

Cappelli v County of Tioga

2021 NY Slip Op 31956(U)

June 29, 2021

Supreme Court, Tioga County

Docket Number: 2020-00061186

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 30th day of April, 2021, on submission.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TIOGA

MICHAEL CAPPELLI,

Plaintiff,

DECISION AND ORDER

-vs.-

Index No. 2020-00061186

COUNTY OF TIOGA,

Defendant.

APPEARANCES:

Counsel for Plaintiff:

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Counsel for Defendant:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to address the motion of Defendant, County of Tioga, filed on December 3, 2020, seeking to dismiss the Complaint of Plaintiff, Michael Cappelli, due to Plaintiff's failure to properly file a Notice of Claim, and also on the ground of failure to state a claim. Plaintiff filed an affirmation in opposition, and then Defendant filed a reply affidavit. The motion was made returnable for April 30, 2021, on submission.¹ After due deliberation and for the reasons set forth below, the Defendant's motion for summary judgment is granted.

BACKGROUND FACTS

Plaintiff filed a Summons with Notice on July 7, 2020, and his subsequently filed Complaint asserts causes of action for negligence, fraud, slander and slander per se, relating to a report from the Tioga County Department of Social Services ("DSS"), that indicated maltreatment and/or abuse by Plaintiff for an incident alleged to have occurred on May 16, 2018. The DSS report was allegedly made in or around August 3, 2018. Plaintiff contends that, in reality, there had been no report or complaint made to the Statewide Central Register of child abuse and maltreatment regarding Plaintiff, and there was no investigation actually conducted by DSS. Pursuant to Social Services Law § 424(6) and (7), when a report is received, DSS shall investigate and determine if the report is "indicated" or unfounded. Plaintiff believes DSS did not have any report of maltreatment or abuse, conducted no investigation, yet made its own determination that maltreatment and/or abuse was "indicated", which was then considered by the Broome County Family Court in denying Plaintiff's petition to modify custody of his children. The Broome County Family Court Decision and Order denying the Petition to modify custody was issued on March 7, 2019. The "indicated" report was allegedly subsequently expunged and sealed. Plaintiff claims that he did not learn of the facts until the County turned over Investigation Progress Notes on April 12, 2019.

Defendant submitted an affidavit from Diane Stephens, a legal secretary in the County Attorney's Office, who is responsible for maintaining records of Notices of Claim filed against

¹ All the papers filed in connection with the motion and opposition are included in the NYSCEF electronic case file, and have been considered by the Court.

the County. Per her affidavit, Plaintiff's Notice of Claim was served on the County on July 11, 2019. Defendant also submitted an attorney's affirmation and attached exhibits pertaining to the scheduling of the General Municipal Law § 50-h examination of the Plaintiff, and excerpts from the transcript of that testimony.

Defendant raises several arguments on this motion for summary judgment. First, Defendant claims that Plaintiff failed to serve timely Notice of Claim, and that Plaintiff has not made a motion to permit the late filing of a Notice of Claim, which would not be permissible at this time since the statute of limitations has run on the underlying claims. Second, Defendant claims that Plaintiff's conduct at the 50-h examination amounted to a refusal to comply and justifies dismissal of the claims. Third, Defendant argues that it has statutory immunity stemming from the preparation and making of its report, and that in any event, Defendant acted in good faith in its investigation and preparation of its report. Fourth, Defendant claims that it is protected by common-law governmental immunity. Lastly, Defendant argues that each of Plaintiff's claims are deficient and subject to dismissal for failure to state a cause of action.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); see *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the opposing party to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination ... and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable

inference and ascertaining whether there exists any triable issue of fact.” *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept. 2000) (internal citation omitted); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

1. Notice of Claim

Most actions against a municipality require that notice be given to the municipality within a certain timeframe, or that an order be obtained permitting the late filing of such notice. The notice requirement “allows a governmental subdivision a meaningful opportunity to investigate in a timely manner the circumstances that gave rise to a claim. ‘The requirement of notice is one of the safeguards devised by the law to protect municipalities against fraudulent and stale claims for injuries to person and property’” *Mills v. County of Monroe*, 59 NY2d 307, 310-311 (1983), quoting *Sandak v. Tuxedo Union School Dist. No. 3*, 308 NY 226, 232 (1954).

