Ortiz v City of New York
2015 NY Slip Op 31891(U)
September 9, 2015
Supreme Court, Bronx County
Docket Number: 21370/12
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

FILED Sep 21 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

JOSHUA N. ORTIZ, INFANT, BY HIS MOTHER AND NATURAL GUARDIAN BENEDA MARRERO, AND BENEDA MARRERO, INDIVIDUALLY,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, AND NEW YORK CITY BOARD OF EDUCATION, AND THE URBAN INSTITUTE OF MATHEMATICS,

Defendant(s).

----------x

DECISION AND ORDER

Index No: 21370/12

In this action for alleged personal injuries arising from the alleged negligent maintenance of a premises, defendants THE CITY OF NEW YORK (the City) THE NEW YORK CITY DEPARTMENT OF EDUCATION, and THE NEW YORK CITY BOARD OF EDUCATION s/h/a THE URBAN INSTITUTE OF MATHEMATICS (the DOE), move seeking an order dismissing the instant action for plaintiffs' failure to state a cause of action. Specifically, defendants aver that insofar as plaintiffs commenced this action without submitting to a duly requested oral examination, as prescribed by GML § 50-h(2), the instant action was commenced absent compliance with a condition precedent to sue. Plaintiffs oppose the instant motion averring that insofar as defendants never rescheduled the aforementioned hearing after plaintiffs failed to attend the same, defendants waived it. Thus,

it did not become a condition precedent to sue.

For the reasons that follow hereinafter, the City and the DOE's motion is denied.

The instant action is for alleged personal injuries. According to the complaint, filed July 3, 2012, plaintiff JOSHUA N. ORTIZ (Ortiz) sustained injuries while within premises - a school- located at 650 Hollywood Avenue, Bronx, NY (650). Plaintiffs allege that 650 was owned by the City and the DOE, that Ortiz sustained an accident therein, and that such accident was caused by the negligence of the defendants in failing to maintain 650 in a reasonably safe condition. Plaintiffs allege that they complied with GML § 50-h insofar as while defendants scheduled a hearing to be held on May 17, 2012, the same was adjourned without a date. Plaintiff BENEDA MORRERO (Morrero), as Ortiz' mother and natural guardian asserts a derivative claim for loss of services.

The City and the DOE's motion to dismiss is hereby denied insofar as the complaint states a cause of action. Specifically, on this record, the failure to submit to a hearing pursuant to GML § 50-h did not become a precondition to commence this action such that it cannot serve as a basis for dismissal.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which

can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]). However, "when evidentiary material [in support of dismissal] is considered the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977])

CPLR § 3013, states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 (2nd Dept. 2006); *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

Pursuant to GML §§ 50-h(1) and (2), upon the filing of a notice of claim, a municipal defendant is entitled to both an oral and physical examination, provided of course, that such examination is requested in writing and provides the claimant with reasonable notice. Moreover, GML § 50-h(5) reads:

> Where a demand for examination has been served as provided in subdivision two of this section *no action shall be commenced against the city, county, town, village, fire district or school district against which the claim is made unless the claimant has duly complied with such demand for examination*, which compliance shall be in addition to the requirements of section fifty-e of this chapter. *If such examination is not conducted within ninety days of service of the demand, the claimant may commence the action.* The

> action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, the city, county, town, village, fire district or school district shall reschedule the hearing for the earliest possible date available. (emphasis added).

Accordingly, once a proper demand for a hearing or physical examination is made, no action may be commenced against the City of New York unless the claimant submits to a hearing or if the municipal defendant fails to conduct the hearing within 90 days of a demand (*Eichelbaum v New York City Hous. Auth.*, 215 AD2d 526, 526 [2d Dept 1995]). It is well settled that compliance with a demand for an oral and/or physical examination pursuant to General Municipal Law § 50-h, when such demand is timely made, is a condition precedent to the commencement of an action against a municipal defendant and an action commenced absent compliance with GML §50-h must be dismissed (*Best v City of New York*, 97 AD2d 389, 389 [1st Dept 1983], *affd* 61 NY2d 847 [1984]; *see also Hymowitz v City of New York*, 122 AD3d 681, 682 [2d Dept 2014]; *Boone v City of New York*, 92 AD3d 709, 710 [2d Dept 2012]; *Cook v Village of Greene*, 95 AD3d 1639, 1639-1640 [3d Dept 2012]). Dismissal, based on the foregoing, however, is not completely unavoidable, and can be prevented upon a showing of "exceptional circumstances, such as extreme physical or psychological incapacity" (*Hymowitz* at 682;

Steenbuck v Sklarow, 63 AD3d 823,824 [2d Dept 2009]; *Arcila v Incorporated Village of Freeport*, 231 AD2d 660, 661 [2d Dept 1996]). In *Twitty v City of New York* (195 AD2d 354 [1st Dept 1993]), the court denied defendant's motion seeking to dismiss her action for her failure to attend a hearing pursuant to GML § 50-h because, while plaintiff failed to attend the hearing after being granted an adjournment, her serious physical disabilities - quadriplegia - prevented her from attending the same (*id.* at 355-356). The failure to submit to the examination requested prior to the expiration of the statute of limitations prescribed by GML § 50-i, bars the action in its entirety (*Lowinger v City of New York*, 64 AD2d 888, 990 [2d Dept 1978] [Court denied petitioner's application to compel the City to conduct a hearing and physical examination, when the City duly scheduled the same, but petitioner never submitted to the same within the applicable statute of limitations. Court, thus dismissed the proceeding as time barred.]).

Notably, compliance with GML 50-h only becomes a precondition to commence an action against a municipality, when the demand for a hearing or physical is properly and timely made and plaintiff fails to comply therewith. Accordingly, the failure by the municipal defendant to provide a date certain for an examination pursuant to GML § 50-h does not make petitioner's appearance a precondition to commence an action and does not require dismissal

of any action commenced after such request is made (*Watson v New York City Hous. Auth.*, 294 A.D.2d 236, 236-237 [1st Dept 2002]; *Ramos v New York City Hous. Auth.*, 256 AD2d 195, 196 [1st Dept 1998]). Similarly, a municipal defendant's adjournment of a duly requested hearing or examination, without setting a date certain for the same does not make the submission to such examination a condition precedent to sue nor warrant dismissal of an already commenced action (*Ruiz v New York City Hous. Auth.*, 216 AD2d 258, 258 [1st Dept 1995]).

Here, plaintiffs' complaint, to the extent it pleads that the hearing was adjourned without a date, pleads compliance with GML § 50-h. Specifically, because on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff* at 414; *Cron* at 366), and the failure by the municipal defendant to provide a date certain for an examination pursuant to GML § 50-h does not make petitioner's appearance a precondition to commence an action and does not require dismissal of any action commenced after such request is made (*Watson* at 236-237; *Ramos* at 196), the complaint establishes that defendants consented to an adjournment but failed to apprise plaintiffs of a new date certain. Under these circumstances, dismissal is not warranted.

In addition to the foregoing, while it is true that "when evidentiary material [in support of dismissal] is considered [on a

motion to dismiss,] the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Guggenheimer* at 275), here, the record nevertheless fails to establish grounds for dismissal of this action. As borne by the record, the hearing initially scheduled to be held on May 17, 2012 - to the extent it was requested on April 4, 2012, less than 30 days after plaintiffs filed their notice of claim - became a condition precedent to commence this action. Plaintiffs' failure to appear - barring "exceptional circumstances, such as extreme physical or psychological incapacity"(*Hymowitz* at 682; *Steenbuck* at 824; *Arcila* at 661), circumstances not present here, therefore, would warrant dismissal. However, here, plaintiffs' failure to appear cannot avail them, because on May 7, 2013, this Court granted defendants' motion for relief identical to that which they now seek, and did so to the limited extent of compelling plaintiffs to submit to a hearing within 45 days. Accordingly, this Court's order excused plaintiffs' failure to appear on May 17, 2012, and gave them until 45 days after the service of the Court's order to appear for the hearing. The onus to serve the foregoing order and schedule a hearing was defendants'. To the extent that plaintiffs, by counsel, aver that not only have defendants failed to serve a copy of this order upon them as prescribed, but that, to date, they have failed to schedule the aforementioned hearing, it is clear that defendants have waived the right to conduct the hearing and

that dismissal of this action is unwarranted. To be sure, defendants submit no evidence that they have served the Court's prior order upon plaintiff, let alone that they have scheduled a date for the hearing. In fact, defendants' moving papers were utterly and disingenuously silent about the relevant procedural history; never apprising the Court of its order dated May 7, 2013. The Court will not endeavor to speculate why defendants omitted this information, but suffice it to say that, as noted above, the information omitted by defendants is critical, warranting denial of the instant motion. It is hereby

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : September 9, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.