

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

2009 NY Slip Op 32866(U)

December 8, 2009

Supreme Court, Richmond County

Docket Number: 100761/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

**Index No. 100761/09  
Motion No.: 1**

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**CURTIS OLIVER**

*Plaintiff*

*against*

**NEW YORK CITY HOUSING AUTHORITY**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of the following motion to dismiss

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, New York City Housing Authority (“NYCHA”), has moved to dismiss the plaintiff Curtis Oliver’s (“Mr. Oliver”) cause of action under New York Civil Practice Law and Rules (“CPLR”) § 3211,<sup>1</sup> on the grounds that the plaintiff failed to comply with General Municipal Law (“GML”) § 50-h<sup>2</sup> and Public Housing Law (“PHL”) § 157<sup>3</sup>. The motion is granted in so far as dismissal is conditionally granted if plaintiff fails to make and keep an oral and physical examination as defendant requires by January 15, 2010. Additionally, the plaintiff is required to first pay costs of \$217.00 to defendant, to schedule another such examination as required by the defendant NYCHA, and do so at a time mutually convenient to the defendant and the plaintiff. The plaintiff has until January 28, 2010 to submit proof of compliance.

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<sup>1</sup>CPLR § 3211 (a) 3.

<sup>2</sup>GML § 50-h (1).

<sup>3</sup>PHL § 157 (2).

### Facts

On October 26, 2008, Mr. Oliver alleges he slipped and fell on the staircase at 208 Lockman Avenue, Staten Island, New York, premises under the ownership and management of the defendant NYCHA. Mr. Oliver filed a notice of claim on November 20, 2008. NYCHA filed a Notice of Hearing and Physical examination on January 28, 2009. The initial hearing and examination was adjourned to March 9, 2009 on request of Mr. Oliver. Both the plaintiff and the defendant consented and another examination was scheduled on April 16, 2009. At the appointed time on April 16, 2009, the plaintiff failed to appear despite the presence of the defendant and a court reporter. The court reporter billed the defendant \$108.50. Counsels for the plaintiff and the defendant made another appointment for examination on May 14, 2009. The plaintiff failed to appear although NYCHA counsel and court reporter were present. Once again, the court reporter billed the defendant \$108.50. Mr. Oliver was scheduled again for examination on June 19, 2009. The plaintiff's counsel notified the defendant's prior counsel to the time of examination that the plaintiff would not be available and again requested an adjournment. The defendant moved to dismiss on July 2, 2009. The plaintiff attempted to schedule another examination, but the defendant declined to do so pending the results of this motion.

Prior to complying with examination as required by PHL § 157 and GML § 50-h, the plaintiff served a Summons and Complaint against NYCHA dated November 20, 2008. Since this was served before its time, mutual agreement was reached to answer the Summons and Complaint May 18, 2009. A subsequent extension of time was granted until June 22, 2009. An answer was served on that last date.<sup>4</sup>

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<sup>4</sup>Defendant NYCHA, Notice of Motion, Exhibit G.

## Discussion

### Motion for Dismissal of the Action

Whenever a notice of claim is filed against a city or a city agency, the city or its agency has the right to demand an examination of the claimant.<sup>5</sup> The examination may consist of oral questions, or be both oral questions and physical examination.<sup>6</sup> The Public Housing Law incorporates the requirement of GML § 50-h, as a requirement for examination following personal injury sustained as a result of negligence caused by an authority.<sup>7</sup> When examination is requested, a plaintiff's compliance with a request for examination under GML § 50-h is a condition precedent<sup>8</sup> to bringing any action against a community or its agencies.<sup>9</sup> NYCHA is specifically included in this requirement.<sup>10</sup> If the plaintiff fails to comply, a "sufficient reason" or "exceptional circumstances" may be interposed to excuse compliance.<sup>11</sup> Excuses for failure to comply with the requirement for compliance have been rarely granted.<sup>12</sup>

In one motion for dismissal decided by the Appellate Division, Second Department, a plaintiff in a wrongful death action caused seven adjournments of hearings required by

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<sup>5</sup>GML § 50-h (1).

<sup>6</sup>*Id.*

<sup>7</sup>PHL § 157 (2).

