

Grandelli v Clyburn

2019 NY Slip Op 33318(U)

November 8, 2019

Supreme Court, New York County

Docket Number: 152664/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 152664/2017

LOUIS GRANDELLI, AS THE ADMINISTRATOR OF THE
ESTATE OF MARIA LOURDES MUNOZ CARMONA,
DECEASED, AND JUAN TRINIDAD CRESPO, AND,
ALVARO TRINIDAD MUNOZ, INDIVIDUALLY,

MOTION DATE 08/14/2019

MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

RANCE CLYBURN, S&E BRIDGE & SCAFFOLD, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 82, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for summary judgment on the issue of liability as against defendants based on the fact that the defendants' actions were the sole proximate cause of the subject incident and to dismiss defendants' affirmative defenses alleging any form of comparative negligence, contributory negligence and culpable conduct of plaintiff is granted.

This action stems from a motor vehicle incident which occurred on December 9, 2016, at the intersection of West 39th Street and Tenth Avenue, in the County, City, and State of New York, and tragically resulted in the death of plaintiffs' decedent Maria Lourdes Munoz-Carmona when she was struck by defendants' vehicle while walking in the crosswalk with the pedestrian walk signal in her favor.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

In support of their motion, plaintiffs submit the deposition of the decedents husband Juan Trinidad Crespo and son Alvaro Trinidad Munoz, surveillance footage of the accident, the deposition of defendant driver Rance Clyburn, the police accident report, photos of the scene of the accident, the written statement of defendant Clyburn, the criminal proceeding transcript of *The People of The State of New York v. Rance Clyburn*, and the Forensic Psychiatric Evaluations of Juan Trinidad Crespo and Alvaro Trinidad Munoz conducted by Dr. Seymour H. Block (Mot, Exh B-L).

Decedent’s husband Mr. Crespo, who witnessed the accident, testified that defendants’ vehicle appeared to be turning out of control and hit the decedent after which Mr. Crespo ran over with his son to hold his wife (Mot, Exh B at 108-109). Video footage of the accident shows defendants’ vehicle turn left and strike the decedent (Mot, Exh D). Mr. Munoz testified that he witnessed defendants’ vehicle lose control and strike the decedent (Mot, Exh C at 86). On October 27, 2017, defendant Clyburn pled guilty to VTL section 1146 (c) (1) Failure of a Driver to Exercise Due Care, Serious Physical Injury (Mot, Exh J at 8). Thus, plaintiff has demonstrated

that defendant violated the VTL and has made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact.

Defendants' opposition fails to raise a triable issue of fact. Defendants Cross-Motion to dismiss plaintiffs cause of action for negligent infliction of emotional distress on the basis that plaintiffs were not in the "zone of danger" is denied. The law is clear, plaintiffs may recover for emotional distress caused by their observation of a family member's death where a defendant's conduct was a substantial factor in causing the death and that defendant negligently exposed plaintiff to an unreasonable risk of bodily injury or death (*Bovsun v Sanperi*, 61 NY2d 219, 230-231 [1984]).

The Court has found that a plaintiff is in the zone of danger when a plaintiff runs over to an injured family member after the family member has been struck (*Shanahan v Orenstein*, 52 AD2d 164 [1st Dept 1976]). Here, Plaintiffs Juan Trinidad Crespo and Alvaro Trinidad Munoz each testified that they ran over to decedent after she was struck and underneath defendants' vehicle in the roadway. Thus, plaintiffs have demonstrated that they were within the "zone of danger" at the time of the accident and defendants' cross-motion is denied.

Accordingly, it is

ORDERED that plaintiffs' motion on liability as against defendants and to dismiss defendants' affirmative defenses based on plaintiffs' comparative negligence is granted; and it is further

ORDERED that defendants' cross-motion to dismiss plaintiffs' cause of action for negligent inflection of emotional distress is denied; and it is further

ORDERED that within 30 days of entry, plaintiffs serve defendants with a copy of this decision/order with notice of entry.

This constitutes the decision/order of the Court.



11/8/2019

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE