

J.A.B. v State of New York

2016 NY Slip Op 33153(U)

May 17, 2016

Court of Claims

Docket Number: Claim No. XXXXX

Judge: Francis T. Collins

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J.A.B. v. THE STATE OF NEW YORK, # 2016-015-135, Claim No. NONE, Motion No. M-87820

Synopsis

Motion for leave to file a late claim alleging a sexual assault by a correction officer was denied as lacking in merit as there was no allegation regarding negligent hiring, supervision or teaching.

Case information

UID: 2016-015-135
Claimant(s): J.A.B.
Claimant short name: J.A.B.
Footnote (claimant name) : The caption is amended to delete the true name of the claimant.
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-87820
Cross-motion number(s):
Judge: FRANCIS T. COLLINS
Claimant's attorney: J.A.B., Pro Se
Honorable Eric T. Schneiderman, Attorney General
Defendant's attorney: By: Michael T. Krenrich, Esquire
Assistant Attorney General
Third-party defendant's attorney:
Signature date: May 17, 2016
City: Saratoga Springs
Comments:
Official citation:
Appellate results:
See also (multcaptioned case)

Decision

Movant, an inmate proceeding pro se, seeks permission to file and serve a late claim pursuant to Court of Claims Act § 10 (6).

In his proposed claim, movant alleges that on July 2, 2015 he was sexually assaulted by a correction officer in a utility closet of the infirmary at Great Meadow Correctional Facility. A single cause of action for "sexual battery" and "excessive force"⁽²⁾ is alleged for which the movant seeks to hold the State vicariously liable. The proposed claim states, in pertinent part, the following:

"2) This claim is for sexual battery and excessive force of the State committed by its employee Correction Officer [name deleted] for injuring the claimant while acting within the scope of his employment and in this discharge of his duties on July 2, 2015 at Great Meadow Correctional Facility"

Court of Claims Act § 10 (6) permits this Court, if the applicable statute of limitations set forth in article 2 of the CPLR has not expired, to allow the filing of a late claim upon consideration of the following factors: "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."

The first issue for determination upon a late claim motion is whether the application is timely. Section 10 (6) requires that a motion to file a late claim be made "before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules." Movant alleges causes of action for sexual assault and battery for which a one-year statute of limitation would apply if asserted against a citizen of the state (CPLR 215 [3]). The instant motion, filed on December 23, 2015, is therefore timely.

Turning to the statutory factors, this Court has broad discretion in deciding a motion to permit the late filing of a claim (*Ledet v State of New York*, 207 AD2d 965 [4th Dept 1994]). The statutory factors are not exhaustive nor is any one factor controlling (*Matter of Gavigan v State of New York*, 176 AD2d 1117 [3d Dept 1991]). The most important factor is whether the potential claim has merit, as it would be a futile exercise to permit litigation of a clearly baseless lawsuit (*Martinez v State of New York*, 62 AD3d 1225 [3d Dept 2009]; *Savino v State of New York*, 199 AD2d 254 [2d Dept 1993]).

The excuse advanced by the movant for failing to timely file and serve the claim is that he was ignorant of the law and, in any event, on suicide watch and without access to a writing implement or paper from approximately July 2015 through October 2015. While ignorance of law is not an acceptable excuse for failing to timely file and serve a claim (*Matter of Robinson v State of New York*, 35 AD3d 948 [3d Dept 2006]), having been deprived of the means to prepare a claim because of the imposition of a suicide watch is. There being no dispute that movant was without the means to compose a claim during the 90-day period immediately following the alleged assault, movant established a reasonable excuse for the delay.

Addressing the intertwined issues of notice, opportunity to investigate and prejudice, movant asserts that the Office of the Inspector General performed an in depth investigation of the incident, including the taking of various sworn statements, and that many of the employees who performed the investigation remain employed by the State. The State does not dispute that it had prompt notice of the incident and performed an investigation nor does it contend it will be prejudiced in the event late claim relief is granted. These factors weigh in movant's favor.

With respect to the required showing of merit, the claim is sufficiently established if the movant demonstrates that the proposed claim is not patently groundless, frivolous, or legally defective and there is reasonable cause to believe a valid cause of action exists (*Fernandez v State of New York*, 43 Misc 3d 1221 [A] [Ct Cl 2014]; *Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1 [Ct Cl 1977]).

It is well settled that "an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; see also *Riviello v Waldron*, 47 NY2d 297, 302 [1979]). Movant's proposed claim is based entirely upon the allegation that the State is vicariously liable for a sexual assault allegedly committed by one of its correction officers. A sexual assault perpetrated by an employee is not, however, an act in furtherance of the employer's business "and is a clear departure from the scope of employment, having been committed for wholly personal motives" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d at 251; see also *Cornell v State of New York*, 46 NY2d 1032 [1979]; *Kunz v New Netherlands Routes, Inc.*, 64 AD3d 956, 958 [3d Dept 2009]; *Dia CC v Ithaca City School Dist.*, 304 AD2d 955 [3d Dept 2003], *lv denied* 100 NY2d 506 [2003]). Insofar as movant's proposed claim is based entirely on the contention that the State is vicariously liable for the sexual assault and battery committed by one of its employees, it lacks merit as a matter of law.

Of course the State may be liable for its own negligence in hiring, supervising or retaining an employee which it knew or should have known had a propensity for the conduct allegedly causing the injury (*Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826 [2d Dept 2015]; *Hicks v Berkshire Farm Ctr. & Servs. for Youth*, 123 AD3d 1319 [3d Dept 2014]; *Ernest L. v Charlton School*, 30 AD3d 649 [3d Dept 2006]; *Steinborn v Himmel*, 9 AD3d 531 [3d Dept 2004]; *Gomez v City of New York*, 304 AD2d 374 [1st Dept 2003]; *Rodriguez v United Transp. Co.*, 246 AD2d 178 [1st Dept 1998]; *Barbosa v State of New York*, 186 Misc 2d 926 [Ct Cl 2001]). Here, however, movant proposes no such cause of action nor does he proffer any evidence relevant to the issue. As a result, even assuming the truth of the allegations (*Jolley v State of New York*, 106 Misc 2d 550, 551-552 [Ct Cl 1980]) the proposed claim lacks merit as a matter of law.

Lastly, there exists a common law tort cause of action against the correction officer who committed the alleged sexual assault and battery (*see Waxter v State of New York*, 33 AD3d 1180, 1182 [2006]), the existence of which militates against granting the instant application.

Insofar as the sole cause of action proposed is meritless, it would be futile to grant movant's application for late claim relief. Moreover, movant has an alternative remedy against the alleged assailant. Given these circumstances, the Court finds late claim relief is not warranted.

Based on the foregoing, movant's application for leave to file and serve a late claim is denied.

May 17, 2016

Saratoga Springs, New York

FRANCIS T. COLLINS

Judge of the Court of Claims

The Court considered the following papers:

1. Notice of motion dated December 7, 2015;
2. Affidavit of J.A.B. sworn to December 8, 2015 with exhibits;
3. Affirmation of Michael T. Krenrich dated January 29, 2016.

2. The proposed claim asserts no allegations other than the alleged sexual assault and battery to support the claim of excessive force.

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