

Amidon v Clemens

2019 NY Slip Op 33997(U)

October 25, 2019

Supreme Court, Onondaga County

Docket Number: 2017EF303

Judge: Gregory R. Gilbert

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ONONDAGA

Annamae Amidon, Individually and as the
Executrix of the Estate of Ted Amidon and
Lucas Amidon,

Plaintiffs,

vs.

Andrew Clemens, Richard Clemens, Rosemar,
Associates, LLC, Best Tile Distributors of
Syracuse, Inc., and Best Tile Realty, Inc.,

Defendants.

DECISION & ORDER

Index No.: 2017EF303
RJI #: 33-17-1338

HON. G. GILBERT, JSC

BACKGROUND

Plaintiffs proceed under a summons and complaint filed 1/19/17. The Court has had previous motions relating to disclosure. Orders on those motions were filed 4/29/19, 8/1/19 and 9/3/19. A trial note of issue was filed on 5/6/19. Defendants have now filed motions for partial summary judgment and also seek to preclude changes to the previously sworn deposition testimony of Lucas Amidon presented by a timely served errata sheet.

FACTS

The present motions seek dismissal of the fourth cause of action of the complaint which alleges a zone of danger case on behalf of Lucas Amidon. Additionally, defendants seek to strike the errata sheet provided by Lucas Amidon to his deposition which addresses the zone of danger issue.

The accident involved in this case was tragic. On January 21, 2016, decedent, Ted Amidon, was accompanied by his son, Lucas Amidon, to the loading dock area of Best Tile on Firestone Drive, Syracuse, New York. It is undisputed that Ted Amidon was struck when a pick up truck backed into him and crushed him against the loading dock. The accident was witnessed by Lucas Amidon. Ted Amidon died as a result of the injuries he sustained.

There are varying accounts of precisely where Lucas Amidon was standing when his father was struck by the pick up truck. Lucas Amidon has testified that he was five feet away from his father and four feet away from the truck at the time of the accident. Lucas Amidon was very specific in noting that he was not behind the pickup truck but was "right next to the truck". Further initial testimony by Lucas Amidon [Herkala Affirmation, Exhibit A] was as follows:

- Q And at any time did you believe that the truck was going to hit you?
- A Yeah, at that moment. I mean you're just -- you're shocked. So yes, answer would be yes.
- Q Well, how was the truck going to hit you when it was backing up away from you?
- A I don't think it was backing up away from me. It was like -- it was right in the same area.
- Q But you weren't between the truck and the loading dock, were you?
- A No.
- Q All right. And you saw the pickup truck backing up, didn't you?
- A Yeah.
- Q And you knew that when it backed up it wasn't going to hit you because you weren't between the loading dock and the truck; true?
- A. Yeah, I guess. [Pg. 24 L. 21 to Pg. 25 L. 14]
- Q So you were standing like four feet -
- A I was on the driver's side.
- Q I know you were on the driver's side about four feet away from the truck. What I want to know is: Where was the driver's compartment in relation to where you were standing when the truck, the rear of the truck, was pinning your father against the loading dock? Was it parallel?
- A It was to the left, to the left of me.
- Q Okay. So, if you looked straight at the side of the truck, what were you looking at? The front of the bed of the pickup?
- A If I was to be looking at the truck, it'd be, yeah, right in middle of the bed. [Pg. 26 L. 12 - 25]
- Q Okay. That's what I'm asking. And at that point, you're four feet away from the middle of the bed of the truck---
- A Correct. [Pg. 27 L. 2 - 5]

The issue with the errata sheet concerns the foregoing testimony. Lucas Amidon attempts to change his testimony to state that “at the time of the accident I feared for my life. I had no idea if the truck was going straight back or if he was going to turn and hit me in the process”. The reason for the change is the assertion that he “felt the answer was unclear and felt pressured”.

STANDARD

Summary judgment may be granted only where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980). The motion needs to be supported by sufficient evidence in admissible form to show the material and undisputed facts based on which judgment as a matter of law must be granted. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985); Viviane Etienne Medical Care v. Country-Wide Insurance Company, 25 NY3d

498 (2015). In the absence of such a showing, the motion must be denied regardless of the sufficiency of the responding papers. Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

Once the burden on the motion has passed to the responding party, it is incumbent on that party to demonstrate by admissible evidence the questions of fact which may preclude summary judgment. Alvarez, 68 NY2d at 324; Zuckerman, 49 NY2d at 562. A responding burden is not met by conclusory or unsubstantiated allegations or the expression of hope. Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124 (2000); Zuckerman, 49 NY2d at 562.

On a motion, the Court is charged to view evidence and inferences arising therefrom in a light most favorable to the responding party. Haymon v. Pettit, 9 NY3d 324 (2007); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., LP, 7 NY3d 96 (2006). Once all the papers have been reviewed, with the foregoing principles in mind, the motion should be granted unless a material triable issue of fact has been identified. Panepinto v. New York Life Insurance Co., 90 NY2d 717 (1997); Rotuba Extruders v. Ceppos, 46 NY2d 223 (1978). The function of the Court on the motion is the determination of whether a triable issue of fact exists and not one determining material fact or credibility issues. Vega, 18 NY3d at 505 and Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957).

DISCUSSION

Given that the Court is presented with motions for summary judgment, the testimony of Lucas Amidon, including the errata sheet, is accepted as the truth of the matter. As a matter of law, Lucas Amidon, as an immediate relative of Ted Amidon, is required to allege and to show that he was in the zone of danger and that the conduct of the defendants unreasonably endangered his physical safety or caused him fear for his physical safety. See Shepherd v. Whitestar Development Corp., 113 AD3d 1078 (4th Dept 2014) leave to appeal denied 7 NY3d 703. The witnessing of a family member being injured is not a sufficient predicate for liability where the zone of danger plaintiff is not also at immediate risk of bodily harm. See Tobin v. Grossman, 24 NY2d 609 (1969). It is obvious that the errata sheet was prepared to meet these requirements.

Defendants argue that even if the errata sheet is permitted, there still would be no zone of danger case. There has to be an objective basis to substantiate a finding of “imminent danger of physical harm” before damages from witnessing the injury to an immediate family member are allowed. Bovsun v. Sanperi, 61 NY2d 219 (1984) states the proposition as follows:

“Inasmuch as the zone-of-danger rule provides a circumscribed alternative to the apparently sweeping liability recognized in Dillon v Legg (68 Cal 2d 728, supra) and does so within the framework of traditional and accepted negligence principles by using an *objective test of whether the plaintiff was unreasonably threatened with bodily harm by the conduct of the defendant*, we view it as comporting with the requirements set out in Tobin of a *“reasonably objective” standard* which will

"serve the purpose of holding strict rein on liability" (Tobin v Grossman, 24 NY2d 609, 618, supra). We therefore hold that where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family -- assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death." [Emphasis added]

What is presented by the errata sheet is a subjective claim of fear intended to support the zone of danger case. Defendants have established that Lucas Amidon was to the side of the truck when it was operated in reverse to strike and kill his father. By no account was Lucas Amidon behind the truck. Defendants, thus, meet the initial burden on the motion for summary judgment which then passes to plaintiffs. The question presented is whether plaintiffs show a question of fact that there was an objective basis for the subjective fear expressed by Lucas Amidon. In this respect, plaintiffs offer no additional facts beyond the differences in testimony as to just how far from the side of the pick up truck Lucas Amidon was standing. The Court gives full credit to the account given by Lucas Amidon and the reasonable inferences that flow therefrom. All that is left is the question of law.

The cases relied on by Lucas Amidon all have the same theme, plaintiff is actually in the direct path of the vehicle. In any zone of danger case, there must at least be a question of fact presented that the zone of danger plaintiff is in the path or exposed to the risk of being hit by the vehicle causing death or serious injury to the immediate family member.

In Bovsun v. Sanperi, 61 NY2d 219 (1984), the plaintiff husband/father was struck and pinned against the back end of his vehicle by defendant's car. The zone of danger plaintiffs were in the same vehicle that was rear-ended and both were aware that the plaintiff husband/father must have been injured. Likewise, the Bovsun case included a companion matter, Kugel v. Westchester Industrial Park in which the zone of danger plaintiffs were occupants of a vehicle struck by a defendant and were witness to the death of their one year old daughter/sister. Being in a vehicle when it is struck and a member of the immediate family is killed presents an objective basis for fear or an actual unreasonable risk of bodily injury or death to the zone of danger plaintiff.

In Trombetta v. Conkling, 82 NY2d 549 (1993), the Court noted that plaintiff was without a doubt in the zone of danger when she attempted to pull her aunt out of the path of a speeding truck. The zone of danger case was nevertheless properly dismissed because plaintiff was not within the deceased's immediate family. In this case, Lucas Amidon was not within the reach of his father and was not in a position to attempt to pull him out of harms way.

In Kurth v. Murphy, 255 AD2d 365 (2nd Dept 1998) appeal dismissed 93 NY2d 848, the

Court noted that the vehicle which struck and seriously injured or killed plaintiff's daughter "was moving toward both the plaintiff mother and the daughter" with the mother some eight feet away from the impact. This was sufficient to create a question of fact as to the zone of danger. In this case, it is undisputed that the pick up truck that killed Ted Amidon never moved towards Lucas Amidon.

The case, Egan v. Penske Truck Leasing Company, LP, 228 AD2d 230 (1st Dept 1996) presented inconsistent testimony on the issue of whether the son who witnessed his father struck by a vehicle was or was not in the zone of danger. A similar case to Egan is presented by Leverock v. Hall & Fuhs, Inc., 245 AD2d 550 (2nd Dept 1997). As previously noted, no account of the accident in this matter places Lucas Amidon in the path of the pickup truck that struck his father.

Plaintiff relies most heavily on Malstrom v. Mackey, 182 AD2d 1006 (3rd Dept 1992) where the 11 year old zone of danger plaintiff was following some 20 to 25 feet behind her 15 year old brother on the right shoulder of a two lane road. A car went past the 11 year old traveling in the same direction but then swerved and hit her brother. Given that the 11 year old sister was in the path of the vehicle as it passed her and then continued on to strike her brother, the Court, over a strong dissent, found that there was a question of fact left to be resolved at trial. The same conditions that applied to the operation of the vehicle were seen as potentially also applicable to the zone of danger plaintiff. Again, Lucas Amidon was in the vicinity of the accident but was not by any reasonable inference of fact in the path of the vehicle that killed his father nor was he, on any objective basis, at risk of being struck by the same at any time.

This case is most similar to Zea v. Kolb, 204 AD2d 1019 (4th Dept 1994). In Zea, a mother as a zone of danger plaintiff was standing in a driveway on the opposite side of the road from her daughter who was riding a bicycle southbound when struck by vehicle also traveling southbound. She was 12 to 15 feet away from the point of impact and admitted at her deposition that she was never in any danger from defendant's vehicle. As in this case, the zone of danger plaintiff argued that she could have been struck by the vehicle or could have been struck by her daughter's body. The Court held as follows:

"Although Nancy was a member of Alisa's immediate family (see, Trombetta v Conkling, 82 NY2d 549), she was not in the zone of danger because she herself was never threatened with bodily harm in consequence of defendant's negligence (see, Bovsun v Sanperi, 61 NY2d 219, 223-224). Thus, she cannot recover damages for emotional injuries she suffered as a result of viewing the accident (see, Gonzalez v New York City Hous. Auth., 181 AD2d 440; cf., DiMarco v Supermarkets Gen. Corp., 137 AD2d 651; Shanahan v Orenstein, 52 AD2d 164, 167, appeal dismissed 40 NY2d 985; Collesides v Westinghouse Elec. Corp., 125 Misc 2d 413). To accept the argument that Nancy was in the zone of danger because she could have been struck by a vehicle other than defendant's or because she could have been struck by her daughter's body, which was thrown into the air upon impact, would unreasonably

expand bystander liability, which the Court of Appeals has declined to do (see, Trombetta v Conkling, supra).”

The only difference between this case and Zea is that Lucas Amidon, while not in the path of the vehicle, was closer to it. This is not a sufficient basis for the Court to find a question of fact regardless of the sympathy one might justifiably have for the circumstances presented.

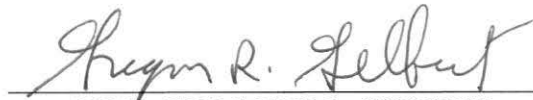
Accordingly, it is

ORDERED, that the motions of defendants, Andrew Clemens, Richard Clemens, Rosemar Associates, LLC, Best Tile Distributors of Syracuse, Inc., and Best Tile Realty, Inc., to dismiss the Fourth Cause of Action asserted by the complaint of the plaintiffs, Annamae Amidon, Individually and as Executrix of the Estate of Ted Amidon and Lucas Amidon, shall be and the same are hereby **GRANTED** in all respects and the same is **DISMISSED**.

IT IS SO ORDERED.

ENTER

Dated: October 25, 2019
Syracuse, NY


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE