

**Skyers v City of New York**

2020 NY Slip Op 35525(U)

August 18, 2020

Supreme Court, Bronx County

Docket Number: Index No. 20584/2019E

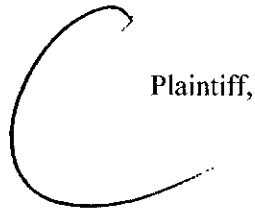
Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 3

-----X  
ASHLEIGH SKYERS,

 Plaintiff,

Index No: 20584/2019E

**DECISION/ORDER**  
**Present:**  
**HON. MITCHELL J. DANZIGER**

-against-

THE CITY OF NEW YORK, THE NEW YORK  
CITY DEPARTMENT OF HOMELESS SERVICES.  
And 1376 TELLER, LLC,

Defendants,  
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Recitation as Required by CPLR §2219(a): The following papers  
were read on this Motion for Summary Judgment:

Papers Numbered

Notice of Motion with Affirmation of Support with Exhibits.....	<u>1</u>
Affirmations in Opposition.....	<u>2-3</u>
Reply Affirmation.....	<u>4</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

THE CITY OF NEW YORK and THE CITY OF NEW YORK s/h/a THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES (hereinafter “City”), moves pursuant to CPLR §3211(a)(5) to dismiss plaintiff’s complaint as untimely, as against the City of New York as an improper party, and pursuant to CPLR §3212 for summary judgment and dismissal of all claims and cross claims against them herein.

The instant action arose from alleged personal injuries sustained by plaintiff as a result of mold exposure. According to plaintiff’s notice of claim, this incident occurred on or about February 4, 2018, and for a considerable time prior to and subsequent to that date. (Ex. A to plaintiff’s opposition) According to plaintiff’s summons and complaint, the incident occurred on August 8, 2017. Plaintiff served her notice of claim on March 13, 2018. Plaintiff filed her summons and complaint on January 15, 2019. The City moves arguing that plaintiff’s summons and complaint is untimely as it should have been filed by November 16, 2018 (1 year and 90 days from the August 8, 2017 incident date used in plaintiff’s summons and complaint). The City avers that plaintiff did not file a notice of claim for the August 8, 2017 incident date nor did plaintiff move for leave to file a late notice of claim. Moreover, the City argues that since the one year and

ninety day statute of limitations has passed, the Court is without discretion to grant leave to file a late notice of claim. Additionally, the City moves for summary judgment and contends that the City is not a proper party to this action since it did not own, operate, maintain, manage, supervise, or control the location of plaintiff's accident.

In opposition, the plaintiff argues that a notice of claim was filed, and it is timely. Per the notice of claim, the incident took place on February 4, 2018, making plaintiff's notice of claim and summons and complaint timely. Plaintiff does not address the fact that the incident date in her summons of complaint is August 8, 2017. Plaintiff's counsel argues that since plaintiff testified at her 50-h that she was placed in the apartment by Project Renewal, NYC, and the NYC Department of Homeless Services ("DHS") and that when she complained of mold, representatives from Project Renewal and from Housing Preservation and Development came and indicated that they would investigate, that a duty was created and owed to plaintiff. In the City's reply, they contend that plaintiff is now alleging a special duty was owed to plaintiff and that plaintiff failed to plead a special duty in her summons and complaint and notice of claim.

As an initial matter, the City's motion to dismiss the plaintiff's summons and complaint as untimely, is granted. Plaintiff filed a notice of claim alleging damages from mold exposure on February 4, 2018. However, plaintiff alleged in her summons and complaint, that her incident took place on August 8, 2017. Plaintiff did not seek leave to serve an amended summons and complaint to correct the incident date to February 4, 2018. Plaintiff did not seek leave to serve a late notice of claim for the August 8, 2017 incident date. As a result, plaintiff's summons and complaint alleging an incident date of August 8, 2017, and filed on January 15, 2019, is untimely as it was filed beyond the one year and 90 day statute allowed per GML §50-i (1)(c).

Notwithstanding, even if plaintiff's summons and complaint were timely, plaintiff did not plead and cannot prove a special duty. Per the public duty rule, a plaintiff cannot recover on a theory that a governmental function was breached unless the plaintiff pleads and proves a special duty. (*Valdez v. City of New York*, 18 N.Y.3d 69 [2011]). While plaintiff asserts in her opposition, that the municipal defendants placed her in the apartment and then upon complaints of mold, indicated they would investigate her claim, plaintiff does not allege the requisite elements to establish a cause of action sounding in special duty.

As a result of the foregoing, the Court need not address the City's argument that they did not own, operate, manage, maintain, and/or supervise the subject location.

Accordingly, based on the foregoing, the City's motion granted and the complaint and cross-claims as against the municipal defendants are dismissed.

This constitutes the decision and judgment of the Court.

Dated:

*8/17/2020*

Bronx, New York



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HON. MITCHELL J. DANZIGER, J.S.C.