Notice of Claim requirements are found in General Municipal Law § 50 and County Law § 52. “General Municipal Law § 50-i (1) precludes commencement of an action against a city ‘for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city,’ unless a notice of claim has been served in compliance with section 50-e.” *Margerum v. City of Buffalo*, 24 NY3d 721, 730 (2015). GML § 50-e establishes a “protocol for serving a notice of claim as a condition precedent to a suit against a public corporation.” *Williams v. Nassau County Med. Ctr.*, 6 NY3d 532, 535 (2006). Pursuant to GML § 50-e (1), notice of claim in a tort action must be provided to a public corporation within ninety days after the claim arises. *Wally G. v. New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672 (2016); *see, Margerum v. City of Buffalo*, 24 NY3d 721. GML § 50-e (5) permits a court, in its discretion, to extend the time to serve a notice of claim, or deem a late notice of claim timely served, *nunc pro tunc*. *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 (2016); *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d 1263, 1263 (3rd Dept. 2019); *Matter of Kranick v. Niskayuna Cent.*

Sch. Dist., 151 AD3d 1262, 1262 (3rd Dept. 2017); *see, Matter of Reddick v. New York City Hous. Auth.*, 188 AD3d 890 (2nd Dept. 2020). The application must also be filed within the Statute of Limitations period of one year and 90 days. *See, Mindy O. v. Binghamton City School Dist.*, 83 AD3d 1335, 1336 (3rd Dept. 2011); GML § 50-e (5), GML § 50-i. In this case, Plaintiff has not sought leave to file a late Notice of Claim, contending that he filed a timely Notice of Claim on July 11, 2019.

Plaintiff takes the position that a Notice of Claim was not required, and relies upon County Law § 52(1), which provides that:

Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature [...] alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law.

Plaintiff argues that his causes of action do not assert claims for damage, injury or death, or for invasion of personal or property rights. Therefore, Plaintiff has taken the position that Notice of Claim is not even required.

The plain language of County Law § 52 shows that it incorporates the notice of claim requirements of the General Municipal Law § 50-e. *See, Russell v. Westchester Cmty. Coll.*, 2017 US Dist LEXIS 159540 (SDNY 2017). However, County Law § 52 is even broader than General Municipal Law in the scope of matters it covers. *Sager v. County of Sullivan*, 145 AD3d 1175 (3rd Dept. 2016); *Rose v. New York City Health & Hosps. Corp.*, 122 AD3d 76 (1st Dept. 2014). County Law § 52 generally applies to any claim for damages against a County (*O'Connell v. Onondaga County*, 2012 US Dist LEXIS 194831 [NDNY 2012]). It is applicable to claims for damage, injury, or death of every name and nature. However, even as broad as it is, County Law § 52 and General Municipal Law § 50-e do not require a Notice of Claim “in an action against a municipality where money damages are incidental to the equitable relief sought.” *See Greaney v. Springer*, 266 AD2d 707 (3rd Dept. 1999); *Maxim Dev. Group v. Montezuma Props., LLC*, 2015 NY Misc LEXIS 278 (Sup. Ct. Seneca County 2015). Similarly, a Notice of Claim is not required in a breach of contract claim. *Smith v. Rise East School*, 120 AD2d 726 (2nd Dept. 1986); *Hamilton v. Cty of Onondaga*, 2018 US Dist LEXIS 161647 (NDNY 2018).

All of Plaintiff's claims seeks compensatory damages (and punitive or special damages) based on alleged tortious conduct on the part of the County. As such, the Court concludes that the provisions of County Law § 52 are applicable such that Plaintiff was required to provide a timely Notice of Claim.

Plaintiff provided Notice of Claim on July 11, 2019, and contends that such notice was timely, as Plaintiff was unaware of the actions giving rise to this lawsuit until April 12, 2019. That was the date when he learned, during the course of seeking expungement/amendment of the indicated report made against him, that he obtained the investigation notes. On the other hand, Defendant claims that the Plaintiff's claims are grounded on the August 3, 2018 report from DSS indicating a report of child maltreatment and/or abuse. Utilizing that date, Notice of Claim would have been due by November 1, 2018.

Essentially, Plaintiff takes the position that due to his delayed discovery of the facts surrounding the investigation, his Notice of Claim is timely. However, under General Municipal Law § 50-i, "the limitation period begins to run upon the happening of the event, irrespective of when the action accrued." *Klein v. City of Yonkers*, 53 NY2d 1011, 1012 (1981). The time in which to file a Notice of Claim "is not tolled pending discovery by the plaintiff of his injuries or damages." *Way v. City of Beacon*, 30 Misc3d 1203(A) (Sup. Ct. Dutchess County 2010), *citing Klein v. City of Yonkers*, 53 NY2d 1011 (1981) (other citations omitted); *see Conner v. State*, 268 AD2d 706 (3rd Dept. 2000) (90 day time limitation to file a claim against the State will not be extended based on Plaintiff's delayed discovery of the pertinent facts); *see, Kitonyi v. Albany County*, 128 AD2d 1018 (3rd Dept. 1987).

