

**Holland v Sellers**

2022 NY Slip Op 33797(U)

November 7, 2022

Supreme Court, New York County

Docket Number: Index No. 155794/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

TRACY HOLLAND

Plaintiff,

- v -

DIJON SELLERS,

Defendant.

INDEX NO. 155794/2022

MOTION DATE 09/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 13, 14, 15

were read on this motion to/for DISMISS

Upon the foregoing documents, Defendant Dijon Sellers' ("Defendant") motion to dismiss based on lack of subject matter jurisdiction is denied.

I. Factual and Procedural Background

Plaintiff Tracy Holland ("Plaintiff") filed her Complaint on July 12, 2022 (NYSCEF Doc. 1). Plaintiff alleges that she sustained personal injuries at the roller-skating rink in Denny Farrell Riverbank State Park on May 1, 2022 (id. at ¶ 28). Plaintiff further alleges that Defendant, who was employed with the New York State Office of Parks, Recreation & Historic Preservation, negligently skated quickly in the wrong direction causing Plaintiff to fall (id. at ¶ 29).

Defendant, through the Attorney General's office, then moved to dismiss Plaintiff's complaint for lack of subject matter jurisdiction (NYSCEF Doc. 4). Defendant asserts that a suit against an agency, officer or employee engaged in carrying on the State's governmental functions is regarded as one against the State itself, and that if an action for money damages is essentially one against the State, then the Court of Claims has exclusive jurisdiction over the matter (NYSCEF Doc. 5 at ¶ 7). Defendant also claims that the action must be dismissed pursuant to CPLR § 307

which permits service upon a state officer sued in an official capacity by mailing the summons by certified mail to such officer, but also mandates personal service upon the State (*id.* at ¶ 9). Defendant asserts that while Plaintiff has shown proof of service to Defendant Dijon Sellers by mail, there is no proof of service to an assistant attorney general (*id.*; *see also* NYSCEF Docs. 2-3).

Plaintiff has attempted to remedy its defective service by filing an affidavit of service on September 19, 2022 which shows proof of service on the New York State Attorney General (NYSCEF Doc. 12). Plaintiff asserts that since the summons and complaint were properly served on the Attorney General within the 120 days mandated by CPLR § 306-b, the Defendant's personal jurisdiction argument is now moot (NYSCEF Doc. 13 at ¶¶ 8-11). Plaintiff also asserts that this Court has subject matter jurisdiction over her lawsuit since subject matter jurisdiction in Supreme Court under circumstances such as the case at bar depends on whether the suit against a State actor in a tort for damages arises from the breach of a duty the actor owes individually to the plaintiff, in which case the State is not the real party in interest (*id.* at ¶ 21). On the other hand, Plaintiff asserts that an action belongs in the Court of Claims if it is a suit against a state officer and arises out of rights asserted not against the officer individually, but solely against the state (*id.* at ¶ 22). Defendant filed no reply to Plaintiff's opposition.

## II. Discussion

As a general matter, actions against State officers acting in their official capacity in the exercise of government functions are, in essence, claims against the State, and therefore, the Court of Claims exercises sole subject matter jurisdiction over those claims (*Morell v Balasubramanian*, 70 NY2d 297, 300 [1987]). However, the Court of Appeals has held that not every suit against an

officer of the State is a suit against the State (*id.*; see also *Borawski v Abulafia*, 117 AD3d 662, 663-664 [2d Dept 2014]).

Indeed, it has long been held by New York Courts that if a lawsuit is brought against a state agent or officer for tort damages which arose out of a breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest, even if it can be held liable under a theory of *respondeat superior*, and in such cases the Supreme Court may exercise subject matter jurisdiction (*Morell v Balasubramanian*, 770 NY2d 297, 301 [1987] [Supreme Court had subject matter jurisdiction over state-employed physicians in medical malpractice case] see also *Lerner v State*, 72 AD3d 406, 407 [1st Dept 2010] [stating in dicta that plaintiff may be able to commence an action against individual State employees in Supreme Court]; *Pratt v State*, 181 Misc.2d 488 [Ct Cl 1999] [reciting that a person injured by the tort of a state employee which arises from the breach of a duty owed individually by the state employee directly to the injured party may bring a direct action against that employee in Supreme Court]).

Here, it is alleged and asserted that Defendant owed Plaintiff a duty to roller skate around Plaintiff in a reasonably safe manner. This is a duty Defendant owed individually to Plaintiff. Therefore, based on the allegations, and as mandated by decades of precedent, the Court finds that this Court has subject matter jurisdiction over the instant action.

Finally, the Court finds Defendant's arguments regarding personal service to be moot as Plaintiff has properly served the Attorney General's office within the 120-day time frame as required by CPLR § 306-b. (see also CPLR § 2001; *Helfand v Cohen*, 110 AD2d 751 [2d Dept 1985]; *Ridge Produce, Inc. v Angelic Foods, Inc.*, 2015 NY Slip Op 30626[U] [Sup. Ct., NY County 2015]).

Accordingly, it is hereby,

ORDERED that Defendant Dijon Sellers' motion to dismiss is denied; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision and order of the Court.

11/7/2022  
DATE

*Mary V Rosado*  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: