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SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING--COW, Justice **PART 62**

PHILICIA SINGLETON THOMAS, Executrix of the Estate of JEAN V. SINGLETON,

Plaintiff,

-against-

CITY OF NEW YORK, ET AL.

Defendants.

INDEX NO.31165/92
MOTION DATE
MOTION SEQ. **NO.007**
MOTION CAL.NO.

The following papers numbered 1 to 4 were considered on this motion to renew and reargue:

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - **Exhibits**	1, 2
Answering Affidavits - **Exhibits** (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: [ ] Yes [X] No

Plaintiffs motion pursuant to CPLR 52221 to renew and reargue this court's decision/order dated April 4,2003 granting defendants the City of New York and the New York City Police Department's ("defendants") motion for summary judgment of dismissal is denied as explained below.

Motion to Reargue

In seeking to reargue this Court's April 4, 2003 decisionlorder, plaintiff failed to establish that this Court overlooked or misapprehended any matters of fact or law to warrant that this Court grant reargument. See CPLR §2221(d)(2). In seeking reargument, plaintiff relies upon the reports of plaintiffs experts, Police Expert Walter Signorelli, Psychiatrist Daniel Kuhn and handwriting expert Sandy Stevens, previously submitted in plaintiffs opposition to defendants' motion for summary judgment; however, now re-submitted in notarized form. Upon review of such affidavits, the Court finds that, even if it had considered such reports or considers such reports on this motion to reargue, they are conclusory, speculative and insufficient to raise any factual issues to warrant that this case proceed to trial,

Specifically, Dr. Kuhn's assertion that the Perry incident was not considered by defendants in reaching their decision to return P.O. Key's firearm is conclusory, lacking in personal knowledge of the actual facts considered by defendants in rendering their decision, and insufficient to refute defendants' proof

submitted in support of their motion for summary judgment which included Dr. Archibald's sworn affidavit, made with personal knowledge of the relevant issues, in which she unequivocally states, *inter alia*, that the restoration of Key to full duty with firearms was made in full compliance with established procedure and in consideration of all relevant information. [Initial Notice of Motion, Exh. H].

Moreover, plaintiffs position, that the decision to restore P.O. Key to full duty was not made with the benefit of information as to the Perry incident, is simply wrong as evidenced by the October 3, 1985 report/record by NYPD staff psychologist Marcia Baruch [Initial Notice of Motion, Exh. E], in which she specifically refers to the Perry incident in her recommendation to restore Key to full duty with firearms. This report by Baruch was also signed and endorsed by Dr. Archibald, indicating consideration of the Perry incident as well. In fact, it is obvious that the prior Perry incident was considered because plaintiff submits an affidavit from Perry which states that Dr. Archibald called Ms. Perry about the incident.

Further, Mr. Signorelli's claim that Internal Affairs (IAB) was required to be called at the time of the initial incident pursuant to NYPD Patrol Guide 108-21, even if accepted, does not mandate that P.O. Key would have been terminated from service; nor would the referral to IAB necessarily have prevented the tragic incident from occurring. In his own words, Mr. Signorelli signifies just how speculative this allegation is: "IAB investigations **if substantiated could result** in formal charges **and a hearing** on those charges **and a possible termination** of the subject officer." [Side Exh. E, New Affidavit of Walter Signorelli, ¶17 (emphasis supplied)]. In fact, by the plaintiffs own account, P.O. Key, in addition to his restored service revolver, had "several weapons secreted on his body" at the time of the subject incident. [Bottom Exh. B, Complaint, ¶11]. Thus, it is entirely speculative that a referral to IAB would have somehow prevented this tragic incident and the failure to do so was negligence.

Motion to Renew

As to that portion of plaintiffs motion which seeks renewal, plaintiff failed to assert new facts not offered on the prior motion that would change this Court's pnor determination and a reasonable justification for failing to present such facts on the prior motion. ***See*** CPLR §2221(e). As explained above, even if this Court were to consider the now notarized affidavits from plaintiffs experts, this

Court fails to find that they raise factual issues to warrant that this case proceed to trial.

Further, even considering all of plaintiff s submissions to date, plaintiff failed to raise a factual issue as to whether defendants considered all relevant information, including the Perry incident, prior to the restoration of P.O. Key's firearm. Thus, as previously decided by this Court, defendants' decision to return P.O. Key's firearm is subject to governmental immunity and cannot be a basis for liability in the within lawsuit. *See Mon v. City of New York,* 78 NY2d 309 (1991); *Figueroa v. City of New York,* 271 AD2d 220, 221 (1st Dept 2000); *Kopec v. City of New York*, 274 AD2d 557, *appeal denied* 96 NY2d 708 (2001) ("The plaintiffs' proof, including the affidavit of Dr. Robert Daley, was insufficient to show the existence of a factual question requiring a trial...[and] [a]ccordingly, repondents'[City's] motion for summary judgment was properly granted" in that the NYPD was not negligent when it allowed the police officer to retain her firearm, notwithstanding that the officer used her revolver to shoot her boyfnend).

Additionally, plaintiffs attempt to submit new proof in the form of an "addendum" to the affidavit of Dr. Kuhn, is improper, as plaintiff offers no excuse as to why such additional information is being submitted at this time. Additionally, such "addendum", is just an attempt by plaintiff to raise new arguments which could have been asserted in the original opposition and to re-assert arguments previously made, now with the guidance of this Court's April 4,2003 decisiodorder. Such practice is improper.

Further, Dr. Kuhn's medical opinion that there is "a relevant relationship nexus" [Exh. F, Notice of Motion] betweenthe Edith Perry incident which occurredin 1984and the subject incident which took place in 1989, does not bear on this Court's legal determination that "the acts and/or omissions by the NYPD were [not] a proximate cause of Jean Singleton's death...". (citation omitted). [Side Exh. D, Notice of Motion].

Additionally, the submission by plaintiff of an "affidavit" [1] by Dr. Robert Daley on this motion to renew, which was not previously submitted in opposition to defendants' motion for summary

[1] Moreover, Dr. Daley's opinion is offered in the form of a letter. While it bares a notary stamp, there is no indication that he was sworn, or the date it was allegedly sworn. [Notice of Motion, Side Exh. H].

judgment, allegedly due in part because this new information "became available to the plaintiff as a consequence of the newspaper articles published" (¶41, Affirmation in Support of Motion) after this Court's Order was published, fails to contain any new information which would warrant a change in this Court's prior determination. Further, the recruitment of a new expert is not a legitimate basis for renewal. ***See*** *Welch Foods, Inc v. Wilson,* 247 AD2d 830 (4" Dept 1998). The Court further notes that this new expert, a former head of Psychological Services, opines as to procedures notwithstanding his lack of personal knowledge as to such procedures, given that he was not employed by NYPD during any of the relevant time periods. While he opines that "During the time I was employed by NYPD as a psychologist, I was not aware of a published and articulated policy with respect to the return of firearms", he concedes that he resigned in June 1980, four (4) years before the alleged Perry incident and six(6) years before the return of Key's firearm As conceded by Dr. Daley, given his prior resignation, "I am no longer in a position to know firsthand". [Side Exh. H, Notice of Motion]. Similarly, the *Kopec* Court also rejected an affidavit by Dr. Daley and this Court gives it no weight. *Kopec,* 274 AD2d at 558, appeal denied 96 NY2d 708 (2001).

As previously decided by this Court, as a matter of law, defendants cannot be held responsible for the tragic death of Jean Singleton, as the murder of Jean Singleton and the suicide of P.O. Key were not foreseeable consequences of defendants' decision to return P.O. Key's firearm, some three years prior to the unfortunate incident. See *Cygan v. City of New York,* 165 AD2d 58 (1st Dept 1991), *appeal denied* 78 NY2d 855 (1991)(holding that P.O.'s suicide a mere four months after his gun was returned to him, after a period during which he was undergoing psychological evaluation was unforeseeable). The Court notes, as it did in its April 4, 2003 decisio order, that it is significant that, during the three years between the return of P.O. Key's gun and the subject incident, there were no allegations of any other incidents or psychological concerns raised with respect to P.O. Key. Plaintiff has had the opportunity to develop her case through the discovery process over the course of approximately eleven years since she filed this action, Yet, plaintiff offered not a shred of evidence to show any such allegation or warning of a psychological problem during the three years between Key's psychological treatment/restoration of Key's firearm and the tragic event, which would have alerted the defendants.

Further, contrary to plaintiffs assertion, this Court's granting of defendants' prior motion for summary judgment was a decision on the merits and not a decision based upon a procedural defect. This Court specifically found that defendants' decision to return P.O. Keys' gun, three years prior to

the subject incident cannot, as a matter of law, be said to have been the proximate cause of tragic death of Jean Singleton.

A motion to renew and/or to reargue is not the proper vehicle to allow a party a second opportunity to argue in support of a position which was previously rejected by the Court. *See Mundo v. SMS Hasenclever Maschinenfabrik*, 224 AD2d 343 (1st Dept 1996), *lv denied in part and dismissed in part* 88 NY2d 1014(1996). Thus, after careful consideration of **all** of the submitted papers, it is ordered that plaintiffs motion to renew and to reargue this Court's decisiodorder dated April 4, 2003 is denied. Thus, for the reasons stated above and in the Court's previous decision dated April 4,2003, summary judgment is granted to defendants. It is further ordered that *within 30 day of entry of this decision/order*, defendants shall serve a copy upon plaintiff with notice of entry.

Dated: 2/20/04

HON. DORIS LING-COHAN

Dons Ling-Cohan, JSC

Check One: [x] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

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