Carter v County of Suffolk
2018 NY Slip Op 31770(U)
July 16, 2018
Supreme Court, Suffolk County
Docket Number: 13-33237
Judge: Sanford N. Berland

SHORT FORM ORDER **INDEX NO.: 13-33237**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

JOHN C. CARTER, NICOLE HAWKINS-CARTER, as parent and natural guardian of M.H., an infant under the age of 16 years, K.B., an infant under the age of 10 years, K.B., an infant under the age of 9 years, K.B., an infant under the age of 6 years, and JOHN C. CARTER and NICOLE HAWKINS-CARTER, individually,

Plaintiff(s),

-against-

THE COUNTY OF SUFFOLK, FABIENNE ALEXANDRE, and SAMANTHA MCEACHIN,

Defendant(s).

ORIG. RETURN DATE: November 18, 2016
FINAL RETURN DATE: February 21, 2018
MOT. SEQ. #: 001-Mot D

ORIG. RETURN DATE: January 24, 2017
FINAL RETURN DATE: February 21, 2018
MOT. SEQ. #: 002-Mot D

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants, dated October 17, 2016, and supporting papers; (2) Notice of Cross-Motion, by plaintiffs, dated January 3, 2017, and supporting papers; (3) Affirmation in Reply and in Opposition to Plaintiffs' Cross-Motion, dated April 25, 2017, it is,

ORDERED that the motion made by plaintiffs pursuant to General Municipal Law 50-e[5] seeking leave to file a late Notice of Claim against defendants and deeming the Notice of Claim dated January 27, 2012 timely served *nunc pro tunc* ranted to the extent that infant-plaintiffs' notice of claim is deemed timely served, and is otherwise denied; and it is further

ORDERED that the branch of the defendants' motion made pursuant to CPLR 3211 seeking dismissal of plaintiffs' complaint is granted to the extent that parent-plaintiffs' causes of action are dismissed, in their entirety, and infant-plaintiffs' first and second causes of action for violations of the State and Federal constitutions are also dismissed; and it is further

ORDERED that the branch of the defendants' motion made pursuant to CPLR 3103

seeking a protective order limiting certain disclosure in response to plaintiffs' discovery demands, dated June 24, 2016, is granted to the extent that defendants are required to provide plaintiffs responses to request (1), in its entirety, and to requests (2) and (3), in redacted form in accordance with this order, and plaintiffs may depose defendants to the extent that no disclosure of the identities or identifying descriptions of persons who participated in the alleged child abuse investigations will be made; and it is further

ORDERED that this order is without prejudice to plaintiffs making an application to the Court for further depositions or discovery upon a proper showing of necessity; and it is further

ORDERED that the attorneys of record for the parties in this action are directed to appear for a previously scheduled compliance conference on **Wednesday, August 22, 2018 at 9:30am** in Part 6 of the Supreme Court located at One Court Street, Riverhead, New York.

This is an action commenced on December 17, 2013 by plaintiffs, John C. Carter and Nicole Hawkins-Carter ("parent-plaintiffs"), both individually and as parents and natural guardians of the infant plaintiffs, M.H., K.B., K.B. and K.B. ("infant-plaintiffs") for damages arising out of the alleged wrongful removal and temporary placement of the infant plaintiffs in foster care between May 27, 2010 and December 23, 2010 by the Suffolk County Department of Social Services. Plaintiffs claim that, as a result of malice, defendants brought a Petition for Neglect against the parent-plaintiffs without a proper investigation and without credible evidence ,which resulted in infant-plaintiffs being removed from their home, separated, and placed in the temporary custody of various grandparents.

It is undisputed that between January and February of 2010, Child Protective Services ("CPS") conducted two visits to plaintiffs' home in its investigation of alleged child abuse. On March 4, 2010, CPS closed its investigation, concluding that no abuse was occurring and that no further investigation was required. Within two months thereafter, infant M.H. "ran away from home twice" and, due to issues with his behavior, was taken for psychiatric evaluation. Plaintiffs allege that M.H. was untruthful during his psychiatric evaluation, which caused CPS to reopen its investigation and to conduct another home visit. On May 27, 2010, pursuant to CPS's further investigation, plaintiffs attended a hearing before former Judge Andrew Tarantino at which the temporary placement of the infant-plaintiffs into the custody of the Suffolk County Department of Social Services was directed. It is also undisputed that on December 23, 2010, former Judge Richard Hoffman issued an order returning the infant-plaintiffs to the custody of the parent-plaintiffs.

