

Andutal v City of New York

2001 NY Slip Op 30077(U)

October 17, 2001

Sup Ct, NY County

Docket Number: 120487/2000

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

ANA CELIA ANDUTAL

INDEX NO.

120487/00

MOTION DATE

5-17-01

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

C of NY + BANCO POPULAR

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum Decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: Oct. 17, 2001

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

ANA CELIA ANDUTAL,

Plaintiff,

Index No. 120487/2000

-against-

Motion Sequence No.
001

THE CITY OF NEW YORK and BANCO POPULAR,

Defendants.

-----X

JOAN A. MADDEN, J. :

The defendant, the City of New York (hereafter, the "City"), moves, pursuant to CPLR 3025(b), for leave to amend its answer to include the affirmative defense of noncompliance with General Municipal Law § 50-h (hereafter, "GML § 50-h"). If the court grants the City's motion for leave to amend its answer, the City further moves, pursuant to CPLR 3211, for an order dismissing the Complaint of the plaintiff, Ana Celia Andutal, on the ground that the plaintiff failed to comply with GML § 50-h.

Background

On July 13, 1999, the plaintiff sustained physical injuries when she fell on a sidewalk in front of the defendant Banco Popular's building, which is located at 615 West 181st Street in Manhattan. The accident report and the hospital records indicate that the plaintiff has Alzheimer's disease. The accident report also shows that the plaintiff's home attendant, who was with the plaintiff when the accident occurred, gave a description of the

accident to the authorities.

The plaintiff duly filed a Notice of Claim with the Comptroller of the City of New York (hereafter, the "Comptroller"). Subsequently, the Comptroller demanded that, pursuant to GML § 50-h(1), the plaintiff submit to an oral examination concerning her claim (hereafter, the "Hearing").

On December 8, 1999, the plaintiff appeared at the Hearing, escorted by her daughter and her home attendant. Before the plaintiff's testimony was taken, the plaintiff's attorney conferred, off the record, with the plaintiff and her escorts concerning the plaintiff's mental state. Following this discussion, the plaintiff's attorney testified that "it had been brought to [his] attention that the [plaintiff] suffers from Alzheimer's disease," and that he had observed that the plaintiff did not "seem to understand the nature of what is going on, the significance of this hearing or further information concerning this hearing." See, Exh E to City's Notice of Motion, Hearing Transcript, 12/08/1999, at 3. Due to her mental condition, the plaintiff's attorney did not allow the plaintiff to be orally examined, because her testimony would not be "pertinent" or "assured of being [f]actual or of any relevance to this matter." *Id.* at 3-4.

In response, the City's attorney expressly reserved the right to raise the plaintiff's noncompliance with GML § 50-h as a

defense to the plaintiff's claim. The City did not contest the plaintiff's attorney's assessment of his client's mental state, nor did it ask to take the home attendant's testimony.

Thereafter, on or about October 2, 2000, the plaintiff filed this action. The City's Answer, which was filed on October 10, 2000, failed to include the affirmative defense of noncompliance with GML § 50-h.

In April 2001, the City made this motion to amend its complaint to add an affirmative defense of plaintiff's noncompliance with GML § 50-h, and to dismiss the complaint on this ground. Plaintiff counters that the City's motion should be denied, in the interest of justice, because the plaintiff made a good faith effort to comply with the requirements of GML § 50-h, but was unable to testify due to her mental deterioration.

Discussion

The purpose of an initial hearing, pursuant to GML § 50-h, is to allow a municipality an opportunity to "investigate the circumstances surrounding the accident and explore the merits of claim, ... with a view towards settlement." *See, Alouette Fashions, Inc. v Consolidated Edison Co. of New York*, 119 AD2d 481, 487 (1st Dept 1986) *affd* 69 NY2d 786 (1987). Pursuant to GML § 50-h(1), a municipality is entitled to orally examine the claimant before litigation commences. At the hearing, the claimant is put under oath, and the claimant's testimony is

taken. *See*, GML § 50-h(3). The transcript of the claimant's testimony may be read in evidence at trial. *See*, GML § 50-h(4).

Generally, a claimant may not commence an action against a municipality until the claimant has complied with the demand for an examination. *See*, GML § 50-h(5). However, if a plaintiff is unable, due to severe physical or mental disabilities, to testify at such a hearing, the hearing requirement may be waived, and the plaintiff may proceed with the action. *See*, *Twitty v City of New York*, 195 AD2d 354, 355 (1st Dept 1993); *Hur v City of Poughkeepsie*, 71 AD2d 1014 (2d Dept 1979) (a claimant who is psychologically unable to undergo an oral examination, pursuant to GML § 50-h, will not be "required to perform the impossible" in order to institute and maintain her action).

The medical records and the hearing transcript indicate that the plaintiff is suffering from Alzheimer's disease. These records raise an issue as to whether the plaintiff's medical condition is so severe that the oral examination, pursuant to GML § 50(h)(1), should be waived, because the plaintiff would be unable to reasonably and accurately relate the information that is sought by the City.

The City, relying on *Matter of Dickey v City of New York*, (167 AD2d 238 [1st Dept 1990]), argues that the court may not compel the City to waive the hearing, because the Statute of Limitations has run. However, that case is inapposite, because

the First Department held that the petitioners could maintain their action, even though the Statute of Limitations had run, if the trial court waived the hearing requirement. However, the First Department held that the trial court had properly exercised its "discretion" in refusing to compel the City to waive its right to a hearing, since the petitioners had adjourned four previously scheduled hearings, and had failed to appear for the fifth scheduled hearing. *See, id.* at 239.

Unlike the situation in *Dickey*, there is no evidence that the plaintiff knowingly and intentionally sought to evade the hearing requirement, and the City made no effort to refute the allegation that the plaintiff was unable to testify due to the alleged severity of her brain disease.

The courts of this State have been charged with a duty to protect litigants that are "'actually incompetent, but not yet judicially declared as such.'" *Shad v Shad*, 167 AD2d 532, 533 (2d Dept 1990) quoting *Sengstack v Sengstack*, 4 NY2d 502, 509 (1958); *see also, Bryant v Riddle*, 259 AD2d 399 (1st Dept 1999); *Palaganas v D.R.C. Industries, Inc.*, 64 AD2d 594 (1st Dept 1978). Granting the City's motion, without considering whether waiver of the hearing requirement would be appropriate under these circumstances, would constitute a violation of this court's duty to protect such litigants.

Accordingly, the City's motion for leave to amend their

Answer, and upon granting such leave, to dismiss the Complaint, shall be denied, without prejudice. In addition, the court will order that a hearing be conducted to determine whether the plaintiff is incapable of undergoing an oral examination, pursuant to GML § 50-h, ^{and} _n to determine if the hearing requirement should be waived.

The plaintiff's alleged mental disability raises another issue which the court must address. "CPLR 1201 mandates that an adult incapable of adequately prosecuting or defending his or her rights shall appear [in the action] by his or her guardian ad litem." *Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300 (1st Dept 2001). Moreover, "once it [is] made aware of plaintiff's condition, the Supreme Court should ... act[] on its own initiative pursuant to CPLR 1202(a) and appoint[] a guardian ad litem to protect plaintiff's interests." *Id.*

Therefore, the court shall also determine, at the hearing to determine whether the hearing requirement in GML § 50-h shall be waived, whether a guardian ad litem should be appointed to protect the plaintiff's interests in this action. *Shad v Shad*, *supra*, 167 AD2d, at 533 ("where there is a question of fact as to whether a guardian ad litem should be appointed, a hearing must be conducted").

Conclusion

Accordingly, it is

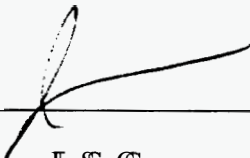
ORDERED that the motion of the defendant City of New York, for an order granting the defendant leave to amend its Answer, and upon the granting of that order, for an order dismissing the Complaint, is denied without prejudice; and it is further

ORDERED that a hearing shall be held on November 15, 2001, at Part 11, in Room 351, 60 Centre Street, New York, NY, at 3:00 p.m., for the purpose of determining whether the plaintiff Ana Celia Andutal suffers from a physical or mental impairment, to such a degree that she is incapable of giving reasonably accurate responses in an oral examination, pursuant to General Municipal Law § 50-h, and also for the purpose of determining whether the plaintiff is incapable of prosecuting or defending her interests in this action, to such a degree that it would be appropriate for the court to appoint a guardian ad litem, pursuant to CPLR 1201, to protect the plaintiff's interests in this action; and it is further

ORDERED that the parties to this action are directed to appear at such hearing, and to present any pertinent evidence or documentation or testimony that is relevant to said proceedings.

Dated: October (7,2001

Enter:



J. S. C.