

Chmelar v County of Ulster

2007 NY Slip Op 31729(U)

June 20, 2007

Supreme Court, Ulster County

Docket Number: 0052011/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

LUBOMIR CHMELAR, Individually and as Executor
of the Estate of CAROLINE JULIA CHMELAR,

Plaintiff,

-against-

Index No.: 05-2011
RJI No.: 55-05-01409

COUNTY OF ULSTER and ROBERT AUGUSTINE,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for the conscious pain and suffering and wrongful death of his wife, which occurred when a dump truck owned by defendant Ulster County and driven by defendant Augustine was unable to stop for a preceding left turning vehicle and skidded across the highway into the decedent's car. Defendants have moved for partial summary judgment dismissing the plaintiff's claims

for pre-impact terror and conscious pain and suffering and limiting the award for wrongful death to funeral expenses. Plaintiff has cross-moved for summary judgment on the issue of liability and for leave to serve an amended bill of particulars.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs,

235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Pre-impact terror constitutes a recoverable form of pain and suffering based upon an injured or deceased person's perception that he or she is about to suffer grave injury or death (see Lang v Bouju, 245 AD2d 1000, 1001 [3d Dept 1997]). Circumstantial evidence of such perception is sufficient to support an award, even though the injured or deceased party did not live with such terror for any significant period of time (see Donofrio v Montalbano, 240 AD2d 617 [2d Dept 1997]). Defendants contend that there is no evidence indicating that the decedent was aware of her impending collision with a massive, orange dump truck, citing Phiri v Joseph, (32 AD3d 922 [2d Dept 2006]; see also Martin v Reedy, 194 AD2d 255, 259 [3d Dept 1994]). However, the Phiri case is clearly distinguishable as it involved an intersection case with the defendant's vehicle approaching from the side. The instant case involved a head on collision with the defendant's dump truck crossing into the decedent's lane of travel immediately in front of her.

Defendants contend that the accident happened so quickly that the decedent could not have been aware of the danger. However, the record contains numerous facts giving rise to an inference that the decedent saw the truck and was aware of the danger. Defendant Augustine testified that as he began to skid into the other lane of travel he saw the decedent's car. He further testified that he was aware that there was a woman driving

the car. If defendant could make such observations from such an elevated and remote location as the cab of the dump truck, the decedent certainly would have been aware of the presence of the dump truck immediately in front of her.

Defendants also rely upon defendant Augustine's answer in the negative to the question "[d]id you see any expression on her face or anything" (cf. Boston v Dunham, 274 AD2d 708, 711 [3d Dept 2000]). However, there was no follow up as to whether he noted an absence of expression or even could have seen any expression or "anything." Moreover, such information is within defendant Augustine's exclusive knowledge. Plaintiff is entitled to have a jury determine the credibility of such claims, rendering summary judgment inappropriate (see Tenkate v Moore, 274 AD2d 934, 935 [3d Dept 2000]; Antunes v 950 Park Ave. Corp., 149 AD2d 332, 333 [1st Dept 1989]).

Defendants further rely upon the fact that there were no skid marks from the decedent's application of her brakes. Defendants have not offered any expert witness testimony on such issue and it is unclear whether they have considered the fact that the decedent's vehicle almost certainly had anti-lock brakes. In any event, it obviously takes longer to react to a situation than to perceive the dangers of such situation. As such, the fact that the decedent may not have had time to apply her brakes does not negate the likelihood of her perception of danger (cf. Lang v Bouju, 245 AD2d at 1001).

Defendants' attorney has also attempted to perform accident reconstruction analysis, notwithstanding his lack of expertise. He argues that the record shows that the

dump truck was traveling at approximately eighteen miles per hour at the time of impact and had crossed into plaintiff's lane of travel approximately 41 feet before the point of impact. Instead of determining how long it would take the truck to travel the 41 feet at its rate of speed, he utilized the closing speed of the two vehicles, an entirely irrelevant factor. Using defendants' facts, the truck would have crossed the center line more than one and one half seconds prior to the collision. Moreover, it is likely that the truck's skidding in the decedent's direction would have been apparent to someone with the decedent's vantage point even before it crossed the center line, increasing such time period. The record also contains a description of the accident from the driver of a car following the decedent who testified that she clearly saw the truck crossing into her lane before it hit the decedent's car. Finally, defendants have failed to offer any expert proof with respect to the time required to perceive danger (see Vogel v Gilbo, 276 AD2d 977, 980 [3d Dept 2000]). As such, defendants have not met their burden of conclusively establishing that the decedent did not perceive the danger (see Cadieux v D.B. Interiors, 214 AD2d 323, 324 [1st Dept 1995]).

Defendants also contend that plaintiff may not recover for the post impact conscious pain and suffering of the decedent on the ground that she was unconscious for the entire period before she died (see Phiri v Joseph, 32 AD3d at 922). Defendants rely upon statements from the first police officer on the scene as well as emergency medical personnel to the effect that the decedent was unresponsive at all times. However, the

driver of the car following the decedent was a nurse who rushed to the decedent's aid immediately after the collision. She testified in detail at her deposition that while the decedent was unresponsive immediately following the collision, including when the police officer checked on the decedent, she began to moan and groan and appeared to respond to the nurse's voice a few minutes after the impact and before the ambulance arrived. The minor inconsistencies between the several statements given by such disinterested witness do not preclude consideration of her testimony (see Alexy v Stein, 16 AD3d 989, 990 [3d Dept 2005]). As such, the Court finds that there are questions of fact with respect to whether the decedent ever regained some form of consciousness following the collision.

Defendants also seek to limit plaintiff's measure of damages on the wrongful death action to funeral expenses. Defendants contend that the decedent earned only \$640 per month in social security benefits and entirely consumed such amount each month, making it impossible for her to have provided her distributees with any support from such income. While it appears that the decedent's income may be reduced by personal consumption for the purposes of a wrongful death award (see Milbrandt v Green Refractories Co., 79 NY2d 26, 32 fn 1 [1992]; cf. Bryant v New York City Health and Hosps. Corp., 250 AD2d 797, 798 [2d Dept 1998], *mod on other grounds*, 93 NY2d 592 [1999]; Doe v State of New York, 189 AD2d 199, 207 [4th Dept 1993]), defendants rely upon plaintiff's testimony that decedent enjoyed cooking and entertaining and that such

expenses probably exceeded \$640 per month. Such argument ignores the fact that plaintiff received a substantial benefit from such activity. There has been no proof of the value of such benefit or any apportionment of the cost to the decedent. As such, defendants have not conclusively established that the decedent's personal consumption exceeded her income.

Defendants also seek to preclude any recovery for the value of personal services provided by the decedent on the ground that such services have been replaced without cost to the plaintiff or the other distributees, relying upon Pattern Jury Instruction 2:280 and its commentaries. However, such instruction is applicable to personal injury actions, not wrongful death actions. The particular comment relied upon by defendants indicated that a living plaintiff could not recover the value of services gratuitously provided in the past. The instruction has no application herein. A cause of action for wrongful death includes the value of the personal services rendered by the decedent (see Klos v New York City Tr. Auth., 240 AD2d 635, 637-638 [2d Dept 1997]) and an award for such item of damages may be made without expert testimony (see Paccione v Greenberg, 256 AD2d 559, 561 [2d Dept 1998]). Such an award may also include the value of parental guidance, even for adult children (see Kiker v Nassau County, 175 AD2d 99, 102 [2d Dept 1991]; see also Walsh v Morris, 126 AD2d 911, 912 [3d Dept 1987]).

Defendants contend that plaintiff may not recover for the value of services rendered to the family corporation, which owned various real estate holdings, citing

Konstantatos v County of Suffolk, (174 AD2d 653 [2d Dept 1991]). In Konstantatos, the plaintiffs sought recovery for the diminution in value and lost profits of a corporation. However, in the instant action, plaintiff is seeking recovery of the value of the services rendered by the decedent, not a reduction in value of the real estate holdings. Moreover, it appears that the real estate is held by a limited liability company, which by definition is an “unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business.” (Limited Liability Company Law § 102 [m]). As such, defendants’ arguments concerning corporations are inapplicable. The value of services rendered to a family business is recoverable (see Lang v Bouju, 245 AD2d at 1002; Donofrio v Montalbano, 240 AD2d at 619). In any event, the gratuitous bookkeeping and other similar services rendered to the family business interests could be considered as imputed income to the decedent, the value of which was given to her husband and children (see e.g. Matter of Hines v Divers World Enters., 158 AD2d 831, 832 [3d Dept 1990]). As such, defendants have not shown any basis to limit plaintiff’s recovery to the cost of funeral services. Accordingly, defendants’ motion for summary judgment shall be denied in all respects.

With respect to plaintiff’s cross-motion for summary judgment on the issue of liability, plaintiff has clearly made a prima facie showing of a right to summary judgment (see e.g. Forbes v Plume, 202 AD2d 821 [3d Dept 1994]). Defendants have withdrawn all of their affirmative defenses other than the claim that defendant Augustine was

confronted with an emergency not of his own making. However, it has regularly been held that when an accident occurs as a result of a defendant's prior negligent conduct, such as following too closely or being inattentive, the emergency doctrine is inapplicable (see Herbert v Morgan Drive-A-Way, 85 NY2d 895 [1995], *revg on dissenting opinion* 202 AD2d 886 [3d Dept 1994]; Lester v Chmaj, 251 AD2d 1069, 1070 [4th Dept 1998]; Tyson v Brecher, 212 AD2d 851 [3d Dept 1995]; Gage v Raffensperger, 234 AD2d 751, 752 [3d Dept 1996]; Forbes v Plume, 202 AD2d at 822). Defendants rely only upon the transcript of the deposition of defendant Augustine in which he claimed that the car preceding him had stopped short. However, he also testified that he only noticed the car a few seconds before the collision. His testimony that the car stopped short is entirely conclusory. There is no information as to the original speed of the preceding car, or the time or distance in which the car stopped. Moreover, the claim of a short stop is entirely inconsistent with the sworn statement of the driver of the preceding car that he began slowing for a left turning vehicle in front of him, that he had time to notice in his rear view mirror that the defendants' dump truck was not slowing down and further had time to attempt the evasive maneuver of driving on to the shoulder out of the path of the truck. Defendant Augustine's conclusory assertion of a short stop is clearly insufficient to defeat summary judgment (see Rosen Auto Leasing, Inc. v Jacobs, 9 AD3d 798, 800 [3d Dept 2004]). Therefore, plaintiff's cross-motion for partial summary judgment on the issue of liability shall be granted. The trial on the issue of damages shall proceed as scheduled.

Plaintiff also seeks leave to serve an amended bill of particulars asserting a loss of services, support and parental guidance by the decedent's four children. Defendants can not claim surprise as a result of such amendment, as the claims were made in the complaint. Moreover, as discussed above, it appears that the claims have merit. Accordingly, leave to serve the amended bill of particulars shall be granted upon condition that defendants may conduct examinations before trial of the four children to be completed by August 31, 2007.

Accordingly it is


ORDERED that defendants' motion for summary judgment dismissing certain of plaintiff's claims is hereby denied, and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment on the issue of liability is hereby granted, and it is further

ORDERED that plaintiff's cross-motion for leave to serve an amended bill of particulars is hereby granted upon condition that defendants may conduct examinations before trial of the decedent's four children to be completed by August 31, 2007.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiff, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
June 20, 2007


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated December 28, 2006; Affirmation of William G. Kelly, Esq. dated December 28, 2006 with Exhibits A-Y annexed;

Notice of Cross-Motion dated February 27, 2007; Affirmation of David B. Golomb, Esq. dated February 27, 2007 with Exhibits A-H annexed;

Affirmation of William G. Kelly, Esq. dated March 29, 2007 with Exhibit A annexed;

Reply Affirmation of David B. Golomb, Esq. dated April 12, 2007.