

Warshefskie v New York City Hous. Auth.

2012 NY Slip Op 30262(U)

February 3, 2012

Supreme Court, Richmond County

Docket Number: 101966/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 101966/07
Motion No.: 5**

PAUL WARSHEFSKIE,

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

NEW YORK CITY HOUSING AUTHORITY

Defendant

The following items were considered in the review of the following motion to reargue and to stay the defendant's prior motions.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion to Reargue and to Stay is as follows:

Pursuant to CPLR § 2221, the defendant, the New York City Housing Authority, moves to reargue the Decision and Order dated August 2, 2011. Reargument is granted and upon reconsideration, portions of the prior decision are reversed.

Facts

Consequent to his duties as a New York City Police Officer, the plaintiff, Paul Warshefskie, entered the General Charles W. Berry Houses, at 50 Dongan Hills Avenue, Staten Island, NY 10306, on December 6, 2006. On that day, he was assigned to serve an unrelated criminal warrant upon a resident of the building. The building was owned and operated by the defendant. The plaintiff ascended to the necessary floor to serve the warrant, and observed an unknown individual. The plaintiff confronted the individual who fled the scene, passing through a

stairwell doorway. As the plaintiff attempted to pass through the doorway behind the fugitive, the door was closed on his hand. Among his injuries, the tip of the index trigger finger of his right hand was amputated at the farthest joint.

In a decision and order dated August 3, 2011, this court found that the plaintiff's motion to amend the Notice of Claim was denied; that the motion made by the plaintiff to amend his Summons and Complaint was granted; that the motion to supplement his Bill of Particulars was granted; and that the defendant was compelled to disclose Police Reports, Police Aided Reports, written complaints received by the defendant, its agents and employees regarding illegal activities; and records, log books, memoranda and documentation maintained by the defendant, its agents and employees regarding illegal activities at the General Charles W. Berry Houses, 50 Dongan Hills Avenue, Staten Island, New York 10306. The plaintiff had submitted a so-called crossmotion to the defendant's crossmotion. The court exercised its discretion and deemed the plaintiff's "crossmotion to a crossmotion" to be a motion. The defendant crossmoved to dismiss those claims that are in the Bill of Particulars, but that are not in the Notice of Claim; to dismiss new claims made without leave of the court; to dismiss claims based upon a new theory of the case; and to deny discovery related to new claims and a new theory of the case.

The defendant has moved to reargue. The defendant asserts that this court erred in the following findings: the court deemed the crossmotion to a crossmotion as a motion; the court granted the plaintiff's motion to supplement his Summons and Complaint; the court granted the plaintiff's motion to supplement his Bill of Particulars; the court ordered disclosure of information concerning unlawful activity known to the defendant; the court allowed claims that are in the Bill of Particulars, but are not in the Notice of Claim; the court allowed new claims to be made; the court allowed claims to be based upon a new theory of the case; and the court permitted discovery relevant to new claims and a new theory of the case.

Discussion

"A motion for leave to reargue: ... 2. shall be based upon matters of fact or law allegedly

overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”¹ Except for motions to reargue a decision by the Appellate Division or the Court of Appeals, a motion to reargue may be “made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”² Granting leave to reargue lies within the discretion of the court.³ Here, the motion to reargue is granted. In this case, the court overlooked issues of law. As such the court’s original decision is reversed in part.

The crossmotion to a crossmotion is deemed a motion.

The defendant asserts that the court improperly considered the plaintiff’s so-called “crossmotion to the crossmotion.” The court carefully reviewed all the available records including this current submission. This court finds no material facts or pertinent laws that were overlooked or misapprehended in formulating the court’s prior decision pertaining to the plaintiff’s “crossmotion to the crossmotion.” The court continues to exercise its discretion and regards the plaintiff’s so-called “crossmotion to the crossmotion” as a motion.

The motion to supplement the Summons and Complaint and Bill of Particulars is denied.

The plaintiff had made a previous claim based upon negligence in maintaining the door responsible for his injuries. The plaintiff now wishes to interpose a new cause of action based upon a violation of law in allowing unlawful activity in the building. A right of action is created when an injury is directly or indirectly a result of failure to comply with statutory requirements.⁴ The owner of real property is held liable for damages resulting from knowingly permitting

¹CPLR § 2221 (d) (2).

²CPLR § 2221 (d) (3).

³*Matter of American Alternative Ins. Corp. v. Pelszynski*, 85 AD 3d 1157, 1158 [2d Dept 2011], *appeal denied Matter of American Alternative Ins. Corp. v. Pelszynski*, ___ NY 3d ___, 2012 NY Slip Op 60571 [2012].

⁴General Municipal Law § 205-e (1).

unlawful trade manufacture or business.⁵ Here, the precipitating events that caused the plaintiff's injuries resulted from the pursuit of a fleeing suspect, and was related to the plaintiff's professional actions as a police officer. Where a defendant increases the inherently risky conditions under which police and firefighters function, that increased risk is "separate and apart" from the expected risks that these public servants have assumed as part of their duties.⁶

An action that is "separate and apart" may depend upon distinguishing between professional actions and private activity.⁷ Here, pursuit of a suspect was related to the plaintiff's professional actions as a police officer. "[P]olice officers are responsible for enforcing the law any time, anywhere in this state."⁸ Accordingly, it should not be said that the plaintiff's pursuit of a suspect was an action separate and apart from his normal duties as a police officer.

The application of the "separate and apart" doctrine may also depend upon differentiating increased the risk from a defendant's actions and risks that furnish the occasion for an injury.⁹ Police work and firefighters duties frequently entail exposure to risk, and police and firefighters assume the risks of their chosen professions inherent in many of their respective professional tasks.¹⁰ Police must anticipate finding themselves in high crime areas, and assume the risks of the chase if they choose to pursue a suspect. Here, the plaintiff was engaged in professional activity that furnished the occasion for any injuries suffered. The plaintiff's pursuit of a suspect was not an action separate and apart from his normal duties as a police officer. Consequently,

⁵Real Property Law § 231 (2).

⁶*Zhangli v. Niagara Frontier Transp. Commn.*, 85 NY 2d at 440.

⁷*Perez v. City of New York*, 79 AD 3d 835, 836 [2d Dept 2010]; *relying upon Stavitz v. New York*, 98 AD 2d 529, 531 [1st Dept 1984], and *Lundberg v. State*, 25 NY 2d 467, 470-471 [1969].

⁸*Schilt v. N.Y. City Transit Auth.*, 304 AD 2d 189, 194 [1st Dept 2003] ; *quoting Alfieris v. American Airlines, Inc. and Cooper*, 63 NY 2d 370, 376-377 [1984]

⁹*Wadler v. City of New York*, 14 NY 3d 192, 195 [2010].

¹⁰*Cooper v. City of New York*, 81 NY 2d at 589.

the doctrine of separate and apart does not apply. The plaintiff may not recover under common law negligence, pursuant to a theory of the case based upon Real Property Law § 231. Therefore, the plaintiff's motion to amend the Summons and Complaint or the Bill of Particulars is denied where the previous decision was to grant it.

The plaintiff's demand for disclosure related to violation of Real Property Law § 231 is rendered moot, and the plaintiff's demand that the defendant disclose information concerning unlawful activity known to the defendant is denied, where the previous holding was to grant it. Having now denied the plaintiff's motions in the entirety, the defendant's motion for a stay pending appeal is made moot.

Conclusion

Upon reconsideration, the doctrine of separate and apart is not applicable in this instance. The holdings of the court should be that the plaintiff's motion to supplement his Summons and Complaint, and to supplement his Bill of Particulars by adding violation of Real Property Law § 231 as a cause of action, is denied, where the previous holding was to grant them. The defendant's motion to preclude new claims based upon a new theory of the case is granted, where the previous holding was to deny them.

Accordingly, it is hereby:

ORDERED, that the previous Decision and Order dated August 3, 2011 is vacated; and it is further

ORDERED, that the crossmotion to the crossmotion made by the plaintiff, Paul Warshefskie, is deemed to be a motion; and it is further

ORDERED, that the plaintiff may not supplement his Summons and Complaint and must strike the claim pursuant to Real Property Law § 231 against the defendant, New York City Housing Authority; and it is further

ORDERED, that the plaintiff may not supplement his Bill of Particulars and must strike the claim pursuant to Real Property Law § 231 against the defendant; and it is further

ORDERED, that the plaintiff's motion to compel discovery pertaining to violation of Real Property Law § 231 is denied; and it is further

ORDERED, that the defendant's motion to strike the plaintiff's claim alleging violation of Real Property Law § 231 as a new theory of the case is granted; and it is further

ORDERED, that the parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor, Staten Island, New York 10301, at 9:30 AM on March 14, 2012.**

ENTER,

DATED: February 3, 2012

Joseph J. Maltese
Justice of the Supreme Court