

Green v New York City Hous. Auth.
2020 NY Slip Op 30113(U)
January 13, 2020
Supreme Court, New York County
Docket Number: 151365/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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POSIE GREEN as administratrix of the estate of
TYRELL GOVAN, deceased,

DECISION AND ORDER

Plaintiff,

Index Number

-against-

151365/2018

NEW YORK CITY HOUSING AUTHORITY

Defendant.

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FRANK P. NERVO, J.S.C.

Plaintiff again seeks to strike Defendant New York City Housing Authority’s (NYCHA) answer pursuant to CPLR § 3216, alleging NYCHA’s failed to provide the full lease for Melissa Andrews, as directed by this Court’s September 13, 2019 status conference order. Plaintiff further seeks to strike NYCHA’s answer for its purported failure to maintain records of criminal activity at the subject building as required by a 1996 Memorandum of Understanding (MOU) between NYCHA and the NYPD. NYCHA cross-moves to strike plaintiff’s claims that NYCHA failed to abide by the 1996 MOU, and failed to evict Jamal Owens and Melissa Andrews from the subject housing development, as new theories of liability not raised at the General Municipal Law § 50 hearing. NYCHA also seeks to strike these theories as time barred.

Motion to Strike

CPLR § 3126(3) provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]).

NYCHA was previously ordered, by this Court, to provide the lease of Melissa Andrews to plaintiff (September 13, 2019 Conference Order NYSCEF Doc. 144; May 6,

2019 Conference Order NYSCEF Doc. 54). NYCHA avers it has provided portions of the lease, totaling between 100 and 150 pages; however, it does not state that this is the entirety of the lease. NYCHA contends that it has provided all relevant portions of the lease agreement and is therefore in compliance with this Court's prior orders. It is beyond cavil that Andrews' lease, as the mother of decedent's alleged killer and her son's co-resident, is relevant to this action. Accordingly, NYCHA is directed to provide plaintiff with the entirety of Melissa Andrews' lease agreement, including all attachments, addenda, and related documents, as ordered below. The Court will not strike NYCHA's answer, at this time, on this basis.

As to NYCHA's failure to maintain records that plaintiff contends are required to be kept under the 1996 MOU, striking NYCHA's answer is not the proper remedy. Plaintiff is unable to provide any case law in support of her contention that such failure amounts to refusal to obey a court order or willful failure to disclose information that ought to have been disclosed, a predicate for striking an answer under CPLR § 3126. Consequently, the Court will not strike NYCHA's answer on this basis, at this time.

Cross-motion to Strike

The purpose of the notice of claim is to "enable authorities to investigate, collect evidence, and evaluate the merit of a claim" (*Brown v. City of New York*, 95 NY2d 389 [2000]). Hence, it must set forth the time, manner, and place where the claim arose (*Phillipps v. New York City Transit Auth.*, 68 AD3d 461 [2009]). However, it need not state those items "with literal nicety or exactness" (*Purdy v. City of New York*, 193 NY 521, 523 [1908]; see also *Brown*, 95 NY2d at 393 [2000]). Notwithstanding, a plaintiff is constrained by the notice of claim and cannot allege new distinct theories of liability (*Lopez v. New York City Hous. Auth.*, 16 AD3d 164 [1st Dept 2005]). Thus, where an allegation goes beyond amplification of an existing claim contained in the notice of claim, it is an improper independent claim and should be stricken (*DeJesus v. New York City Hous. Auth.*, 46 AD3d 474 [1st Dept 2007]; *Monmasterio v. New York City Hous. Auth.*, 39 AD3d 354 [1st Dept 2007]).

Plaintiff's notice of claim alleges, inter alia, that NYCHA "negligently departed from reasonable care in their failure to take preventative measures to remove trespassers, criminals and other unauthorized individuals from the subject premises" (NYSCEF Doc. 173 p. 2). Plaintiff expects that the missing portions of the Andrews' lease will contain language which would allow NYCHA to evict those persons who have committed certain felonies from its buildings, and that Melissa Andrew's son, the alleged killer, had been convicted of an evictable felony. Consequently, plaintiff contends, NYCHA's failure to evict Andrews and her son amounts to mere amplification of her claim that NYCHA failed to take preventative measures to remove criminals from the premises.

NYCHA argues that plaintiff's allegations relating to its purported violations of a 1996 MOU between NYCHA and the NYPD amounts to an improper new theory of liability and should be stricken. Likewise, NYCHA contends plaintiff's claim that NYCHA failed to evict Jamal Owens and his mother Melissa Andrews is also an improper new theory of liability not contained in the notice of claim and should be stricken.

The notice of claim expressly includes a claim that NYCHA failed to keep its property free of unauthorized persons, including criminals, and is sufficient for pleading standards. Consequently, plaintiff's allegation that NYCHA failed to evict Jamal Owens and Melissa Andrews is not an improper new theory of liability, but an amplification of a claim contained in the notice of claim, and will not be stricken. However, the notice of claim does not reference any memoranda of understanding or allege NYCHA failed to comply with the same. Therefore, plaintiff's allegations relating to NYCHA's failure to comply with the 1996 MOU between it and the NYPD amount to improper new claims and must be stricken.

The Court notes that its prior decision and order of October 4, 2019, vacating the note of issue, directed discovery be completed within 60 days and a new note of issue filed within 75 days; the parties failed to meet these deadlines. Counsel are reminded that the note of issue deadline set at the January 10, 2020 conference will be enforced,

pursuant to the part rules, and extensions of the note of issue deadline must be brought by order to show cause prior to the deadline (NYSCEF Doc. 181).

Accordingly, it is

ORDERED that NYCHA provide plaintiff with the entire lease agreement for Melissa Andrews, including all attachments, addenda, and similar, subject to redaction of confidential tenant financial information, if any, within 20 days of notice of entry of this order; and it is further

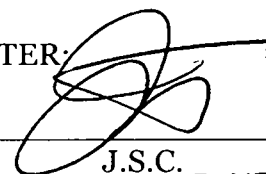
ORDERED that plaintiff's claim alleging NYCHA violated the 1996 MOU between it and the NYPD is stricken as not contained in the notice of claim or bill of particulars; and it is further

ORDERED that the motion and cross-motion are otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: January 13, 2020

ENTER:



J.S.C.
HON. FRANK P. NERVO