

Dannel v New York City Hous. Auth.

2008 NY Slip Op 33620(U)

January 2, 2008

Supreme Court, New York County

Docket Number: 109331-2007

Judge: Carol Robinson Edmead

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

PRESENT: HON. CAROL EDNEAD

PART 35

Justice

Index Number : 109331/2007

DANNEL, PHAIMA

vs

N.Y.CITY HOUSING AUTHORITY

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE 12/19/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

JAN 07 2008

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant New York City Housing Authority to dismiss the summons and complaint is denied, without prejudice; and it is further

ORDERED that the summons and complaint is dismissed unless plaintiff appears for a GML §50-h hearing within 30 days of the date of service of this order; and it is further

ORDERED that plaintiff shall tender \$298.50 to counsel for NYCHA for fees associated with plaintiff's failure to appear on October 5, 2006, October 25, 2006, and November 21, 2006, within 30 days of service the date of this order; and it is further

ORDERED that provided plaintiff complies with this order, the parties shall appear for a preliminary conference on February 19, 2008, 2:15 p.m.; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/2/08


HON. CAROL EDNEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
PHAIMA DANDEL,

Plaintiff,

Index No. 109331-2007

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM

In this personal injury action, the defendant, New York City Housing Authority (“NYCHA”) moves pursuant to CPLR 3211, Public Housing Law §157 and General Municipal Law §50-h(5) to dismiss the complaint of the plaintiff, Phaima Dannel (“plaintiff”) for failing to appear for a statutory hearing prior to the commencement of the action.

Plaintiff allegedly tripped and fell inside of an apartment located in one of NYCHA’s housing developments. After receiving plaintiff’s notice of claim, NYCHA served a “Notice of Hearing Pursuant to GML §50-h,” for July 19, 2006. On July 7, 2006, plaintiff’s then counsel notified NYCHA that he had closed the file, returned same to the plaintiff, and that “we” would not appear at the hearing. On the same date, plaintiff served another notice of claim, which indicated that he was represented by new counsel. Thus, NYCHA served another Notice of Hearing, this time for September 20, 2006. Both counsel later agreed to adjourn the hearing to October 5, 2006. Plaintiff’s counsel later confirmed the hearing, and NYCHA scheduled a reporter. However, without explanation, plaintiff failed to appear at the hearing and NYCHA was charged a “no show” fee by the court reporting agency.

At plaintiff's request, the hearing was rescheduled for October 25, 2006, which plaintiff's counsel later confirmed on October 24th. However, 10 minutes before the hearing was to begin on October 25th, plaintiff's counsel notified NYCHA that plaintiff would not be appearing. NYCHA was charged another "no show" fee and a fee for putting a statement on the record memorializing plaintiff's nonappearance.

To accommodate the plaintiff, NYCHA rescheduled the hearing for November 21, 2006. However, despite receiving confirmation from plaintiff's counsel, plaintiff failed to appear as scheduled, resulting in another "no show" fee assessed against NYCHA.

When plaintiff sought another adjournment, NYCHA denied the request based on the plaintiff's previous defaults. NYCHA also advised that it would seek to dismiss any complaint subsequently filed by the plaintiff.

NYCHA argues that caselaw holds that until plaintiff has complied with GML §50-h, he is precluded from commencing an action against NYCHA. Thus, argues NYCHA, dismissal of the complaint is warranted, given the plaintiff's failure to comply with GML §50-h prior to commencement of the action. NYCHA contends that Notices of Hearing were duly served, thereby entitling NYCHA to conduct the hearing, and there has been no claim that the Notices served were defective. It is argued that plaintiff's defaults significantly prejudiced NYCHA's ability to promptly investigate the facts surrounding plaintiff's claim and to hold a physical of the plaintiff.

In opposition, plaintiff contends that the July 19, 2006 hearing was adjourned because plaintiff's counsel no longer represented him. The September 20th hearing was adjourned by NYCHA because it did not have an attorney to cover the hearing.

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The plaintiff failed to appear for the October 5th hearing because he was hospitalized on that date until October 13th. Further, plaintiff contends that his substance abuse condition made it impossible to appear on November 21st, which was a date selected by NYCHA at its convenience; NYCHA never inquired as to whether plaintiff was available for this date.

Plaintiff contends that contrary to NYCHA's contention, he attempted to reschedule the November 21st hearing. On November 27th, he requested that the November 21st hearing be rescheduled. It is argued that dismissal of the complaint is unwarranted. NYCHA never served another demand for a hearing, plaintiff was never unwilling to appear for a hearing, and having received his treatment, plaintiff is now ready and able to appear for a hearing. GML §50-h(5) provides that if a hearing is not conducted within 90 days of service of the demand, the claimant may commence the action. Since the statute of limitations is not tolled by a pending hearing, plaintiff had to file the summons and complaint. Nor is NYCHA prejudiced by the delay in conducting the hearing. Plaintiff's counsel states that due to his office's inability to contact the plaintiff the day before the hearing, said hearing was confirmed. However, when plaintiff failed to appear at his office the morning of said hearing, then, at that point, NYCHA was contacted to reschedule the hearing.

In reply, NYCHA argues that plaintiff's explanation for his failures to appear is a complete *non sequitur*. Further, it was irresponsible and inexplicable for plaintiff's counsel to continue to confirm and then reschedule hearings without ever contacting the plaintiff. This is not a case where plaintiff made timely and good faith requests for adjournments. At best, plaintiff's counsel rescheduled hearings with no basis for believing that the plaintiff would

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actually appear. At worst, plaintiff's counsel rescheduled the hearings with plaintiff's consent, which would belie the claim of incapacity.

Further, plaintiff's failure to provide any documentation to support his claimed incapacity should result in dismissal. The documentation reflecting plaintiff's treatment on October 5th is unverified and fails to explain the other dates plaintiff's missed.

Analysis

Public Housing Law §157 provides:

The authority may require any claimant hereunder to be examined as provided in section fifty-h of the general municipal law, and *all the provisions of such section shall apply to such examinations.* (Emphasis added).

GML Section 50-h grants municipalities the right to demand an examination of the claimant when a notice of claim is filed against it (GML §50-h(1)). GML 50-h(5) provides that

where a demand for examination has been served . . . no action shall be commenced against the city . . . unless the claimant has duly complied with such demand for examination. . . . If such examination is not conducted within ninety days of service of the demand, the claimant may commence the action. The action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, the city . . . shall reschedule the hearing for the earliest possible date available.

Because a claimant cannot commence an action until first complying with a demand for an examination (unless the municipality fails to schedule the examination within 90 days), the requirement that a claimant comply with a demand for examination made pursuant to GML § 50-h is a condition precedent to commencing an action against the municipality. Thus, once a demand for examination has been served, no action shall be commenced unless the claimant has complied with the demand for examination (*Alouette Fashions v Consolidated Edison, Co.*, 119

AD2d 481 [1st Dept 1986], *affd.* 69 NY2d 787 [1987]). The law is well established that, until the claimant has complied with GML§ 50-h(1), the claimant is precluded from commencing an action against a municipality (*La Vigna v County of Westchester*, 160 AD2d 564, 554 NYS2d 1014 [1st Dept 1990]).

Plaintiff's failure to comply with demands for a hearing after being given several opportunities to do so has warranted dismissal of the complaint (*Wilson v City of New York*, 254 AD2d 121 [1st Dept 1998]; *Best v City of New York*, 97 AD2d 389, 468 NYS2d 7 [1st Dept 1983] [dismissing complaint where plaintiff received an appointment date and then four separate adjournments, and on the last date, failed to show up; "[r]egardless of whether or not she had a valid reason for not appearing, she neglected to inform the city of her inability to attend or to seek a rescheduled date]; *cf.* denying dismissal of the complaint, where plaintiff provided a reasonable excuse for failing to appear at the hearing, and did not repeatedly schedule the examinations and then fail to appear]).

In the instant case, NYCHA served a demand for a hearing pursuant to GML §50-h, and relies on Public Housing Law §157, which specifically incorporates GML §50-h, and "*all the provisions of such section*"

Of the five adjournments of plaintiff's hearing, plaintiff failed to appear for three: October 5th, October 25th, and November 21st, without advising NYCHA beforehand that plaintiff would be unable to appear. Although plaintiff was apparently being treated for his substance abuse on October 5th, there is no indication that plaintiff provided notice to NYCHA prior to October 5th of his inability to appear on that date. Notably, while plaintiff submits documentary

support for his claim that he was receiving treatment on the date of his October 5th hearing, there is no such support explaining plaintiff's failure to appear on October 25th or November 21st.

Further, while plaintiff states that NYCHA selected the November 21st date at its convenience, there is no indication that plaintiff offered any alternative dates prior to the hearing. Instead, plaintiff sent a letter on November 27th, after his failure to appear on November 21st, 2006, seeking to reschedule the hearing.

However, the record indicates that plaintiff was being treated on one of the scheduled dates, and that plaintiff's condition prevented him from appearing on November 21st. Under the circumstances, dismissal of the complaint is warranted in the event plaintiff fails to appear for a hearing pursuant to this Order.

Based on the foregoing, it is hereby

ORDERED that the motion by defendant New York City Housing Authority to dismiss the summons and complaint is denied, without prejudice; and it is further

ORDERED that the summons and complaint is dismissed unless plaintiff appears for a GML §50-h hearing within 30 days of the date of service of this order; and it is further

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