

<b>Ebron v New York City Hous. Auth.</b>
2012 NY Slip Op 33989(U)
May 25, 2012
Supreme Court, Bronx County
Docket Number: Index no. 20082/2012E
Judge: Alexander W. Hunter, Jr.
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA23A**

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Joanna L. Ebron,

Index No.: 20082/2012E

Plaintiff,

Decision and Order

-against-

New York City Housing Authority,

Defendant.  
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**HON. ALEXANDER W. HUNTER, JR.**

The motion by defendant, for an order pursuant to C.P.L.R. §3211(a)(2) and (7), Public Housing Law §157 and General Municipal Law §50-h, dismissing plaintiff's complaint against it on the ground that plaintiff failed to satisfy conditions precedent to commencing suit against defendant, is granted. The request for sanctions, costs and attorney's fees against plaintiff and plaintiff's counsel is denied.

The cause of action is for personal injuries sustained by plaintiff on December 10, 2011 or December 11, 2011, while she was in the bathroom of her apartment located at 3845 Baychester Avenue, Apartment 3B in Bronx County and she fell and sustained burns from heating pipes.

Defendant moves to dismiss plaintiff's complaint and asserts that plaintiff served a Notice of Claim on or about December 15, 2011. On January 10, 2012, defendant served plaintiff with a "Notice of Examination of Claim Pursuant to General Municipal Law Section 50-h." Pursuant to said notice, plaintiff was compelled to appear for an examination on February 21, 2012. However, plaintiff made no attempt to contact defendant's law firm with respect to said examination and plaintiff has not taken any steps to confirm or reschedule that examination.

Defendant asserts that only one week after its 50-h notice was served and in total disregard of the statutory requirement, plaintiff filed a summons and verified complaint dated January 16, 2012 which was served on defendant on February 9, 2012. Defendant argues that courts have recognized that General Municipal Law §50-h provides a municipality with a period of ninety (90) days from the date of the filing of the notice of claim within which to serve a demand for examination of the claimant. Once a demand has been served, no action shall be commenced unless the claimant has complied with the demand. However, plaintiff commenced her action against NYCHA before submitting to an examination pursuant to General Municipal Law §50-h.

Additionally, defendant asserts that plaintiff's complaint should be dismissed because plaintiff, in her verified complaint, did not allege compliance with General Municipal Law §50-h and non-compliance is a fatal defect evincing plaintiff's frivolous conduct. Defendant cites to case law which holds that a party bringing a claim against a public authority is required to allege in his or her complaint compliance with conditions precedent to commencing the action. Since plaintiff and her counsel willfully ignored her obligation to comply with General Municipal Law §50-h, plaintiff's complaint should be dismissed with prejudice. Moreover, defendant asserts

that this court should impose costs and sanctions against plaintiff and her counsel for their frivolous actions.

Plaintiff opposes the motion and asserts that a Notice of Claim was filed on December 15, 2011 and said date was entered in plaintiff's counsel's "calendar to file suit if no 50-h hearing was requested within thirty (30) days of December 15, 2012." (Frekhtman Aff, p. 1).<sup>1</sup> Plaintiff asserts that on January 16, 2012, thirty-two (32) days after the notice of claim was filed with defendant, plaintiff filed a summons and complaint. Plaintiff avers that it is entitled to properly institute an action against defendant more than thirty (30) days and less than ninety (90) days after service of notice of claim where defendant's demand for examination had not yet been served. Plaintiff's counsel contends that no demand for 50-h hearing was received by his office between December 15, 2011 and January 16, 2012 and it was not until January 19, 2012 that he received a demand for 50-h hearing from defendant's counsel. Plaintiff's counsel claims that the demand was dated January 9, 2012 but was received in the regular mail by him on January 19, 2012. He further states that it was marked on the same day he opened it. He annexes a copy of the demand as Exhibit D which shows a handwritten notation indicating "received 1/19/12".

Plaintiff argues that since defendant's demand for a 50-h hearing was received more than thirty (30) days after the notice of claim was filed, defendant waived its right to a 50-h hearing. However, "out of good faith" plaintiff's counsel claims that he agreed to conduct the 50-h hearing. (Frekhtman Aff., p. 3). Plaintiff's counsel contends that the hearing was adjourned to February 28, 2012 and then it was agreed by the parties that the hearing would be held on March 7, 2012. On March 6, 2012, when plaintiff's counsel called to confirm the hearing, he was told that defendant would not go forward with the 50-h hearing until its motion to dismiss was decided by this court.

Plaintiff's counsel then sent a letter to defendant's counsel dated February 17, 2012, informing defendant that its demand for a 50-h hearing was late and as such, "a legal nullity." (Exhibit E). Nevertheless, plaintiff's counsel informed defendant's counsel that he would agree to conduct the 50-h hearing. Plaintiff asserts that even if this court were to agree with defendant's arguments and hold that plaintiff failed to satisfy conditions precedent to filing suit, plaintiff would agree to conduct the 50-h hearing and then re-file suit after the hearing is conducted. Plaintiff further contends that sanctions are not warranted since it is defendant who is acting in bad faith.

In reply, defendant argues that plaintiff's counsel's conduct should not be tolerated by this court. Defendant contends that plaintiff served her complaint on defendant on February 9, 2012, knowing that plaintiff violated a condition precedent thereby rendering the filed complaint a nullity. Defendant refers to the affidavit of service by "Dawn Rowe" attesting to the fact that the Notice of Examination pursuant to General Municipal Law §50-h was duly served upon plaintiff on January 10, 2012. (Exhibit B). Thus, the documentary evidence shows that the notice of examination was properly served and plaintiff disregarded same and instead filed a summons and verified complaint on January 16, 2012 which was served on defendant on February 9, 2012.

Moreover, defendant points out that despite plaintiff's counsel affirming, under penalty of

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<sup>1</sup> Plaintiff's counsel's reference to December 15, 2012, is obviously a typographical error.

perjury to the contrary, plaintiff made no attempt to contact defendant's counsel regarding the 50-h examination prior to serving her summons and verified complaint on February 9, 2012, even after admitting that he received defendant's notice on January 19, 2012. Plaintiff's counsel took no steps to confirm or reschedule the 50-h hearing to February 28, 2012 or March 7, 2012. Defendant submits an affidavit from Steven Martin, the managing attorney at defendant's law firm, attesting to the fact that, at his specific direction, defendant's law firm did not agree to adjourn the deposition to February 28, 2012 or March 7, 2012. As such, failure to comply with General Municipal Law §50-h precludes plaintiff from commencing an action.

Additionally, defendant submits a copy of an amended notice of claim submitted by plaintiff and contends that it is a nullity as it was served on March 6, 2012, without leave of court. Said amended notice of claim alleges that the injury occurred on December 11, 2011 and not December 10, 2011 as alleged in plaintiff's original notice of claim and in the complaint. Thus, it is clear that plaintiff had no factual basis to serve a complaint on January 16, 2012 because no incident occurred on December 10, 2011. Defendant argues that plaintiff's decision to "jump the gun" by filing the summons and complaint "impeded the statutory process and now will lead to more motion practice solely due to Plaintiff's decision not to respond to NYCHA's Notice of Statutory Hearing..." (Tenney Aff. in Reply, para. 14).

**General Municipal Law §50-h** states, "Wherever a notice of claim is filed against a city, county, town...the city, county town...shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, which examination shall be upon oral questions...5. Where a demand for examination has been served...no action shall be commenced against the city, county, town...unless the claimant has duly complied with such demand for examination...If such examination is not conducted within ninety days of service of the demand, the claimant may commence the action."

Public Housing Law §157(2) states, "An action against an authority for damages for...personal injuries, alleged to have been sustained by reason of the negligence of, or by the creation or maintenance of a nuisance by said authority, or any member, officer, agent or employee thereof, shall be commenced within one year and ninety days after the cause of action therefor shall have accrued, provided that a notice of the intention to commence such action shall have been served upon the authority...The authority may require any claimant hereunder to be examined as provided in section fifty-h of the general municipal law, and all the provisions of such section shall apply to such examinations."

It is well established that a party who fails to comply with a demand for examination pursuant to General Municipal Law §50-h, is precluded from commencing an action against a municipality absent exceptional circumstances. **Kemp v. County of Suffolk, 61 A.D.3d 937 (2<sup>nd</sup> Dept. 2009)**. In the case at bar, defendant established through proof in admissible form that a notice of examination pursuant to General Municipal Law §50-h was duly served on plaintiff's counsel on January 10, 2012. Plaintiff failed to appear for said examination and plaintiff's counsel failed to contact defendant's counsel to confirm or re-schedule the examination. Plaintiff's counsel claims that the demand was not received by him until January 19, 2012 but even if that were so, plaintiff's counsel did not contact defendant's counsel's office to confirm or re-schedule same and instead, served a summons and verified complaint on defendant on February 9, 2012.

While it is true as plaintiff alleges that there is no “waiting period” and , “...a claimant may properly institute an action against the city more than 30 days and less than 90 days after the filing of the notice of claim...” **Alouette Fashions Inc. v. Consolidated Energy Co. of New York, Inc.**, 69 N.Y.2d 787 (1987) the court in that case also held that, “...if the demand has been served within the 90-day period at a time when no action had yet been instituted, the claimant may not thereafter commence an action until the demand had been complied with.” **Id. at 789-790.** In the case at bar, defendant has submitted ample proof in admissible form to support its contention that the demand was timely made before the action was instituted and that plaintiff failed to comply with the demand. It is incredulous to this court that a demand served on January 10, 2012 in Manhattan, would be received nine (9) days later in Brooklyn.


Even more troubling to this court is the fact that plaintiff submitted an amended notice of claim that was served on defendant on March 9, 2012. Said amended notice of claim changes the date of the incident from December 10, 2011 to December 11, 2011. Plaintiff did not seek leave of court pursuant to General Municipal Law §50-e(6) prior to amending said notice of claim and further, the complaint filed by plaintiff and verified by plaintiff herself, lists the incident date as December 10, 2011 which contradicts the amended notice of claim.

Accordingly, plaintiff’s motion to dismiss plaintiff’s complaint against defendant is granted. However, this court does not find that the imposition of costs and sanctions is warranted.

Defendant is directed to serve a copy of this order with notice of entry upon the plaintiff and file proof thereof with the clerk’s office.

This constitutes the decision and order of the court.

Dated: May 25, 2012

  
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J.S.C.  
**ALEXANDER W. HUNTER JR.**