

Mann v New York City Hous. Auth.

2023 NY Slip Op 30588(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 153799/2022

Judge: J. Machelles Sweeting

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

ANNESSIA MANN,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF
NEW YORK

Defendant.

-----X

INDEX NO. 153799/2022

MOTION DATE 12/05/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS.

In the underlying action, plaintiff alleged in her Notice of Claim (NYSCEF Document #12) that on February 17, 2021 at approximately 10:00 pm, she was caused to trip and fall while entering the elevator in the building located at 154 Broome Street, in the County, City and State of New York, due to the fact that the elevator car floor was not level with the hallway floor.

Pending now before the court is a motion in which defendant New York City Housing Authority (“NYCHA”) seeks an order, pursuant to Civil Practice Law and Rules (“CPLR”) 3211(a) (1) and (7) and (c); Public Housing Law 157(2); and General Municipal Law (“GML”) 50-h; dismissing plaintiff’s Complaint against NYCHA due to plaintiff’s failure to comply with conditions precedent to the commencement of a lawsuit against NYCHA.

Standard on a Motion to Dismiss

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties

NYCHA argues that over the course of more than 16 months, and six separate scheduled dates, plaintiff has yet to appear for her 50-h hearing. NYCHA argues that during that time, their office repeatedly and consistently initiated communication with plaintiff’s counsel’s office to obtain compliance, without success. Accordingly, NYCHA argues, plaintiff has refused to comply with a condition precedent to suit, and hence her Summons and Complaint must be dismissed. In support of these arguments, NYCHA submitted, *inter alia*, numerous communications between its offices and the offices of plaintiff’s counsel (see NYSCEF Documents #15, 16, 17, 18, 19, 20 and 21).

In opposition, plaintiff’s counsel states only:

2. I submit this affirmation in opposition to defendant's motion to dismiss the Plaintiff's Complaint for failure to appear at 50-h hearing.
3. Your affirmant deeply regrets inconvenience sustained by the Court and Counsel as a result of Plaintiffs failure to appear.
4. The failure to appear by plaintiff is due to communication issues and currently further extensive search to locate plaintiff to appear for the 50-H hearing is being conducted.
5. Your affirmant notes that the 50-h hearings were adjourned on several occasions. However, we ask that the court grant 120 days to locate plaintiff to appear for the 50- H hearing.

Analysis and Conclusions

It is undisputed that appearing for a noticed hearing pursuant to GML 50-h is a condition precedent to suit, and a plaintiff's failure to appear for same is a basis by which to dismiss plaintiff's complaint. *See, e.g. La Vigna v County of Westchester*, 160 AD2d 564 (1st Dept 1990) ("Plaintiff concedes that, pursuant to General Municipal Law § 50-h (1), a hearing was noticed, that it was repeatedly adjourned, at his request, and that he served a summons and complaint against the Village of Harrison before the hearing was held. The law is well established that, until a potential plaintiff has complied with General Municipal Law § 50-h (1), he is precluded from commencing an action against a municipality"); *Simon v Bellmore-Merrick Cent. High School Dist.*, 133 AD3d 557 (1st Dept 2015) ("[...] the motion for summary judgment dismissing the complaint pursuant to General Municipal Law § 50-h granted [...] By refusing to produce for an examination under General Municipal Law § 50-h the minor child on whose behalf they are suing, plaintiffs failed to comply with a condition precedent to commencing the action [...]. Nor did they demonstrate exceptional circumstances so as to excuse their noncompliance"); *Ward v New York City Health & Hosps. Corp.*, 82 AD3d 471 (1st Dept 2011) ("Defendant obtained a default judgment dismissing the action after plaintiffs failed to comply with a precondition to commencing action by failing to appear at a General Municipal Law § 50-h hearing, after adjourning the hearing nine times").


Here, plaintiff does not dispute any of the facts or arguments set forth by NYCHA. It is also undisputed that plaintiff's 50-h hearing was scheduled six different times, and that plaintiff failed to appear for any of the six scheduled appointment dates. The exhibits provided by NYCHA, which include communications between NYCHA's counsel and plaintiff's counsel, corroborate that it was NYCHA that took the initiative to schedule every one of the six different dates and that

plaintiff inexplicably failed to appear. Plaintiff’s counsel fails to provide any explanation for plaintiff’s repeated non-compliance. Accordingly, it is hereby:

ORDERED that NYCHA’s motion is GRANTED; and it is further

ORDERED that the complaint is dismissed with prejudice against defendant NYCHA; and it is further

ORDERED that NYCHA shall be removed as a named defendant in this action and the caption amended to reflect the same.

<u>2/27/2023</u> DATE		 _____ J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE