

<b>Barker v City of New York</b>
2018 NY Slip Op 31238(U)
June 12, 2018
Supreme Court, New York County
Docket Number: 153620/2017
Judge: Alexander M. Tisch
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At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 12<sup>th</sup> day of JUNE 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

MICHAEL BARKER,

MOTION SEQ. # 2

Plaintiff,

-against-

INDEX NO.:

CITY OF NEW YORK, et al.,

153620/2017

Defendant(s).

The following papers numbered 13 to 25 read on this motion

NYSCEF Doc. Nos.

Notice of Motion, Affirmation, Memorandum of Law

13, 15-16

Notice of Cross-Motion, Memorandum of Law, Exhibits

20-22

Memoranda of Law and Affirmation in Opposition to Cross-Motion & Further Support of Motion to Dismiss

24-25

Hon. Alexander M. Tisch, A.J.S.C.:

Upon the foregoing papers, defendant New York State Office of Children and Family Services (the State) moves to dismiss the complaint insofar as asserted against it and plaintiff cross moves for leave to amend his complaint.

It is well settled that a State and its agencies are not considered "person[s]" under 42 USC § 1983 (Remy v NYS Dept. of Taxation and Fin., CV 09-4444 SJF AKT, 2010 WL 3925184, at \*11 [EDNY Aug. 18, 2010] ["Since (New York State Department of Taxation and Finance) and (New York State Office of Temporary and Disability Assistance) are state agencies, neither can be held liable under Section 1983, and Plaintiff's attempt to assert Monell claims against these or other State entities must consequently fail."], report and recommendation adopted, 09-CV-4444, 2010 WL 3926919 [ED NY Sept. 29, 2010], affd sub nom. Remy v New York State Dept. of Taxation and Fin., 507 Fed Appx 16 [2d Cir 2013]). It is also well settled that monetary claims against the State must be brought in the Court

of Claims (see Schaffer v Evans, 57 NY2d 992 [1982]). Because all of plaintiff's claims seek monetary damages, the complaint must be dismissed against the State as they cannot be maintained in this Court.

Under CPLR § 3025 (b), “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 499 [1st Dept 2010] [internal citation omitted]). In an attempt to save his claims against the State, plaintiff, in opposition to the State's motion to dismiss, seeks leave to amend his complaint and contends that his causes of action are actually against individual State employees of the agency, and not the agency itself. Plaintiff relies on, inter alia, Morell v Balasubramanian (70 NY2d 297 [1987]) to argue this is such a case where his claims are properly asserted against state employees (who have yet to be identified) in their individual capacities. In Morrell, the Court of Appeals states as follows:

Generally, actions against State officers acting in their official capacity in the exercise of governmental functions are deemed to be, in essence, claims against the State and, therefore, suable only in the Court of Claims. Not every suit against an officer of the State, however, is a suit against the State.

A suit against a State officer will be held to be one which is really asserted against the State when it arises from actions or determinations of the officer made in his or her official role and involves rights asserted, not against the officer individually, but solely against the State. \* \* \*

Where, however, the suit against the State agent or officer is in tort for damages arising from the 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 though it could be held secondarily liable for the tortious acts under respondeat superior. Thus, an action arising out of a traffic accident against a hospital operating a State ambulance service was not one against the State as real party in interest. The action could, therefore, be maintained against the hospital in Supreme Court (id. at 300–01).

A review of plaintiff's complaint and proposed amended pleading<sup>1</sup> reveals that the complaint and proposed amended complaint both assert a malicious prosecution claim, constitutional violations (e.g., equal protection and due process), and civil rights violations. The proposed amended complaint clearly labels those claims and adds negligence and negligent supervision claims. Nothing is specifically alleged with respect to the proposed individual State employees, whom plaintiff intends to sue as "John Does 1-5," and all allegations are asserted against the "defendants" collectively. No new allegations have been added or changed so as to describe the proposed individual defendants and the amended pleading does not even describe who they might be, or at least identify the nature of the relationship and/or circumstances giving rise to a duty to the plaintiff in tort. Thus, this Court finds that the claims are still essentially being asserted against the State (see *id.*, citing Sinhogar v Parry, 53 NY2d 424 [1981] as an example where "a demand for damages against the Commissioner of the State Department of Social Services, based on the allegedly unconstitutional procedures employed by the State for out-of-State placement of mentally or emotionally handicapped children, was one against the State and, as such, assertable only in the Court of Claims"). Clearly, the amended pleading does not cure the deficiency above, in terms of asserting claims against the State, and the cross-motion should be denied as palpably insufficient and/or devoid of merit.

Accordingly, it is hereby ORDERED that plaintiff's cross motion is denied; and it is further ORDERED that plaintiff's complaint is dismissed insofar as asserted against defendant New York State Office of Children and Family Services, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is

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<sup>1</sup> As pointed out by the Office of the Attorney General, the amended pleading does not comply with CPLR § 3025 (b), as it does not clearly reflect the proposed changes.

further

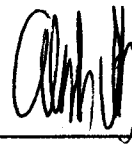
ORDERED that the caption be amended to reflect the dismissal from the plaintiff's action and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M) in accordance with the e-filing protocol, who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the Court.

ENTER,

*JUNE 12, 2018*



HON. ALEXANDER M. TISCH  
A.J.S.C.

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