

Nieves v New York City Hous. Auth.

2011 NY Slip Op 31558(U)

June 8, 2011

Sup Ct, NY County

Docket Number: 113632/08

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 113632/2008 J.S.C.

NIEVES, SUZANNE

INDEX NO. _____

vs

NEW YORK CITY HOUSING

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 6/08/11

HON. JUDITH J. GISCHE J.S.C.

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 10

-----X
SUZANNE NIEVES,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.
-----X

DECISION/ORDER

Index No.: 113632/08

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

FILED

Numbered

Def's n/m (3212) w/CDC affirm, exhs	1
Pltf's x/m (compel) w/RJR affirm, exhs	2
Def's reply/opp w/JPT affirm, exhs	3
Pltf's reply w/RJR affirm, exh	4

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Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, Suzanne Nieves ("Nieves"), to recover money damages for personal injuries she claims to have sustained on July 1, 2008 at a building owned/operated by defendant, the New York City Housing Authority ("NYCHA"). NYCHA now moves for summary judgment dismissing the complaint on the basis that Nieves failed to serve NYCHA with a timely notice of claim (within 90 days after the claim arises), as required under Public Housing Law § 157(2) and General Municipal Law § 50-e(1)(a) and on the basis that no timely motion to file a late notice of claim was made within 1 year and 90 days after the claim arose. General Municipal Law § 50-i(1)(c). Plaintiff opposes the motion and cross-moves to strike

defendant's answer, compel discovery, and for preclusion.

It is undisputed that plaintiff's accident occurred on July 1, 2008 and that plaintiff mailed a notice of claim letter on September 30, 2008 (91 days following the accident) and served an official notice of claim on October 1, 2008 (92 days following the accident). Regardless of which date the court accepts, each was filed with NYCHA's law department late.

Plaintiff contends that she was deceived into not requesting leave to file a late notice of claim because NYCHA verbally agreed not to move to dismiss since the notice was filed, at most, two days late and would cause no prejudice to NYCHA. Plaintiff also refers the court to a stipulation dated May 1, 2009, in which NYCHA agreed to withdraw its third affirmative defense which asserts that plaintiff failed to submit to an oral hearing, pursuant to General Municipal Law § 50-h and Public Housing Law § 157 (the "stipulation"). Plaintiff further argues that NYCHA's failure to raise objections to the timeliness of the notice of claim, and engaging in discovery, are indications that NYCHA accepted the late notice of claim.

Discussion

"Where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped from asserting a right or defense which it otherwise could have raised." Bender v. New York City Health & Hospitals Corp., 38 N.Y.2d 662 (1976). The doctrine of equitable estoppel can arise in a notice of claim situation where the governmental entity engaged

in "positive acts, or omissions where there was a duty to act." Bender v. New York City Health & Hospitals Corp., *supra*.

However, Bender has very limited application and is based on a specific factual situation. See Matter of Hamptons Hosp. & Med. Center v Moore, 52 N.Y.2d 88, 93-4. Defendant's conduct in this case--its mere failure to apprise plaintiff of the untimeliness of the notice of claim--does not constitute wrongful conduct such as to warrant a departure from the general rule or justify the finding of an estoppel. See Rodriguez v. City of New York, 169 A.D.2d 532 (1st Dept. 1991). Furthermore, the stipulation had nothing to do with plaintiff's late notice of claim and, therefore, did not waive NYCHA's right to assert the untimeliness of the notice of claim, neither did NYCHA's holding a 50-h Hearing and proceeding with the litigation. Davis v. City of New York, 250 A.D.2d 368 (1st Dept. 1998); Rodriguez v. City of New York, *supra* at 533; Hochberg v City of New York, 99 A.D.2d 1028, 1029 (1st Dept. 1984), *aff'd* 63 N.Y.2d 665. Furthermore, the court rejects plaintiff's contention that NYCHA verbally agreed not to move to dismiss. Plaintiff has not provided the court with information about when NYCHA made the alleged verbal agreement; has not identified who made the statement or whether such person had authority to make an agreement; and has not provided the exact language of the alleged verbal agreement. Even assuming plaintiff's attorney thinks he was lulled into complacency, the failure to file a timely notice of claim may be raised any time prior to trial. Davis v. City of New York, *supra* (even where preceded by "years of litigation," we have upheld a defendant's right to raise this claim).

Accordingly, NYCHA's motion is granted and this action is dismissed as

untimely. Plaintiff's cross-motion is denied as moot.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by defendant is **GRANTED** and this action is dismissed as untimely; the Clerk shall enter a judgment of dismissal against plaintiff, SUZANNE NIEVES; and it is further

ORDERED that plaintiff's cross-motion is **DENIED** as moot; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 8, 2011

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

JUN 10 2011

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