Plaintiffs' complaint contains causes of action for violations of the New York State Constitution, false imprisonment, malicious prosecution, prima facie tort, intentional infliction of

emotional distress, "reckless gross negligence," libel and slander.[1] Plaintiffs served non-compliant notices of claim in this action on April 15 and May 13, 2011, and an amended notice of claim, prepared by their attorney, was served on or about January 27, 2012.

Defendants now move for an order pursuant to CPLR 3211[2] dismissing the complaint on the grounds that plaintiffs failed to timely serve Notice of Claim pursuant to GML 50-e and are, in any event, barred from pursuing their claims by the statute of limitations enumerated in GML 50-i[1][c].[3] In support of their motion, defendants argue that the alleged causes of action accrued on May 27, 2010, the date that the infant-plaintiffs were placed into the custody of their grandparents, and that, therefore, pursuant to GML 50-e, the time to serve Notice of Claim expired on August 27, 2010 and, pursuant to GML 50-I, the time to commence an action expired on August 27, 2011. Defendants aver that because the statute of limitations has expired, plaintiffs should not be granted leave to serve late Notice of Claim.

Plaintiffs oppose defendants' motion, contending that a lengthier statute of limitations applies, and that, in any event, any statute of limitations is tolled for the infant-plaintiffs. Plaintiffs also cross-move for leave to file late Notice of Claim, arguing, *inter alia*, that defendants would suffer no prejudice by the service of late Notice of Claim because they were on notice of the facts underlying the claims within the 90-day period prescribed by GML 50-e, the witnesses are still available to be interviewed and the defendants are remain able to conduct any further investigation they wish to conduct. Plaintiffs also argue, in effect, that they have a reasonable excuse for their failure to file a late notice of claim because of the infant-plaintiffs' infancy.

Intentional tort claims. Claims involving intentional torts, including false imprisonment, malicious prosecution, intentional infliction of emotional distress, libel and slander are governed by a one-year statute of limitations (*see* CPLR 215[3]; ***Rice v New York City Hous. Auth.***, 149 AD2d 495, 496 [2d Dept 1989]) However, CPLR 208 provides a statutory toll if the person entitled to commence the action is an infant at the time the cause of action accrues (*see* ***Daniel J. by Ann Mary J. v New York City Health and Hosps. Corp.***, 77 NY2d 630, 634 [1991]). The infancy toll does not, however, apply to a parent's derivative claim (*see* ***Blackburn v Three***

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[1] Plaintiffs' causes of action alleging violations of their rights under the United States Constitution were withdrawn from this action.

[2] Defendants purported to move pursuant to CPLR 4442, a non-existent provision. The Court can only assume that defendants intended to move to dismiss pursuant to CPLR 3211.

[3] Defendants also seek to collaterally estop plaintiffs from asserting their federal claims in this action. However, because plaintiffs have withdrawn their federal claims, that branch of defendants motion seeking dismissal of plaintiffs' federal claims is moot.

Village Cent. School Dist., 270 AD2d 298 [2d Dept 2000]).

Here, the event giving rise to parent-plaintiffs' claims occurred on May 27, 2010, the date that infant-plaintiffs were temporarily removed from the custody of their parents. Therefore, parent-plaintiffs were required to commence this action against the County and its employees for its claims of false imprisonment, malicious prosecution, intentional infliction of emotional distress, libel and slander on or before May 27, 2011 (*see* CPLR 215[3]). Plaintiffs did not commence their action until December 17, 2013, well outside the time permitted by the statute of limitations. Likewise, because the infancy toll applicable to the claims of infant-plaintiffs, discussed *infra*, does not apply to the parent-plaintiffs' derivative claim, any derivative claim asserted by the parent-plaintiffs is similarly time barred. Accordingly, the parent-plaintiffs' causes of action for false imprisonment, malicious prosecution, intentional infliction of emotional distress, libel and slander are time-barred, and that branch of defendants' motion seeking dismissal of those claims by parent-plaintiffs' is, therefore, granted.

