

Brady v Village of Malverne

2009 NY Slip Op 30688(U)

March 23, 2009

Supreme Court, Nassau County

Docket Number: 10667/08

Judge: Michele M. Woodard

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SCAN

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

-----X
LISA HUMBERTSON BRADY, as the Administratrix
of the Goods Chattels and Credits which were of
PAUL R. BRADY, Deceased, and LISA HUMBERTSON
BRADY, Individually,

Plaintiff,

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:10667/08
Motion Seq. Nos.: 01, 06, 07 & 08

DECISION AND ORDER

-against-

VILLAGE OF MALVERNE, TOWN OF HEMPSTEAD,
COUNTY OF NASSAU, and THE MALVERN FIRE
DEPARTMENT/NORWOOD HOOK LADDER & HOSE
#1, ROBERT J. MEYER, FERERRA FIRE APPARATUS,
INC., ARCHITECT ABC and CONTRACTOR XYZ,
Defendants.

-----X
Papers Read on this Motion:

Defendant Village of Malverne's Notice of Motion	01
Defendant Robert Meter's Notice of Cross-Motion	06
Defendant Malvern Fire Department's Notice of Motion	07
Plaintiff's Notice of Cross-Motion	08
Plaintiff's Affirmation in Support	xx
Defendant Fererra Fire Apparatus's Affirmation in Opposition	xx
Defendant Robert Meter's Reply Affirmation	xx
Defendant Village of Malverne's Reply Affirmation	xx
Defendant Malvern Fire Department's Reply Affirmation	xx
Defendant Village of Malverne's Affidavit of Service	xx
Defendant Malvern Fire Department's Affirmation In Opposition	xx

Decedent Paul F. Brady was a volunteer firefighter for Defendant Malverne Fire Department. Plaintiff Lisa Humbertson Brady is Brady's administrator. On July 30, 2006 at approximately 10:11 a.m., Brady was performing maintenance on top of a fire department rescue truck. More specifically, Brady was filling the truck with "Speedy Dry," a substance used to clean up oil spills. Defendant Robert Meyer, another firefighter, was instructed by the Captain to drive all five fire trucks out of their

bays so that the interior of the firehouse could be cleaned. Meyer pulled three of the trucks out of the firehouse without incident, and a fourth truck was driven out by another firefighter. However, when Meyer drove the rescue truck out of the firehouse, Brady, who was still working on top of the truck, struck a ceiling beam located near the door of the building. Brady died later that day from his injuries.

This action for wrongful death was commenced on June 10, 2008. Plaintiff asserts claims for common law negligence against Meyer, the Village of Malverne, and the Malverne Fire Department. Plaintiff also asserts a products liability claim against the manufacturer of the truck, Defendant Fererra Fire Apparatus, Inc. Plaintiff's theory is that the truck was defectively designed in that it did not contain a sensor device or some type of warning system to alert the driver that the roll top storage bin on the top of the truck was in the open position. It was apparently necessary for Brady to open the storage bin to transfer the Speedy Dry into the vehicle. In its answer, Defendant Fererra cross-claims against Defendants Meyer and Malverne Fire Department for contribution or indemnity.¹

Defendant Village of Malverne is moving to dismiss the complaint for failure to state a cause of action on the ground that pursuant to § 19 of the Volunteer Firefighters' Benefit Law, the benefits provided by the law are the exclusive remedy for a line of duty injury. There is no dispute that Brady's estate received these benefits. Defendant Malverne Fire Department is moving for similar relief. Defendant Robert Meyer is moving for summary judgment dismissing the complaint on the same grounds.

Plaintiff opposes Defendants' motions to dismiss on the ground that General Municipal Law § 205-a provides an additional right of action to representatives of deceased firefighters where death occurs as a result of willful or culpable negligence in failing to comply with a statute or ordinance. Plaintiff argues that § 19 of the Volunteer Firefighters' Benefit Law does not bar an action against the fire department as the owner and operator of the firehouse. Plaintiff is cross-moving for an order granting her permission to inspect the firehouse. Defendant Fererra Fire Apparatus, Inc. also opposes the motions to dismiss by the other defendants. Fererra argues that despite § 19's provision that the Volunteer Firefighters' Benefit Law is the exclusive remedy, based upon Workers Compensation Law § 11, Defendants Meyer and Malverne Fire Department may be liable to Fererra for contribution or indemnity.

Section 19 of the Volunteer Firefighters' Benefit Law provides that the benefits provided by the

¹Defendant Fererra's ex. B at ¶ 44.

law shall be the exclusive remedy of a volunteer firefighter, or the spouse, parents, dependents, next of kin, executor or administrator, “or anyone otherwise entitled to recover damages, at common law or otherwise, for or on account of an injury to a volunteer fire[fighter] in line of duty or death resulting from an injury...in line of duty, as against (1) the political subdivision liable for the payment of such benefits, (2) the political subdivision regularly served by the fire company of which the volunteer fire[fighter] is a member...(3) any person or agency acting under governmental or statutory authority in furtherance of the duties or activities in relation to which any such injury resulted....” However, the statute further provides that the benefits shall not be the exclusive remedy “as against persons who, in the furtherance of the same duties or activities, are not similarly barred from recourse against the volunteer fire[fighter], or his executor or administrator.” For § 19 to bar an action against a fellow firefighter, the firefighter’s injury- causing acts must be within the scope of employment (*Maines v Fire Dept*, 50 NY2d 535 [1980]).

Section 205-a of the General Municipal Law provides that in addition to any other right of action, in the event any accident causing injury or death occurs directly or indirectly as a result of any neglect or omission of any person in failing to comply with the requirements of any “statutes, ordinances, rules, orders, and requirements” of federal, state or local government, the person guilty of said neglect shall be liable to pay any employee of any fire department in the case of death not less than \$40,000. Pursuant to the “firefighter’s rule,” a firefighter is barred from suing a real property owner for negligence in the very situations that create the occasion for the firefighter’s services (*Mullen v Zoebe, Inc.*, 86 NY2d 135, 140 [1995]). Section 205-a was enacted to benefit firefighters by ameliorating the harsh effects of the firefighter’s rule by imposing liability where there is a reasonable connection between a statutory or code violation and the injury or death of the firefighter (Id). An action by the firefighter pursuant to § 205-a may be maintained only against parties who were in possession or control of the premises at the time the accident occurred (*Raquet v Braun*, 90 MY2d 177, 180 [1997]). However, a person in possession or control of the premises may seek contribution from a third party, such as a contractor, who was allegedly responsible for the accident (Id).

In his affidavit, Defendant Robert Meyer asserts that he was unaware that Brady was working on top of the rescue truck when he attempted to pull it out of the firehouse.² There is no question that Meyer was acting within the scope of his employment when the accident occurred. Since there is no

²Defendant Meyer’s ex. D at ¶ 5.

evidence that Meyer's action was intentional or willful, Motion sequence # 6, Defendant Meyer's motion for summary judgment dismissing Plaintiff's complaint is **granted**.

General Municipal Law § 205-a is intended to provide an injured or deceased firefighter with a right of action against the owner or possessor of the premises where the fire occurred. The statute has no application to line of duty injuries which occur in the firehouse. Accordingly, Motion sequence # 7, Defendant Malverne Volunteer Fire Department's motion to dismiss the complaint for failure to state a cause of action is **granted**. Motion sequence # 1, Defendant Village of Malverne's motion to dismiss the complaint for failure to state a cause of action is similarly **granted**.

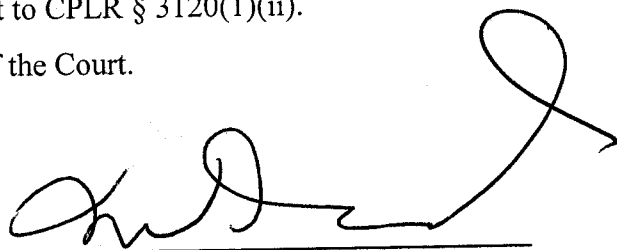
Workers' Compensation Law §11 provides that an employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his employment unless such third person proves that such employee has sustained a "grave injury." The term "grave injury" includes the death of the employee (Id). Workers' Compensation Law § 11 applies to injuries sustained by volunteer firefighters (*Theodoreu v Fire District*, 12 AD3d 499 [2d Dept 2004]). Since Brady's injury resulted in his death, Defendant Fererra's cross-claims against Defendants Meyer and Malverne Fire Department are deemed third party claims and remain viable.

Since Plaintiff's claim against Defendant Malverne Fire Department has been dismissed, Motion sequence # 8, Plaintiff's cross-motion for an order permitting an inspection of the firehouse is **denied**. The denial of Plaintiff's motion is without prejudice to Defendant Fererra's serving a notice to permit entry upon the Malverne firehouse pursuant to CPLR § 3120(1)(ii).

This constitutes the Decision and Order of the Court.

DATED: March 23, 2009
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

MAR 26 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE