

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

2011 NY Slip Op 31928(U)

June 29, 2011

Sup Ct, NY County

Docket Number: 100115/10

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 100115/2010

FERNANDEZ, ANA J.

vs

NYC HOUSING AUTHORITY

Sequence Number : 004

AMEND

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

MOTION DATE \_\_\_\_\_

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this 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

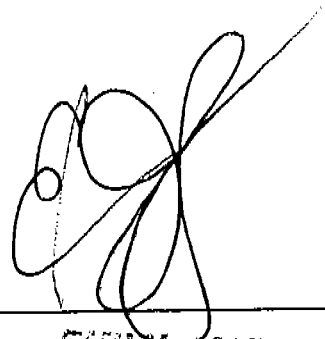
*is decided for the Plaintiff*

**FILED**

JUL 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/29/11



J.S.C.  
EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 17

-----X  
ANA J. FERNANDEZ, as Administrator of the Estate of  
MASCHAY EDUARDO JOA VALDEZ et al,

Plaintiffs,

Index No.  
100115/10

-against-

NEW YORK CITY HOUSING AUTHORITY, and  
THE CITY OF NEW YORK

Defendants.

**FILED**

**JUL 14 2011**

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Defendant New York City Housing Authority (NYCHA) moves to strike various aspects of Plaintiff's<sup>1</sup> Bill of Particulars, which NYCHA asserts adds new theories of liability, not previously alleged in the Notice of Claim. Although Plaintiff acknowledges that General Municipal Law (GML) § 50-e (2) requires the inclusion, among other things, of "the manner in which the claim arose" Plaintiff argues that no new theories are stated in the Bill of Particulars, and that additional allegations merely amplify what was already alleged the Notice of Claim. Plaintiff also points out that the purpose of GML § 50-e (2) is to provide the agency with sufficient notice of the nature of the claim, and, the manner in which the claim arose, so that the agency is able to adequately investigate the claim. That purpose, Plaintiff argues, was satisfied here as it is undisputed that NYCHA performed two extensive inspections of the premises, the last being over a year ago, and held a 50-h hearing.

This action results from a fire at the NYCHA Fulton Houses city project in Chelsea,

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<sup>1</sup>Although the action includes more than one Plaintiff, they will be referred to herein collectively as Plaintiff.

Manhattan, where five family members perished from smoke inhalation, in a fire in their apartment from which they could not escape. The Notice of Claim indicates that the incident occurred because of:

the carelessness, recklessness and negligence of Respondents CITY and NYCHA, their agents, servants and/or employees in the ownership, operation, management, maintenance, control, repair and inspection of the premises located at 401 West 18<sup>th</sup> Street, Apartment 6A, New York, New York. MASCHAY JOA, deceased, sustained serious burns and inhalation of smoke and fumes of varying degrees which caused pain and suffering and his death. Respondents CITY and NYCHA, their agents, servants and/or employees were careless, reckless and negligent in failing to have working fire alarms; in failing to have working smoke detectors; in failing to have adequate fire escapes and means of egress; in permitting and allowing Apartment 6A to be a fire hazard; in allowing Apartment 6A to become a trap; in causing the occupants of Apartment 6A be unable to exit the apartment as there was no fire escape for said apartment; in failing to provide the occupants with alternate means of egress; in permitting Apartment 6A to remain in an unsafe manner; in permitting and/or allowing and/or causing windows to become defective and inoperable; in permitting window guards to be placed on said windows in a manner which prevents them from being removed from the inside of the apartment; in permitting and/or allowing and/or causing the smoke detector to become unconnected from the building electrical system; in permitting and/or allowing and/or causing the batteries from the smoke detector to be removed; in permitting a defective smoke detector to remain in the apartment; in failing to properly inspect the aforementioned apartment; in failing to properly maintain and repair the smoke alarm; and in failing to properly maintain and repair the smoke detector.

NYCHA complains that the Bill of Particulars improperly add six new theories:

- (1) the lack of posting of diagrams of escape routes;
- (2) insufficient number or type of fire sprinklers in at and around the apartment;

- (3) insufficient number and type of windows;
- (4) insufficient number or type of fire alarms;
- (5) insufficient number or type of smoke detectors<sup>2</sup>; and
- (6) the design and construction of the apartment was such that it contained the fire within it, thereby exacerbating the fire inside.

NYCHA also complains that the Bill of Particulars improperly references numerous Multiple Dwelling Laws, and, New York Administrative Code and New York City Code violations not previously mentioned, and, also includes non specific references to violations of unidentified statutes, rules and ordinances.

The purpose of the notice of claim requirement in GML § 50-e is “to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity ‘to explore the merits of the claim while information is still readily available’” (Matter of Porcaro v City of New York, 20 AD3d 357, 357 [1st Dept 2005]), quoting Teresta v City of New York, 304 NY 440, 443 [1952]). “The statute, however, is not intended to operate as a device to frustrate the rights of individuals with legitimate claims” (Matter of Porcaro, supra at 358). “The statute is remedial in nature and, therefore, *should be liberally construed.*” (Id. [emphasis added]).

Although it is clear that a bill of particulars may not include “distinct and independent theories of liability” not previously included in a notice of claim (Lopez v NYCHA, 16 AD3d 164 [1st Dept 2005]), this standard it is often difficult to apply, involves a fact specify inquiry and, a review of the cases in this area reflect inconsistencies. Thus, in deciding this issue, this Court looks to cases which are most factually similar to assist it in the determination of whether a notice of claim

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<sup>2</sup>The evidence indicates that the building has hard wired smoke detectors.

to cases which are most factually similar to assist it in the determination of whether a notice of claim “fairly implied the allegation contained in plaintiff’s bill of particulars” (Dones v NYCHA, 81 AD3d 554 [1st Dept 2011] [where notice of claim alleged that NYCHA was negligent in causing and allowing a steam pipe to remain in a defective condition, leaked water, and left the area unguarded and unprotected, the allegation that NYCHA was negligent in failing to place mats or other materials to absorb water was fairly implied from the notice of claim]; see also Goodwin v NYCHA, 42 AD3d 63, 64-65 [1st Dept 2007] [amendment of a late notice of claim should have been granted because “[i]n the instant case, there was no change in the theory of liability” where the first notice of claim stated that “Claimant was walking down steps...He fell down steps, Exit B staircase” and the second notice stated that “Claimant tripped and/or slipped on broken/cracked/chipped stairs covered with debris, as claimant was walking down steps...He fell down steps, Exit B staircase...claimant fell as a result of defendant’s negligence in maintaining such stairway”]).

The following cases cited by NYCHA are of limited use and even appear to conflict with the most relevant case cited by NYCHA, discussed below (see Monmasterio v NYCHA, 39 AD3d 354 [1st Dept 2007] [where notice of claim alleged that NYCHA was negligent in providing adequate lighting, and plaintiff was assaulted, a negligent security claim alleged in a bill of particulars was stricken as a new theory of liability]; DeJesus v NYCHA, 46 Ad3d 474 [1st Dept 2007] [where notice of claim alleged that NYCHA was negligent in permitting garbage to accumulate, a negligent hiring, training and supervision claim was not fairly implied and was stricken]; Melendez v NYCHA, 294 AD2d 243 [1st Dept 2002] [notice of claim in a slip and fall action on debris and due to lack of railing, did not fairly imply allegations in the bill of particulars regarding negligent hiring, training and supervision, and, inadequate illumination]).

2005]), which also involves an apartment fire and allegations that the condition of the smoke detectors failed to alert plaintiff to the fire, resulting in plaintiff's severe injuries. In that case, the First Department found that allegations in the bill of particulars referring to negligent hiring was not a new theory of liability from what was asserted in the notice of claim. The NYCHA brief submitted to the First Department indicates that the notice of claim alleged that defective a smoke detector/smoke alarm failed to activate and alert the plaintiff to the fire, and, that NYCHA was negligent in the ownership, operation, maintenance, management, care and control of the smoke alarm/detector. Accordingly, the allegation in the notice of claim that the defective smoke detector/alarm was not properly maintained also fairly implied that the allegation that NYCHA was negligent in hiring incompetent employees. Additionally, as is instructive here, the First Department found that the allegation in the bill of particulars, that NYCHA failed to give a sign or warn of the defective condition, was also fairly implied.

Here, the Notice of Claim alerts NYCHA to the need to investigate the smoke detectors and smoke alarms (e.g., NYCHA was "careless, reckless and negligent in failing to have working fire alarms; in failing to have working smoke detectors" and in "permitting and/or allowing and/or causing the smoke detector to become unconnected from the building electrical system; in permitting and/or allowing and/or causing the batteries from the smoke detector to be removed; in permitting a defective smoke detector to remain in the apartment...in failing to properly maintain and repair the smoke alarm; and in failing to properly maintain and repair the smoke detector"); investigate the windows (e.g., "permitting and/or allowing and/or causing windows to become defective and inoperable"; "in failing to have adequate fire escapes and means of egress; in permitting and allowing Apartment 6A to be a fire hazard; in allowing Apartment 6A to become a trap; in causing

the occupants of Apartment 6A be unable to exit the apartment as there was no fire escape for said apartment; in failing to provide the occupants with alternate means of egress"); and investigate the design and construction of the apartment, which contained the fire within it, thereby exacerbating the fire inside the apartment (e.g., "in failing to have adequate fire escapes and means of egress; in permitting and allowing Apartment 6A to be a fire hazard; in allowing Apartment 6A to become a trap; in causing the occupants of Apartment 6A be unable to exit the apartment as there was no fire escape for said apartment; in failing to provide the occupants with alternate means of egress").<sup>3</sup> Additionally, as in Lopez (*id*), the allegations regarding the lack of posting of diagrams of escape routes is fairly implied from the language that NYCHA was negligent "in the ownership, operation, management, maintenance, control" of the apartment and "in permitting and allowing Apartment 6A to be a fire hazard." However, the allegations that there were an insufficient number or type of fire sprinklers, is not fairly implied from the Notice of Claim, which fails to mention sprinklers at all, confining the allegations to defective fire alarms, smoke detectors, windows and lack of egress/escape routes. Notably, Plaintiff makes no argument as to how any issue concerning sprinklers can be fairly implied from the Notice of Claim.<sup>4</sup>

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<sup>3</sup>NYCHA's argument, that it had no notice of the allegation concerning the insufficient "number" and "type" of windows, fire alarms and smoke detectors, is unpersuasive. No case require that the injured plaintiff, who is constrained by the 90 day time limit of the General Municipal Law, to notify the agency, who is often in possession of the requisite information, of every detail of the manner in which the claim arose, at its very infancy. All that is required is that the agency is provided with sufficient notice of the nature of the claim and the manner in which the claim arose, which is based upon what is "fairly implied" from the notice of claim, so that it can adequately investigate.

<sup>4</sup>It appears that this allegation is surplusage, as the apartment did not contain a fire sprinkler system, and, Plaintiff does not demonstrate that the apartment should have had one.

NYCHA is correct that the non-specific reference to violations of unidentified statutes, rules and ordinances should be stricken (see DeJesus v NYCHA, 46 AD3d 474 [1st Dept 2007]; Lopez v NYCHA, 16 AD3d 164, supra). This language appears to be a meaningless attempt to reserve rights to amend the bill of particulars, in the event that Plaintiff omitted anything.

The Court denies, with leave to renew, NYCHA's argument, that various references to numerous Multiple Dwelling Laws, and New York Administrative Code and New York City Code violations should be stricken. Plaintiff has not specifically addressed the individual laws and regulations, many of NYCHA's arguments are affected by this decision and the Court should not bear the burden of parsing through the numerous alleged laws and violations. It is hereby

ORDERED the motion is denied, except to the extent that leave to renew is granted regarding striking the numerous Multiple Dwelling Laws, and New York Administrative Code and New York City Code violations, which may be renewed after counsel first attempt to resolve this issue, and, to the extent that the non-specific allegations in the Bill of Particulars referencing the insufficient number or type of fire sprinklers, in at and around the apartment, and referencing violations of unidentified statutes, rules and ordinances, are stricken.

This constitutes the Decision and Order of the Court.


Dated: June 29, 2011

ENTER:

**FILED**

**JUL 14 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**