UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JEFFREY PITRE, SR., AWENHA PITRE,
on their own behalf and on behalf of their children:
DP, SP, BP, SP, EP and JP

Plaintiffs,

vs.

LORRIE A. SHENANDOAH, JAMES DOOLEY,
ONONDAGA SOCIAL SERVICES EPARTMENT,
OSWEGO SOCIAL SERVICES DEPARTMENT,
ONONDAGA NATION

Defendants.

14-CV-293 (DNH/TWD)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ONONDAGA COUNTY'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

This proceeding purportedly alleges claims for a violation of Plaintiffs' Federal Constitutional Rights pursuant to 42 U.S.C. §1983 ("§1983") [which Plaintiffs incorrectly cite as 28 U.S.C. 1983], and State law claims for a violation of the New York State Constitution and violations of New York State law. (Court Doc. No. 1, Complaint). Plaintiffs allege that their children are being wrongfully withheld from them by Defendants.

Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant, Onondaga Social Services Department [formerly the Onondaga County Department of Social Services, presently the Onondaga County Department of Children and Family Services][hereinafter referred to as Onondaga County] moves to dismiss the Complaint for the reasons set forth herein.

STATEMENT OF THE CASE

On February 6, 2013, pursuant to the Indian Child Welfare Act (ICWA), the Oswego County Family Court transferred jurisdiction of an abuse/neglect proceeding, involving the children who are the subject of this proceeding, to the jurisdiction of the Onondaga Nation. (Court Doc. No. 12-4).

On or about August 6, 2013, Plaintiff Jeffrey Pitre filed a Petition in Onondaga County Family Court for custody of the children who are the subject of the proceeding herein. On or about February 20, 2014, a Summons was issued for the Petition for Custody. (Exhibit A). By Notice of Motions to Dismiss and Counterclaim, dated March 13, 2014, the Onondaga Nation, James Dooley and Lorrie Shenandoah moved to have the Petition for Custody dismissed on several grounds, including lack of subject matter and personal jurisdiction. (Exhibit B). On July 14, 2014, the Onondaga County Family Court granted the Onondaga Nation's motion to dismiss,

and dismissed the Petition for Custody on the grounds that the Court lacked jurisdiction. (Exhibit C).

On March 18, 2014, Plaintiffs, *pro se*, filed an Action for Declaratory Relief, Order Directing Defendants to Immediately Return the Children to Parents and for Money Damages, 28 U.S.C. 1983, Tort Claim, Violation of Constitutional Rights and NYS Law [hereinafter referred to as the Complaint]. (Court Doc. No. 1). On July 22, 2014, Defendants, Lorrie A. Shenandoah, James Dooley and the Onondaga Nation [hereinafter referred to as the Nation Defendants] filed a Motion to Dismiss pursuant to FRCP Rules 12(b)(1) and 12(b)(2), and Rule 19 (a) and (b). (Court Doc. No. 12). Onondaga County hereby adopts the arguments set forth in the Nation Defendants' Motion to Dismiss.

On July 23, 2014 Defendant Oswego Social Services Department [hereinafter referred to as Oswego County] filed an Answer to Complaint. (Court Doc. No. 15).

Onondaga County submits the following memorandum of law in support of its motion to dismiss Plaintiffs' Complaint.

POINT I

STANDARD FOR MOTION TO DISMISS

A motion to dismiss on the pleadings should be granted if it appears from the face of the complaint that a plaintiff cannot prove any set of facts in support of his/her claim that would entitle him/her to relief. Easton v. Sundown, 947 F.2d 1011 (2d Cir. 1991), cert. denied, 112 S.Ct. 1943 (1992); Bramin v. Clark, 927 F.2d 698 (2d Cir. 1991); Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994).

In reviewing a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to Plaintiff. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996); Sheppard v.

Baerman, 18 F.3d 147, 150 (2d Cir. 1994), cert. denied 513 U.S. 816 (1994). Thus, the material facts alleged in the complaint must be accepted as true and all reasonable inferences must be drawn in favor of Plaintiff. Bernheim v. Litt, 79 F.3d at 321. The review of a 12(b)(6) motion is limited, however. The issue is not whether Plaintiff will ultimately prevail, but rather, whether he is entitled to offer evidence to support his claims. Bernheim, 79 F.3d at 321. In considering a motion to dismiss, the Court must afford pro se litigants great liberality. See Plateky v. C.I.A., 953 F.2d 26, 28 (2d Cir. 1991). A district court must consider "not only the assertions made within the four corners of the complaint itself, but also those contained in documents attached to the pleadings or in documents incorporated by reference." Gregory v. Daly, 243 F.3d 687, 690 (2d Cir. 2001). See Keating v. Gaffney, 182 F.Supp.2d 278, 283 (E.D.N.Y. 2001). "In addition, the Court may consider documents that are in the plaintiff's possession or that the plaintiff knew of and relied on in bringing suit." Keating v. Gaffney, 182 F.Supp.2d at 283 [citations omitted]. For the reasons set forth in the Nation Defendants' Motion to Dismiss, as well as for those reasons set forth below, Plaintiffs' Complaint must be dismissed in its entirety as against Onondaga County.

POINT II

THE ONONDAGA SOCIAL SERVICES DEPARTMENT IS NOT AN ENTITY SUBJECT TO SUIT

Whether a governmental entity is subject to suit in federal court is determined by the applicable state law. Avery v. Burke County, 660 F.2d 111, 113-114 (4th Cir. 1981). Plaintiffs name as a defendant the Onondaga Social Services Department [formerly the Onondaga County Department of Social Services, presently the Onondaga County Department of Children and Family Services]. The Onondaga Social Services Department is merely a department of the

County of Onondaga that does not exist as a legal entity and is not subject to suit. Accordingly, Plaintiff's claims against the Onondaga Social Services Department must be dismissed.

POINT III

PLAINTIFFS FAIL TO COMPLY WITH RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a) of the Federal Rules of Civil Procedure requires that the complaint afford Defendants notice of Plaintiff's claim and the grounds upon which the claim rests. Fed. R. Civ. Pro. 8(a). Gould v. Russi, 830 F. Supp. 139, 142 (N.D.N.Y. 1993)(dismissing *pro se* complaint). Rule 8(a) requires that a pleading set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. Pro. 8(a)(2). Thus, for Plaintiff to survive a motion to dismiss he "must assert a cognizable claim and allege facts that, if true, would support such a claim." Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir. 1997).

Here, the only fact Plaintiffs allege against Onondaga County is that "upon information and belief, the Onondaga Department of Social Services has not consented to custody being awarded to the Mother and the Father and has supported custody of the Children being with the non-relative respondents James Dooley and Lorrie A. Shenandoah". (Court Doc. No. 1, par. 49). Despite this limited fact, Plaintiffs proceed to generically allege that the "Defendants" have wrongfully prevented Plaintiffs from being reunited with their children. Nowhere in the Complaint do Plaintiffs attempt to clarify the claims against the two municipal defendants and the Nation Defendants, but rather chooses to assert all claims against all of them. Clearly, based upon the facts alleged, Plaintiffs' Complaint does not set forth a cognizable claim against the County of Onondaga.

Furthermore, while acknowledging its existence, Plaintiffs purposefully attempt to mislead this Court as to the order issued by the Oswego County Family Court. (Court Doc. No.

1, par. 29). More specifically, Plaintiffs fail to fully cite the Oswego County Family Court order which terminated the placement or temporary removal of the children as of January 25, 2013 due to the transfer of the abuse/neglect proceedings to the jurisdiction of the Onondaga Nation. (Court Doc. No. 12-4, Findings and Orders). As a result of the transfer of the abuse/neglect proceedings to the jurisdiction of the Onondaga Nation pursuant to ICWA, the County of Onondaga has no jurisdiction over the children who are the subject of the instant proceedings, a fact which is acknowledged and confirmed by the dismissal of the custody petition filed by Plaintiff Jeffrey Pitre Sr. in Onondaga County Family Court. (Exhibit C).

Consequently, Plaintiffs have failed to comply with Federal Rules of Civil Procedure Rule 8 in that the Complaint is insufficient on its face, and further, have failed to state a cause of action against Onondaga County, and as such their Complaint must be dismissed in its entirety as against Onondaga County.

POINT IV

THE CLAIM UNDER §1983 MUST BE DISMISSED AGAINST THE COUNTY OF ONONDAGA FOR LACK OF A POLICY

Section 1983 creates no substantive rights, it is merely the vehicle through which a plaintiff may seek redress for deprivations of federal constitutional or statutory rights. See 42 U.S.C. §1983. See also, Henneberger v. County of Nassau, 465 F.Supp.2d 176, 187 (E.D.N.Y. 2006); Baines v. Masiello, 288 F.Supp.2d 376, 389 (W.D.N.Y. 2003). Plaintiffs' Complaint, herein, fails to clearly state the manner in which Plaintiffs are seeking relief pursuant to 42 U.S.C. §1983. As a result, Plaintiffs' claims as they relate to 42 U.S.C. §1983 should be dismissed in their entirety. However, even if Plaintiffs had properly pled their §1983 claim, they still are unable to state a cause of action under 42 U.S.C. §1983 against Onondaga County.

A §1983 plaintiff cannot sustain a claim against a municipality absent proof of a municipal policy. Liffiton v. Keuker, 850 F.2d 73, 76 (2d Cir. 1988). Plaintiff must assert a municipal policy promulgated by the County of Onondaga, and establish some causal connection between the policy and the constitutional deprivation allegedly suffered by Plaintiff. See McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978). Even the mere assertion that a custom or policy exists is insufficient in the absence of allegations of facts tending to support, at least circumstantially, such an inference. Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993); See also Gan v. City of New York, 996 F.2d 522, 529 (2d Cir. 1993). Further, such an official policy cannot ordinarily be inferred from a single incident of illegality absent some additional circumstances. City of Oklahoma v. Tuttle, 471 U.S. 808 (1985); Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980), cert. denied 450 U.S. 920 (1981).

In the instant case, Plaintiffs have sued the municipality, County of Onondaga, through one of its departments, however, they fail to allege any facts to support even an inference of a custom or policy of the County that led to any alleged constitutional deprivation they claim they suffered. Thus, Plaintiffs' claims pursuant to 42 U.S.C. §1983 as they relate to the County of Onondaga must be dismissed.

Inasmuch as Plaintiffs have failed to allege any tangible connection between a municipal policy and their alleged injuries or any existence of a violative policy whatsoever, their claims against the Onondaga County must be dismissed.

POINT V

ANY STATE LAW CLAIMS MUST BE DISMISSED FOR FAILURE TO FILE A NOTICE OF CLAIM

"State claims brought under state law in federal court are subject to state procedural rules". Henneberger v. County of Nassau, 465 F.Supp.2d 176, 197 (E.D.N.Y. 2006); Keating v. Gaffney, 182 F.Supp.2d 278, 290 (E.D.N.Y. 2001). See Felder v. Casey, 487 U.S. 131, 141 (1988). In the instant matter, Plaintiffs allege that Defendants, collectively, have violated New York State law and the New York State Constitution. (Court Doc. No. 1, par. 15). Consequently, in regards to Onondaga County, Plaintiffs are subject to New York State's procedural rules regarding notices of claim.

New York County Law §52 requires "that a notice of claim against a county for damage . . . or for invasion of personal or property rights, of every name and nature . . . or any other claim for damages arising at law or in equity, alleged to have been caused . . . because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees" must be served in compliance with New York General Municipal Law §50-e and that any action upon such claim must be commenced in accordance with General Municipal Law §50-i. See N.Y.County Law §52(1) (McKinney 2004). General Municipal Law §50-e requires that a notice of claim be filed within 90 days of the incident giving rise to the claim. See N.Y. Gen. Mun. Law §50-e (McKinney 2007). Section 50-i of the General Municipal Law requires that a plaintiff plead in the complaint that a notice of claim was served, that at least 30 days have elapsed since service of the notice of claim, and that the defendant has failed to adjust the claim. See N.Y. Gen. Mun. Law §50-i (McKinney 2007). The burden is upon Plaintiffs to show that they have complied with the statutory notice of claim requirements. See Henneberger v. County of Nassau, 465 F.Supp.2d at 198. Furthermore, "where state law

specifies a particular notice of claim procedure, federal courts are not free to substitute another procedure." Brennan v. Albany County, 2005 WL 2437026 *6. (N.D.N.Y. 2005) (for the Court's convenience a courtesy copy has been annexed hereto as Appendix A). The failure to timely serve a notice of claim "is fatal unless the action has been brought to vindicate a public interest or leave to serve a late notice of claim has been granted". Brennan v. Albany County, 2005 WL 2437026 *6 [citations omitted]; Keating v. Gaffney, 182 F.Supp.2d at 290 [citations omitted]. See Henneberger v. County of Nassau, 465 F.Supp.2d at 198; Feldman v. Nassau County, 349 F.Supp.2d 528, 539 (E.D.N.Y. 2004).

Claims brought against Onondaga County pursuant to the New York Constitution, as well as any other claims in tort or brought pursuant to New York law, are subject to the notice of claim requirements of County Law §52. See Wallikas v. Harder, 67 F.Supp.2d 82 (N.D.N.Y. 1999). Here, Plaintiffs have failed to serve a notice of claim in regards to any of their claims of State law or constitutional violations as required by County Law §52 and General Municipal Law §50-e. Nor have Plaintiffs met the pleading requirements outlined in General Municipal Law §50-i. (Court Doc. No. 1). Furthermore, Plaintiffs have never sought leave to file a late notice of claim. Finally, Plaintiffs' Complaint was not brought to "vindicate a public interest", such as a class action, but rather was brought on their own behalf and the behalf of their children to seek enforcement of their own private rights. As a result, Plaintiffs were required to serve a timely notice of claim, and to allege it as such in their pleadings. See Wallikas v. Harder, 67 F.Supp.2d at 82. Plaintiffs' failure to do so requires the dismissal of their claims under New York law and the New York Constitution.

As a result, Plaintiff's claims of violations of State law and the State Constitution must be dismissed in their entirety.

POINT VI

PLAINTIFFS ARE NOT ENTITLED TO PUNITIVE DAMAGES

In their prayer for relief, Plaintiffs erroneously request punitive damages against Defendants. Punitive damages normally will lie in cases where persons who are sued in their personal capacity recklessly or carelessly disregarded a plaintiff's rights. See Smith v. Wayne, 461 U.S. 30 (1983). However, punitive damages will never lie against a municipality. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). Therefore, Onondaga County, as a municipality is not subject to punitive damages, and Plaintiffs' demand for punitive damages must be denied as a matter of law.

CONCLUSION

For all the foregoing reasons, Defendant, Onondaga Social Services Department [Onondaga County], respectfully requests that this Court dismiss Plaintiffs' Complaint in its entirety, together with such other and further relief as the Court deems just and proper.

Dated: August 12, 2014

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