

**Organek v Harris**

2012 NY Slip Op 33876(U)

June 8, 2012

Supreme Court, Erie County

Docket Number: I2008-8888

Judge: Donna M. Siwek

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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ALBERT ORGANEK as Administrator of the  
Estate of MICHAEL ORGANEK, Deceased,  
  
*Plaintiff,*

v.

Index No. I2008-8888

ANTONIO HARRIS,  
  
*Defendant,*

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SIWEK, J.,

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**MEMORANDUM DECISION**

The defendant Antonio Harris (“Harris”) has moved to dismiss plaintiff’s complaint pursuant to CPLR §3211(a)(1), (3) based upon documentary evidence and lack of legal capacity to sue.

We note at the outset that defendant’s moving papers are insufficient because they do not include the plaintiff’s Complaint or the defendant’s Answer. However, given the defendant’s *pro se* status and the fact that the plaintiff has cross moved for summary judgment pursuant to CPLR §3212 and has attached the appropriate pleadings, the court will nonetheless consider the motion

and cross motion.

Plaintiff's wrongful death action alleges that on or about August 18, 1998, defendant Harris caused the death of Michael Organek by homicide. The plaintiff's instant claim for wrongful death and pecuniary loss asserts that the injuries and death of the decedent Michael Organek were caused solely by the actions of the defendant and not by any negligence on the part of Michael Organek.

On or about June 18, 2008, the New York State Crime Victims Board (now the N.Y.S. Office of Victim Services) notified plaintiff Albert Organek, the Administrator of the Estate of Michael Organek, that the defendant was the likely recipient of money from the Erie County Surrogate's Court<sup>1</sup>. On or about July 22, 2008, Albert Organek was appointed the Administrator of his son Michael Organek's estate. See Exhibit "A" to Affidavit of Justin S. White, sworn to February 24, 2012.

In support of his motion to dismiss, Harris first argues that the plaintiff lacks standing to sue. Harris also argues that the plaintiff's complaint is "meritless and the Court of Appeals has continuously ruled that the law prevents monetary recovering [sic] damages for injury suffered as a result of the injured party's participation in an unlawful transaction." (See Harris affidavit at ¶9). The defendant relies on the Court of Appeals decisions in *Manning v. Brown*, 91 N.Y.2d 116, 667 N.Y.S.2d 336 (1997) and *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d (1984), as well as *LaPage v. Smith*, 166 A.D.2d 831, 563 N.Y.S.2d 174 (3d Dept. 1990) for the proposition

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<sup>1</sup>By Order entered October 30, 2008 in Albany County, the N.Y.S. Crime Victims Board successfully obtained a preliminary injunction prohibiting Harris from accessing the funds until such time as the claims of the Organeks could be resolved. The determination was upheld by the Appellate Division, Third Department (12/10/09).

that public policy prohibits the recovery of damages for an injury suffered as a result of the injured party's participation in an unlawful transaction.

A review of the exhibits submitted by Harris in support of his motion establishes that he was charged with and tried for Intentional Murder, Depraved Indifference Murder, two counts of Felony Murder and one count each of Attempted Robbery in the First Degree, Burglary in the First Degree, Criminal Possession of a Weapon in the Fourth Degree and Criminal Possession of a Controlled Substance in the Third Degree, all relating to the same incident which occurred on August 9, 1998. (See Memorandum Decision and Order of Robert C. Noonan dated October 20, 1999 attached to Harris affidavit sworn to February 9, 2012, as Exhibit "A").

Harris moved for a trial order of dismissal on all counts at the close of the People's direct case and Judge Noonan reserved decision pending the jury's verdict. The jury returned a verdict convicting Harris of all counts except Intentional Murder. Harris then moved to set aside the verdict for legally insufficient evidence. In considering the motion, Judge Noonan found that there was legally sufficient evidence to support the charges of Burglary in the First Degree, Attempted Robbery in the First Degree and both counts of Felony Murder against Harris.

On the day in question, Harris dropped his cousin, Latwett Harris ("Latwett"), off at 307 North Street to sell drugs to the decedent Michael Organek. Michael Organek did not pay Latwett for the drugs immediately, and there were several hours of back and forth discussions relative to payment, including an offer by Organek to provide prescription pills to Latwett as collateral. Latwett then paged Antonio Harris and arranged for him to come to Organek's apartment to pick her up. Harris, Robert Gordon Hennegan and Anthony Franklin then went to Organek's apartment. The jury found that they entered Organek's apartment "without permission

or license to do so, with the intent of forcibly taking property from him, and that in the furtherance of that unlawful entry and attempted robbery or immediate flight therefrom, his cohort Anthony Franklin, caused serious physical injury to the victim which ultimately resulted in his death.” (See Decision of Hon. Robert C. Noonan attached to Harris’ motion as Exhibit “A”). Organek died as a result of being stabbed in the eye socket with a carpet sweeper or broom handle. The testimony at trial established that a co-conspirator, defendant Anthony Franklin used a carpet sweeper or broom handle to stab Michael Organek.

Harris urges this court to find that plaintiff’s decedent Michael Organek was a crack addict and died as a result of his direct participation in illegal drug activity, namely buying drugs; and as such, his estate should be barred from any recovery, citing *Barker*, *Kallash* and *LaPage*. Moreover, Harris argues that he is not liable for Organek’s death, noting that the jury acquitted him of Intentional Murder and the Court dismissed the Depraved Indifference Murder charge. Harris argues that he did not have the requisite *mens rea* to kill Organek and, because he was not the person that killed Organek, but rather guilty by reason of Felony Murder, re-litigation of the wrongful death claim is inappropriate.

In support of his cross-motion and in opposition to Harris’ motion, the plaintiff cites the principles of law of the case and *res judicata*. Harris’ conviction for Felony Murder was upheld on post-trial motion, where it was determined as a matter of law that Harris participated in a burglary of plaintiff’s decedent’s dwelling during which transaction a criminal co-defendant of Antonio Harris killed Michael Organek. Therefore, criminal responsibility for the death of Michael Organek lies on the shoulders of Antonio Harris. Plaintiff seeks a judgment that Harris is responsible for the death of Michael Organek under tort and wrongful death law in the State of

New York. See, *People v. Hernandez*, 82 N.Y.2d 309 (1983). The plaintiff seeks summary judgment on the issue of liability and requests that the court conduct an inquest on the issue of damages.

### *Decision*

As to the defendant's first argument that the plaintiff lacks capacity to sue, we note that the plaintiff was appointed Administrator of his son's estate on July 22, 2008 in Erie County Surrogate's Court and has standing to bring this wrongful death claim.

The defendant's argument of a "defense founded upon documentary evidence" (apparently Judge Noonan's Decision and transcripts of testimony from the criminal trial which were attached to his moving papers) is not supported by the record. Rather, the court finds that the plaintiff is entitled to Summary Judgment on the issue of liability based upon the doctrine of *res judicata*.

We disagree with the defendant that the plaintiff's claim is barred because he is not liable for the death of Michael Organek. Harris was found guilty of Felony Murder by a jury and the jury's determination was upheld by Judge Noonan. Simply put, Harris is guilty of Felony Murder because Michael Organek's death was caused by one of the felons in furtherance of their crime. See, *People v. Hernandez*, 82 N.Y.2d 309 (1993). "More than civil tort liability must be established [to support felony murder]; criminal liability will adhere only when the felons' acts are a sufficiently direct cause of the death." Thus, a sufficient nexus was established to convict Harris of Felony Murder. Mr. Harris' criminal conviction for Felony Murder estops him from arguing that his acts were not a sufficiently direct cause of Michael Organek's death.

Our next consideration is the application of the *Barker/Kallash* line of cases and whether those cases operate as a bar to the estate's recovery in this wrongful death action. "The Court of Appeals instructs us that when the plaintiff's injury is a direct result of his knowing and intentional participation in a criminal act he cannot seek compensation for the loss, if the criminal conduct is judged to be so serious an offense as to warrant denial of recovery". (emphasis added) *LaPage, supra*, 1166 A.D.2d at 832. A complaint should not be dismissed merely because the plaintiff's injuries were occasioned by a criminal act. *Barker, supra*, 63 NY2d at 203.

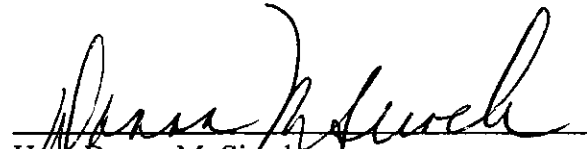
We find that an analysis of this line of case law to the facts of this case it not necessary. Michael Organek is deceased. Even if he was engaged in criminal conduct at the time of his death, his estate, a separate legal entity, should not be precluded from recovering damages for pecuniary loss.<sup>2</sup> Michael Organek's parents are innocent victims, and the damages they seek inure (pecuniary loss) to their benefit as distributees because of his death. The cause of action belongs to the distributees, not to the decedent's estate. "The personal representative of an estate has the right to seek fair and just compensation for pecuniary injuries to them resulting from the decedent's death. The cause of action belongs to those distributees while an action for personal injury belongs to the estate." See N.Y. EPTL §5-4.1 Practice Commentaries. (McKinney's, 1999) "A decedent has no cause of action to recover for his or her own death." *Sand v. Chapin*, 238 A.D.2d 862, 565 NYS2d 700 (3d Dept. 1997). Inasmuch as it has been determined that

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<sup>2</sup>Were the Court to consider whether Organek's activities at the time of his death were such a dereliction so as to preclude recovery, the question would be whether his involvement in a \$70.00 drug transaction was sufficient to deny recovery in the face of the criminal behavior of the defendant and his cohorts.

Michael Organek died as a direct result of the defendant's crime and the plaintiff seeks damages for their pecuniary loss, the plaintiff is entitled to summary judgment. Accordingly, the defendant's motion is denied and the plaintiff's cross motion granted. The court will conduct a telephone conference to discuss an inquest on damages on **Wednesday, July 11, 2012 at 9:00 a.m.**

This is the Decision of the Court. Submit Order on notice.

  
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Hon. Donna M. Siwek  
Justice of the Supreme Court

Dated: June 8, 2012