

Silver v Silver

2016 NY Slip Op 30652(U)

March 7, 2016

Supreme Court, Queens County

Docket Number: 705471/15

Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED
MAR 10 2016
COUNTY CLERK
QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART MD
Justice

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PETER J. O'DONOGHUE

Jackie Silver,

Index No.: 705471/15

Plaintiff

-against-

Jennifer Silver, Zucker Hillside
Hospital, North Shore Long Island
Jewish Health System/EMS, North Shore/
Long Island Jewish Health System ER,

Motion Date: 10/21/15
and 12/09/15

Motion Seq. Nos:1 and 2

Defendants

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Motions bearing sequence numbers 1 and 2 of 10/21/15 and 12/09/15 are hereby consolidated for disposition. The following papers numbered 3-9; 12; 14; 15; 17; 19; 20; 22; 23 read on this motion by Zucker Hillside Hospital, North Shore Long Island Jewish Health System/EMS, North Shore/Long Island Jewish Health System ER ("the hospital defendants") and cross motion by Jennifer Silver for an Order

a. pursuant to CPLR 3211(a)(5) dismissing this matter as it is barred by the doctrine of *res judicata*;

b. alternatively, pursuant to CPLR 3211(a)(4) dismissing this matter as there is another action pending between the same parties for the same cause of action in the Supreme Court, Queens County;

c. alternatively, pursuant to CPLR 3211(a)(5) dismissing the three causes of action that are barred by the applicable statute of limitations;

d. alternatively, dismissing plaintiff's cause of action through 42 USC 1983 as defendants are not State actors and were not acting under color of State law;

and motion by plaintiff for permission/an order to file a sur-reply to Anna Hock' s, and John Moroney's, counsel for defendants, Affirmation in Reply (motion #001).

PAPERS
NUMBERED

Seq. No. 1

N.M.-Affidavits-Exhibits.....	3-9
Notice of Cross Motion-Affidavits-Exhibits..	12
Answering Papers-Affidavits-Exhibits.....	14
Reply Affirmation-Exhibits.....	15;17

Seq. No. 2

N.M.-Affidavits-Exhibits.....	19
Answering Papers-Affidavits-Exhibits.....	20;22
Reply Affirmation-Exhibits.....	23

Upon the foregoing papers it is Ordered that the motion by by the hospital defendants and cross motion by Jennifer Silver for orders as described above are decided as follows:

Initially, the Court notes that plaintiff pro se commenced an earlier action bearing index number 10216/13 alleging claims surrounding certain events that transpired on May 27, 2012. This case was assigned to Hon. Leonard Livote. The case was dismissed as against "the hospital defendants", pursuant to CPLR 3211(a)(8) and CPLR 306-b for failure to effectuate proper service, by Order dated August 29, 2014. The remaining branches of the motion to dismiss the complaint pursuant to CPLR 3211(a)(5) as it relates to all causes of action for intentional torts as time barred by the applicable one year statute of limitations and pursuant to CPLR 3211(a)(7) for failure to state a cause of action were denied as moot (Exh. C annexed to moving papers). The case was dismissed as against the remaining defendant Jennifer Silver, pursuant to CPLR 3211(a)(8) and CPLR 306-b for failure to effectuate proper service, by Order dated December 15, 2014 and the remaining branches of the motion to dismiss the complaint as time barred by the applicable statute of limitations and for failure to state a cause of action were denied as moot. Plaintiff's motion to enter a default judgment against defendant Jennifer Silver was denied in the same Order.

In June, 2015 plaintiff pro se moved the Court to "reconsider" the August 29, 2014 dismissal against "the hospital defendants". In an Order dated September 22, 2015, the Hon. Livote denied the branch of the motion seeking re-argument and granted the branch of the motion seeking renewal and upon renewal adhered to the Court's original determination.

In May, 2015, prior to plaintiff pro-se's submission of her "reconsideration" motion, plaintiff pro se commenced the within action bearing index number 705471/15. The allegations set forth in the action bearing index number 705471/15 are identical to the allegations set forth in the case bearing index number 10216/13. In light of the fact that the "reconsideration" motion has been decided and the Court denied re-argument and adhered to its original determination dismissing the action for failure to effectuate proper service, the branches of the within motion and cross motion in the case bearing index number 705471/15 for an order dismissing this matter pursuant to CPLR 3211(a)(5) on the grounds that it is barred by the doctrine of *res judicata* and 3211(a)(4) on the grounds that there is another action pending between the same parties for the same cause of action in the Supreme Court, Queens County are denied.

The branches of the within motion and cross motion for an order pursuant to CPLR 3211(a)(5) dismissing the three causes of action that are barred by the applicable statute of limitations is granted. The causes of action which in essence allege false imprisonment, intentional infliction of emotional distress and defamation are intentional torts which carry a one-year statute of limitations. The incident giving rise to these allegations occurred on May 27, 2012. The within action was commenced on or about May 28, 2015, more than one year after the May 27, 2012 incident.

The branches of the motion and cross motion for an order dismissing plaintiff's cause of action through 42 USC 1983 as defendants are not State actors and were not acting under color of State law is granted. Plaintiff pro se alleges that she "was deprived of her freedom and civil rights...liberty" (see Summons with Notice annexed to moving papers as Exh. A). To the extent that this language is interpreted to allege a violation of 42 U.S.C.S. 1983 it is noted that this statute "provides a civil claim for damages against any person who, *acting under color of state law* (emphasis added), deprives another of a right, privilege, or immunity secured by the constitution or the laws of the United States. Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere. In order to prevail

on a 1983 claim, the plaintiff must show that the defendant's conduct deprived him of a federal right." (Sykes v James, 13 F. 3d 515 [1993].) "Congress enacted 42 U.S.C.S. 1983 to enforce provisions of the U.S. Const. amend. XIV against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." (see Hafer v Melo, 502 US 21 [1991].) In this case bearing index number 705471/15, defendants are not State actors. Nor is there any indication at all that they were acting under color of state law.

The branches of the motion and cross motion for an order pursuant to 22 NYCRR 130-1 granting a permanent injunction preventing plaintiff from filing additional claims related to the May 27, 2015 date of loss and imposing financial sanctions if such injunction is violated is denied at this time. 22 NYCRR 130-1 provides in part:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

Section 130-1.3(c) defines conduct as frivolous if

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3). it asserts material factual statements that are false.

In the case at bar, plaintiff's conduct in re-commencing the within action alleging identical facts and bases for relief as asserted in the prior action does not constitute frivolous conduct. The prior action as against all the defendants was dismissed by the Hon. Livote based on a failure to effectuate

proper service. The branches of the motions to dismiss the complaint as time barred by the applicable statute of limitations and for failure to state a cause of action were denied as moot and therefore a decision on the merits was not rendered. Plaintiff re-commenced the action under the within index number 705471/15. This Court has now ruled on these issues as set forth above. Prospectively, plaintiff is cautioned not to recommence an action asserting the identical allegations surrounding the events that occurred on May 27, 2012.

Subsequent to oral argument and submission of these motion and cross motion papers, plaintiff moved for permission to serve a sur-reply. This motion is denied. CPLR 2214 does not provide for submission of sur-reply papers.

Accordingly, the within Complaint is dismissed in its entirety with prejudice.

Dated: March 7, 2016

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Hon. Peter J. O'Donoghue, J.S.C.

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