

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

2008 NY Slip Op 30204(U)

January 23, 2008

Supreme Court, New York County

Docket Number: 0111573/2007

Judge: Karen Smith

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: SMITH  
Justice

PART 62

CRYSTAL OLIVER

- v -

NYC HOUSING AUTHORITY

INDEX NO. 111573/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion ~~to~~ for leave to file an amended notice of claim and a late notice of claim

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2-3

7-8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is granted in part and denied in part in accordance with the annexed memorandum decision, order and judgment

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

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/23/08

KSS  
**HON. KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
CRYSTAL OLIVER,

Petitioner,  
-against-

Index No.: 111573/2007  
Motion Seq.: 001  
Motion Date: 12/13/2007

THE NEW YORK CITY HOUSING AUTHORITY  
and THE CITY OF NEW YORK,

Respondent

DECISION, ORDER  
AND JUDGMENT

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

-----  
PRESENT: KAREN S. SMITH, J.S.C.:

Petitioner's application for leave to serve a late Notice of Claim and to amend the Notice of claim she has already filed is granted in part and denied in part.

Petitioner ("Oliver") alleges that, on or about March 8, 2007, she was the victim of an assault by her estranged husband. Oliver further alleges the assault occurred as a result of the negligence of the New York City Housing Authority ("NYCHA") and the New York City Police Department ("NYCPD"). Oliver brought this special proceeding<sup>1</sup> seeking permission to amend the Notice of Claim she has already served and filed with respect to NYCHA and to serve and file a late Notice of Claim against the City of New York (hereafter referred to as the "CNY").

With respect to NYCHA, Oliver's original notice of claim (filed June 4, 2007) alleged, *inter alia*, her assailant had been able to gain access to her apartment building because the

---

<sup>1</sup> Although Petitioner's papers are in the form of a motion by Order to Show Cause, proper procedure dictates that this application be brought as a petition in a special proceeding. The court is exercising discretion to overlook the form of the papers in favor of the substance of the application as there has been no allegation or any indication of any potential prejudice to the opposing parties.

building intercom system was broken and the front door to her apartment building "...did not lock...". Additionally, Oliver's Notice of Claim alleges NYCHA's negligence included "...failing to provide a secure building, including a functional intercom system and locked front door, in the lobby... in failing to inspect, maintain and repair the defective front entrance door to said premises..." (see Exhibit 4 to Oliver's moving papers). At the current time, Oliver seeks to amend the Notice of Claim she filed with NYCHA to add facts Oliver alleges came to light after she had filed the original Notice of Claim. Oliver now alleges tape had been affixed to the door so the door lock mechanism did not function and her attorney uncovered this information when he visited Oliver's apartment building on or about June 8, 2007. NYCHA opposes this branch of Oliver's motion contending the allegations Oliver seeks to add constitute a new theory of liability. NYCHA argues it will be prejudiced because, on or about March 26, 2007, NYCHA sent an investigator to the building who investigated whether the door was malfunctioning but not whether there was any tape over the door lock mechanism. Furthermore, NYCHA argues the condition of the door lock as observed by Oliver's counsel on or about June 8, 2007 is irrelevant because it is too remote in time to the date of Oliver's assault.

The facts Oliver seeks to add to her Notice of Claim do not constitute a new theory of liability. The overriding allegation remains that NYCHA was negligent because the failure of the entrance door at Oliver's apartment building to lock and provide security allowed Oliver's assailant to gain unauthorized access to Oliver's building and that NYCHA's negligence thus enabled the attack upon Oliver. NYCHA's effort to categorize the alleged defect identified in Oliver's original Notice of Claim solely as a mechanical defect is not borne out by the language of the original Notice of Claim. NYCHA cannot now be heard to complain because it chose to

limit the scope of its investigation to mechanical issues rather than addressing the allegations of the Notice of Claim which stated that the door "... did not lock ..." and that NYCHA failed to provide "...a locked front door...".

General Municipal Law §50-e(6) specifically grants the court discretion to allow the correction of mistakes in a Notice of Claim; "...provided it shall appear that the other party was not prejudiced thereby." In the instant matter, NYCHA argues authorizing the amendment of Oliver's Notice of Claim will prejudice NYCHA because its investigator only conducted an investigation into whether the door mechanically malfunctioned and not whether the door was deliberately disabled at the time of Oliver's injury. However; "[t]he test of the sufficiency of a notice to avoid prejudice to a municipality as stated in *Widger v. Central School Dist.* (18 N Y 2d 646) and *Rivero v. City of New York* (290 N. Y. 204) is whether the notice sufficiently informed the municipality of the nature of the claim, and of the time when, the place where, and the manner in which the claim arose so as to enable the municipality to investigate the claim of negligence." (*In the Matter of Theodore W. Powell et al v Town of Gates*, 36 AD 2d 220 [4<sup>th</sup> Dept, 1971]). Oliver's original Notice of Claim broadly described the fact that the security door to the apartment building did not lock. Amending the Notice of Claim to assert a reason the door failed to lock merely adds specificity to Oliver's claim. Under similar circumstances, amendment has been allowed (cf: *Yerdon et al v Baldwinsville Academy et al*, 39 AD2d 824 [4<sup>th</sup> Dept, 1972]). Additionally; "...where the condition which allegedly caused the accident is extremely transitory, such as snow and ice, the defendants may be hard pressed to demonstrate that they have been prejudiced from carrying out a physical inspection ... as the condition would undoubtedly have changed or disappeared by the time a notice of claim was filed and an

inspection conducted” (*Hoffman v. New York City Housing Authority et al*, 187 AD2d 334 [1<sup>st</sup> Dept, 1992]). Oliver’s allegation that the lock was disabled by the use of tape to cover its mechanism is, like an allegation of the existence of snow or ice, an extremely transitory condition. Thus, NYCHA’s claim there was no tape covering the door’s locking mechanism on March 26, 2007 is insufficient to demonstrate that NYCHA would be prejudiced by the amendment of Oliver’s Notice of Claim. Accordingly, this branch of Oliver’s application is granted.

The branch of Oliver’s application seeking leave to file a late Notice of Claim as against CNY is denied. “A motion to serve a late notice of claim is appropriately denied where the claim is ‘patently meritless’” (*Williams v City of New York*, 290 AD2d 354 [1<sup>st</sup> Dept, 2002], internal citations omitted). Oliver alleges that the NYCPD owed Oliver a “special duty” to protect her from her estranged husband. Oliver bases her contention upon the allegations that: 1) she had an order of protection against her estranged husband, 2) Oliver’s estranged husband had broken into Oliver’s apartment on March 4, 2007, 3) at the time of the break in, the NYCPD officers who responded to the scene advised Oliver that they would tell NYCHA to replace Oliver’s door lock on March 5, 2007, 4) Oliver waited in her apartment all day March 5, 2007 for the promised locksmith to appear, 5) the NYCPD officers failed to contact NYCHA and 6) Oliver would not have been in the hallway to her apartment building when she was attacked on March 8, 2007 if NYCHA had replaced her door lock on March 5, 2007.

Although municipalities are generally immune from tort liability for the discretionary acts of their employees, an exception to that rule exists where a “special relationship” has been established between the plaintiff and the municipality.

When a claim is made that a municipality has negligently exercised a governmental function, liability turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public ... Such a duty is found when a special relationship exists between the municipality and an individual or class of persons, warranting the imposition of a duty to use reasonable care for those persons' benefit ... This principle operates to impose liability where the municipality has violated a duty commanded by a statute enacted for the special benefit of particular persons ... where the municipality has voluntarily assumed a duty, the proper exercise of which was justifiably relied upon by persons benefitted thereby ... or where it assumes positive direction and control under circumstances in which a known, blatant and dangerous safety violation exists. (*Garrett v Holiday Inns, Inc. et al*, 58 NY2d 253, 261-262 [1983], internal citations omitted)

In the instant matter, assuming *arguendo*, the facts are as Oliver alleges them to be, the NYCPD officers assumed no special duty with respect to the security door lock at Oliver's apartment building. As Oliver was attacked in the hallway of her apartment building rather than in her apartment itself, her attack is unrelated to any special duty Oliver alleges the NYCPD officers assumed to her. Oliver's allegation that she would not have been in the hallway at the time of the attack if the officers had directed NYCHA to replace her apartment door lock as they had promised is immaterial. Any relationship between the allegation that, on March 5, 2007, Oliver waited all day for a locksmith who never appeared and the time that Oliver happened to be in the hallway of her apartment building on March 8, 2007 is entirely speculative. This is particularly true because Oliver has alleged that the malfunctioning security door to the apartment building allowed unauthorized persons unfettered access to the building. Thus, there is no causal relationship between any special duty allegedly assumed by the NYCPD to Oliver and her injuries. As a result, the claim she now seeks to interpose against NYC and the NYCPD is patently meritless and her application for leave to file a late notice of claim against them is denied. Accordingly, it is;

ORDERED, ADJUDGED AND DECREED that Oliver's petition is granted to the extent of granting Oliver leave to amend the Notice of Claim she previously filed with respect to NYCHA to the form provided as "Exhibit 1" and said Notice of Claim shall be deemed served timely and amended *nunc pro tunc* provided it is served upon NYCHA's counsel, together with a copy of this order and notice of entry hereof within thirty days of the date of the entry hereof, and it is further;

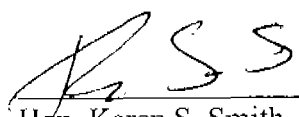
ORDERED, ADJUDGED AND DECREED that Oliver's petition is denied to the extent that it seeks leave to file a late notice of claim against CNY

The foregoing constitutes the decision, order and judgment of this court. Petitioner is advised that this is a final disposition of the special proceeding bearing the index number above and any further proceedings in this matter will require the purchase of a new index number.

Dated: January 3, 2008

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based on this judgment. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).

ENTER:



Hon. Karen S. Smith, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based on this judgment. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).