<sup>8</sup>*Campbell v City of N.Y.*, 4 NY 3d 200, 201 [2005].

<sup>9</sup>*Steenbuck v. Sklarow*, 63 AD 3d 823, 824 [2d Dept 2009]; *and Misek-Falkoff v MTA*, 44 AD 3d 629 [2d Dept 2007].

<sup>10</sup>*Wilson v. N.Y. City Hous. Auth.*, 15 AD 3d 572, 573 [2d Dept 2005].

<sup>11</sup>*Misek-Falkoff v MTA*, 44 AD 3d at 629.

<sup>12</sup>*For examples see Hur v. City of Poughkeepsie*, 71 AD 2d 1014 [2d Dept 1999]; *and Twitty v City of N.Y.*, 195 AD 2d 354 [1st Dept 1993].

GML 50-h.<sup>13</sup> The court dismissed the complaint, but on other grounds.<sup>14</sup> In another such motion for dismissal, the Appellate Division, Second Department dismissed a complaint “because the plaintiff failed to comply with the defendants’ demand for an examination pursuant to *General Municipal Law § 50-h (5)* before commencing the action.”<sup>15</sup> Six adjournments of GML § 50-h examinations led to dismissal in yet another action.<sup>16</sup> In that action, the plaintiff had requested adjournments or failed to appear and it was not possible to schedule another examination before expiration of one year and 90 days.<sup>17</sup> In another Appellate Division, Second Department decision on a motion to dismiss based upon failure to appear at GML § 50-h examinations, adjourning an examination “multiple times at the plaintiff’s request” was adequate to permit dismissal.<sup>18</sup> Therefore, dismissal upon grounds of failure to attend GML § 50-h examinations is discretionary to the court, in so far as the number of scheduled examinations missed that may justify dismissal.

In this instant action, there have been two adjournments of examinations at the request of the plaintiff. It has been noted that the reason for these adjournments was that plaintiff’s counsel was unable to contact Mr. Oliver. There were an additional two examinations at which the plaintiff and plaintiff’s counsel did not attend and for which no advance notice was given of their absence. This Court declares that an inability to contact a plaintiff client is not “sufficient reason” or “exceptional circumstances” to justify failing to keep two scheduled appointments for examination. Failing to appear without any attempt to notify opposing counsel of an intent not to keep appointments for examination is not proper, nor are failures to keep appointments for

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<sup>13</sup>*Arcila v. Inc. Vill. of Freeport*, 231 AD 2d 660, 661 [2d Dept 1996].

<sup>14</sup>*Id.* at 661.

<sup>15</sup>*Asaro v Gilpin*, 289 AD 2d 429 [2d Dept 2001].

<sup>16</sup>*Pelekanos v. City of N.Y.*, 264 AD 2d 446 [2d Dept 1999].

<sup>17</sup>*Id.* at 446-7.

<sup>18</sup>*Patterson v Ford*, 255 AD 2d 373 [2d Dept 1998]; *see also for unspecified number of failures to appear* *McDaniel v City of Buffalo*, 291 AD 2d 826 [4th Dept 2002].

examination proper on the grounds that the individual client could not be reached.

Nonetheless, it is a longstanding principle that a “case should be tried on its merits”.<sup>19</sup> Accordingly, defendant’s motion is granted to the extent that the plaintiff Curtis Oliver must schedule a GML § 50-h hearing (alternatively designated a PHL § 157 hearing) by December 30, 2009 and must appear at the hearing by January 24, 2010 or the plaintiff’s complaint is struck.

### **Sanctions and Costs**

At the time of an examination under GML § 50-h, if a party wilfully fails to disclose information which the court finds ought to have been disclosed, a court may make such orders as are just.<sup>20</sup> When an infant was not produced for an examination pursuant to GML § 50-h, CPLR § 3126 was invoked to dismiss the action.<sup>21</sup> The Appellate Division, Second Department awarded a penalty of \$10,000 to be paid to the plaintiffs when a defendant hospital’s failure to comply was extensive, continuing, and wilful, and where the proffered excuses were unsatisfactory.<sup>22</sup>

Un-explained and un-excused absences from scheduled appointments place burdens on the opposing party, including monetary costs. In this action, no satisfactory explanations for failure to keep the scheduled appointments are offered. The Court finds it is just and proper to order the plaintiff to pay \$217.00 to the defendant for the cost of the court reporters. The plaintiff must do so prior to scheduling another oral and physical examination as required by the defendant under GML § 50-h and PHL § 157.

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<sup>19</sup>*Bergen Beach Land Corp. v New York*, 192 AD 884 [2d Dept 1920].

<sup>20</sup>CPLR § 3126.

<sup>21</sup>*Wilson v N.Y. City Hous. Auth.*, 303 AD 2d 403 [2d Dept 2003]; *subsequent appeal at Wilson v N.Y. City Hous. Auth.*, 15 AD 3d 572 [2d Dept 2005], *but not overturned*; *see also Watson v N.Y. City Hous. Auth.*, 294 AD 2d 236, 237 [1st Dept 2002] *in which the court suggested sanctions under CPLR § 3126 would have been appropriate had they been considered.*

<sup>22</sup>*Deans v Jamaica Hosp. Med. Cent.*, 64 AD 3d 744, 745 [2d Dept 2009].

In the instant case, the plaintiff still has time to schedule an appointment for examination under GML § 50-h and PHL § 157 prior to January 24, 2010, one year and ninety days from the date of the alleged incident. The court directs that after payment of \$217.00 to the defendant, the plaintiff and the defendant shall schedule an appointment in good faith for oral and physical examination as required by the defendant. Should the plaintiff fail to attend the next examination without a satisfactory excuse that this Court finds sufficient, such failure will result in dismissal of the plaintiff's action by direction of this Court. Failure to conform to these orders prior to January 24, 2010 will result in dismissal of this action on the grounds of being time barred.

### **Conclusion**

The plaintiff's serial absences from scheduled examinations required by GML § 50-h<sup>23</sup> and PHL § 157<sup>24</sup> impose disadvantage upon a defendant. Remedies for the defendant may lie in restitution of money wasted by the plaintiff's absence and in discretionary dismissal by the court. The defendant New York City Housing Authority moves for dismissal of the complaint made by each of which requires an examination of the plaintiff by the defendant within ninety days after accrual of the cause of action.

Inability to contact a client is not sufficient reason to be absent from a scheduled GML § 50-h examination. In that the plaintiff offers no sufficient reason nor any exceptional circumstances for plaintiff's missed appointments required by GML § 50-h, none are excused. While no specific number of missed appointments justifies dismissal of an action for failure to comply with required examinations under GML § 50-h and PHL § 157, the plaintiff fails to provide satisfactory excuses for any of them. None the less, dismissal of the complaint for having missed appointments would be a drastic remedy, and the Court will not dismiss this action at this time.

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<sup>23</sup>GML § 50-h (1).

<sup>24</sup>PHL § 157 (2).

The plaintiff's repeated disregard of his obligations under GML § 50-h and PHL § 157 shall require him to pay the costs of the court reporter, \$217.00, to the defendant. Following payment of the \$217.00, the plaintiff may schedule an appointment on or before January 15, 2010 and must keep said appointment for oral and physical examination. The motion by the defendant New York City Housing Authority is granted on condition that the plaintiff, Curtis Oliver fails to make and keep a scheduled appointment on or before January 15, 2010 for oral and physical examination as required by the defendant New York City Housing Authority.

Accordingly, it is hereby:

ORDERED, that the plaintiff, Curtis Oliver, pay to the defendant, New York City Housing Authority, the sum of \$217.00; and it is further

ORDERED, that New York City Housing Authority's motion is granted to the extent that the plaintiff, Curtis Oliver, shall be required to schedule and appear for an oral and physical examination as required by GML § 50-h and PHL § 157, by no later than January 15, 2010, and the plaintiff Curtis Oliver's failure to appear shall result in his complaint being struck without prejudice; and it is further

ORDERED, that all parties shall return to **DCM Part 3** for pre-trial conference on **Thursday, January 28, 2010.**

ENTER,

DATED: December 8, 2009

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Joseph J. Maltese  
Justice of the Supreme Court