

Van Winkle v Witbeck
2009 NY Slip Op 31339(U)
June 4, 2009
Supreme Court, Rensselaer County
Docket Number: 223305/07
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

VINCENT VAN WINKLE,

Plaintiff,

-against-

ROBERT M. WITBECK d/b/a ROBERT M. WITBECK
GENERAL CONTRACTING and TOWN OF EAST
GREENBUSH,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 41-0103-2008 Index No. 223305-07

APPEARANCES:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The above-captioned action to recover damages for personal injuries arises from an August 7, 2006 incident when plaintiff Vincent Van Winkle was injured in a construction accident when a trench that he was working on or near collapsed due to the alleged negligence of defendants Robert M. Witbeck d/b/a Robert M. Witbeck General Contracting and the Town of East Greenbush (“defendants”). Plaintiff now moves for an order pursuant to CPLR §§§ 1015(a), 1021 and 3025 amending the title of this action to substitute Misty May Brandon, the Administratrix of the Estate of Vincent Van Winkle, as plaintiff, and for leave to amend the complaint to include a cause of action for wrongful death. Van Winkle died on December 28, 2008. The only cause of death stated on his death certificate was “ventricular fibrillation and arteriosclerotic heart disease.”

Defendants do not oppose that portion of plaintiff’s motion that seeks to amend the caption to substitute Van Winkle’s Administratrix, Misty May Brandon, as plaintiff. As such, that branch of the motion will be granted.

Defendants do oppose that portion of plaintiff’s motion seeking leave to amend the complaint to add a cause of action for wrongful death. Defendants submit that plaintiff’s application is legally insufficient due to the failure to submit competent medical proof establishing a causal connection between Van Winkle’s death and the alleged negligence on August 7, 2006. Defendants claim that in the absence of such proof, there is “simply

nothing to establish any link at all from the accident to a death from heart disease.”

In general, leave to amend a pleading “rests within the trial court’s discretion and should be freely granted...” (CPLR 3025; Bast Hatfield, Inc. v Schalmont Central School Dist., 37 AD3d 987, 988 [3rd Dept., 2007]; Berger v Water Comm’rs. of the Town of Waterford, 296 AD2d 649, 649 [3rd Dept., 2002]). As further recognized by the courts, leave to amend should be freely granted when there is no prejudice to the non-moving party and the amendment is not plainly lacking in merit (McCaskey, Davies and Associates. v New York City Health and Hosp. Corp., 59 NY2d 755 [1983]; Berger v Water Comm’rs of the Town of Waterford, supra; Sabol & Rice, Inc. v Poughkeepsie Galleria Co., 175 AD2d 555 [3rd Dept., 1991]). Where, as here, plaintiff seeks leave to add a cause of action for wrongful death, the Appellate Division, Third Department has held that the plaintiff must submit “competent medical proof showing a causal connection between the alleged negligence and the decedent’s death” (Ludwig v Horton Memorial Hosp., 189 AD2d 986, 986 [3rd Dept., 1993]). Thus, in the Third Department, the presentation of expert evidence, by way of a physician’s affidavit or affirmation, causally linking the defendant’s alleged negligence and the death of the original plaintiff, appears to be the *sine qua non* of an application for leave to assert a cause of action for wrongful death (Ludwig v Horton Mem. Hosp., supra; Smith v Haggerty, 16 AD3d 967, 968-969 [3rd Dept., 2005]).

Plaintiff’s proposed wrongful death action alleges that Van Winkle died as a result of the combination of multiple prescription medications that he was taking to alleviate his

chronic and disabling pain resulting from the incident. In support of the motion, plaintiff's counsel indicates that before his death Van Winkle was "eating pain killers and muscle relaxers like candy...". Plaintiff argues that said medications lead to Van Winkle's development of heart disease, which ultimately caused his death on December 28, 2008.

Although apparently acknowledging "the requirement of submitting competent medical proof of causal connection" in her initial moving papers, plaintiff points out that this requirement has been abandoned by the Appellate Division, Second Department, in the case of Lucido v Mancuso (49 AD3d 220 [2nd Dept., 2008]). In Lucido the Court overruled a fifty-year-old line of cases which had required a competent showing of merit before a complaint could be amended to add a cause of action for wrongful death. The Second Department rejected any requirement demonstrating a causal connection between plaintiff's death and the underlying cause of action, reasoning that an application to amend a complaint to assert a wrongful death cause of action should be governed by the same broad principles which apply to applications to amend a pleading under CPLR 3025 (b). Notwithstanding the holding in Lucido (supra), this Court finds that it is bound by the Third Department's decision in Ludwig v Horton Memorial Hosp., supra, and more recently in Smith v Haggerty, supra).

In the case at bar, the plaintiff did not submit a physician's affidavit or affirmation to provide an opinion on the requisite causal connection between the decedent's death and the underlying cause of action. Rather, as noted, plaintiff submitted a death certificate

certified by an out-of-state physician which indicates that the immediate cause of death was ventricular fibrillation due to arteriosclerotic heart disease. While there is authority for the proposition that a motion to amend a complaint to add a wrongful death cause of action can be solely based upon information contained in a death certificate (see *Gosse v Saint Peter's Hosp. of City of Albany*, 873 NYS2d 882 [Sup. Ct., Albany Co., 2009]), in the instant matter, prior to Van Winkle's death, "ventricular fibrillation and arteriosclerotic heart disease" was not pleaded or otherwise claimed as an injury sustained as a result of the accident on August 7, 2006. Moreover, a review of the death certificate shows that it is silent on the question of what caused the ventricular fibrillation and arteriosclerotic heart disease. The death certificate, and facts alleged in pleadings, simply fail to spell out sufficient causality to justify granting plaintiff's motion where the sequence of events following the August 7, 2006 incident fail to inexorably and logically lead to the conclusion that plaintiff's death was causally related to the August 7, 2006 accident.

In sum, plaintiff's motion to amend to add the wrongful death cause of action is based solely on plaintiff's attorney's conclusory affidavit stating that Van Winkle's death from heart disease was "caused by, the result of, and/or brought about by the prescription medications he was taking as a result of the injuries he sustained in the accident of August 7, 2006." The record does not show that plaintiff's attorney is a physician or is competent to aver to the causal connection between the August 7, 2006 incident and Van Winkle's death. Thus, in the absence of a physician's affidavit adequately setting forth the causal

connection between defendants' alleged negligence and the death of the plaintiff, plaintiff's motion in this regard must be denied.

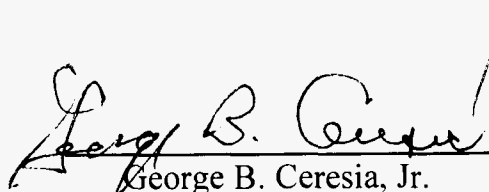
Accordingly, it is

ORDERED, that plaintiff's motion to substitute Misty May Brandon as Administratrix of the Estate of Vincent Van Winkle as plaintiff in the above-captioned action in the place and stead of Vincent Van Winkle is granted, and the caption of the action is amended to read as follows: MISTY MAY BRANDON, as Administratrix of the Estate of Vincent Van Winkle, Deceased, Plaintiff -against- ROBERT M. WITBECK d/b/a ROBERT M. WITBECK GENERAL CONTRACTING and TOWN OF EAST GREENBUSH, Defendants; and it is further

ORDERED, that the motion is otherwise denied.

This shall constitute the Decision and Order of the Court. All papers including this Decision and Order are returned to the attorney for defendant Robert Witbeck. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: June 4, 2009
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

- (1) Notice of Motion dated March 20, 2009;
- (2) Affirmation of Peter R. Garcia, Esq. dated March 20, 2009, with exhibits annexed;
- (3) Affirmation of Linda A. Mandel Clemente, Esq. dated April 13, 2009;
- (4) Affirmation of Todd C. Roberts, Esq. dated April 8, 2009.