

C.C. v State of New York
2016 NY Slip Op 33152(U)
April 26, 2016
Court of Claims
Docket Number: Claim No. XXXXX
Judge: Debra A. Martin
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(2) "> <& /claims/inclusions/header.htm &>

C.C. v. STATE OF NEW YORK-[\(1\)](#), # 2016-051-011, Claim No. None , Motion No. M-87679

Synopsis

Former inmate's motion for permission to file a late claim denied.

Case information

UID: 2016-051-011

Claimant(s): C.C.

Claimant short name: C.C.

Footnote (claimant name): The caption has been amended to give the movant a fictitious name in order to protect her identity since her proposed claim involves allegations that she is a victim of sexual offenses. The Chief Clerk is directed to seal the file in Motion No. M-87679 pursuant to Civil Rights Law § 50-b (see, Civil Rights Law §§ 50-b [1], 50-c [private right of action for wrongful disclosure of victim of sexual offense]).

Defendant(s): STATE OF NEW YORK-[\(2\)](#)

Footnote (defendant name):

Third-party claimant(s):

Third-party defendant(s):

Claim number(s): None

Motion number(s): M-87679

Cross-motion number(s):

Judge: DEBRA A. MARTIN

Claimant's attorney: LAW OFFICES OF JAY H. TANENBAUM
BY: JAY H. TANENBAUM, ESQ.

Defendant's attorney: HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
BY: TAMARA B. CHRISTIE, ESQ.
Assistant Attorney General

Third-party defendant's attorney:

Signature date: April 26, 2016

City: Rochester

Comments:

Official citation:

Appellate results:

See also (multcaptioned case)

Decision

The following papers were read on claimant's motion to file a late claim:

1. Claimant's Notice of Motion with attached Affirmation and exhibits of Jay H. Tanenbaum, Esq., and Claimant's Affidavit dated October 21, 2015, filed October 30, 2015;
2. Affirmation of Tamara B. Christie, AAG, with attached Memorandum of Law, dated February 2, 2016;
3. Reply Affirmation of Jay H. Tanenbaum, Esq., dated February 9, 2016;
4. Filed papers: Claim.

Before the court is a motion for permission to file a late claim pursuant to Court of Claims Act § 10 (6) that was filed with the Clerk of the Court on October 30, 2015. The claim arises from claimant's incarceration at Albion Correctional Facility where she alleges that: (1) she was repeatedly raped and sexually assaulted by two DOCCS employees between March 2015 and the end of June 2015; (2) two DOCCS employees harassed and threatened her with claims that they could affect revocation of her early release, thereby causing her to consent to their sexual abuse; (3) a civilian DOCCS employee "had her fired" from her prison job in late June 2015 after she refused to have sex with him, which constituted a hostile work environment and quid pro quo sexual harassment; (4) she was denied medical treatment for a suspected STD from about May 7, 2015, prompting her to file a grievance on July 7, 2015, until she was finally seen by a gynecologist and treated for chlamydia on or about August 5, 2015; (5) her privacy rights under HIPAA were violated when the test results pertaining to the STD were distributed, and she was later denied a scheduled hearing on her Health Complaint Grievance when she was transferred to Bedford Hills Correctional Facility on August 25, 2015; and (6) the State was negligent in the training and supervision of the two DOCCS employees. She states that the nature of her proposed claim is as follows:

"constitutional rights under 42 USC 1983 including rape, assault, continuing harassment, negligent supervision and training of its employees, violation of privacy rights under The Health Insurance Portability and Accountability Act (HIPAA), violation of the guarantees against cruel and unusual punishment and for hostile work environment and a systematic and purposeful violation of her rights to due process."

Relevant to the issues is the fact that claimant was released from DOCCS custody on September 3, 2015, at which time she allegedly reported the rapes and assaults in person to her parole officer and a representative of the DOCCS Office of Special Investigations, and by phone to the Prison Rape Enforcement Act representative at Bedford Hills. She retained counsel on September 16, 2015.

Defendant opposes the motion. Ten days after filing her motion, claimant filed a virtually identical claim⁽³⁾ (Claim No. 127006) with the Clerk of the Court hereinafter referred to as the "filed claim."

It is well settled that the Court of Claims has broad discretion to grant or deny an application for permission to file a late claim (*Cabrera v State of New York*, UID No. 2011-039-220 [Ct Cl, Ferreira, J., Mar. 16, 2011]). Court of Claims Act § 10 (6) sets forth, at a minimum, the six factors to be weighed when deciding whether to grant an application to file a late claim:

"whether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy."

In applying these criteria, it is important to note that no one factor is more important because the presence or absence of any one factor is not controlling. (*Cabrera*, UID No. 2011-039-220.)

In reviewing the motion papers, the first factor regarding whether the delay in filing the claim is excusable must go against the movant. The claimant alleges that the two DOCCS employees claimed they could negatively affect the review of her case for early release if she reported their assaults. However, "neither incarceration nor fear of retaliation are acceptable excuses for the failure to meet the filing and service requirements of the Court of Claims Act." (*Smalls v The State of New York*, UID No. 2004-015-431 [Ct Cl, Collins, J., Oct. 28, 2004].)

The three factors regarding whether the State had notice of the essential facts, had an opportunity to investigate, or would be prejudiced by the granting of this motion, are "intertwined and may be considered together." (*Benedict v The State of New York*, UID No. 2011-016-058 [Ct Cl, Marin, J., Dec. 12, 2011].) Here movant argues that the State was notified by her testing positive for a sexually transmitted disease on August 5, 2015, and her reporting of the sexual assaults to the Prison Rape Enforcement office at Bedford Correctional Facility, to her parole officer, and to DOCCS Office of Special Investigations on September 3, 2015 upon her release from prison. Claimant also suggests that the locations of the sexual assaults may have been under camera surveillance, thereby inferring that someone at DOCCS was watching the video in real time. In its papers, the State referenced its answer to the filed claim noting its untimeliness affirmative defense, but did not rebut the allegations of communications to DOCCS on September 3.

Throughout the moving papers and the proposed claim is the presumption that a diagnosis of an STD unequivocally proves that rape by a male occurred. Since sexually transmitted diseases can be spread by same-sex contact, the STD diagnosis was not notice of sexual abuse or rape. Further, the references in the papers to the alleged phone call to an assistant in the Prison Rape Enforcement Act Officer at Bedford Correctional Facility and the alleged communication with Carmen Padilla from the DOCCS Office of Special Investigations failed to divulge what claimant actually communicated to these individuals, so it is difficult to assess what notice was provided. Although claimant's papers reference an Exhibit D related to this communication, no Exhibit D is attached to any of her papers. Likewise, claimant fails to establish notice with her speculation that cameras in the prison may have captured the sexual encounters.

Although the court takes allegations of this nature very seriously and would not want to hold claimant to an impossibly high standard, the court must also carefully review the claimant's submission of the notice communicated for critical details of the claim, such as the dates, times, locations, and description of what actually took place. The whole point of considering notice in a motion to file a late claim is to decide whether the State had ample opportunity to investigate the claims within the 90 days even if no claim or notice of intention to file a claim was served. Here, without more specific details, the State was left without the opportunity to even verify whether the alleged transgressors were working on the day and time in question. There are no specific details as to what job claimant held from which she was fired. Defendant is not required "to ferret out or assemble information that section 11 (b) obligates the claimant to allege." (*Lepkowski v State of New York*, 1 NY3d 201, 208 [2003].) Conclusory allegations are insufficient to meet the pleading requirements of Court of Claims Act § 11 (b), which are designed to provide defendant with an opportunity to conduct a meaningful investigation and evaluate its potential liability; general allegations of numerous acts of sexual misconduct at unnamed locations over the course of four months do not meet the pleading requirements of section 11 (b). (*See Robin BB. v State of New York*, 56 AD3d 932, 933 [3d Dept 2008].) In light of these requirements, the three factors regarding notice weigh against the claimant.

It has been held that the appearance of a merit factor should be weighed most heavily since it would be futile to permit the filing of a deficient claim (*Clark v The State of New York*, UID No. 2013-028-507 [Ct Cl, Sise, P.J., Apr. 19, 2013]). This factor is evaluated using the two prong test set forth in *Matter of Santana v New York State Thruway Auth.* (92 Misc 2d 1 [Ct Cl 1977]). Movant's proposed claim "must not be patently groundless, frivolous, or legally defective," and her record as a whole, including the proposed claim and any affidavits or exhibits, must give "reasonable cause to believe that a valid cause of action exists" (*id.* at 11). With regard to merit, unlike a party who has timely filed a claim, a party seeking to file a late claim has the heavier burden of demonstrating that the claim appears to be meritorious (*see Nyberg v State of New York*, 154 Misc 2d 199, 202 [Ct Cl 1992]).

Claimant's causes of action premised upon her constitutional rights under 42 USC 1983, including violations of due process and her right to be free from cruel and inhumane treatment pursuant to article 1, section 5 of the New York State Constitution including the cause of action sounding in deliberate indifference to claimant's health and safety are without merit. The Court of Claims has no jurisdiction over claims of violations of 42 USC § 1983. (*Kidd v The State of New York*, UID No. 2003-013-030 [Ct Cl, Patti, J., Nov. 19, 2003].) This is conceded in the Reply Affirmation of claimant's counsel dated February 9, 2016.

The intentional tort claims are equally without foundation in law. It has long been held in New York that employers are not vicariously liable for their employees' intentional torts if such acts fall outside of their scope of employment. (*Cornell v State of New York*, 46 NY2d 1032, 1032, 1034 [1979].) Thus, an employer will not be liable for employees' intentional torts where the tortious acts were not undertaken within the scope of their employment, were not authorized by the employer, and were not within the discretionary authority afforded the employees. (*Forester v State of New York*, 169 Misc 2d 531, 531-36 [Ct Cl 1996].) The doctrine of respondeat

superior has been repeatedly found not to apply to sexual assaults "because they are clearly perpetrated for the employee's own purposes, and are a departure from service to the employer." (*Shantelle v The State of New York*, UID No. 2006-030-516 [Ct Cl, Scuccimarra, J., Feb. 22, 2006].) Here, claimant's proposed claim does not allege that either of the two DOCCS employees' actions were within the scope of their employment, were authorized by defendant, or fell within their discretionary authority.

New York courts have held that employers may still be liable for the injuries caused by the intentional acts of their employees under theories of negligent training and supervision, which have been asserted by claimant in her proposed claim. However, to support those causes of action, the following must be alleged:

"Negligent supervision requires a showing that the employer knew or should have known - had the supervision been adequate - of the employee's propensity for the type of conduct which injured Claimant . . . Negligent training requires a showing of some type of specific deficiency in training that led the correction officer to engage in misconduct, here, the sexual assault of the Claimant."

(*Shantelle v The State of New York*, UID No. 2006-030-516 [Ct Cl, Scuccimarra, J., Feb. 22, 2006].)

Once again, claimant's papers omit necessary elements to support these causes of action. Absent from her proposed claim are any specifics with respect to how the State was negligent in its training and supervision of its employees. There are no allegations that prior to the alleged sexual assaults upon claimant the State had actual or constructive notice of these employees' prior bad acts or previous complaints from other female prisoners about sexual abuse. On a motion seeking permission to file a late claim, a movant's burden is greater than one who timely served and filed a claim. Merely asserting a cause of action without any factual details is not sufficient to persuade the court to find merit for these unsupported causes of action. (*Warren v State of New York*, UID No. 2012-039-299 [Ct Cl, Ferreira, J., Apr. 20, 2012].)

Claimant's remaining causes of action are equally unsupported by relevant facts. Claimant's conclusory allegation regarding her "hostile work environment including quid pro quo sexual harassment" fails to meet the pleading requirements of Court of Claims Act § 11 (b). The papers are silent as to: what job claimant held; how much she was paid or lost as a result of her termination; on what day she was allegedly fired from the work assignment and under what specific circumstances; what, if anything, was communicated to the claimant or what conduct or acts demonstrated hostility; whether claimant filed a grievance; an allegation that the defendant became a party to such conduct or had knowledge of it and did nothing; and/or an allegation that claimant's "supervisor had expressly or tacitly linked tangible job benefits to the acceptance or rejection of sexual advance." (*Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 44-58 [4th Dept 1996].) Notably, inmates "have no statutory, constitutional or precedential right to hold any particular job within the prison." (*Blake v The State of New York*, UID No. 2015-015-066 [Ct Cl, Collins, J., Sept. 3, 2015] [internal quotation marks and citations omitted].) So, regardless of why an inmate is removed or transferred from a work assignment, any judicial review of DOCCS decision must be made pursuant to CPLR Article 78. (*Fair v The State of New York*, UID No. 2013-048-532 [Ct Cl, Bruening, J., Dec. 23, 2013].) Finally, movant pleads a "continuing harassment" cause of action, which is prohibited in New York Courts as a matter of public policy. (*Kidd v The State of New York*, UID No. 2003-013-030 [Ct Cl, Patti, J., Nov. 19, 2003].) Accordingly, the assessment of the merit factor weighs heavily against the claimant.

The last factor to be considered is whether the claimant has any alternative forms of relief. Once again, this factor weighs against the claimant. Claimant can seek relief by commencing an action in federal court against her alleged transgressors.

Accordingly, upon weighing all of the facts and after due consideration, the court declines to exercise its discretion and claimant's motion for leave to file a late claim is DENIED.

In so ruling, the court does not consider the status of the filed claim, No. 127006, and will consider any motions related to that claim separately.

April 26, 2016

Rochester, New York

DEBRA A. MARTIN

2. The Court has amended the caption *sua sponte* to reflect the only proper defendant before the Court.

3. The only discrepancy between the proposed claim and the claim that was filed is the final sentence of the filed claim. The added sentence is "This continued and was ongoing until being released from prison on September 3, 2015."

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