

Chambers v City of New York
2014 NY Slip Op 30531(U)
January 14, 2014
Supreme Court, Bronx County
Docket Number: 23690/13
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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STEVEN CHAMBERS,

DECISION AND ORDER

Plaintiff(s), Index No: 23690/13

- against -

CITY OF NEW YORK, CORRECTION OFFICER SANCHEZ,
BADGE NUMBER 15883, CORRECTION OFFICER WARD,
BADGE NUMBER 18963, AND SEVERAL UNIDENTIFIED
CORRECTION OFFICERS ASSIGNED TO ANNA M. KROSS
CENTER,

Defendant(s).

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In this action for alleged personal injuries arising from, *inter alia*, the alleged negligence of the defendants in the supervision of inmates within their prison facility, defendant CITY OF NEW YORK (the City) moves for an order dismissing the action pursuant to CPLR § 3211(a)(7). The City avers that because plaintiff did not appear for a hearing pursuant to GML § 50-h after a demand was made, plaintiff was precluded from commencing this action pursuant to GML § 50-h(5). Plaintiff opposes the instant motion on grounds that he adjourned the aforementioned hearing and the City never rescheduled it. Plaintiff cross-moves for an order pursuant to CPLR § 3215, seeking a default judgment against defendants CORRECTION OFFICER SANCHEZ, BADGE NUMBER 15883 (Sanchez) and CORRECTION OFFICER WARD, BADGE NUMBER 18963 (Ward). Plaintiff avers that both Sanchez and Ward were served with the summons and verified complaint and have failed to interpose an answer within the time period prescribed by CPLR § 3012(a). Plaintiff's cross-motion is

unopposed.

For the reasons that follow hereinafter, The City's motion is denied and plaintiff's cross-motion is also denied.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*id.*). With respect to hearings required by GML § 50-h, subsection 5 reads:

Where a demand for examination has been served as provided in subdivision two of this section *no action shall be commenced against the city, county, town, village, fire district or school district against which the claim is made unless the claimant has duly complied with such demand for examination*, which compliance shall be in addition to the requirements of section fifty-e of this chapter. *If such examination is not conducted within ninety days of service of the demand, the claimant may commence the action.* The action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, the city, county, town, village, fire district or school district shall reschedule the hearing for the earliest possible date available. (emphasis added).

Accordingly, once a demand for a hearing is made, no action may be commenced against the City of New York unless the claimant submits to a hearing or if the municipal defendant fails to conduct the hearing within 90 days of a demand. It is well settled that compliance with a demand

for an oral examination pursuant to General Municipal Law § 50-h is a condition precedent to the commencement of an action against a municipal defendant and an action commenced absent compliance with GML §50-h must be dismissed (*Best v City of New York*, 97 AD2d 389, 389 [1st Dept 1983], *affd* 61 NY2d 847 [1984]; *see also Boone v City of New York*, 92 AD3d 709, 710 [2d Dept 2012]; *Cook v Village of Greene*, 95 AD3d 1639, 1639-1640 [3d Dept 2012]).

Here, the complaint alleges that "[u]pon information and belief, Defendant CITY OF NEW YORK has waived a Municipal Hearing regarding the above claim because Plaintiff STEVEN CHAMBERS is incarcerated." Deeming this allegation to be true, as the Court must, the complaint establishes that defendants waived compliance with GML § 50-h, and while it is true that on a motion to dismiss, "when evidentiary material is considered the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), here, the City's only evidence on this issue fails to refute the allegation of waiver in the complaint. Specifically, the City submits the demand sent to plaintiff requesting that he appear for a hearing. However, nothing in this demand evidences that subsequent to their demand, the City did not waive the hearing. Therefore, the City fails to controvert the allegations in the complaint. Defendants motion to dismiss must, therefore, be denied.

Plaintiff's cross-motion for a default judgment must also be denied. CPLR § 3215[f] states that "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim."

Accordingly, the proponent of a motion for a default judgment must submit proof that defendant was served with the summons and complaint and an affidavit of the facts constituting the claim (*Pampalone v Giant Building Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005; *Andrade v Ranginwala*, 297 AD2d 691, 691-692 [2d Dept 2002])). Here, while plaintiff submits proof that Sanchez and Ward were duly served with the summons and complaint and have failed to interpose answers, he fails to submit an affidavit of merit. Thus, his cross-motion must be denied. it is hereby

ORDERED that the City serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : 1/14, 2014
Bronx, New York



MITCHELL J. DANZIGER, J.S.C.