Aponte v New York City Hous. Auth.
2020 NY Slip Op 33652(U)
September 23, 2020
Supreme Court, Queens County
Docket Number: 714378/2019
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

FILED
9/25/2020
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COUNTY CLERK
QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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Index No.: 714378/2019

FELICITA APONTE,

Plaintiff,

Motion
Date: August 26, 2020

-against-

Motion Cal. No.:5

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

Motion Sequence No.: 1

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The following efile papers numbered 25-45, 47-49 submitted and considered on this motion by defendant New York City Housing Authority (hereinafter "NYCHA") seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3126 striking from plaintiff Felicita Aponte's (hereinafter "Aponte") verified bill of particulars all of the new allegations and new theories of liability that were not contained in plaintiff's Notice of Claim.

	Papers Numbered
Notice of Motion -Affidavits-Exhibits.....	EF 25-44
Affirmation in Opposition-Affidavits-Exhibits.....	EF 45
Reply Affirmation-Affidavits-Exhibits.....	EF 47-49

This litigation involves a claim that on June 24, 2018, at approximately 1:30 A.M., Aponte was shot on the premises of the Pomonok Housing Development located in Queens. Aponte commenced this litigation by serving a Notice of Claim dated July 20, 2018, which is a condition precedent to the commencement of this action under General Municipal Law §50-e and Public Housing Law §157(2) on NYCHA, alleging the following as the nature of her claim: "As a result of the negligence and carelessness of [NYCHA], its servants, agents and/or employees, the Claimant was shot and was severely injured. The Claimant's injuries include, but are not limited to a shattered left foot and required a rod to be placed". In the Notice of Claim Aponte specified the time, place and the manner of how the claim arose as follows: "At 1:30 am, June 24, 2018 at the Pomonok Housing Development in Queens, NY on 67-10 Parsons Blvd between Parsons Blvd and Kissena

Blvd." Aponte alleged items of damage or injuries, claiming the following: "Claimant sustained severed injuries that include, but are not limited to a Shattered left foot. The total amount claimed is an amount greater than can be awarded in Civil Court".

Aponte filed a summons and verified complaint on August 20, 2019. NYCHA served a verified answer on August 27, 2019. NYCHA also served a demand for a Bill of Particulars on or about August 27, 2019. Aponte served a Verified Bill of Particulars on or about October 21, 2019. According to NYCHA, Aponte's verified particulars contained new allegations and theories which were not contained in her Notice of Claim. Therefore, NYCHA served a good faith letter and stipulation on Aponte's counsel on October 31, 2019, requesting that the new theories of liability as listed by NYCHA be withdrawn. When Aponte's counsel failed to respond, NYCHA served a second good faith letter and stipulation upon Aponte's counsel on or about February 12, 2020. According to NYCHA, Aponte's counsel has not responded. Aponte's Notice of Claim states generally, *inter alia*, that she was shot because of the negligence and careless of NYCHA, its "servants, agents, and/or employees". Thus, NYCHA maintained that as Aponte's Notice of Claim sets forth a single claim for negligence, with no mention of the additional theories of liability, adding new allegations and theories of negligence to the verified bill of particulars is improper. According to NYCHA, Aponte's verified bill of particulars states the following as new theories of liability:

- Additionally, the defendant [NYCHA] was negligent in that it refused to honor the request or plaintiff [Aponte] to transfer out of the Pomonok Housing Development when Ms. Aponte made such a request in February, 2019, after she was the victim of domestic violence. The bill of particular alleges NYCHA never responded to plaintiff's [Aponte] request for a housing transfer. Then, four months later, in June, 2019, she was shot on the premises of the Pomonok Housing Development while she was still a resident there. Had the defendant [NYCHA] honored plaintiff's [Aponte] request for a housing transfer when she initially made such a request, she would not have been shot and would not have suffered such severe injuries.

- Actual notice is claimed in that the defendant [NYCHA] should have known of the activities of the perpetrator of the crime against plaintiff [Aponte] because the perpetrator also resided in the Pomonok Housing Development, the same housing complex in which plaintiff was living at the time of the incident.

- In addition, the defendant knew or should have known that the perpetrator was a member of a gang, and therefore, could have had access to weapons that he could use against other residents of the housing complex.

- Plaintiff [Aponte] alleges that defendant [NYCHA] its agent(s), servant(s) and/or employees caused or created the alleged condition and/or activity in that they failed to maintain the premises of the Pomonok Housing Development in a safe condition, thereby giving rise to the presence of gang members who felt comfortable firing shots while on the premises. Furthermore, the defendant failed to properly screen its residents because the perpetrator of the crime against the plaintiff is a resident of the Pomonok Housing Development, had he been properly screened, the defendant should have discovered the perpetrator's affiliation with gangs, and thus, should not have rented to him, or should have implemented measures to ensure the safety of its residents.

- Defendant was also negligent in that it failed to prevent the admission of the perpetrator to the same hospital to which Plaintiff was admitted shortly after she was shot by him. The presence of the perpetrator in the same hospital, and on the same floor, as [Aponte] only contributed to [Aponte's] anxiety.

Further, NYCHA argued that Aponte cannot seek to amend the Notice of Claim to include the allegations improperly stated in the bill of particulars because they fall outside of the scope of permissible corrections(*see* Gen. Mun. Law §50-e[6]; *White v New York City Housing Authority*, 288 AD2d 150 [1st Dept 2001]; *Olivera v City of New York*, 270 AD2d 5 [1st Dept 2000]; *see also Morris v City of New York*, 132 AD3d 997 [2d Dept 2015]).

In opposition, Aponte explained that it responded to NYCHA's good faith letter of October 31, 2019 by email, advising NYCHA that another law firm would be assuming responsibility of this matter and requesting that NYCHA postpone any motion practice until January 2020. Aponte argued that her verified bill of particulars is an amplification of her theory of negligence provided in her Notice of Claim. Thus, what NYCHA refers to as new theories of liability are really only an amplification of the theory of negligence mentioned in Aponte's Notice of Claim, and were articulated and clarified at Aponte's 50-h Hearing. Thus, NYCHA's application should be denied. Also, although NYCHA cited *Lopez v New York City Housing Authority*, 16 AD3d 164 (1st Dept 2005) to support its view that it is not permissible to assert new theories of liability in the Verified Bill of Particulars which were not alleged in the Notice of Claim, the Court in *Lopez* held that some of the allegations mentioned in the Bill of Particulars were new theories of liability, and could not be added to the notice of claim, but those allegations that referred to the maintenance and control of the smoke alarm were sufficiently related to the notice of claim, and could be added. So here also, the allegations raised in the Bill of Particulars are merely an extension of the theory of negligence that was initially stated in the Notice of Claim. Aponte asserted that she testified at her 50-h hearing that NYCHA refused to honor her request to transfer out of the Pomonok Housing Development when she made such a request in February, 2018 after she was a victim of domestic violence, and that had NYCHA honored her request she would not have been a victim of a crime in the housing development four months later in June 2018. Also in the case *Matter of Corwin v City of New York*, 141 AD3d 484 (1st Dept 2016) the Court allowed plaintiff to amend his notice of claim to include the failure of the defendant to provide helmets to bikers. The First Department stated that "plaintiff

only raised that issue in response to the City's decision to assert as an affirmative defense that plaintiff's injuries would have been less severe had he work a helmet while riding a Citibike".

In this case, the allegations stated in plaintiff's verified bill of particulars were made in response to defendant's Demand for a Bill of Particulars, wherein paragraph 3 requested "the acts or omissions constituting the alleged negligence of defendant." In paragraph 4 of NYCHA's demand requested "If a defective and/or dangerous condition is alleged, set forth in detail the nature, manner and location of each and every defective and/or dangerous condition that was responsible, wholly or partially". In paragraph six of NYCHA's demand it asks "State whether actual notice is claimed." In response, Aponte claimed that "Actual notice is claimed in that the defendant should have known of the activities of the perpetrator of the crime against the plaintiff because the perpetrator also resided in the Pomonok Housing Development, the same housing complex in which plaintiff was living at the time of the incident." Although NYCHA refers to this claim as new, it was a response to its demand, and an amplification of the nature of the claim as stated in the Notice of Claim, in particular, Aponte's claim of negligence. Aponte also responded to paragraph 10 of defendant's demand, asking whether it is being claimed that NYCHA (or its agents) caused or created the condition and she responded that NYCHA "caused or created the alleged condition and/or activity in that they failed to maintain the premises of the Pomonok Housing Development in a safe condition, thereby giving rise to the presence of gang members who felt comfortable firing shots while on the premises." Additionally Aponte merely responded to NYCHA's demand in paragraph 13 which requested with specificity, how and in what manner defendant was negligent, detailing each act of negligence claimed by responding in various ways NYCHA was negligent, including its failure to prevent the admission of the perpetrator to the same hospital in which Aponte was admitted shortly after the event, the perpetrator was in the same hospital, on the same floor as she was which caused her anxiety. Thus, this is not a new theory of negligence but a response to the demand. Aponte cited *Sutin v Manhattan & Bronx Surface Transit Operating Auth*., 54 AD3d 616 [2d Dept 2008]). In that case, defendant moved to dismiss plaintiff's complaint, arguing that plaintiff's claim in her bill of particulars was that defendant was negligent in failing to let passengers off parallel to the curb, and within 12 inches of the curb at the bus stop. Defendant alleged that this violated NYC Traffic Rules & Regulations because it was an impermissible shift in theory since it was not mentioned in the original notice of claim or at the 50-h hearing. However, the Court sided with plaintiff and stated that the "purpose of the notice of claim is to give a municipal authority the opportunity to investigate....defendant was sufficiently apprised in the notice of claim, and in the 50-h hearing that plaintiff was basing her theory of liability on a claim that the bus driver negligently failed to position the bus in order to provide plaintiff with a safe place to exit the bus." Aponte maintained that this case was similar. Thus although NYCHA is claiming that she asserted a new theory of liability when she alleged that NYCHA was negligent in failing to prevent the admission of the perpetrator to the same hospital to which she was admitted, this is information she provided at her 50-h hearing, which was held long before she submitted her bill of particulars was served. This revelation is not a new theory of liability, but another instance of negligence perpetrated by NYCHA and an amplification of the original theory of negligence. Aponte also cited the case *Dowd v City of New York*, 40 AD3d 908 (2d Dept 2007) where the Second Department granted plaintiff leave to amend her notice of claim. Aponte argued that although she had not made such an

application, leave to amend her notice of claim to further specify the manner in which a claim arose would be granted.

In reply, NYCHA adhered to its arguments presented in support of its motion, and also provided arguments in response to Aponte's opposition. According to NYCHA, any application by Aponte seeking leave to amend her notice of claim would be denied as untimely (*see Rice v New York City Housing Authority*, 149 AD2d 495, 497 [2d Dept 1989]).

DISCUSSION

The timely filing of a Notice of Claim is a condition precedent to the commencement of an action against NYCHA. (*See Gen. Mun. Law §50-e; Galarza v New York City Housing Authority*, 99 AD3d 545 [1st Dept 2012]; *Shahid v City of New York*, 50 AD3d 770 [2d Dept 2008]). The purpose of a Notice of Claim is to allow the authority "to investigate, collect evidence and evaluate the merit of a claim". (*See Brown v City of New York*, 95 NY2d 389 [2000].) Thus, the Notice of Claim must provide the governmental authority with notice, not only of when, where the claim arose, but also the manner in which the claim arose; what the act or acts of negligence was/were and how it caused the injuries claimed by the Claimant. (*See O'Brien v Syracuse*, 54 NY2d 353 [1981].) The purpose of the Notice of Claim is to provide sufficient notice for the municipal authority "to make a prompt investigation of the facts and preserve the relevant evidence". (*See Lomax v New York City Health and Hosp. Corp*., 262 AD2 [1st Dept 1999]; *see also Rosenbaum v City of New York*, 8 NY3d 1,7 [2006].)

It is not permissible by plaintiff to assert new theories of liability in the verified bill of particulars which were not alleged in the Notice of Claim. (*See Lopez v New York City Housing Authority*, 16 AD3d 164 [1st Dept 2005]; *White v New York City Housing Authority*, 288 AD2d 150 [1st Dept 2001]; *Mazzulli v City of New York*, 154 AD2d 355 [2d Dept 1989]; *see also Semprini v Vil. Of Southampton*, 48 AD3d 543 [2d Dept 2008]; *Chieffet v New York City Transit Authority*, 10 AD3d 526 [1st Dept 2004]; *Demorcy v City of New York*, 137 AD2d 650 [2d Dept 1988].) Claims which are not included in the Notice of Claim cannot be included in the complaint or the bill of particulars. Although a Claimant need not state "a precise cause of action in *haec verba* in a notice of claim" the Notice of Claim must at least apprise the defendant of the facts of the underlying claim. (*See Steins v Inc. Vil. of Garden City*, 127 AD3d 957 [2d Dept 2015], *lv denied*, 26 NY3d 915 [2016]). The additional causes of action, theories of liability asserted by Aponte against NYCHA in the verified bill of particulars are not permissible based upon the allegations set forth in Aponte's Notice of Claim as they failed to apprise NYCHA of the additional claims, therefore they shall be stricken (*see Lewis v New York City Housing Authority,* 135 AD3d 444 [1st Dept 2016]; *DeJesus v New York City Housing Authority,* 46 AD3d 474 [1st Dept 2007]; *Melendez v New York City Housing Authority*, 294 AD2d 243 [1st Dept 2002]). Nothing in the Notice of Claim would have apprised NYCHA to investigate those additional claims (*see Williams v County of Westchester*, 103 AD3d 796 [2d Dept 2013]).

Therefore, the defendant's motion is granted.

This constitutes the decision and Order of the Court.

Dated: September 23, 2020

Hon. Chereé A. Buggs, JSC

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