

<b>Cobb v The State of New York</b>
2017 NY Slip Op 32847(U)
March 1, 2017
Court of Claims
Docket Number: M-89758
Judge: Christopher J. McCarthy
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**COBB v. THE STATE OF NEW YORK, # 2017-040-029, Claim No. NONE, Motion No. M-89758****Case information**

<b>UID:</b>	2017-040-029
<b>Claimant(s):</b>	JAQUAN COBB
<b>Claimant short name:</b>	COBB
<b>Footnote (claimant name) :</b>	
<b>Defendant(s):</b>	THE STATE OF NEW YORK
<b>Footnote (defendant name) :</b>	
<b>Third-party claimant(s):</b>	
<b>Third-party defendant(s):</b>	
<b>Claim number(s):</b>	NONE
<b>Motion number(s):</b>	M-89758
<b>Cross-motion number(s):</b>	
<b>Judge:</b>	CHRISTOPHER J. McCARTHY
<b>Claimant's attorney:</b>	Jaquan Cobb, #13A2611, <i>Pro Se</i>
<b>Defendant's attorney:</b>	ERIC T. SCHNEIDERMAN Attorney General of the State of New York By: Glenn C. King, Esq., AAG
<b>Third-party defendant's attorney:</b>	
<b>Signature date:</b>	March 1, 2017
<b>City:</b>	Albany
<b>Comments:</b>	
<b>Official citation:</b>	
<b>Appellate results:</b>	
<b>See also (multicaptioned case)</b>	

**Decision**

For the reasons set forth below, the application of *pro se* Movant, Jaquan Cobb, to serve and file a late Claim pursuant to Court of Claims Act § 10(6) is granted.

The proposed Claim, attached to the motion papers, alleges that she was incarcerated at Franklin Correctional Facility annex (hereinafter, "Franklin") and is a pre-operative transsexual who identifies as female; that, upon admission to Franklin, she was interviewed by corrections staff and advised them that she had problems with gangs and had numerous physical altercations with members of the "Bloods" gang at Rikers Island; that she was placed in a dorm, which almost exclusively housed members of the "Bloods" gang, and Movant was involved in an altercation with a member of that gang. Movant asserts that she was moved to a different dorm, which also almost exclusively housed members of the "Bloods" gang, and Movant was involved in another altercation with a "Bloods" member. Movant asserts that she was moved to yet another dorm after the second altercation; that the officer working the dorm was informed by an inmate, when Movant arrived, that Movant's life was in danger; that she was subjected to discrimination and verbal abuse at this dorm. Movant states that, on December 9, 2014, she entered the dorm bathroom and was assaulted by four gang-related inmates; that correction officers responded to the situation and Movant was taken to the infirmary, where she was experiencing slurred speech and was misusing words. Movant asserts that both medical staff and security staff were unprofessional and were making fun of her; that she was taken to an outside hospital, where it was determined that she had suffered a depressed skull fracture and surgery was performed on her skull. After returning to Franklin from the hospital, Movant was served with a misbehavior report for fighting with regard to the incident in the bathroom where she was injured. Movant was found guilty of fighting at a disciplinary hearing and was sentenced to 30 days of keeplock. Movant asserts that the staff at Franklin was negligent in allowing her to be attacked on December 9, 2014.

Pursuant to Court of Claims Act § 10(6), it is within the Court's discretion to allow the filing of a late claim if the applicable statute of limitations set forth in Article 2 of the CPLR has not expired. Thus, the first issue for determination upon any late claim motion is whether the application is timely. The proposed Claim asserts a cause of action for negligence (CPLR § 214[5], a three-year Statute of Limitations). Movant asserts that the claim accrued on December 9, 2014. The Court concludes that, based upon the information provided in the proposed Claim, the statute of limitations has not yet expired.

Next, in determining whether to grant a motion to file a late claim, Court of Claims Act § 10(6) sets forth six factors that should be considered, although other factors deemed relevant also may be taken into account (*Plate v State of New York*, 92 Misc 2d 1033, 1036 [Ct Cl 1978]). Movant need not satisfy every statutory element (*see Bay Terrace Coop. Section IV v New York State Employees' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979, 981 [1982]). However, the burden rests with Movant to persuade the Court to grant his or her late claim motion (*see Matter of Flannery v State of New York*, 91 Misc 2d 797 [Ct Cl 1977]; *Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1 [Ct Cl 1977]).

The first factor to be considered is whether the delay in filing the claim was excusable. In her Affidavit in Support, Movant asserts that she did not have access to the law library at Franklin during the statutory filing period because of the injury she suffered from the assault. The Court finds Movant's proffered excuse for the delay in timely filing and serving the claim - her significant injury - is not a reasonable excuse. While Movant underwent surgery, it appears to have been performed shortly after the assault.

The excuse for failing to timely file must relate to the initial 90-day period (*see Bloom v State of New York*, 5 AD2d 930 [3d Dept 1958]). Here, the 90-day period expired March 9, 2015. However, Movant has submitted neither a physician's affidavit nor medical records to establish the length of time of her alleged incapacity (*Cabral v State of New York*, 149 AD2d 453 [2d Dept 1989]; *Goldstein v State of New York*, 75 AD2d 613 [2d Dept 1980]; *Rios v State of New York*, 67 AD2d 744 [3d Dept 1979]). There is no indication why she could not serve a notice of intention to file a claim or serve and file a Claim prior to expiration of the statutory period. However, the tender of a reasonable excuse for delay in filing a claim is not a precondition to permission to file a late claim such as to constitute a *sine qua non* for the requested relief (*Bay Terrace Coop. Section IV v New York State Employees' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, *supra* at 981).

The next three factors to be addressed - whether Defendant had notice of the essential facts constituting the claim, whether Defendant had an opportunity to investigate the circumstances underlying the claim, and whether the failure to file or serve a timely claim or to serve a notice of intention resulted in substantial prejudice to Defendant - are interrelated and will be considered together. Defendant does not argue lack of notice, lack of opportunity to investigate, or that it will be substantially prejudiced by a delay in filing a claim (*see Affirmation of Glenn C. King, Esq., Assistant Attorney General*). Those factors, therefore, weigh in Movant's favor.

The fifth factor to be considered is whether Movant has another remedy available. It appears that Movant does have a possible alternate remedy against the alleged assailants.

The sixth, final and perhaps most important factor to be considered is whether the proposed Claim has the appearance of merit, for it would be futile to permit a defective claim to be filed, subject to dismissal, even if other factors tended to favor the request (*Ortiz v State of New York*, 78 AD3d 1314, 1314 [3d Dept 2010], *lv granted* 16 NY3d 703 [2011], *affd sub nom. Donald v State of New York*, 17 NY3d 389 [2011], quoting *Savino v State of New York*, 199 AD2d 254, 255 [2d Dept 1993]). It is Movant's burden to show that the claim is not patently groundless, frivolous or legally defective, and, based upon the entire record, including the proposed claim and any affidavits, that there is reasonable cause to believe that a valid cause of action exists. While this standard clearly places a heavier burden upon a party who has filed late than upon one whose claim is timely, it does not, and should not, require Movant to establish definitively the merit of the claim, or overcome all legal objections thereto, before the Court will permit Movant to file a late claim (*Matter of Santana v New York State Thruway Auth.*, *supra* at 11-12).

At this stage of the proceeding, it should be noted the Court generally takes as true factual allegations of Movant. Based upon the entire record, including the proposed Claim, the Court finds that the proposed Claim has the appearance of merit. Movant need only establish the appearance of merit; she need not prove a *prima facie* case at this stage of the proceedings.

In accordance with the foregoing, the Court finds that the preponderance of factors considered weigh in Movant's favor. The mix of circumstances presented by this case fall well within the remedial purposes of the amendments to the Court of Claims Act enacted in 1976 (L 1976, ch 280), which was designed to vest in the Court of Claims broader discretion than previously existed to permit late filing, indicated a strong concern that litigants with meritorious claims be afforded their day in court (*Calzada v State of New York*, 121 AD2d 988, 989 [1st Dept 1986]; *Plate v State of New York*, *supra* at 1036). Movant has provided ample basis for a favorable exercise of this Court's discretion to grant her leave to file a late

claim against the State as set forth above. Therefore, within forty-five (45) days of the date of filing of this Decision and Order, Movant shall file with the Clerk of the Court her proposed Claim against the State of New York and serve a copy of the proposed Claim upon the Attorney General personally or by certified mail, return receipt requested. In serving and filing her claim, Movant is directed to follow all of the requirements of the Court of Claims Act, including § 11-a regarding the filing fee, and the Uniform Rules for the Court of Claims.

March 1, 2017

Albany, New York

CHRISTOPHER J. McCARTHY

Judge of the Court of Claims

The following papers were read on Movant's application for permission to file a late claim:

Papers Numbered

Notice of Motion, Affidavit in Support

& Exhibit Attached 1

Affirmation in Opposition & Exhibit Attached 2