

Boles v City of New York

2010 NY Slip Op 31796(U)

July 7, 2010

Sup Ct, NY County

Docket Number: 100331/2007

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

ALISON BOLES,

INDEX NO. 100331/07

Plaintiff,

- v -

MOTION DATE 4/29/10

MOTION SEQ. NO. 002

MOTION CAL. NO. 1

THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY (MTA), MTA CAPITOL CONSTRUCTION, GRANITE CONSTRUCTION, INC., SCHIAVONE CONSTRUCTION COMPANY, and NEW YORK TRANSIT AUTHORITY,

Defendants.

(And a third-party action).

The following papers, numbered 1 to 4 were read on this motion to dismiss

	<u>Papers Numbered</u>
Notice of Motion— Affirmation — Exhibits A-O	<u>1-2</u>
Affirmation In Opposition — Exhibits	<u>3</u>
Replying Affirmation — Exhibit A	<u>4</u>

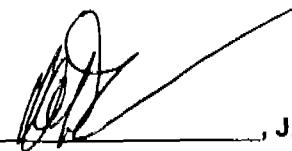
Cross-Motion: Yes x No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/7/10
New York, New York

 _____, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
ALISON BOLES,

Plaintiff,

- against -

Index No. 100331/2007

THE CITY OF NEW YORK, METROPOLITAN TRANSIT
AUTHORITY (MTA), MTA CAPITOL CONSTRUCTION,
GRANITE CONSTRUCTION, INC., SCHIAVONE
CONSTRUCTION COMPANY, and NEW YORK TRANSIT
AUTHORITY,

Decision and Order

Defendants.

-----X
METROPOLITAN TRANSPORTATION AUTHORITY and
NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Plaintiffs,

- against -

DEWBERRY-GOODKIND, INC.,

Third-Party Defendant.

-----X

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

Defendant City of New York moves for leave to amend its answer to assert the defense that plaintiff failed to appear for a hearing pursuant to General Municipal Law § 50-h, and for an order dismissing the complaint on that ground, and on the ground that plaintiff is precluded from offering evidence of liability and damages against the City, as per a so-ordered stipulation dated November 19, 2009 (Motion Seq. No. 002). Defendants Metropolitan Transportation Authority (sued herein as Metropolitan Transit Authority and MTA Capitol Construction, Inc.) and New York City Transit Authority (collectively, the Authorities) also separate move to dismiss the complaint on similar

grounds (Motion Seq. No. 003). Third-party defendant Dewberry-Goodkind, Inc. (Dewberry) cross-moves for an order striking the complaint due to plaintiff's alleged failure to comply with three conference orders. This decision addresses both motions and the cross motion.

BACKGROUND

In this action, plaintiff, an archeologist, alleges that, on February 24, 2006, around 11 PM, she was excavating at the South Ferry subway construction site, when the excavation site collapsed, burying her and causing her serious injuries.

On May 18, 2006, plaintiff filed a notice of claim with the City. Shultz Affirm., Ex A. By letter dated May 26, 2006, the New York City Transit requested plaintiff to appear for its own statutory hearing on June 2, 2006. Levi Affirm., Ex B. By letter dated June 12, 2006, the City requested plaintiff to appear for a 50-h hearing on July 19, 2006. Schultz Affirm., Ex B. By letter dated June 15, 2006, plaintiff's counsel requested that the two hearings be consolidated into one hearing, claiming that plaintiff's ability to travel was greatly restricted due to her injuries. *Id.*, Ex C. Plaintiff's counsel claims that he received a call from "the appropriate scheduler at the Comptroller's office," but "he was never able to provide a date for the 50h hearing." Walshe Opp. Affirm. to MTA Defendants' Motion ¶ 9. Plaintiff's counsel claims that he made more than three additional calls asking for a date and had received no response. *Id.*

On January 9, 2007, plaintiff commenced this action. It is undisputed that plaintiff did not appear for a 50-h hearing for the City or a statutory hearing for the Authorities. On August 7, 2007, the Authorities commenced a third-party action against Dewberry.

A preliminary conference was held before Justice Mills on September 25, 2008. Pursuant to the preliminary conference order, plaintiff was directed to serve a supplemental bill of particulars

on or before October 17, 2008 with respect to several items, in particular, items 12, 13, 14, 15, 19, 23, 25, and 26 of the Authorities' demand for a bill of particulars. A compliance conference was held before Justice Beeler on May 28, 2009. Pursuant to the so-ordered stipulation dated May 28, 2009, plaintiff agreed "to provide a BP + discovery response responsive to each defendant's respective demands for such by June 29, 2009--BPs must be properly verified. Per P.C. order, Π [plaintiff] to supplement BP to MTA/NYCTA Re: items 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, 26, 27." Levi Affirm., Ex J.

By a so-ordered stipulation dated November 19, 2009, the parties agreed, in pertinent part, as follows:

- "1- Π to comply with prior court orders dated 9/25/08 + 5/28/09;
- 2. Π to provide MTA/NYCTA (all within 45 days)
 - a. properly verified Bill of Particulars – verified by plaintiff;
 - b. supplements to Bill of Particulars to MTA/NYCTA Re: Items #s - 12, 13, 14, 15, 18 . . 19, 23, 25 and 26; Further supplementing Π BP of 6/23/

* * *
- 4) Π to provide Δ [defendant] City with a bill of particulars responsive to the demand of the City & such BP will be properly verified. *BP to be served within 45 days. If not served, Π will be precluded from offering evidence on liability & damages against the City.*
- 5) Π to provide each defendant w/ authorizations for a) medical records; b) employment records; c) W2 records (2004-present); d) workers compensation records from Travelers; e) workers compensation board; f) IRS with proper ID; g) work member history from plaintiff's union within 45 days *or plaintiff will be precluded from offering evidence of damages.*"

Shultz Affirm, Ex O (emphasis supplied).

DISCUSSION

City's Motion to Amend and to Dismiss (Motion Seq. No. 002)

The branch of the City's motion for leave to amend its answer to assert the defense that

plaintiff did not appear for a 50-h hearing is denied. The City did not include a copy of the proposed amended pleading. *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639 (2d Dept 1960).

However, this Court notes that, “[w]hen requested, a claimant's submission to a General Municipal Law § 50-h examination is a condition precedent to bringing an action against a municipality.” *Steenbuck v Sklarow*, 63 AD3d 823, 824 (2d Dept 2009). As a condition precedent to suit, “the failure to comply is not an affirmative defense to be asserted by defendant[.]” *Reaves v City of New York*, 177 AD2d 437, 437 (1st Dept 1991). Thus, it is unnecessary for the City to move for leave to amend its answer to seek dismissal of the action based on the alleged non-compliance with a condition precedent to suit against the City.

Turning to the branch of the City’s motion to dismiss, the standard is well-settled. “When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . ‘the benefit of every possible favorable inference.’” *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005)(citation omitted). “In assessing a motion under CPLR 3211(a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v Martinez*, 84 NY2d 83, 88 (1994).

As the City indicates, General Municipal Law § 50-i (1) states, in pertinent part:

“No action or special proceeding shall be prosecuted or maintained against a city, . . . for personal injury . . . alleged to have been sustained by reason of the negligence or wrongful act of such city. . . .unless, (a) a notice of claim shall have been made and served upon the city . . . (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused”

Here, the complaint does not contain an allegation that at least 30 days had passed since service of the notice of claim upon the City, and that adjustment or payment had been neglected or refused. *See Schultz Affirm.*, Ex D.

However, the affirmation of plaintiff's counsel, which may be considered on this motion to dismiss, has cured this pleading defect. Plaintiff's counsel states that, when two separate 50h hearing notices were sent to him, he requested, by letter dated June 15, 2006, a consolidation of the two scheduled hearings, because plaintiff's ability to travel was allegedly greatly restricted. *Walshe Affirm. in Opp. to MTA Defendants' Motion ¶ 8; See Levi Affirm.*, Ex C. According to *Walshe*, although he received a call from the Comptroller's office, he was never given a date for the 50h hearing, notwithstanding three additional calls asking for that date without a response. *Walshe Affirm. in Opp. to MTA Defendants' Motion ¶ 9*. *Walshe* claims that he waited more than nine months for a 50h hearing date. *Id.* Considering the affirmation of counsel, plaintiff therefore alleged that more than 30 days had passed since service of the notice of claim, and that adjustment or payment of the claim was neglected or refused by the City.

“Generally, a plaintiff who has failed to comply with a demand for a hearing served pursuant to General Municipal Law § 50-h (2) is precluded from commencing an action against a municipality. However, dismissal of the complaint is not warranted where the hearing has been postponed indefinitely beyond the 90-day period and the municipality does not reschedule the hearing.”

Vargas v City of Yonkers, 65 AD3d 585, 586 (2d Dept 2009). Here, after the City served plaintiff with a demand for a hearing to be held on June 19, 2006 (*Shultz Affirm.*, Ex B), the plaintiff's attorney adjourned the scheduled hearing date and no new hearing date was selected. “Since the hearing had been indefinitely postponed and the defendant did not serve a subsequent demand, the plaintiff[’s] failure to appear for a hearing did not warrant dismissal of the complaint.” *Vargas*, 65

AD3d at 586; accord *Belton v Liberty Lines Transit, Inc.*, 3 AD3d 334 (1st Dept 2004), citing *Ruiz v New York City Hous. Auth.*, 216 AD2d 258 (1st Dept 1995). Therefore, the branch of the City’s motion to dismiss the complaint based on plaintiff’s failure to plead compliance with General Municipal Law § 50-i is denied.

