

Kislin v New York City Tr. Auth.
2022 NY Slip Op 30526(U)
February 10, 2022
Supreme Court, Kings County
Docket Number: Index No. 505671/2021
Judge: Ingrid Joseph
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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of February 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

P R E S E N T: HON. INGRID JOSEPH, J.S.C

-----X Index No.: 505671/2021
Dina Kislin,

Plaintiff,

-against-

Decision/Order

New York City Transit Authority, Metropolitan Transportation Authority, B & S Iron Works, LLC, and the City of New York

Defendants.

-----X
Recitations, as required by CPLR § 2219(a), of the papers considered in the review of plaintiff's motion

Papers	NYSCEF Nos.
Notice of Motion/Affirmation/Affidavit/Exhibits _____	<u>8-22</u>
Opposition/Affirmation/Exhibits Annexed _____	<u>24-26</u>
Reply _____	<u>27</u>

Defendants, New York City Transit Authority, Metropolitan Transportation Authority, and the City of New York ("City Defendants") move (mot.seq.1) pursuant to CPLR 3211 and General Municipal Law § 50-h dismissing the complaint in its entirety against them on the ground that Plaintiff, Dina Kislin ("Plaintiff") failed to comply with a condition precedent to the commencement of an action against defendants when she failed to appear for a medical examination.

City Defendants argue that under General Municipal Law ("GML")§ 50-h they are entitled to demand an examination of the claimant relative to the occurrence and extent of the injuries for which the claims are made. City Defendants state that Plaintiff's contention that she is not required to submit to a physical examination because it was improperly noticed is meritless. City Defendants claim that GML § 50-h(2) requires that a notice of 50-h examination shall state the person before whom the examination is to be held, the time, place and subject

matter and if a physical examination is required. The City Defendants position is that the plain language of the statute requires only that the notice state if a physical examination is required. City Defendants aver that there is no condition that waives their entitlement to demand an examination if a medical examination has not been scheduled within ninety (90) days of the 50-h hearing. City Defendants also state that the Plaintiff is not entitled to refuse to appear for a physical examination based on the fact that the notice was delivered via email. The City Defendants defend this position by stating that the statute's explicit specification of which types of mail are acceptable for service upon unrepresented parties followed by the complete lack of any specificity as to which mail is acceptable upon a claimant's attorney indicates an intent of the legislature that all types of mail (including email) are acceptable. City Defendants, alternatively, state that even if it was improper plaintiff's counsel acknowledged receipt of the notice.

Plaintiff in opposition to the City Defendants motion states that her claims against the City Defendants are governed by Public Authority Law ("PAL") § 1212 and § 1276 and not GML § 50-h. Plaintiff argue that Courts only apply GML § 50-h to municipalities or when a statute explicitly incorporates it by reference. Plaintiff cites Hernandez v. New York City Transit Authority 245 NYS2d 43 (Sup. Ct. New York County 1963) which was affirmed by the First Department 20 Ad2d 968(1 Dept 1964) holding that there is no prohibition in that section to the commencement of an action until compliance with the demand for examination as provided in section 50-h of GML. Plaintiff claims that the courts have consistently applied PAL § 1276 to the MTA and PAL § 1212 to the NYCTA. Plaintiff emphasizes that the only reference to the GML in PAL §§ 1212 and 1276 is to GML §50-e which pertains to the notice requirement and not authorizing a physical examination of claimant as a condition precedent. Plaintiff argues that even if GML is the governing statute the demand for a physical examination is defective and improper since it was not served within ninety (90) days after November 3, 2020¹ and did not include a date for the physical examination. Plaintiff also highlights the fact that although the City of New York defendant is a movant in this motion it never demanded that Plaintiff appear for a physical examination

The City Defendants reply and state that the actions against City of New York is governed by GML § 50-h and that the notice of 50-h Hearing dated July 14, 2020 was sent to

¹ This is the date the Governor Cuomo's Executive Order tolling judicial matters was lifted.

Plaintiff and it demanded that Plaintiff appear for an independent medical examination following the completion of the 50-h hearing. The City Defendants defend the position that the City of New York Defendant never demanded that Plaintiff appear for a physical examination by stating that it was a law office error when the Notice of physical examination did not include the City of New York as a named defendant. The City Defendants state that Plaintiff's counsel knew that the Ropers Majeski P.C. was representing the City Defendants when its notice to conduct an oral examination dated March 4, 2020 was served. The City Defendants allege that this law office clerical error should not absolve plaintiff from her statutory obligation to appear for a pre-suit physical examination.

A party who has failed to comply with a demand for examination pursuant to General Municipal Law § 50-h is precluded from commencing an action against a municipality (*Bernoudy v County of Westchester*, 40 AD3d 896, 897 [2d Dept 2007]). The term "municipal corporation," as used in this chapter, includes only a county, town, city and village (General Municipal Law § 2). Public Authorities Law § 1276 governs actions against the MTA and its subsidiaries (*Rose v Metro N. Commuter R.R.*, 143 AD2d 993, 994 [2d Dept 1988]). Unlike General Municipal Law § 50-h, there is no provision in Public Authorities Law § 1317 which precludes a claimant from commencing an action before the...examination is held under Public Authorities Law § 1317(4) (*Pickens v Capital Dist. Transp. Auth.*, 209 AD2d 855, 856 [3d Dept 1994]). Nor can it be held that section 1212 of the Public Authorities Law must be read in light of the provisions of section 50-h of the General Municipal Law. Section 1212, insofar as it refers to the General Municipal Law, does so only with respect to section 50-e and the serving of notice (*Hernandez v New York City Transit Authority*., 41 Misc 2d 123, 124 [Sup Ct 1963], *affd.*, 20 AD2d 968 [1st Dept 1964]).

After a review of all the documents submitted the court finds that GML§ 50-h demand requirement is only applicable to municipalities and MTA and NYCTA are public authorities. Here, the demand sent to plaintiff was sent on behalf of New York City Transit Authority and Metropolitan Transit Authority only. The City Defendants' attorney asks the Court to deem that the demand was sent from all City Defendants including the City of New York, however the notice of the GML §50-h demand for physical examination only stated the "Defendants 'Metropolitan Transportation Authority' and 'New York City Transit Authority'...hereby demand that Claimant Kislin be submitted to an evaluation by the following Orthopedic

Specialist designated by Defendants” in the body of the notice. Additionally, the attorney’s signature on the notice was only from the attorney for Defendants Metropolitan Transportation Authority and New York City Transit Authority. The City of New York Defendants whose name appeared in the caption of the action were omitted twice from the notice. Moreover, the initial notice of GMI, 50-h hearing which first demanded a physical examination after the hearing also did not include the City of New York as the Defendant making the demand. Thus, the City Defendants are not entitled to a dismissal of Plaintiff’s complaint pursuant to CPLR 3211.

Accordingly, Defendant’s motion to dismiss is denied.

This constitutes the decision and order of the court.



HON. INGRID JOSEPH

JSC

**Hon. Ingrid Joseph
Supreme Court Justice**