

Hahn v Canty

2013 NY Slip Op 31670(U)

July 25, 2013

Supreme Court, Orange County

Docket Number: 3034-2012

Judge: Elaine Slobod

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
IAS PART-ORANGE COUNTY

Present: HON. ELAINE SLOBOD, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----x
ARIEL HAHN and MARTINE ELMOWITZ, as
Administrators of the Estate of
FREDY HAHN,

Plaintiffs, To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
-against- advised to serve a copy of this
order, with notice of entry,
upon all parties.

SEAN CANTY and KEVIN CANTY,

Defendants. Index No. 3034-2012
Motion Date: July 16, 2013

-----x

The following papers numbered 1 to 7 were read on this motion by
defendant Kevin Canty for summary judgment dismissing the complaint
[CPLR 3212]:

Notice of Motion-Affirmation-Exhibits A-L.....	1-3
Affirmation in Opposition-Exhibits 1-4.....	4-5
Reply Affirmation-Exhibit A.....	6-7

Upon the foregoing papers it is ORDERED that the motion is
granted only to the extent that the claim for punitive damages
against the moving defendant (hereinafter "defendant") is dismissed
and the motion is otherwise denied.

Plaintiffs' decedent (hereinafter "Fredy") was a guest in the
home of defendant on the night of July 31, 2011. Fredy was visiting
his friend, defendant Sean Canty (hereinafter "Sean"). The two and
some other friends were drinking. They were all over the age of
twenty-one years. Fredy was thirty-two years old. Sean was twenty-
three.

Defendant owned a Glock gun which he kept in the home. When Sean was six years old, defendant told him that if he ever saw a gun on the floor, it was empty but he shouldn't touch it but get an adult's attention. Defendant had kept the gun unloaded when it was at his house.

A few weeks before the accident which is the subject of this action, defendant loaded the gun. He did so because the friend of a family member was assaulted in South Carolina, where defendant had a vacation home. Defendant was in South Carolina at the time of the accident but did not take the gun with him and left it in his New York home loaded.

In the course of the evening, Sean and his friends, who had earlier learned that there was a gun in the house, decided to play with the gun, which Sean believed was unloaded. He, apparently as a joke, put the gun to Fredy's head and pulled the trigger. The gun discharged a bullet, killing Fredy.

This wrongful death action ensued. Plaintiffs' theory of liability against defendant is that it was negligent to leave the gun loaded after leading Sean to believe that the gun was not loaded when it was in the house. Defendant now moves for summary judgment dismissing the complaint.

In Abrams v Berelson (94 AD3d 782 [2012]), the defendant hired the plaintiff to clean the carpets of a house which had been owned by defendant's deceased mother. The defendant had told plaintiff and his co-worker that anything they found in the house could be kept by

them, discarded as trash or donated to charity. In the course of the work, the plaintiff's co-worker found a loaded rifle in one of the closets and accidentally shot the plaintiff. The defendant moved for summary judgment and submitted an affidavit which stated that she did not know that there was a rifle in her mother's house.

The Abrams case contained an issue regarding the propriety of renewal of a motion. The original determination of Supreme Court was that the defendant had met her prima facie burden that she had neither actual nor constructive notice of the gun's presence in the house. Nine years after that determination, the plaintiff moved for renewal on the ground that he had just located the co-worker who had shot him. The co-worker submitted an affidavit saying, essentially, that the rifle was in plain sight in a closet. In reversing Supreme Court's grant of renewal by a three to two vote, the Appellate Division, Second Department stated, "[a]lthough the presence of a loaded gun may constitute a dangerous condition, under the circumstances of this case, the mere presence of a gun in the defendant's house was not sufficient, as a matter of law, the defendant's liability founded on the presence of a dangerous condition, absent proof that the defendant had actual or constructive knowledge that the gun was loaded (see Yusko v Remizon, 280 App. Div. 637, 639 [1952]; Napieralski v Pickering, 278 App. Div. 456, 457-458 [1951])" (Id. at 785). The dissent stated that the co-worker's secreting himself provided an adequate basis to support renewal and stated that the defendant, assuming a trier of fact believed that she

knew of the rifle's presence, had a duty to ascertain whether the rifle was loaded before she invited the workers into the house to clean it out (Id. at 786-794).

Defendant in the case at bar, relying upon the case law which states that the mere presence of the gun in the house is not negligent, argues that he is entitled to dismissal. Here, however, there is more. The gun was loaded. Defendant led Sean to believe that the gun was unloaded when it was in the house. He decided to load it without telling anyone. The trier of fact could conclude that he thereby created a dangerous condition. The court does not find that defendant has established an entitlement to summary judgment on this ground. Defendant argues "it is unfathomable that adults ranging between the ages of 23 and 32 would assume that risk and fool around with a gun" (Affirmation of James R. McCarl, dated May 28, 2013, para. 13.). In the court's opinion, the foreseeability of the accident is a jury issue. "The concept of foreseeability does not require that a defendant could foresee exactly how plaintiff was injured, but rather that the condition posed a risk of harm" (Robinson v CSX Transp., 40 AD3d 1384, 1387 [2007]).

Defendant also argues, alternatively, that the cause of action for Fredy's conscious pain and suffering must be dismissed because by eyewitness account Fredy died approximately a minute after he was shot. Defendant relies upon the deposition testimony of David Elmowitz, Sean and Fredy's friend, who was present at the time of the accident. Elmowitz testified:

Q: What transpired after that?

A: It all happened really fast. He pointed the gun at Fredy's head.

And Fredy kind of was shocked. And Fredy put up one hand to say Whoa, Whoa. And the second time he pulled the trigger when it was pointed at Fredy a bullet came out.

Q: How much time transpired from the time Sean pulled the trigger the first time to the time he pulled the trigger the second time?

A: Less than 30 seconds.

Q: Did you say anything to Sean in the those 30 seconds or less?

A: Whoa; what's going on?

Q: Did Fredy say anything?

A: I can't remember his words. He was shocked that a gun was pointed at his head and said like Whoa, Whoa.

Q: How soon after Sean pointing the gun at Fredy's head and Fredy saying Whoa until the time he pulled the trigger?

A: Instantly.

...

Q: The gun discharged?

A: Right.

Q: What happened then?

A: Fredy went immediately down; he fell. Half his body fell into the bathroom and for about minute [sic] or so he was gasping for air and convulsing. He was shaking, and I heard him gasping for air.

Q: What was Sean doing at the time?

A: He was on the phone to 911.

Q: He immediately called 911?

A: Immediately, yes.

Q: What were you doing?

A: I was with Fredy, rubbing his back.

Q: Did Fredy say anything?

A: No words.

Q: For how long did Fredy gasp?

A: For I would say a minute.

Q: Did he have his eyes open or closed?

A: They were closed.

Q: So from the time the gun was discharged did he say anything after that?

A: No.

Q: Did he appear to be conscious during that timeframe, any time after the gun was discharged?

A: No.

(Deposition of David Elmowitz, dated March 22, 2013, pp. 44-48).

Defendant urges that the court accept the testimony of this lay

witness that Fredy immediately became unconscious after the gunshot. The court does not accept this testimony as conclusive on the issue. Fredy may have appeared to be unconscious to Elmowitz, but absent medical proof that Fredy felt no pain upon the bullet entering his brain, defendant has not established an entitlement to summary judgment on the issue. “[W]hile a plaintiff bears the ultimate burden of proof at trial on the issue of conscious pain and suffering, on a motion for summary judgment the defendant bears the initial burden of showing that the decedent did not endure conscious pain and suffering” (Haque v Daddazio, 84 AD3d 940, 941 [2011], quoting Gaida-Newman v Holtermann, 34 AD3d 634, 635 [2008]; see Dmytryszyn v Herschman, 98 AD3d 715 [2012]).

Defendant’s next alternative argument is that Fredy’s parents suffered no pecuniary loss as a result of his death. He argues that Fredy did not support his parents at the time of his death and that there is no evidence that he would ever do so.

When, as here, a decedent’s distributees are his parents, the parents may establish a pecuniary loss by demonstrating that the decedent was predisposed to help his parents should they be in need and that they had a reasonable expectation of future support (see Zelizo v Ullah, 2 AD3d 273 [2003]). Fredy’s father testified that Fredy visited his elderly grandparents two or three times a week. Fredy took them to the doctor and shopping, thereby evidencing a predisposition to assist elderly relatives. Fredy worked for his father for seven or eight years and gave him advice concerning the

business. In the court's opinion, this evidence is sufficient to support the cause of action for pecuniary loss. As the Court of Appeals stated in Parilis v Feinstein (49 NY2d 984 [1980]), "the absence of dollars and cents proof of pecuniary loss does not relegate the distributees [of a child] to recovery of nominal damages only. Rather, since it is often impossible to furnish direct evidence of pecuniary injury, calculation of pecuniary loss is a matter resting squarely within the province of the jury" (Id. at 985).

The court, however, dismisses the claim for punitive damages as against the moving defendant. In New York, punitive damages may be awarded in a tort action only when the defendant is guilty of quasicriminal conduct, utterly reckless behavior, a malicious intent to injure plaintiff or gross, wanton or willful fraud (see Gellman v Seawane Golf & Country Club, Inc., 24 AD3d 415 [2005]; see also Brown v Maple3, LLC, 88 AD3d 224 [2011]). Here, the evidence does not support submitting this claim to the jury. To the best of defendant's knowledge, his gun had been successfully hidden for many years. There is no evidence that his children reported to him that they had found the gun's hiding place. There is no evidence that defendant was charged with a crime as a result of Fredy's death. The allegations do not rise to the level of moral culpability sufficient to support such damages (see Maiorani v Adesa Corp., 83 AD2d 669 [2011]; Morton v Brookhaven Mem. Hosp., 32 AD3d 381 [2006]; Zabas v Kard, 194 AD2d 784 [1993]).

Accordingly defendant's motion is granted only to the extent that the claim for punitive damages is dismissed and the motion is, otherwise, denied.

The foregoing constitutes the decision and order of the court.

Dated: July 25, 2013
Goshen, New York

E N T E R

S/ELAINE SLOBOD_____
HON. ELAINE SLOBOD, J.S.C.

TO: LAW OFFICES OF ALAN R. CHORNE
Attorneys for Plaintiffs
41 Madison Avenue, 40th Floor
New York, New York 10010

LAW OFFICES OF JAMES R. MCCARL & ASSOCIATES
Attorneys for Defendant Kevin Canty
18 Bridge Street
Montgomery, New York 12549