

Cadigan v Liberty Helicopters, Inc.

2024 NY Slip Op 32000(U)

June 11, 2024

Supreme Court, New York County

Docket Number: Index No. 152286/2018

Judge: James E. d'Auguste

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

PRESENT: Hon. James d'Auguste PART 55

Justice

-----X

INDEX NO. 152286/2018

JERRY CADIGAN, NANCY CATON CADIGAN,

MOTION DATE _____

Plaintiffs,

026 027 028

- v -

MOTION SEQ. NO. 029 031

LIBERTY HELICOPTERS, INC., A NEW YORK CORPORATION, NY ON AIR LIMITED LIABILITY COMPANY, A NEW JERSEY LIMITED LIABILITY COMPANY, FLYNYON LLC, A DELAWARE LIMITED LIABILITY COMPANY, MERIDIAN CONSULTING I CORPORATION, INC., A DELAWARE CORPORATION, RICHARD ZEMKE VANCE, A CONNECTICUT RESIDENT, AIRBUS HELICOPTERS, S.A.S., A FRENCH CORPORATION, AIRBUS HELICOPTERS, INC., A DELAWARE CORPORATION, APICAL INDUSTRIES, INC. D/B/A DART AEROSPACE,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 026) 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 964, 967, 968, 969, 970, 971, 972

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 027) 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 999

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 028) 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 963, 985, 986, 987, 988, 989, 990, 991, 992, 993, 998

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 029) 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 895, 922, 923, 924, 925, 926, 973

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 031) 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 966, 1819, 1820, 1821, 1825, 1827

were read on this motion to/for

SUMMARY JUDGMENT

Motion Sequences 026, 027, 028, 029, and 031 are consolidated for disposition and resolved as follows.¹

Procedural Posture and Parties:

In Motion Sequence 026, defendants NYONAIR LLC and FLYNYON LLC (collectively “NYON”) move for summary judgment, seeking to dismiss punitive damages claims by plaintiffs’ Jerry Cadigan and Nancy Caton Cadigan, as co-administrators of the estate of Trevor Cadigan, deceased (collectively “plaintiffs”), against NYON; also, NYON seeks to limit compensatory damages that plaintiffs can recover at trial – specifically dismissing non-pecuniary losses and plaintiffs’ claim for loss of financial support. Plaintiffs oppose the motion, and defendant Apical Industries, Inc., d/b/a DART Aerospace (“DART”) filed a response to NYON’s statement of material facts.

In Motion Sequence 027, defendant DART moves for summary judgment, seeking to dismiss the complaint and any cross-claims against them on the grounds that plaintiffs’ complaint is preempted under federal law and to dismiss plaintiffs’ claims for non-pecuniary losses. Plaintiffs, and defendants Liberty Helicopters, Inc. and Meridian Consulting I Corporation, Inc.² (collectively “Liberty”) oppose the motion.

¹ In Motion Sequence 030 (summary judgment between Liberty and DART), the Court denied the motion as moot as Liberty and DART resolved their cross-claims (NYSCEF Doc. No. 1015).

² Meridian Consulting I Corp. is a Delaware corporation and the registered owner of the subject helicopter.

In Motion Sequence 028, defendants Airbus Helicopters SAS and Airbus Helicopters, Inc. (collectively “Airbus”) move for summary judgment, seeking to dismiss the complaint against them, dismissing plaintiffs’ claims for punitive damages or limiting them under Texas law, and dismissing plaintiffs’ claim for pecuniary damages. Plaintiffs oppose the motion, and DART filed a response to Airbus Helicopters’ statement of material facts.

In Motion Sequence 029, defendant Liberty moves for summary judgment, seeking to dismiss plaintiffs’ punitive damages claims against them and dismiss plaintiffs’ claims for the recovery of non-economic damages. Plaintiffs oppose the motion, and NYON filed a response to Liberty’s statement of material facts. Airbus filed a response to Liberty’s motion, disputing Liberty’s assertion that the Airbus design of the fuel shutoff lever was defective.

In Motion Sequence 031, plaintiffs move for summary judgment, seeking to dismiss defendants’ affirmative defenses of “assumption of risk” and “comparative negligence.” NYON and DART oppose the motion. Airbus partially opposes the motion – contesting several factual assertions made by plaintiffs.

Factual Summary and Analysis:

On March 11, 2018, Trevor Cadigan (“decedent”) was a passenger on a “doors off” aerial photography helicopter flight operated by Liberty on behalf of NYON. Liberty Helicopters is a New York corporation and was the operator of the subject helicopter – a Eurocopter (Airbus Helicopters) AS350 B2 with the serial number 7654 and the registration number N350LH (“subject helicopter”). Richard Zemke Vance was piloting the subject helicopter at the time of the fatal crash.³ The NYON defendants are New Jersey corporations that conduct sightseeing helicopter tours in the New York City area. The Airbus Defendants (Airbus Helicopters SAS, a French corporation, and Airbus Helicopters,

³ The parties stipulated to discontinue the action without prejudice as to Richard Zemke Vance (NYSCEF Doc. No. 479).

Inc., the U.S. subsidiary and a Delaware corporation) are the successors to the subject helicopter's original manufacturer, Eurocopter.

During the March 11, 2018 fatal flight, the passengers were required to wear supplemental harnesses tethered to anchor points in the helicopter so they could safely take photographs during the flight. Decedent was sitting in the left front seat of the subject helicopter opposite the pilot. A loop in his anchoring tether caught the fuel shutoff lever, and he inadvertently activated the fuel shutoff lever while maneuvering to take pictures. As a result, the helicopter's engine shut off mid-flight. Vance performed an emergency landing on the East River, and he attempted to inflate the floatation devices attached to the subject helicopter's skids. The emergency floatation system was manufactured by Dart Aerospace and installed by Eurotec Canada.⁴ The floatation devices failed to inflate properly, and the subject helicopter tipped over, filled with water, and sank. Vance was able to escape the sinking aircraft because he was wearing a standard helicopter harness, but the five passengers who were wearing the supplemental harnesses, including plaintiff/decedent Trevor Cadigan, drowned.

Plaintiffs have put forth several theories of defendants' liability. Plaintiffs argue that the NYON and Liberty defendants used a harness system with anchoring tether for the aerial photography flights that was unsafe for the intended purpose. Plaintiffs describe the harness used as the "yellow harness" – a multifunction rigging harness that can be purchased at stores like Home Depot for various construction applications. Specifically, plaintiffs argue that the yellow harness did not provide options for safe egress if the helicopter had an emergency landing; therefore, plaintiffs offer that NYON and Liberty should have used the "blue harness" – a newer harness that secured passengers more effectively and provided additional egress options in an emergency. Plaintiffs argue that NYON and Liberty made this decision to save on costs, despite knowing prior to the fatal accident that passengers could not remove the yellow

⁴ Eurotec Canada is a non-party to this action, and the parties have stipulated that Eurotec Canada's installation did not cause or contribute to the wrongful deaths in this action (NYSCEF Doc. No. 478).

harnesses or detach from the anchoring tether in an emergency. NYON and Liberty provided seatbelt cutters with the harnesses to assist passengers in an emergency evacuation, but plaintiffs allege that NYON and Liberty knew the cutters would be useless in an emergency. Plaintiffs claim that Airbus should not have placed the fuel shutoff lever on the floor of the cabin without a supplementary protective guard. Decedent was seated in the front left seat of the helicopter for the aerial photography flight, and the tether securing his harness to the aircraft was fastened to an anchor in the cabin behind his seat. *See* NYSCEF Doc. No. 588, Ex. A, Plaintiffs' Motion for Summary Judgment, In-Cabin GoPro Video. He was sitting to the left of the center instrument panel, so his tether ran above the instruments. The GoPro video demonstrates that a loop in decedent's tether caught the fuel shutoff lever while he was taking photographs, and he accidentally engaged the fuel shutoff lever mid-flight while repositioning himself to take other photographs. Plaintiffs argue that a supplementary protective guard was necessary to prevent this sort of inadvertent activation of the fuel shutoff lever mid-flight. Finally, plaintiffs argue that DART's defective design and manufacture of the emergency pontoons caused the pontoons to not inflate properly during the emergency landing on the East River, thus causing the helicopter to tip over and fill with water.

