

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

2009 NY Slip Op 30165(U)

January 23, 2009

Supreme Court, New York County

Docket Number: 103820/07

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 103820/2007

HOLLIMAN, DONNELL

vs

HOUSING AUTHORITY

Sequence Number : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 9.16.08

MOTION SEQ. NO. \_\_\_\_\_

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

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 denied in accordance  
with the accompanying memorandum opinion.

**FILED**  
JAN 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/22/09

[Signature] J.S.C.

**WALTER B. TOLUB**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 15

-----X  
Donnell Holliman,

Plaintiff,

-against-

Index No.: 103820/07

New York City Housing Authority,

Defendant.

-----X

Walter Tolub, J:

In this personal injury action arising out of, and in connection with, a residential apartment fire, defendant New York City Housing Authority (NYCHA) moves, pursuant to CPLR 3212, seeking an order granting summary judgment dismissal of the complaint on the issue of liability. In support of its motion, NYCHA asserts that: (1) the complained-of negligence cause of action is devoid of a basis in fact and law, and (2) the complained-of proximate causal connection has been severed by intervening and superseding conduct.

NYCHA also moves, pursuant to General Municipal law (GML)§ 50-c (6), seeking an order striking certain claims in the Bill of Particulars not set forth in the Notice of Claim. In support of its motion, NYCHA asserts that: (1) the newly asserted theories of liability are devoid of a basis in fact and law, and (2) the claims alleging “trap-like” conditions and an alleged malfunctioning stove/oven/ignition pilot light contained in the Verified Bill of Particulars and Second Supplemental Verified Bill of Particulars of plaintiff, Donnell Holliman (Holliman), constitute newly asserted, statutorily barred theories of liability.

Holliman, cross-moves, pursuant to GML § 50-c (6), seeking leave to correct the Notice

of Claim so as to more specifically set forth the complained-of “trap-like” conditions, as well as the malfunctioning stove/oven/ignition pilot light. In support of her application, Holliman argues that, rather than asserting new theories of liability, the requested amendments merely constitute a permissive correction of omissions in the Notice of Claim.

Holliman and various members of her family leased and occupied a NYCHA residential apartment (Apartment). NYCHA supplied and installed the requisite smoke detector/fire alarm (alarm) in the Apartment. On a few previous occasions, NYCHA was able to satisfy Holliman’s complaints concerning the malfunctioning of the alarm by either replacing the batteries or the alarm itself. In response to Holliman’s last complaint, preceding the injury-causing fire, NYCHA replaced the alarm. Thereafter, the inner hallway alarm was occasionally activated when someone was cooking in the kitchen.

On November 7, 2006, when no one was in the kitchen, a fire broke out on the stove/oven. One of the Apartment occupants became alerted to the fire because of a burning/smoky odor, rather than the alarm in the Apartment. The alarm failed to function. It was not activated by the fire. After Holliman unsuccessfully tried to put out the fire, she, as well as all of the other occupants were able to leave the Apartment and reach an area of safety without sustaining any physical injuries. Holliman, however, voluntarily re-entered the Apartment and once again tried to put out the still-burning kitchen fire. While doing so, Holliman sustained a number of serious burn injuries.

Thereafter, Holliman timely filed the statutory Notice of Claim, wherein she asserts that “the claim arose when claimant sustained burns . . . **when a fire occurred in the aforementioned apartment due to a faulty/broken smoke alarm**” (Notice of Claim, ¶ 4,

emphasis added). There is no mention whatsoever of the kitchen area of the Apartment. A GML §50-h hearing (Hearing) was conducted a few days after the requisite 30 days for NYCHA to settle her claim. During the Hearing, Holliman testified that the fire originated on the back burner of the stove, which she had turned off about an hour earlier when she had finished cooking (50-h, at 18). Holliman also testified that she saw flames shooting from the burner and spreading to the gas line (50-h, at 23 - 24). Holliman further testified that from the summer of 2006 until the time of the fire, she had notified NYCHA several times of problems with the pilot light failing to ignite and start the burner (50-h, at 37). NYCHA's maintenance, as well as apartment inspection, personnel previously visited the Apartment either knowing, or then advised, of the complained-of problem with the stove burner (50-h, at 42).

Shortly after the 50-h hearing, Holliman commenced this action. Among other contentions, NYCHA's Verified Answer asserts a number of defenses, including, but not limited to, Holliman's culpable conduct, assumption of the risk, and intervening and superseding acts. Holliman subsequently served her Verified Bill of Particulars, asserting for the first time that both the non-functioning alarm, as well as the malfunctioning stove pilot light subjected her to an unreasonable risk due to the dangerous and hazardous "trap-like" conditions existing at the time of the fire.

