

Alejandro v State of New York

2016 NY Slip Op 33216(U)

May 13, 2016

Court of Claims

Docket Number: Claim No. 125769

Judge: Francis T. Collins

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This opinion is uncorrected and not selected for official publication.

Synopsis

Defendant's cross motion to dismiss claim was granted and claimant's motion for leave to file a late claim was denied. Claim alleging wrongful placement of sex offender in a residential treatment facility at Woodbourne Correctional Facility lacked merit.

Case information

UID: 2016-015-130
Claimant(s): ABELARDO C. ALEJANDRO
Claimant short name: ALEJANDRO
Footnote (claimant name) :
Defendant(s): THE STATE OF NEW YORK
Footnote (defendant name) :
Third-party claimant(s):
Third-party defendant(s):
Claim number(s): 125769
Motion number(s): M-87736
Cross-motion number(s): CM-87935
Judge: FRANCIS T. COLLINS
Claimant's attorney: Robert Dembia, Esquire
Robert Dembia, P.C.
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 13, 2016
City: Saratoga Springs
Comments:
Official citation:
Appellate results:
See also (multicaptioned case)

Decision

Claimant seeks permission to file a late claim pursuant to Court of Claims Act § 10 (6). Defendant opposes the motion and cross-moves to dismiss the pending claim on the ground it was untimely served.

In 1978, claimant was convicted of three counts of first degree rape, three counts of first degree robbery and two counts of second degree burglary. In 2013, while in prison, claimant was convicted of one count of criminal possession of a controlled substance and sentenced to a two-year determinate prison term with 1-1/2 years post-release supervision. Following the 2013 conviction, the maximum expiration date of claimant's sentence was September 18, 2014, his conditional release date was June 4, 2014, and his post-release supervision expiration date was March 16, 2016 (Exhibit D annexed to McGrath affidavit). Acting pursuant to Penal Law § 70.45 (3), the Department of Corrections and Community Supervision (DOCCS) imposed upon claimant as a condition of his release to parole supervision the requirement that he be transferred to, and participate in the programs of, a Residential Treatment Facility (RTF) "as that term is defined by Correction Law section 2 (6) until such time as a residence has been approved and such address has been verified to be located outside of the penal law definition

of school grounds" (Exhibit E, annexed to McGrath affidavit). Claimant states in an affidavit submitted in support of his motion that he should have been released on June 4, 2014, his conditional release date, rather than being transferred to an RTF at Woodbourne Correctional Facility in Sullivan County where he was placed in a program with other sex offenders. Claimant seeks damages for the period of his confinement following the date of his conditional release - from June 4, 2014 through the date of his release from the RTF on December 29, 2014 (Exhibit A annexed to Krenrich affirmation, Notice of Claim, ¶ 3).

It is undisputed that the claim, filed on March 10, 2015, was not served until April 1, 2015. Court of Claims Act § 10 requires that claims for both unintentional and intentional torts be filed and served within 90 days after accrual unless a notice of intention is served within that time (Court of Claims Act §§ 10 [3] and [3-b]). Claims sounding in either negligence or wrongful confinement accrue when damages are reasonably ascertainable, the day the claimant is released from the allegedly wrongful confinement (*Johnson v State of New York*, 95 AD3d 1455, 1456 [3d Dept 2012]; *Davis v State of New York*, 89 AD3d 1287, 1287 [3d Dept 2011]; *Conner v State of New York*, 268 AD2d 706 [3d Dept 2000]). Here, according to the allegations in the claim, claimant was released from confinement on December 29, 2014. The claim, having been served on April 1, 2015, more than 90 days after the claim accrued, was therefore untimely. Defendant raised as its ninth and tenth affirmative defenses that the claim was not timely served within 90 days of accrual and claimant does not argue that the defenses are insufficiently particular for purposes of Court of Claims Act § 11 (c).⁽¹⁾ Accordingly, defendant's cross motion should be granted and the claim dismissed.

Turning to claimant's late claim motion, 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." The statutes of limitations applicable to the instant matter are three years for a negligence claim (CPLR 214 [5]) and one year for a wrongful confinement/false imprisonment claim (CPLR 215 [3]). Thus, the instant motion for late claim relief is timely, even under the one-year statute of limitations for wrongful confinement.

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, 1226 [3d Dept 2009]; *Savino v State of New York*, 199 AD2d 254 [2d Dept 1993]).

The excuse advanced by claimant's counsel for failing to timely serve the claim is that he was accustomed to the commencement-by-filing statute applicable to actions in Supreme Court (*see* CPLR 304 [a]). Claimant's unfamiliarity with the requirements of the Court of Claims Act is nothing more than ignorance of the law, which is not an acceptable excuse for delay in serving and filing a claim (*Borawski v State of New York*, 128 AD3d 628, 629 [2d Dept 2015]). Accordingly, this factor does not weigh in claimant's favor.

Addressing the intertwined issues of notice, opportunity to investigate and prejudice, claimant states in an affidavit that he repeatedly informed a DOCCS' staff member at Woodbourne Correctional Facility of his belief he was being illegally confined beyond his conditional release date. In addition, claimant's counsel indicates that at least one other inmate confined to Woodbourne Correctional Facility's RTF raised similar allegations regarding the legality of the confinement in the context of a proceeding brought pursuant to CPLR article 78 (*see* reply affirmation of Robert Dembia, ¶ 9; Exhibit 1 attached thereto). Insofar as defendant does not dispute these contentions or otherwise argue it will be prejudiced in the event late claim relief is granted, these factors weigh in claimant's favor.

With respect to the required showing of merit, the claim is sufficiently established if the claimant demonstrates that the proposed claim is not patently groundless, frivolous, or legally defective and there is reasonable cause to believe that 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]). Correction Law § 73 (1) and (10) and Penal Law § 70.45 (3) authorize DOCCS to transfer inmates nearing the completion of their sentences to a RTF, defined in Correction Law § 2 (6) as follows:

"A correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released".

The determination to transfer an inmate to an RTF⁽²⁾ is a discretionary one, as made clear from the plain language of the applicable statutes. Penal Law § 70.45 (3) states "the board of parole *may* impose as a condition of post-release supervision" that an individual "be transferred to and participate in the programs of a residential treatment facility" (emphasis added). Similarly, Correction Law § 73 (1) states that "[t]he commissioner *may* transfer any inmate . . . to a residential treatment facility" (emphasis added). With the passage of the Sexual Assault Reform Act (SARA) in 2000, the legislature amended the Penal Law and the Executive Law to require, as a condition of parole, that certain sex offenders, including those like the claimant designated as a level three sex offender, be prohibited from entering upon "school grounds" as that term is defined in Penal Law § 220 (14) (*People v Diack*, 24 NY3d 674, 681 [2015]; Executive Law § 259-c [14]).⁽³⁾ Courts have interpreted the definition of "school grounds" in Penal Law § 220 (14) as creating a residency restriction prohibiting certain classes of sex offenders from living within 1,000 feet of a school (*see People v Diack*, 24 NY3d at 682 and the cases cited therein). Confronted with the sometimes difficult task of finding acceptable residences that comply with SARA's residency restriction, DOCCS has been exercising its discretionary authority under either Penal Law § 70.45 (3) or Correction Law § 73 (10) to require felony sex offenders to reside within one of DOCCS' RTF facilities (*see* affidavit of Ann Marie McGrath, ¶ 9; *see also People ex rel. Johnson v Superintendent, Fishkill Corr. Facility*, 47 Misc 3d 984 [Sup. Ct. Dutchess Co. 2015]; *People ex rel. Green v Superintendent of Sullivan Corr. Facility*, 137 AD3d 56, 60 [3d Dept 2016]). Claimant contends that his placement into Woodbourne Correctional Facility's RTF was a wrongful confinement because it was not "in or near the community" where he intended to reside upon release, i.e., the Bronx or Manhattan (claimant's affidavit, ¶ 2, quoting Correction Law § 2 [6]). Claimant's counsel also contends in a reply affirmation "that application of the SARA rules to him is improper as a violation of the Ex Post Facto doctrine" (Reply Affirmation and In Opposition, ¶ 27). Notably, claimant now resides in Far Rockaway, New York.

The appropriate vehicle to challenge claimant's placement at the Woodbourne Correctional Facility's RTF is a proceeding pursuant to CPLR article 70 or 78 (*see e.g. People ex rel. Johnson v Superintendent, Fishkill Corr. Facility*, 47 Misc 3d 984; *People ex rel. White v Superintendent, Woodbourne Corr. Facility*, 45 Misc 3d 1202 [A] [Sup Ct, Sullivan Co. 2014]). "Regardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims" (*Polanco v State of New York*, 130 AD3d 1494, 1495 [4th Dept 2015], quoting *Green v State of New York*, 90 AD3d 1577, 1578 [4th Dept 2011], *lv dismissed in part and denied in part* 18 NY3d 901 [2012]; *Buonanotte v New York State Off. of Alcoholism & Substance Abuse Servs.*, 60 AD3d 1142 [3d Dept 2009], *lv denied* 12 NY3d 712 [2009]). Here, the legality of claimant's confinement to Woodbourne Correctional Facility's RTF requires review of DOCCS' determination to place him there in the first place. To the extent such review is required, therefore, this Court lacks subject matter jurisdiction.

Moreover, aside from the jurisdictional limitations of the Court of Claims, the law is clear that the State is immune from liability for discretionary conduct "even if resulting from negligence or malice" (*Tango v Tulevech*, 61 NY2d 34, 40 [1983]; *see also McLean v City of New York*, 12 NY3d 194, 203 [2009] ["Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general"]; *Arteaga v State of New York*, 72 NY2d 212 [1988] [State is immune from liability for discretionary conduct resulting in prisoners' unlawful confinement claims]). Discretionary conduct, i.e., conduct "involving the exercise of reasoned judgment" (*Lauer v City of New York*, 95 NY2d 95, 99 [2000]; *Tango v Tulevech*, (61 NY2d at 41), includes even erroneous judgments by State officials as to the scope of their own authority (*Donald v State of New York*, 17 NY3d 389, 396 [2011]; *see also Hudson v State of New York*, 115 AD3d 1020 [3d Dept 2014], *lv denied* 23 NY3d 907 [2014]).

Here, State officials were confronted with the dilemma of releasing claimant without an approved residence, thereby potentially violating the school-grounds prohibition of SARA's law, or placing him in a designated RTF such as the one at Woodbourne Correctional Facility (*see* 7 NYCRR 100.50 [c] [2]) until an appropriate residence could be located. DOCCS was statutorily authorized, as a matter of discretion, to place claimant in a RTF, which

it did, rather than run afoul of the school-grounds prohibition of SARA's law (*cf. People ex rel. Green v Superintendent of Sullivan Corr. Facility*, 137 AD3d 56 [3d Dept 2016] [when petitioner reached his maximum expiration date, DOCCS was required to release him to either an approved residence or a residential treatment facility). For such discretionary determinations the State is immune from liability. In light of this immunity, claimant's proposed causes of action⁽⁴⁾ for negligence and false imprisonment, both of which arise from his placement at Woodbourne Correctional Facility's RTF, lack merit as a matter of law.

With respect to claimant's proposed cause of action under 42 USC § 1983, this Court lacks jurisdiction as the State is not a "person" within the meaning of the statute (*Will v Michigan Dept. of State Police*, 491 US 58, 66 [1989]; *Flemming v State of New York*, 120AD3d 848 [3d Dept 2014]).

Claimant's proposed cause of action for negligent hiring and/or training is meritless as no such claim lies where the employees were acting within the scope of their employment (*Williams v State of New York*, 137 AD3d 1579 [4th Dept 2016]).

To the extent the proposed claim mentions wrongful arrest, malicious prosecution, abuse of process and illegal search and seizure (Exhibit A annexed to Krenrich affirmation, Notice of Claim, ¶ 4), the facts alleged in the claim, accepted as true, do not support these causes of action (*see Leon v Martinez*, 84 NY2d 83 [1994]).

Lastly, claimant's contention that the SARA provisions violate the Ex Post Facto Clause of the United States Constitution has been rejected by the Appellate Division, First Department in *Matter of Williams v Department of Corr. & Community Supervision* (136 AD3d 147 [1st Dept 2016]) and, in any event, should be addressed in the context of a declaratory judgment action in the Supreme Court (*see id.*), not a plenary action for monetary relief in the Court of Claims.

The foregoing demonstrates that the proposed claim is "patently groundless, frivolous or legally defective, and [that] the record as a whole [does not] give reasonable cause to believe that a valid cause of action exists" (*Sands v State of New York*, 49 AD3d 444, 444 [1st Dept 2008]).

The last factor for consideration on an application to file a late claim, the existence of

alternative remedies, weighs against the claimant as he could have commenced an action under 42 USC § 1983 or filed a petition in the Supreme Court seeking relief pursuant to CPLR articles 70 or 78.

Upon consideration of all of the applicable factors, the Court finds that late claim relief would not be appropriate as it would be futile to permit litigation of these clearly meritless causes of action. Moreover, claimant failed to establish a reasonable excuse for his failure to timely serve the claim and alternative avenues of redress are available.

Based on the foregoing, defendant's cross motion to dismiss the claim is granted and the claim is dismissed. Claimant's motion to file a late claim is denied.

May 13, 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 4, 2015;
2. Affirmation of Robert Dembia dated December 4, 2015 with exhibits;
3. Affidavit of Abelardo Alejandro sworn to October 6, 2015;
4. Notice of cross motion dated January 21, 2016;
5. Affirmation of Michael T. Krenrich dated January 21, 2016 with exhibits;
6. Reply affirmation of Robert Dembia dated January 28, 2016 with exhibit.

1. Court of Claims Act § 11 (c) provides that an objection to the timeliness of a claim is waived unless raised with "particularity" either in a pre-answer dismissal motion or in a responsive pleading. Defendant's ninth affirmative defense asserts the time limitations of Court of Claims Act § 10 (3), applicable to unintentional torts, while its tenth affirmative defense asserts the time limitations of Court of Claims Act § 10 (3) (b). Although the time limitation applicable to intentional torts is set forth in Court of Claims Act § 10 (3-b), not § 10 (3) (b) as alleged, defendant's thirteenth affirmative defense correctly cites both Court of Claims Act §§ 10 (3) and 10 (3-b) in connection with the date the claim was filed and claimant does not argue that he was in any way misled by the citation of § 10 (3) (b), rather than § 10 (3-b) or that the defendant waived these defenses under Court of Claims Act § 11 (c).

2. Woodbourne Correctional Facility is a designated RTF (7 NYCRR 100.50 [c] [2]).

3. Penal Law § 220 (14) defines "School grounds" as:

"(a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants."

4. The claimant's pending claim has been submitted as his proposed claim for the purpose of determining his late claim motion under Court of Claims Act § 10 (6) and treated as such by the Court.

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