Airbus and DART seek to dismiss the complaint, arguing that the Federal Aviation Act ["FAAct"] preempts state products liability laws and, thus, plaintiffs cannot pursue state law claims. Specifically, DART highlights that the design of the emergency floatation device was approved by the FAA by issuing a supplemental type certificate (No. SR00470LA), and the Federal Aviation Regulations ("FARs") required Liberty to install the emergency floatation device for overwater operations. 14 CFR 135.183(d). Therefore, DART argues that the FAA's approval of the design through issuance of a supplemental type certificate prevents state products liability actions and, the FARs governing safe

operations preclude state tort claims arising out the alleged defective design and manufacture of their emergency pontoons.

The Second Circuit follows a two-part test: “First, a reviewing court must determine whether a challenged state law falls within the ‘field of air safety’ as established by the FAAAct, and second, it must determine whether ‘the state regulation sufficiently interferes with federal regulation [such] that it should be deemed pre-empted.’” Jones v Goodrich Pump & Engine Control Sys., Inc., 86 F4th 1010, 1017 [2d Cir 2023] (quoting Gade v Natl. Solid Wastes Mgt. Ass'n, 505 US 88, 107 [1992]). A Third-Circuit case - Sikkelee v Precision Airmotive Corp., 907 F3d 701 [3d Cir 2018] – states the following:

In addition, allowing state-law claims to proceed in this context complements, rather than conflicts with, the federal scheme. See Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237, 249 (3d Cir. 2008) (“[S]tate tort law and other similar state remedial actions are often deemed complementary to federal regulatory regimes, and this appears to be such a case.”). “[T]he regulations are framed in terms of standards to acquire FAA approvals and certificates—and not as standards governing manufacturing generally,” which indicates “that the acquisition of a type certificate is merely a baseline requirement.” Sikkelee II, 822 F.3d at 694. Thus, “in the manufacturing context, the statutory language indicating that these are ‘minimum standards,’ means what it says.” Id. (internal citation omitted) (quoting 49 U.S.C. § 44701). State-law claims, such as Sikkelee's, supplement the federal scheme and further its central purpose: safe aircrafts.” Id. at 714-15.

The state law products liability, design, and manufacturing defects claims pursued in this action do not “sufficiently interfere” with federal regulation, and therefore, the branch of DART’s motion seeking total dismissal of this action on federal preemption grounds is denied. Federal aviation regulation – as codified through the FAAAct and FARs – is meant to serve as a “minimum standard” for aircraft and safe aircraft operation. See 49 USC § 44701, see also Sikkelee v Precision Airmotive Corp., 822 F3d 680, 694 [3d Cir 2016]. Courts have preempted state law claims based on the federal aviation regulations when the regulations are comprehensive to the point of both setting complete guidelines for the conduct as well as a *de facto* standard of care. For example, in In re Air Crash Near Clarence Ctr., New York on February 12, 2009, 38 Misc3d 308, 312 [Sup Ct 2012], this court [Marshall, J.] granted defendants’

motion to preempt state claims related to negligent hiring, training, and retention, holding that the FARs regarding pilot certification, training, and conduct are so pervasive and complete that a state court has “no room [to apply] state standards of care” *Id.* at 314. In contrast, the purpose of the FARs that address manufacture and design are guidelines to receive FAA approvals and certificates, rather than establishing general standards of care. *Sikkelee*, 822 F3d at 694. Indeed, the Court recognizes that barring state products liability or other tort claims because a manufacturer attained a federal supplemental type certificate is contrary to the stated purpose of the cited federal statutes and regulations – aviation safety. Therefore, the Court is denying the branches of DART’s motion and Airbus’s motion seeking to apply federal preemption to the claims against them.

NYON seeks to apply New Jersey law to plaintiff’s punitive damages claims, arguing that New Jersey was where the tortious conduct occurred – specifically the decisions to use the harness and tether system from which the decedent could not escape during the subject accident. For torts, the “relevant inquiry [under New York law] is which forum has the greatest policy interest in the outcome of the dispute in light of the parties’ contacts with each forum.” *Eccles v Shamrock Capital Advisors, LLC*, 2024 NY Slip Op 02841 [Ct App May 23, 2024] [internal citations omitted].⁵ For “conduct regulating” issues arising from a tort (including punitive liability), the law of the place of the tort’s commission will usually govern. *Id.* Plaintiffs allege that the NYON defendants’ potential punitive liability arises from their decision to use the yellow harnesses for their aerial photography flights despite allegedly knowing that passengers could not egress a helicopter with them on in an emergency, and NYON argues that New Jersey has the greatest interest in regulating the conduct that occurred in New Jersey. In support, NYON highlights those operational decisions made during safety meetings that occurred in New Jersey by a New Jersey corporation, as well as the flight originating from a heliport in Kearny, NJ. The Court

⁵ The Court notes that it denied the NYON defendants’ prior application in Motion Sequence 018 to apply New Jersey law pursuant to a forum selection clause in the pre-flight agreement between decedent and NYON. NYSCEF Doc. No. 501.

disagrees. NYON's attempt to distinguish the "location of the tort" from the "location of the injury" to apply New Jersey law is misplaced; to determine that NYON's torts only occurred in New Jersey and all torts related to flight operations are wholly attributable to Liberty as the flight operator, NYON would have to be granted summary judgment on that issue. Otherwise, NYON cannot distinguish their conduct in New Jersey from the remainder of the torts that led to decedent's death. NYON and Liberty heavily dispute which party had the ultimate authority to decide to use (or stop the use) of "yellow harnesses," which caused the passengers on the fatal flight to drown. Moreover, in this case, and in contrast to other air crash cases like Colgan Air Flight 3407 that crashed near Buffalo, New York on February 12, 2009, the location of the crash is highly significant. In In re Air Crash Near Clarence Ctr., New York, on February 12, 2009, 798 F Supp 2d 481, 489 [WDNY 2011] (one of two parallel cases that arose from the Colgan Air crash), District Judge William Skretny states that "location of the air crash itself is generally not significant because it is often fortuitous" when aircraft are traveling interstate. In the present case, NYON (which the Court notes is an acronym for "New York on Air") advertises aerial photography flights of the New York skyline and flies regularly, if not almost exclusively, over New York airspace. Therefore, the facts that the mid-air engine shutoff happened in New York airspace and the emergency landing occurred in a New York waterway were not merely random chance; this type of emergency was probably more likely to happen in New York airspace than New Jersey airspace. Accordingly, NYON's motion to apply New Jersey law is denied.

The Airbus defendants seek to apply French law as to Airbus SAS (the French entity) and Texas law as to Airbus Helicopters International (Texas entity), instead of New York law on punitive damages. Specifically, Airbus seeks to dismiss claims for punitive damages as against them pursuant to French law and Texas law. The Court is severing this branch of the application and holding it in abeyance, and the Court will address the issue of the application of French law and Texas law as a post-trial motion to

set aside the verdict if the jury awards punitive damages to the plaintiffs against the Airbus defendants. The Court recognizes that plaintiffs' punitive damages claim against Airbus has limited factual support from the record presented; however, in the interest of judicial economy and in anticipation of potential post-trial appellate review, the Court believes that any party seeking redress from its ruling on the issue of punitive liability against Airbus would be best served with a full trial record.

Claims related to damages:

Plaintiffs do not oppose the branch of the summary judgment motions seeking to dismiss non-economic damages. Plaintiffs recognize that New York law does not provide for non-economic damages in a wrongful death action (*see* EPTL 5-4.1 *et. seq.*; *see also* Gonzalez v New York City Hous. Auth., 77 NY2d 663, 668, [1991]), but they reserve the right to move for reconsideration if New York law changes. Therefore, the Court is dismissing plaintiffs' claims for non-economic damages.

The branches of NYON's motion and DART's motion seeking to dismiss pecuniary damages are denied. New York law allows parents of a deceased child to establish pecuniary losses by showing that the child was predisposed to help the parents and there was a reasonable expectation of future assistance. Zelizo v Ullah, 2 AD3d 273 [2003]; Hahn v Canty, 40 Misc 3d 1217(A) [Sup Ct 2013]. Deposition testimony of Jerry Cadigan, decedent's father, shows that he would have likely supported his parents in their later life, so this issue cannot be resolved through summary judgment and must be resolved by a jury. Deposition Transcript of Jerry Cadigan, NYSCEF Doc. No. 609, at pp. 42-44. Pecuniary losses are inherently speculative, and plaintiffs have met the threshold to present their claims to a jury.

The branches of NYON's and Liberty's motion to dismiss punitive damages as to NYON and Liberty are denied. Plaintiffs have provided evidence that NYON and Liberty knew that the harnesses presented a drowning risk if the helicopter had to make an emergency landing on the water, but they continued to operate the flights. In their Counter-Statement of Material Facts, plaintiffs present a

timeline of decisions made by NYON and Liberty to continue to operate these photographic air tour flights knowing that passengers would not be able to escape from the helicopter in the event of a fire or water landing. Notably, during a recorded safety meeting on January 11, 2018 (two months before the fatal flight), Liberty's Director of Training, Brent Duca, warned NYON that passengers could not escape from the yellow harnesses in an emergency:

With your carabiner being hard attached to the upper D-ring on that yellow harness, you cannot, and I repeat, cannot, reach your own carabiner. You will die, drown, trapped I the bottom of the Hudson fucking River to get that. NYSCEF Doc. No. 840, Ex. DD, Plaintiffs' Opposition to NYON's Motion for Summary Judgment, Transcript of January 11, 2018 NYON Air Pilot Safety Conference Call, at 228.

Furthermore, Liberty and NYON knew that the seatbelt cutters provided for passengers to cut themselves free from the harnesses were ineffective, stating that the cutters were "for posterity only... to give people a warm and fuzzy" so "[y]ou can take it to the bottom of the river with you" as "a gift for Davy Jones." *Id.* at 232. This timeline of Liberty's and NYON's knowledge that the yellow harnesses created a safety hazard in an emergency are sufficient to deny Liberty's and NYON's motions for summary judgment. *See generally Matter of 91st St. Crane Collapse Litig.*, 154 AD3d 139 [1st Dept 2017] [discussing the standard and facts considered for punitive damages].

Assumption of Risk and Comparative Negligence:

Plaintiffs move to dismiss defendants' affirmative defense that decedent assumed the risk of his death. Defendants argue that, in signing the pre-flight waiver and taking the photographic air tour over water, he consented to the "obvious risks of flying over water." NYSCEF Doc. No. 879, at p.13.

Although New York law allows for broader applicability of "implied assumption of risk" as opposed to "contractual assumption of risk," "implied assumption of risk" is inapplicable when an individual faces an emergency situation. *See Perez v Navarro*, 148 AD2d 509, 510 [2d Dept 1989]. As decedent

drowned following an emergency landing, “implied assumption of risk” does not apply and must be dismissed.

Plaintiffs move to dismiss defendants’ affirmative defense alleging that decedent’s alcohol consumption prior to the fatal flight affects his comparative negligence. While defendants would have been allowed to assert comparative fault, defendants’ effectively withdrew the affirmative defense during oral arguments on the motions *in limine*. See NYSCEF Doc. No. 1820 (citing the transcript from oral arguments on the motions *in limine*, May 14-15, 2024); NYSCEF Doc. No. 1825. That said, defendants’ can assert decedent’s intoxication to the extent it is relevant to other legal issues, such as liability by other co-defendants. As discussed during a conference with the Court, defendants may not raise the issue of decedent’s intoxication during *voir dire* or opening statements.

Any further requests for relief not expressly granted herein are denied without prejudice.

Accordingly, it is hereby,

ORDERED that Motion Sequence 026 is granted to the extent of dismissing non-pecuniary damages and otherwise denied, and it is further

ORDERED that Motion Sequence 027 is granted to the extent of dismissing non-pecuniary damages and otherwise denied, and it is further

ORDERED that the branches of Motion Sequence 028 seeking to apply French law to Airbus Helicopters SAS and Texas law to Airbus Helicopters, Inc. for punitive damages claims is hereby severed and held in abeyance for post-trial briefing if a jury awards punitive damages against Airbus Helicopters SAS or Airbus Helicopters, Inc., and otherwise denied, and it is further

ORDERED that Motion Sequence 029 is granted to the extent of dismissing non-economic damages and otherwise denied, and it is further,

ORDERED that Motion Sequence 031 is granted to the extent of dismissing defendants' "assumption of risk" defense and denying the branch seeking dismissal of "comparative fault" as moot as to plaintiffs' claims.

This constitutes the decision and order of the Court.

James d'Auguste, J.S.C.

6/11/2024

DATE

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