

Krisher v Hernandez

2023 NY Slip Op 32195(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 161171/2020

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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MICHAEL KRISHER

Plaintiff,

- v -

AL HERNANDEZ,

Defendant.

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INDEX NO. 161171/2020

MOTION DATE 04/18/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action, inter alia, to recover damages for assault and battery, negligent hiring and supervision, and intentional infliction of emotional distress, the plaintiff moves pursuant to CPLR 305(c), 1003, and 3025(b) for leave to file and serve a supplemental and amended summons and an amended complaint in order to add Eugene Grossi and Elizabeth Grossi, as executors of the estate of Margaret T. Grossi, as party defendants, and pursuant to CPLR 306-b to extend the time for service of process upon the defendant Al Hernandez. The motion is granted, without opposition.

The plaintiff had previously alleged in an affidavit that, on July 4, 2019, he was assaulted and battered by Hernandez on the sidewalk in front of 520 East 82nd Street in Manhattan and that Hernandez was, at the time, acting in the course of his employment for the owner of that building as a building superintendent. The plaintiff asserted that he immediately called the police, and that Hernandez was arrested. The plaintiff commenced this action on December 22, 2020 by filing a summons with notice (see CPLR 304[a], 305[b]). In his initial complaint, the plaintiff named not only Hernandez, but 522 East 82nd Street, LLC, Mary Lewis, Jim Lewis, also known as L. James Lewis, and Kamen Management Corporation, as defendants, asserting a

negligent hiring and supervision cause of action against those additional defendants. Pursuant to CPLR 306-b, the plaintiff had 120 days from December 22, 2020 to serve process upon Hernandez, or until April 21, 2021.

The plaintiff, however, was unable to serve process upon Hernandez by April 21, 2021. In the first affidavit of service referable to attempted service of process upon Hernandez, the plaintiff's process server alleged that, at 1:58 p.m. on April 15, 2021, he "made proper and diligent effort to serve said process on" Hernandez at 522 East 82nd Street, rather than 520 East 82nd Street, where the attack allegedly occurred, and that

"AT THE GIVEN ADDRESS IS A MULTIPLE DWELLING WHERE THE DEFENDANT'S NAME DOES NOT APPEAR ON ANY BELL OR MAILBOX. I KNOCKED ON THE DOOR BUT I RECEIVED NO ANSWER. I NEED THE APARTMENT NUMBER."

The relevant police aided report, however, identified the place of occurrence as the "street" in "front of 510 East 82nd Street Apt: 1C," in Manhattan (emphasis added). On August 9, 2021, the plaintiff moved, among other things, to extend his time to serve process upon Hernandez (SEQ 001). In support of that motion, the plaintiff's attorney alleged that

"On multiple occurrences [sic], in or around April 2021, Plaintiff attempted service of process upon Defendant AL HERNANDEZ at 522 East 82nd Street, New York, New York 10028 believed to be a home or work address for that Defendants. However, the Process Server could not effectuate service at the subject premises as Defendant was not present nor working at the time service was attempted to be effectuated. Further, as a result of the Covid Pandemic, new building procedures implemented have also hindered Process Servers' abilities to conduct many of their usual investigations.

"Both Plaintiff and Counsel are rigorously searching alternate home or work locations of Defendant AL HERNANDEZ.

"Plaintiff's Process Server attempted to serve Defendant AL HERNANDEZ [at] what was believed to be his work address. However, the process servers could not locate said individual Defendant in or around the vicinity of the subject premises where the assault occurred."

In an order dated November 22, 2021 (SEQ 001), the court extended the plaintiff's time to serve Hernandez up to and including March 22, 2022.

According to the plaintiff, however, he learned in early 2021 that Margaret T. Grossi was the owner of the building located at 520 East 82nd Street, that she employed Hernandez as the superintendent at that building, and that at least one tenant of the building provided information that Hernandez was “a known drunk.” In his August 9, 2021 motion, the plaintiff thus also moved pursuant to CPLR 305(c), 1003, and 3025(b) for leave to add Grossi as a party defendant. In the November 22, 2021 order, the court granted that branch of the plaintiff’s motion as well, and directed that the caption be amended accordingly. On March 3, 2022, the plaintiff discontinued the action against 522 East 82nd Street, LLC, Mary Lewis, Jim Lewis, also known as L. James Lewis, and Kamen Management Corporation. In an order dated May 2, 2022 (SEQ 002), the court further amended the caption to reflect the discontinuance.

On May 5, 2022, the plaintiff’s attorney informed the court that Grossi had died, and that he believed that she had died on August 19, 2021. In an order dated June 16, 2022, the court stayed the action retroactively to the date of Grossi’s death, and directed the plaintiff’s attorney to ascertain the precise date of Grossi’s death. By affirmation dated January 26, 2023, the plaintiff’s attorney confirmed that Grossi did, in fact, die on August 19, 2021. In an order dated January 30, 2023, the court noted that, although the plaintiff’s motion for leave to serve a supplemental summons and amended complaint adding Grossi as a defendant was made on August 9, 2021 (see CPLR 2211) and, thus, 10 days prior to her death, Grossi died during the pendency of the motion. The court consequently vacated, as nullities, so much of the November 22, 2021 order as granted leave to add Grossi as a defendant and amended the caption accordingly, as well as the May 2, 2022 order further amending the caption. Additionally, the court held that, inasmuch as the plaintiff filed the supplemental summons purporting to add Grossi as a defendant on February 17, 2022, which was several months after her death, the plaintiff never properly commenced this action against Grossi, she never was properly added a party defendant, and the causes of action asserted against her were nullities from their inception. The court thus sua sponte dismissed the amended complaint insofar as

asserted against Grossi, but permitted the action to proceed against Hernandez. Despite the dismissal, the court never formally vacated the stay set forth in the June 16, 2022 order.

The plaintiff now moves to add Eugene and Elizabeth Grossi, as the executors of the estate of Margaret T. Grossi, as defendants. Since Grossi was never properly a party to this action, her executors may not be “substituted” in her place as a defendant. Nonetheless, even where, as here, the action against the decedent was a legal nullity from its inception, the court has jurisdiction to grant leave to amend a complaint to add the executors as *new parties* defendant, and permit the action to proceed against any other defendants (*see Pensabene v City of New York*, 172 AD3d 1396, 1397 [2d Dept 2019]).

The plaintiff specifically seeks to assert the negligent hiring and supervision cause of action against the executors of Grossi’s estate. Leave to amend a complaint to add a new party defendant must be denied where the limitations period against the new party already has expired, unless the relation-back doctrine applies (*see Cintron v Lynn*, 306 AD2d 118, 119-120, [1st Dept 2003]; CPLR 203[c]; *see also Garcia v New York-Presbyterian Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]). The relation back doctrine permits a plaintiff to amend a complaint to add a defendant even though the statute of limitations has expired at the time of amendment, so long as the plaintiff can demonstrate three things:

“(1) that the claims arose out of the same occurrence, (2) that the later-added [defendant] is united in interest with a previously named [defendant], and (3) that the later-added [defendant] knew or should have known that, but for a mistake by [plaintiff] as to the later-added [defendant's] identity, the proceeding would have also been brought against him or her”

(*Koplinka-Loehr v County of Tompkins*, 189 AD3d 2039, 2042 [3d Dept 2020], quoting *Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 AD3d 1518, 1519-1520 [3d Dept 2017] [citations omitted]).

The limitations period applicable to negligent hiring and supervision causes of action against an employer is three years (1096 days) (*see Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015]; CPLR 214[5]), and begins to run on the date that an employee committed the

underlying wrongful act, including an assault and battery (see *Green v Emmanuel African Methodist Episcopal Church*, 278 AD2d 132, 132-133 [1st Dept 2000]). The limitations period here normally would have expired on July 4, 2022, or 3 years after the July 4, 2019 incident, but the 2020 COVID toll extended the limitations period. In this regard, the Legislature, in accordance with L 2020, ch 23, § 2 (eff Mar. 3, 2020), amended Executive Law § 29-a to authorize the Governor to issue, by executive order, any directive necessary to respond to the state disaster emergency arising from the COVID-19 pandemic, including a declaration that all statutory periods for the service and filing of papers in legal actions and other legal matters were tolled. On March 20, 2020, the Governor, pursuant to that authority, issued Executive Order (EO) 202.8, which provided, in relevant part:

“In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . . , or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.*”

(emphasis added). The terms of that EO, including the tolling deadlines set forth therein, were extended 13 times between March 20, 2020 and October 4, 2020. On October 4, 2020, the Governor issued EO 202.67, providing for a final extension of the tolling deadline until November 3, 2020, and reciting that the “toll would no longer be in effect” as of November 4, 2020 (*Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021])

With respect to the instant action, at the time that the COVID toll went into effect on March 20, 2020, 259 days had passed from the date that the plaintiff’s claim accrued, leaving him with 837 days after the toll finally expired on November 4, 2020 to commence a negligence action against Grossi or the representatives of her estate. The plaintiff thus would have had, under most circumstances, until February 19, 2023 to properly commence a negligence action against Grossi or her executors. He did not commence an action against the executors by that

date, and had not sought leave to add them as defendants in the instant action by that time, but instead waited until March 9, 2023 to seek leave to add the executors as defendants.

Nonetheless, the court concludes that the plaintiff made a prima facie showing that the relation-back doctrine applies to his claims against the executors of Grossi's estate. The negligent hiring and supervision claim sought to be asserted against the executors arose from the same July 4, 2019 assault and battery that the plaintiff asserted that Hernandez had committed. Grossi, and thus the executors of her estate, were united in interest with Hernandez by virtue of Hernandez's employer/employee relationship with Grossi, since a judgment against one of them will similarly affect the other (*see Ramirez v Elias-Tejada*, 168 AD3d 401, 403 [1st Dept 2019]; *Grossman v New York City Health & Hosps. Corp.*, 178 AD2d 323, 324 [1st Dept 1991]).

Specifically, Grossi's executors cannot be held liable for negligent hiring and supervision unless Hernandez is found to have committed the alleged assault and battery or intentionally inflicted emotional distress upon the plaintiff in the first instance. Furthermore, since the plaintiff asserted a negligent hiring and supervision cause of action in his initial complaint, but asserted it against persons and entities who were not the owners or managers of the building in which Hernandez worked, Grossi knew or should have known that, but for the plaintiff's mistake as to her identity, the action would have also been commenced against her. Hence, the plaintiff is granted leave to file and serve an amended complaint adding Eugene and Elizabeth Grossi, as executors of the estate of Margaret T. Grossi, as party defendants.

Although the plaintiff purportedly seeks an extension of time within which to serve Eugene and Elizabeth Grossi, granting that relief is unnecessary, since the plaintiff will have 120 days from the date that he files the supplemental and amended summons and amended complaint to serve the new defendants.

With respect to the branch of the plaintiff's motion seeking a further extension of time within which to serve Hernandez with the summons and complaint, the court notes that the plaintiff's time to effectuate this service was initially extended until March 22, 2022.

Nonetheless, since the action was stayed retroactively to the date of Grossi’s death on August 19, 2021, any service that he might have effectuated after that date would have been a nullity in any event. For the same reasons set forth in this court’s November 21, 2021 order, the plaintiff’s time within which to serve Hernandez is extended until October 31, 2023.

Accordingly, it is

ORDERED that, on the court’s own motion, the stay previously imposed in the order dated June 16, 2022 is vacated and dissolved; and it is further,

ORDERED that the plaintiff’s motion is granted, and the plaintiff is granted leave to file and serve a supplemental and amended summons and an amended complaint, in the form uploaded as Docket Entry No. 61 in the New York State Court Electronic Filing System, adding Eugene Grossi and Elizabeth Grossi, as executors of the estate of Margaret T. Grossi, as party defendants, and his time within which to serve the supplemental and amended summons and amended complaint upon the defendant Al Hernandez is extended up to and including October 31, 2023; and it is further,

ORDERED that the caption of the action shall be amended to read as follows:

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MICHAEL KRISHER,

Plaintiff,

v

AL HERNANDEZ, and EUGENE GROSS and ELIZABETH GROSSI, as executors of the estate of MARGARET T. GROSSI, deceased,

Defendants.

-----X;

and it is further,

ORDERED that, on the court's own motion, within 15 days of the entry of this order, the plaintiff shall serve a copy of this order upon the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall separately file and upload the notice required by CPLR 8019(c) in a completed Form EF-22, and the Trial Support Office shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

6/30/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: