only applicable as it pertains to the tolling of the statute during infancy. However, since she is now pursuing an action for negligence and by extension, is seeking damages for personal injury, she is now afforded a three year statute of limitations commensurate with an action for personal injury. Plaintiff further argues that res judicata is inapplicable in that "the instant action is not the same cause of action as the first cause of action. The injuries claimed herein are not the same as those claimed in the first cause of action. The injuries Plaintiff alleges

herein, were not foreseeable at the time of the first action." (*Id.* 7 ¶ 13). Hence, there is no legal bar to plaintiff's proceeding with the instant cause of action.

Conclusions of law:

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the first cause of action" (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347 [1999]; see also *Pawling Lake Prop. Owners Assn., Inc. v. Greiner*, 72 A.D.3d 665, 668 [2d Dept. 2010]). Under New York's transactional approach to the doctrine of res judicata, once a claim is brought to a final conclusion on the merits, "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Hunter*, 4 N.Y.3d 260, 269 [2005]; see *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 [1981]); *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d at 347).

In the case at bar, the court agrees with defendant that the instant action is barred by the doctrine of res judicata. Indeed, plaintiff herself "concedes" that the doctrine "gives binding effects to judgments of a Court of competent jurisdiction." (*Id.* p.6, ¶ 11). However, she argues against the application of said doctrine, asserting that she was denied the opportunity to sue because she was merely an infant at the time of the federal action. Additionally, she asserts that the injuries she is now claiming are different than those previously claimed in the federal action. Thus, "[t]he instant case was not foreseeable and the settlement and order in the first case could not have and did not anticipate all eventualites." (*Id.* p. 7, ¶14).

The Court finds unavailing, plaintiff's argument that she was denied a rightful opportunity to sue because she was an infant when the federal action was commenced. Indeed, plaintiff's interests in the federal action were represented by her biological parents and their counsel.

Additionally, her interests were also recognized, protected and promoted by the federal court's settlement order. It is well settled that the doctrine of res judicata bars litigation of a cause of action that either was raised or could have been raised in the prior proceeding (see *Poundview Corp. v. Blatt*, 95 A.D.3d 980 [2d Dept. 2012]). It also bars an attempt to relitigate the same transaction based upon different theories and the seeking of different remedies (see *Lanzano v. City of New York*, 202 A.D.2d 378 [1st Dept. 1994], *lv. denied* 83 N.Y.2d 760 [1994]).

Additionally, the Court finds unavailing, plaintiff's argument regarding what the applicable statute of limitations is with regard to the instant action. The Court agrees with defendant that plaintiff takes inconsistent and contradictory positions regarding the accrual date of her action, which severely undermine the legitimacy of her arguments. In paragraph 8, she argues that her cause of action actually accrued when she received the DNA results on January 18, 2011. In paragraph 9, she argues that because she was an infant (under eighteen years old), when her cause of action accrued, she is entitled to the benefit of the infancy toll pursuant to CPLR§ 208.

She states "[h]owever, the Statute of Limitation is only applicable as it pertains to the tolling of the Statute during infancy. Since, she claims that she is now pursuing an action for negligence and by extension seeking damages for personal injury, the applicable Statute of Limitations is three (3) years." (*Id.* at ¶ 9). In support of her 3 year argument, plaintiff refers to and relies on the segment of CPLR§ 208 which provides in pertinent part, "If the applicable period is three (3) years or longer, as it is in a personal injury action, the Plaintiff will have at least three(3) years from the time the disability ceases...."

Plaintiff's arguments relating to what the applicable statute of limitations is in the instant action are devoid of any merit, particularly since she fails to submit any legitimate basis for them.

She fails to address when her alleged disability allegedly ceased, or why she is entitled to the infancy toll. Moreover, while she ostensibly argues that the statute of limitations was tolled until discovery of her injury, (presumably when she received the results of her DNA tests), she again conveniently fails to proffer any legal basis for this argument.

It is important to note that during her GML§ 50-h hearing, plaintiff testified that in January 2011, she sought psychological counseling (*id.*, p. 69), and at the time of said hearing, she was seeing a counselor nearly every week (*id.*, pp. 69-70), and the counselor diagnosed her as suffering from depression (*id.*, p. 71). The federal order specifically states in pertinent part, that if plaintiff was to be found and identified at any time in the future, whether before or after July 15, 2008, the Comptroller of the City of New York would be responsible for paying the reasonable costs of her education through college, in addition to "any medical treatment, including psychological treatment, without limit, as a result of the abduction..."

While the Court has no legal alternative but to grant the instant motion to dismiss, it does note that plaintiff may have a cause of action against the Comptroller of the City of New York, for any costs incurred which would be covered by the aforementioned federal order. Hence, nothing in this decision/order should be interpreted as precluding any such action.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is hereby granted; and it is further

ORDERED that plaintiff's cross-motion is denied ; and it is further

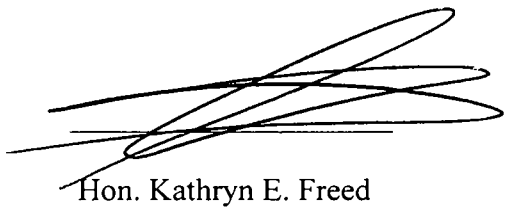
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 2, 2013

JUL 0 2 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT