

Hosking v City of New York

2015 NY Slip Op 31088(U)

June 22, 2015

Supreme Court, New York County

Docket Number: 157081/2013

Judge: Kathryn E. Freed

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

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STEPHANY HOSKING,

Plaintiff,

-against-

DECISION/ORDER
Index No. 157081/2013
Seq. No. 004

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION AND
THE NEW YORK CITY BOARD OF EDUCATION,

Defendants.

-----X
KATHRYN E. FREED, J.S.C:

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

Seq. 004

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVIT ATTACHED	1,2 (Exs. 1-9)
ANSWERING AFFIDAVIT	3
REPLYING AFFIDAVIT	4

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Plaintiff Stephany Hosking moves, for the second time, pursuant to CPLR 2221, for an order granting reargument of her motion, dated June 3, 2014, seeking, inter alia, leave, pursuant to General Municipal Law § 50-e (5), to serve a late notice of claim, nunc pro tunc, upon defendants the New York City Board of Education and the New York City Department of Education (hereinafter collectively “the DOE”) or, in the alternative, to deem a notice of claim filed on the DOE on June 13, 2012 to be timely. After oral argument, a review of the papers presented, and all relevant statutes and case law, this Court **denies** the motion.

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FACTUAL AND PROCEDURAL BACKGROUND:

This action, alleging negligent supervision, arises from an incident on February 5, 2004 in which plaintiff was allegedly sexually assaulted by fellow students at P.S. 4 in Manhattan. On February 10, 2004, the DOE issued an "Occurrence Report" reflecting that, on February 5, 2004, an unidentified individual waved a knife in plaintiff's face and threatened her and that she was inappropriately touched by two male students in a hallway on the third floor of the school.

On March 19, 2004, plaintiff, by her mother and natural guardian, Priscilla Cabrera, and Priscilla Cabrera individually, filed a notice of claim against the City alleging that plaintiff was sexually assaulted at knifepoint by two fellow classmates on February 5, 2004. On April 28, 2005, plaintiff, through her guardian, Cabrera, as well as Cabrera individually, commenced an action against the City of New York ("the City") under Index Number 105910/05. In the complaint, plaintiff alleged that, as a result of the negligence of the City, she was sexually assaulted on February 5, 2004.

On May 14, 2004, plaintiff testified at a 50-h hearing. She testified, inter alia, that her date of birth was May 8, 1994 and that she was sexually assaulted in her school at knifepoint on February 5, 2010.

On July 13, 2012, plaintiff filed a notice of claim against the DOE alleging the same assault by fellow classmates. On August 2, 2013, plaintiff, in her individual capacity, commenced the above-captioned action sounding in negligent supervision against the City and the DOE under Index Number 157081/13.

On August 5, 2013, plaintiff moved for an order, pursuant to GML § 50-e (5), to serve a notice of claim, nunc pro tunc, on the DOE, or to deem the notice of claim served on the DOE on June 13, 2012 to be timely filed. In the alternative, plaintiff moved for an order, pursuant to GML § 50-e (6), to correct her good faith omission of the DOE from the notice of claim filed on the City on March 19, 2004. By order dated and entered April 29, 2014, this Court denied

plaintiff's motion and, by motion dated June 3, 2014, plaintiff sought to reargue that motion in motion sequence 002. In motion sequence 003, the City and the DOE moved, pursuant to CPLR 3211(a)(4), to dismiss the complaint on the ground that there was another action pending against them.

By order dated March 11, 2015, this Court denied plaintiff's motion to reargue on the ground that it was untimely. This court also dismissed the complaint as against the City.

Plaintiff now moves, once again, for reargument of her motion seeking, inter alia, to file a late notice of claim, and the City opposes. In support of her motion, plaintiff incorporates by reference the underlying motion papers and the arguments therein as well as the court orders deciding the preceding motions.

POSITIONS OF THE PARTIES:

Plaintiff asserts that this Court incorrectly determined in its order dated March 11, 2015 that her motion for reargument was untimely based on the case of *Fornabaio v City of New York*, 41 AD3d 125 (1st Dept 2007). Specifically, she claims that, although *Fornabaio* would render untimely a motion to renew, it does not render untimely her motion to reargue, which relates back to the time of her initial motion to serve a late notice of claim. Further, plaintiff asserts that her motion should be granted since the DOE will not be prejudiced if it is served with a late notice of claim.

In opposition to the motion, the DOE further argues, inter alia, that the plaintiff failed to establish any nexus between her infancy and the delay in seeking leave to file a late notice of claim. The City and DOE further assert that the plaintiff cannot be granted leave to file a late notice of claim because the DOE did not have actual knowledge of the facts underlying the claim against it within 90 days of the alleged occurrence. Further, they assert that they would be

prejudiced by the granting of the plaintiff's motion since their ability to investigate the claim would be compromised.

In reply, plaintiff asserts that, since the City and the DOE fail to raise the issue of the timeliness of the motion in their opposition papers, the motion should be granted as unopposed. Plaintiff further asserts that the argument by the City and the DOE regarding prejudice is undermined by the finding in this Court's April 29, 2014 order that "[t]he DOE Occurrence Report arguably reflects that the DOE had knowledge of the essential facts underlying that claim, and the [d]efendants do not deny such knowledge in opposing the motion." Further, plaintiff asserts that, since the City and the DOE are both represented by the City's Law Department, the Law Department's ability to investigate this claim could not have been compromised.

CONCLUSIONS OF LAW:

As this Court stated in its order dated March 11, 2015, a motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]) and is "addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Since plaintiff has failed to identify any ground warranting the granting of reargument of its June 3, 2014 motion for reargument, the instant motion must be denied.

As an initial matter, this Court notes that the instant motion is procedurally improper. Plaintiff originally moved for leave to file a late notice of claim. When the motion seeking such leave was denied, plaintiff moved, on June 3, 2014, for reargument of the same. When the June 3, 2014 reargument motion was denied by order dated March 11, 2015, plaintiff made the instant

motion seeking, inter alia, leave to file a late notice of claim once again. However, plaintiff has cited no authority supporting its ability to move to reargue the same motion twice.

In any event, as this Court stated in its March 11, 2015 order, this Court lacks the discretion to entertain the instant motion for reargument, since it was made after the limitations period of one year and 90 days had expired. *See* Gen. Mun. Law § 50-i (1) (c); *Fornabaio v City of New York*, 41 AD3d 125 (1st Dept 2007). As noted above, plaintiff was born on May 8, 1994. Any claim she had against the DOE was tolled until her eighteenth birthday, May 8, 2012. *See* CPLR 105 (j), 208. She thus had one year and 90 days from May 8, 2012 (until August 6, 2013) to move to file a late notice of claim (*see Pryor v Serrano*, 305 AD2d 717 [3d Dept 2003]; *Simons v Sherburne-Earville Cent. School Dist.*, 233 AD2d 592 [3d Dept 1996]; *Corpas v Copiague Union Free School Dist.*, 100 AD2d 951 [2d Dept 1994]) and her August 5, 2013 motion seeking such relief was in fact timely. However, since her initial motion to reargue was filed on June 4, 2014, after the expiration of the one year and 90 day period on August 6, 2013, her untimely application did not relate back to the date on which the timely August 5, 2013 motion was made. *See Fornabaio, supra*. Given this Court's lack of discretion, it must deny plaintiff's reargument motion, even though the City and the DOE did not raise this issue in their papers.

Although plaintiff argues, based on the appellate briefs submitted in *Fornabaio*, that that case involved a motion to renew, and not one to reargue, and that the reargument motion should thus relate back to plaintiff's initial motion to file a late notice of claim as timely, the plain language of the First Department's decision is to the contrary:

The motion court lacked discretion to grant petitioner leave to file a late notice of claim, since his reargument/renewal motion was made 12 days after the one-year-and-90-day limitations period had expired.”

41 AD3d, *supra*, at 125.

Although this Court notes that the First Department has held in the past that a motion for reargument will relate back to a timely motion to file a late notice of claim (*see, e.g., Mateo v City of New York*, 245 AD2d 25 [1st Dept 1997]), it sees no reason not to adhere to the much more recent decision in *Fornabaio*, upon which it relied in rendering its March 11, 2015 order.

Even assuming, arguendo, that plaintiff's motion were timely and procedurally proper, it would be denied on the merits. Plaintiff, relying on the case of *Padilla v Dept. of Educ. of the City of New York*, 90 AD3d 458 (1st Dept 2011), asserted in support of their underlying motion that it was reasonable to name only the City as a defendant since the law was unclear as to whether the DOE had to be named separately. Indeed, the defendants conceded in opposition to the underlying motion that “[p]laintiff [was] correct that the court in *Padilla* found that the plaintiff's mistake in failing to file a notice of claim against the DOE was excusable given the large amount of confusion regarding the notice of claim requirements as they apply to the DOE.” Defendants’ Aff. In Opp. To Underlying Motion, at par. 21.

In *Padilla*, the First Department noted that, after November of 2002, when “the Office of the Corporation Counsel posted a notice in the New York Law Journal indicating that it was the ‘sole representative for the New York City Department or Board of Education’ for service of notices of claim and process”, there was a “‘period of particular confusion’ about notice of claim procedure.” *Padilla, supra* at 458. However, stated the First Department, “[t]his situation was clarified in 2007, when [it] held [in the matter of *Perez v City of New York*, 41 AD3d 378 (1st Dept 2007), *lv denied* 10 NY3d 708 (2008)] that the City was not a proper party to actions arising out of torts allegedly committed by the [DOE] and its employees.” *Id.*, at 458. The First Department, in reversing the dismissal of the complaint due to plaintiff's failure to serve the DOE with a notice of claim, stated that, in 2006, before the clarification set forth in *Perez*, “it

was reasonable for plaintiff to name the City as the only defendant in her initial notice of claim timely filed with Corporation Counsel.” *Padilla, supra* at 458-459. The Court further stated that “[b]y the time *Perez* was decided, it was too late for plaintiff to move for leave to serve a late notice of claim.” *Id.*, at 459. Here, however, the plaintiff had no explanation for why she waited until six years after *Perez* was decided in 2007 to move to file a late notice of claim, as that decision clearly held that the DOE needed to be sued separately from the City. Further, plaintiff should have moved to file a late notice of claim when the First Department decided *Padilla* in 2011. However, plaintiff, without ever having given any excuse, waited until 2013 to move to file a late notice of claim.

Additionally, plaintiff’s argument that the DOE may have had knowledge about the facts underlying the subject claim because the City had such knowledge is without merit. The City conducted a 50-h hearing and the DOE did not have the opportunity to do so. It is well settled that the City and the DOE are separate entities and that the knowledge of one is not imputed to the other. *See Padilla v Dept. of Educ. of the City of New York, supra; Caselli v City of New York*, 105 AD2d 251, 255 (2d Dept 1984). Therefore, an investigation conducted by the City would not be identical to one conducted by the DOE. Similarly, the investigation conducted by the District Attorney in connection with its criminal case against the alleged assailants was by no means identical to that which the DOE may have performed if it had received timely notice of the claim. *See Caselli, supra*, at 255.

Contrary to plaintiff’s contention, this Court did not previously find that the DOE had knowledge of the essential facts underlying the claim. Rather, this Court stated that the DOE “arguably” had such knowledge. Thus, this Court never found that there would be an absence of prejudice were the DOE to file a late notice of claim at this juncture. On the contrary, given the

factors above, and the totality of the circumstances in this matter, this Court finds that there would be substantial prejudice were plaintiff to file a late notice of claim at this juncture against the DOE arising from a 2004 incident.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for reargument is denied in all respects; and it is further,

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

DATED: June 22, 2015

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', with several overlapping loops and a long horizontal stroke at the end.

Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**