

Nichols v Livingston County
2019 NY Slip Op 34706(U)
December 18, 2019
Supreme Court, Livingston County
Docket Number: Index No. 000698-2018
Judge: Dennis S. Cohen
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At a Special Term of the Supreme Court held in and for the County of Livingston, at the Livingston County Courthouse in the Village of Geneseo, New York on the 16th day of October 2019.

PRESENT: HON. DENNIS S. COHEN
Acting Supreme Court Justice

**TIMOTHY NICHOLS, as authorized Administrator
of the Estate of SAMUAL NICHOLS,**

Plaintiffs,

DECISION & ORDER

Index No. 000698-2018

v.

**LIVINGSTON COUNTY, LIVINGSTON COUNTY SHERIFF'S
DEPARTMENT, LIVINGSTON COUNTY SHERIFF THOMAS
DOUGHERTY, LIVINGSTON COUNTY DEPUTY SHERIFF
CHAD DRAPER, LIVINGSTON COUNTY CORONER PHILIP
GRANSHAW, LIVINGSTON COUNTY EMS,
STATE OF NEW YORK, STATE OF UNIVERSITY OF NEW
YORK AT GENESEO, SARAH COVELL,**

Defendants.

Appearances:

For Plaintiff(s):

Timothy D. Nichols, SRL/Pro Se
6 Crystal Lane
Latham, New York 12110

For Livingston Co. Defendants:

Michael P. McClaren, Esq.
Webster Szanyi, L.L.P.
1400 Liberty Building
Buffalo, New York 14202

For NYS Defendants:

Thomas G. Ramsay
Assistant Attorney General
NYS Office of Attorney General
144 Exchange Blvd
Rochester, NY 14614

The following papers filed with NYSCEF were reviewed and considered for this decision:

- 1) PETITION Nichols, T. (Pro Hac / Pro Se)-Filed: 08/04/2018
- 3) ADDENDUM - GENERAL (840A) Nichols, T. (Pro Hac / Pro Se)-Filed: 08/04/2018
- 4) NOTICE OF REMOVAL / REMAND (POST RJJ)
Notice of Removal to Federal Court McClaren, M.-Filed: 09/19/2018
- 5) EXHIBIT(S) - A-Filed: 09/19/2018
- 6) RJJ -RE: REQUEST FOR PRELIMINARY CONFERENCE Nichols, T. (Pro Hac / Pro Se)-
Filed: 09/05/2019
- 7) ADDENDUM - GENERAL (840A) Nichols, T. (Pro Hac / Pro Se)-Filed: 09/05/2019
- 9) NOTICE OF MOTION (Motion #01)-Notice of Motion to Dismiss Ramsay, T.
-Filed: 09/09/2019

- 10) AFFIRMATION (Motion #01)- Ramsay, T. -Filed: 09/09/2019
- 11-13) EXHIBIT(S) - A (Motion #01)- Ramsay, T.-Filed: 09/09/2019
- 16) LETTER / CORRESPONDENCE TO JUDGE- Ramsay, T.-Filed: 09/09/2019
- 17) AFFIDAVIT Affidavit of Service Ramsay, T.-Filed: 09/09/2019
- 19) NOTICE OF MOTION (Motion #02)-McClaren, M.-Filed: 09/25/2019
- 20) AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION (Motion #02) McClaren, M.-
Filed: 09/25/2019
- 21-23) EXHIBIT(S) - A (Motion #02)-Filed: 09/25/2019
- 24) MEMORANDUM OF LAW IN SUPPORT (Motion #02) McClaren, M.-Filed: 09/25/2019
- 27) NOTICE OF CROSS-MOTION (Motion #03) Nichols, T. (Pro Hac / Pro Se)-
Filed: 10/09/2019
- 28) AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION (Motion #02) Nichols, T.
(Pro Hac / Pro Se)-Filed: 10/10/2019
- 29) AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION (Motion #02)
Reply Affirmation of Michael P. McClaren, Esq.-Filed: 10/14/2019
- 30) MEMORANDUM OF LAW IN SUPPORT (Motion #02)-Reply Memorandum of Law-
McClaren, M.-Filed: 10/14/2019

DECISION

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In the Spring of 2017, Samuel Nichols, son of the Plaintiff Timothy Nichols, was a sophomore at State University of New York at Geneseo (“SUNY”). On May 6, 2017, Samuel Nichols died of injuries sustained while he was traversing a gorge-filled area known as Fallbrook Falls located off Rt. 20-A in the Town of Geneseo, New York.

On or about August 4, 2018, Plaintiff Timothy Nichols commenced this current action by filing a petition alleging numerous torts and other causes of action for money judgments against the above-captioned Defendants for their purported actions or omissions related to the death of Samuel Nichols.

On September 19, 2019, the matter was removed to Federal District Court and assigned to Judge Elizabeth Wolford, United States District Judge for the Western District of New York.

On August 20, 2019, Judge Wolford granted the Defendants’ motions to dismiss for lack of federal questions and returned the matter to this Court to address any remaining New York State claims.

Both Livingston County and the State of New York moved separately to dismiss the state law claims made by the Plaintiff. In response, the Plaintiff has opposed the motions and filed what he has

deemed a cross motion.

After a number of granted adjournment requests, the matter came before this Court on October 16, 2019. Following the on-the-record arguments of the parties, the Court reserved decision.

Now, after due consideration of all moving and responding papers listed above, the Court makes the following rulings:

LACK SUBJECT MATTER JURISDICTION OVER NYS DEFENDANTS

Exclusive jurisdiction over any action to recover money damages against the State of New York rests in the Court of Claims. *See*, N.Y. Const, art. VI, § 9; Court of Claims Act § 9(2); *Gross v. Perales*, 72 N.Y.2d 231; *Schaffer v. Evans*, 57 N.Y.2d 992; *Cass v. State*, 58 N.Y.2d 460 (1983).

As such, lawsuits seeking money damages against the State of New York, its agencies, departments and employees acting in their official capacity in the exercise of governmental functions must be litigated in the Court of Claims. Therefore, this Court is without subject matter jurisdiction over the present action as it applies to the New York State Defendants.

This Court's lack of subject matter jurisdiction is a non-waivable jurisdictional defect that may be raised at any time. *See*, *D'Angelo v. State Ins. Fund*, 48 A.D.3d 400; *Moulden v. White*, 49 A.D.3d 1250, *citing*, *Mtr. of Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 718; *Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y. 315, 324.

The Plaintiff bears the burden of establishing the court's jurisdiction over the Defendant by a preponderance of the evidence. *Wem v. D'Alessandro*, 219 A.D.2d 646, 647. This is a burden that the present Plaintiff cannot meet.

Because this Court lacks jurisdiction over the Plaintiff's claims against the New York State Defendants, this action must be dismissed as it applies to them. Therefore, the Court hereby dismisses the Plaintiff's Petition/Complaint against the following Defendants: the STATE OF NEW YORK, STATE UNIVERSITY OF NEW YORK COLLEGE AT GENESEO and SARAH COVELL.

GOVERNMENTAL IMMUNITY

The doctrine of governmental immunity shields public employees and municipalities from liability "where their alleged acts and omissions are discretionary, even if the acts arose out of malice." *Moore v. Melesky*, 14 A.D.3d 757; *Dinardo v. City of New York*, 13 N.Y.3d 872.

As the actions at issue are clearly governmental, the Court's next analysis is to determine if these same actions were discretionary or ministerial. If discretionary, the actions may not be a basis for liability, while ministerial actions may, but only if they violate a special duty to the plaintiff, apart from any duty to the public in general. *Valdez v City of New York*, 188 N.Y.3d 69, 89-90 (2012). Based upon the record before it, the Court finds the alleged actions to be discretionary acts as they clearly involve the exercise of reasoned judgment which could typically produce different acceptable results.

In the present case, all of the Plaintiff's claims against the Livingston County Defendants pertain to the exercise of professional judgment when responding to an emergency dispatch. The Plaintiff's assertions include: failure to act, failure to order a rescue helicopter, failure to order an investigation, failure to timely respond to the 911 call, failure to utilize all lifesaving options, failure to administer pain medication, failure to transport the nearest hospital, and failure to conduct a proper death investigation. Thus, each and everyone of the Plaintiff's allegations touch and concern the exercise of discretion. Therefore, the Livingston County Defendants are entitled to governmental immunity for their actions.

STANDARD OF REVIEW (CPLR §§3211(a)(5) and (7))

It is well settled that on a motion to dismiss a complaint pursuant to CPLR §3211 all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. *See, Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414; *Wells v. Hurlburt Road Co.*, 145 A.D.3d 1486, 1487. "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." *Simkin v Blank*, 19 N.Y.3d 46, 52; *Miller v. Allstate Indem. Co.*, 132 A.D.3d 1306.

Pursuant to CPLR §3211(a)(7), a court must determine whether a complaint fails to state a cause of

action. Said court is required to “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” *Daley v. County of Erie*, 59 A.D.3d 1087, 1087; *Stevens v. Perrigo*, 122 A.D.3d 1430, 1431–32.

In order to prevail on a motion to dismiss, a defendant must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim, or that none of the facts asserted by plaintiff fits within any cognizable legal theory. In other words, a CPLR §3211(a)(7) motion to dismiss will be granted only where the dispute pertains to a matter of law, not facts; and only evidence that utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law, will warrant dismissal.

NEGLIGENT INVESTIGATION

The Court must agree with the Livingston County Defendants that a majority of the Plaintiff's Petition/Complaint focuses on the post-death investigation conducted by the Livingston County Sheriff and his deputies.

It is well established that New York does not recognize a cause of action for negligent investigation. *Pandolfo v. U.A. Cable Systems of Watertown*, 171 A.D.2d 1013, 1014; *Brown v. State*, 45 A.D.3d 15; *Russ v. SEFCU*, 298A.D.2d 791, 793; *Coleman v. Corporate Loss Prevention Assoc, Inc.*, 282 A.D.2d 703, 724.

As such, the Plaintiff's claims that the Livingston County Defendants failed to adequately respond to the 911 call and failed to investigate the circumstances of the death of Samuel Nichols are dismissed because it is not a recognized cause of action in New York State.

NEGLIGENT TRAINING, HIRING, RETENTION FAILS TO STATE A CLAIM

New York Courts have held that a state law claim for negligent hiring, training or supervision will be dismissed when the alleged acts by the employee were within the scope of employment. *Ashely v. City of New York*, 7 A.D.3d 742; *Lamb v. Baker*, 152 A.D.3d 1230.

In the present matter, the Plaintiff's claims appear to be based solely upon the Livingston County

Defendants' purported conduct when responding to a 911 call. In fact, all of the Plaintiff's allegations stem from their duties as police and emergency services personnel. Thus, there are no facts concerning actions outside the scope of employment and the Plaintiff's negligent training/supervision claims are dismissed.

NEGLIGENT AND/OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Public policy bars claims for intentional infliction of emotional distress against a governmental entity. *See, De Lesline v. State of New York*, 91 A.D.2d 785, 458 N.Y.S.2d 79; *La Belle v. County of St. Lawrence*, 85 A.D.2d 759, 445 N.Y.S.2d 275; *Richir v. Village of Fredonia*, 2008 WL 2778920.

A cause of action to recover damages for negligent infliction of emotional distress, "must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." *Santana v. Leith*, 117 A.D.3d 711, 712.

In the current matter, the Plaintiff alleges emotional distress as a result of his son's death, but does not allege that Samuel Nichols was ever in danger or that he ever feared for his own safety. Therefore the conduct alleged by the Plaintiff is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303.

For the above-listed reasons, the Plaintiff's inflictions of emotional distress claims are dismissed.

WRONGFUL DEATH CLAIM

The Plaintiff has failed to state a valid claim for wrongful death, as he did not sufficiently plead all of the following elements: (1) the death of a human being; (2) a wrongful act, neglect, or default of the defendant that caused the decedent's death; (3) the survival of distributees who suffered pecuniary loss by reason of the decedent's death; and (4) the appointment of a personal representative of the decedent. *See, Pub. Adm'r of Queens Cnty. ex rel. Estate & Beneficiaries of Guzman v. City of N.Y.*, 2009 WL 498976; N.Y. Est. Powers & Trusts Law § 5-4.1.

LIABILITY OF LIVINGSTON COUNTY SHERIFF FOR THE ACTS OR OMISSIONS OF HIS DEPUTIES

The Plaintiff's claims against the Livingston County Sheriff are premised on vicarious liability.

N.Y. County Law § 54 states "[n]o head of any...office of a county shall be liable...for any act or omission of any employee of the county employed within the.... office of which he is such head." The case law is also clear that "a Sheriff cannot be personally liable for the acts or omissions of his deputies." *Mosey v. Cnty. of Erie*, 117 A.D.3d 1381, 1385; *Villar v. Howard*, 126 A.D.3d 1297, 1299;

With his allegations based upon vicarious liability, the Plaintiff's claims are dismissed.

SHERIFF'S DEPARTMENT AND EMS SERVICES CANNOT BE SUED

Under New York law, municipal departments are merely administrative arms of a municipality and do not have a legal identity separate and apart from the municipality. As such, the departments cannot sue or be sued. *Davis v. Lynbrook*, 224 F.Supp.2d 463, 477.

Sheriff's Departments are conclusively considered to be an 'administrative arm' of the municipality, and thus cannot be sued. *Roberites v. Huff*, 2012 WL 1113479. Livingston County's Emergency Medical Services does not have an independent legal entity and also cannot be sued. *See, McKenzie v. County of Erie*, 2013 WL 5348084. Therefore, the Plaintiff's allegations are dismissed.

TIMELINESS OF PLAINTIFF'S CLAIMS

The Plaintiff's claims against the Coroner, Sheriff, and Deputy are all untimely. The conscious pain and suffering claim accrued on May 6, 2017, which is when Plaintiff alleges his son suffered conscious pain and suffering. Accordingly, Plaintiff's claim against the Sheriff and Deputy expired on May 6, 2018, three months before Plaintiff filed his complaint. Likewise, the Plaintiff's claim against the County Coroner is also untimely because it accrued on the day Plaintiff's son passed away (May 6, 2017). The Plaintiff's argument to the contrary is insufficient to avoid the expiration of the statute of limitations, and these claims are dismissed as untimely.

GENERAL MUNICIPAL LAW § 50-e

The Plaintiff's argument that he did not know about all the potential causes of action when he served his Notice of Claim is not a reasonable excuse. Plaintiff never requested leave to serve an amended and/or a new Notice of Claim. The Plaintiff cannot now seek to include additional causes of action that were never in his Notice of Claim and are further untimely.

PUNITIVE DAMAGES ARE UNAVAILABLE

Punitive damages are not recoverable against a municipality, nor does the conduct of the individual defendants rise to the level of culpable conduct for recovering punitive damages. *See, Dorian v. City of New York*, 129 A.D.3d 445.

CONCLUSION

For all of the foregoing reasons, the Plaintiff's Petition/Complaint is dismissed in its entirety against all Defendants.

ORDERS


ORDERED, that the motion by the New York State Defendants to dismiss the Plaintiff's Petition/Complaint for a lack of subject matter jurisdiction is **GRANTED**; and it is further

ORDERED, for all of the reasons stated above, the motion by the Livingston County Defendants to dismiss the Plaintiff's Petition/Complain is **GRANTED**; and it is further

ORDERED, that the Plaintiff's "cross motion" is **DENIED**; and it is further

The foregoing constitutes the Decision and Order of the Court.

Date: December 18, 2019



Hon. Dennis S. Cohen
Acting Supreme Court Justice