

A.M. v City of New York

2023 NY Slip Op 31811(U)

May 24, 2023

Supreme Court, New York County

Docket Number: Index No. 951347/2021

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART 63M

Justice

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A. M.,

Plaintiff,

- v -

CITY OF NEW YORK, ST. CHRISTOPHER'S INC., DOES
2-10

Defendant.

-----X

INDEX NO. 951347/2021

MOTION DATE 05/22/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 56, 57, 59, 60, 61, 62, 63, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant, St. Christopher’s, Inc.’s motion seeking an Order dismissing this action pursuant to CPLR §3211(a)(5) and plaintiff’s cross-motion pursuant to CPLR § 306-b seeking an extension of time to serve process on St. Christopher’s Inc are decided as follows:

Plaintiff commenced the instant action on August 3, 2021, listing The City of New York and SCO Family of Services f/k/a St. Christopher-Ottlie as defendant and listing Defendants DOES 1-10 as persons or entities with responsibilities for Plaintiff’s safety, supervision and/or placement in foster care, who have not to date been identified. “In a stipulation dated March 9, 2022, and so-ordered November 10, 2022 this action was discontinued against SCO Family of Services and St. Christopher’s Inc. was added as a party defendant.

St. Christopher’s Inc. was served with the Summons and Amended Complaint on November 21, 2022, a date indisputably after the expiration of the two-year window to file Child

Victims Act cases and ST. CHRISTOPHER'S INC. now moves to dismiss, arguing that plaintiff has failed to satisfy the jurisdictional requirements of CPLR §1024 and §3025(b).

As discussed in *Holmes v. City of New York*, 132 A.D.3d 952 (2d Dept 2015),

In order to employ the procedural “Jane Doe” or “John Doe” mechanism made available by CPLR 1024, a plaintiff must show that he or she made timely efforts to identify the correct party before the statute of limitations expired (see *Comice v Justin's Rest.*, 78 AD3d 641, 642 [2010]; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 29-30 [2009]; *Hall v Rao*, 26 AD3d 694, 695 [2006]). “[W]hen an originally-named defendant and an unknown ‘Jane Doe’ [or ‘John Doe’] party are united in interest, i.e. employer and employee, the later-identified party may, in some instances, be added to the suit after the statute of limitations has expired pursuant to the ‘relation-back’ doctrine of CPLR 203 (f), based upon postlimitations disclosure of the unknown party's identity” (*Bumpus v New York City Tr. Auth.*, 66 AD3d at 34-35). The moving party seeking to apply the relation-back doctrine to a later-identified “Jane Doe” or “John Doe” defendant has the burden, inter alia, of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations (see *id.* at 35; *Hall v Rao*, 26 AD3d at 695).

Movant contends that plaintiff has failed to show that same made timely efforts to identify the correct party and further argues that it could never be apprised that it would be a defendant in this action from a reading of the original complaint. Movant also argues that plaintiff has failed to establish that movant is united in interest with a party to this action.

In plaintiff's original complaint, the sole description applicable to the Does is that they were persons or entities with responsibilities for Plaintiff's safety, supervision and/or placement in foster care. The Court notes that as plaintiff has elected to proceed under a pseudonym, and as such, it would be impossible for movant, looking at the original complaint, to conclude that plaintiff was ever under its care as plaintiff is identified only by initials. In support of its argument that plaintiff engaged in diligent efforts to identify the proper defendant prior to the expiration of the statute of limitations, plaintiff's counsel allegedly conducted extensive pre-suit investigation

which identified Orange County as a defendant in the Summons and Complaint. Specifically, plaintiff's investigator interviewed plaintiff on or about April 22, 2021, who indicated that the foster home where she was allegedly abused was located in Westchester, NY and identified the foster home and foster parents in question. Thereafter, plaintiff filed a stipulation to amend the complaint to add St. Christopher's Inc.. on March 9, 2022. Plaintiff's failure to immediately file a new action in the three weeks following March 9, 2022 is especially problematic. As such, plaintiff has not established either requirement.

Plaintiff further argues that they are entitled to use the relation back doctrine as St. Christopher's Inc.. is united in interest with the City of New York as they are in an agency relationship, See, *Scheff v. St. John's Episcopal Hospital*, 115 A.D.2d 532, 534 (2d Dep't 1985). Unity of interest exists in instances where, by virtue of their relationship, the defendants in a matter have the same defenses to the claims of the plaintiff such that "they will stand or fall together and are therefore united in interest." *Connell v. Hayden*, 83 A.D.2d 30, 42 (2d Dep't 1981) "In a negligence action, 'the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other.'" *Mileski v. MSC Indus. Direct Co.*, 138 A.D.3d 797, 800 (2d Dep't 2016).

However, said parties are not united in interest. The City of New York's first affirmative defense is that same is immune from suit for their exercise of discretion in the performance of a governmental function and/or their exercise of professional judgment. This Court has previously ruled in *Q.G. v. City of New York*, Supreme Ct. N.Y. Cty, Index No. 950104/2020, January 29, 2022, that the City of New York is entitled to dismissal of that action as the City was engaged in a government function, that of oversight of foster care agencies, and as such, plaintiff must plead a special duty. As discussed in *Applewhite*, 21 N.Y.3d at 426, "[A] special duty can arise in three

situations: (1) the [claimant] belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the [government entity] took positive control of a known and dangerous safety condition” Here, there is no allegation that the second or third methods are applicable and as such, the sole applicable method to establish a “special duty” is the breach of a statutory duty, which itself requires that “the governing statute must authorize a private right of action. One may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme (see *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633 [1989]). If one of these prerequisites is lacking, the claim will fail.” *McLean v. City of New York*, 12 N.Y.3d 194, 200, (2009), citing, *Pelaez v. Seide* 2 N.Y.3d 186 (2004).

McLean continues:

We addressed a similar issue in *Mark G. v. Sabol*, 93 N.Y.2d 710, 695 N.Y.S.2d 730, 717 N.E.2d 1067 (1999). The plaintiffs there, children alleging that they had suffered abuse or neglect in the foster homes where they had been placed by New York City child welfare officials, sought recovery from the City, relying on provisions of the Social Services Law designed to protect foster children and to prevent child abuse generally. Emphasizing the detailed, comprehensive nature of the statutes the plaintiffs relied on, we rejected their claim that those statutes implied a private right of action. “[I]t would be inappropriate,” we said, “for us to find another enforcement mechanism beyond the statute’s already ‘comprehensive’ scheme.... Considering that the statute gives no hint of any private enforcement remedy for money damages, we will not impute one to the lawmakers” (93 N.Y.2d at 720–721, 695 N.Y.S.2d 730, 717 N.E.2d 1067).

J.J. also raises this argument holding that:

Decisions involving the supervision of children in foster care decided after *McLean* follow that decision in determining the

parameters of governmental liability in this area (see e.g. *Rivera v City of New York*, 82 AD3d 647, 648 [1st Dept 2011]; *Albino v New York City Hous. Auth.*, 78 AD3d 485, 487-492 [1st Dept 2010]; *Kochanski v City of New York*, 76 AD3d 1050, 1051-1052 [2d Dept 2010]; see also *Avila v State of New York*, 39 Misc 3d 1064 [Ct Cl 2013] [recognizing Sean M. to be implicitly overruled by the Court of Appeals decision in McLean]). Thus, contrary to claimant's contention, he must establish a special duty. Although claimant appears to advance a statutory duty, he fails to demonstrate a private right of action. Notably, the statutory scheme for foster care placement and supervision upon which claimant relies is no different than article 19-G of the Executive Law relating to juvenile detention centers in that both do not create nor imply a private right of action (see Social Services Law art 6; *Mark G. v Sabol*, 93 NY2d 710, 718-722 [1999]; *Albino*, 78 AD3d at 488-489).

Accordingly, it is hereby

ORDERED that the motion of defendant St. Christopher's Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, 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 further


ORDERED that the caption be amended to reflect the dismissal 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 Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website)].

ORDERED that plaintiff’s cross-motion is DENIED as moot.

5/24/2023		
DATE		LAURENCE L. LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE