

**Gomez v City of New York**

2024 NY Slip Op 34609(U)

December 27, 2024

Supreme Court, New York County

Docket Number: Index No. 151298/2023

Judge: Jeanine R. Johnson

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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. JEANINE R. JOHNSON**

**PART**

**52-M**

*Justice*

-----X

HALERFI GOMEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY  
HOUSING AUTHORITY

Defendant.

-----X

INDEX NO. 151298/2023

MOTION DATE 05/21/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Upon the foregoing documents and oral argument heard on August 14, 2024, Plaintiff’s motion to amend pursuant to CPLR § 3025(b) deeming the supplemental summons and amended complaint against the New York City Housing Authority (hereinafter “NYCHA”), *nunc pro tunc*, is granted. Additionally, Defendant, The City of New York’s (hereinafter “the City”), cross-motion to dismiss pursuant to CPLR § 3211(a)(7) is granted.

CPLR § 3025(b) states “A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” *See Fahey v County of Ontario*, 44 NY2d 934 (1978) (“Leave to amend shall be freely given absent prejudice or surprise resulting directly from the delay”); *Briggs v NYC Transit Authority*, 132 AD2d 451 (1st Dept 1987).

Here, Plaintiff seeks to amend the manner of the occurrence of the accident from “a ceiling collapse” to a “trip and fall.” Plaintiff asserts there is no surprise or prejudice to the Defendants because the Notice of Claim, Bill of Particulars and 50-h testimony all assert a trip

and fall. Defendant-the City, argues that the complaint lacks merit and it is an improper party in this matter. Defendant-NYCHA did not oppose the amendment.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon v Martinez*, 84 NY2d 83, 87 (1994). However, allegations comprising bare legal conclusions are not entitled to the same consideration. *See Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 (2017) quoting *Simkin v Blank*, 19 NY3d 46 (2012). This Court is required to “determine only whether the facts alleged fit within any cognizable legal theory.” *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348, \*3 (2d Dept 2003). When considering a “motion to dismiss a complaint, [pursuant to CPLR § 3211(a)(7)] an appellate court must accept all of the factual allegations in the complaint as true and draw all inferences favorably to a plaintiff.” *Shui Kam Chan v Louis*, 303 AD2d 151, \*3 (1st Dept 2003).

In a negligence action, “a [P]laintiff must establish that the [D]efendant owed a duty of care and then breached that duty to that [P]laintiff.” *Turcotte v Fell*, 68 NY2d 432, 502 (1986). Additionally, “liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises.” *Jackson v Bd. Of Educ. Of City of New York*, 30 Ad3d 57, 60 (1st Dept 2006).

Defendant-City, asserts this matter warrants dismissal because the walkway where Plaintiff was injured is owned by Co-Defendant NYCHA, a distinct entity. In support of its position, the City submitted three documents that showed the properties on both sides of the walkway are owned by Defendant-NYCHA – an affidavit from David Schloss, Senior Title Examiner; an affidavit from Evelyn Cabrera, Director of Urban Renewal and Property Management in the Division of Property Management and Client Services of the NYC Department of Housing Preservation and Development; and, a deed. Moreover, Defendant-City notes that Defendant-NYCHA conceded ownership in its answer.

Plaintiff contends in its opposition that Defendant-NYCHA’s motion is premature because discovery has not been completed. Plaintiff also refutes the affidavit of Evelyn Cabrera - arguing she failed to provide the records used to make her determination. Plaintiff makes no mention of the deed or the affidavit of David Schloss. Defendant-NYCHA did not oppose the motion to dismiss.

This Court finds that the City of New York established, through the deed and affidavits of Examiner Schloss and Director Cabrera, that on the day of the Plaintiff’s accident, June 19,

2022, it did not own, maintain or control the subject premises, 51 Nostrand Avenue and 35 Nostrand Avenue, Brooklyn, NY and said premises was solely owned by the New York City Housing Authority. *Torres v NYCHA*, 261 AD2d 273, 275 (1st Dept 1999); citing *Seif v City of New York*, 218 Ad2d 595 (1st Dept 1995). Furthermore, this Court finds that there is no prejudice or surprise resulting from the Plaintiff's request to amend the complaint as to Defendant-NYCHA. *Fahey* at 935; *Briggs* at 511.

Accordingly, it is hereby

ORDERED that Defendant, The City of New York's motion to dismiss is granted; it is further

ORDERED that all claims against the Defendant, The City of New York are dismissed, it is further

ORDERED that the Plaintiff's motion for leave to supplement the summons and amend the complaint *nunc pro tunc* against the New York City Housing Authority, is granted; it is further

ORDERED that the action is severed and continued against the remaining Defendant, the New York City Housing Authority; it is further

ORDERED that as the City of New York is no longer a party to the action this matter is remitted to the General Clerk's Office for reassignment to a General IAS Part; it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; it is further

ORDERED that the caption is amended to read as follows:

-----X  
HALERFI GOMEZ,

Plaintiff,

- v -

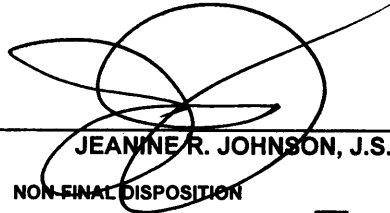
NEW YORK CITY HOUSING AUTHORITY  
Defendant.  
-----X

it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

This constitutes the Decision and Order of the Court.

<u>12/27/2024</u>				
DATE			JEANINE R. JOHNSON, 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"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				REFERENCE