

Shepard v Power
2020 NY Slip Op 35801(U)
September 14, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 008226/2016
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 8226/2016CAL. No. 202000091MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY**PRESENT:**Hon. DAVID T. REILLY
Justice of the Supreme CourtMOTION DATE 7-15-20
ADJ. DATE _____
Mot. Seq. # 003 MG; CASEDISP-----X
MARIA SHEPARD, Individually and as the
Administrator of the Estate of SAMUEL
SHEPARD, Deceased,

Plaintiff,

- against -

MICHAEL POWER,

Defendant.
-----XMCCARTHY STUCKY, LLC
Attorney for Plaintiff
350 Theodore Fremd Avenue, Suite 160
Rye New York 10580CUOMO LLC
Attorney for Defendant
200 Old Country Road, Suite 2South
Mineola, New York 11501

Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant dated May 12, 2020; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff dated July 7, 2020; Replying Affidavits and supporting papers dated July 15, 2020; Other ____; it is

ORDERED that the motion by the defendant pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

The plaintiff, who is the mother of decedent Samuel Shepard and the administrator of his estate, commenced this negligence action to recover damages for, *inter alia*, the wrongful death of the decedent. On August 29, 2014, the decedent, who was 18-years old at the time, was involved in a one-vehicle accident while he was operating a vehicle owned by the defendant. The subject vehicle was a 2010 Lamborghini equipped with a 552-horsepower engine. The plaintiff alleges that the defendant was negligent in managing, controlling, and maintaining the vehicle, and that the defendant should have known that allowing the decedent to drive the vehicle was an unreasonable risk to himself and others. The plaintiff further alleges that the defendant is vicariously liable for the actions of the decedent pursuant to Vehicle and Traffic Law §388.

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The defendant now moves for summary judgment dismissing the complaint, arguing that he was not negligent in entrusting the decedent with his vehicle, that under the circumstances, he cannot be held vicariously liable under the Vehicle and Traffic Law, and that the evidence shows that he properly maintained the vehicle.

The decedent's brother, Frank Shepard, testified that on the night of the accident, he, the decedent, and a friend were traveling on Route 25 in Mount Sinai, New York when they observed the Lamborghini in the parking lot of a bar. They stopped to look at the vehicle and spoke to the defendant, who walked outside to greet them. Frank and decedent recognized the defendant, and they spoke to him about the car before entering the bar together. Frank consumed one alcoholic beverage while the men continued their conversation about cars. The decedent did not drink, and the defendant consumed two or three alcoholic beverages. Upon exiting the bar, the defendant asked Frank and the decedent whether they wanted to drive the Lamborghini, and they both responded affirmatively. Frank entered the driver's seat, and the defendant sat in the passenger's seat. Frank testified that he was familiar with the roadways around the area, and that he drove the vehicle for a period of time before returning to the bar's parking lot. He recalled that at some point during the drive, he traveled at over 100 miles per hour. He described the driving experience as "euphoric" and "powerful." There was no skidding, and the defendant did not set any limitations on how he drove.

When Frank returned to the parking lot, the defendant remained in the passenger seat and the decedent entered the driver's seat, and he proceeded to drive in the same direction that Frank and the defendant had traveled some minutes prior. Sometime later, while he waited in the parking lot, Frank observed emergency service vehicles traveling in the same direction, and he and the friend who was with him followed. When he arrived at the scene of an accident, Frank observed the decedent on the ground surrounded by emergency personnel. The decedent was transported to Stony Brook University Hospital where he succumbed to the injuries, which resulted from the accident.

Frank testified that the decedent had some experience around cars as their father owned an auto repair shop. He further testified that the decedent accompanied him to car shows, and sometimes helped his father in the office of the repair shop. He recalled that at the bar, the decedent and the defendant discussed building a car as they shared this same interest. Frank testified that he did not give the decedent any feedback about the vehicle before the decedent drove it, and he recalled the decedent wore a seatbelt after entering the vehicle.

The defendant testified that his son and the decedent were friends, and that his family and the decedent's family became friends as a result. Prior to the night of the accident, the defendant had not seen the decedent for a number of years because his son and the decedent went to different school districts. The defendant purchased the used, two-seat, automatic Lamborghini convertible in 2011, and he used it occasionally during summer months. The defendant testified that he was aware that the top speed of the Lamborghini was 200 miles per hour, and that he had driven the vehicle at approximately 130 miles per hour prior to the accident. He was not aware of some of its features, and on the night of the accident, Frank explained to him that it could be driven in "race mode." The vehicle was serviced in 2013 by the dealership that the defendant purchased it from after he received notification from the dealership that "it was ready for maintenance." The defendant testified that the vehicle was involved in

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one accident prior to the subject accident. He stated that the front end of the car was “smashed in” by one of his friends, and the total repair cost was approximately \$100,000. One front tire was replaced, and he could not recall whether the driver’s side seat belt was replaced. According to the defendant, the car drove perfectly after the repair.

The defendant recalled that Frank approached him while he was standing outside of a bar smoking a cigarette, and that he, Frank, the decedent, and their friend had a conversation inside of the bar. They were in the bar for approximately one hour, and he had two alcoholic drinks. He testified that he offered Frank and the decedent a test drive in the car because he needed time before driving home after having the beverages, and because he wanted the decedent to have the experience of driving the car before he left for the Army. Frank did not make any complaints about how the car drove when he was operating it. The defendant testified that the decedent entered the driver’s seat after he and Frank returned to the bar. Frank explained how the car worked to the decedent, and he and the decedent started the test drive. He testified that he told the decedent the direction that he and Frank drove, and showed him the buttons that Frank pushed. While he was stopped at a red light preparing to make a U-turn, the decedent switched the vehicle from automatic to manual, and started using the paddle shifter to operate the car without any instruction from the defendant to do so. According to the defendant, he did not have “much knowledge of [the decedent’s] driving experience,” and he did not ask the decedent whether he had experience driving a sports car before permitting him to drive the Lamborghini.

The decedent drove at a normal speed when he left the bar, and he drove faster than Frank when he was returning to the bar. The defendant recalled that he told the decedent that the car was “powerful” while they were driving. The defendant testified that as he gestured to the decedent to slow down, the decedent engaged the brake, and the car started to drift and spin out of control, eventually colliding with a guardrail on Route 83. The defendant testified that the decedent was wearing a seatbelt, and that he was not aware how the decedent was ejected from the vehicle.

A party seeking summary judgment has the burden of “tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68NY2d 320, 324, 508 NYS2d 923, 925 [1986]; see *Granados v Cox*, 43 AD3d 391, 392, 840 NYS2d 427, 428 [2d Dept 2007]). The motion must be “supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions” (CPLR 3212 [b]). Failing to make prima facie showing will result in the motion’s denial, “regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852, 487 NYS2d 316 [1985]). If the movant establishes a prima facie case of entitlement to summary judgment, the burden shifts to the party opposing the motion to produce “evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 597 [1980]).

The happening of an accident, in and of itself, does not establish the liability of a defendant (*Scavelli v Town of Carmel*, 131 AD3d 688, 15 NYS3d 214 [2d Dept 2015]). To establish a prima facie case of negligence under the common law, a plaintiff must demonstrate the existence of duty owed by defendant to plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825, 37 NYS3d 750 [2016];

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Greenberg, Trager & Herbst, LLP v HSBC Bank USA, 17 NY3d 565, 934 NYS2d 43 [2011]; **Mendez-Canales v Agnelli Macchine S.R.L.**, 165 AD3d 646, 85 NYS3d 188 [2d Dept 2018]). The defendant has met his burden on the motion by demonstrating that he did not negligently own, manage, control, and maintain the vehicle, nor did he negligently entrust it to the decedent. The record shows that the defendant purchased the 2010 Lamborghini in 2011 and maintained it as recommended by the dealership. Although the vehicle was involved in an accident, it was repaired by a dealership contractor, and based upon testimony in the record, it operated normally after the repair.

Furthermore, to establish a cause of action under a theory of negligent entrustment, “the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the person to whom a particular chattel is given, which renders that person’s use of the chattel unreasonably dangerous ... or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous” (**Cook v Schapiro**, 58 AD3d 664, 666, 871 NYS2d 714 [2d Dept 2009]; **Troncoso v Home Depot, U.S.A., Inc.**, 258 AD2d 644, 645, 685 NYS2d 797 [2d Dept 1999]). Although the defendant knew the decedent when he was a young child, testimony revealed that the defendant had not seen the decedent for a long period of time before the night of the accident. On the night of the accident, the decedent’s brother had one drink before he started the test drive, and the decedent did not drink any alcoholic beverages at the bar. The defendant knew that the decedent had graduated high school, and that he had enlisted in the Army. Additionally, the decedent was a licensed driver and had driven to the bar unaccompanied in his own vehicle. With respect to the Lamborghini, the defendant demonstrated that there was no characteristic or defect that rendered the vehicle itself unreasonably dangerous (see **Fredette v Town of Southampton**, 95 AD3d 940, 941, 944 NYS2d 206 [2d Dept 2012]).

As for the plaintiff’s claim pursuant to Vehicle and Traffic Law §388, the defendant has demonstrated his entitlement to judgment as a matter of law dismissing that cause of action. Vehicle and Traffic Law § 388 provides, in pertinent part that:

Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner”

Essentially, Vehicle and Traffic Law §388 imputes liability to the owner of a vehicle where the owner permits another to use or operate that vehicle, and such operator is negligent. However, under the Vehicle and Traffic Law, “the owner or lessee of the vehicle is not vicariously liable to the operator of a motor vehicle for the operator’s own negligence” (**Perrin v Chase Equip. Leasing, Inc.**, 9 AD3d 839, 840, 780 NYS2d 256[4th Dept 2004]). Here, the decedent was the operator of the vehicle when the accident occurred, and he was the injured party.

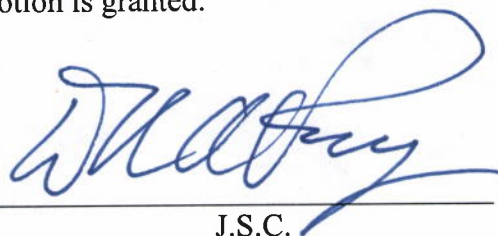
In opposition to the motion, the plaintiff, *inter alia*, submits the report and affidavit of Neil Hannemann, an automotive engineer. Hannemann opines that the subject Lamborghini was a high performance vehicle known as a “supercar;” and that the defendant knew or should have known that the

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decedent was incapable of safely operating such a vehicle because of his age and inexperience as a driver. The plaintiff has failed to raise an issue of fact with regard to the defendant's negligence.

Although Hannemann opines that as an owner of a supercar, the defendant exercised poor judgment in allowing the decedent, who was only 18 years old at the time, to drive the Lamborghini, his opinion is conclusory. Hannemann cites to no industry standard that indicates that an 18-year old driver with approximately two years of driving experience required additional licensing and training or more intense supervision to operate a Lamborghini. Additionally, Hannemann's opinion that low pressure in the tire of the vehicle may have also contributed to the accident is speculative (*see Powell v Prego*, 59 AD3d 417, 872 NYS2d 207 [2d Dept 2009]; *see also Patterson v Metropolitan Suburban Bus Auth.*, 112 AD3d 682, 977 NYS2d 60 [2d Dept 2013]; *Landman v Sarcona*, 63 AD3d 690, 880 NYS2d 168 [2d Dept 2009]). Based upon the foregoing, the plaintiff failed to raise an issue sufficient to defeat the defendant's motion for summary judgment. Accordingly, the motion is granted.

Dated: Sep 14, 2020
Riverhead, NY



J.S.C.

HON. DAVID T. REILLY

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