

**Keene v New York City Hous. Auth.**

2012 NY Slip Op 32326(U)

September 5, 2012

Supreme Court, New York County

Docket Number: 105592/2011

Judge: Singh

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

PRESENT: \_\_\_\_\_  
Justice

PART 61

Index Number : 105592/2011  
KEENE, LARRY  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 002  
DISMISS DEFENSE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**  
SEP 10 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 9/5/12

*[Signature]*  
HON. ANIL C. SINGH, J.S.C.  
SUPREME COURT JUSTICE

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X

LARRY KEENE, as Administrator of the Estate of  
JENNIFER BAEZ,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.  
105592/11

NEW YORK CITY HOUSING AUTHORITY and  
THE CITY OF NEW YORK,

**FILED**

Defendants.

SEP 10 2012

-----X

NEW YORK  
COUNTY CLERK'S OFFICE

HON. ANIL C. SINGH, J.:

Plaintiff in this wrongful death action moves to strike defendants' tenth affirmative defense based on the statute of limitations and eleventh affirmative defense based on failure to comply with prerequisite conditions of the Public Housing Law and General Municipal Law. Defendant New York City Housing Authority ("NYCHA") opposes the motion to the extent that it seeks dismissal of NYCHA's affirmative defense based on the expiration of the statute of limitations.

On February 15, 2009, a fire broke out in an apartment building owned and operated by NYCHA at 2400 Second Avenue in Manhattan. Jennifer Baez, a resident of apartment 10A, suffered smoke inhalation. She died three days later.

The decedent was an unmarried mother of three minor children. Calvone Smith was born February 11, 1998, and Serenity Baez was born February 27, 2002. Calvin

Smith is the biological father of Calvone and Serenity. Decedent's third child, Eternity Keene, was born January 22, 2007. Larry Keene is the biological father of Eternity. Neither Mr. Keene nor Mr. Smith were ever married to decedent.

On May 7, 2009, a Notice of Claim was served on NYCHA by decedent's mother, Merle Baez, as proposed Administratrix of decedent's estate.

On October 8, 2009, Larry Keene was appointed as the guardian of the property of the decedent's daughter, Eternity Keene.

On January 24, 2011, Letters of Limited Administration were issued by Surrogate's Court to Larry Keene for the Estate of Jennifer Baez. Surrogate's Court refused to grant Letters of Administration to Merle Baez because she was not the guardian of any of decedent's children. Accordingly, Mr. Keene was appointed Administrator.

On February 7, 2011, Mr. Keene served a Notice of Claim upon NYCHA and the City of New York.

Plaintiff Larry Keene, as administrator of the estate of Jennifer Baez, commenced the instant action on May 12, 2011, by filing a summons and complaint. The complaint alleges that defendants were negligent in maintaining smoke and/or carbon monoxide detectors, causing the injury to decedent that ultimately led to her death. Plaintiff seeks damages on behalf of all three distributee children of Jennifer Baez.

Defendant NYCHA filed a verified answer asserting twelve affirmative defenses.

Subsequently, plaintiff filed the instant motion to strike two of the affirmative defenses, including the statute of limitations defense.

#### Discussion

“A plaintiff, having moved to dismiss a defendant’s affirmative defenses pursuant to the statute governing motions to dismiss a defense, bears the burden of establishing that the affirmative defenses are without merit as a matter of law” (97 N.Y.Jur.2d Summary Judgment, Etc. Section 153). “In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (534 East 11<sup>th</sup> Street Housing Development Fund Corp. v. Hendrick, 90 A.D.3d 541, 542 [1<sup>st</sup> Dept., 2011] (internal citation omitted)). “A defense should not be stricken where there are questions of fact requiring a trial” (Id.).

Defendant contends that factual questions remain as to when a “potential personal representative” could have commenced this case. NYCHA points out that all three of decedent’s children reside with Calvin Smith (Opp., exhibit A). NYCHA notes that, while plaintiff’s counsel focuses on the timing of Mr. Keene’s appointment as guardian of his daughter, plaintiff makes no showing that Calvin Smith could not have served as a “potential personal representative.” According to defendant,

plaintiff's motion to dismiss does not even consider the "earliest possible moment" that Mr. Smith was, or could have been, a "potential personal representative."

Defendant exhibits a letter dated June 25, 2009, in which plaintiff's counsel confirmed that they were retained by Mr. Keene, as well as by Mr. Smith (Opp., exhibit B).

After careful consideration, the Court finds that NYCHA has sufficiently demonstrated that an issue of fact exists as to when a "potential personal representative" could have begun this action. Accordingly, it would be premature for the Court to dismiss the statute of limitations defense at this early stage of the litigation before defendants have had an opportunity to conduct discovery, including depositions of Mr. Keene and Mr. Smith.

For the above reasons, it is

ORDERED that the motion to dismiss is granted only to the extent that the affirmative defense asserting failure to comply with the Public Housing Law and General Municipal Law (eleventh affirmative defense) is dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on SEP 10 2012 7:14, 2012, at 9:30 a.m.

**FILED**

**NEW YORK COUNTY CLERKS OFFICE**

Date: Sept 5, 12  
New York, New York

*ACS*  
Anil C. Singh

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**