The last branch of City’s motion is to dismiss the action on the ground that plaintiff is precluded from presenting evidence of liability and damages against the City, as per the so-ordered stipulation dated November 19, 2009.

In opposition to the City’s motion, plaintiff’s counsel does not state that the discovery sought (which plaintiff agreed by counsel to provide) was, in fact, provided. Instead, plaintiff’s counsel argues that “moving defendant’s counsel have [*sic*] previously received the items complained of . . .” *Walshe Affirm. in Opp. to City’s Motion* ¶ 3. Plaintiff’s counsel also states, that “Most important is the fact that its counsel are [*sic*] receiving amended responses contemporaneously with opposition.” *Id.* ¶ 3.

These arguments are unavailing. The so-ordered stipulation dated November 19, 2009 specifically required plaintiff to provide the demanded discovery within 45 days, or else face preclusion. Plaintiff cannot rely on discovery responses provided prior to the date of the so-ordered stipulation to establish compliance. It is questionable whether plaintiff’s prior discovery responses were adequate.¹ Neither is plaintiff’s belated compliance with the so-ordered stipulation adequate,

¹ The Court notes a history of plaintiff’s discovery responses that were not actually responsive to discovery demands. For example, in response to the City’s demand for witness information, plaintiff’s response dated July 21, 2008 states, “Plaintiff is unaware of the existence of or need for fact witnesses in this strict liability Labor Law case.” *Schultz Affirm., Ex I.* By so-ordered stipulation dated May 25, 2009, plaintiff agreed “to provide a response to demand for witnesses . . . The response shall be responsive + not state plaintiff is unaware of the need to provide such information inn a Labor Law case . . .” *Id.*, Ex J. However, in a response dated June

because plaintiff had to provide the discovery within 45 days.²

The City has established that plaintiff did not provide the discovery which plaintiff agreed to provide within 45 days, as set forth in the November 19, 2009 stipulation, which contained a self-executing order of preclusion. With respect to the City, the self-executing order precluded plaintiff from presenting evidence as to liability and damages against the City. “The preclusion of plaintiff’s evidence rendered him unable to establish a prima facie case, thus requiring dismissal of the complaint.” *Samuels v Montefiore Med. Ctr.*, 49 AD3d 268 (1st Dept 2008). Given that plaintiff agreed to the deadlines to provide discovery, the Court may not excuse plaintiff’s belated compliance.

Plaintiff’s arguments in opposition are unavailing. Plaintiff argues that the motion is “premature because it did not take into account the five days allowed for service by mail.” To the extent that plaintiff is arguing that the notice of motion was not timely served, the affidavit of service indicates that notice of motion was served by mail on January 4, 2010, which is 22 days before the original return date of the motion. The minimum notice period is eight days before the hearing on the motion (CPLR 2214 [b]), with 5 days added to the minimum notice period if the moving papers are served by mail. CPLR 2103 (b) (2). The minimum notice period therefore was 13 days, and the papers were served 22 days before the original return date. Plaintiff also argues that the City did not include an affirmation of good faith. However, under the circumstances, an affirmation of good faith

23, 2009, plaintiff again stated, “Plaintiff is unaware of the existence of or need for fact witnesses in this strict liability Labor Law case.” *Id.*, Ex L.

² Plaintiff’s counsel did not include a copy of the amended discovery responses with the opposition papers. Thus, the Court cannot tell on this record whether the amended discovery responses were, in fact, responsive to defendants’ demands.

is not required because the City is seeking dismissal of the action by virtue of self-executing orders of preclusion; the City is not attempting to secure compliance with discovery.

Therefore, this branch of the City's motion is granted, and the complaint is dismissed as against the City.³ Dismissal of the complaint as against the City necessarily results in dismissal of the City's cross claims against its co-defendants for contribution.

The Authorities' Motion to Dismiss

Like the City, the Authorities argue that the complaint should be dismissed because plaintiff did not allege compliance with Public Authorities Law § 1212. Like General Municipal Law § 50-i, Public Authorities Law § 1212 (4) requires the complaint to allege that

“at least thirty days have elapsed since the service of such notice upon a member of the authority, its general manager or other officer designated for such purpose and that the authority has neglected or refused to make an adjustment or payment of the claim for thirty days after the service of such notice. . .”

As discussed above in the context of the City's motion to dismiss, the affirmation of plaintiff's counsel cured this pleading defect.

Like the City, the Authorities also argue that the action should be dismissed because plaintiff did not appear for a statutory hearing pursuant Public Authorities Law § 1212 (5). However, unlike General Municipal Law § 50-h, the statutory hearing pursuant to Public Authorities Law § 1212 (5) is not a condition precedent to suit against the Authorities. “[T]here is no prohibition in the Public Authorities Law to the commencement of an action until compliance with a demand for an examination.” *Cespedes v City of New York*, 301 AD2d 404, 404 (1st Dept 2003).

Therefore, the branches of the Authorities' motion to dismiss the action as against them,

³ The City remains as a defendant to a cross claim by co-defendant Schiavone Construction Corp.

based on plaintiff's non-compliance with Public Authorities Law § 1212, is denied.

The remaining branch of the Authorities' motion to dismiss concerns plaintiff's alleged failure to comply with three prior conference orders: the preliminary conference order dated September 25, 2008, a so-ordered stipulation dated May 25, 2009, and a so-ordered stipulation dated November 19, 2009. The chief recurring item of alleged non-compliance is plaintiff's purported failure to provide a supplemental bill of particulars as to certain items (as set forth in item 2 of the so-ordered stipulation dated November 19, 2009), which would be verified by plaintiff herself.⁴

In support of their motion, the Authorities submitted a copy of plaintiff's reply to their demand for bill of particulars dated March 19, 2008. Levi Affirm., Ex G. It appears that plaintiff served another reply dated June 23, 2009, but this reply is identical to plaintiff's first reply. Shultz Affirm., Ex K. It also appears that plaintiff served an amended bill of particulars, which the Authorities' counsel received on January 22, 2010. Levi Reply Affirm., Ex D. However, the Authorities do not include a copy of this amended bill of particulars.

The open question of whether plaintiff substantially complied with the discovery orders, albeit belatedly, warrants denial of the Authorities' motion. Because plaintiff's latest amended bill of particulars was not included with this record, it cannot be determined whether plaintiff's pattern of delay in compliance was a product of wilful or contumacious contact. *Cambry v Lincoln Gardens*,

⁴ The Authorities also indicate that plaintiff did not provide an address for three witnesses in response to a demand for witness information, and that plaintiff had failed to respond to demands for party statements, photographs, expert reports and expert information. Levi Reply Affirm. ¶¶ 21-22. However, because this was raised for the first time in reply, the Court does not consider these matters on this motion.

The Court notes that the demand for expert reports and expert information was not specifically mentioned in the prior court orders.

50 AD3d 1081, 1082-1083 (2d Dept 2008). Therefore, this branch of the Authorities' motion is denied, without prejudice to another motion to dismiss for failure to provide a supplemental bill of particulars, so long as the motion is accompanied by a copy of all of plaintiff's bill of particulars. Counsel is also reminded that Rule 14 (a) of the Rules of the Justices of the Supreme Court of New York County require motion papers to be tabbed, with protruding tabs. See New York State Supreme Court, New York County—Civil Branch, <http://www.courts.state.ny.us/supctmanh/UNIFRL-May%2019%202010.pdf> [accessed July 6, 2010]. Future untabbed papers may be rejected.

Dewberry's Cross Motion

Like the other defendants, Dewberry cross-moves to strike plaintiff's complaint,⁵ due to plaintiff's failure to comply with prior court orders. However, Dewberry's cross motion was served late. Because the Authorities' motion to dismiss was served more than 16 days before the return date, Dewberry's cross motion should have been served at least 7 days before the return date, as demanded in the Authorities' notice of motion. CPLR 2214 (b). Dewberry's cross motion was served 5 days before the return date. Moreover, Dewberry's cross motion, which relates to disclosure, does not contain an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion. 22 NYCRR 202.7 (a), (c). Therefore, Dewberry's cross motion is denied.

CONCLUSION

Accordingly, it is hereby

⁵Dewberry's cross motion is not a true cross motion, because it seeks affirmative relief from a non-moving party. *Terio v Spodek*, 25 AD3d 781(2d Dept 2006). Such a technical defect may be disregarded where, as here, there is no prejudice to plaintiff, who had ample opportunity to be heard on the merits of the relief sought. See *Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003]).

ORDERED that motion to dismiss by defendant City of New York is granted, the complaint is dismissed as against this defendant; and it is further

ORDERED that the cross claims of defendant City of New York are dismissed as against all defendants; and it is further

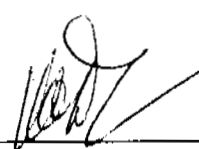
ORDERED that the motion to dismiss by defendants Metropolitan Transportation Authority and New York City Transit Authority is denied; and it is further

ORDERED that the cross motion to dismiss by third-party defendant Dewberry-Goodkind, Inc. is denied; and it is further

ORDERED that the remaining parties are directed to appear for a status conference on September 2, 2010 at 2:30 PM. in IAS Part 21, at 80 Centre St, Room 278, New York, New York.

Copies to counsel.

Dated: July 7, 2010
New York, New York

ENTER:


J.S.C.