

Hodges v New York City Hous. Auth.

2022 NY Slip Op 32647(U)

August 5, 2022

Supreme Court, New York County

Docket Number: Index No. 153379/2020

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

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INDEX NO. 153379/2020

BRENDA HODGES,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL

In this personal injury and wrongful death action, defendant New York City Housing Authority moves, pursuant to CPLR 3211(a)(7), for an order dismissing the complaint. Plaintiff Brenda Hodges opposes the motion and cross-moves, pursuant to CPLR 3025(b), for an order granting her leave to amend the complaint. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

Factual and Procedural Background

On March 1, 2019, a fire occurred at one of defendant's properties located at 405 East 105th Street, Apartment 3C, New York, New York (Doc. No. 3 at 2-3). McKee Sylvester Hodges ("McKee") and Marie Hodges ("Marie") (collectively "the decedents") passed away as a result of injuries sustained in the fire (Doc No. 3 at 4, 7). Shortly thereafter, plaintiff, as administratrix of the decedents' estates, served defendant with two notices of claim asserting that the decedents suffered serious personal injuries and wrongful death due to defendant's negligence (Doc No. 8). Plaintiff then commenced the instant action in May 2020 (Doc No. 1). In her complaint, plaintiff's first and second causes of action were for personal injury on behalf

of McKee and Marie, respectively, with her third and fourth causes of action sounding in wrongful death of the decedents (Doc No. 3). Issue was joined (Doc No. 4), and defendant now moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint (Doc No. 5). Specifically, defendant seeks to dismiss plaintiff's personal injury claims for failure to satisfy the requirements of General Municipal Law § 50-e, and to dismiss plaintiff's wrongful death claims for failure to state a cause of action (Doc No. 6 at 3-8). Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3025(b), for leave to amend the complaint (Doc Nos. 18, 21).

Plaintiff's Cross Motion for Leave to Amend the Complaint

"Under CPLR 3025, a party may amend a pleading 'at any time by leave of court,' . . . [and] that leave 'shall be freely given upon such terms as may be just'" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014], quoting CPLR 3025 [b]). A movant is not required to establish the merits of his or her proposed amended allegations; rather, he or she "must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015] [internal quotation marks and citation omitted]). Further, "[d]elay alone is insufficient to bar an amendment to the pleading; '[i]t must be lateness coupled with significant prejudice to the other side'" (*Park v Home Depot U.S.A., Inc.*, 183 AD3d 645, 646 [2d Dept 2020], quoting *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). The party opposing amendment of the complaint bears the burden of establishing prejudice (*Kimso Apts., LLC*, 24 NY3d at 411).

Here, defendant does not establish, or even allege, prejudice (Doc No. 28). In the absence of prejudice, there is no merit to defendant's contention that the Court should decline to consider plaintiff's cross motion for leave to amend the complaint due to late service (*see Prato v Arzt*, 79 AD3d 622, 622-623 [1st Dept 2010]; *Glasz v Glasz*, 173 AD2d 937, 938 [3d Dept

1991]). Additionally, plaintiff's proposed amendments are not palpably insufficient or clearly devoid of merit. In the proposed amended complaint, plaintiff alleges that the decedents died as a result of defendant's negligence, that she was appointed as the administratrix of decedents' estates, and that there are people surviving the decedents who suffered losses arising from the decedents' deaths (Doc No. 27), all of the elements required to sustain a cause of action for wrongful death (*see Chong v New York City Tr. Auth.*, 83 AD2d 546, 547 [2d Dept 1981]). Therefore, plaintiff's request for leave to amend the complaint is granted (*see Vitale v Giaimo*, 103 AD3d 835, 837-838 [2d Dept 2013]).

Defendant's Motion to Dismiss

Initially, contrary to plaintiff's contention, plaintiff's cross motion for leave to amend the complaint does not render defendant's motion to dismiss moot. As the moving party, defendant has the option to decide whether its motion should apply to the initial pleadings or the proposed amended pleadings (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]). A review of defendant's moving papers reveals that it has opted to apply the motion to plaintiff's proposed amended pleadings (Doc No. 28).

Plaintiff's Personal Injury Claims

Generally, prior to the commencement of a personal injury action against a public authority, a plaintiff must serve a notice of claim upon the public authority within 90 days of the date that the claim arose (*see General Municipal Law § 50-e [1] [a]*; *Matter of Rivera v New York City Hous. Auth.*, 25 AD3d 450, 451 [1st Dept 2006]). This requirement applies where, as here, a plaintiff simultaneously asserts a claim for wrongful death (*see Jae Woo Yoo v New York City Health and Hosps. Corp.*, 239 AD2d 267, 267-268 [1st Dept 1997]), despite a statutory exception for wrongful death actions which allows a notice of claim in such actions to be served

within 90 days from the date the representative of a decedent's estate is appointed (*see* General Municipal Law § 50-e [1] [a]). However, in such instances, the personal injury claim can accrue as late as the date of death (*see Heslin v County of Greene*, 14 NY3d 67, 74 [2010]; *Jae Woo Yoo*, 239 AD2d at 267).

Here, the dates of death for McKee and Marie are March 1, 2019 and March 16, 2019, respectively (Doc No. 26). Thus, the deadline for filing a notice of claim asserting personal injury claims on behalf of the decedents was May 30, 2019 for McKee and June 14, 2019 for Marie (*see* General Municipal Law § 50-e [1]). It is undisputed that plaintiff served both notices of claim on June 3, 2019 (Doc No. 3 at 2, 5; Doc No. 6 at 2; Doc No. 8). Therefore, the notice of claim was timely with respect to the personal injury claim on behalf of Marie, but untimely with respect to the personal injury claim on behalf of McKee. Even “liberally constru[ing] the complaint, as amplified by plaintiff’s notice of claim, the transcript of the 50-h hearing and other papers submitted by the parties on the motions” (*Scollar v City of New York*, 160 AD3d 140, 144 [1st Dept 2018]), plaintiff’s first cause of action for personal injury on behalf of McKee must be dismissed for failing to comply with the requirements of General Municipal Law § 50-e (*see Gibbons v City of Troy*, 91 AD2d 707, 707-708 [3d Dept 1982]). However, plaintiff’s second cause of action for personal injury on behalf of Marie remains viable.

Plaintiff’s Wrongful Death Claims

“The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent’s death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent” (*Chong*, 83 AD2d at 547 [citation omitted]; *see Eberts v Makarczuk*, 52 AD3d 772,

772-773 [2d Dept 2008]). In her proposed amended complaint, plaintiff alleges that she was appointed as administratrix of the decedents' estates, that the decedents' deaths were caused by defendant's negligence, and that she and others suffered losses because of such deaths (Doc No. 27). Therefore, contrary to defendant's contention, and taking the facts alleged in the proposed amended complaint as true, plaintiff has demonstrated that her third and fourth causes of action for wrongful death are viable (*see Han v New York City Tr. Auth.*, 203 AD3d 511, 512 [1st Dept 2022]).

Accordingly it is hereby:

ORDERED that plaintiff's cross motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers as NYSCEF Doc. No. 27 shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the branch of defendant's motion seeking dismissal of the complaint is granted to the extent that plaintiff's first cause of action for personal injury on behalf of decedent McKee Sylvester Hodges is dismissed, and the motion is otherwise denied; and it is further

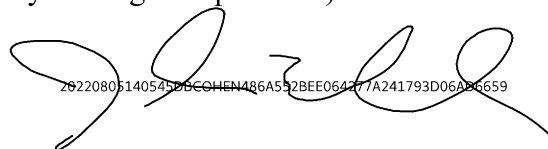
ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's first cause of action against defendant for personal injury on behalf of decedent McKee Sylvester Hodges is severed, and the action shall continue against defendant as limited herein; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days after plaintiff's service of a copy of this order with notice of entry upon defendant; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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DAVID B. COHEN, J.S.C.

8/5/2022
DATE

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