Passantino v City of New York
2015 NY Slip Op 32976(U)
August 14, 2015
Supreme Court, Bronx County
Docket Number: 22973/14
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

JOSEPH PASSANTINO,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, NEW YORK CITY DEPARTMENT OF EDUCATION, AND AMIRAL CONSTRUCTION,

Defendant(s).

----------x

DECISION AND ORDER

Index No: 22973/14

In this action for alleged personal injuries arising from, *inter alia,* the alleged negligent maintenance of a premises, defendants THE CITY OF NEW YORK (the City) and THE NEW YORK CITY DEPARTMENT OF EDUCATION (the DOE), move seeking an order dismissing the instant action for plaintiff's alleged failure to state a cause of action. Specifically, movants aver that insofar as plaintiff commenced this action without submitting a duly requested physical examination, as prescribed by GML § 50-h(5), the instant action was commenced absent compliance with a condition precedent to sue. Plaintiff opposes the instant motion averring that insofar as movants properly requested the aforementioned examination more than 90 days after he served his notice of claim, his failure to appear did not bar the initiation of this action. Accordingly, plaintiff cross-moves seeking an order striking movants' first affirmative

defense insofar as premised on plaintiff's alleged failure to comply with GML § 50-h(5). Movants oppose plaintiff's cross-motion for the very same reasons they seek dismissal of the instant action, namely, plaintiff's failure to comply with GML § 50-h(5).

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

The instant action is for alleged personal injuries. According to the complaint, filed June 26, 2014, plaintiff sustained injuries while within premises located at 519 St. Anns Avenue, Bronx, NY (PS 277). Plaintiff alleges that PS 277 was owned by the City and the DOE, that plaintiff sustained an accident therein, and that such accident was caused by the negligence of the movants and the other defendants. Plaintiff alleges that in compliance with GML § 50-h, he attended a hearing scheduled by movants.

The City and the DOE's motion to dismiss is hereby denied insofar as the complaint states a cause of action. On this record, the failure to submit to a physical examination did not become a precondition to commence this action nor can it serve as basis for dismissal of the same.

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]).

GML § 50-h, subsection 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. 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]). 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 [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 or warrant dismissal of an already commenced action (*Ruiz v New York City Hous. Auth.*, 216 AD2d 258, 258 [1st Dept 1995]). Obviously, the failure to serve a demand for an examination pursuant to GML § 50-h within 90 days of the filing of a notice of claim cannot make the appearance at such examination a precondition to commence an action (*Eichelbaum v New York City Hous. Auth.*, 215 AD2d 526, 526 [2d Dept 1995]).

Here, to the extent that plaintiff's complaint pleads compliance with GML § 50-h, and 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), he sufficiently pleads a cause of action. To be sure, generally, pursuant to GML § 50-h, once a proper demand for a hearing or physical examination is made, no action may be commenced against a municipal defendant unless the claimant submits to a hearing. Dismissal, then, is only warranted when such demand is timely made and an action is commenced absent compliance with the examinations requested pursuant to GML §50-h (*Best* at 389; *Hymowitz* at 682; *Boone* at 710; *Cook* at 1639-1640).

The foregoing, notwithstanding, movants seek to controvert the veracity of the allegations within plaintiff's complaint by submitting documentary evidence evincing that they duly requested a physical examination pursuant to GML § 50-h(5) and that plaintiff, despite failing to appear for such physical, nevertheless commenced this action. While it is true that "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* at 275), here, the evidence submitted by movants fails to establish that plaintiff failed to comply with GML § 50-h(5). Specifically, the instant motion is premised on plaintiff's alleged failure to submit to a

physical examination, purportedly properly and timely requested within 90 days of the filing of the notice of claim. On this record, this assertion is baseless.

A review of the evidence establishes that plaintiff filed his notice of claim on February 12, 2014 and amended the same on February 24, 2014. Thereafter, on April 9, 2014, movants sent plaintiff a letter requesting both an oral and physical examination pursuant to GML § 50-h. While defendants indicated a date certain for the oral exam, they did not similarly do so for the physical exam. Instead, movants requested HIPPA compliant authorizations for plaintiff's medical records, reserving their right to physically examine him, thereafter. Because plaintiff failed to provide the foregoing authorizations, on May 2 and 13, 2014, movants sent additional letters requesting the aforementioned authorizations and again, reserving their right to conduct a physical examination. On July 10, 2014, movants sent plaintiff a notice, seeking to have him submit to a physical examination pursuant to GML § 50-h, setting a date and time certain and apprising him of the location where such examination would be held.

Based on the foregoing, it is clear that movants first three requests for HIPPA complaint authorizations, wherein they reserved their right to a physical examination did not make plaintiff's appearance at a physical examination a condition precedent to the commencement of the instant action. Significantly, those letters

failed to specify where and when such physical was to be held and as such, under prevailing law, did not make a physical examination a condition precedent to initiate this action (*Watson* at 236; *Ramos* at). While the notice served upon plaintiff on July 10, 2014 did, in fact, designate a date, time and place for the foregoing physical, such notice was served approximately five months after the notices of claims were filed. Thus, having been served more than 90 days after the notices of claim were filed, the physical examination requested by movants in July, did not become a condition to iniate this action and cannot be the basis for dismissal (*Eichelbaum* at 526).

That movants could not properly perform a physical examination absent the medical records for which they sought authorizations from plaintiff is no basis for the relief sought. While it is true that a physical is more meaningful when the examining doctor has reviewed prior records, GML § 50-h does not require that a plaintiff provide such records. As such, the failure to provide them cannot serve as a basis, where as here, to refuse to examine the plaintiff.

Based on the foregoing, plaintiff's cross-motion seeking to strike movants' first affirmative defense - non-compliance with GML § 50-h - is granted. It is hereby

ORDERED that this action be transferred to a non-City Part[1]. It is further

ORDERED that plaintiff 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 : August 14, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.

[1] Because the City and the DOE are represented by outside counsel, this action cannot remain in the City Part.