The instant motions and cross motion ensued.

GML § 50-e (6) provides that "[a]t any time after the service of a notice of claim and at any stage of an action . . . , a mistake, omission, irregularity or defect made in good faith in the notice of claim . . . not pertaining to the manner or time of service thereof, **may be corrected, supplied** or disregarded, as the case may be, **in the discretion of the court**, provided it shall

appear that the **other party was not prejudiced thereby**" (emphasis added).

Holliman argues that her proposed amended Notice of Claim satisfies the requirements of GML § 50-e (6) in that the additional information constitutes nothing more than correcting/supplying an "omission". Holliman also argues that the information set forth in the Notice of Claim was sufficient to have placed NYCHA on notice, as well as to enable it to promptly and adequately investigate the cause(s) of the complained of fire itself, and the asserted claims of negligence associated with the Apartment kitchen fire. As such, Holliman concludes that NYCHA was not prejudiced, in that the kitchen stove/oven owned and maintained by NYCHA, was not only inspected by NYCHA the day after the fire, but is still connected in Holliman's Apartment.

In response, NYCHA, inter alia, asserts that Holliman's proposed "amendment" is barred by the applicable statute of limitation, in that, rather than permissively correcting an "omission", the "amendment" it impermissibly asserts new theories of liability (GML §50-e [6]). As such, NYCHA contends that Holliman's cross motion is improper, thereby rendering the assertion of any new theories of liability barred by the applicable one year and 90 day statute of limitations (Public Housing Law § 157 [2] and GML § 50-e). Upon denial of the cross motion, Holliman would be statutorily precluded from further seeking relief upon her post-Notice of Claim assertions.

Upon review of the facts and circumstances, together with the applicable law, Holliman's cross motion to amend the Notice of Claim is granted in all respects.

It is improbable, if not impossible, for a battery-powered alarm located in an adjoining hallway of a kitchen to cause a fire. However, it is probable, if not likely, that valuable time was

wasted because a faulty, non-functioning alarm did not warn the occupants of a dangerous/risky fire-related situation. In this case, one of the occupants became alerted to the situation because she smelled smoke/fire, and proceeded to warn the other occupants. No doubt the resulting delay increased the danger and risk of being harmed. Even the difference in time of signaling the existence of a dangerous/risky fire-related condition between that of a working alarm and that of a person's (wrong place, right time) olfactory senses could be critical.

As to the source of the complained-of fire, the Notice of Claim reasonably implicates the kitchen, and quite probably either the oven/stove or some other electrical appliance/fixture. As such, and as attested to within the papers presently before the court, NYCHA in its efforts to timely evaluate the cause and effect of the fire, promptly investigated the kitchen and its contents. Upon such an investigation, NYCHA concluded that the fire had started in the kitchen due to the stove.

In view of the foregoing, Holliman's proposed amendments appropriately correct "omissions," which, rather than prejudice NYCHA, provide a clearer understanding of the already, and still available, inspected and evaluated complained-of faulty, malfunctioning alarm and kitchen stove/oven pilot light burner igniter that placed Holliman, as well as the other Apartment occupants, in a trap-like, dangerous and risky fire-related situation.

As to NYCHA's summary judgment motion, such relief is inapplicable in that various material issues of fact exist that cannot be resolved upon the papers presently before the court and require a plenary trial for proper disposition (*Creighton v Milbauer*, 191 AD2d 162, 165 [1<sup>st</sup> Dept 1993]). Such issues include questions of proximate cause, culpable conduct, implied assumption of risk, and intervening and superseding conduct. The function of the court upon a

motion for summary judgment is issue-finding and not issue-determination (*id.*).

Accordingly, it is

**ORDERED** that the cross motion by plaintiff, Donnell Holliman, seeking leave to amend the Notice of Claim is granted; and it is further

**ORDERED** that the motion for summary judgment by defendant, New York City Housing Authority, is denied; and it is further

**ORDERED** that Holliman's original Notice of Claim be deemed amended to the fullest extent sought herein, and it is further


**ORDERED** that the parties proceed with the prosecution and defense of this action in an appropriate and timely manner.

Counsel for the parties are directed to appear in IA Part 15, Room 335, 60 Centre Street, New York, New York on March 13, 2009 at 11:00 a.m for a Pre-Trial Conference in this matter.

This constitutes the decision and order of the court.

Dated: 1/28/09

ENTER:

  
\_\_\_\_\_  
Hon. Walter B. Tolub, J.S.C.