Doe v State of New York
2021 NY Slip Op 33010(U)
July 13, 2021
Court of Claims
Docket Number: Claim No. 134523
Judge: Maureen T. Liccione
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DOE v. THE STATE OF NEW YORK, # 2021-059-043, Claim No. 134523, Motion No. M-96449, Cross-Motion No. CM-96571

Synopsis

Case information

UID:	2021-059-043
Claimant(s):	JANE DOE (a patient of the Respondents whose name is known but withheld due to the nature of the claim herein)
Claimant short name:	DOE
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	134523
Motion number(s):	M-96449
Cross-motion number(s):	CM-96571
Judge:	MAUREEN T. LICCIONE
Claimant's attorney:	Rappaport, Glass, Levine & Zullo By: Thomas P. Valet, Esq.
Defendant's attorney:	HON. LETITIA JAMES, ATTORNEY GENERAL By: Antonella Papaleo, Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	July 13, 2021
City:	Hauppauge
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

Before the Court are motions: 1) by claimant "Jane Doe" (Claimant) to strike the third, fourth, fifth and fourteenth affirmative defenses in the verified answer or, in the alternative, for permission to amend the claim and/or for leave to file a late claim and to proceed anonymously under the pseudonym Jane Doe, and 2) by defendant State of New York (State or Defendant) for summary judgment to dismiss the claim pursuant to CPLR 3212 and Court of Claims Act § 11.

Background

By claim filed February 26, 2020, and served on the Attorney General May 11, 2020, Claimant alleges that while she was a patient under the care of Sagamore Children's Psychiatric Center (Sagamore), operated by the New York State Office of Mental Health, in Dix Hills, New York, she was subjected to neglect, sexual abuse and gross violations of the professional relationship between a patient and employees/agents/servants of the facility. More specifically, the claim alleges that in December 2017, Claimant was admitted as a minor into Sagamore. Claimant and had been diagnosed with autism and post traumatic stress disorder. Claimant was under the care and treatment of one of Sagamore's employees, Clarice Thompson (Thompson). Beginning in or about May 1, 2018, Thompson initiated an inappropriate relationship with Claimant, in violation of her duties as a licenced master social worker. The claim adds that Claimant did not and could not have consented to acts by Thompson, which constituted sexual assault and sexual battery.

Defendant interposed a verified answer in which it raised the third, fourth, fifth and fourteenth affirmative defenses.

The third affirmative defense states "the claim fails to comply with Court of Claims Act Section 11 by failing to include an adequate description of the location of the incident alleged in the claim, and therefore there is no proper claim over which the Court has jurisdiction."

The fourth affirmative defenses states "this Court lacks subject matter jurisdiction over the claim and personal jurisdiction over the defendant, the State of New York, as the claim fails to comply with Section 11 of the Court of Claims Act by failing to include adequate particularization of the nature of the cause(s) of action and the defendant's conduct in regard to it."

The fifth affirmative defenses states "this Court lacks subject matter jurisdiction over the claim and personal jurisdiction over the defendant, the State of New York, as the claim fails to comply with Section 11 of the Court of Claims Act by failing to state the specific time when and date of accrual of the cause of action."

The fourteenth affirmative defenses states "this Court lacks subject matter jurisdiction over the claim and personal jurisdiction over the defendant, the State of New York, because the claim is untimely in that neither the claim nor a notice of intention was served within ninety (90) days of the accrual of the claim as required by Court of Claims Act Section 11 and Court of Claims Act Section 10 (3)."

Claimant argues that these affirmative defenses are without merit and should be dismissed from the State's answer (Cl. Aff. in Supp., at ¶ 8). In support of her application, Claimant submits her own affidavit and copies of two documents prepared by New York State Justice Center for the Protection of People with Special Needs (Justice Center). The first such document, dated February 1, 2019, is titled "Notice to Vulnerable Person or Personal Representative of Investigation Determination," and the second, dated February 22, 2019, is titled "Administrative Appeals Unit Notice to Personal Representative of Administrative Review Determination - Substantiated." Each notice was made to Claimant's mother concerning the investigation agency conducted into the allegations of abuse and neglect (Cl. Aff. in Supp., Ex. A).

In her affidavit Claimant states that beginning in May 2018, Thompson, a social worker at Sagamore, engaged in abusive and inappropriate behavior towards her, including verbal and physical sexual abuse that included a sexual relationship with her. The sexual abuse lasted about three months, until late July 2018. In October 2018, Claimant's mother learned of the abuse and reported it to the Sagamore administrators. An investigation was conducted by a number of agencies including the Justice Center, which concluded that the allegations against Thompson were substantiated.

With respect to the notices provided to Claimant's mother referenced above, the February 1, 2019 notice states, in part, that the allegation of neglect "has been SUBSTANTIATED as Category 2 Neglect pursuant to Social Services Law § 493 (4) (b)" (formatting in the original). The February 22, 2019 notice states, in part, that "the Administrative Appeals Unit has determined that a preponderance of evidence supports the finding(s) of abuse or neglect as well ascategory level(s) and the report is upheld."

By affirmation of an assistant attorney general, the State asserts that not only are the affirmative defenses Claimant moves to strike meritorious, but, also, that they are "firmly based upon facts that serve to support dismissal of the Claim" as the claim fails to comply with the jurisdictional pleading requirements of Court of Claims Act (CCA) § 11 (b) (Def. Aff. in Supp., at ¶ 7). Defendant also argues that the causes of action based on the theory of respondeat superior fail as a matter of law and should be dismissed.

Defendant's Motion for Summary Judgment

Since the State's cross-motion concerning Claimant's compliance with CCA § 11 (b) goes to the jurisdiction of the Court and is potentially dispositive, the Court will address it first.

Under CCA § 11 (b), a claim must "state the time when and place where such claim arose, the nature of same, the items of damage or injuries claimed to have been sustained and, except in an action to recover damages for personal injury, medical, dental or podiatric malpractice or wrongful death, the total sum claimed." In *Lepkowski v State of New York* (1 NY3d 201 [2003]), the Court of Appeals held that the failure of a claim to set forth any of the specific items referenced in the statute resulted in a failure to invoke the Court's subject matter jurisdiction (*see*

also Kolnacki v State of New York, 8 NY3d 277 [2007] ["[t]he failure to satisfy any of the conditions" of Court of Claims Act § 11 (b) is a "jurisdictional defect"]). A claim need not be pled with "absolute exactness" (*Triani v State of New York*, 44 AD3d 1032, 1032 [2d Dept 2007]), but must be sufficient "to enable the State to be able to investigate the claim promptly and to ascertain its liability under the circumstances" (*Grumet v State of New York*, 256 AD2d 441, 442 [2d Dept 1998] [internal quotations and citation omitted]; *see also Rodriguez v State of New York*, 8 AD3d 647, 647 [2d Dept 2004] [the statement must be "specific enough so as not to mislead, deceive or prejudice the rights of the State. In short, substantial compliance with section 11 is what is required"]; *accord Wharton v City Univ. of N.Y.*, 287 AD2d 559, 559 [2d Dept 2001]). Defendant "is not required to ferret out or assemble information that section 11 (b) obligates the claimant to allege" (*Lepkowski*, 1 NY3d at 208).

Defendant argues that the claim "fails to state the date and time of the alleged incident(s)," and does not "adequately plead the detail required by section 11 (b)." In opposition, Claimant relies on the arguments made in her motion to strike the affirmative defenses.

With respect to factor of "time when" claim arose, Defendant argues that because the claim provides a general time period when the alleged wrongdoing occurred "on or about May 1, 2018" and "beginning in or about May 2018" the pleading does not satisfy the requirements of section 11 (b).

Contrary to Defendant's assertion, there is no requirement that the claim set forth a single "specific date" of accrual. Instead, CCA § 11 (b) requires that the claim set forth the "time when" the claim arose. Therefore, claims do not always have specific dates, but instead may arise from an "ongoing" legal wrong (*see Epps v State of New York*, 199 AD2d 914, 914 [3d Dept 1993]; *see also Foreman v City University of New York*, UID No. 2006-036-534 [Ct Cl, Schweitzer, J., May 30, 2006] [there is no "mandate" that the statute set forth a specific date]). Moreover, a tort claim arises when an injury is sustained (*see Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994] ["it is upon injury that a legal right to relief arises in a tort action"]). The Court, therefore, finds the allegation in the claim that the abuse to claimant was initiated "[o]n or about May 1, 2018" satisfies section 11 (b).

Defendant's reliance on *Robin BB. v State of New York* (56 AD3d 932 [3d Dept 2008]) is unpersuasive. In *Robin BB.*, the claim alleged that "[b]eginning on or about 1998 through June 22, 2005 in the Town of Massena, County of St. Lawrence and State of New York, and various other locations in St. Lawrence County," Stephen Kotzen, a state law enforcement officer, sexually abused and raped claimants. The Third Department found that claimants have alleged only that Kotzen engaged in numerous acts of sexual misconduct at various locations in St. Lawrence County over the course of an eight-year period, which fell short of satisfying the time and place pleading requirements of CCA § 11(b). In contrast, here the allegations are circumscribed to Sagamore commencing on a specific date.

With respect to Defendant's assertion that the claim does adequately plead the "nature" of

the claim as required by section 11 (b), it posits that the allegations in the claim "are so sparse and conclusory as to provide no factual information whatsoever about the alleged incidents; and

frankly, the Claim is so devoid of factual allegations that it is not clear how many acts of

wrongdoing the Claim is alluding to" (Def. Aff. in Supp., ¶ 18). The State then asks a number of

rhetorical questions in an effort to bolster its contention that the pleading is inadequate and

proceeds to argue that the claim fails to provide any allegations as to how the State's purported

negligence contributed "to this entirely undescribed accident"[(1)] (*id*. at ¶ 19).

It has been held that "conclusory or general allegations of negligence that fail to [state] the manner in which the claimant was injured and how the State was negligent do not meet... [the] requirements" section 11 (b) (*Wharton*, 287 AD2d at 560, quoting *Grumet*, 256 AD2d at 442), and the failure to sufficiently particularize the nature of its claim constitutes a jurisdictional defect mandating dismissal (*see Kimball Brooklands Corp. v State of New York*, 180 AD3d 1031 [2d Dept 2020]).

Contrary to Defendant's assertions, Claimant sufficiently specified the nature of the claim. The claim sets forth the nature of the claim as outlined, *supra*, and alleges four causes of action.

The first cause of action alleges that the State and Thompson owed Claimant a duty to

treat her within accepted standards of care of a psychiatric health care facility, and that Thompson violated this duty. Such acts of the State through Thompson constituted sexual assault and battery, which proximately caused Claimant's injuries.

The second cause of action alleges that the misconduct of the State by and through

Thompson was done with intention to cause, or with reckless disregard of causing Claimant to

suffer emotional distress.

The third cause of action alleges that Thompson departed from acceptable standards of

care for a licensed social worker, and violated moral and ethical standards and rules and

regulations for social workers treating a patient.

The fourth cause of action asserts that the State, by and through its employees was

negligent in that the State failed to comply with the standard of care in the treatment of Claimant

for her psychological and medical conditions and failed to respond to information and complaints

of its employees, including Thompson's abuse of Claimant.

The State's own argument belies its contention that the claim is defective. As the State

notes "the instant claim is essentially for the State's alleged negligent hiring, training, and

supervision of Thompson. . . . To the extent Claimant seems to view her Claim as seeking

recovery directly against the State for her alleged rape(s) under a respondeat superior theory or for alleged malpractice by Thompson, such causes of action is [sic] not cognizable" (Def. Aff. in

Supp., ¶ 20). Accordingly, the State cannot now argue that the "nature" of the claim was not

properly pled or that the State's involvement was not described. Moreover, "defendant's

negligence in hiring, supervising and training its employee is reasonably inferred from such

allegations" (*Morris v State of New York*, 27 AD3d 282 [1st Dept 2006]).

On a related point, in a footnote, Defendant also argues that the claim did not state where the incidents occurred with "sufficient particularity" and that statements of generalized location do not satisfy the requirements of section 11 (b) (Def. Aff. in Supp., n 2). Clearly, the nature of the claim shapes the Court's assessment of compliance with the statute. For instance, in a medical malpractice action, typically the precise operating room in a State hospital where an alleged breach of duty took place need not be pled. Conversely, in a slip and fall case at the same State hospital, where for purposes of assessing a defective or dangerous condition, and notice thereof, the specific location is crucial. All of the cases on which defendant relies fall into latter category.[(2)] Put otherwise, the "place where" requirement of section 11 (b) does not always require the pinpoint precision that the State suggests, but must be evaluated in the context of the allegations in the pleading. In the instant case, the listing of specific locations in Sagamore where the alleged incidents of inappropriate sexual behavior and abuse took place is unnecessary under the unique circumstances of this case, where an investigation was conducted prior to the filing of the claim.

In *Lepkowski*, the Court of Appeals made clear that "the guiding principle informing

section 11 (b)" is to "to enable the State . . . to investigate the claim[s] promptly and to ascertain

its liability under the circumstances" (*Lepkowski*, 1 NY3d at 207 [2003], quoting *Heisler v State*

of New York, 78 AD2d 767, 767 [4th Dept 1980]). This legal principle was explored in *Davila v*

State of New York (140 AD3d 1415 [3d Dept 2016]). In *Davila*, the appellate court stated

"[w]here an agency of defendant has performed the internal investigation of an incident and is

therefore the primary or, perhaps, even the sole source of information upon which a claim is

based, it cannot be readily found that a lack of specificity has interfered with defendant's ability to investigate a claim, nor that defendant has been improperly required to 'assemble' information

regarding a claim" (140 AD3d at 1417). Similarly, in *Oliver v State of N.Y. (SUNY) Health*

Science Ctr. at Brooklyn (40 AD3d 719, 719 [2d Dept 2007]), the Second Department found that

"[u]nder the particular facts of this case, where the state hospital had full and complete knowledge of the facts upon which the claim was based even before the claim was filed, and where the verified bill of particulars filed four months after the claim and well within the two-year statute of limitations, fully described each of the elements required by Court of Claims Act § 11 (b)," the claim satisfied that provision. In the instant matter, the State does not claim that its investigation was hampered in any way. Under the totality of the circumstances of this case, the claim is sufficient under the statute.

Defendant also moves to dismiss the causes of action based on the theory of respondent

superior. In *Rivera v State of New York* (34 NY3d 383, 389 [2019] [quotes and citation omitted]),

the Court of Appeals stated that "[u]nder the common-law doctrine of respondeat superior, an

employer -- including the State -- may be held vicariously liable for torts, including intentional

torts, committed by employees acting within the scope of their employment" (34 NY3d at 389

[quotes and citation omitted]). Under this doctrine, "the employer may be liable when the

employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment" (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]). It stands to reason, therefore, that an employer will not be responsible for the torts of an employee who is not acting in furtherance of his employer's business or who acts only on personal motives. A sexual assault "is a clear

departure from the scope of employment, having been committed for wholly personal motives"(*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247 [2002]). However, 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 causing the injury such that the employee's acts could be anticipated or were foreseeable (*see Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 828 [2d Dept 2015]). While Defendant's argument that the claim for the sexual assault will not lie under the theory of respondent superior may be a correct statement of the law, the allegations of malpractice and abuse are so intertwined that it is not clear whether challenged conduct bears a substantial relationship to the treatment of Claimant (*cf. Dupree v Giugliano*, 20 NY3d 921, 924 [2012] [discussing the substantial relationship standard in the context of a medical malpractice action]). The Court, therefore, will let these allegations stand, subject to further development of the record. Thus, Defendant's application to dismiss the causes of action based on the theory of respondent superior is denied without prejudice.

Claimant's Motion to Strike Certain Affirmative Defenses

The Court will now address Claimant's application to strike the third, fourth, fifth and

fourteenth affirmative defenses in defendant's answer. CPLR 3211(b) provides that "[a] party

may move for judgment dismissing one or more defenses, on the ground that a defense is not

stated or has no merit." On a motion to strike affirmative defenses, "the [claimant] bears the

burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Grecov Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010], *quoting Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]); *see also Arquette v State of New York*, 190 Misc 2d 676 [Ct Cl 2001]). All of Defendant's allegations must be taken as true, and Defendant must be granted all reasonable inferences from the evidence submitted (*see Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2d Dept 2008]). No affirmative defense should be dismissed where there is "any doubt as to the availability of a defense" (*Becker v Elm A.C. Corp.*, 143 AD2d 965, 966 [2d Dept 1988]).

As set forth above, the third, fourth and fifth affirmative defenses allege jurisdictional

defenses pursuant to CCA § 11 (b) asserting that the location, particularization and time,

respectively, of the alleged incidents are insufficiently pled. For the reasons set forth above, these

three affirmative defenses are dismissed.

