

Cuomo v State of New York

2023 NY Slip Op 34901(U)

November 9, 2023

Court of Claims

Docket Number: Claim No. 133775

Judge: Catherine C. Schaewe

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STATE OF NEW YORK COURT OF CLAIMS

**CHRISTOPHER R. CUOMO AS
ADMINISTRATOR OF THE ESTATE OF
JOAO SOUZA,**

Claimant,

**DECISION AND
ORDER**

-v-

THE STATE OF NEW YORK,

**Claim No. 133775
Motion Nos. M-99635
CM-99745**

Defendant.

**BEFORE: HON. CATHERINE C. SCHAEWE
Judge of the Court of Claims**

**APPEARANCES: For Claimant:
RAPPAPORT, GLASS, LEVINE & ZULLO, LLP
BY: Michael S. Levine, Esq., of counsel
MARK E. GOIDELL, ESQ.**

**For Defendant:
LEWIS JOHS AVALLONE AVILES, LLP
BY: John B. Saville, Esq., of counsel**

Claimant, the Public Administrator of Westchester County as the administrator of the Estate of Joao Souza (Decedent), filed Claim No. 133775 (the Original Claim) to recover for the wrongful death and conscious pain and suffering Decedent allegedly endured when he was stabbed and later died due to the conduct of Michael Roque while both were students at the State University of New York at Binghamton (BU).

The tortuous procedural history thereafter was set forth at length in this Court’s Decision and Order dated December 16, 2021 (*Cuomo v State of New York*, Ct Cl, Dec. 23, 2021,

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Schaewe, J., Claim No. 133775, Motion No. M-97028). To summarize, the Office of the Attorney General filed an answer in response to the Original Claim which asserted that the affirmative defense of timeliness barred the cause of action for conscious pain and suffering. Claimant accordingly filed a motion for late claim in order to assert an action for conscious pain and suffering based upon two theories of liability: defendant's duty in its capacity as a landlord and also an affirmative duty to protect Decedent from Roque. This Court granted late claim relief to the extent of allowing a late claim asserting the former duty, but found that there was no affirmative duty to protect Decedent from Roque and denied the motion to that extent (*Cuomo v State of New York*, UID No. 2020-044-522 [Ct Cl, Schaewe, J., Apr. 27, 2020]).

During the course of discovery, claimant brought a motion to compel disclosure of certain items. Among the documents submitted to the Court was an amended answer which had never been filed in the Clerk's Office of the Court of Claims. This amended answer failed to assert the affirmative defense of timeliness with regard to the cause of action for conscious pain and suffering in the Original Claim. The Court consequently found that this cause of action (which asserted both duties set forth above) still existed, but noted that the theory of liability based on an affirmative duty was still contrary to existing law (*Cuomo*, Motion No. M-97028).

Claimant now brings another motion to compel discovery of documents and information relating to defendant's threat assessment policy, and further seeks to depose certain members of BU's counseling center. Defendant cross-moves for partial summary judgment dismissing the portion of the conscious pain and suffering cause of action based upon the existence of an affirmative duty to protect Decedent from Roque and further requests a protective order

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precluding claimant from seeking discovery (both documentary and in the form of depositions) with regard to that theory of liability.

Because it is potentially dispositive of a portion of the claim, the Court will initially address defendant's cross motion for partial summary judgment. Contrary to claimant's assertion in his affidavit in support of this motion, this Court never "reinstated" the cause of action for conscious pain and suffering based upon an affirmative duty to protect Decedent.¹ Rather, because the timeliness defense was waived, the cause of action based upon that legal theory still existed as set forth in the Original Claim despite the Court's late claim Decision and Order.

The Court's analysis of the merits of the cause of action as it relates to the alleged existence of an affirmative duty has not changed. The Court need not reiterate the analysis, but again finds that defendant did not owe Decedent any duty of protection from the dangerous conduct of Roque nor was it obligated to restrict Roque in some manner based upon either's status as a BU student.² Accordingly, any discovery demands – such as BU's threat assessment or the deposition of BU counselors – based upon this theory are inappropriate and unsupported by any cognizable legal theory.

Defendant's motion for partial summary judgment and for a protective order precluding further discovery pertaining to allegations that defendant owed an affirmative duty to Decedent is hereby granted. Claimant's motion is denied as moot.

¹ *Cuomo*, Motion No. M-97028 at 4-5.

² *Cuomo*, UID No. 2020-044-522 at 4.

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November 9, 2023***Catherine Schaewe*

**CATHERINE C. SCHAEWE
Judge of the Court of Claims**

The following papers were read on claimant's motion and defendant's cross motion:

- 1) Notice of Motion filed June 30, 2023; Affirmation of Michael S. Levine, Esq., dated June 30, 2023, and attached exhibits.
- 2) Notice of Cross Motion filed July 31, 2023; Affirmation of John B. Saville, Esq., dated July 31, 2023, and attached exhibits.
- 3) Claimant's Reply Memorandum of Law dated August 30, 2023.
- 4) Reply Affirmation of John B. Saville, Esq., dated September 12, 2023.

Filed Papers: Consolidated Claim No. 133775; Verified Answer filed December 4, 2019; Answer filed January 6, 2022.