

Barone v Elizabeth Firehouse, LLC
2016 NY Slip Op 32143(U)
April 15, 2016
Supreme Court, New York County
Docket Number: 110404-2010
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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**LAURA BARONE, individually and as
Administratrix of the Estate of Vincent Barone, Deceased,**

Plaintiff,

**Index No. 110404-2010
Motion Seq: 004**

- against-

FILED

**ELIZABETH FIREHOUSE, LLC, and ELIZABETH
STREET GALLERY INC., and ELIZABETH
STREET GALLERY, LLC and MAJOR
ELEVATOR CORP.,**

APR 19 2016

**COUNTY CLERK'S OFFICE
NEW YORK
DECISION/ORDER
ARLENE P. BLUTH, JSC**

Defendants.

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The motion by defendants, Elizabeth Firehouse, LLC, Elizabeth Street Gallery Inc., Elizabeth Street Gallery, LLC (defendants) for summary judgment dismissing plaintiff's cause of action for wrongful death is granted. Defendant Major Elevator's cross-motion for summary judgment dismissing plaintiff's cause of action for wrongful death is also granted.¹

Mr. Barone's ingestion of methadone in 2012, which was the proximate cause of the overdose that caused his death, was a superseding act that broke the chain of causation from his initial accident in 2009 because the methadone was not prescribed to Mr. Barone and therefore was an unforeseeable act.

¹Defendant Major Elevator's cross-motion for summary judgment incorporated the arguments of the other defendants.

Background

This action arises out of a personal injury suffered by Vincent Barone on June 25, 2009. Mr. Barone, while on duty as a firefighter, fell down a six-foot open and unguarded elevator shaft while responding to a fire emergency at 209 Elizabeth Street (defendants' building). At the time of the accident, defendant Major Elevator was installing an elevator in the building. Mr. Barone claimed that he suffered, among other injuries, lumbar disc herniations which resulted in spinal fusion surgery and cervical disc herniations.

Before the accident, Mr. Barone was involved in the clean-up efforts at Ground Zero after the attacks on September 11, 2001. Mr. Barone was eventually prescribed Prozac and received psychiatric treatment due to depression, stress and anxiety suffered as a result of his participation in the clean-up. During this same time period, Mr. Barone's alcohol consumption increased. In July 2010, Mr. Barone was treated for 28 days at Villa Veritas for alcohol abuse and for self-medicating with pain medications.

After Mr. Barone received treatment, Mr. Barone continued to complain about pain in his legs and lower back. Mr. Barone was prescribed morphine to reduce his pain. However, Mr. Barone was later admitted to drug rehabilitation at Nyack Hospital in the summer of 2011 for three days because Mr. Barone was abusing morphine.

During this time period, and particularly after Mr. Barone's spinal fusion surgery in October 2011, Mrs. Barone relayed concerns to Mr. Barone's pain management doctor, Dr. Solomon, about how much pain medication was prescribed to Mr. Barone. Dr. Solomon started to reduce the amount of pain medication that Mr. Barone was taking and made further adjustments at each office visit. Dr. Solomon was prescribing OxyContin, which contains

oxycodone, to Mr. Barone. Mrs. Barone hid Mr. Barone's OxyContin pills and dispensed the pills to Mr. Barone in accordance with his prescription.

On February 7, 2012 Mr. Barone died from a drug overdose after allegedly taking both OxyContin and methadone. Mr. Barone was not prescribed methadone as part of his pain management. Mr. Barone allegedly took methadone that had been prescribed to his daughter after she had back surgery in 2010. Mrs. Barone observed that the bottle was half empty after Mr. Barone's death. Mrs. Barone recalled that her daughter had only taken about 2-4 doses of the methadone and that the bottle was "mostly full" before her husband's death. It is unclear whether Mr. Barone took methadone prior to his death or exactly how many pills he ingested on February 7, 2012.

The Rockland County medical examiner performed an autopsy and concluded that Mr. Barone's death was accidental and the result of a mixed-drug (methadone and oxycodone) intoxication.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955

NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Causation

To establish proximate cause, "a plaintiff must generally show that the defendant's negligence was a substantial cause of the events which proved the injury" (*Derdiarian v Felix Constr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166 [1980]). "Liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*id.*). "If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" (*id.*).

Defendants claim that plaintiff has not proffered any evidence that causally connects Mr. Barone's death with the 2009 accident. Specifically, defendants assert that none of Mr. Barone's treating physicians opined that Mr. Barone's death was related to the accident. Defendants further argue that Mr. Barone's death from ingesting methadone that was not prescribed to him

constitutes an intervening and unforeseeable act that breaks the causal chain.

Defendants have made a prima facie showing that they are entitled to summary judgment. The burden shifts to the plaintiff to raise a triable factual question sufficient to defeat the motion.

In opposition, plaintiff argues that the relaxed causation standard under General Municipal Law § 205-a applies in the instant action. This statute, which abolished the firefighter's rule barring recovery for injuries suffered while on duty stemming from a party's negligence, "gives a firefighter (or a deceased firefighter's representative) a right of action against any person whose negligent failure to comply with a government provision either 'directly or indirectly' results in injury or death" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 80, 760 NYS2d 397 [2003]). "[I]ndirect causation involves a somewhat less than direct and unimpeded sequence of events resulting in injury. Whereas direct causation requires that the defendant's conduct be a substantial causative factor, an indirect cause is simply a factor that—though not a primary cause—plays a part in producing the result" (*id.* [internal quotations and citation omitted]). Plaintiff claims that under either the normal or the relaxed causation standards, there is an issue of fact whether Mr. Barone's overdose was foreseeable.

Defendants claim that plaintiff's cause of action for wrongful death fails even under this *relaxed* causation standard.

Plaintiff's Expert

In opposition, plaintiff also offers an affidavit from Dr. Sellers, a New York physician who asserts that she reviewed relevant medical files of Mr. Barone. Dr. Sellers insists that Mr.

Barone's overdose was accidental and that Mr. Barone's death was causally related to the June 2009 accident. Dr. Sellers claims that Mr. Barone developed a physical dependency on the oxycodone contained in Mr. Barone's Oxycontin prescription and that the reduction in Mr. Barone's oxycodone usage in January 2012 caused Mr. Barone to experience opioid withdrawal symptoms. Dr. Sellers theorized that Mr. Barone sought out the methadone to help relieve these symptoms.

In reply, Defendants claim that Dr. Sellers' affidavit is conclusory and should be ignored because Dr. Sellers never treated Mr. Barone. Defendants also claim that Dr. Sellers' conclusion regarding causation should be ignored because Mr. Barone's treating physicians never noted any signs that Mr. Barone was experiencing any withdrawal symptoms in January 2012.

Dr. Sellers affidavit is speculative and contains conclusory assertions concerning the cause of Mr. Barone's death. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 754 NYS2d 195 [2002]). Dr. Sellers concludes that Mr. Barone "went into subacute withdrawal when his oxycodone prescription was cut down in January, 2012" (affidavit of Dr. Sellers, ¶ 29). Dr. Sellers further asserts that Mr. Barone was likely experiencing "symptoms of withdrawal from oxycodone on the night of his death" (*id.* ¶ 30). The symptoms may have included "insomnia, anxiety, depression and distress" (*id.*). Dr. Sellers suggests that Mr. Barone "died of an accidental overdose of opioids as a result of trying to grapple with the symptoms of withdrawal" (*id.* ¶ 36).

Although Dr. Sellers is correct that powerful prescription drugs such as OxyContin can

cause significant effects when patients are weaned off the drug, there is no indication that Mr. Barone was experiencing any withdrawal symptoms that would have caused him to ingest methadone. Dr. Solomon, who managed Mr. Barone's pain medication, observed in a report on December 7, 2011 that Mr. Barone was "doing well" and that "we are going to get him off some of the OxyContin" (affirmation of plaintiff's counsel, exhibit 7). On January 12, 2012, Dr. Solomon reported that Mr. Barone was doing "*very well*" and that Mr. Barone was "now down to OxyContin 40 t.i.d." (*id.* [emphasis added]). Dr. Solomon also observed that Mr. Barone's "mood and affect are significantly improved since last visit" (*id.*).

These observations directly contradict Dr. Sellers' conclusions. Despite the reduction in the amount of OxyContin prescribed to Mr. Barone from December 2011 to January 2012, Mr. Barone exhibited none of the symptoms theorized by Dr. Sellers. In fact, Dr. Solomon's reports indicate that the reduction in OxyContin had the exact opposite effect. While these withdrawal symptoms may be common in patients whose oxycodone levels have been reduced, there is no indication that those symptoms were occurring in Mr. Barone. Therefore, the Court is unable to credit Dr. Sellers' affidavit.

Wrongful Death Cases Do Not Compel Denial of the Motion

Plaintiff insists that a First Department decision, *Rice v West 37th Group, LLC*, (96 AD3d 500, 949 NYS2d 7 [1st Dept 2012]), compels the Court to deny defendants' motion. In *Rice*, the court rejected "defendants' contention that the decedent's accidental overdose on two currently prescribed medications, and a third medication that may have been recently discontinued, was an extraordinary and unforeseeable occurrence as a matter of law" (*id.* at 501 [rejecting defendants'

motion summary judgment on plaintiff's wrongful death claim]).

Defendants claim that *Rice* is inapposite because it did not involve the theft of another person's prescription.

The *Rice* case is clearly distinguishable from the present case because the decedent in *Rice* overdosed on *his own* medications while treating his serious injuries. In the present action, Mr. Barone's overdose was due, in part, to the methadone prescribed to his daughter rather than his own prescription pills. Mrs. Barone's testimony indicates that she dispensed the OxyContin to Mr. Barone consistent with his prescription and that Mr. Barone did not have independent access to the OxyContin because Mrs. Barone hid the OxyContin. There is no indication that Mr. Barone would have overdosed if he had only taken his prescribed OxyContin.

Based on these facts, Mr. Barone's consumption of the methadone was a necessary cause of the overdose that led to his death. Further, the possession of methadone is regulated under the New York Penal Law (*see e.g.*, Penal Law 220.09). Although a jury must decide if it is foreseeable when a person overdoses on his or her *own prescription* (*see Rice*, 96 Ad3d at 501), a person overdosing on a controlled substance without a prescription is a different question.

Plaintiff submits a case, *Fayo v Crystal Run Health Care LLP*, (80 AD3d 1025, 915 NYS2d 705 [3d Dept 2011]), in support of the proposition that an accidental overdose due to abuse of a controlled substance is foreseeable. The death of the decedent in *Fayo* was due, at least in part, to decedent's abuse of heroin. However, the Third Department's decision was in a vastly different procedural posture from the instant action. In *Fayo*, the Court was limited to deciding whether there was substantial evidence to support a Workers' Compensation Board's finding that the decedent's death was causally related to her work-related injury. The Third

Department *did not* find that an overdose from an illegal drug was foreseeable; it merely upheld the decision from the Worker's Compensation Board.

Further, the decedent's psychiatrist in *Fayo*, who had treated the decedent for four years, concluded that decedent's post-accident pain led to her drug abuse and her eventual overdose. In the instant action, plaintiff does not proffer evidence from Mr. Barone's treating physicians that Mr. Barone's death was causally related to his accident. Instead, plaintiff offers the testimony of a doctor who did not examine Mr. Barone and whose conclusions are belied by the reports of the doctor who managed Mr. Barone's pain medication.

The Ingestion of Methadone Was A Superseding Act

The Court finds that Mr. Barone's ingestion of pills prescribed to another person was an unforeseeable, superseding act that breaks the causal chain between the initial accident in 2009 and Mr. Barone's death in 2012. The causal chain is broken even if the relaxed causation standard (*see Giuffrida*, 100 NY2d at 80) applies to this matter. The Court is unable to hold that the consumption of a controlled substance prescribed to another person constitutes a foreseeable act when there is no evidence that Mr. Barone was suffering from withdrawal symptoms that might have caused him to ingest the methadone.

Plaintiff failed to raise an issue of fact regarding causation. There is also no indication that Mr. Barone had ingested methadone prior to this accident or that he was using other substances, such as alcohol, to relieve pain in early 2012. The relevant testimony indicates that all alcohol had been removed from the home and that Mr. Barone's consumption of oxycodone was tightly regulated. Mr. Barone's pain management doctor observed that Mr. Barone's

condition was improving in January 2012. In light of these facts, it was completely unforeseeable that Mr. Barone would pass away from consuming methadone.

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Elizabeth Firehouse, LLC, Elizabeth Street Gallery Inc., and Elizabeth Street Gallery, LLC to dismiss plaintiff's cause of action for wrongful death is granted and it is further

ORDERED that the cross-motion for summary judgment by defendant Major Elevator Corp. to dismiss plaintiff's claim for wrongful death is granted.

This constitutes the Decision and Order of the Court.

Dated: April 15, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED

APR 19 2016

COUNTY CLERK'S OFFICE
NEW YORK