

Colon v City of New York
2013 NY Slip Op 31830(U)
August 5, 2013
Supreme Court, New York County
Docket Number: 157967/2012
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHERYN FREED
JUSTICE OF SUPREME COURT

PRESENT:

PART 5

Index Number : 157967/2012
COLON, EDWARD T
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

Dated: 8-5-13


_____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

AUG 05 2013

HON. KATHERYN FREED
JUSTICE OF SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
EDWARD COLON,

Plaintiff,

-against-

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

Defendants.

-----X
HON. KATHRYN E. FREED:

DECISION/ORDER
Index No. 157967/2012
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant The City of New York (“the City”), moves for an Order pursuant to CPLR§
3211(a)(7) dismissing the Complaint and all cross-claims, if any. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **grants**
the motion.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries he allegedly sustained on August 7,
2011, as he was walking within the grounds of the Amsterdam Houses, located at 217 West 63rd

Street, County of New York. Plaintiff alleges that at that time, he was assaulted by an individual identified as Cyrus Griffin along with other males, who are not alleged to be City employees. Plaintiff alleges that the co-defendant The New York City Housing Authority (“NYCHA”), had previously banned Griffin from the premises. The Amsterdam Houses are owned by NYCHA.

Consequently, plaintiff served a Notice of Claim on or about September 15, 2011. He commenced the instant action against the City via Summons and Complaint on or about November 14, 2011. The City subsequently joined issue via service of its Answer on or about December 20, 2012. On or about December 24, 2012, the City received an Answer on behalf of co-defendant NYCHA. The instant Notice of Claim alleges in pertinent part “[n]egligence, specifically allowing a dangerous criminal Cyrus Griffin, onto NYCHA premises....The Respondents failed to take reasonable and adequate measures to prevent Griffin from entering and remaining upon their premises.” (See Exhibit “A,” ¶2).

Positions of the parties:

First, the City argues that the Complaint necessitates dismissal since it did not own the subject property on the date of the alleged incident, and therefore, did not owe plaintiff a special duty in its proprietary capacity. Additionally, it argues that plaintiff’s claim that a nuisance existed at the premises to members of his building and the community also implicates the public duty rule, wherein plaintiff cannot successfully prosecute a tort action against a municipality or other governmental actor performing a governmental function unless a special duty is pled and proven.

Plaintiff argues that “it is common knowledge that the Housing Authority police force merged with New York City Police Department, (“NYPD”), in 1995, creating a Housing Bureau, which according to the NYPD’s own website, is ‘entrusted with providing for the security and

delivery of police services to more than 400,000 residents, employees and guests of public housing throughout New York City.’ ” (See Aff. in Opp. pp. 1-2, ¶3). Plaintiff argues that the City’s motion has raised genuine issues of fact with respect to the City’s role at the subject premises and thus, discovery concerning what NYCHA’s role with regard to security at the Amsterdam Houses is warranted.

Conclusions of law:

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff every benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]; see also *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 704 [2d Dept. 2008], *lv dismissed* 12 N.Y.2d 878 [2009]; *511 W.232nd Owners Corp. v. Jennifer Realty Corp.*, 98 N.Y.2d 144 [2002]). “So liberal is the standard under these provisions that the test is simply whether the proponent of the pleadings has a cause of action, not even whether he has stated one” (*Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114 [1st Dept. 1998]). Therefore, “if [the court] determine[s] that [plaintiff] is entitled to relief on any reasonable view of the facts stated, [the court’s] inquiry is complete and [it] must declare the complaint legally sufficient” (*Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 318 [1995]).

It is well settled that NYCHA is a “distinct municipal entity not united in interest with [the] City” (*Torres v. New York City Hous. Auth.*, 261 A.D.2d 273, 275 [1st Dept. 1999]), and as such, it is independent of the City of New York (see *Roberts v. New York City Office of Collective*

Bargaining, 33 Misc.3d 1224(A), 2011 NY Slip Op. 52094(U) (Sup Ct, NY County 2011)). The Housing Authority is not an alter ego of the City of New York and notice to the City may not be imputed to it (see *Pavone v. City of New York*, 170 A.D.2d 493 [2d Dept. 1991]; *Seif v. City of New York*, 218 A.D.2d 595 [1st Dept. 1995]). Moreover, plaintiff's claim that NYCHA exhibited negligence, in permitting Griffin, a dangerous criminal to be on its premises, is unavailing absent a special duty owed to him. It is well established that the special duty rule holds that a government agency is not liable for the negligent performance of a government function unless there existed a special duty owed to plaintiff, as opposed to a general duty owed to the public at large (*McLean v. City of New York*, 12 N.Y.3d 194, 199 [2009]; see also *Lombardo v. Temple Beth-El of Rockaway Park*, 31 Misc.3d 1219(A), 2011 NY Slip Op. 50737(U) (Sup Ct, Queens County 2011)).

In the instant case, the Court finds that plaintiff has failed to state a cause of action against defendants. Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City's motion to dismiss the complaint for failure to state a cause of action is granted; and it is further

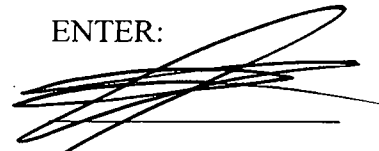
ORDERED that the remainder of the action shall continue; and it is further

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

DATED: Aug 5, 2013

AUG 05 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**