

Pagliari v City of New York
2018 NY Slip Op 34098(U)
February 27, 2018
Supreme Court, Bronx County
Docket Number: Index No. 0021147/2017
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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NICOLE PAGLIARO,

Plaintiff,

DECISION/ORDER

Present:
HON. MITCHELL J. DANZIGER

Index No.: 0021147/2017

-against-

THE CITY OF NEW YORK and NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion to Dismiss

Papers Numbered

Notice of Motion, Affirmation in Support with Exhibits	<u>1</u>
Notice of Cross Motion by NYCHHC, affirmation in support with Exhibits	<u>2</u>
Affirmation in Opposition with Exhibit by Plaintiff	<u>3</u>
Reply affirmation in Support by NYCHHC	<u>4</u>
Notice of Cross-motion by City, Affirmation in Support.....	<u>5</u>
Affirmation in Opposition by Plaintiff	<u>6</u>
Reply Affirmation in Support by City	<u>7</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Plaintiff seeks leave to amend the complaint to correct a typographical error in the original complaint that recited her hand as the area of her body that sustained injuries instead of her face. Defendant, NEW YORK CITY HEALTH AND HOSPITAL CORPORATION (“NYC HHC”), does not oppose plaintiff’s motion but instead cross-moves to dismiss the complaint on the bases that plaintiff’s Notice of Claim is insufficient, that plaintiff failed to appear for a GML §50-h hearing, and because the complaint fails to state a cause of action against NYC HHC. Defendant, CITY OF NEW YORK (“City”), also cross-moves to dismiss the complaint on the basis that plaintiff failed to name the City in the Notice of Claim and failed to serve the Notice of Claim upon the City, and further, on the basis that the complaint fails to state a cause of action against the City.

Plaintiff’s Notice of Claim only names the NYC HHC and it is undisputed that the Notice

of Claim was never served upon the City prior to plaintiff commencing this action. Plaintiff's present attorney claims that plaintiff's prior counsel failed to serve the Notice of Claim upon the City, and that his office was faced with an expiring statute of limitations when it was retained to represent plaintiff herein. In light of the expiring statute of limitations, plaintiff's attorney argues he was forced to commence this action without serving a Notice of Claim upon the City.

The Notice of Claim alleges that on January 1, 2016, plaintiff was injured when non-party, KARI BAZEMORE ("Bazemore"), approached plaintiff and slashed her in her cheek before fleeing the scene. The Notice of Claim alleges that Bazemore had been arrested at least 32 times prior to this incident and that he was released two days prior to the plaintiff being slashed. The Notice of Claim further alleges that the arrest for which Bazemore was released just prior to the slashing involved allegations that Bazemore attacked another woman. The Notice of Claim does not indicate that the attack was another slashing. The Notice of Claim asserts that NYC HHC was on notice of Bazemore's behavioral problems, and that the NYC HHC was negligent in:

"hiring, training, and/or supervising, of their agents... and/or in the ownership, maintenance, control, and supervision of the aforesaid the city [sic], without any negligence, carelessness or recklessness on the part of the plaintiff contributing thereto."

However, the notice of claim fails to allege when Bazemore was in the custody of NYC HHC, what facility within NYC HHC Bazemore was held, when Bazemore was released from and NYC HHC facility, and whether NYC HHC ever evaluated, or failed to evaluate the mental capacity of Bazemore.

The Court notes that plaintiff never moved to serve a late Notice of Claim upon the City. GML §50-i(1) directs that:

"[n]o action...shall be prosecuted against a city....for personal injury alleged to have by sustained by the negligence or wrongful act of such city...unless (a) a Notice of Claim shall have been made and served upon the city..."

GML §50-e(1)(a) makes the service of a Notice of Claim a precondition to the commencement of an action against the City. Plaintiff's failure to serve a Notice of Claim upon the City requires dismissal of the action (*Davis-Wallbridge, Inc. v. City of Syracuse*, 71 N.Y. 2d 842 [1988]; *Florence*

Development Corp., v. Board of Ed. of City School Dist. of City of New York, 81 A.D.2d 855 [2d Dep't., 1981]).

As indicated hereinabove, it is undisputed that the City was not named in, nor served with plaintiff's Notice of Claim. No application has been made to serve a late Notice of Claim upon the City. Therefore, plaintiff failed to satisfy a condition precedent to commencing this action against the City, and the complaint is hereby dismissed as against the City of New York. In light of the foregoing, the Court need not consider the additional arguments made by the City in support of its cross-motion to dismiss.

Turning to NYC HHC's cross-motion to dismiss. Initially, the Court notes that plaintiff did indeed appear for a GML §50-h hearing as evidenced by a copy of the transcript therefrom that plaintiff submits to the Court as exhibit "C" to her opposition to NYC HHC's cross-motion. Therefore, dismissal based upon plaintiff's failure to appear at a §50-h hearing is not appropriate. NYC HHC also asserts that the complaint must be dismissed because the Notice of Claim is insufficient in that it failed to indicate how NYC HHC knew or should have known of Bazemore's arrest or of his troubling behavior. NYC HHC also posits that the Notice of Claim is deficient in that it failed to indicate how NYC HHC acted negligently and failed to specify whether Bazemore was ever treated in a specific facility operated by NYC HHC prior to assaulting the plaintiff.

The purpose of a Notice of Claim, "is to guard [municipal defendants] against imposition by requiring notice of the circumstances . . . upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation" (*Rosenbaum v. City of New York*, 8 N.Y. 3d 1 [2006]). Furthermore:

"[t]he test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate . . . Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the [claim]." (*Id.*)

Here, the Court finds that the Notice of Claim fails to set forth sufficient information to enable NYC HHC to determine the place and time of plaintiff's claim and to understand the nature of plaintiff's

claim. The Notice of Claim fails to allege whether Bazemore was ever in the care and custody of NYC HHC. Further, the Notice of Claim fails to indicate whether NYC HHC had any involvement with permitting Bazemore to be released after his arrests. While the Notice of Claim does assert that Bazemore had a history of arrests, it fails to set forth how NYC HHC might know of the same. Indeed, not every person arrested within the City of New York is placed in the care of NYC HHC. Moreover, the notice of claim fails to indicate whether Bazemore’s prior 32 arrests arose from conduct similar to plaintiff’s claims. Granted, the Notice of Claim does allege that Bazemore’s arrest immediately preceding his assault on plaintiff involved him attacking a woman. However, the Notice of Claim fails to connect that arrest and his subsequent release to any specific act or omission on the part of NYC HHC that constitutes negligence. Moreover, without knowing when NYC HHC treated or evaluated Bazemore, both the parties herein and the Court are not provided with sufficient information to determine whether the notice of claim was timely. Therefore, the Court finds the Notice of Claim is insufficient.

In addition to the foregoing, while complaint does allege that Bazemore, “was improperly discharged from the custody of the defendants,” it fails to set forth why or when Bazemore was in the custody of the defendants. Therefore, the insufficiencies of the Notice of Claim are not alleviated by a complaint detailing the allegations of negligence. The Court notes that plaintiff’s motion to amend does not seek to amend anything other than the body part injured. Moreover, the Court has reviewed the §50-h testimony of the plaintiff and none of the deficiencies discussed hereinabove are remedied thereby. Based on the foregoing, the cross-motion by NYC HHC is granted and the complaint is dismissed based upon the insufficient Notice of Claim.

In light of the foregoing, the motion by plaintiff to amend her complaint is denied as moot as the complaint has been dismissed against all defendants.

Defendant, NYC HHC, is directed to serve a copy of this order, with notice of entry, upon all parties within 30 days of the entry date.

The above constitutes the decision and judgment of the Court.

Dated: 2/27/18
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.