

Holston v New York City Hous. Auth.

2019 NY Slip Op 30447(U)

February 20, 2019

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 DAVID KALISH PART IAS MOTION 29EFM

Justice

-----X

TEPHANIE HOLSTON,
Plaintiff,

INDEX NO. 158442/2012

MOTION DATE 02/20/2019

MOTION SEQ. NO. 008

- v -

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

DECISION AND ORDER

Defendant.

(and a third-party action)

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 136, 137, 138, 139,
140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to/for REARGUMENT/RECONSIDERATION

Motion by defendant/Third-Party Plaintiff New York City Housing Authority ("NYCHA")
pursuant to CPLR 2221 (d) for an order granting it leave to reargue motion seq. 007, which was
for an order directing the entry of a default judgment against Third-Party Defendant Terique
Collins ("Collins"), and which this Court previously denied in its May 28, 2018 decision and
order on the motion, is denied.

BACKGROUND

In motion seq. 005, this Court signed an order on August 8, 2016, denying NYCHA's
first default judgment motion in the third-party action against Collins. The Court explained that
"NYCHA's Third-Party Complaint is not a verified complaint and as such cannot be used as an
affidavit of facts pursuant to CPLR 3215 (f)." (NYSCEF Doc No. 70 at 3.) In fact, the third-party
complaint was verified by Steven Martin, Esq. on June 24, 2016. On September 7, 2017, this
Court issued a decision and order granting NYCHA's motion in seq. 006 to amend its third-party
complaint. (NYSCEF Doc No. 104.) The Court noted that NYCHA submitted "the criminal trial
transcript of non-party Brittany Santiago who described going to [] Collins' apartment and
witnessing Collins hand-over a gun to Defendant Brockington" in support of its motion for leave
to amend. (Id. at 3.) NYCHA's proposed amended third-party complaint was also verified by Mr.
Martin. (NYSCEF Doc No. 99 [Amended Third-Party Complaint].) To date, NYCHA has not e-
filed a version of its Amended Third-Party Complaint that is verified by NYCHA.

The Amended Third-Party Complaint alleges, among other things, that:

- 1. Collins was a resident of the State of New York on September 11, 2011;
2. Collins shot Plaintiff's deceased on the fourth-floor hallway of the Grant Houses
building located at 3170 Broadway, New York, New York, owned by NYCHA;

3. Collins contributed to the shooting of Plaintiff's decedent Tayshana Murphy in the fourth-floor landing of the Grant Houses;
4. Collins had or should have had knowledge of the violent tendencies of Robert Cartagena ("Cartagena") and Tyshawn Brockington ("Brockington"), who have been tried and convicted of the murder of Ms. Murphy;
5. Robert Cartagena had Collins' number;
6. Robert Cartagena contacted Collins;
7. Cartagena and Brockington arrived at Collins' apartment on the 16th floor of 1420 Amsterdam to pick up the gun used to shoot Plaintiff's decedent;
8. Collins was acquitted of the criminal charges regarding the September 11, 2011 incident;
9. Collins perpetrated the shooting on September 11, 2011;
10. Plaintiff's injuries were caused by the intentional, negligent, and reckless acts of Collins
11. Collins unlawfully sold the gun to Cartagena and Brockington;
12. Collins knew or should have known that Cartagena and Brockington intended or were likely to use the gun to shoot Plaintiff's decedent in a manner that would create an unreasonable risk of physical injury to others.

On May 24, 2018, the Court denied NYCHA's second default judgment motion, which was based upon the Amended Third-Party Complaint, noting that NYCHA had committed the same error it made in its first default judgment motion by submitting a third-party complaint that was only verified by counsel, which "amounts to no more than attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215." (NYSCEF Doc No. 130, at 2, citing *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994].)

In its affirmation in support of its second default judgment motion in seq. 007, NYCHA stated that "[o]n May 10, 2017 NYCHA moved this Court for an Order granting NYCHA leave to amend the Third-Party Complaint. A copy of this Motion and all accompany [sic] papers, including the proposed Amended Third-Party Complaint, are annexed hereto as **Exhibit 'I'**." (NYSCEF Doc No. 111 ¶ 11.) The affirmation in support also noted that the amendment "added a claim of negligent entrustment as to Terique Collins." (*Id.* ¶ 12.) The affirmation in support in seq. 007 contained no argumentation except where it indicated that Collins had failed to respond to the Amended Third-Party Complaint and that his time to do so had expired.

In its memorandum of law in support of motion seq. 007, NYCHA offered a one-point argument: "NYCHA should be granted [a] default judgment against third-party defendant Collins because the time to answer has expired." (NYSCEF Doc No. 112 at 2.) NYCHA argued in sub-point "A" to its "Point I" that NYCHA had submitted proof of service of the supplemental summons and amended verified complaint and that Collins had failed to answer or appear. NYCHA further argued in sub-point "B" to its "Point I" that "NYCHA has served a Verified Amended Third-Party Complaint on Third-Party Defendant, Satisfying the Second Requirement to Prove Entitlement to Default Judgment." (*Id.* at 3.) NYCHA stated that "the plaintiff must file proof by affidavit made by the party of the facts constituting the claim. A verified complaint may be submitted instead of the affidavit when the complaint has been properly served." (*Id.* [citation omitted].) NYCHA then stated as follows:

“Here, the Verified Amended Third-Party Complaint alleges, *inter alia*, that Third-Party Defendant Collin’s [sic] negligent entrustment of the gun used to shoot Plaintiff’s Decedent was a substantial factor in bringing about the wrongful death of Tayshana Murphy. Third-Party Defendant Collins permitted Robert Cartagena and Tyshawn Brockington, unlawful possessors and/or purchasers, to[] possess and use the gun used to shoot Plaintiff’s decedent, and either knew or should have known in the exercise of ordinary care that Robert Cartagena and Tyshawn Brockington intended or were likely to use the gun used to shoot Plaintiff’s decedent in a manner that would create an unreasonable risk of physical injuries to others.

“Accordingly, NYCHA has satisfied the second requirement to prove entitlement to default judgment against Third-Party Defendant Collins.”

(*Id.* at 3–4.)

NYCHA now moves in seq. 008 pursuant to CPLR 2221 (d) to reargue the Court’s denial of NYCHA’s second default judgment motion in seq. 007 and, upon reargument, issue an order directing the entry of a default judgment in favor of NYCHA and against Collins on the Amended Third-Party Complaint. NYCHA argues, in sum and substance, that it submitted adequate proof of the facts constituting its claim in seq. 007 by means of the previously mentioned eight-page set of excerpts from a May 22, 2013 criminal trial transcript containing the testimony of Brittany Santiago, which was annexed as exhibit O in seq. 006 and was included in exhibit I of seq. 007 at pages 94–101 (the “Santiago Excerpts”). NYCHA states that the transcript’s presence in exhibit I “may have prevented the Court from locating it.” (Affirmation of Martin ¶ 21.)

NYCHA has annexed as exhibit P to the instant motion a 397-page copy of the May 22, 2013 trial transcript. This transcript was not submitted on the prior motion—as stated previously an eight-page set of multiple excerpts from this transcript had been annexed to the prior motion. Further testimony from Ms. Santiago in a 223-page trial transcript dated March 19, 2014, that was not submitted at all with the previous motion in seq. 007, has been annexed to the instant motion as exhibit Q.

NYCHA argues that its motion “should be granted because NYCHA did include adequate proof of facts by citing to Ms. Santiago’s testimony at both the Brockington and Cartagena criminal trials and NYCHA offered sufficient evidence to establish a meritorious cause of action against Collins.” (Affirmation of Martin ¶ 25.)

DISCUSSION

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue

issues previously decided or to present arguments different from those originally asserted.” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992].)

In its original motion seq. 007, NYCHA argued, as is relevant here, that it satisfied a requirement to prove its entitlement to a default judgment against Collins by means of the Amended Third-Party Complaint. The original motion makes no reference to the Santiago Excerpts as having been submitted as proof of the facts constituting its claims. NYCHA never argued in the prior motion that the Court should consider the Santiago Excerpts as proof of the facts constituting its claims. NYCHA’s statement that the Santiago Excerpts’ presence in exhibit I “may have prevented the Court from locating it” presupposes that the Court had any reason to locate it. Nothing in the moving papers in seq. 007 asked the Court to review the Santiago Excerpts for the purposes of deciding that second default judgment motion. The lone reference to exhibit I which contained the Santiago Experts was in the context of a recitation of the procedural history of the case—nothing more.

Rather, NYCHA relied entirely on the Amended Third-Party Complaint. The Court has twice found that NYCHA’s complaints against Collins were verified by an attorney, only, rendering the entirety of those complaints insufficient to support the entry of a default judgment. NYCHA does not dispute this fact in the instant motion, but instead points to another document, not relied upon by NYCHA for the purpose in the prior motion, and asks the Court to accept what is, in effect, an argument different from that which it originally asserted. This is not the purpose of a motion to reargue.

Moreover, even if NYCHA had argued in its prior motion that the Santiago Excerpts should be considered as proof of the facts constituting its claims, the eight pages submitted to the Court in the prior motion do not support the factual allegations in the Amended Third-Party Complaint at a level sufficient for the purpose. The Santiago Excerpts first mention Collins on page 4. The testimony as submitted indicates that the witness saw Cartagena call Collins and saw Collins give Brockington a gun on the sixteenth floor of 1420 Amsterdam. While it is true that the Amended Third-Party Complaint alleges this as a fact, nowhere in the Santiago Excerpts is there any testimony regarding: whether Collins shot Ms. Murphy; whether Collins contributed to the shooting; whether Collins had or should have had knowledge of Cartagena or Brockington’s violent tendencies; or whether Collins otherwise perpetrated the shooting, committed any intentional, negligent, or reckless act, unlawfully sold the gun to Cartagena and/or Brockington, or knew or should have known that Cartagena and/or Brockington were likely to use the gun to shoot Ms. Murphy in a manner that would create an unreasonable risk of physical injury to others.

To the extent that NYCHA now submits a 397-page May 22, 2013 trial transcript and a 223-page March 19, 2014 trial transcript—presumably hundreds of pages of the full testimony of Ms. Santiago—such submissions constitute matters of fact not offered on the prior motion and are not properly before the Court on the instant motion. (*See CPLR 2221 [d] [2].*)

As such, NYCHA has failed to show entitlement to an order granting it leave to reargue and, even if the Court had granted reargument on the papers submitted in motion seq. 007, the application for a default judgment would again have been denied.

CONCLUSION

Accordingly, it is


ORDERED that the motion by defendant/Third-Party Plaintiff New York City Housing Authority pursuant to CPLR 2221 (d) for an order granting it leave to reargue motion seq. 007, which was for an order directing the entry of a default judgment against Third-Party Defendant Terique Collins ("Collins"), and which this Court previously denied in its May 28, 2018 decision and order on the motion, is denied; and it is further

ORDERED that the branch of the motion that sought, upon reargument, a default judgment against Collins is denied as academic, as leave to reargue is denied; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry on Collins by personal service within 30 days of the date of the decision and order on this motion and e-file proof of the service to NYSCEF within 10 days of completion of the service.

The foregoing constitutes the decision and order of the Court.

2/20/2019
DATE


HON. ROBERT D. KALISH

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	