

Ashby v The State of New York
2017 NY Slip Op 32878(U)
April 13, 2016
Court of Claims
Docket Number: M-87488
Judge: Judith A. Hard
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

ASHBY v. THE STATE OF NEW YORK, # 2016-032-122, Claim No. None, Motion No. M-87488**Case information**

UID:	2016-032-122
Claimant(s):	DONALD ASHBY
Claimant short name:	ASHBY
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	None
Motion number(s):	M-87488
Cross-motion number(s):	
Judge:	JUDITH A. HARD
Claimant's attorney:	Franzblau Dratch, P.C. By: Ekaterina Vyrkin, Esq.
Defendant's attorney:	Hon. Eric T. Schneiderman, NYS Attorney General By: Michael C. Rizzo, Assistant Attorney General, Of Counsel
Third-party defendant's attorney:	
Signature date:	April 13, 2016
City:	Albany
Comments:	
Official citation:	
Appellate results:	

See also (multicaptioned case)

Decision

Donald Ashby (movant) moves this Court for an Order pursuant to Court of Claims Act § 10 (6) granting him permission to file and serve a late claim, or in the alternative, granting claimant permission to treat the Notice of Intention as a claim. Defendant opposes the motion on the basis that it is untimely and lacks merit. For the reasons set forth below, the Court denies movant's application.

PROCEDURAL HISTORY

Movant served a notice of intention to file a claim upon the Attorney General's office on February 1, 2013, alleging that movant was assaulted and slashed in the face by a fellow inmate in the "Big Yard" at Great Meadow Correctional Facility, and further that in the course of pulling movant away from his assailant, one or more officers caused injury to his left knee. On or about June 4, 2014, movant filed the claim with the Clerk of the Court and the following day served the Attorney General with a copy of the same. However, the claim, which included a cause of action that defendant was negligent in its care and treatment of movant, indicated that the subject incident occurred at Wende Correctional Facility. In its Answer, which was filed on July 11, 2014, defendant raised multiple affirmative defenses, including that the Court lacked jurisdiction because movant had failed to timely serve a notice of intention to file a claim or a claim within ninety days of the alleged incident at Wende Correctional Facility. Movant moved to amend his claim to reflect that the claim arose at Great Meadow Correctional Facility, rather than at Wende Correctional Facility. Defendant opposed the motion and cross-moved in part to dismiss the claim for failure to comply with Court of Claims Act § 11 (b). By Decision and Order dated October 8, 2015, the Court (Hudson, J.) granted defendant's cross motion to dismiss to the claim, stating that the failure to adequately set forth the location of an incident is a jurisdictional defect, and further that while the service of a notice of intention to file a claim alleging misconduct at Great Meadow would have extended the time for filing a claim to recover for wrongdoing at that facility, it could not extend the time to recover for any incident at Wende.

Movant now seeks to file a late claim, alleging that the State was negligent in: (1) failing to prevent an assault on movant; (2) defendant's excessive use of force when restraining movant during the subject assault; and (3) failing to provide necessary diagnostic tests and allowing movant's left knee to remain in an injured state.

LAW AND ANALYSIS

The Court of Claims is vested with broad discretion to grant or deny an application for permission to file a late claim (Matter of Gonzalez v State of New York, 299 AD2d 675 [3d Dept 2002]). In making a determination to grant or deny such an application, the Court must determine whether the claim would be timely under Article 2 of the CPLR and then consider certain statutory factors (Court of Claims Act § 10[6]). These factors are: (1) whether the delay in filing the claim was excusable; (2) whether the state had notice of the essential facts constituting the claim; (3) whether the state had an opportunity to investigate the circumstances underlying the claim; (4) whether the state was substantially prejudiced; (5) whether the claimant has any other available remedy; and (6) whether the claim appears to be meritorious (Court of Claims Act § 10[6]). The presence or absence of any one of said factors is not dispositive (Bay Terrace Coop. Section IV v New York State Employees' Retirement Sys. Policemen's and

Firemen's Retirement Sys., 55 NY2d 979 [1982]). However, the last factor is the most decisive inasmuch as it is futile to proceed with a meritless claim even if the other factors support the granting of the movant's application (Savino v State of New York, 199 AD2d 254 [2d Dept 1993]; Prusack v State of New York, 117 AD2d 729 [2d Dept 1986]).

I. Timeliness Under CPLR Article 2

Movant's cause of action for excessive force is an intentional tort subjected to a Statute of Limitations of one year (CPLR § 215 [3]). As the accrual date alleged herein is November 18, 2012, and this application was made on October 13, 2015, said cause of action would be untimely under Article 2 of the CPLR and therefore movant's request for late claim relief on the same is denied. Movant's argument that the excessive force exerted by defendant's employees falls under a negligence cause of action rather than an intentional tort is unavailing. "New York has adopted the prevailing modern view that, once intentional offensive contact has been established, the actor is liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently. 'There is, properly speaking, no such thing as a negligent assault'" (Mazzaferro v Albany Motel Enterprises, Inc., 127 AD2d 374, 376 [3d Dept 1987] [internal citations omitted]; see also Smiley v North General Hospital, 59 AD3d 179 [1st Dept 2009]).

As to movant's other causes of action, to wit: that defendant was negligent in failing to prevent an assault on movant, and that defendant committed medical negligence by failing to provide timely care to movant, they are subject to a three year Statute of Limitations (CPLR § 214). As the accrual date alleged herein is November 18, 2012, and this application was made on October 13, 2015, said causes of action would be timely under Article 2 of the CPLR. Accordingly, the Court must now consider the statutory factors set forth in Court of Claims Act § 10 (6), as they relate to the surviving causes of action, as set forth herein above.

II. Reasonable Excuse for the Delay

The first factor to consider is whether the delay in filing and serving the claim was excusable. Movant alleges that the delay is excusable because his claim would have been timely but for the typographical error in the claim. The Court disagrees. It is well settled that law office failure does not constitute an excusable delay within the meaning of Court of Claims Act § 10 (6) (see Sessa v State of New York, 88 Misc 2d 454, 459-460 [1976], affd 63 AD2d 334 [3d Dept 1975], affd 47 NY2d 976; Nyberg v State of New York, 154 Misc 2d 199, 200 [Ct Cl 1992]; Bierria v State of New York, UID No. 2009-044-552, [Ct Cl, Schaewe, J., Sept. 15, 2009]). This factor does not weigh in movant's favor.

III. Notice, Opportunity to Investigate, and Prejudice

The three factors of notice, opportunity to investigate and prejudice to defendant are all intertwined and may be considered together. Movant argues that because he went to the infirmary as a result of the injuries he sustained during the subject attack, and thereafter was brought to an outside hospital, defendant was on notice of the essential facts of the claim and had an opportunity to investigate the circumstances underlying the claim. Defendant does not allege that it was not on notice of the essential facts or that it has been prejudiced in any way. Accordingly, these three factors weigh in favor of granting the motion.

IV. Other Adequate Remedy

Movant alleges that he has no other adequate available remedy. The Court disagrees, as movant could assert an eighth amendment claim for excessive force against the correction officer in his individual capacity in either state or federal court pursuant to 42 USC §1983 (*see generally* Haywood v Drown, 556 US 729, 129 S Ct 2108 [2009]; *see also* Scott v Coughlin, 344 F3d 282 [2d Cir 2003]). However, even if movant had no other adequate available remedy, the Court's decision would not be affected because of the factors discussed herein, particularly the issue of merit.

V. Merit

The final factor for the Court to consider is whether the claim appears to be meritorious. In order to establish a meritorious cause of action, movant need not demonstrate a likelihood that he will prevail on his claim; he need only show that the proposed claim is not patently groundless, frivolous, or legally defective (*see* Matter of Santana v New York State Thruway Auth., 92 Misc 2d 1 [Ct Cl 1977]). In addition, the Court must find, upon a consideration of the entire record, including the proposed claim and any affidavits or exhibits, that there is reasonable cause to believe that a valid cause of action exists (*id.*). While there is a heavier burden on a movant who is seeking to file late than upon a claimant whose claim is timely, movant is not required to definitively establish the merits of his claim or overcome all legal objections thereto (*id.*).

It is well settled that the State has a duty to provide inmates with reasonable protection against the foreseeable risk of attacks by other inmates (Blake v State of New York, 259 AD2d 878 [3d Dept 1999]). However, it is not an insurer against any injuries which might occur (Sanchez v State of New York, 99 NY2d 247 [2002]). The fact that an assault occurs does not give rise to the inference of negligence (Sebastiano v State of New York, 112 AD2d 562 [3d Dept 1985]).

To establish liability in an inmate assault case, movant must demonstrate one of the following: (1) the State knew or should have known that movant was at risk of being assaulted and yet failed to provide movant with reasonable protection; (2) the State knew or should have known that the assailant was prone to perpetrating such an assault and the State did not take proper precautionary measures; or (3) the State had ample notice and opportunity to intervene but did not act (Sanchez v State of New York, 288 AD2d 647, 648 [3d Dept 2001]). The mere fact that a correction officer is not present at the time and place of an assault does not rise to an inference of negligence absent a showing that the correctional facility officials had notice of a foreseeable dangerous situation (Padgett v State of New York, 163 AD2d 914 [4th Dept 1990], *lv denied* 76 NY2d 711 [1990]).

In the present case, movant has not alleged that the State knew or should have known that movant was at risk of being assaulted and still failed to provide claimant with reasonable protection; that the State knew or should have known that the assailant was prone to perpetrating such an assault and the State did not take proper precautionary measures; or that the State had ample notice and opportunity to intervene, but did not act. The proposed claim alleges only that: (1) on November 18, 2012, at 9:15 p.m., at Great Meadow Correctional Facility, movant was in the big yard when he was suddenly and without warning was attacked by another inmate who slashed movant with a razor across the facial area; and (2) defendant was negligent in failing to use the metal detector thereby allowing a razor to enter the big yard. This is insufficient for establishing that his proposed cause of action for negligence is meritorious.

To the extent movant alleges that defendant was negligent in failing to provide timely care to movant, the Court also concludes he has failed to establish merit.

It is well settled that the State owes a duty to its incarcerated citizens to provide them with adequate medical care (Mullally v State of New York, 289 AD2d 308 [2d Dept 2001]). To prove that the State failed in this duty and committed medical malpractice, a movant must show that defendant departed from the accepted standard of medical care, and that said departure was a proximate cause of the injury (id.). Expert medical evidence is required to demonstrate that the diagnosis and treatment rendered to a movant departed from accepted medical practices and standards (Matter of Perez v State of New York, 293 AD2d 918 [3d Dept 2002]). A cause of action sounding in medical negligence assumes that the claimant's allegations are determinable on common knowledge alone, without the use of expert testimony (Coursen v New York Hosp.-Cornell Med. Ctr., 114 AD2d 254, 256 [1st Dept 1986]). This theory, however, is very limited and only applies to cases in which the fault is so obvious that the trier of fact does not need an expert to explain why something is or is not standard medical procedure.

In the present case, movant alleges that there was a substantial delay in the treatment of the injuries he received from the alleged assault and that said delay caused further injury to movant. In support of his application, he attaches uncertified medical records. However, the question regarding whether the care given to movant or the alleged delay in rendering such care affected or exacerbated his injuries is not a matter of common knowledge which could be decided in the absence of expert testimony. Accordingly, to the extent movant seeks permission to file a late claim for medical negligence, the Court concludes that he has failed to show that said cause of action is meritorious.

As such, the Court concludes that movant has failed to establish that her proposed causes of action have merit.

CONCLUSION

After reviewing the proposed claim and weighing all of the relevant factors set forth in Court of Claims Act § 10 (6), the Court concludes that movant is not entitled to late claim relief on any of his proposed causes of action, and his motion seeking said relief (Motion No. M-87488) is denied.

April 13, 2016

Albany, New York

JUDITH A. HARD

Judge of the Court of Claims

Papers Considered:

1. Notice of Motion, dated October 13, 2015; and Affirmation in Support, affirmed by Ekaterina Vyrkin, Esq., on October 13, 2015, with Exhibits A through H.
2. Affidavit in Opposition to Claimant's Motion to File a Late Claim, sworn to by Michael C. Rizzo, AAG, on October 29, 2015.
3. Reply Affirmation, affirmed by Ekaterina Vyrkin, Esq., on December 1, 2015.