

Dow v City of New York

2023 NY Slip Op 32628(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 150807/2023

Judge: J. Mabelle Sweeting

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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. J. MACHELLE SWEETING PART **62**

Justice

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HELENA DOW and EDWARD F. WILKINS, as Co-
Administrators of the Estate of EDWARD F.
WILKINS, Deceased,

INDEX NO. 150807/2023

MOTION DATE 04/10/2023

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, KERRY GALLAGHER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - DEFAULT

Pending before the court is a motion where plaintiffs seek:

- 1) The entry of a default judgment on liability pursuant to Civil Practice Law and Rules (“CPLR”) 3215 in favor of the plaintiff and against the defendants THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, and setting the matter down for an inquest with respect to the amount of damages to which the plaintiffs are entitled; and
- 2) In the event that a default judgment is entered against only the defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, pursuant to CPLR 603, the entry of an order severing the causes of action that arose from the conduct of SEAN D. ARMSTEAD, Deceased, to wit, the Third and Fourth

Causes of Action set forth in the Verified Complaint, from the causes of action alleged against the other defendants and scheduling an inquest with respect to the damages to which the plaintiffs are entitled pursuant to the Third and Fourth Causes of Action.

On April 12, 2023, counsel submitted a Stipulation on consent (NYSCEF Doc. No. 24) whereby, *inter alia*, this motion was withdrawn with respect to defendants THE CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT.

With respect to a default judgment on liability as against defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased (“the Defaulting Defendant”), the record shows that the Defaulting Defendant was properly served (NYSCEF Doc. Nos. 7, 15) on January 30, 2023 with the Summons and Complaint, but has not appeared in this matter or filed an Answer. Further, as plaintiff argues, the Limited Letters of Administration (NYSCEF Doc. No. 17) provide that defendant KERRY GALLAGHER was authorized by the Surrogate’s Court to accept service of process in this case, but was not obligated to appear, answer, or defend the action. The court also notes that although the defendants THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT (collectively, the “City”) filed Opposition papers (NYSCEF Doc. No. 26, further discussed below), the content of the City’s filing makes clear that the City has no opposition to the issuance of a default judgment on liability as against the Defaulting Defendant. Accordingly, this branch of plaintiff’s motion is GRANTED pursuant to the attached Default Judgment.

With respect to severing the Third and Fourth Causes of Action that allegedly arose from the conduct of SEAN D. ARMSTEAD, Deceased, the First Department has made clear that related actions should be tried together when possible, and the presumption is one against severance. *See*

Sichel v. Cmty. Synagogue, 256 A.D.2d 276 (Sup. Ct. App. Div. 1st Dept. 1998) (“Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties [...] To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff’s injury”). Accordingly, plaintiff, as the party seeking severance, has the burden of showing that a joint trial will result in prejudice or substantial delay (Vecciarelli v King Pharm., Inc., 71 AD3d 595, 596 [1st Dept 2010]).

Here, in the Affirmation in Support of plaintiff’s motion, plaintiff, inexplicably, made no arguments whatsoever regarding this issue. Other than reiterating that she sought severance, plaintiff cited no facts or laws regarding why severance was appropriate in this case. The City’s Opposition papers opposed plaintiff’s request to sever, and argued that plaintiff failed to meet her burden of proof with respect to this issue.

Subsequently, in her Reply papers, plaintiff argued that severance was necessary because the theory of liability as against the City and the theory of liability as against the Defaulting Defendant “are completely independent of one another” and that “there are few, if any, common issues involved with respect to the very different theories of liability against the City Defendants (negligence) and the Armstead Estate (intentional tort).” Plaintiff also argued:

41. The only significant asset of the Armstead Estate of which the Plaintiffs are aware is real property that was occupied by Armstead and Vanderheyden. Annexed hereto as Exhibit E is a copy of the deed to that real property which is in Armstead's name. The street address of the property is 676 Mullock Road, Port Jervis, New York. According to a Police Accident Report of May 8, 2022 as of that date Armstead owned a 2012 Dodge registered in New York which bore license plate number KRB6566.

42. It is the Plaintiffs' desire to obtain a money judgment against the Armstead Estate as soon as possible and to file it in Orange County so that it will constitute an unsecured lien against this real property.

43. In addition, once the Plaintiffs obtain a judgment against the Armstead Estate, the Plaintiffs will be able to serve information subpoenas and otherwise seek to enforce their money judgment against assets of the Armstead Estate, including the 2012 Dodge automobile referred to above.

Importantly, however, a moving party “cannot meet its [...] burden by submitting evidence for the first time in reply” (Cent. Mortg. Co. v Jahnsen, 150 AD3d 661 [2d Dept 2017]). Further, because these arguments were made in Reply, the City had had no opportunity to address them. Hence, to grant severance based on the substantive arguments made in the Reply papers would be prejudicial.

Conclusion

Accordingly, for the reasons stated above, it is hereby:

ORDERED that the branch of plaintiff’s motion seeking a default judgment on liability with respect to defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, is **GRANTED**; and it is further

ORDERED that the branch of plaintiff’s motion seeking to sever the Third and Fourth Causes of Action that allegedly arose from the conduct of SEAN D. ARMSTEAD, Deceased, is **DENIED**.

7/28/2023
DATE



J. MACHELLE SWEETING, 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

At a Motion Term, Part 62 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse at 80 Centre Street, New York, New York, on the 28th day of July, 2023

PRESENT: HONORABLE J. MACHELLE SWEETING
Justice of the Supreme Court

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

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HELENA DOW and EDWARD F. WILKINS, as Co-Administrators of the Estate of EDWARD F. WILKINS, Deceased,

Plaintiffs,

DEFAULT JUDGMENT
Index No.: 150807/2023

- against -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased,

Defendants.

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The plaintiffs HELENA DOW and EDWARD F. WILKINS, as Co-Administrators of the Estate of EDWARD F. WILKINS, Deceased, having commenced this action by filing a Summons and Verified Complaint with Exhibits A and B on January 26, 2023, and the Defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, having been duly served with the Summons and Complaint, with Exhibits A and B, together with a Notice of Commencement of Action Subject to Mandatory Electronic Filing on

January 30, 2023, and the Court having read the Summons and Verified Complaint with Exhibits A and B, together with proof of due service thereof upon the Defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, and it appearing from the NYSCEF docket in this action in this action that the Defendant has not filed an Answer to the Verified Complaint as of the date of this judgment, and the said Defendant has been and is in default in filing an Answer to the Verified Complaint, and the Plaintiffs having made a motion on April 10, 2023 for, among other things, the entry of a default judgment on liability in favor of the Plaintiffs and against the said Defendant pursuant to CPLR 3215 and for an Order pursuant to CPLR 603 severing the causes of action that arose from the conduct of SEAN D. ARMSTEAD, Deceased, to wit, the Third and Fourth Causes of Action set forth in the Verified Complaint, from the causes of action alleged against the other defendants and scheduling an inquest with respect to the damages to which the Plaintiffs are entitled pursuant to the Third and Fourth Causes of Action, the return date of which motion was adjourned to May 15, 2023, and the Court having read and considered the following papers in connection with the aforesaid motion: Notice of Motion dated April 10, 2023, affirmation of Joseph E. O'Connor, Esq. in support of the Plaintiffs' motion for a default judgment, with Exhibits A-F, proof of service of the motion upon the defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, by certified mail, return receipt requested, on April 10, 2023, and upon Robert J. Dickover, Esq. by certified mail, return receipt requested, on April 10, 2023, affirmation in partial opposition of Julie Rubenstein, Esq., Assistant Corporation Counsel, dated May 1, 2023, reply affirmation of Michael Kolb, Esq., dated May 12, 2023, with Exhibits A-E, and letter to the Court of attorney Rubenstein, dated May 12, 2023,

NOW, on motion of O'Connor & Partners, PLLC, attorneys for the Plaintiffs HELENA DOW and EDWARD F. WILKINS, as Co-Administrators of the Estate of EDWARD F. WILKINS, Deceased, it is

ORDERED, ADJUDGED, and DECREED that, pursuant to CPLR 3215, the Plaintiffs have judgment on default against the Defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, adjudging that the said Defendant is liable to the Plaintiffs pursuant to the Third and Fourth Causes of Action set forth in the Verified Complaint, and it is further

~~ORDERED, ADJUDGED, and DECREED that, pursuant to CPLR 3215(a) and CPLR 603, the Third and Fourth Causes of Action set forth in the Verified Complaint, be and they hereby are severed from the causes of action alleged against the defendants THE CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT, and it is further~~

ORDERED, ADJUDGED, and DECREED that an inquest shall be held to determine the amount of damages which the Plaintiffs are entitled to recover from the Defendant KERRY GALLAGHER as ADMINISTRATRIX OF THE ESTATE OF SEAN D. ARMSTEAD, Deceased, pursuant to the Third and Fourth Causes of Action set forth in the Verified Complaint.

ENTER,



HON. J. MACHILLE SWEETING
Justice of the Supreme Court

Dated: New York, New York
July 28, 2023

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