The fourteenth affirmative defenses states "this Court lacks subject matter jurisdiction

over the claim and personal jurisdiction over the defendant, the State of New York, because the

claim is untimely in that neither the claim nor a notice of intention was served within ninety (90)

days of the accrual of the claim as required by Court of Claims Act Section 11 and Court of

Claims Act Section 10 (3)."

CCA § 10 (5) provides that "[i]f the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed" (*see also* NY Const, Art III, § 19[(3)]). The term "legal disability" is not defined in the CCA, and, therefore, it is necessary to look to the CPLR for a definition (*see* CCA § 9 [9]). CPLR 208 provides that a statute of limitations may be tolled if the person commencing suit is under a disability due to "infancy" or "insanity" at the time the claim accrues. In her affidavit Claimant states that in 2018, at the time of the sexual abuse, she was age 17, and turned 18 April 2019, and that the claim against the State was filed and served within two years of the date of her 18th birthday (Doe, Aff. ¶¶ 7, 8). Defendant makes no argument that the two year toll is inapplicable here (*see e.g. Parks v State of New York*, UID No. 2019-051-049 [Ct Cl, Martin, J., Oct. 10, 2019] [rejecting the State's argument that the CPLR 208 tolling provision of one-year limitations period applies to claimant's intentional tort]). The Court concludes that Claimant has established that the claim was tolled because of the legal disability of infancy at the time of accrual. Therefore, the claim filed February 26, 2020, and served on May 11, 2020, is timely (*cf.* CPLR 214-g [New York Child Victims Act]). This defense is, therefore, dismissed.

Claimant's Motion to Amend the Claim

Claimant's application to for an order permitting her to amend the claim is denied without prejudice, as she submit a proposed amended claim on her motion (CPLR 3025 [b]; *see also Muro-Light v Farley*, 95 AD3d 846 [2d Dept 2021] [application to amend denied when plaintiff failed to failed to submit a proposed amended pleading]). Furthermore, since the claim was filed and served timely Claimant's motion for permission to file a late claim is denied as moot.

Finally, in the exercise its discretion, the Court will grant Claimant's unopposed application to proceed pseudonymously under the name Jane Doe (*see e.g. LG 39 Doe v State of New York*, UID No. 2020-053-535 [Ct Cl, Sampson, J., Aug 24, 2020]).

Accordingly, it is

ORDERED that Claimant's motion no. M-96571 is granted to the extent that: (1) Defendant's third, fourth, fifth and fourteenth affirmative defenses are dismissed; and (2) Claimant may proceed pseudonymously. The branch of Claimant's motion for leave to amend her claim is denied without prejudice and the branch seeking leave to file a late claim is denied as moot; and it is further

ORDERED that the branch of Defendant's cross-motion no. CM-96571 seeking to dismiss the causes of action based on the theory of respondent superior is denied without prejudice. The cross-motion is denied in all other respects.

July 13, 2021

Hauppauge, New York

MAUREEN T. LICCIONE

Judge of the Court of Claims

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1. Defendant's characterization of these allegations as an "accident" is curious.

2. Defendant cites to the following cases: *Corbin v State of New York*, 234 AD2d 498, 499 (2d Dept 1996) (claimant fell "on the boardwalk at Jones Beach, County of Nassau, State of New York, in the East Quarter Circle, or its vicinity" was insufficient); *Byrne v State of New York*, UID No. 2018-050-012 (Ct Cl, Lynch, J., Feb. 23, 2018) (trip and fall at Jones Beach by the dock in front of the Coast Guard station at the West End Boat Basin at Jones Beach State Park" was too vague to adequately allow the State to meaningfully investigate the incident); *Constable v State of New York*, UID No. 2017-045-004 (Ct Cl, Lopez-Summa, J., Jan. 20, 2017) (trip and fall on the ground level of the Stony Brook University Hospital's North Visitor's Parking Lot, which is adjacent to the Emergency Room Entrance, was not sufficiently definite to satisfy the requirements set forth in Court of Claims Act § 11 [b]). The Court will not consider defendant's citation to *Oraa v State of New York*, as that decision is neither on the Court's online decision database nor was it proffered with its application.

3. Section 19 of article III of the NY Constitution provides "No claim against the state shall be audited, allowed or paid which, as between citizens of the state, would be barred by lapse of time. But if the claimant shall be under legal disability the claim may be presented within two years after such disability is removed."

[* 9]

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