

**Sierra v New York City Hous. Auth.**

2007 NY Slip Op 33504(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0105834/2007

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**HON. ROLANDO T. ACOSTA**

PRESENT: \_\_\_\_\_

PART 61

Justice  
\_\_\_\_\_

Index Number : 105834/2007

**SIERRA, AHSLEY**

vs.

**HOUSING AUTHORITY**

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 105834-01

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

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

*Motion decided as per  
attached order*

**FILED**

OCT 29 2007

NEW YORK  
COUNTY CLERK'S OFFICE

SO ORDERED  
SO ORDERED

*[Signature]*  
**ROLANDO T. ACOSTA** s.c.  
J.S.C.

Dated: 10/24/07

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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Ashley Sierra, Individually, and as Mother and  
Natural Guardian of Jayden James, an Infant,

Plaintiffs,

– against –

New York City Housing Authority,

Defendants.

**DECISION/ORDER**

Index No. 115927/05

Seq. No. 1

Present:

**Rolando T. Acosta**  
Supreme Court Justice

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The following documents were considered in reviewing defendants' motion for an order pursuant to CPLR 3211 dismissing the complaint:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation &amp; Affidavit</b>	<b>1 (Exhibits A-D)</b>
<b>Notice of Cross-Motion, Affirmation &amp; Affidavit</b>	<b>2</b>
<b>Reply Affirmation</b>	<b>3</b>

Infant plaintiff Jayden James was allegedly burned on the back of his right leg when it came in to contact with an exposed pipe in his bedroom. Defendant NYCHA owned and operated the building. NYCHA issued a Notice of Hearing pursuant to GML §50-h to plaintiffs' counsel (Jacoby & Meyers, LLP) on May 11, 2006, noticing the hearing for June 26, 2006. According to Richard Denham, a paralegal with Herzfeld & Rubin, NYCHA's counsel, he contacted Jacoby & Meyers on June 23, 2006, and was told that new counsel (the Law Offices of Held & Held) would be representing plaintiffs. Denham contacted Held & Held and spoke with a Joanne who told him that Held & Held was not taking the case. Denham then asked Joanne to "have the attorneys who would be taking the case or the pro-se claimants contact me to confirm the hearing." See NYCHA's Exhibit D.

Without any factual support, NYCHA claims that "[a]t plaintiff's request, the statutory hearing that was scheduled for June 26, 2006, was adjourned (see, Exhibit D)." See

Affirmation in Support of Motion at ¶ 7. NYCHA's counsel went on to affirm that "[d]espite the efforts of NYCHA to re-schedule the statutory hearing (see, Exhibit D), plaintiff did not respond. Plaintiffs never sought to arrange for their statutorily-required hearing." *Id.*

According to plaintiff Ashley Sierra (Jayden's mother), she initially retained Jacoby & Meyers and signed many forms. At some point thereafter, she was told by Jacoby & Meyers that her case was turned over to Held & Held. Eventually, after having no contact with Held & Held, she received a letter from Held & Held advising her that it would no longer represent her in the lawsuit. Some time later, she retained present counsel, who commenced the instant action after receiving no responses to his letters to Jacoby & Meyers and Held & Held to avoid the expiration of the one year and ninety days from date of occurrence.

NYCHA now moves to dismiss the complaint based on plaintiffs' failure to comply with GML § 50-h, and plaintiffs cross-move for an order allowing plaintiffs to testify at a 50-h hearing *nunc pro tunc*. Although generally, a plaintiff who has not complied with GML § 50-h(1) is precluded from commencing an action against a municipality, Arcila v. Incorporated Village of Freeport, 231 A.D.2d 660 (2<sup>nd</sup> Dept. 1996), compliance with section 50-h (1) has been excused in exceptional circumstances. *see, e.g., Twitty v City of New York*, 195 AD2d 354 (1<sup>st</sup> Dept. 1993)(claimant was extremely ill and disabled). Here, the Court finds exceptional circumstances. There is absolutely no evidence in the record that plaintiffs even knew that a 50-h hearing had been scheduled. Rather, her case was bounced from one law firm to another without her knowledge. And NYCHA's assertions to the contrary, there is no indication that plaintiffs or their counsel requested an adjournment. Rather, what is clear is that a paralegal for the firm representing NYCHA asked a person named Joanne at Held & Held to inform plaintiffs' new counsel or plaintiff Sierra to call NYCHA to confirm the hearing date. Whether Joanne actually took it upon herself to do so, however, is not reflected in the record. Under these circumstances, and given no prejudice to NYCHA, plaintiffs are granted leave to testify at a 50-h hearing to be scheduled within 30 days of this order. Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs' cross-motion for an order allowing plaintiffs to testify at a 50-h hearing *nunc pro tunc* is granted to the extent that a 50-h hearing be held within 30 days of this order; and it is further

ORDERED that a Preliminary Conference is scheduled for December 13, 2007 in Part 61 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: October 24, 2007

ENTER

**SO ORDERED**



Rolando T. Acosta, J.S.C.  
**ROLANDO T. ACOSTA**  
J.S.C.

**FILED**  
OCT 29 2007  
NEW YORK  
COUNTY CLERK'S OFFICE