The Plaintiff in *Kitonyi*, like the Plaintiff in this action, sought to bring an action based upon a DSS report of child abuse or neglect, and claimed that he did not learn of the facts until long after the report had been made. The Third Department declined to extend the time for filing the Notice of Claim based upon delayed discovery, noting that:

the Court of Appeals stated that for the purposes of General Municipal Law § 50-i, the limitation period begins to run upon the happening of the event, irrespective of when the action may technically accrue (*Klein v City of Yonkers*, 53 NY2d 1011, 1013; *see, Doyle v 800, Inc.*, 72 AD2d 761). Discovery accrual is not the norm; rather, it is an exception recognized for particular types of actions (see, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:1, at 111-114; McLaughlin, 1986 Supplementary Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:1 [1987 Pocket Part], at 57). We hold that plaintiffs have not established their entitlement to a deviation from the principles espoused in *Klein v City of Yonkers* (supra) and *Doyle v 800, Inc.* (supra).

Kitonyi, 128 AD2d at 1018-1019.

In *Kitonyi*, the DSS report was made and filed in July 1982, but Plaintiff claimed he was not aware of the possible existence of the report until March 1985, and received a notice of expungement on July 1, 1985. He filed a Notice of Claim on September 28, 2015, which was within 90 days of the expungement. The Third Department rejected the argument that the claim did not accrue until Plaintiff became aware of it, and even if it was inclined to accept that argument, the Plaintiff did not file his Notice of Claim within 90 days of becoming aware of the report in March 1985 and the fact that he knew it involved a claim of child abuse.

In the present case, the DSS report was created on about August 3, 2018, far more than 90 days before the Notice of Claim which was filed on July 11, 2019. Since the date of the creation of the report is the proper date to measure the filing requirement (per the *Kitonyi* decision), the Notice of Claim was not timely. Moreover, even if a discovery accrual approach were proper, it would not salvage the Notice of Claim. Plaintiff alleges that Family Court relied upon the false DSS report when it made its decision on March 7, 2019, and the Family Court Decision and Order cited the DSS report and made specific reference to the allegations which formed the basis for the indicated report. Thus, Plaintiff was aware of the existence of the report and that it pertained to a claim of maltreatment or abuse no later than March 7, 2019, and 90 days from that date would have been June 5, 2019. Plaintiff did not file his Notice of Claim within 90 days of the Family Court's Decision and Order. Thus, even a discovery accrual approach does not change the result. The Notice of Claim was not filed timely, and the case is subject to dismissal.

Plaintiff has also not made any application to the Court to permit the late filing of a Notice of Claim pursuant to General Municipal Law § 50-e (5), and the time to do so has expired. The Court cannot grant an Order beyond the statute of limitations, which is one year and 90 days. *See* General Municipal Law § 50-i. Even if the Court utilized the later date of March 7, 2019 as the date to start the limitations period, and permitted a toll for the time from when the notice of deposition was served and when the deposition occurred (48 days), and also

factored in a toll during the periods of time effected by Executive Orders related to the coronavirus pandemic² (228 days), the deadline would have been March 8, 2021 (one year and 90 days [456 days] plus 48 days plus 228 days from March 7, 2019). Plaintiff did not make an application to file a late Notice of Claim, and therefore the Court could not now grant an Order to permit late service of the Notice of Claim, or authorize the service that was made on July 11, 2019, *nunc pro tunc*.

CONCLUSION

Accordingly, the Court finds that Notice of Claim was required, and it was not made in a timely manner, and cannot be granted at this point. Therefore, Plaintiff's claims against the County are barred. The Court need not address the parties' arguments regarding Plaintiff's compliance or non-compliance with the deposition pursuant to General Municipal Law § 50-e, nor the merits of the Plaintiff's causes of action or the County's defenses. Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is GRANTED and the Complaint is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: June 29, 2021
Binghamton, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice

² On March 20, 2020, Governor Andrew Cuomo issued Executive Order 202.8 which tolled time limitations in civil actions, and the toll was extended multiple times by Executive Order, until being lifted on November 4, 2020. See, *Brash v. Richards*, 2021 NY App. Div. LEXIS 3555 (2nd Dept. June 2, 2021).