

Sipes v Lambert

2013 NY Slip Op 30935(U)

April 26, 2013

Supreme Court, Suffolk County

Docket Number: 10-27210

Judge: Arthur G. Pitts

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-14-13
ADJ. DATE 2-14-13
Mot. Seq. # 004 - MD

-----X
LAVENA SIPES, as Administratrix of the Estate :
of COURTNEY RENEE SIPES, LAVENA SIPES, :
as mother and natural guardian of CAMERON :
SIPES, an infant under the age of 14, and :
LAVENA SIPES, Individually, :
Plaintiffs, :
- against - :
MAUREN E. LAMBERT and JOHN N. :
LAMBERT, :
Defendants. :
-----X

SALENGER, SACK, KIMMEL &
BAVARO, LLP
Attorney for Plaintiffs
180 Froehlich Farm Boulevard
Woodbury, New York 11797

PICCIANO & SCAHILL, P.C.
Attorney for Defendants
900 Merchants Concourse, Suite 310
Westbury, New York 11590

Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 11 - 14; Replying Affidavits and supporting papers 15 - 16; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by the plaintiffs for summary judgment on the issue of the defendants' liability is denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212(b), summary judgment is granted in favor of the plaintiff Lavena Sipes, individually, dismissing the counterclaim against her.

This is an action for negligence and wrongful death arising out of a pedestrian/motor vehicle accident that occurred on November 24, 2009 on Route 25A near its intersection with Lawrence Avenue, Smithtown, New York. The plaintiffs' decedent, Courtney Renee Sipes (Courtney), while crossing Route 25A, was struck by a vehicle operated by the defendant Maureen E. Lambert, sued herein as Mauren E. Lambert [Lambert], and owned by the defendant John N. Lambert. As a result of the incident, Lambert was charged with multiple criminal offenses. On October 25, 2010, Lambert pled guilty to, among other things, the crime

of Manslaughter in the second degree. The plaintiff Lavena Sipes (Sipes) commenced this action on behalf of Courtney's Estate, Courtney's Brother, Cameron Sipes (Cameron) and, as an individual plaintiff, she has brought a cause of action for emotional injuries that she sustained as a result of the subject accident. By order dated July 17, 2012, the undersigned dismissed Sipes' cause of action for emotional injuries. It appears from the record that the sole cause of action set forth on behalf of Cameron has been withdrawn.

The plaintiff now moves for an order granting her partial summary judgment as to the defendants' liability on the grounds that the defendants are collaterally estopped from re-litigating the issue of their liability based on Lambert's plea of guilty in the criminal action, and that they are entitled to summary judgment as a matter of law. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of the motion, the plaintiff submits the pleadings, a copy of Sipes' deposition, transcripts from Lambert's criminal action, police photographs, and an unauthenticated copy of the police accident report, Form MV-104A. The police accident report record relied on by the plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (*see CPLR 4518 [c]*; *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378 [1984]; *Cheul Soo Kang v Violante*, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]). *Mooney v Osowiecky*, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; *Szymanski v Robinson*, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; *Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; *Cadieux v D.B. Interiors*, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]). In addition, the plaintiff has failed to authenticate the police photographs submitted, and they have not been considered by the Court herein.

At her examination before trial, Sipes testified that, on the date of this incident, she had parked her car in a parking lot south of Main Street (Route 25A), across from the Cornet Music Store (Cornet), which is located on the north side of Main Street. She had driven with Courtney and Cameron, who had a music lesson scheduled for 7:00 p.m. She described Main Street as running east and west with two lanes of travel in each direction, and a parking lane at the north curb. The south curb separated the parking lot from the right lane in the eastbound direction. She parked in a parking spot facing north towards Cornet, and they all exited the car. Sipes further testified that she walked to the southeast corner of the intersection of Main Street and Lawrence Avenue and pushed the button for the crosswalk, that Cameron went to the south sidewalk approximately ten feet to her right, and that Courtney followed her brother and stood to Cameron's left side. She stated that the crosswalk was controlled by a "pedestrian cross light (Cross Light)." However, she did not recall if the Cross Light had a "countdown" indicator showing how many seconds remained until the signal changed. Sipes further testified that the Cross Light "was, not cross" when she pushed the crosswalk button, that Cameron ran across Main Street to the door for Cornet, and that the Cross Light did

not change before Cameron ran across the street. She did not recall if she saw Courtney step off the sidewalk. She indicated that she was looking back and forth between the Cross Light and Courtney, then saw Courtney in the street approximately one or two steps from the south sidewalk, and that the last time she had looked at the Cross Light it was “red.” Sipes testified that she saw the vehicle involved in this incident in the left lane of travel heading westbound on Main Street about three or four car lengths from Courtney, that she stepped into the right lane of eastbound travel, and that she screamed Courtney’s name. She did not see the Cross Light change before she stepped off the sidewalk, and she did not know what the Cross Light or the traffic lights controlling the intersection showed at that time. She indicated that she saw vehicles on Lawrence Avenue, and vehicles traveling eastbound on Main Street, stopped at the intersection. Sipes further testified that Courtney had crossed over the eastbound lanes of travel, and was in between the left and right westbound lanes of travel, in the area of the dotted line separating the two lanes, when the incident occurred. Because Courtney was on the other side of the vehicle as it passed, she did not see the impact.

A review of the transcript wherein Lambert pled guilty to the criminal charges against her reveals that she admitted her guilt in the allocution elicited by the prosecution before the Hon. Stephen Braslow accepted the plea agreement therein. Lambert admitted under oath, among other things, that she was driving a vehicle owned by her father, the defendant John N. Lambert, that she was impaired at the time of this incident, that she was traveling at twice the posted speed limit of 30 miles per hour at the time, and that she struck a girl that she now knows was Courtney.

The plaintiff contends that Lambert’s admissions under oath conclusively establish the defendants liability and that the defendants should be collaterally estopped from relitigating the issue. Collateral estoppel, a corollary to the doctrine of res judicata, “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 478 NYS2d 823 [1984]). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 868 NYS2d 563 [2008]; *D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 563 NYS2d 24 [1990]; *Gilberg v Barbieri*, 53 NY2d 285, 441 NYS2d 49 [1981]; *Mahler v Campagna*, 60 AD3d 1009, 876 NYS2d 143 [2d Dept 2009]; *Matter of New York State Site Dev. Corp. v New York State Dept. of Env’tl. Conservation*, 217 AD2d 699, 630 NYS2d 335 [2d Dept 1995]). Thus, it is the plaintiff’s burden to establish that the identical issue was necessarily decided in the criminal action and that it is determinative in the present action (see *Buechel v Bain*, 97 NY2d 295, 740 NYS2d 252 [2001]). Once the party invoking the doctrine discharges his or her burden in that regard, the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*id.* 97 NY2d at 304, 740 NYS2d at 257).

However, the doctrine is a flexible one requiring a case-by-case analysis of the facts and circumstances and a determination “whether relitigation should be permitted ... in light of ... fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance

Sipes v Lambert
Index No. 10-27210
Page No. 4

depending on the nature of the proceedings ...” (*id.*, quoting *Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 531 NYS2d 876 [1988] [citations omitted]).

Here, a review of the plaintiff’s submission reveals that the defendants have asserted an affirmative defense in their answer which raises the issue of Courtney’s comparative negligence and seeks an apportionment of liability (CPLR Article 14-A). While the defendants admit that they are liable in this action, they contend that a trial is necessary to determine if they are 100% liable herein. The Court finds that the plaintiff has failed to establish that the criminal action determined that issue, and that the defendants had a full and fair opportunity to contest the issue. It is beyond cavil that the actions of Courtney on that horrific evening are not pertinent to a determination of Lambert’s guilt or innocence in the criminal action. In addition, there was no reason for Lambert to raise the issue in the context of the criminal prosecution. Accordingly, the Court finds that the defendants are permitted to litigate the comparative negligence issue in this action.

The plaintiff also contends that, notwithstanding collateral estoppel, Lambert’s admissions establish her violation of VTL 1146 (a) and 1180, entitling them to judgment as a matter of law. VTL 1146 provides “every driver [shall] exercise due care to avoid colliding with any pedestrian upon any roadway. While the term due care is not defined in the statute, the cases connote a standard of reasonableness under the circumstances. Due care is that care which is exercised by reasonably prudent drivers. It is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be” (*Matter of Russell v Adduci*, 140 AD2d 844, 528 NYS2d 232 [3d Dept 1988]). VTL 1180 (a) provides in pertinent part that “No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.” Drivers are under duty to maintain a reasonable safe rate of speed, have the automobile under reasonable control, and to use reasonable care under the circumstances to avoid an accident (*Oberman v Alexander’s Rent a Car*, 56 AD2d 814, 392 NYS2d 662 [1st Dept 1977]).

A review of the record reveals that the plaintiff’s submission has failed to address the issues raised in the defendant’s answer. CPLR 3212 (b) provides in pertinent part: “A motion for summary judgment shall be supported by affidavit ... and by other available proof ... and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” The plaintiff has failed to demonstrate the absence of triable issues of fact on every issue raised by the pleadings (*Aimatop Rest., Inc. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 425 NYS2d 8 [1st Dept 1980]; *Stone v Continental Ins. Co.*, 234 AD2d 282, 650 NYS2d 772 [2d Dept 1996]). There can be more than one proximate cause and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law (*Antaki v Mateo*, 100 AD3d 579, 954 NYS2d 540 [2d Dept 2012]; *Pollack v Margolin*, 84 AD3d 1341, 924 NYS2d 282 [2d Dept 2011]; *Tapia v Royal Tours Serv., Inc.*, 67 AD3d 894, 889 NYS2d 225 [2d Dept 2009]; *Lopez v Reyes–Flores*, 52 AD3d 785, 861 NYS2d 389 [2d Dept 2008]). It has been held that where the “submissions to the nisi prius court ... demonstrate that [a pedestrian] may have been negligent” while crossing the intersection, it raises a factual question which does not satisfy the movants’ burden of demonstrating the absence of any material issue of fact (*Thoma v Ronai*, 82 NY2d 736, 737, 602 NYS2d 323, 324 [1993]; see also *Melchiorre v Dreisch*, 95 AD3d 845, 942 NYS2d 892 [2d Dept 2012]; *Day v MTA Bus Co.*, 94 AD3d 940, 942 NYS2d 172 [2d Dept 2012]; compare with *Qamar v Kanarek*, 82 AD3d 860, 918 NYS2d 360 [2d Dept 2011] [pedestrian showed he exercised due care when he was struck “almost to curb”]; *contra Capuano v Tishman Construction Corp.*, 98 AD3d 848, 950

Sipes v Lambert
 Index No. 10-27210
 Page No. 5

NYS2d 517 [1st Dept 2012]; *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 [1st Dept 2010]). Because the plaintiff's own submission fails to eliminate all triable issues of fact as to the issue of comparative negligence, this branch of their motion for summary judgment is denied without considering the papers in opposition (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Pollack v Margolin*, *supra*; *Villa v Leandrou*, 94 AD3d 980, 942 NYS2d 371 [2d Dept 2012]; *Mackenzie v City of New York*, 81 AD3d 699, 916 NYS2d 511 [2d Dept 2011]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (*Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Elzer v Nassau County*, 111 AD2d 212 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (*Chilberg v Chilberg*, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; *Barclay v Denckla*, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; *Cohen v Herbal Concepts, Inc.*, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]). Accordingly, the plaintiff's motion for summary judgment is denied.

However, the Court finds that its inquiry should not end there. A court may search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court (CPLR 3212 [b]; *Dunham v Hilco Construction Co., Inc.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *1133 Taconic, LLC v Lartrym Serv., Inc.*, 85 AD3d 992, 925 NYS2d 840 [2d Dept 2011]; *Shore Dev. Partners v Board of Assessors*, 82 AD3d 988, 918 NYS2d 566 [2d Dept 2011]). Upon reviewing the entirety of the records submitted, the Court determines as a matter of law that the plaintiff Lavena Sipes, individually, is entitled to summary judgment dismissing the defendants' counterclaim which seeks judgement over and against her for her alleged negligence in causing this incident. It is well settled that a counterclaim for negligent or non-supervision of an infant does not lie as a matter of substantive law, and that it cannot be asserted against the parent by a third person seeking contribution (*Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859 [1974]). Accordingly, the defendants' counterclaim against the plaintiff Lavena Sipes is dismissed.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (see CPLR 3212 [e] [1]).

Dated: April 26, 2013


 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION