

<b>Green v New York City Hous. Auth.</b>
2020 NY Slip Op 32592(U)
August 11, 2020
Supreme Court, New York County
Docket Number: 151365/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART IV

-----X  
POSIE GREEN as administratrix of the estate of  
TYRELL GOVAN, deceased,

DECISION AND ORDER

Plaintiff,

Index Number  
151365/2018

-against-

NEW YORK CITY HOUSING AUTHORITY

Defendant.

-----X  
FRANK P. NERVO, J.S.C.:

Plaintiff moves to reargue this Court’s January 13, 2020 decision and order which, inter alia, denied plaintiff’s request to strike defendant New York City Housing Authority’s (NYCHA) answer, required NYCHA to comply with this Court’s prior conference orders, and struck that portion of plaintiff’s complaint claiming NYCHA violated a 1996 memoranda of understanding (MOU) between it and the NYPD. Alternatively, plaintiff seeks leave to amend the complaint and bill of particulars to include claims related to the MOU and claims that NYCHA failed to evict Melissa Andrews, mother of decedent’s alleged killer, and her co-resident.

**Reargument**

The purpose of reargument is to provide “a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law” (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR § 2221[d][2]). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*id.*) Nor is reargument a proper forum to

present arguments different from those originally asserted (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992] *lv. dismissed in part and denied in part* 80 NY2d 1005 [1992]).

Plaintiff alleges the Court overlooked NYCHA's willful noncompliance with prior conference orders and should have struck NYCHA's complaint on this basis. The Court did no such thing. The Court exercised its discretion and determined that striking NYCHA's answer was not warranted at that time. Plaintiff's disagreement with that determination does not provide a basis for reargument.

Plaintiff's contention that the Court misapprehended her allegation that NYCHA's failure to maintain records of complaints of criminal activity was an amplification of her claim that "NYCHA was otherwise reckless, careless and negligent, and carelessly recklessly, and negligently departed from reasonable care in their failure to take preventative measures to remove trespassers, criminals and other unauthorized individuals from the subject premises" is without merit. The Court did not strike these claims. Instead, the Court found plaintiff's separate claims that NYCHA violated a MOU between it and the NYPD was not contained in her notice of claim. That plaintiff incorrectly assumed NYCHA would maintain records of criminal activity, as plaintiff contends is required by the 1996 MOU between NYCHA and the NYPD, does not transmute her claim of an unsafe premises into NYCHA's willful noncompliance, for the purposes of CPLR § 3126, and thus does not form a basis for reargument. Put another way, plaintiff's notice of claim does not allege a violation of the 1996 MOU, and thus the

failure by NYCHA, if any, to comply with the MOU cannot form a basis for striking NYCHA's answer under CPLR § 3126.

**Amend**

CPLR § 3025(b) governs permissive leave to amend a pleading upon terms which are just. Leave is to be freely given absent a showing that amendment would cause surprise or prejudice, and the proposed amendment is not palpably insufficient as a matter of law (*170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *Lanpont v. Savvas Cab Corp., Inc.*, 244 AD2d 208 [1st Dept 1997]; *Shepherd v. New York City Tr. Auth.*, 129 AD2d 574 [1st Dept 1987]). Prejudice warranting denying leave to amend requires “some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position” (*McGhee v. Odell*, 96 AD3d 449 [1st Dept 2012], *internal quotations omitted, insertions in original*).

Plaintiff's claims against NYCHA are straightforward. Tyrell Govan, decedent, was killed inside a NYCHA building. Plaintiff, the administratrix of Govan's estate, alleges, inter alia, that NYCHA failed to keep its buildings in a reasonably safe condition. Plaintiff seeks to amend her complaint to include (1) NYCHA's alleged failure to maintain records of criminal activity at the subject building, as plaintiff contends is required by a 1996 MOU between NYCHA and the NYPD, and (2) NYCHA's purported failure to evict Melissa Andrews and her son Jamal Owens, who is charged with killing decedent.

NYCHA incorrectly asserts that this Court found, by earlier motion, that plaintiff's claims related to the MOU were time-barred and struck those claims on that basis. The Court did not reach any statute of limitations issue. Instead, the Court found plaintiff's MOU claims were not contained in the notice of claim and could not be maintained for that reason. Plaintiff now seeks to amend her complaint to include her MOU claims contending that she was unaware of the MOU at the time she served her notice of claim and complaint, and only through fact discovery was made aware of its existence. Plaintiff argues that NYCHA, as a party to the MOU, was on notice of its existence and aware of plaintiff's claims that NYCHA's failure to limit criminal conduct, causing the death of Govan. Consequently, plaintiff argues, that amending her complaint to include her MOU claims does not prejudice NYCHA.

When a defendant is placed on notice of an additional theory of liability by a plaintiff's allegations in his/her initial complaint, leave shall be granted, absent prejudice, and any time-barred claims in the amended complaint are deemed to have been interposed at the time of the initial complaint (*Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 AD3d 652 [1st Dept 2009]; see also *Panto v J & M Salvage Co.*, 157 AD2d 582 [1990]; CPLR 203[f]). However, here, it cannot be said defendant was placed on notice of plaintiff's later claims – that NYCHA violated the MOU or failed to evict certain persons – by plaintiff's complaint alleging NYCHA negligently failed to maintain its buildings in a safe manner, eject unauthorized persons from the property, train employees, and violated the warranty of habitability (*c.f. Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 AD3d 652).

Similarly, plaintiff is barred from amending her complaint to contain claims not present in her notice of claim. The purpose of the notice of claim is to “enable authorities to investigate, collect evidence, and evaluate the merit of a claim” (*Brown v. City of New York*, 95 NY2d 389 [2000]). Hence, it must set forth the time, manner, and place where the claim arose (*Phillipps v. New York City Transit Auth.*, 68 AD3d 461 [2009]). However, it need not state those items “with literal nicety or exactness” (*Purdy v. City of New York*, 193 NY 521, 523 [1908]; see also *Brown*, 95 NY2d at 393 [2000]). Plaintiff’s notice of claim contends that NYCHA negligently maintained and operated the buildings, negligently and reckless failed to provide appropriate security, failed to provide working door locks, failed to properly train staff, failed to keep the buildings free from unauthorized individuals, and violated the warranty of habitability. NYCHA, relying on these claims contained in plaintiff’s notice of claim, cannot properly evaluate the merit of plaintiff’s later allegations it violated a prior agreement with the NYPD or improperly failed to evict the alleged killer or his mother.

Notwithstanding, plaintiff is not precluded, subject to order of the trial court otherwise, from presenting evidence of the alleged MOU violation and failure to evict the alleged killer and his mother in support of her claims that NYCHA failed to maintain the buildings in a safe manner; however, she cannot amend her complaint to include these allegations as additional claims for the reasons stated herein.

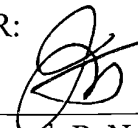
Accordingly, it is

ORDERED that the motion is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: August 11, 2020

ENTER:



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Hon. Frank P. Nervo, J.S.C.