Ehrenkrantz v IESI NY Corp.
2011 NY Slip Op 34266(U)
February 8, 2011
Supreme Court, Kings County
Docket Number: 37709/2007
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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KAY EHRENKRANTZ and ANNE ROBBINS, CO-ADMINISTRATORS OF THE ESTATE OF SARA ELLEN ROBBINS, DECEASED,

Plaintiffs,

-against-

IESI NY CORPORATION and BRIAN HAYES,

Defendants.

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DECISION / ORDER

Index No. 37709/2007

Submitted: 1/7/11

Mot. Seq. #3

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for partial summary judgment.

Papers	Numbered
Notice of Motion, Affirmation, Exhibits Annexed	1-8
Affirmation in Opposition	9
Reply	10

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendants move for partial summary judgment dismissing plaintiffs' cause of action for wrongful death, other than their claim for funeral expenses. For the reasons set forth herein, the motion is granted.

Decedent, the Director of the library at Brooklyn Law School, was crossing the street at Henry and Montague Streets in Brooklyn Heights on December 13, 2006, when she was struck and killed by a private garbage truck owned by defendant IESI NY Corporation and driven by defendant Hayes. She was approximately 54 years of age and died intestate.

She was survived by her father, three sisters and several nephews. Two of her three surviving siblings were appointed Co-Administrators of her estate by the Surrogate's Court of Kings County, and have brought this action for conscious pain and suffering and her wrongful death caused by defendants' negligence.[1] Decedent's mother predeceased her, having passed away in 2005. Her parents had divorced in 1975. Decedent was not married and she had no children.

Defendants do not claim that the action was commenced late, or that any of the other prerequisites for a wrongful death action were not met prior to suit. Defendants claim that the action cannot be maintained, other than with regard to funeral expenses, because decedent's sole distributee is her father, a retired pediatrician and a "snow bird" [2] who was remarried, and whom decedent was not supporting, nor did she have any obligation to do so. Additionally, they claim she was not providing any financial support to him or to any of her other family members at the time of her death or within the five years preceding her death. In support of the motion, defendants provide the EBT transcripts of the Co-Administrators, and an affidavit of one of them, Kay Ehrenkrantz, which was provided in response to a court order following a discovery motion[3], which states that, despite a diligent search of the decedent's belongings, she was unable to locate any canceled checks issued by the decedent to any next of kin during the five years prior to her death (paragraph 6), and that she discussed the matter with her family, and none of them were aware of any "checks to any next of kin for support during the requested period". There was no Last Will

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[1]There is no indication any criminal charges were filed against the defendant driver.

[2]With homes in Columbus, Ohio and Boynton Beach, Florida.

[3]Order of Justice E. Spodek dated November 20, 2009.

located, nor any trust agreements. Ms. Ehrenkrantz is an attorney and lives with her husband and children in Pennsylvania. The co-administrator lives in Pennsylvania as well. The third surviving sister lives in Columbus, Ohio.

New York has steadfastly restricted recovery in wrongful death actions to pecuniary injuries, or injuries measurable by money, and denied recovery for grief, loss of society, affection, conjugal fellowship and consortium. The essence of the cause of action for wrongful death is that the plaintiff's reasonable expectancy of future assistance or support from the decedent was frustrated by the decedent's death. *Gonzalez v New York City Housing Authority*, 77 NY2d 663 (1991).

Defendants have made out a prima facie case for the relief requested. The issue is whether plaintiffs have overcome the motion.

The applicable statute, EPTL § 5 - 4.3 (a) states, in pertinent part, that damages in a wrongful death action are exclusively limited to:

> "Fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damages".

The New York State Trial Lawyers Association has tried for many years to amend this statute to make it more equitable and up-to-date. There are two different bills pending in the New York State Legislature, S02540 and S01953, which endeavor to expand the categories of permissible damages to include, for example, grief and anguish. The New York statute is outdated and harks back to a time when men had greater economic worth than women, as the work of homemakers and stay at home moms wasn't given much

pecuniary value, and when children had a value to their parents more or less solely as laborers who helped support the family.

The goal of damages in a wrongful death action is to compensate the decedent's distributees for no more than the pecuniary loss sustained. *Milbrandt v AP Green Refractories Co.*, 79 NY2d 26 (1992). The categories of damages permitted under the law are limited to compensation for 1) loss of services or voluntary assistance, 2) loss of financial assistance or support, 3) loss of parental care, advice, guidance and training, and 4) loss of prospective inheritance, plus medical and funeral expenses.[4] Interest is retroactive to the date of death for some of the items (funeral expenses) and not for others (loss of inheritance). Punitive damages may be awarded if they would have been recoverable by the decedent had she survived. EPTL § 5-4.3(b).

The amount of damages recoverable in a wrongful death action depends in part upon which distributees survive the decedent. Their status, including the extent of their dependency upon the decedent and the probable benefits they would have received from the decedent except for his or her death, must be weighed in order to ascertain their probable loss by reason of the death. *Franchell v. Sims*, 73 A.D.2d 1 (4th Dept 1980).

The definition of a distributee is also statutory, in EPTL 4-1.1, 1-2.5 and 5-4.4. EPTL 2-1.1 makes it clear that "heirs", "heirs at law" and "next of kin", or words of "like import" mean distributees as defined in EPTL 1-2.5.

It is often pointed out that the wrongful death statute is in derogation of common law, and therefore must be strictly construed. *Carter v NYC Health & Hosps. Corp.*, 47 AD3d 661 (2nd Dept 2008).

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[4]NY Jur 2nd Damages § 337 et seq.

Damages may be awarded to non-dependent distributees if lost services are established, such as proof that the decedent was the distributee's caregiver, babysat for the distributee's child, or cooked, cleaned, did grocery shopping and the like for the distributee's benefit. Plaintiffs do not raise an issue of fact with any claim for lost services in the instant matter.

The next inquiry is whether plaintiffs have raised an issue of fact concerning a claim for lost support. New York courts have stated that this measure of pecuniary loss is the distributee's reasonable expectancy of future assistance or support by the decedent that was frustrated by the decedent's death. Pecuniary loss can be demonstrated by showing: (1) that decedent had a legal duty to support the distributee; or (2) that decedent would have voluntarily provided such support to the distributee. Where the decedent was under no legal obligation to support a distributee, the court examines whether, and to what extent, the distributee might reasonably have expected to have become a recipient of decedent's voluntary help had decedent lived. The following factors should be assessed to determine whether there existed a reasonable expectation of voluntary assistance: (1) the nature of the relationship between the decedent and the distributee; (2) the amount or amounts customarily contributed to the distributee by the decedent during his or her lifetime; (3) other indicia of a disposition on the part of the decedent to continue to assist the survivor financially; (4) the circumstances and condition in life of the distributee; and (5) whether the distributee was dependent on decedent. *Carty v Am. Airlines, Inc. (In re Air Crash at Belle Harbor)*, 2005 U.S. Dist. LEXIS 8415 (SDNY 2005). An evaluation of these factors comes up short for the plaintiffs. The decedent's sole distributee, her father, has never lived in New York. There is no dispute that he goes back and forth between homes in Ohio and Florida. Decedent had been living in New York for 22 years at the time of her death.

None of her three surviving sisters have ever lived in New York either.

The present state of the law in New York results in the conclusion that, when the "child" of the distributee parent is 54 years old at the time of death, and there is not a shred of evidence of any financial support or financial interdependence between the decedent and the parent, there is no showing of any pecuniary loss, and to find to the contrary would be speculative. *Mono v Peter Pan Bus Lines*, 13 FSupp2d 471 (1998). While it has been held that a deceased's voluntary contributions to his or her family members' support can be a basis for showing a pecuniary injury, plaintiffs have failed to provide any evidence of any such voluntary contributions. *In re Payne's Estate*, 12 AD2d 940 (2nd Dept 1961).

In this case, the decedent did not live with her father, in fact they did not even live in the same state. She moved to New York over 20 years ago and he remained in Ohio. There is no affidavit in the opposition papers from him, and no indication that the decedent ever provided him with any financial support or services. There is no transcript of his deposition, if one was in fact taken. It is clear that EPTL § 5-4.4, which concerns damages in a wrongful death action, provides at subsection (a) that "damages . . . are exclusively for the benefit of decedent's distributees". In this action, decedent's father is her sole distributee, and so the elements of damages may only be considered with regard to his pecuniary losses, if any. With regard to the element of damages of loss of support, plaintiffs have failed to overcome the motion.

The next element of damages, loss of parental care, advice, guidance and training, is inapplicable.

Finally, the element of damages denominated loss of prospective inheritance must be considered. It is here that the law is truly harsh. While the right of a distributee to damages for loss of a prospective inheritance does not depend upon whether the

beneficiary received contributions or support from the decedent during the latter's life, it has been held to be error for the trier of fact to consider only the decedent's life expectancy and not the beneficiary's, particularly where the distributee's projected life span is shorter. *Matter of Acquafredda*, 189 AD2d 504, 506, (2d Dept 1993). While the plaintiffs in a wrongful death action are entitled to have the jury consider the amount of money that the decedent might have set aside to increase her distributable estate (after her estate's debts are paid) which her beneficiaries might have hoped to inherit from her upon her death, had she continued to work until her retirement and had she died a natural death, it is required that the finder of fact consider the probability that such distributee(s) would be alive to inherit the decedent's property if she had lived to die a natural death. In this case, there is no question that by the time decedent would have reached her life expectancy pursuant to the life expectancy charts, her father would have predeceased her.

In *Larson v Cabrini Med. Ctr.*, 175 Misc 2d 573, 580, (Sup. Ct. NY Co 1998) the parents' claim for loss of inheritance was dismissed, based on the age of decedent's parents and on his life expectancy at the time of his death at age 35, as a matter of law, as there was no reasonable certainty that decedent's parents would have been alive at time of his death.

One reason this statutory form of recovery is so harsh is because it requires the determination of the decedent's distributees at the time of his or her death, but it also requires consideration of the beneficiary's life expectancy as well as the decedent's, without regard to whether the decedent might leave other contingent surviving distributees. This is most unusual. Furthermore, any testamentary bequests are considered irrelevant, as is any consideration of the "natural objects of the decedent's bounty". Herein, the decedent left some of her testamentary substitutes, in particular, a life insurance policy, to

her nephews, evincing an intent to leave her estate to them. Nonetheless, they are not her distributees for purposes of the wrongful death statute.

However, another avenue of analysis has arisen in the past ten years, perhaps to ameliorate the unfortunate outcome in cases such as this. The Appellate Division has held that not only can a distributee renounce her interest in a wrongful death recovery and thereby change the identity of the decedent's distributees, including to persons of a younger generation, but by doing so she can also thereby alter the measure of recovery, to the pecuniary losses suffered by the replacement distributee(s). *DeLuca v Gallo*, 287 AD2d 222 (2nd Dept 2001). In that case, an off-duty police officer was driving a motorcycle when he was killed by an automobile. He was survived by his mother and sister. His sister was granted Letters of Administration by the Surrogate's Court, and commenced a wrongful death action for her damages. The defendant moved to dismiss the cause of action, claiming the proper distributee was his mother, not his sister, regardless of who obtained Letters. The Supreme Court dismissed the sister's cause of action for wrongful death. The Appellate Division reversed, finding that the decedent's mother had filed a timely renunciation of her distributive share of the decedent's estate in the Surrogate's Court,[5] including her interest in any claims by the estate for conscious pain and suffering and any claims for wrongful death in the pending action. The court also held that not only was it error to dismiss the sister's wrongful death cause of action, but, in response to other issues raised in the appeal, she was not limited to the amount her mother would have been entitled to claim for pecuniary loss, but could claim her own pecuniary damages, which would include lost inheritance and lost support, as the decedent was living with her and

[5]Albeit after the defendants' motion was served.

supporting her at the time of his death. Laying out a clear roadmap, the Appellate Division states "The cause of action to recover damages for wrongful death is a property right belonging solely to the distributees of the decedent and vests in them at the decedent's death", citing EPTL 4-1.1 and 5-4.4(a). The court goes on to say the "effect of a valid renunciation . . . is retroactive to the creation of the disposition and operates as if the renouncing party had predeceased the decedent (See EPTL 2-1.11[d]. . . Thus, the disposition never vests in the renouncing party, [and] there is no valid reason to limit the recovery of the next distributee in line, the beneficiary of the renunciation, to the amount of pecuniary loss suffered by the renouncing party." (Citations omitted). The *DeLuca* case has been cited many times, and is still good law. See *Carter v NYC Health & Hosps. Corp.*, *supra*; *Langan v St. Vincent's Hosp.*, 25 AD3d 90 (2nd Dept 2005) [a same-sex spouse pursuant to a Vermont civil union doesn't qualify as a distributee]; *Mahonski v State*, 195 Misc2d 580 (Ct Claims 2003) [an out of wedlock child may be a distributee].

A valid renunciation must meet the prerequisites of EPTL 2-1.11. As there is no claim by plaintiffs that there was a renunciation in this matter, and the time to do so has long since passed[6], the court finds that the decedent's father has failed to establish that he has suffered a pecuniary loss, as that term is defined and interpreted in New York law.

Plaintiffs' opposition papers consist solely of an affirmation from counsel. The court reviewed the transcripts of plaintiffs' EBTs annexed to defendants' motion papers. There is nothing contained therein which overcomes the motion. The fact that the decedent bought baby gifts for her nephews, and occasional airline tickets and theater tickets as

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[6]Nine months from the date of death. Nor have plaintiffs alleged that they have brought a petition, setting forth reasonable cause, for an order permitting the late filing of such a document in the Surrogate's Court. *Matter of Estate of Dominguez*, 143 Misc2d 1010 (Surr Ct Kings Co 1989).

presents for her siblings does not constitute support of her father, the sole distributee. It has been over three years since this action was commenced. Plaintiffs have failed to come forward with any evidence which raises a triable issue of fact and overcomes the motion.

To overcome a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient for this purpose. *Public Adm'r of Kings County v. U.S. Fleet Leasing, Inc.*, 159 AD2d 331 (1st Dept 1990).

As defendants' motion does not address the remaining three causes of action, this decision is solely addressed to the Fourth Cause of Action, for wrongful death. Based upon the funeral bills exchanged, and testified to, plaintiffs are entitled to judgment for $9,046.07 for the funeral plus $864.56 for the memorial stone, and $600.00 for the family's air fare (EBT Page 96) for a total of $10,510.63, plus interest from the date of death, December 13, 2006, together with statutory costs and disbursements, and plaintiffs may enter judgment therefor at the conclusion of this action.

The foregoing constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
February 8, 2011

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court