

Jones v City of New York
2018 NY Slip Op 32995(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 156417/2013
Judge: Verna Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNAL SAUNDERS PART IAS MOTION 5

Justice

-----X
SANDRA CAROLINA JONES, as Administrator
of the Estate of DARRIUS HAYWARD KENNEDY
Deceased,

INDEX NO. 156417/2013
MOTION SEQ. NO. 001 002

Plaintiff,

- v -

DECISION AND ORDER

THE CITY OF NEW YORK,

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

COMPEL/DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Decedent's estate commenced this wrongful death action alleging that the decedent Darrius H. Kennedy, an emotionally disturbed person, was unjustifiably shot and killed by members of the New York City Police Department (NYPD). It is alleged that at the time he was killed, Mr. Kennedy was skipping backwards with a knife in his hand, away from approximately forty to fifty police officers who were in pursuit of him.

Plaintiff moves pursuant to CPLR § 3101(a) seeking an order directing defendant to provide all material and necessary disclosures, specifically the production of NYPD Sergeant Joseph Pagano for a deposition as his testimony is necessary to the prosecution of plaintiff's action. According to plaintiff, on the date of the incident, despite various requests for a supervisor, Sgt. Pagano, the supervising officer on duty at the time of the shooting, equipped with a taser, failed to appear until after decedent was shot. Plaintiff relies upon the transcript of Sgt. Pagano's interrogation wherein he admits to the foregoing. Plaintiff further relies upon the

deposition testimony of Sgt. Michael Dittrich who testified that a taser was requested in response to the incident as it unfolded and that Sgt. Pagano was the patrol supervisor who was assigned a taser during the time of the incident. Sgt. Dittrich also testified that several of the officers on the scene were recent graduates of the academy.

The City opposes the motion arguing that the deposition testimony of Sgt. Pagano is irrelevant inasmuch as no cause of action for failure to supervise was pleaded and the time to amend the complaint has expired. The City further asserts that a deposition of Sgt. Pagano is unwarranted as he was never on the scene and had no contact with the decedent. Here, the City avers that as Mr. Kennedy “lunged” at the officers with a knife in his hands causing them to fear for their safety and discharge their weapons, the only issue is whether or not Police Officer Roger and Police Officer Massett were justified in shooting him. Finally, the City argues that any assertions that the presence of Sgt. Pagano may have prevented decedent’s death is mere speculation.

Thereafter, plaintiff moved the Court seeking to amend its complaint to add a cause of action for negligence arguing that the City has been on notice of its negligence claim, including negligent supervision, as it was asserted in the Notice of Claim and specified in its Verified Bill of Particulars, and further, that the negligence cause of action arises from the same set of facts, has merit, and the note of issue has not yet been filed.

The City opposes the motion as untimely as the relief is sought over five years after the incident occurred and the statute of limitations to add a new cause of action for negligence or negligent supervision has expired.

In reply, plaintiff argues that the amendment is timely pursuant to the “relation back doctrine” outlined in CPLR § 203.

The motions are hereby consolidated for disposition.

Pursuant to CPLR § 3025(b), the court has discretion to grant leave to amend pleadings at any time and such leave shall be freely given upon such terms as may be just.. (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). Such leave to amend shall be freely given in the absence of prejudice or surprise, unless it is palpably insufficient or patently devoid of merit. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). Further, under CPLR § 203(f) an amendment to a complaint may relate back to the date of the original complaint unless it did not give notice of the occurrence on which the proposed amendment was based. The provisions of CPLR § 203, commonly referred to as the relation back doctrine, enables a plaintiff to amend a pleading by adding a new claim or a new party after the statutory limitations period has expired and thus gives the court the “sound judicial discretion” to justify relaxation of limitations to enable decisions on the merits if the amendment will not cause undue prejudice to the defendants. (*Buran v Coupal*, 87 NY2d 173 [1995].).

Here, the Notice of Claim, a prerequisite to the summons and complaint, as well as, the Verified Bill of Particulars allege negligence and/or negligent supervision, this coupled with the detailed allegations in the complaint provide adequate notice to the City of plaintiff’s negligence claims. As such, the City has failed to establish surprise and/or prejudice and the amendment is hereby permitted.

As to plaintiff’s demand to depose Sgt. Pagano, CPLR § 3101 provides that “[there] shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” This provision is liberally construed to require disclosure “of any facts bearing on the controversy which will assist preparation for trial by sharpening issues and reducing delay and prolixity.” (*Allen v Crowell-Collier Publ. Co.*, 21

NY2d 403 [1968].) Here, the examination of Sgt. Pagano is likely to provide material and relevant factual information related to the controversy before the Court and plaintiff has established entitlement to the relief sought. Accordingly, it is hereby

ORDERED that plaintiff's motion to amend the complaint to include a cause of action for negligence and negligent supervision is granted and the proposed Summons and Amended Complaint annexed to the motion (Sequence 002) as Exhibit A shall be deemed filed and served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall answer the amended complaint or otherwise respond thereto within twenty days from the date of service; and it is further

ORDERED that plaintiff's motion to compel the production of Sergeant Joseph Pagano for a deposition is granted; and it is further

ORDERED that defendant shall, within thirty (30) days from service of this order with notice of entry, schedule Sergeant Joseph Pagano for deposition at a location, date, and time convenient for the parties; and it is further

ORDERED the parties are directed to appear for the previously scheduled compliance conference on December 18, 2018 at 2:00 P.M., Part DCM, Room 103, 80 Centre Street, New York, N.Y.

November 26, 2018

HON. VERA L. SAUNDERS, JSC

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: