Hamid v City of New York
2018 NY Slip Op 32637(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 152213/2014
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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NASMOON HAMID Index №.: 152213/2014

-against- **Hon. GEORGE J. SILVER**

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AND COLER GOLDWATER SPECIALTY HOSPITAL AND NURSING FACILITY Justice Supreme Court

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The following papers numbered 1 to 3 were read on this motion (Seq. №.:001) for an order substituting administrator Bibi Z. Shrivnauth ("plaintiff") in the place of Nasmoon Hamid ("decedent"); and cross motion by defendant New York City Health and Hospitals Corporation ("NYCHHC") for an order pursuant to CPLR §§ 3211(a)(3) and (7) dismissing the complaint, with prejudice:

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Motion is Respectfully Referred to Justice: _____
Dated: _____

Decedent commenced this action following a fall at Coler Goldwater Specialty Hospital and Nursing Home ("Coler"), a NYCHHC facility, on March 3, 2013. A notice of claim alleging that decedent fell and broke her leg at Coler was served on NYCHHC on March 13, 2013. A summons and verified complaint were subsequently served on defendants, and issue was joined by service of answer was interposed on behalf of defendants, including NYCHHC. Thereafter, a bill of particulars and response to discovery was exchanged. Decedent passed away on November 19, 2016. At the time of her death, a 50-h hearing had not been conducted. On November 8, 2017, decedent's daughter, plaintiff, was formally appointed as an administrator of decedent's estate by the Bronx County Surrogate's Court. Accordingly, plaintiff now moves to vacate the stay that was imposed by decedent's death, and to amend the caption to indicate her involvement in this case. NYCHHC cross moves for dismissal of the case, arguing that decedent's notice of claim is defectively vague, and that this action cannot proceed because a 50-h hearing was never held. As such, NYCHHC contends that it was impermissibly deprived of its opportunity to examine decedent, and assess the viability of her claims. In response, plaintiff argues that because decedent was in a permanent vegetative state while she was admitted as a patient at Coler, a 50-h hearing would not have yielded any findings helpful to NYCHHC's assessment of the case. Moreover, plaintiff contends that the notice of claim filed in this action contains enough specificity to have given NYCHHC more than adequate information concerning the nature of the lawsuit. Accordingly, plaintiff renews its request to restore this action to active status, and amend the caption.

DISCUSSION

The death of a party divests a court of jurisdiction to conduct proceedings in an action, including severance, until a proper substitution has been made pursuant to CPLR §1015(a) (*see Harding v. Noble Taxi Corp.*, 155 A.D2d 265 [1st Dept. 1989]). Once an appropriate substitution has been made, an action may be restored to the calendar with the substituted party added to the caption (*id.*).

The filing of a notice of claim is a pre-condition to an action against a municipality such as NYCHHC. The primary purpose of the notice of claim requirement is to permit the municipality to conduct a prompt investigation of the facts and circumstances from which a claim arose while the information is still fresh and readily available (*O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]; *Adkins v City of New York*, 43 NY2d 346, 350 [1977]).

GML § 50-e(2), requires that a notice of claim:

> be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney if any,; (2) the nature of the claim; (3) the time when, the place where, and the manner in which the claim arose

With regard to the location of an accident, a claimant must identify the location of an accident within his notice of claim not with "with literal nicety or exactness" (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]; *see also Purdy v City of New York*, 193 NY 521, 523-524 [1908]), but merely, with "sufficient [specificity] to enable the city to investigate the claim" (*O'Brien,* 54 NY2d at 358, *supra*). Accordingly, if the location alleged within a notice of claim is such that it prevents the municipality from locating the defect alleged and investigating the same, the requirement prescribed by GML § 50-e(2)(2) has not been satisfied (*Harper v City of New York*, 129 AD2d 770, 771 [2d Dept 1987] ["Initially, we note that the plaintiff's original notice of claim, which merely stated that the accident occurred 'at Crown Street and New York Avenue', failed to describe the location of the alleged defect with sufficient particularity to enable the defendant to conduct a proper investigation and otherwise assess the merits of the plaintiff's claim."]; *Faubert v City of New York*, 90 AD2d 509. 509 [2d Dept 1982] [Notice of claim defective when it misstated the location of the sidewalk alleged to have caused plaintiff's accident. Specifically, "the notice of claim erroneously described the accident site as 'the sidewalk located on Parsons Boulevard between Jewel Avenue and 65th Street', when the actual location of the accident was on Parsons Boulevard between Jewel Avenue and 65th Avenue."]; *Caselli v City of New York*, 105 AD2d 251, 253 [2d Dept 1984] ["Manifestly, the mere statement in the instant notice that the incident occurred on 'the public roadway at the intersection of Queens Boulevard and Woodhaven Boulevard', a major intersection, was too vague to enable the city to locate the alleged defect."])

Even where the location within a notice of claim is insufficient to permit the municipality to locate the defective condition and investigate,"[i]n passing on the sufficiency of a notice of claim in the context of a motion to dismiss, courts are not confined to the notice of claim itself" (*D'Alessandro v New*

York City Tr. Auth., 83 NY2d 891, 893 [1994]). Instead, whether such motion should be granted hinges on whether the municipality was prejudiced by any deficiency in the description of the location within the notice of claim (*id.*). If any deficiency was ameliorated by other relevant evidence, a motion to dismiss for failure to comply with GML 50-e(2), should be denied (*id.*; *Rivera v City of New York*, 169 AD2d 387, 388 [1st Dept 1991] ["At the outset, it should be noted that even assuming that plaintiff's counsel might have prepared a more comprehensive notice of claim, the fact remains that this case hardly presents an example of a vague negligence claim being foisted upon the City of New York, the examination in the Comptroller's office narrowed the possible accident site to one of two places, and the photographs not only show the pothole to have been so large that anyone inspecting these spots could hardly have missed it but also served to put the defect in a readily identifiable location."]).

Moreover, compliance with a demand for a General Municipal Law §50-h examination is a condition precedent to the commencement of an action against a municipal defendant (*see Ross v. County of Suffolk*, 84 AD3d 775 [2d Dept 2011]; *Steenbuck v. Sklarow*, 63 AD3d 823 [2d Dept 2009]; *La Vigna v. County of Westchester*, 160 AD2d 564 [1st Dept 1990]; *Best v. City of New York*, 97 AD2d 389 [lst Dept 1983], *aff'd* 61 NY2d 847 [1984]). With the exception of an extraordinary circumstance, such as "extreme physical or psychological incapacity," the failure to submit to a 50-h examination constitutes grounds for dismissal (*Steenbuck v. Sklarow*. 63 AD3d at 824, *supra* [plaintiff's failure to appear at the 50-h hearing did not warrant dismissal of the complaint, given the extent of plaintiff motorcyclist's injuries, as documented by his treating physician, including speech, memory and cognitive deficits, and given his parents' appointment as his guardian and their appearance at the 50-h hearing]); *see also Twitty v. City of New York*, 195 AD2d 354 [1st Dept 1993][plaintiff presented sufficient evidence as to her inability to attend the 50-h hearing, where she was confined to her home and bed, had no practical use of her legs or arms, and was in generally failing health]).

Notice of Claim

Here, NYCHHC's application to dismiss this action on account of perceived vagaries in the notice of claim, is denied. To be sure, the record evidence in this case establishes the following: On March 13, 2013, decedent served a notice of claim upon NYCHHC indicating that her accident occurred on March 3, 2013 between 9:00 PM and 10:00 PM while she was a resident at Coler. Moreover, decedent indicated that she fell while admitted at the facility on that date and time, and that she sustained a leg fracture. At the time of decedent's fall, NYCHHC, as her custodian, would have known the room and floor that decedent was located on. Additionally, NYCHHC would have known which of its personnel at Coler was tasked with looking after decedent. Moreover, NYCHHC was in possession of decedent's hospital chart and other documentation that could have been used to investigate the nature of decedent's claim. Accordingly, decedent's notice of claim satisfied the requirements of GML § 50-e(2), especially when one considers that decedent was not required to specify the time and place of her accident "with literal nicety or exactness" (*Brown v City of New York*, 95 NY2d 389, *supra*). To be sure, based on the information that NYCHHC had at the time that the notice of claim was served, it had more than enough facts to conduct a thorough investigation of decedent's claims. As such, the court finds that NYCHHC's application to dismiss this action based on the alleged vague assertions within the notice of claim, is without merit.

50-h

The court next turns to NYCHHC's application for dismissal based on the absence of a § 50-h hearing prior to the commencement of this action. It is not disputed that on or about March 25, 2013, NYCHHC served a demand for a General Municipal Law § 50-h hearing on decedent. Pursuant to that demand, the GML 50-h hearing of decedent was scheduled to take place on May 28, 2013. On or about May 23, 2013, decedent submitted a request for an adjournment of that 50-h hearing, and it was rescheduled for September 10, 2013. Decedent failed to appear on that date. Plaintiff concedes that this action was commenced without decedent first having appeared for a 50-h hearing. However, it is similarly without question that prior to her death, decedent was in a permanent vegetative state that would have rendered her appearance at a 50-h hearing impossible. Indeed, NYCHHC concedes that during the duration of her stay at Coler, decedent was non-ambulatory and non-verbal. Plaintiff's counsel states that recognition of that fact necessitated its initial requests to adjourn the 50-h hearing. As decedent was unable to attend a 50-h hearing on account of her permanent vegetative state, the court finds that the exception for the condition precedent of holding a 50-h hearing where a party has an "extreme physical or psychological incapacity" applies on the facts of this case. As such, on the record before this court, plaintiff has made a sufficient showing to establish an excuse for commencing this action without holding a 50-h hearing. Similarly, NYCHHC has not shown that even if decedent could have testified that it requested a rescheduled date for a 50-h hearing after decedent failed to appear on September 10, 2013. Where a 50-h hearing is postponed, and a defendant does not reschedule it or provide a subsequent demand on a plaintiff, the requirement that such a hearing be held may be waived *(see Cheeseboro v. New York City Housing Authority*, 55 AD3d 428 [1st Dept 2008]; *Belton v. Liberty Lines Transit. Inc.*, 3 AD3d 334 [1st Dept 2004]; *Ramos v. New York City Housing Authority*, 256 AD2d 195 [1st Dept 1998]; *Ruiz v. New York City Housing Authority*, 216 AD2d 258 [1st Dept 1995]. As such, NYCHHC's application to dismiss this case on account of decedent's failure to appear for a 50-h hearing is denied.

The court has considered NYCHHC's remaining arguments and finds them unavailing.

In light of the foregoing, the court finds that the requirements of CPLR §1015(a) that must be satisfied in order to restore a case and amend the caption to reflect the proper parties, have been met here. Accordingly, the stay is vacated, and the action is restored to the trial calendar. Additionally, the caption of this action shall now reflect that administrator Bibi Z. Shrivnauth is a plaintiff. It is hereby,

ORDERED that plaintiff's motion to vacate the stay in this action and amend the caption to add administrator Bibi Z. Shrivnauth, is granted; and it is further

ORDERED that the caption in this action is hereby amended as follows:

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

BIBI Z. SHRIVNAUTH, as Administratrix of the Estate of

NASMOON HAMID, deceased

Index No. 152213/2014

Plaintiffs

-against-

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AND COLER GOLDWATER SPECIALTY HOSPITAL AND NURSING FACILITY,

Defendants

; and it is further

ORDERED that NYCHHC's cross motion to dismiss is denied in its entirety; and it further

ORDERED that the parties are directed to appear for a preliminary conference in this matter at the courthouse located at 111 Centre Street, Room 1227, on Tuesday October 23, 2018 at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Dated: September 27, 2018 **Hon.** George J. Silver

GEORGE J. SILVER, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☑ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☑ DENIED	☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER