

Formisano v Volpe

2008 NY Slip Op 32224(U)

July 31, 2008

Supreme Court, Richmond County

Docket Number:

Judge: Joseph J. Maltese

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

**Index No.: 0100421/2006
Motion No.: 001**

**ANGELA FORMISANO, as Administratrix of the Estate
of RACHEL SALVATO**

Plaintiffs

against

**ANTHONY VOLPE, PHYLLIS VOLPE, and
THE ESTATE OF ANTHONY VOLPE, JR.**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment.

<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 is as follows:

Facts

Anthony Volpe Jr. shot and killed Rachel Salvato with a .30 Carbine Rifle on or about August 28, 2004 in the home of his parents, Anthony and Phyllis Volpe. Anthony Volpe Jr. subsequently drove to New Jersey and committed suicide by a self inflicted gunshot wound.

Plaintiffs allege that the Volpe parents were negligent in their maintenance and ownership of their property in failing to supervise Anthony Volpe Jr., and that they failed to use reasonable care to ensure that the property was safe.

In response, the Volpe parents deny knowing the gun was in the house, denied ownership of the gun, and claimed that they had inspected the house regularly. The Volpe parents contend that they were sleeping at the time of the incident and did not know of the incident until the police came to their home, early the next morning.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact.”¹ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁴ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁵ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.

¹ CPLR § 3212[b].

² *Marine Midland Bank, N.A. v. Dino*, et al. 168 A.D.2d 610 [2nd Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 A.D.2d 472 [1st Dept 1994].

⁴ *Rotuba Extruders v. Ceppos.*, 46 N.Y.2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 A.D.2d 500 [2nd Dept 1985].

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 A.D.2d 331 [2nd Dept. 1984]. Aff’d 65 N.Y.2d 732 [1985].

The defendant parents rely upon a series of Appellate Division decision to support their contentions, that they cannot be held liable for the actions of their adult child, with the possible exception of negligent entrustment..

In *Hartsock v. Hartsock*,⁶ the Appellate Division, Third Department, found the defendant did not negligently entrust a gun to a shooter, even though the defendant kept the gun in his home. The Court held that a defendant storing a gun in his home is insufficient to attach liability.

In *Mimoun v. Bartlett*⁷, the defendant's son crashed into the plaintiff's car. The defendant's son owned the car and the defendant co-signed the lease. The Appellate Division Second Department held that the defendant could not have negligently entrusted the car because it was owned by the son.

Lastly, in *Cook v. Polak*⁸, the Appellate Division Fourth Department, held that the parents were not liable for their son's actions in causing a fire on defendant's property, because the son was an adult.

Presently, Anthony Volpe, Jr. was 25 years old when he shot Rachel Salvato and was therefore an adult. Anthony Volpe, Sr. and Phyllis Volpe both contend that they did not own a gun and that there was no gun in their home. It is unclear who owned the gun because it was untraceable. The Volpe parents deny ever owning a firearm, nor was there any evidence indicating that the gun was in the house prior to the incident. Therefore, there could be no negligent entrustment because the parents did not own, or know of, that a gun was in their home.

⁶ *Hartsock v. Hartsock*, 189 AD2d 993 [3rd Dep't. 1993].

⁷ *Mimoun v. Bartlett*, 162 AD2d 506 [2d Dep't. 1990].

⁸ *Cook v. Polak*, 46 AD3d 1442 [4th Dep't. 2007].

The plaintiffs' also contend that the Volpe parents were negligent as landowners, and they did not use reasonable care to ensure that the premises were in a safe condition. The plaintiffs cite *D'Amico v. Christie*⁹, a Court of Appeals decision, claiming that "Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property."¹⁰ However, a landowners' duty to control a third party's actions are based on whether: they had the ability to control the third party and are reasonably aware of the need for such control.¹¹ The Volpe parents did not have the ability to control the actions of Anthony Volpe, Jr., because he was an adult, nor did they know that he owned or had access to a gun. Lastly, the Volpe parents were asleep when the incident occurred, so they could not have prevented the shooting.

However, even if the Volpe parents were able to exercise such control, over their adult son, they were not reasonably aware of the need for such control. Anthony Volpe, Jr. did not have a history of violence; nor did he have a history of owning or collecting weapons; nor was there any indication that he and Ms. Salvato were involved in an altercation.

Plaintiffs also allege that there is circumstantial evidence showing that the Volpe parents knew of the weapon, that there was constructive notice of the weapon, and that the burden of proof is on the parents to prove they did not have actual or constructive notice. In support of these contentions the plaintiffs rely on a series of cases that are distinguishable from the facts in this case.

⁹ *D'Amico v. Christie*, 71 NY2d 76 [1987].

¹⁰ 71 NY2d at 85.

¹¹ *Id.* at 85.

In *Garrido v. IBM, Inc.*¹², a witness stated that he saw the plaintiff laying in the elevator and that it was misleveled. But this was after the incident. In *Negri v. Stop and Shop, Inc.*¹³, in a slip and fall case, there was testimony that the witness did not hit the shelves, that the aisle had not been cleaned nor inspected for at least 50 minutes prior to the accident, and that a witness in the vicinity did not hear any jars falling from the shelves nor the breaking of glass 15 to 20 minutes prior to the incident. Finally, in *Armstrong v. Ogden Allied Facility Management Corp.*¹⁴, the maintenance supervisor had been aware for two years prior to the incident, that the clips would work loose when adhesive backed carpeting would pull up, thereby giving the maintenance company notice of the defect.

In the present case, there is no evidence to support the contention that the parents had constructive or actual knowledge that a gun was present in their house, or acted unreasonably. Plaintiffs contend that because the basement entrances were viewable, the parents may have had constructive or actual knowledge that their son brought a gun into the home. Such an allegation is without merit and speculative. Circumstantial evidence must be actual evidence of some type of evidence introduced on behalf of the party opposing the motion. Here, no evidence was introduced, the plaintiffs rely solely on the pleadings and their speculative propositions. The speculative possibilities in this case are endless; the gun could have been in the Volpe parents home prior to the incident; it could have been brought in the night of the incident; it could have been Volpe Jr.'s gun; or less likely, it could have been Ms. Salvato's gun. The only evidence introduced is that the gun did not belong to the Volpe parents and that they did not know that a gun was in their house. All other assertions are speculative and are not supported by facts or evidence. Speculative assertions cannot withstand a motion for summary judgment, and evidence cannot be rebutted by speculative inferences. Since there is no evidence to support the plaintiffs'

¹² *Garrido v. IBM, Inc.* 38 AD3d 594 [2d Dept, 2007].

¹³ *Negri v. Stop and Shop, Inc.*, 65 NY2d 625 [1985].

¹⁴ *Armstrong v. Ogden Allied Facility Management Corp.*, 281 AD2d 317 [1st Dept, 2001].

allegations, an issue of fact does not exist.

Therefore, it is the finding of this court that, based upon the record, no triable issues of fact exist with regards to the reasonableness of Anthony and Phyllis Volpe in maintaining their property. This is a tragedy for which the parents of the perpetrator bear no legal responsibility.

Conclusion

On this record no triable issues of fact exist and the defendant parents are entitled to summary judgment dismissing the cause of action against them. However, the action against the Estate of Anthony Volpe, Jr. is not dismissed.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment by Anthony and Phyllis Volpe dismissing the plaintiff's complaint is granted in its entirety; and it is further

ORDERED, that the cause of action against the Estate of Anthony Volpe, Jr. shall proceed to trial.

ENTER,

DATED: July 31, 2008

Joseph J. Maltese
Justice of the Supreme Court