At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of April, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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SANETA WATSON

Index No.: 518768/2018

Plaintiff,

DECISION AND ORDER

- against -

Motions Sequence #1

NEW YORK CITY HOUSING AUTHORITY

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,
Memorandum of Law.....	5

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Defendant New York City Housing Authority ("NYCHA") moves (motion sequence #1) for an Order for pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint on the ground that Plaintiff Saneta Watson (hereinafter the "Plaintiff") failed to submit to a 50-h statutory hearing in accordance with General Municipal Law 50-h and Public Housing Law 157. NYCHA alleges that while the Plaintiff appeared for the hearing, it was concluded as a result of the Plaintiff's counsel who repeatedly directed that the Plaintiff not answer certain questions. NYCHA further contends that it sought to reschedule the hearing by letter and other communications with the Plaintiff but that the Plaintiff refused to appear.

The Plaintiff opposes the motion and contends that the Plaintiff appeared as necessary and was within her right to refuse to answer some of the questions posed to her during the hearing at issue. In her Affirmation in Opposition (paragraph 12), she states, through counsel, that "[q]uestions such as the Plaintiff's Citizenship status and social security number are irrelevant to the purpose of the hearing." The Plaintiff also contends that the hearing itself had been scheduled beyond the 90 day period by NYCHA and as a result the Plaintiff could have commenced the action without the hearings completion and the instant motion should be denied.

In general, "the oral examination of the claimant pursuant to General Municipal Law § 50–h serves to supplement the notice of claim and provides an investigatory tool to the public corporation, with a view toward settlement." *Di Pompo v. City of Beacon Police Dep't*, 153 A.D.3d 597, 598, 57 N.Y.S.3d 426, 427 [2nd Dept, 2017]. In *Di Pompo,* "the plaintiff's attorney objected to many of the questions and instructed the plaintiff not to answer, ostensibly because criminal charges were pending, the plaintiff did not expressly invoke his Fifth Amendment privilege against self-incrimination." *Id.* However, the Court held that "[e]ven if the plaintiff had properly asserted his privilege, he was obligated to schedule a new General Municipal Law § 50–h examination after his criminal case ended, but he failed to do so." *Di Pompo v. City of Beacon Police Dep't*, 153 A.D.3d 597, 598, 57 N.Y.S.3d 426, 427 [2nd Dept, 2017].

Turning to the merits of the instant motion, the Court finds that the Plaintiff failed to comply with the requirements of General Municipal Law § 50–h and the instant motion is granted. The Plaintiff's position that a 50-h hearing that is not scheduled within 90 after the Notice of Claim is filed is waived is without support. General Municipal Law § 50–h[5] provides in pertinent part that "[i]f such examination is not conducted within ninety days of service of the demand, the claimant may commence the action." In the instant proceeding, the hearing was conducted within 90 days of the service of demand, given that the Notice to Take 50-h Oral and

Physical Examination was served on or around March 1, 2018, and the hearing was scheduled for April 24, 2018, approximately fifty four days later. The cases cited by the Plaintiff in support of its position merely stand for the proposition that in situations where the municipal defendant failed to seek to reschedule a hearing, any subsequent motion to dismiss for failing to conduct the hearing should be denied. *See Oct. v. Town of Greenburgh*, 55 A.D.3d 704, 704, 865 N.Y.S.2d 646, 647 [2nd Dept, 2008]; *see also Belton v. Liberty Lines Transit, Inc.*, 3 A.D.3d 334, 334, 769 N.Y.S.2d 885 [1st Dept, 2004]; *Page v. City of Niagara Falls*, 277 A.D.2d 1047, 716 N.Y.S.2d 173 [4th Dept, 2000]; *Ruiz v. New York City Hous. Auth.*, 216 A.D.2d 258, 258, 629 N.Y.S.2d 222, 223 [1st Dept, 1995]. In the instant proceeding, the Defendant has produced communications (See NYCHA Motion, Exhibits C, D, E) that it attempted to reschedule the hearing but the Plaintiff refused to reschedule.

What is more, the Plaintiff's position that her immigration status and social security number were irrelevant and outside the scope of the hearing is incorrect. Courts have held that "a plaintiff's immigration status is relevant to a determination of damages for lost wages and presents an issue of fact to be resolved by the jury."[1] *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 30, 802 N.Y.S.2d 56, 68 [2nd Dept, 2005], *aff'd sub nom. Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 845 N.E.2d 1246 [2006]; *see also Vasquez v. Sokolowski*, 277 A.D.2d 370, 371, 717 N.Y.S.2d 212, 213 [2nd Dept, 2000]; *Avendano v. Sazerac, Inc.*, 221 A.D.2d 395, 395, 634 N.Y.S.2d 390 [2nd Dept, 1995]; *Murillo v New York City Partnership*, No. 105451/11, 2015 WL 1897272, at *1 [Supreme Court, NY County, 2015]. Also, while Plaintiff contends that the questions asked were outside the scope of a 50-h hearing and claims such information could have been addressed pursuant to Article 31 of the CPLR, "CPLR provisions, including CPLR article

[1] The Plaintiff's Notice of Claim (Defendant's Motion, Exhibit A) indicates a claim for loss of earnings.

31 discovery rules, do not apply to the pre-commencement 50–h hearings at issue." Colon v. Martin, 170 A.D.3d 1109 [2nd Dept, 2019].

Where the Plaintiff challenges a line of questioning, it is the Plaintiff who is obligated to reschedule a continuation of the 50–h hearing. *See Kemp v. Cty. of Suffolk*, 61 A.D.3d 937, 938, 878 N.Y.S.2d 135, 136 [2nd Dept, 2009]. While the Court recognizes the sensitive nature of the questions at issue, the Plaintiff, through counsel, could have sought to address these matters off the record, and the Court notes significantly that the Plaintiff failed to seek Court intervention (e.g. a ruling, protective order) and did not seek to reschedule the hearing. The Defendant advised Plaintiff, by letter, that the opportunity to do so was available (See Defendant's Motion Exhibit C) and thereafter scheduled another date for the hearing which the Plaintiff apparently did not appear for.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant NYCHA's motion (motion sequence #1) is granted and the proceeding is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.