

**Pui Kum Ng Lee v Chatham Green, Inc.**

2016 NY Slip Op 31307(U)

July 11, 2016

Supreme Court, New York County

Docket Number: 155485/2012

Judge: Kelly A. O'Neill Levy

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

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PUI KUM NG LEE, as Executrix of the Estate of  
RAYMOND LEE, and PUI KUM NG LEE, Individually,

Plaintiffs,

Index No. 155485/2012  
Motion Seq. 007

-against-

**DECISION & ORDER**

CHATHAM GREEN, INC., CHATHAM GREEN  
MANAGEMENT CORP., GERARD J. PICASO, INC.,  
TRANSEL ELEVATOR & ELECTRIC INC.,

Defendants.

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**HON. KELLY O'NEILL LEVY, J.:**

In this personal injury action following plaintiffs' decedent's alleged fall out of an elevator and subsequent death, the defendants Chatham Green Inc., Chatham Green Management Corp. and Gerard J. Picaso, Inc. seek to dismiss the second cause of action in the supplemental complaint sounding in wrongful death. The defendant Transel Elevator & Electric cross-move for partial summary judgment, seeking the same relief. The plaintiff opposes these applications.

**Facts**

On February 20, 2011 Raymond Lee left his apartment with his wife, Pui Kum Lee, and nephew, Mar Fang, to attend a doctor's appointment. Mr. Lee, age 77, suffered from back problems and required a motorized scooter for transportation. Upon exiting his apartment, he rolled his scooter into a specialized elevator that could be operated by disabled persons. After entering the elevator, his wife and nephew left him and proceeded to descend the building through alternate means. Upon arrival at the main floor of the building, Mrs. Lee observed her husband face down on the floor just outside the elevator with various injuries. An ambulance was later called and Mr. Lee was taken to a nearby hospital for treatment. He remained in the

hospital for a number of weeks and was then discharged to a rehabilitation facility to continue recovery from the accident. Sometime later, Mrs. Lee was called to the hospital as Mr. Lee was moribund. He died shortly thereafter on April 29, 2011.

Mrs. Lee brought this action individually, and in her capacity as executrix of the estate of her husband. She alleges that the elevator was negligently constructed and maintained and that Mr. Lee's death was a direct result of this negligence. Mrs. Lee is seeking damages to compensate her and her family's pecuniary injuries. The defendants in this action, Chatham Green Inc., Chatham Green Management Corp., Gerard J. Picaso, Inc., and Transel Elevator (the company that was contracted to "install, repair, inspect, and maintain the handicap lift"), have moved to dismiss the second cause of action. They claim that the plaintiff experienced no pecuniary loss and that the funeral costs paid by Mrs. Lee cannot be recovered as she is not a distributee of Mr. Lee's estate. Additionally, the defendants claim that a loss of guidance and companionship is not enough to sustain an action for wrongful death.

### **Discussion**

Pursuant to N.Y. Est. Powers & Trusts Law § 5-4.1, "a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued."

Generally, recovery of funeral expenses is permitted only where the decedent's estate paid or was responsible for paying these expenses. See N.Y. Est. Powers & Trusts Law § 11-3.3 (Consol.) ("[W]here an injury causes the death of a person the damages recoverable for such injury . . . shall not include damages for or by reason of death, except that the reasonable funeral expenses of the decedent, paid by the estate or for the payment of which the estate is responsible,

shall be recoverable in such action.”) In the instant case, Mrs. Lee was not a beneficiary of her late husband’s estate nor did Mr. Lee stipulate that her husband’s funeral expenses should be paid out of the estate. As a result, Mrs. Lee ended up paying for his funeral expenses out-of-pocket and, therefore, she cannot recover this loss as part of the wrongful death lawsuit. This restriction was affirmed in *Erbstein v. Savasatit*, 274 A.D.2d 445 (2d Dep’t 2000), where the Second Department permitted a plaintiff to recover funeral expenses in a wrongful death suit, but only because he was a beneficiary of the decedent’s estate. *See also In re Riley*, 45 Misc.2d 658, 661 (Sur. Ct., Broome County 1965) (holding that funeral expenses should not be charged against a wrongful death settlement unless “there are no assets or where the question is largely academic because of an intestate death”).

In opposition to the defendant’s claim that the funeral expenses paid by Mrs. Lee are not recoverable in this wrongful death lawsuit, the plaintiff claims that these expenses are a “lawful element” in “every wrongful death action.” (Affirmation in Opposition 10). While this is correct, it does not take into account the fact that Mrs. Lee was not a beneficiary of Mr. Lee’s estate nor was she a decedent responsible for the payment. Consequently, she cannot recover reasonable funeral expenses. *See Ruiz v. New York City Health and Hospitals Corp.*, 165 A.D.2d 75, 79 (1st Dep’t 1991) (holding that recovery of funeral expenses was limited to what was paid by the distributees, or of which the distributee(s) was responsible).

The court must determine defendants’ request to dismiss plaintiff’s wrongful death claim as it relates to loss of homemaking services. Plaintiffs in a wrongful death suit are entitled to recover pecuniary damages resulting from the death of the decedent. *See Parilis v. Feinstein*, 49 N.Y.2d 984, 985 (1980) (“damages in a wrongful death action are, by statute, limited to ‘pecuniary injuries’ suffered by the distributees of decedent’s estate”). In *Parilis*, the court

describes pecuniary damages as those limited to “loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death.” *Id.* at 985. The plaintiff’s claim is partially based on this definition as she asserts that she has lost her husband’s assistance and support. However, the defense argues that this loss is neither substantial nor calculable. Mrs. Lee claims that the decedent cooked for her and helped her around the house and that his death constituted a significant loss of support.

The case *Gonzalez v. N.Y.C. Hous. Auth.*, 77 N.Y.2d 663 (1991) is instructive. In *Gonzalez*, an elderly grandmother is murdered and her family files a wrongful death lawsuit to recover for loss of her support and companionship. The defense claims that the plaintiff cannot recover for loss of support since the plaintiffs are emancipated adults. The Court of Appeals rejects this argument. The court held that, “recovery [is not] barred solely because plaintiffs were self-supporting adults at the time of their grandmother’s death. The argument that an adult distributee cannot state a claim for pecuniary injuries based on the loss of a parent’s guidance was long ago rejected by this court.” *Id.* at 668; *see also Pub. Adm’r of Kings Cty. v. U.S. Fleet Leasing, Inc.*, 159 A.D.2d 331 (1st Dep’t 1990) (the extent to which a father relied on deceased son is relevant for determining whether damages should be awarded); *but see Schild v. Kingsley*, 5 A.D.3d 103, 104 (1st Dep’t 2004) (where the decedent is an emancipated adult, the family cannot recover unless they have a “reasonable expectation of pecuniary loss resulting from his [or her] death”).

The defendants’ argument that plaintiff’s assertions of pecuniary loss are insufficient is misplaced. Based on the record before it, the court finds that the extent of support offered and whether it constitutes a compensable loss is a question of fact for the jury to decide here such that summary judgment on the entire wrongful death claim is inappropriate. *See e.g., Ferrante v.*

*Am. Lung. Ass'n*, 90 N.Y.2d 623 (1997). In *Ferrante*, the Court of Appeals held that, “[a] plaintiff is not required to prove his claim to defeat summary judgment . . . [and] it is not the court’s function on a motion for summary judgment to assess credibility.” *Id.* at 630-31.

The defendant’s other argument for dismissal is that the plaintiff’s alleged loss of guidance, companionship, and advice is not a recognizable pecuniary injury. In *Pub. Adm’r of Kings Cty. v. U.S. Fleet Leasing, Inc.*, 159 A.D.2d 331 (1st Dep’t 1990), the First Department refused to allow a father to recover damages resulting from the death of his adult son. The court held that because their relationship was attenuated (they had only spoken twice in the previous six years and the father did not learn of the decedent’s death until two years later), it could not be assumed that the decedent would have supported his father by his own free will. This is relevant because according to the court:

[W]hether an estate beneficiary may reasonably expect to sustain pecuniary loss as a result of the decedent’s death . . . it is, of course, relevant whether the decedent would have been legally obligated to support the beneficiary and, if not, whether there is any evidence that the decedent would have volunteered to do so. *Id.* at 331.

The defense claims that, in accordance with this holding, Mrs. Lee and her children cannot recover damages and that the wrongful death cause of action should be dismissed. They argue that there is no evidence that the decedent would have voluntarily donated to the beneficiaries nor is there evidence of any substantial support being offered to them. However, the decedent’s family here was close and plaintiff claims that the decedent’s guidance and advice was a form of compensable support, and that this can be factored into recoverable damages in a wrongful death lawsuit.

The First Department has held that damages can be awarded to a plaintiff in a wrongful death action for loss of guidance and support, if the loss was substantial. *See Weiner v. Lenox Hill Hosp.*, 193 A.D.2d 380, 381 (1st Dep’t 1993) (plaintiff could recover pecuniary damages

resulting from the death of his mother though he was an emancipated adult). Further, in *Ramos v. La Montana Moving & Stor., Inc.*, 247 A.D.2d 333 (1st Dep't 1998), the court held that the plaintiff had established a sufficient claim for pecuniary damages in a wrongful death lawsuit though the decedent was relied upon merely for babysitting services, counseling, and guidance.

Based on the above, the court finds triable issues of fact with regard to the wrongful death claim. Therefore, the motion and cross-motion are granted only to the extent that the portion of the second cause of action seeking funeral expenses is dismissed. The remainder of the motions is denied.

Accordingly, it is hereby

ORDERED that the motion and cross-motion are granted only to the extent that the portion of the second cause of action seeking funeral expenses is dismissed; and it is further

ORDERED that the remainder of the motion and cross-motion is denied; and it is further

ORDERED that as previously directed, the parties are to appear for a status conference in Part 19 on August 31, 2016 at 9:30 AM.

This constitutes the decision and order of the court.

**ENTER:**

**Dated:** July 11, 2016

  
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Kelly O'Neill Levy, A.J.S.C.

**HON. KELLY O'NEILL LEVY**