

Not Reported in F.Supp.2d, 2005 WL 106783 (D.Or.)
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United States District Court,
D. Oregon.
J.S., Plaintiff,
v.
CITY OF EUGENE, a municipal corporation, De-
fendants.
No. Civ. 04-6320-TC.

Jan. 19, 2005.

Elden M. Rosenthal, Rosenthal & Greene, PC, Port-
land, OR, for Plaintiff.

Jens Schmidt, Harrang Long Gary Rudnick, PC,
Eugene, OR, for Defendants.

ORDER

COFFIN, Magistrate J.

*1 Plaintiff has filed a third amended complaint in which she brings thirty-four claims against defendant. These claims reflect seventeen discrete occasions upon which she alleges unlawful events-to wit, sexual abuse committed by a city police officer, Roger Magana-occurred, with each event supporting a state tort claim and a federal civil rights claim. Presently before the court is defendant's motion (# 12) to dismiss plaintiff's seventeen state tort claims for failure to state a claim, on the basis that plaintiff did not timely file a claims notice pursuant to the Oregon Tort Claims Act.^{FN1}

^{FN1}. Defendant also argues that this issue has been previously decided while the matter was in state court, and that that court's order dismissing the tort claims is the law of the case and should not be disturbed. However, at oral argument, defendant conceded that the state court's granting of plaintiff's motion to reconsider had the effect of vacating the dismissal, with the result that there is no controlling law of the case.

STANDARD OF REVIEW

Pursuant to Fed.R.Civ.P. 12(b), a complaint may be dismissed on the basis of the pleadings if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Tanner v. Heise, 879 F.2d 572, 576 (9th Cir.1989) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In making this determination upon a motion to dismiss, this court accepts all allegations of material fact as true and construes the allegations in the light most favorable to the nonmoving party. *Id.*

DISCUSSION

The Oregon Tort Claims Act ("OTCA"), ORS 30.275, provides, in relevant part, that:

(1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body ... shall be maintained unless notice of claim is given as required by this section.

(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

(b) For all other claims, within 180 days of the alleged loss or injury.

It is undisputed that plaintiff did not provide formal notice of her claims to defendant or a qualified recipient on behalf of defendant^{FN2} within 180 days of the alleged abuse occurring, or within the 270 days allowed in the case of incapacity.^{FN3} There is also no evidence that defendant or a qualified representative of defendant had actual notice of the claim within those time periods. However, plaintiff argues that, under the circumstances presented in this case, the doctrines of equitable estoppel and/or duress should apply to toll the running of the OTCA clock. The basis for this argument as asserted in her complaint is

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that:

FN2. See ORS 30.275(4)-(5).

FN3. The last incident alleged in the complaint occurred on May 31, 2002; plaintiff did not provide notice until after September 10, 2003, well beyond the 270 day limit.

Until the time Officer Magana was arrested on various charges involving sexual abuse and official misconduct on or about September 10, 2003, [plaintiff] reasonably feared that she was physically at risk from Officer Magana if she made any official report of the abuse she was suffering. This fear was reasonably based upon a series of verbal threats made by Officer Magana, threats intended to intimidate [plaintiff] and cause her to not complain about or file any official reports of Officer Magana's wrongdoing. On one occasion these threats were accompanied by Officer Magana drawing his loaded service weapon, placing it on [plaintiff's] chest and threatening to kill her if she spoke about the sexual abuse. On one other occasion these threats were accompanied by Officer Magana drawing his loaded service weapon, placing it on [plaintiff's] genitals and again threatening to kill her if she spoke about the sexual abuse.

*2 Third Amended Complaint (# 9) at ¶ 5. Once Magana was arrested, plaintiff promptly filed a tort claim notice. *Id.* at ¶ 6. However, defendant argues that the OTCA does not, on its face, permit tolling on any basis beyond the 90 days specifically provided for, and that no Oregon court has applied doctrines of equitable tolling or duress to it.

All parties, and this court, have been unsuccessful in locating an Oregon case that squarely addresses the question of whether equitable estoppel or duress should apply to the OTCA in cases such as the one at bar. The question has been presented to the Oregon Supreme Court on two occasions, in Brown v. Portland School Dist. No. 1, 291 Or. 77, 628 P.2d 1183 (1981) and in Webb v. Highway Div. of the Oregon State Dept. of Transportation, 293 Or. 645, 652 P.2d 783 (1982). However, those cases were "substantial compliance" cases where some-albeit imperfect-notice was actually given, and as such the cases did not present the question at issue here. Regardless, in neither case did the court reach the ultimate question of whether equitable estoppel was available. ^{FN4} It appears that this is a question of first impression. ^{FN5}

FN4. In *Brown*, the court found that petitioner had not sufficiently pled facts to warrant estoppel were such a remedy available; in *Webb*, the court determined that the plaintiff had sufficiently complied with the Act and that estoppel was not necessary to maintain the action.

FN5. Defendant has suggested that, as this issue has never been addressed by the Oregon courts, the question should be certified to the Oregon Supreme Court for consideration. I disagree. I believe that the Oregon courts have provided sufficient guidance on the question to allow this court to make an informed decision on the issue, and I have no desire to delay this action for the significant amount of time it would take to certify the question and, should the Oregon Supreme Court agree to take up the question, to get a resolution. Similarly, plaintiff seeks certification on the question of whether the OTCA notice provision is constitutional to the Oregon Attorney General. Because the court's decision does not necessitate a constitutional analysis, that question is moot, and the motion (# 20) is denied.

Were this a question of tolling a statute of limitations, the court would have little trouble finding that allegations of misconduct by defendant's agent which directly impacted plaintiff's ability to file the appropriate notice would, if found to be true, toll the running of the statute until the impediment had been removed. However, as the Oregon courts have recognized, the notice period in the OTCA is not a statute of limitations; it is, rather, a jurisdictional requirement that must be satisfied for the action to be maintained. See, e.g., Fry v. Willamalane Park and Rec. Dist., 4 Or.App. 575, 583-83, 481 P.2d 648 (Or.App.1971): "[W]e conclude that the giving of the notice to 'the governing body' of the respondent was jurisdictional.... We ... hold that the giving of the required [] notice is not a statute of limitations, but that is a condition precedent to the bringing of the action." In reaching its conclusion in *Fry*, the Court of Appeals cited to an earlier Oregon Supreme Court case, which had, in turn, quoted from an American Jurisprudence section that provided the following rationale:

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A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought.

*3 *State ex. rel. Bowles v. Olson*, 175 Or. 98, 110, 151 P.2d 723 (1944) (quoting 34 AM.JUR. 16, *Limitation of Actions* § 7) (quotation marks omitted). See also *Bagley v. Beaverton School Dist. No. 48*, 12 Or.App. 377, 380-81, 507 P.2d 39 (Or.App.1973) (“Statutes of limitations are distinguishable from statutes which create a right of action not existing at common law coupled with a restriction on the time within which action may be brought to enforce the right.”).

However, the notice provision has not been invulnerable to all equitable challenges. The Oregon Supreme Court, in *Adams v. Oregon State Police*, 289 Or. 233, 611 P.2d 1153 (1980), applied the “discovery rule” developed in challenges to statute of limitations to the OTCA notice provision, finding that “a narrow construction of that legislation would be contrary to its remedial purposes” and concluding that “the 180 day period ... does not commence to run until plaintiff has a reasonable opportunity to discover his injury and the identity of the party responsible for that injury.” *Id.* at 238-39, 611 P.2d 1153. Quoting from *Berry v. Branner*, 245 Or. 307, 312, 421 P.2d 996 (1966), where the Oregon Supreme Court first articulated its endorsement of the discovery rule, the court reiterated that:

To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, “You had a remedy, but before the wrong

was ascertainable to you, the law stripped you of your remedy,” makes a mockery of the law.

I believe that the logic of *Berry*, extended by the Oregon Supreme Court to the OTCA notice provision in *Adams*, applies with equal force to the facts alleged in the instant action. Equitable estoppel is a judicially crafted remedy which by its very nature is designed to prevent a party from benefitting from wrongful conduct that unjustly deprives another of a right^{FN6} in this case, a right to her day in court by satisfying what should be a fairly easy condition precedent: timely notice. But a claimant who credibly believes, based upon express threats by the tortfeasor, that providing the statutorily-mandated notice will result in her being shot and killed is plainly deterred from providing that notice. The situation here is closely analogous to *Berry*: to paraphrase from the court's quotation therein:

FN6. See, e.g., *Scott County, Ark. v. Advance-Rumley Thresher Co.*, 228 F.739, 750 (8th Cir.1923) (“The doctrine of estoppel is one of fundamental justice. Its application must depend upon the circumstances of each particular case, and courts have gone a long way in applying it to prevent manifest injustice and wrong.”).

To say to one who has been wronged, “You had a remedy, but *because the wrongdoer deterred you from pursuing that remedy under pain of death*, the law stripped you of your remedy,” makes a mockery of the law.

This is particularly true given that the agent-Magana was a police officer, a member of the very department which would be called upon to protect plaintiff against his threats if notice were filed. A legal conclusion that would require a plaintiff, in the circumstances presented here, to file a notice of tort claim to the city, under threat of death and with no certain expectation of protection, is too inequitable for the OTCA to bear.^{FN7} Without deciding whether equitable estoppel or duress are generally available to toll the OTCA notice clock, I find that under the circumstances alleged in this case, the notice provision was not triggered, and the clock did not start to run, until the impediment created by the city's agent's threats was removed-which occurred upon Magana's arrest on or about September 10, 2003. Plaintiff alleges, and defendant does not contest, that she provided appro-

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appropriate notice within 180 days of that date. As such, the notice provision of the OTCA was met. Defendant's motion to dismiss plaintiff's state law tort claims for failure to comply with the notice provision is denied.^{FNS}

FN7. Courts in other jurisdictions, in less egregious circumstances, have not hesitated to estop a defendant from asserting lack of notice as a defense. *See, e.g., City of Montgomery v. Weldon*, 280 Ala. 463, 195 So.2d 110 (1967); *Anske v. Borough of Palisades Park*, 139 N.J.Super. 342, 354 A.2d 87 (N.J.App.Div.1976); *Fritsch v. St. Croix Cent. School Dist.*, 183 Wis.2d 336, 515 N.W.2d 328 (Wis.Ct.App.1994); *Rabinowitz v. Town of Bay Harbor Islands*, 178 So.2d 9 (Fla.1965); *Roberts v. Haltom City*, 543 S.W.2d 75 (Tex.1976).

FN8. As the court noted at the oral argument of this motion, the resolution of the instant motion is based on the allegations in plaintiff's complaint. Should facts be presented at trial to call plaintiff's allegations of threats or her resulting fear into question, defendant may renew its motion at that time.

CONCLUSION

*4 Defendant's motion (# 12) to dismiss plaintiff's state law tort claims is denied.

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J.S. v. City of Eugene
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