

**Goodman v Sklar**

2011 NY Slip Op 31936(U)

June 6, 2011

Sup Ct, NY County

Docket Number: 102944/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Saliann Scarpulla*

PART 19

Index Number : 102944/2008

GOODMAN, ALEX

INDEX NO. \_\_\_\_\_

vs

SKLAR, PAUL R.

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

**FILED**

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

JUL 8 2011

Cross-Motion:  Yes  No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*is determined in accordance with the accompanying decision/order.*

Dated: \_\_\_\_\_

*7/6/11*

*Saliann Scarpulla*

SALIANN SCARPULLA, S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
ALEX GOODMAN, AS ADMINISTRATOR TO  
DECEDENT, ROBERT D. GOODMAN,

Plaintiff,

- against-

PAUL R. SKLAR, AS RECEIVER AND S.W.  
REALTY MANAGEMENT, INC.,

Defendants.

----- X  
For Plaintiff: Wilson, Grochow, Druker & Nolet  
233 Broadway  
New York, NY 10279  
For Defendants: Quirk and Bakalor, P.C.  
845 Third Avenue, 15<sup>th</sup> Floor  
New York, NY 10022

Index No.: 102944/08

Submission Date: 3/2/11

DECISION AND ORDER

**FILED**

**JUL 08 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment:

- Notice of Motion ..... 1
- Aff in Opp ..... 2
- Reply ..... 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injury and wrongful death, defendants Paul R. Sklar, as receiver and S.W. Realty Management, Inc. ("Sklar defendants") move for summary judgment dismissing the complaint.

The building located at 1482 Fifth Avenue ("subject building") was owned by decedent Robert D. Goodman's ("Goodman") mother Viola Goodman ("Viola"), and Philip and Maurice Silverstein. The subject building was put into receivership in the 1990s, and in 1999, defendant Paul Sklar ("Sklar") was appointed receiver. Mitchell

Kaufman ("Kaufman") of defendant S.W. Realty Management, Inc. ("S.W.") managed the day to day activities of the subject building.

On August 4, 2006, Goodman, who was occupying apartment 2S of the subject building, sustained fatal injuries in his apartment. Administrator Alex Goodman ("plaintiff") commenced this action on behalf of Goodman's estate in or about February 2008 seeking to recover damages for Goodman's wrongful death, funeral/burial expenses, loss of earnings, pain and suffering, and loss of companionship.

At an examination before trial, Viola testified that she called S.W. and spoke to Amy in June and July 2006 to complain that the heat had gone on in the building during the spring and summer months. Each time she complained, the problem was remedied. On August 4, 2006, at 8:00 or 8:30 a.m., Goodman knocked on her door to tell her that there was flooding in his apartment. At that time, the heat was on in her apartment again, and even with her "powerful air conditioner" running, her apartment was still very hot. She also testified that it was hot outside. She saw the flooding in Goodman's apartment, which was coming from the back bathroom, and running onto the kitchen floor. Goodman and Viola left the apartment a minute later and knocked on the neighbor, Phil Silverstein's ("Silverstein") door. Silverstein informed them that his daughter was taking a shower. They asked him to have her turn off the shower because they believed it was causing the leak into Goodman's apartment. Goodman then returned to his apartment to mop up the water. Viola and Silverstein went to the basement to try and shut the heat.

According to Viola, they tried to turn off the heat, but did not know how, so they called the New York City Fire Department. Neither of them touched anything. Viola also called management to tell them that there was an emergency, and the super to inform him about the flooding. Someone from the Fire Department came and shut off the machinery in the boiler room.

Viola then went back up to Goodman's apartment and found him laying on his back on the kitchen floor. There was no air conditioning in Goodman's apartment, only a fan in the bedroom that was running at the time. Viola believed that it was more than 100 degrees in Goodman's apartment at the time but she did not check the radiators in the apartment. She later testified that the heat was coming into the entire building that day, which included Goodman's apartment.

Viola indicated that Bob Flamenbaum ("Flamenbaum") of Combustion Consulting Services, LLC, who would come to the subject building for regular boiler inspections and would be on call for emergency services, responded to the scene shortly thereafter and indicated to her that the aquastat was missing from the boiler room and that is what caused the heat to come into the apartments.

According to Flamenbaum, when he responded to the scene, he noticed that the boiler was hot but it was already shut off. He did not know why the boiler was hot. He replaced the aquastat because he thought it may have failed, but he was not certain. The last inspection of the boiler prior to the subject incident was performed on December 15,

2005. Flamenbaum performed the inspection and the boiler passed. He also responded to a call from the super that the burner was shut down on June 13, 2006. He replaced and installed a new ignition transformer, replaced the nozzle, fire burner and checked the operations. Although boiler violations were issued to the subject building in 2006, Flamenbaum explained that none of those violations could have caused problems with the burner.

Meteorological data submitted for the days leading up to the incident indicated that New York had been experiencing temperatures in the high 80s and low 90s. On August 3, the average temperature was 87 degrees and on August 4, the average temperature was 83 degrees.

The medical examiner's report indicated that there was 1/4 inch of water on the bathroom floor where Goodman was found. The windows were closed when he was found. The ambient temperature was 88 degrees and the body temperature was 112 degrees. According to his death certificate, the cause of Goodman's death was "hyperthermia due to high ambient temperatures."<sup>1</sup>

Sklar testified that as receiver, he was responsible for maintaining the premises. The boiler systems were "inspected as required" by Flamenbaum. Before the incident, he had never been made aware that the heat was coming on in the building during the summer. He also indicated that over the years, Viola would give him problems about

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<sup>1</sup> No autopsy was conducted due to the decedent's Jewish religion.

doing repairs that needed to be made in the building, saying that they were too expensive or unnecessary.

Kaufman testified at an examination before trial that the building super, hired by S.W., was responsible for maintaining the boiler. The super would perform minor work on the boiler, including cleaning filters, restarting the boiler and cleaning dirt from the aquastat. It was S.W.'s responsibility to correct any violations. S.W. filed a report with the City once a year noting the last boiler inspection date. A "non-hazardous" boiler violation was issued on July 26, 2006. Two of the building supers and Silverstein told him that often times Viola would break the locks to the boiler room and enter the room and play around with the boiler. Because of this, he changed the locks to the boiler room at least four times.

The Sklar defendants now move for summary judgment dismissing the complaint, arguing that there is no evidence of any causal connection between any heat condition allegedly caused by the building's boiler and/or water condition in Goodman's apartment and Goodman's death. Specifically, they argue that there is no evidence to prove that it was not the high weather temperatures that caused Goodman's death, as opposed to heat coming from the building's boiler, and there is no evidence that heat from the building's boiler was even coming into Goodman's apartment at the time of his death. They further argue, among other things, that, in any event, there is no evidence that the Sklar defendants had notice of any alleged heat condition caused by the building's boiler in

Goodman's apartment prior to his death. Alternatively, the argue that any damages claims must be dismissed.

In opposition, plaintiff argues that issues of fact exist as to whether the Sklar defendants improperly maintained the subject boiler, which thereby led to Goodman's death. Plaintiff submits the affidavit of Matthew Spink ("Spink), certified boiler installer, who reviewed the discovery documents, deposition testimony and violations issued to the subject premises in this case. Spink opined that the reason that the heat was going through the radiators in the building was due to the Sklar defendants' improper installation, maintenance and inspection of the subject boiler and its aquastat. He also maintained that the incident was caused by the Sklar defendant's negligence, and they clearly had notice of the unreasonably dangerous conditions at the site of the incident, which caused or substantially contributed to the occurrence of the accident.

Plaintiff also submits the affidavit of medical examiner Charles Catanese, who opined that the ambient temperatures in Goodman's apartment, due to the heat coming from the boiler, were sufficient to have caused his body temperature to have risen to 112 degrees and to have caused his death from hyperthermia. He maintained, based on a reasonable degree of medical certainty, that Goodman suffered conscious pain and suffering and a fear of impending death as his temperature gradually rose to a critical level. He explained, "prior to being overcome by heat stroke the body goes through different stages of hyperthermia including heat exhaustion. At first he would have

experienced nausea, fatigue, weakness headache, muscle cramps and dizziness while he frantically tried to gain control of his situation. As he became more overtaken by the heat, he would have experienced some degree of disorientation with rapid heart rate, difficulty breathing, confusion, agitation and eventually seizure and/or coma. It is my opinion the process leading to his death took at least 10 minutes with conscious pain and suffering.”

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). It is well settled that a defendant can not obtain summary judgment by merely pointing to gaps in plaintiff's proof. *See Coastal Sheet Metal Corp. v. Martin Assoc.*, 63 A.D.3d 617 (1<sup>st</sup> Dept. 2009); *Torres v. Indus. Container*, 305 A.D.2d 136 (1<sup>st</sup> Dept. 2003).

Here, while the Sklar defendants seek to discount Viola's examination before trial testimony as “speculative” and “inadmissible,” Viola was actually present in Goodman's apartment on the day of the incident before his death and her testimony therefore has probative value and is material to the resolution of this action. While she testified that it

was hot outside on the day of the incident, she also testified that (1) her apartment was very hot even with her powerful air conditioner running; (2) it felt like it was 100 degrees in her son's apartment when she first entered it that morning; and (3) that the heat was running into her apartment and the entire building that morning. She also testified that the boiler had gone on previously during the spring and summer months, and she had notified S.W. about the problem. Further, the boiler was clearly on and running at the time of Goodman's death, as testimony established that the Fire Department came and turned off the boiler after the incident, and when Flamenbaum later responded to the scene, he noted that the boiler was still hot. Therefore, the evidence submitted presents issues of fact for a jury to resolve, including whether the boiler was negligently maintained by the Sklar defendants, whether a heat condition was caused or created by the boiler, and whether that condition led to Goodman's death.

The Court further finds that the Sklar defendants have not met their burden of proving that all of the plaintiff's damages claims should be dismissed. "The plaintiff in a wrongful death action is entitled to recover damages for only pecuniary loss, i.e., the economic value of the decedent to each distributee at the time decedent died."

*Huthmacher v. Dunlop Tire Corp.*, 309 A.D.2d 1175, 1176 (4<sup>th</sup> Dept. 2003). Pursuant to EPTL 5-4.3, "pecuniary loss" includes decedent's loss of earnings, loss of services each survivor may have received from decedent, loss of parental guidance from decedent, and the possibility of inheritance from decedent. See *Johnson v. Manhattan & Bronx Surface*

*Transit Operating Auth.*, 71 N.Y.2d 198 (1988). With respect to personal injury claims pursuant to EPTL 11-3.3 (a), decedent's estate cannot recover damages for future loss of earnings or loss of services, but only for pain and suffering, expenses incurred, and loss of earnings up until the time of decedent's death.

First, the Sklar defendants submit the affirmation of medical examiner Gerald Catanese, in which he opined that there is no evidence that Goodman experienced any pain or suffering in between the time of the incident and his death. The plaintiff, however, submits an affirmation from medical examiner Charles Catanese in which he indicates that Goodman did suffer pain and fear of impending death in the moments prior to his death, and he provides a detailed explanation for that conclusion. Due to the conflicting medical examiner affirmations, the Court will not dismiss the plaintiff's damages claim for pain and suffering at this time. In addition, the Sklar defendants fail to submit evidence sufficient to meet their burden of establishing entitlement to dismissal of plaintiff's claim for funeral/burial expenses. Finally, as post-death loss of earnings can be a component of a wrongful death claim pursuant to EPTL 5-4.3, the Court will not dismiss the claim for lost earning damages.

However, the Sklar defendants properly maintain that the plaintiff's claim for loss of companionship must be dismissed as a plaintiff can not seek recovery for the grief or loss of society or companionship suffered as the result of decedent's death. *See Gonzalez*

v. *New York City Housing Authority*, 77 N.Y.2d 663 (1991); *Sand v. Chapin*, 238 A.D.2d 862 (3<sup>rd</sup> Dept. 1997).

In accordance with the foregoing, it is hereby

ORDERED that defendants Paul R. Sklar, as receiver and S.W. Realty Management, Inc.'s motion for summary judgment dismissing the complaint is granted only to the extent that any damages claim for loss of society or companionship is dismissed and all remaining claims asserted against those defendants are severed and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

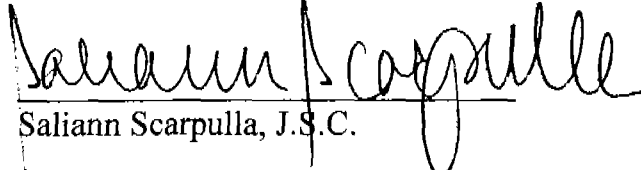
Dated: New York, New York  
July 6, 2011

**FILED**

**JUL 08 2011**

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Saliann Scarpulla, J.S.C.