

**Wright v New York City Bd. of Educ.**

2013 NY Slip Op 32032(U)

August 28, 2013

Sup Ct, New York County

Docket Number: 401901/2012

Judge: Louis B. York

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

## LOUIS B. YORK

PRESENT: \_\_\_\_\_  
J.S.C.  
Justice

PART 2

Index Number : 401901/2012  
WRIGHT, PETER A.  
vs.  
NEW YORK CITY BOARD OF EDUCATION  
SEQUENCE NUMBER : 001  
OTHER RELIEFS \_\_\_\_\_

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 *decided in accordance with the accompanying decision.*

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

**FILED**  
SEP 03 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**  
SEP 03 2013  
IAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

Dated: 8/28/13

LBY, J.S.C.  
**LOUIS B. YORK**

- 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

----- X  
PETER A. WRIGHT as Parent of Nicole Wright

Plaintiff(s),

- against -

NEW YORK CITY BOARD OF EDUCATION &  
JEAN MCKEON, AS PRINCIPAL, P.S. #197,

Defendants.

----- X

Index No. 401901/12  
File No. 2012-042812

**FILED**  
SEP 03 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

York, J.S.C.:

In this personal injury action *pro se* plaintiff Peter Wright ("Wright"), as parent of Nicole Wright ("Nicole"), alleges that on or about September 9, 2009, Nicole's classmates verbally and physically assaulted her. Plaintiff alleges that this abuse continued throughout the next three school years and that the Principle and staff did not intervene. Defendants New York City Board of Education and P.S. #197 Principal Jean McKeon now move for summary judgment under New York General Municipal Law Sections 50-e and 50-i and CPLR Section 3013, on the grounds that plaintiff failed to file a timely notice of claim and that plaintiff's complaint is time-barred by the statute of limitations. Defendants also move for dismissal on the ground that plaintiff did not provide the prerequisite notice regarding his allegations under CPLR Section 3013. Alternatively, defendants request that if this court denies this motion, it changes the venue of matter to the County of Queens. For the reasons below, the court grants the motion and dismisses the action.

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## Background

Peter Wright alleges that his 11-year-old daughter, Nicole Wright, was verbally and physically assaulted on September 9, 2009 at or on her way to Public School #197. Wright alleges that this abuse continued for three years until Nicole was granted a transfer to Public School #47Q. Wright also contends the Jack McKeon, Principal of P.S. #197, and other staff members were aware of this abuse and did not intervene.

The parties dispute whether plaintiff served upon defendants a notice of claim within 90 days of the incident. Plaintiff alleges he properly served defendants within 90 days of September 9, 2009. Accordingly, plaintiff has not sought leave to serve defendants with late notice. Defendants assert they were not served until June 12, 2012 when plaintiff filed a notice of claim with the Department of Education.

The parties also dispute whether plaintiff's pleading is adequate. Plaintiff contends that over the course of three years, other students abused Nicole by shoving her down a flight of stairs, smashing her forehead into a concrete wall, kicking her legs during class, and punching her in the nose. Plaintiff alleges that these incidents caused Nicole to suffer a concussion, severe headaches, a permanent bump on her forehead, insecurity about this bump's appearance, and panic attacks.

## Discussion

Under CPLR 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Under CPLR 3211(a)(7), a party may dismiss one or all causes of action if the "pleading fails to state a cause of action."

1) *General Municipal Law*

a. *Section 50-e*

Any case “founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . the notice of claim shall . . . be served . . . within 90 days after the claim arises,” under General Municipal Law Section 50-e (1) (a). Notice of claim is a statutory condition precedent without which a party cannot bring an action against a municipal entity. See Scantlebury v. N.Y. City Health & Hospital Corp., 4 N.Y.3d 606, 609, 797 N.Y.S.2d 394, 396 (2005). Defendants argue that plaintiff failed to file a claim within 90 days of September 9, 2009 and therefore the court should dismiss the action.

First, plaintiff alleges in his complaint that he served defendants with the notice of claim <sup>within</sup> ~~with~~ 90 days of the September 2009 incident. However, in opposing this motion plaintiff has provided no evidence for support of this alleged service. Defendants assert they were not served until June 12, 2012 when plaintiff filed his claim with the Department of Education. Plaintiff’s first allegation must be dismissed, as defendants were not served notice of claim within the 90-day limitation period.

Second, from his papers it appears plaintiff alleges that the 90-day limitation period is extended by the continuing wrong doctrine. Plaintiff argues that the tortious abuse of his daughter, which spanned three years, constitutes a continuing wrong. A continuing wrong occurs where “the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed.” Covington v. Walker, 3 N.Y.3d 287, 292, 786 N.Y.S.2d 409, 411 (2004). “If a continuing wrong is alleged, the action is not time-barred because the cause of action continues to accrue anew, each day the wrong is perpetrated.” Town

of Huntington v County of Suffolk, 79 A.D.3d 207, 215, 910 N.Y.S.2d 454, 461 (2nd Dept. 2010) (holding that repeated failure to repair a damaged road is a continuing wrong).

The Court of Appeals has held that a permanent encroachment or trespass gives rise to successive, continuously accruing claims for damages. See 509 Sixth Avenue Corp. v. New York City Transit Authority, 15 N.Y.2d 48, 52, 255 N.Y.S.2d 89, 92 (1964). However, the continuing wrong rule commonly applies to trespass actions for permanent or continuing encroachments. See e.g. State of New York v. CSRI Limited Partnership, 289 A.D.2d 394, 395, 734 N.Y.S.2d 626, 628 (2nd Dep. 2001). Additionally, even though a tortious act may have a lasting effect, “it cannot be [] argued that the tort is a continuing wrong unaffected by any statute of limitations.” Patrowich v. Chemical Bank, 98 A.D.2d 318, 325, 470 N.Y.S.2d 599, 604 (1st Dept. 1984) (holding that defendant’s discrimination, which had lasting effects, was not a continuing wrong). Furthermore, when the act is not continuous it does not constitute a continuing wrong, even if it creates a continuing dangerous or unwanted condition. See Firth v. State, 98 N.Y.2d 365, 368, 747 N.Y.S.2d 69, 70 (2002) (including the republication of a defamatory article).

Plaintiff’s allegation that the abuse of his daughter constitutes a continuing wrong is incorrect. Plaintiff alleges that on separate occasions, Nicole was pushed, punched, kicked and slammed into a wall. While each incident constitutes abuse, each instance creates an individual harm that can be traced exclusively to the day the abuse was committed. Covington, 3 N.Y.3d at 292, 786 N.Y.S.2d at 411. Additionally, plaintiff’s complaint provides no specific dates detailing when each act occurred. Here, unlike Huntington in which the town repeatedly failed to repair the roads, each incident should not be considered a successive cause of action because plaintiff has failed to detail any connection or correlation among each action. Huntington, 79

A.D.3d at 215, 910 N.Y.S.2d at 461. Furthermore, even if plaintiff is able to prove that the school's negligence allowed for Nicole's repeated abuse, the lasting effects of this negligence, such as her panic attacks, would not constitute a continuing wrong.

Finally, a court may extend the time to serve notice in a tort claim against a school district, pursuant to General Municipal Law Section 50-e(5). Under Section 50-e(5) courts weigh three factors: (1) whether there was a reasonable excuse for the failure to serve a timely notice of claim; (2) whether the school district had notice of the essential facts of the claim within 90 days after the claim arose; and (3) whether the delay would substantially prejudice the school district. See Grogan v. Seaford Union Free School District, 59 A.D.3d 596, 597, 873 N.Y.S.2d 225, 226 (2nd Dept. 2009). Here, plaintiff provides no excuse for his failure to serve timely notice. Plaintiff also does not provide any support for his claim that he did file timely notice. Moreover, many of the essential facts such as dates and parties present are absent from the pleading. Finally, the delay in notice will likely prejudice defendants as there is no documentation of the abuse, and the further removed from the incident, the harder it becomes to discern the facts of each incident and the injuries sustained. Thus, the court must conclude that defendants were not given actual notice of the essential facts of the claim within a reasonable time.

*b. Section 50-i*

As stated above, plaintiff has failed to provide any specific dates regarding the abuse. Even if plaintiff had served a timely notice of complaint, a city or school district can only be prosecuted for negligence if notice is served within 1 year and 90 days of the date upon which the claim is based, under General Municipal Law Section 50-i (1). Witt v. Town of Amherst, 17 A.D.3d 1030, 1031, 794 N.Y.S.2d 187, 188 (4th Dept. 2005). Plaintiff's complaint is outside of the 1-year and 90-day requirement based on the original date of abuse, September 9, 2009.

Plaintiff's assertion that various instances of abuse continued for three years is not enough to delay start of this period. Also, acts that are not continuous do not constitute continuous wrongs. See Witt, 17 A.3d at 1031, 794 N.Y.S.2d at 188. As this is not a continuous wrong, the alleged tort occurred, and the statute of limitations began to accrue, on September 9, 2009. Thus, this claim must be dismissed even if plaintiff effectively served defendants on June 12, 2012 because this falls outside of the 1-year and 90-day service period.

For the reasons above, the court grants summary judgment for the General Municipal Law Section 50-e and 50-i claims.

2) *CPLR Section 3013*

This Court has already granted summary judgment for the defendants, rendering the CPLR Section 3013 moot. However, had it reached the matter, this Court would have found that the complaint is insufficiently particular under Section 3013. Section 3013 requires "statements in a pleading shall be sufficiently particular to give the court and parties notice of the . . . occurrences . . . intended to be proved, and the material elements of each cause of action or defense." The court dismisses pleadings that fail to detail when and where the tort occurred, and what parties were present and responsible should be dismissed. See Simon v. 160 West End Ave. Corp., 7 A.D.3d 318, 320, 775 N.Y.S.2d 851, 851-52 (1st Dept. 2004). Even affording this *pro se* plaintiff some "latitude" in his pleading, including reading all supplemental evidence provided into his complaint, he has not satisfied the standard of proof required by law. See Duffen v. State, 245 A.D.2d 653, 653, 665 N.Y.S.2d 978, 979 (3rd Dept. 1997).

In addition, defendants' alternative request for a change of venue is moot. For the reasons above, it is hereby



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U.S. DEPT. OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION