

Hodges v New York City Hous. Auth.

2023 NY Slip Op 30319(U)

February 1, 2023

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

-----X

INDEX NO. 153379/2020

BRENDA HODGES

MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 37 were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this personal injury and wrongful death action, defendant moves, pursuant to CPLR 2221(d), for leave to reargue their motion to dismiss and plaintiff’s cross motion for leave to amend her complaint. The motion is unopposed.

Factual and Procedural Background

As set forth in this Court’s August 5, 2022 order (NYSCEF Doc No. 30), on March 1, 2019, a fire occurred at defendant’s property located at 405 East 105th Street, Apartment 3C, in Manhattan (Doc No. 3). McKee Sylvester Hodges and Marie Hodges (collectively, the decedents) died as a result of injuries sustained in the fire (Doc No. 3). Shortly thereafter, plaintiff, as administratrix of the decedents’ estates, served upon defendant two notices of claim asserting personal injury and wrongful death claims (Doc No. 8), and in May 2020, she commenced the instant action (Doc No. 1).

Following joinder of issue, defendant moved to dismiss the complaint, arguing, among other things, that the personal injury claims failed to satisfy the requirements of General Municipal

Law § 50-e, and that the wrongful death claims failed to state a cause of action (Doc No. 6). Plaintiff opposed the motion and cross-moved for leave to amend her complaint (Doc. Nos. 18, 21). Defendant opposed the cross motion, arguing that, as pertinent here, plaintiff failed to provide evidentiary support for her proposed amendments (Doc No. 28).

By decision and order of August 5, 2022, this Court granted plaintiff's cross motion and partially granted defendant's motion to dismiss (Doc No. 30). It was determined that plaintiff's proposed amendments were not palpably insufficient or devoid of merit, and that defendant failed to establish amendment of the complaint would cause prejudice (Doc No. 30). Regarding plaintiff's personal injury claims, the notice of claim on behalf of McKee was deemed untimely and necessitated dismissal of the corresponding personal injury claim, whereas the notice of claim on behalf of Marie was timely (Doc No. 30). With respect to plaintiff's wrongful death claims, the amended complaint sufficiently stated causes of action for wrongful death (Doc No. 30).

Defendant now moves, pursuant to CPLR 2221(d), for leave to reargue its motion to dismiss as well as plaintiff's cross motion for leave to amend her complaint, and, upon reargument, for an order denying plaintiff leave to amend, dismissing the wrongful death claim on behalf of McKee, and dismissing the personal injury claim on behalf of Marie (Doc Nos. 33-34).

Legal Analysis and Conclusions

Defendant contends that plaintiff's motion for leave to amend should not have been granted because she failed to provide "reliable substantiation" for her proposed amendments and this Court failed to examine the merits of such amendments. It also contends that this Court misapprehended the law by concluding that a personal injury claim on behalf of a decedent could accrue on the date of said decedent's death.

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979] [citations omitted]; accord *Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

Here, defendant fails to establish that the law was misapprehended in determining that a claim for conscious pain and suffering may accrue on the date of death. “[A] claim for conscious pain and suffering accrues during the lifetime of the decedent” (62A NY Jur 2d, Government Tort Liability § 430); therefore, such a claim may accrue as late as the date of death (*see id.*; *Heslin v County of Greene*, 14 NY3d 67, 74 [2010] [“The personal injury claim accrued no later than the date of (decedent’s) death.”]; *Perez v Baez*, 185 AD3d 1062, 1064 [2d Dept 2020] [finding time to assert conscious pain and suffering cause of action began on decedent’s date of death]; *Santos v City of New York*, 38 AD3d 302, 302 [1st Dept 2007] [noting defendants “concede(d) that plaintiff’s notice of claim was timely as to her decedent’s pain and suffering on the date of his death”]; *Jae Woo Yoo v New York City Health and Hosps. Corp.*, 239 AD2d 267, 267 [1st Dept 1997] [finding date of accrual for conscious pain and suffering claim was “at the latest, the date of death”]).

Although defendant argues that the accrual analysis centers on the date the injurious conduct initially occurred, the analysis actually centers on the date the alleged conscious pain and suffering was last experienced (*see e.g. Perez v Baez*, 185 AD3d at 1064); and defendant’s attempt to distinguish the caselaw cited in the original decision, i.e., *Heslin v County of Greene* (14 NY3d

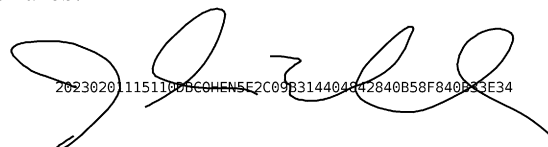
67 [2010]) and *Jae Woo Yoo v New York City Health and Hosps. Corp.* (239 AD2d 267 [1st Dept 1997]), is unpersuasive.

Defendant also fails to demonstrate that the court misapprehended the law in granting plaintiff leave to amend her complaint, as the caselaw it submits in support of its argument that a party seeking leave to amend must substantiate his or her proposed amendments with documentary evidence, and that a court must examine the merits of such proposed amendments, is no longer the law in this department. Although the First Department previously held that examination of the underlying merits was required (*see e.g. Spitzer v Schussel*, 48 AD3d 233, 233 [1st Dept 2008]; *Glenn Partition v Trustees of Columbia Univ. in City of N.Y.*, 169 AD2d 488, 489 [1st Dept 1991]), “[i]t appears . . . that this standard . . . has more recently been *abandoned*” (Patrick M. Connors, 2021 Supp Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3025:11 [emphasis added]; *see Sorge v Gona Realty, LLC*, 188 AD3d 474, 475 [1st Dept 2020] [“(A) plaintiff does not need to establish the merit of his (or her) proposed new allegations.”]). Thus, under the more recent standard, “[a] plaintiff [is] not required to support its allegations with evidence or an affidavit of merit” (*St. Nicholas W. 126 L.P. v Republic Inv. Co., LLC*, 193 AD3d 488, 488-489 [1st Dept 2021] [granting leave to amend complaint because proposed amendment “sufficiently alleged” cause of action]; *see Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015] [“Supreme Court erred by holding that plaintiff was required to make an evidentiary showing as to the merits of the proposed amendment, and by considering the underlying merits of the proposed wrongful death claim.”]).

Accordingly, it is hereby:

ORDERED that defendant’s motion for leave to reargue is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in person at 71 Thomas Street, Room 305, at 10:00 a.m. on April 11, 2023, unless the parties submit a stipulation by 3:00 p.m. the day before in accordance with the Part rules.



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2/1/2023
DATE

DAVID B. COHEN, J.S.C.

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