

**Tunne v Halpern**

2015 NY Slip Op 31868(U)

October 7, 2015

Supreme Court, New York County

Docket Number: 450873/2014

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 50

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MARK TUNNE

Plaintiff,

Index No. 450873/2014

-against-

GERALD A. HALPERN, ESQ., EXECUTOR  
FOR THE ESTATE OF FRED ZEISS, et al.

Defendants.

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**Peter H. Moulton, J.S.C.:**

This action arises out of the eviction of plaintiff from an apartment located at 225 East 10th Street, Apt. 5A New York, NY 10003. Defendant City Marshal Thomas Bia ("Bia") moved by motion dated May 29, 2014 to dismiss plaintiff's complaint against him on the grounds of failure to state a cause of action based on the existence of an indemnity provision signed by Bia and Landlord Gerald P. Halperin as well as the doctrine of qualified immunity.

By decision dated October 21, 2014 this court partially granted Bia's motion to dismiss the complaint for failure to state a cause of action to the extent that the portion of the complaint alleging that Bia was liable for failing to notify plaintiff as to the cancellation of the execution of the warrant of eviction for failing to serve proper notices of eviction was dispensed with. The remaining arguments advanced by Bia in his motion were dismissed.

Bia now moves to reargue this court's October 21, 2014 decision only to the extent that Bia asserts that the court

incorrectly concluded that he, as a marshal, could be held responsible for plaintiff's property inside of the apartment after placing the landlord in legal possession of the apartment.

In support of his motion, Bia cites principles of law he believes this court overlooked, including those asserted in Ramirez v. Sol Goldman, 1990 WL 186837 (S.D.N.Y. 1990) ("the eviction seems to have been an eviction by legal possession, which means that the Marshal supervises the changing of the locks and turns over legal possession of the apartment and its contents to the landlord who assumes responsibility for the tenants property"), and two lower court cases acknowledging a landlord's responsibility for a plaintiff's property following the execution of a legal possession.

In stating that the court overlooked the aforementioned legal principles, Bia misstates this court's prior ruling. To be sure, plaintiff's allegations in this case, as pointed out in the court's prior ruling, contain accusations that Bia conducted an incomplete inventory of plaintiff's items and stole others. Acknowledging those accusations in a light most favorable to plaintiff (see J.E. Beth Israel Hosp., 295 AD2d 281, 283 [2002], lv denied, 99 NY2d 207 [2003]), this court ruled that plaintiff can assert a claim against Bia due to the nature and extent of plaintiff's accusations.

Reargument of a motion is not available where a party seeks to advance new arguments which it failed to previously raise (see DeSoignies v. Cornasesk House Tenants' Corp., 21 AD3d 715, 800 [1st

Dept. 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (see Amato v. Lord & Taylor, Inc., 10 AD3d 374 [2d Dept. 2004]).

Here, Bia has failed to demonstrate that this court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v. Roche, 68 AD2d 558, 567 [1979]). Accordingly, Bia has failed to state grounds for the instant motion, including any grounds based upon new facts unknown to them when the initial motion was made (see William P. Pahl Equip. Corp. v. Kassis, 182 AD2d 22, lv. denied 80 NY2d 1005 [1st Dept. 1992]; see also Forteau v. Westchester County, 227 AD2d 245 [1st Dept. 1996]). The court did not overlook any controlling law when rendering its decision. The law with respect to a legal possession is undisturbed by this court's ruling. Bia does not cite any First Department precedent by which this court is bound. Additionally, this court is not obligated to follow the holdings in the lower court cases cited by Bia. Even if the court were bound by such precedent, as previously stated, plaintiff's complaint in this case contains accusations that Bia conducted an incomplete inventory of plaintiff's items and stole others. As the court indicated in its prior ruling, those accusations are actionable (see Slepoy v. Kliger, 2009 N.Y. Slip Op 52603[U] [2d Dept. 2009] [noting that a marshal shall exercise certain standards of care when conducting an

eviction)). Not to mention that what plaintiff alleges Bia did, in part, may be grounds for a cause of action with respect to conversion. As such, plaintiff's allegations cannot categorically be discounted merely on account of the endorsement within the warrant of eviction that Bia cites to. Nor can they be discounted by the existence of an indemnity provision.

As such, to the extent that Bia seeks to revisit this argument previously raised and rejected in the court's prior Decision and Order dated October 21, 2014, his application is denied.

Accordingly, it is hereby

ORDERED that defendant's motion to reargue is denied.

**This Constitutes the Decision and Order of the Court.**

Dated: October 7, 2015

ENTER:

  
**HON. PETER H. MOULTON**  
J.S.C.

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