

**Tuitt v State of New York**

2017 NY Slip Op 33558(U)

October 16, 2017

Court of Claims

Docket Number: Claim No. 127760

Judge: Frank P. Milano

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## Synopsis

Defendant's cross-motion to dismiss wrongful confinement/negligence claim arising from claimant's post-release supervision assignment to residential treatment facility located within correctional facility is granted where claim fails to state a cause of action for either wrongful confinement or negligence and where Court of Claims lacks subject matter jurisdiction over challenge to administrative acts and/or omissions of Parole Board.

## Case information

UID: 2017-041-070  
Claimant(s): BRIAN TUITT  
Claimant short name: TUITT  
Footnote (claimant name) :  
Defendant(s): THE STATE OF NEW YORK  
Footnote (defendant name) :  
Third-party claimant(s):  
Third-party defendant(s):  
Claim number(s): 127760  
Motion number(s): M-90562  
Cross-motion number(s): CM-90670  
Judge: FRANK P. MILANO  
Claimant's attorney: BRIAN TUITT  
Pro Se  
HON. ERIC T. SCHNEIDERMAN  
New York State Attorney General  
Defendant's attorney: By: J. Gardner Ryan, Esq.  
Assistant Attorney General  
Third-party defendant's attorney:  
Signature date: October 16, 2017  
City: Albany  
Comments:  
Official citation:  
Appellate results:  
See also (multicaptioned case)

## Decision

Claimant moves for an order compelling disclosure and/or granting claimant judgment, as a sanction for defendant's failure to disclose, in this wrongful confinement/negligence claim arising from claimant's post-release supervision assignment to a residential treatment facility located within a correctional facility.

Defendant cross-moves to dismiss the claim on the grounds that the claim fails to state a cause of action and because the Court lacks subject matter jurisdiction over this claim arising from the alleged negligent failure of the New York State Board of Parole (Parole Board) to follow applicable statutes and regulations and to permit claimant to live in New York City pursuant to housing, medical, educational, vocational and employment plans claimant had formulated and described to defendant.

Claimant opposes the defendant's cross-motion.

Defendant's potentially dispositive cross-motion will be considered first.

On May 12, 2006, claimant was sentenced by the Orange County Court to a determinate term of 10 years imprisonment and 5 years of post-release supervision after being convicted of the following crimes: Penal Law 130.75 (1) (a), Course of sexual conduct against a child in the first degree; Penal Law 130.80 (1) (b), Course of sexual conduct against a child in the second degree; and Penal Law 130.60 (2), Sexual abuse in the second degree.

The claim alleges that claimant's term of imprisonment ended on February 16, 2015, but rather than being released to serve his post-release supervision period in New York City pursuant to housing, medical, educational, vocational and employment plans claimant had formulated and described to defendant, the defendant instead negligently failed to comply with applicable laws and regulations regarding post-release supervision, and wrongfully confined claimant "in prison, located at Downstate Correctional Facility."

The claim sounds in wrongful confinement and negligence.

Defendant argues that the claim fails to state a cause of action for either wrongful confinement or negligence because the alleged confinement was privileged, the alleged negligent acts and omissions of defendant amount to discretionary governmental activity for which defendant is immune from liability and that the Court lacks subject matter jurisdiction because the claim improperly asks the Court to review the determination of an administrative agency.

The claim fails to state a cause of action for wrongful confinement. To establish that he was wrongfully confined, claimant must prove that "(1) the defendant intended to confine him, (2) the [claimant] was conscious of the confinement, (3) the [claimant] did not consent to the confinement and (4) the confinement was not otherwise privileged" (Broughton v State of New York, 37 NY2d 451, 456 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929; Krzyzak v Schaefer, 52 AD3d 979 [3d Dept 2008]).

With respect to whether a confinement is privileged, Holmberg v County of Albany (291 AD2d 610, 612 [3d Dept 2002], *lv denied* 98 NY2d 604 [2002]), instructs that: "Generally, where a facially valid order issued by a court with proper jurisdiction directs confinement, that confinement is privileged . . . and everyone connected with the matter is protected from liability for false imprisonment."

Contrary to claimant's contention, his confinement at Downstate Correctional Facility and Hudson Correctional Facility after February 16, 2015 was privileged pursuant to claimant's Orange County Court Commitment Order sentence of five years post-release supervision and the discretionary post-release supervision placement authority given to defendant by Penal Law section 70.45 (3) and Correction Law sections 73 (1) and (10), which provide as follows:

Penal Law section 70.45 (3)

"Conditions of post-release supervision. The board of parole shall establish and impose conditions of post-release supervision in the same manner and to the same extent as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release; provided that, notwithstanding any other provision of law, the board of parole may impose as a condition of post-release supervision that for a period not exceeding six months immediately following release from the underlying term of imprisonment the person be transferred to and participate in the programs of a residential treatment facility as that term is defined in subdivision six of section two of the correction law. Upon release from the underlying term of imprisonment, the person shall be furnished with a written statement setting forth the conditions of post-release supervision in sufficient detail to provide for the person's conduct and supervision."

Correction Law 73 (1)

"The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the program established for him or her. While outside the facility he or she shall be at all times in the custody of the department and under its supervision."

"The commissioner is authorized to use any residential treatment facility as a residence for persons who are on community supervision. Persons who reside in such a facility shall be subject to conditions of community supervision imposed by the board."

The Court finds, as a matter of law, that the placement/confinement of claimant in a residential treatment facility at Downstate Correctional Facility was privileged pursuant to claimant's May 12, 2006 Orange County Court Commitment Order sentence of five years post-release supervision and the discretionary post-release supervision placement authority given to defendant by Penal Law section 70.45 (3) and Correction Law sections 73 (1) and (10). Because the alleged confinement was privileged, the claim fails to state a cause of action for wrongful confinement.

The claim also fails to state a negligence cause of action because the defendant owed claimant no legal duty of care required to support such a cause of action. "To establish a prima facie case of negligence, the [claimant] is required to demonstrate that the defendant owed a duty to him or her, that the defendant breached that duty and that such breach was a proximate cause of the injuries sustained" (Evarts v Pyro Engineering, Inc., 117 AD3d 1148, 1150 [3d Dept 2014]). In Di Ponzio v Riordan (89 NY2d 578, 583 [1997]), the court reminded that "[t]he existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court."

Parole Board supervision of individuals, such as claimant, sentenced to a term of post-release supervision, is a governmental function (Davis v State of New York, 257 AD2d 112 [3d Dept 1999]; Ruotolo v State of New York, 157 AD2d 452 [1<sup>st</sup> Dept 1990]). In Valdez v City of New York (18 NY3d 69, 75 [2011]), the court explained that where a "case involves . . . a classic governmental, rather than proprietary, function . . . [it is a] fundamental obligation of a [claimant] pursuing a negligence cause of action to prove that the putative defendant owed a duty of care."

In McLean v The City of New York (12 NY3d 194, 203 [2009]), the Court of Appeals recited the law as to the state's duty of care with respect to the negligent performance of a governmental function:

"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."

The governmental actions of defendant regarding claimant were discretionary, as set forth above, and may not be a basis for liability. As such, the claim fails to state a negligence cause of action, as a matter of law.

Finally, the Court lacks subject matter jurisdiction over the claim to the extent it seeks to review the actions of the Parole Board in placing/confining claimant in a residential treatment facility within a correctional facility. The jurisdiction of the Court of Claims is invoked where money damages are the essential object of the claim, unlike an instance where the principal claim is equitable in nature (such as to review action or inaction by a state agency), with monetary relief being incidental to the principal claim (see Harvard Fin. Servs. v State of New York, 266 AD2d 685, 685 [3d Dept 1999]; Matter of Gross v Perales, 72 NY2d 231, 236 [1988]).

In City of New York v State of New York (46 AD3d 1168, 1169-1170 [3d Dept 2007], *lv denied* 10 NY3d 705 [2008]), the court explains that:

"Two inquiries must be made to determine if the Court of Claims has subject matter jurisdiction. As that court has 'no jurisdiction to grant strictly equitable relief' (Psaty v Duryea, 306 NY 413, 416 [1954]), but may grant incidental equitable relief so long as the primary claim seeks to recover money damages in appropriation, contract or tort cases (see Ozanam Hall of Queens Nursing Home v State of New York, 241 AD2d 670, 671 [1997]), 'the threshold question is "[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim"' (Madura v State of New York, 12 AD3d 759, 760 [2004], *lv denied* 4 NY3d 704 [2005], quoting Matter of Gross v Perales, 72 NY2d 231, 236 [1988]). The second inquiry, regardless of how a claimant categorizes a claim, is whether the claim would require review of an administrative agency's determination--which the Court of Claims has no subject matter jurisdiction to entertain (see Hoffman v State of New York, 42 AD3d 641, 642 [2007]), as review of such determinations are properly brought only in Supreme Court in a CPLR article 78 proceeding (see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 757 [1991])."

In order for the Court to award money damages to claimant it would necessarily be required to review the administrative acts and/or omissions of the Parole Board, and as set forth above, it lacks jurisdiction to do so (see City of New York, 46 AD3d at 1169-1170). Claimant challenges the administrative acts and omissions of the Parole Board. The Court lacks jurisdiction to review the proceedings of the Parole Board and the appropriate venue for such a challenge is a CPLR Article 70 or Article 78 proceeding in Supreme Court (see Matter of Gonzalez v Annucci, 149 AD3d 256 [3d Dept 2017]; Kirkland v Annuci, 150 AD3d 736 [2d Dept 2017], *lv denied* 29 NY3d 918 [2017]; Alcantara v Annucci, 55 Misc 3d 1216(A) [Supreme Court, Albany County, February 24, 2017, Hartman, J.]).

The defendant's cross-motion to dismiss the claim is granted. The claim is dismissed. Claimant's motion for an order compelling disclosure is denied as moot.

October 16, 2017

Albany, New York

FRANK P. MILANO

Judge of the Court of Claims

**Papers considered:**

1. Claimant's Notice of Motion, filed June 2, 2017;
2. Affidavit of Brian Tuitt, sworn to May 30, 2017, and attached exhibits;
3. Defendant's Notice of Cross-Motion, filed July 3, 2017;
4. Affirmation of J. Gardner Ryan, dated June 30, 2017, and attached exhibits;
5. Reply Affidavit of Brian Tuitt, sworn to July 26, 2017, and attached exhibits.

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