

Estate of Murphy v New York City Hous. Auth.

2017 NY Slip Op 31901(U)

September 7, 2017

Supreme Court, New York County

Docket Number: 158442/2012

Judge: Robert D. Kalish

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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. _____ ROBERT D. KALISH
Justice

PART 29

The Estate of TAYSHANA MURPHY by its
administratrix, TEPHANIE HOLSTON,

INDEX NO. 158442/2012

MOTION DATE 6/12/17

Plaintiff,

MOTION SEQ. NO. 006

- v -

THE NEW YORK CITY HOUSING AUTHORITY,
TYSHAWN BROCKINGTON, ROBERT CARTAGENA
and CLC COMMUNICATIONS, INC.,

Defendants.

NEW YORK CITY HOUSING AUTHORITY,

INDEX NO. 595105/2016

Third-Party Plaintiff,

- v -

TERIQUE COLLINS,

Third-Party Defendant.

The following papers, numbered 81-98, were read on this motion for leave to amend the third-party complaint.

Notice of Motion—Affirmation—Exhibits A-O—Affidavit of Service

| No(s). 81-98

Motion by Defendant New York City Housing Authority (NYCHA), pursuant to CPLR 3025 (b), for leave to amend the Third-Party Complaint is granted without opposition by Plaintiff or Third-Party Defendant Collins.

BACKGROUND

The instant action arises out of allegations regarding the shooting death of Plaintiff's decedent, Tayshana Murphy, on September 9, 2011 around 4:00 a.m., on the fourth floor of Defendant NYCHA's premises at 3170 Broadway, New York, New York, commonly known as the Grant Houses. (Martin Affirm. ¶ 1, Ex. A [Notice of Claim] ¶ 3.) Defendant Tyshawn Brockington, Defendant Robert Cartagena, and Third-Party Defendant Terique Collins were arrested and charged

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

with crimes related to Ms. Murphy's homicide. (Martin Affirm. ¶ 1.) At a subsequent criminal trial in 2013, Defendants Brockington and Cartagena were convicted of murder and Third-Party Defendant Collins was acquitted. (*Id.*)

Simultaneous with the aforesaid criminal litigation, Plaintiff initiated the instant civil action against Defendant NYCHA and others. In Plaintiff's Notice of Claim, dated December 5, 2011, it is alleged that "[t]he front entrance doors to the premises were regularly left unsecured & open, and the buzzer and locking mechanisms were not properly functioning . . ." thereby allowing access to Ms. Murphy's now-convicted killers. (Notice of Claim ¶¶ 2-3.)

Plaintiff originally brought direct claims against Mr. Collins, but eventually moved for and was granted an order dismissing the action as against Mr. Collins on December 23, 2015. (Martin Affirm., Ex. H [Seq. 004 Order].)¹ Thereafter, Defendant NYCHA personally served now Third-Party Defendant Collins with a Third-Party Complaint on February 19, 2016.

After Third-Party Defendant Collins failed to answer and appear, Defendant NYCHA timely filed a motion for entry of a default judgment on June 24, 2016. (NYSCEF Document No. 55.) This Court however denied that motion with leave to renew, in an order filed on August 9, 2016, finding that "Defendant/third-party Plaintiff NYCHA has failed to establish prima facie entitlement to a default judgment pursuant to CPLR § 3215." (Martin Affirm., Ex. L [Seq. 005 Order].) As of this date, Defendant NYCHA has not filed a renewed motion for entry of a default judgment against Third-Party Defendant Collins.

On May 10, 2017; Defendant NYCHA filed the instant motion roughly 447 days after serving the Third-Party Complaint—and 401 days if one subtracts the 46-day period between Defendant NYCHA's initial filing and the Court's decision in the prior default judgment motion.

On the instant motion—filed more than a year after Third-Party Defendant Collins' default—Defendant seeks leave to serve an amended Third-Party Complaint, adding a claim for negligent entrustment, to wit, that Third-Party Defendant Collins supplied a firearm to Defendants Cartagena and Brockington knowing that said Defendants had violent tendencies. (Martin Affirm., Ex. N

¹ The Court also granted a cross-motion by Plaintiff for entry of default judgments as against Defendants Brockington and Cartagena on March 31, 2015. (Ex. F [Seq. 003 Order].)

[Proposed Amended Third-Party Complaint] ¶¶ 6-8, 12.) In support of the instant motion, Defendant submits the criminal trial transcript of non-party Brittany Santiago who described going to Third-Party Defendant Collins' apartment and witnessing Collins hand-over a gun to Defendant Brockington. (Martin Affirm., Ex. L [Santiago Tr.] at 704:02-25.)

DISCUSSION

CPLR 3025 (b) provides that parties may amend their pleadings and courts shall freely grant such leave. A party seeking leave to amend its pleading is "not required to establish the merit of the proposed amendment in the first instance." (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008].) The First Department has established that motions for leave to amend should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." (*MBIA Ins. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].) The court may deny a motion to amend if the proposed amendment will prejudice or surprise the opposing party. (*Aurora Loan Servs. LLC v Thomas*, 70 AD3d 986, 987 [2d Dept 2010] [finding no prejudice or surprise from a delay to amend an answer when the movant relied on documents obtained during disclosure].) However, the movant only needs to demonstrate that its proposed amendment is neither palpably insufficient nor patently devoid of merit. (*Lucido*, 49 AD3d at 230.)

The tort of negligent entrustment imposes liability on:

"[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use"

(Restatement of Torts § 390; *see also Splawnik v Di Caprio*, 146 AD2d 333, 335 [3d Dept 1989] [collecting cases].)

On the instant motion, the proposed amended Third-Party Complaint adds a claim for negligent entrustment, alleging that Third-Party Defendant Collins supplied a firearm to Defendants Cartagena and Brockington knowing that said Defendants had violent tendencies. (Martin Affirm., Ex. N [Proposed Amended Third-Party Complaint] ¶¶ 6-8, 12.) As to whether said allegations are true is not

before this Court. The Court finds that the proposed amendment is neither palpably insufficient nor patently devoid of merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that this motion by Defendant New York City Housing Authority's for leave to amend its Third-Party Complaint to add a claim is granted without opposition; and it is further

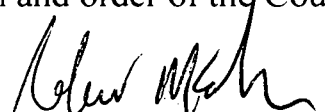
ORDERED that the amended complaint in the form annexed to the moving papers shall be deemed served upon the current parties upon service of a copy of this order with notice of entry; and it is further

ORDERED that the supplemental summons and amended complaint as annexed to the moving papers shall be personally served on Third-Party Defendant Terique Collins, along with a copy of this order, within 20 days of service of a copy of this order with notice of entry; and it is further

Defendant New York City Housing Authority must serve a copy of this order on the General Clerk's Office (60 Centre Street, Room 119) and the County Clerk, who are directed to mark their records to reflect this amendment.

The foregoing constitutes the decision and order of the Court.

Dated: September 7, 2017
New York, New York

 J.S.C.

HON. ROBERT D. KALISH

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE