Erickson v Erickson
2014 NY Slip Op 31258(U)
May 15, 2014
Supreme Court, Tioga County
Docket Number: 43591
Judge: Eugene D. Faughnan
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

TRACIE ERICKSON, as the natural parent and guardian of CASEY ERICKSON, an infant,

Plaintiffs,

-vs-

ERICK ERICKSON, individually and as the administrator of the Estate of KAYNE ERICKSON, and RICARDO STEFANO,

Defendants.

ERIK ERICKSON, as the natural parent and administrator of the Estate of KAYNE ERICKSON, a deceased infant,

Plaintiff,

-vs-

RICARDO F. STEFANO and KRISTEN A. STEFANO,

Defendants.

DECISION AND ORDER

Index No.: 43591
RJI No.: 2014-0055-N

APPEARANCES:

COUNSEL FOR PLAINTIFF, TRACIE ERICKSON, AS THE NATURAL PARENT AND GUARDIAN OF CASEY ERICKSON, AN INFANT

HUGH B. LEONARD, ESQ.
LEONARD & CUMMINGS, LLP
84 COURT ST., STE. 402
BINGHAMTON, NY 13901

COUNSEL FOR DEFENDANT, ERICK ERICKSON, INDIVDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF KANYE ERICKSON

BARNEY F. BILELLO, ESQ.
5784 WIDEWATERS PARKWAY
DEWITT, NEW YORK 13214

COUNSEL FOR PLAINTIFF,
ERIK ERICKSON, AS THE NATURAL PARENT AND ADMINISTRATOR OF THE ESTATE OF KAYNE ERICKSON, A DECEASED INFANT

KEITH A. O'HARA, ESQ.
COUGHLIN & GERHART, LLP
P.O. BOX 2039
BINGHAMTON, NY 13902

COUNSEL FOR DEFENDANT,
RICARDO F. STEFANO AND KRISTEN A. STEFANO

TIMOTHY J. DEMORE, ESQ.
HISCOCK & BARCLAY, LLP
ONE PARK PLACE
300 SOUTH STATE ST.
SYRACUSE, NY 13202

EUGENE D. FAUGHNAN, J.S.C.

Defendant landowner, Ricardo Stefano ("Stefano"), seeks summary judgment against Tracy Erickson, as the natural parent and guardian of Casey Erickson, ("Erickson"), and Erick Erickson, individually and as administrator of the Estate of Kayne Erickson ("Decedent or Estate") pursuant to CPLR §3212. Erickson seeks partial summary judgment against the Estate on the issue of negligence.

The Court has reviewed and considered the following submissions in the above action:

Defendant Notice of Motion (Index # 44139) dated April 3, 2014;
Defendant Notice of Motion (Index # 43591) dated April 3, 2014;
Defendant Memorandum of Law (Index # 44139) dated April 3, 2014;
Defendant Attorney Affidavit (Index #44139) (with exhibits) dated April 3, 2014;
Defendant Memorandum of Law (Index # 43591) dated April 3, 2014;
Defendant Attorney Affidavit (Index #43591) (with exhibits) dated April 3, 2014;
Affidavit of Richard Stefano (Index # 43591) dated April 22, 2014;
Defendant Attorney Affidavit (Index # 43591) (with exhibits) dated April 3, 2014;
Erickson Notice of Motion and Attorney Affidavit dated April 9, 2014 and April 14, 2014; respectively;
Erickson Attorney Affidavit (with exhibits) dated April 14, 2014;
Erickson Memorandum of Law in support of her Motion for Partial Summary Judgment (undated);
Erickson Memorandum of Law in opposition to Defendant's Motion for Summary Judgment dated April 14, 2014;
Decedent's (Plaintiff) Memorandum of Law (with exhibits) dated April 15, 2014;
Decedent (as Defendant) Attorney Affirmation dated April 17, 2014;
Defendant Attorney Combined Reply Affidavit (Index # 43591) (with exhibit) dated April 21, 2014;

Defendant Attorney Reply Affidavit (with exhibit) (Index # 44139) dated April 21, 2014.

For the reasons set forth herein, the Defendant's motions are denied and Erickson's motion is granted.

The above actions[1] arise from a motor vehicle accident occurring on December 14, 2011 on Bornt Hill Road in Tioga County. On the date in question, the Decedent was the driver of a 2010 Suzuki passenger vehicle with his sister, Erickson, as the passenger. Decedent lost control of the vehicle and struck a brick and concrete mailbox structure owned by Defendant resulting in Decedent's death and injuries to Erickson.

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Santard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mosely v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Ctr.*, 64 NY2d 851, 853 (1985).

It is well settled that "no liability exists for an injury to a traveler who leaves the roadway and strikes an object entirely on private property and not within the highway right-of-way" *DiMarco v. Verone*, 147 AD2d 671 (2nd Dept. 1989); *see Hayes v. Malkan*, 26 N.Y.2d 295 (1970); *Echorst v. Kaim*, 288 AD2d 595 (2nd Dept. 2001); *Wang v. County of Rockland*, 179 AD2d 977 (2nd Dept. 1992). However, the "placement of poles or other objects...in close proximity to the pavement and within the highway right of way, raises a question of fact for jury determination as to whether the placement of that object was such as to create an unreasonable danger for travelers on the highway. *Hayes, supra, citing Trabisco v. City of New York*, 280 NY 776 (1939); *Koehler v. City of New York*, 262 NY 74 (1933); *Stern v. International Ry. Co.*, 220 NY 284 (1917).

In the present case, there appears to be little dispute that the Decedent was traveling at a higher rate of speed than was prudent given the road conditions. Defendant alleges that the mailbox structure was located on his property and therefore, no claim for negligence may lie. In support of his application for summary judgment, Defendant points to the testimony of the Defendant wherein he states that he consulted with Town of Owego officials prior to constructing the mailbox and was told by Ken Jennison of the Permit Department that the structure was on Defendant's property and not in the roadway or right of way. He also testified that after the accident, he was told by Ron Schmidt, (Jennison's successor), that the structure was beyond the Town's right of way. This testimony, although in admissible form, is entirely hearsay and therefore inadmissable. Notably absent from Defendant's proof is any admissible evidence

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[1]By order dated May 5, 2014, Index # 44139 was consolidated into Index # 43591.

regarding the exact location of the mailbox.[2]

The Court finds that the Defendant has failed to present a prima facie case for summary judgment. The Defendant bore the burden of presenting a prima facie case that the Defendant did not act in a negligent manner in constructing the mailbox structure adjacent to the roadway. The Defendant argues that the mailbox is located on Defendant's property. However, in failing to provide any admissible evidence on the location of the mailbox structure, the defendant has failed to establish a prima facie case for summary judgment. There remain issues of fact regarding the location of the subject mailbox and, as such, the Defendant's motion is denied.

The Defendant also argues that the Decedent's negligence was an intervening, superseding proximate cause of the subject accident and as such, Defendant is entitled to summary judgment. He alleges that the Decedent's excessive speed and reckless driving constitute the cause of the accident and that the Defendant's mailbox was merely the location of the accident.

"Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, 314 (1980); *see Parvi v. City of Kingston*, 41 NY2d 553, 560 (1977); *Restatement, Torts 2d, §§ 443, 449*; Prosser, Law of Torts, § 44). "Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve." *Derdiarian* at 315. Proximate cause is ordinarily a factual issue for the jury and only when there is only one conclusion that can be drawn should the question of law be decided by the court. *See Grant v. Nembhard*, 94 AD3d 1397 (3rd Dept 2012) *citing Dupell v. Levesque*, 198 AD2d 712 (3rd Dept 1993) and *Derdiarian, supra.* " 'There may be more than one proximate cause of an accident' " *Bailey v. County of Tioga*, 77 AD3d 1251, 1253 (3rd Dept 2010), *quoting Ayotte v. Gervasio*, 186 AD2d 963, 964 (3rd Dept 1992), *aff'd* 81 NY2d 1062 (1993); *see Grant, supra.*

In the present case, as set forth above, there are questions of fact that prevent summary judgment. If the evidence adduced at trial supports the proposition that the mailbox is in the right of way, it will be the role of the finder of fact to determine proximate cause. There may be more than one proximate cause and, in that event, the jury will have to determine the percentage of liability. As noted above, there is an issue of fact as to possible liability on the part of the Defendant and therefore, the Defendant's motion for summary judgment based upon proximate cause is denied. The Court cannot conclude at this point that the Defendant has no liability, even if there is some contribution from other factors, or parties. *See e.g. Grant, supra.*

Erickson moves for partial summary judgment regarding negligence as against the Decedent. Erickson alleges that she was an innocent passenger in the vehicle and was free from negligence. She sites to the deposition of Nicholas Buono, a witness to the Decedent's driving immediately

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[2]The Court notes that such evidence could have taken the form of an affidavit from Jennison, Schmidt, or even a surveyor.

before the accident. Specifically, Buono testified that the Decedent was driving at a high rate of speed when he passed his nearby house. The speed limit on Bornt Hill Road is 40 MPH and Buono estimated the Decedent's speed to be between 55-70 MPH. He testified that there was moisture on the road just prior to the accident but that there was no snow or ice on the road. There is no evidence of any other cause for the Decedent losing control of the vehicle. There likewise is no evidence that Erickson contributed to the accident in any way.

Erickson testified that she and Decedent had discussed "drifting"[3] but denied knowledge of Decedent engaging in such conduct prior to the accident. Although several Vehicle and Traffic tickets were issued to Decedent, these will not be considered by the court as they merely represent charges and not convictions. The disposition of a traffic ticket could be admissible in a subsequent civil case for limited purposes *Marotta v. Hoy*, 55 AD3d 1194 (3d Dept. 2008), but clearly, charges without conviction are nothing more than unproven allegations.

The Decedent has offered no evidence in opposition to the motion for partial summary judgment.

The direct evidence of the Decedent's negligence is very limited. Lay testimony regarding the Decedent's speed and the general road conditions is informative, but not dispositive. The only witness to the accident, Erickson, was unable to describe the events leading to the accident.

The lay testimony regarding the speed the decedent was traveling and the wet road conditions may well constitute a *prima facie* case for partial summary judgment regarding the Decedent's negligence. In light of the lack of any evidence offered by Decedent, summary judgment is warranted.

The Court also observes that the finding of negligence as against the Decedent does not contradict the denial of Defendant's motion for summary judgment made above, since there may be more than one proximate cause.

Even if the lay evidence is insufficient to support summary judgment, the Court finds that this is one of the rare cases where *res ipsa loquitur* can direct summary judgment in favor of a plaintiff. It is settled law that "...only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment...". *Morejon v. Rais Const. Co.*, 7 NY3d 203, 209 (2006). For *res ipsa loquitur* to apply, a Plaintiff must show that "...(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Corcoran v. Banner Super Market*, 19 NY2d 425, 430 (1967).

In the absence of evidence that there were other intervening causes for the accident, it can safely be said that this is not the kind of accident that ordinarily occurs in the absence of negligence. Whether the Decedent was speeding, "drifting", inattentive or merely driving at a speed unsafe

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[3]Drifting, as popularized in the media, is where a driver uses his emergency brake to attempt to "skid" around a corner.

for conditions, there is simply no evidence that the accident occurred for reasons other than some unidentified negligence. The Decedent was in sole and exclusive control of the vehicle and there is no evidence that Erickson in any way contributed to the occurrence of the accident.

For the reasons outlined herein, Erickson's motion for partial summary judgment on negligence as against Decedent is granted.

ENTER.
Dated: May 15, 2014

EUGENE D. FAUGHNAN
SUPREME COURT JUSTICE