Greene v Esplande Venture Partnership
2017 NY Slip Op 32335(U)
October 4, 2017
Supreme Court, Kings County
Docket Number: 510780/2015
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4h day of October, 2017.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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STACY GREENE, as Administratrix of the Estate of GRETA DEVERE GREENE, Deceased, and on behalf of her distributes, and SUSAN FRIERSON,
Plaintiff(s),

Index No.: 510780/2015

-against-

Decision and Order

ESPLANDE VENTURE PARTNERSHIP, D & N CONSTRUCTION AND CONSULTING, INC., BLUE PRINTS ENGINEERING, P.C. and MAQSOOD FARUQI,
Defendant(s).

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The following *papers* numbered 1 to 3 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendants, move this court pursuant to C.P.L.R. § 2221(d) for an order granting leave to reargue this Court's Decision and Order dated December 12, 2016, which granted plaintiff's motion to amend their Verified complaint, pursuant to C.P.L.R. § 3015(b) to add an additional cause of action on behalf of plaintiff, Susan Frierson, under

the "zone of danger" doctrine; and upon reargument denying plaintiffs said motion. Plaintiffs oppose the same.

ARGUMENTS

Defendants, move this court to reargue, contending that this court has overlooked and misapprehended the controlling principal of law with respect to the class of persons known as "immediate family" eligible to be included within the "zone of danger" doctrine pursuant to controlling caselaw.

Plaintiff opposes the same contending the arguments advanced by these defendants in the instant motion are the same as the arguments they advanced in the underlying motion, this court carefully considered the arguments of both parties and ultimately concluded that the plaintiff should be granted leave to amend the complaint to add a "zone of danger" claim. Moreover, the defendants do not dispute the fact that the Court of Appeals has never specifically address the issue of whether a grandparent qualifies as a member of one's "immediate family" for purposes of bystander recovery.

ANALYSIS

N.Y. C.P.L.R. § 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. N.Y. C.P.L.R. § 2221(d)(2) articulates the standards previously

outlined in the caselaw. A motion to reargue, it says: "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. N.Y. C.P.L.R. 2221 (McKinney).

Under the caselaw existing prior to the 1999 amendments, a motion for re-argument was often used when there was a change in the law after the prior order. N.Y. C.P.L.R. § 2221(e)(2) now clarifies that the motion to renew, not the motion to reargue, is the proper expedient when the motion is based on a change in the law that occurs while the case is still subjudice, such as a new statute taking effect or a definitive ruling on a relevant point of law being handed down by an appellate court that is entitled to stare decisis. *See* Siegel, New York Practice § 449 (4th ed. 2005). The distinction, made clear in the caselaw and now embodied in the statute, is that the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to change its mind. N.Y. C.P.L.R. § 2221 (McKinney)

In the present case, Defendant contends that in deciding the previous motion in plaintiffs' favor, the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law. The Court can find nothing in defendant's renewal which indicates that the Court overlooked or misapprehended relevant facts. Defendant fails to set forth any facts that the Court overlooked, however, but contends apparently that the Court misapplied controlling principles of law. The Court disagrees.

This court relied on *Bovsun v. Sanperi*, 61 N.Y.2d 219, 232, 461 N.E.2d 843, 849 (1984), wherein the Court of Appeals found "the zone-of-danger rule that the Court adopted is not inconsistent with the past decisions of the Court of Appeals that have denied recovery for emotional distress attributable to a family member's death or injury" (e.g., *Lafferty v. Manhasset Med. Center Hosp.*, 54 N.Y.2d 277, 445 N.Y.S.2d 111, 429 N.E.2d 789; *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 436 N.Y.S.2d 871, 418 N.E.2d 386; *Becker v. Schwartz,* 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807; *Howard v. Lecher,* 42 N.Y.2d 109, 397 N.Y.S.2d 363, 366 N.E.2d 64). However, none of those cases involved plaintiffs who had themselves been subjected to a danger of bodily harm, although some of the plaintiffs had been present during, had observed, and even had participated in the negligent conduct. In *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 462 N.Y.S.2d 421, 448 N.E.2d 1332, *supra,* although recovery of damages for emotional disturbance was denied—he had not been exposed to a risk of bodily harm by the negligence of the defendant. Unlike the present case where the plaintiff did experience bodily harm. *Bovsun v. Sanperi*, 61 N.Y.2d 219, 232, 461 N.E.2d 843, 849 (1984).

Therefore, in light of the reasoning in *Bovsun*; coupled with New York State's specific recognition of the custody rights of grandparents with respect to their grandchildren; the facts specific to this case of the actual injury to the grandparent who was in "the zone of danger"; and in accordance with the holdings of every other state court which has considered the issue, it is the opinion of this court that plaintiff, Susan Frierson, who not only was injured but witnessed the crush injury death of her two year old granddaughter from within the "zone of danger", should be considered an "immediate

family member" and afforded a right to recover for her emotional injuries caused by this tragic accident.

Accordingly, Defendant's motion to reargue is hereby Denied.

This constitutes the Decision/Order of the Court.

Date: October 4, 2017

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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