Prima facie tort claim. Plaintiffs also purport to assert a claim for prima facie tort. However, it is well settled that where, as here, "a reading of the factual allegations discloses that the essence of the cause of action is an intentional tort, plaintiff cannot avoid a statute of limitations bar by labeling the action as one to recover damages for prima facie tort" (***Havell v Islam***, 292 AD3d 210 [1st Dept 2002]). "Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs" (***Lancaster v Town of East Hampton***, 54 AD3d 906 [2d Dept 2008]). Accordingly, that branch of defendants' motion seeking dismissal of parent-plaintiffs' prima facie tort cause of action is also granted.

Negligence claims. Claims involving personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence of a municipality, such as claims for negligent training, are subject to a one year and ninety day statute of limitations (*see* CPLR 50-I; ***Broyles v Town of Evans,*** 147 AD3d 1496, 1497 [4th Dept 2017]; ***Murray v City of New York***, 283 AD3d 560 [2d Dept 2001]).

Here, plaintiffs bring causes of action for "reckless gross negligence" based upon the allegedly "improper train[ing]" of Suffolk County employees which, they claim, resulted in the wrongful removal of infant-plaintiffs and, consequently, emotional distress to plaintiffs and injuries to their respective reputations. Parent-plaintiffs' action, however, was not commenced until more than one year and ninety days after the happening of the event upon which the claim is based - the removal of their children - and, accordingly, parent-plaintiffs cannot avoid the bar of the statute of limitations of CPLR 50-I. Accordingly, that branch of defendants' motion seeking dismissal of parent-plaintiffs' "reckless gross negligence" causes of action, including any derivative claim. is granted

Alleged violations of State constitutional rights. Further, where a claimant's "alleged wrongs could have been redressed by an alternative remedy, namely, timely interposed common-law tort claims" dismissal of state constitutional claims asserted by the claimant is appropriate (***Lyles v State, 2 AD3d 694, 695*** [2d Dept 2003], *affirmed on other grounds*, 3 NY3d 396 [2004]; *see* ***Peterec v State***, 124 AD3d 858 [2d Dept 2015] ["The claim alleging violations of the New York State Constitution is unavailable, since the claimant has an alternative remedy available"]).

Here, plaintiffs make a claim, without elaboration, that they were "denied their civil rights . . . under the New York State Constitution." Plaintiffs cite no specific provision of the New York State Constitution nor do they attempt to articulate any rights under the New York State Constitution that they claim were violated. Nonetheless, it is evident that had the parent-plaintiffs timely interposed their purported tort claims, the merits vel non of those claims could have been addressed, just as the merits vel non of the infant-plaintiffs' alleged tort claims will be addressed. Accordingly, that branch of defendants' motion seeking dismissal of both parent-plaintiffs' and infant-plaintiffs' causes of action asserting violations of rights under the New York State Constitution is granted.

Infant-plaintiffs' motion for leave to file late notice of claim. Although the parent-plaintiffs' claims are all untimely, the running of the statutes of limitations applicable to the infant-plaintiffs' claims has been tolled by operation of CPLR 208. Accordingly, the court will consider their motion for leave to file late notice of claim for their causes of action alleging false imprisonment, malicious prosecution, prima facie tort, intentional infliction of emotional distress, "reckless gross negligence," libel and slander. As noted above, notices of claim were served in various iterations on April 15, 2011, May 13, 2011 and January 27, 2012, in each instance after the ninety-day period allowed by the General Municipal Law 50-e had expired.

General Municipal Law 50-e [5] permits the court as a matter of discretion and upon consideration of all relevant facts and circumstances, to grant permission to claimants to serve late notices of claim (*see* ***Felice v Eastport/South Manor Cent. School Dist.***, 50 AD3d 138, 851 NYS2d 218 [2d Dept 2008]). The "period during which an extension may be granted [is] coextensive with the statute of limitations governing the claim" (***Cohen v Pearl River Un. Free School Dist.***, 51 NY2d 138 [1980]). "[W]here the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time during which late notice of claim may be served" (***Cohen v Pearl River Un. Free School Dist.***, *supra*). The key factors in determining whether to allow service of a late notice of claim are whether (1) the petitioner demonstrated a reasonable excuse for the failure to serve a timely notice of claim, (2) the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) the delay would substantially prejudice the municipality in its defense (*see* General Municipal Law 50–e[5]; ***City of New York v County of Nassau***, 146 AD3d 948, 46 NYS3d 155 [2d Dept 2017]; ***Matter of Dell'Italia v Long Is. R.R.***

Corp., 31 AD3d 758, 820 NYS2d 81 [2d Dept 2006]). The presence or absence of any one of these factors is not necessarily determinative (*see* ***Matter of Dell'Italia v Long Is. R.R. Corp.***, *supra*), and the absence of a reasonable excuse is not necessarily fatal (see ***Brownstein v Incorporated Vil. of Hempstead***, 52 AD3d at 509, 859 NYS2d 682 [2d Dept 2008]; ***Jordan v City of New York,*** 41 AD3d 658, 659, 838 NYS2d 624 [2d Dept 2007]; ***Matter of March v Town of Wappinger,*** 29 AD3d 998, 816 NYS2d 534 [2d Dept 2006]). "However, whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim is seen as a factor which should be accorded great weight" (***Matter of Dell'Italia v Long Is. R.R. Corp.***, *supra*). "General Municipal Law 50-e is to be liberally construed and not present a barrier to a legitimate claim" (***Wally G. ex rel. Yoselin T. V New York City Health and Hosps. Corp.***, 27 NY3d 672, 682 [2016]).

The Court turns first to whether infant-plaintiffs' had a reasonable excuse for not serving a timely notice of claim."[I]t is incumbent upon the claimant to demonstrate a nexus between the delay [in filing Notice of Claim] and the[ir] infancy" (***Berg v Town of Oyster Bay***, 300 AD2d 330, 330 [2d Dept 2002]; ***Wooden v City of New York***, 136 AD3d 932, 932 [2d Dept 2016])

Here, under the circumstances, where the infant-plaintiffs were separated from one another, temporarily placed into the custody of their respective grandparents for seven months, were returned just before the holidays, and in view of the purported emotional disturbances suffered by infant M.H., as well as the collateral effects of the CPS investigations, the Court finds that infant-plaintiffs have offered a reasonable excuse for the delay in serving notice of claim.

The court turns next to whether the defendants had actual notice of the essential facts constituting infant-plaintiffs' claims within 90 days after the claim arose or within a reasonable time thereafter. Courts have found that defendants had actual notice where the delay in service of the notice of claim was only minimal (***Gelish v Dix Hills Water Dist.***, 58 AD3d 841, 842 [2d Dept 2009]; ***Cicio v City of New York***, 98 AD2d 38, 40 [2d Dept 1983]; ***Johnson v New York City Hous. Auth.***, 38 AD3d 352 [1st Dept 2007]). Here, infant-plaintiffs' first notice of claim, albeit deficient, was served just over four-months after they were returned to the custody of their parents. Accordingly, the Court finds that the defendants had actual notice of the essential facts constituting infant-plaintiffs' claim within a reasonable time after the ninety-day period, measured from the date they were returned to their parents, had expired.

The Court next considers whether defendants would be substantially prejudiced by maintaining their defense on the merits. A claimant seeking leave to serve a late notice of claim pursuant to General Municipal Law 50-e[5] bears the burden of showing that the delay will not substantially prejudice the public corporation in maintaining its defense on the merits (*see* ***Rodriguez v Woodhull School***, 105 AD3d 1050, 963 NYS2d 724 [2d Dept 2013]; ***Joy v County of Suffolk***, 89 AD3d 1025, 933 NYS2d 369 [2d Dept 2011]; ***Jordan v City of New York***, 41

AD3d 658, 838 NYS2d 624 [2d Dept 2007]). The burden of establishing the lack of prejudice is placed upon a plaintiff who is seeking to excuse his or her failure to comply with the statute. When the public corporation has actual knowledge of the facts constituting the claim, it may be easier for a plaintiff to meet this burden (*see* ***Rodriguez v Woodhull School***, *supra;* ***Jordan v City of New York***, *supra;* ***Gibbs v City of New York***, 22 AD3d 717, 804 NYS2d 393 [2005]).

Here, the Court finds that the defendants would not be substantially prejudiced by maintaining its defense on the merits, particularly in view of the fact that the defendants had notice of the circumstances underlying infant-plaintiffs' claims (***Matter of Dell'Italia v Long Is. R.R. Corp.***, *supra*) and given the strong public policy that General Municipal Law 50-e not be construed as to present a barrier to a claim (***Wally G. ex rel. Yoselin T. V New York City Health and Hosps. Corp.***, *supra*). Further, the brief delay in service of Notice of Claim was hardly the delay contemplated by the statute as potentially causing prejudice to a municipal defendant.

Accordingly, the infant-plaintiffs' motion for leave to file a late Notice of Claim is granted to the extent that their previously served notice of claim is deemed timely served *nunc pro tunc*

Defendants' motion for a protective order. Defendants also move for a protective order, pursuant to CPLR 3101[a], CPLR 3103 as and Section 422 of the Social Services Law, limiting the scope both of the production of documents and the deposition testimony of parties and non-party witnesses to information concerning only members of the plaintiffs' family.

Plaintiffs have made the following disclosure demands:

1. All statements of the plaintiffs, in any form, including but not limited to written, digital, audio and video, regardless of source.

2. All documents in the legal file relating to the family court prosecution of the plaintiffs commenced on May 28, 2010, including a list of all pleadings, all notes, all memos and all statements, in any form, including but not limited to written, digital, audio and video, regardless of source.

3. All documents comprising the Suffolk County Child Protective Services files for the years 2009 and 2010, including all files, notes, memos, statements, transcripts of any kind, in any form, including but not limited to written, digital, audio and video; including but not limited to Court proceedings, regardless of source.

In support of their motion, defendants argue that the records, to the extent that they contain references to individuals other than the plaintiffs, are confidential pursuant to section 422[4][A][d] of the Social Services Law, and that disclosure of those records could result in

prejudice and liability to the Department of Social Services and to the named defendants. Defendants do not cite case law in support of their interpretation of the Social Services Law.

Plaintiffs oppose defendants' motion and contend, in effect, that the documents and reports in the CPS files are necessary for and relevant to the prosecution of their core assertion, that the defendants wrongfully brought a Petition for Neglect against the parent-plaintiffs and wrongfully removed infant-plaintiffs from their home. Plaintiffs argue that because they are subjects of the reports and materials related to the reports, the reports and materials should be examined *in camera* and made available to them pursuant to Social Services Law 442[4][A][d].

Reports of child abuse and maltreatment, as well as "any other information obtained, reports written or photographs taken concerning such reports in the possession of the department [or] local department . . . shall be confidential" and shall only be disclosed to certain enumerated individuals or agencies (*see* Social Services Law 422[4][A][a-z]). Of note, the persons entitled to access to these reports and materials include "any person who is the subject of the report or other persons named in the report" (Social Services Law 422[4][A][d]). While the release of the reports and materials to persons entitled to them is typically an administrative function of the local Department of Social Services, the statute also constrains a Court's authority in the context of civil discovery to order the production of "all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]; 18 NYCRR 432.7; ***see Sayegh v McGuire***, 146 AD3d 788, 789 [2d Dept 2017]; ***Bibbins v Sayegh***, 46 Misc 3d 519, 525 [Sup Ct 2014]). Further, Social Services Law 422[4][A], with few exceptions, expressly prohibits the "release, disclosure or identification of the names or identifying descriptions of persons who have reported suspected child abuse or maltreatment . . . without such persons' written permission" (*see* ***Selapack v Iroquois Cent. School Dist.***, 17 AD3d 1169, 1170 [4th Dept 2005]).

Here, the plaintiffs, as subjects of the disputed reports and the materials related to, are individuals who are statutorily permitted to receive such reports and materials to the extent that those reports relate to the plaintiffs and do not disclose the identities or identifying descriptions of persons who may have reported the alleged child abuse or participated in the investigation of such allegations. Accordingly, defendants' motion for a protective order is granted subject to the following conditions: defendants are required to provide to plaintiffs responses to request 1 in its entirety, and to requests 2 and 3 in redacted form, to the extent that the requested discovery is related to the plaintiffs and with the proviso that defendants shall not disclose the identities or identifying descriptions of persons who participated in the alleged child abuse investigation. Further, plaintiffs may question the defendants at deposition generally about discussions they had with non-parties related to plaintiffs, again with the proviso that no disclosure of the identities or identifying descriptions of such non-parties shall be made.

This order is without prejudice to plaintiffs making an application to the Court for further depositions or discovery upon a proper showing of necessity.

The foregoing constitutes the decision and order of the court.

Dated: July 16, 2018
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ FINAL DISPOSITION **__XX__ NON-FINAL DISPOSITION**