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APP. DIV. FOURTH DEPT. NOS. CA 17-01986, CA 17-01987

Court of Appeals
of the State of New York

JOSE RIVERA, #05-A-0469

Appellant,

-against-

STATE OF NEW YORK

Respondent.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Dated: July 3, 2018

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PRELIMINARY STATEMENT

Respondent the State of New York submits this memorandum in opposition to claimant-appellant Jose Rivera's motion for leave to appeal two orders of the Appellate Division, Fourth Department, issued June 8, 2018. The Appellate Division affirmed two orders of the Court of Claims that: (1) granted the State's motion to amend its complaint to add an affirmative defense, and (2) granted the State's cross-motion for summary judgment dismissing the claim.[1]

Rivera brought this claim seeking damages for injuries suffered when he was beaten by corrections officer Michael Wheby. The Court of Claims granted summary judgment to the State on the ground that Wheby acted outside the scope of his employment when he assaulted Rivera. And in a prior order, the Court of Claims granted the State permission to amend its answer to include an affirmative defense on the scope-of-employment issue. The Appellate Division unanimously affirmed both orders without issuing an opinion. Because Rivera's

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[1] The questions identified in appellant's motion were actually the subject of two separate appeals that were briefed and argued together. The Fourth Department, however, issued separate orders, only one of which is annexed to appellant's motion for leave to appeal. For purposes of completeness, both orders are included with this response as an exhibit.

proposed appeal does not meet this Court's leave-grant criteria, the motion for leave to appeal should be denied.

ARGUMENT

THE MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED

A. Whether Former Corrections Officer Wehby Was Acting Within the Scope of His Employment is Not a Leave-worthy Issue

Rivera argues that the Appellate Division erred in affirming the grant of summary judgment in favor of the State on the ground that officer Wheby acted outside the scope of his employment when he assaulted Rivera. There is no error to correct, but even if there were, mere error correction is not a ground for leave to appeal. Rivera points to no split among the appellate divisions, no novel issue of law, and no question of statewide importance.

Attempting to create a leave-issue where none exists, Rivera argues that the Fourth Department's decision leaves assaulted inmates without any legal recourse. (Leave Motion at 2-3.)[2] That is plainly not the case.

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[2] Rivera's leave motion is not paginated. Citations to the motion count the page containing the statement of procedural history as page "1" and so on.

First, Rivera is incorrect that inmates must choose between bringing suit in the Court of Claims or in Supreme Court and are left to guess at the outset of the litigation which forum is correct. (Leave Motion at 2.) Inmates who have been assaulted by corrections officers may, and often do, proceed simultaneously against the State in the Court of Claims and the individual officers in either Supreme Court or a federal District Court. Jurisdiction may be proper in either or both courts, depending on the facts of the individual case. Indeed, inmates may pursue federal civil rights claims—which include excessive force claims—against corrections officers regardless of whether they also have a claim pending against the State in the Court of Claims. *See generally Haywood v. Drown*, 556 U.S. 729 (2009).

Second, this case does not stand for the proposition that an officer who used excessive force on an inmate was *per se* acting outside the scope of his employment, as Rivera suggests. (Leave Motion at 2.) Where a corrections officer was justified in using some force on a prisoner, but used too much, the State may be vicariously liable in the Court of Claims and the individual officer also may be liable in an action under 42 U.S.C. § 1983. *See, e.g., Tranchina v. McGrath*, 2018 U.S. LEXIS 101783, 9:17-

CV-1256 (MAD/DEP) (N.D.N.Y. June, 19, 2018) (dismissing state-law assault claims against some corrections officers for them to be brought in the Court of Claims, retaining a state-law assault claim against another officer, and retaining federal excessive force claims). It is only in extreme cases such as this, where there is no dispute that the corrections officer lacked any justification to use force at all, that the Appellate Divisions have found that the guard acted outside the scope of his employment and, therefore, that the State is not vicariously liable for the officer's actions. Such an officer, however, may be personally liable in a section 1983 action, even though the officer lacked any justification for using force, on the theory that the officer acted under color of state law in assaulting the prisoner.

The problem for Rivera is not that he was prevented from suing the officer individually in Supreme Court or federal court. It is that he chose not to do so. His choice not to proceed with another action directly against corrections officer Wehby does not transform his otherwise routine scope-of-employment issue into one that is leave-worthy.

B. Whether The State Should Have Been Granted Leave to Amend Its Answer is Not a Leave-worthy Issue

Likewise not leave-worthy is Rivera's request for review of the Appellate Division's order affirming the Court of Claims' decision to allow the State to amend its answer to raise the scope-of-employment defense. This issue involved the application of settled law, namely, that leave to amend should be freely given absent a showing of prejudice resulting from the delay. *See Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014). A trial court's decision to grant leave to amend is discretionary, as is the Appellate Division's. *Id.* This Court may overturn the Appellate Division's decision on this issue only upon a showing of abuse of discretion as a matter of law. *Id.* Whether the Appellate Division did so in this instance does not present a leave-worthy issue.

In any event, no prejudice was demonstrated here. The State's evidence in support of the affirmative defense was Rivera's own affidavit and testimony at Wehby's criminal trial. He cannot be surprised by his own words. And, the only prejudice Rivera claimed in opposition to the motion to amend the answer was that he could no longer bring an action directly against former corrections officer Wehby because he had let the

statute of limitations run. But, as the Court of Claims correctly held, his present inability to bring that action is the result of his own choice. As his counsel admitted during oral argument in the Fourth Department, nothing prevented him from filing those actions. *See* Recording of Oral Arguments, May 16, 2017 at 52:50-53:22, https://ad4.nycourts.gov/go/live/channel.asp?id={5C5B9D5F-B373-4E87-84E9-EE66E9FF05A4}.

CONCLUSION

The motion for leave should be denied.

Dated: Albany, New York
July 3, 2018

Respectfully submitted,

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CA 17-01986

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ.

JOSE RIVERA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120113.)
(APPEAL NO. 1.)

GOLDBERGER & DUBIN, P.C., NEW YORK CITY (STACEY VAN MALDEN OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Judith A. Hard, J.), entered February 19, 2016. The order, among other things, granted the motion of defendant for leave to amend its answer.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Architectural Bldrs. v Pollard*, 267 AD2d 704, 705 [3d Dept 1999]; *see also* CPLR 5501 [a] [1]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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CA 17-01987

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ.

JOSE RIVERA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120113.)
(APPEAL NO. 2.)

GOLDBERGER & DUBIN, P.C., NEW YORK CITY (STACEY VAN MALDEN OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Judith A. Hard, J.), entered September 14, 2017. The order denied the motion of claimant for summary judgment, granted the cross motion of defendant for summary judgment and dismissed the claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decisions at the Court of Claims.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court