

Ramsingh v James

2015 NY Slip Op 31252(U)

June 30, 2015

Supreme Court, Kings County

Docket Number: 500689/13

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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**SATNARINE RAMSINGH, Individually and as
Administrator of the Estate of SOMOUTIE
RAMSINGH, deceased,**

Plaintiff,

-against-

OAKLAND JAMES and VERONICA JAMES,

Defendants.

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DECISION/ORDER

Index No. 500689/13

Submitted 4/30/15

Mot. Seq. #2 & 3

HON. DEBRA SILBER, A.J.S.C.:

Recitation, required by CPLR 2219(a), of the papers considered in the review of defendants' motion for additional time to file a summary judgment motion and defendant's motion for summary judgment dismissing plaintiff's claim for conscious pain and suffering.

| Papers | Numbered |
|---|---------------------|
| Notices of Motion, Affirmation, Exhibits Annexed..... | <u>1-12, 13-20</u> |
| Affirmations in Opposition and Exhibits Annexed..... | <u>21-25, 26-30</u> |
| Reply..... | <u>31</u> |

Upon the foregoing cited papers, the decision/order on these motions is as follows:

Defendants move for leave to file a summary judgment motion beyond the sixty-day deadline and separately move for summary judgment to dismiss plaintiff's claims for decedent's pre-death mental anguish, terror of impending death and conscious pain and suffering. Plaintiff opposes the motions. For the reasons cited herein, the motion for an extension of time is granted and the motion for summary judgement is granted in part and denied in part.

This is a wrongful death action initiated by the plaintiff to recover for, inter alia,

injuries sustained by decedent, Somoutie Ramsingh, on March 11, 2012 when she allegedly fell down a staircase at defendants' business premises at 1102 Flatbush Avenue in Kings County. Decedent died three days later on March 14, 2012. The death certificate states the cause of death was blunt impact to her head with resultant fractured skull and subdural hematoma. In addition to seeking damages for decedent's wrongful death, plaintiff, the husband of the deceased, is suing on his own behalf and also as the administrator of the decedent's estate. Among the claims in the complaint are claims regarding defendants' negligence. The complaint seeks recovery for alleged pre-death mental anguish, terror of impending death and conscious pain and suffering experienced by the decedent prior to her death as a result of defendants' negligence.

Plaintiff commenced this action by service of a summons and complaint dated February 13, 2013. Issue was joined on or about March 7, 2013 by service of a verified answer on behalf of the defendants. Plaintiff filed a Note of Issue and Certificate of Readiness dated September 26, 2014. On October 15, 2014, defendants filed a motion to vacate plaintiff's Note of Issue (Motion Seq. #1) on the grounds that various previously noticed non-party depositions remained outstanding, including those of the EMTs who treated the decedent on the date of the incident and the EBTs of plaintiff's family members who were present with decedent on the date of the incident. The motion was made returnable on November 14, 2014 and includes a request for an extension of time to file a Motion for Summary Judgment. That motion is currently adjourned in the Central Compliance Part to a date in August, 2015.

Motion to Extend Time

Defendants request that the date to file a summary motion be extended. CPLR § 3212(a) states that any party may move for summary judgment in any action, after

issue has been joined, provided that the court may set a date after which no such motion may be made, such date being no earlier and than thirty days after the filing of the Note of Issue. In Kings County, the Supreme Court's Uniform Rules require summary judgment motions to be served no later than sixty days after the filing of a Note of Issue, except with leave of the court, on good cause shown.

Defendants' counsel avers that, after consulting with a medical expert, he learned for the first time on November 23, 2014 that the records supplied to his firm by Kings County Hospital Center (KCHC) appeared to be incomplete in that they did not contain x-ray reports, CT scan reports and intra-operative reports. As such, defendants aver that their expert was not in a position to render an opinion on conscious pain and suffering until they were able to determine that KCHC had supplied a complete set of its records. On November 24, 2014, defendants' counsel avers that he contacted both HealthPort and the hospital to inquire about the records. He was advised that defendants would have to submit a new request as the authorizations were made out to the prior defense counsel. On November 24, 2014, defendants' counsel served a subpoena on KCHC for the entire record. As of the date of the motion for an extension, (Motion Seq. #2) made November 25, 2014, the hospital had not responded. Defendants' counsel states he requested plaintiff's counsel to stipulate to a sixty-day extension, but plaintiff's counsel would not do so.

Defendants subsequently filed their summary judgment motion (Motion Seq. #3) on December 16, 2014, only 21 days later. Having shown good cause, the court grants defendants' motion for an extension of time and will consider the summary judgment motion on its merits.

Summary Judgment

Plaintiff alleges in his bill of particulars that the accident occurred on March 11, 2012 on the staircase to the basement of defendants' property. Amongst other relief, plaintiff is seeking damages for "decedent's pre-death pain and suffering, pre-death terror and fear of impending death, from March 11, 2012 to March 14, 2012."

Defendants aver that the evidence shows that the decedent was not conscious for any period following her accident and so has no such claim, as provided by the controlling case law.

Plaintiff Satnarine Ramsingh, the decedent's husband, testified at his EBT that the accident occurred on March 11, 2012, when the decedent fell down the stairs at defendants' premises. Plaintiff was walking behind the decedent and witnessed the accident.

After the fall, plaintiff started to yell and call out "is there anybody, please come and help, please come and help, my wife fell down, she is dying here." He went down the stairs and ran to the decedent, grabbed her hand and said "baby, hold on, hold on, I am going to call for some help." He said she grabbed his hand, not very tightly, and made eye contact. He said she was tearing up and then she was gasping for air. He said she continued gasping until the ambulance came. She did not speak to him at any point. He did not believe she lost consciousness, because her eyes were open the whole time.

Plaintiff called his daughter, Davika Nash, about two or three minutes after the decedent fell. Ms. Nash arrived five minutes later. During the five minutes, decedent's condition did not change.

Yakov Kornitzer, an emergency medical technician, testified at his EBT that he was dispatched to 1102 Flatbush Avenue at 9:01 p.m. on March 11, 2012. The dispatcher informed him that the patient was unconscious. He arrived three minutes later at 9:04 p.m. He was met outside by firefighters who had arrived before him and who informed him that the patient was bleeding and was not responsive.

He said he first saw decedent from the top of the stairs. She was belly-down, facing sideways, with a lot of blood around her. Mr. Kornitzer said he called out the patient's name and tapped her when he began treating her. He said there were no signs of consciousness. He does not know when she lost consciousness. He states that, consistent with her kind of head injury, she probably became unconscious as soon as she hit her head. She was "decerebrate and was flexing out." He said this was a sign of intercranial pressure from significant brain damage and causes the toes, hands and fingers to flex away from the body. Her status was described as "unstable to critical." She did gasp for air during the ambulance ride, but gasping for air has no bearing on whether a person is conscious. The gasping was due to the movement of blood and vomit. He said "breathing is the last thing in the brain to go. Unconscious people can still breathe."

The ambulance call report prepared by Mr. Kornitzer, and identified by him at his EBT, is consistent with his testimony. He refers to the decedent as decerebrate and unconscious. The chief complaint is reported as "she is unconscious per her husband." Under "objective physical assessment" the report notes: "Husband reports she fell down a flight of stairs hitting the concrete [floor] head first. Patient unresponsive, positive

airway compromised, airway prohibited, modified jaw thrust, positive dyspnea,¹ lung sounds wet bilaterally, positive trachea midline, negative jugular vein distention, positive distal pulse times four extremities, pupils are non-reactive to light, positive decerebrate, positive laceration to back of head, positive bleeding from nose, mouth and eyes, 83% oxygen saturation.” Under tx (treatment), the report states “positive suction, negative gag reflex, intubation via 7.0 milliliter andotracheal tube attempted two times, unsuccessful due to excessive vomitus and blood. Was unable to visualize vocal cords, IV access established with a 20 gage angio cap, 100 cc’s of normal saline to keep vein open, transport to Kings County Trauma Center and the emergency room was notified.”

The affirmed report of Dr. Kunjlata Ashar (and despite plaintiff’s assertions to the contrary, the report is affirmed), the Westchester County Medical Examiner, who is defendants’ expert, states she reviewed plaintiff’s Verified Bill of Particulars, the ambulance call report, the Kings County Hospital Records, the death certificate, and the EBTs of plaintiff and Yakov Kornitzer. Dr. Ashar concludes that decedent was unconscious immediately from the point of her head injury, and she did not have any conscious pain or suffering or any level of awareness from the time she hit her head to the time of her death, and that plaintiff’s testimony does not point to any meaningful response to stimuli which would indicate any conscious pain and suffering.

Dr. Ashar notes “Glasgow Coma Scale 3 is indicative of severe brain injury as well as a coma/unconscious state with no meaningful response and no voluntary activities.” Based on her review of the records and other evidence, Dr. Ashar concludes that plaintiff’s cerebral functions were absent during her entire hospital stay and at no

¹Defined as “difficulty breathing” in Webster’s Dictionary.

point did she respond to any stimuli. Dr. Ashar also notes that the decedent's tears, hand holding and gasping for air are not signs of consciousness. These she describes as mere reflexes. She concludes, with a reasonable degree of medical certainty, that decedent "had no pain and suffering from the time of her trauma to her death."

The certified 911 Sprint report states that 911 was called at 8:56:36 p.m. from cellphone 347-666-2202. (An independent IRB phone search indicated that this is plaintiff's number). The report indicates that at 9:04:54 another call was received from cellphone 917-418-1790 indicating that a female fell down the steps in a basement. An ambulance was on the scene at 9:05:02.

The defendants submit subpoenaed records from Kings County Hospital concerning the decedent. The Emergency Room Record indicates plaintiff had a Glasgow Coma Scale of 3. Decedent had blood drawn at 9:42 p.m. which indicated a blood alcohol concentration of 264.4 mg/dl. Next to this number is written "abnormal." A pre-operative assessment on March 12, 2012 noted the doctors were unable to assess for pain as "patient was unresponsive." The operative report notes she underwent surgery, consisting of a left craniectomy, removal of a subdural hematoma and the removal of a left intracerebral hemorrhage. The patient was placed under general anesthesia during the operation. On March 13, 2012, the patient was tested for neurological death and it was noted that her pupils were dilated and unresponsive to light, she was absent corneal reflexes, she was absent response to airway stimulation, absent oculocephalic response and absent spontaneous respiration. On March 14, 2014, it was noted "57 year old female, slip/fall while intoxicated." The report noted she had "no movement to noxious stimuli," and "no brainstem function." Decedent died on

March 14, 2012.

On a motion for summary judgment, the burden is on the movant who seeks dismissal of a claim for damages for conscious pain to show there was no conscious pain and suffering. See, *Kevra v Vladagin*, 96 AD3d 805 [2nd Dept 2012]. *Rusiecki v Hoffman Investors Corp.*, 222 AD2d 275 [1st Dept 1995]. The defendants herein thus bear the initial burden of demonstrating that the decedent did not suffer conscious pain and suffering. See, *Phiri v Joseph*, 32 AD3d 922 [2nd Dept 2006]; *Schild v Kingsley*, 5 AD3d 103, 104 [2004]; *Massey v New York City Hous. Auth.*, 230 AD2d 601, 602 [1st Dept 1996].

In the instant matter, defendants have provided the testimony of Mr. Kornitzer, the records of the hospital and the ambulance report as well as an expert affirmation from Dr. Ashar, which together establish that the decedent was unconscious from the point of impact until she died, and defendants have thus made a prima facie showing of their entitlement to summary judgment dismissing the plaintiff's claims for conscious pain and suffering.

Plaintiff's evidence in opposition consists of all the aforementioned exhibits, except the Ashar affirmation, plus the EBT of defendant Oakland James, which is relevant only to issues of defendants' liability. There is no report from any expert which refutes Dr. Ashar's opinions.

As there is no evidence submitted which overcomes the motion and raises a triable issue of fact that the decedent had any level of consciousness following her fall, the motion is granted and the claims in the complaint are dismissed which seek damages for conscious pain and suffering. See, *Zurita v McGinnis*, 7 AD3d 618, 619

[2nd Dept 2004]. "Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed" *Cummins v County of Onondaga*, 84 NY2d 322, 325 [1994]. Mere conjecture, surmise, or speculation is insufficient to sustain a claim to recover damages for conscious pain and suffering. *Phiri v Joseph*, 32 AD3d 922 [2nd Dept 2006].

However, while defendants submitted evidence that decedent was unconscious when found at the scene, defendant failed to establish as a matter of law that decedent did not endure what is known as pre-impact terror, and thus defendant has failed to demonstrate entitlement to dismissal of plaintiff's claims for pre-death mental anguish and terror of impending death. See, e.g., *Rice v Corasanti*, 122 AD3d 1374 [4th Dept 2014]; *Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1186 [4th Dept 2014]. *Boston v Dunham*, 274 AD2d 708, 711 [3d Dept 2000]; *Donofrio v Montalbano*, 240 AD2d 617 [2nd Dept 1997]; *Cadieux v D.B. Interiors*, 214 AD2d 323 [1st Dept 1995]; *Torelli v City of New York*, 176 AD2d 119, 123-24 [1st Dept 1991]; *Stein v Lebowitz-Pine View Hotel*, 111 AD2d 572 [3rd Dept 1985]; *Anderson v Rowe*, 73 AD2d 1030, 1031 [4th Dept 1980].

It is noted that pre-impact terror is a sub-category of conscious pain and suffering. See, e.g., *Donofrio v Montalbano*, 240 AD2d 617 [2nd Dept 1997]; *Lang v Bouju*, 245 AD2d 1000 [3rd Dept 1997]; *Sanchez v Morgan El. Co., Ltd.*, 24 Misc 3d 1247A [Sup Ct, Kings 2009].

Whether the decedent suffered any pre-impact terror is a question of fact for a jury. In order to be compensable, it must be shown by a preponderance of the evidence that the decedent had some knowledge or other basis for anticipating the impending

disaster; otherwise no basis exists for a finding of fright or mental anguish. See, *Anderson v Rowe*, 73 AD2d 1030 [4th Dept 1980]; *Shatkin v McDonnell Douglas Corporation*, 727 F2d 202 [2nd Cir 1984]. Eyewitness testimony to the decedent's pain and suffering is not essential to recovery, but at least some circumstantial evidence must be adduced from which it can reasonably be inferred that the plaintiff underwent some suffering before the impact. See, e.g., *Solomon v Warren*, 540 F2d 777, 792 [5th Cir 1976], *cert denied*, 434 US 801 [1977].

Recovery has been permitted for pre-impact terror experienced by decedents prior to their death, even if only for a short period of time, even only lasting a few seconds. *Lang v Bouju*, 245 AD2d 1000 [3rd Dept 1997]. In *Lang v Bouju*, decedent was driving a motorcycle and came into contact, head on, with a truck stopped in decedent's lane of traffic. The Third Department found that it was appropriate for plaintiffs to recover for pain and suffering due to the likelihood that decedent, upon seeing the truck and applying his brakes, was "aware of the likelihood and ultimately the certainty — of a serious collision, during the approximately five seconds preceding impact." Likewise, in *Donofrio v Montalbano*, 240 AD2d 617 [2nd Dept 1997], decedent was a passenger in a car driven by defendant which struck a tree. The plaintiffs were permitted to recover for the very brief period of time decedent could have experienced pre-impact terror as he observed the vehicle in which he was a passenger move at a speed of 70-75 miles per hour towards the tree.

In the instant case, the EBT of plaintiff Satnarine Ramsingh, an eyewitness, indicates that whether the decedent suffered pre-impact terror is a question of fact for the jury. The shortness of the time interval from when the decedent began falling down

the stairs and the time of her impact at the bottom, would only be relevant to the amount of an award, if any. If such recovery was permitted for a period of approximately five seconds before a motor vehicle collision, as in *Lang*, it cannot be said as a matter of law on this record that an award would not be permissible for a tumble down a flight of stairs. See, *Torelli v City of New York*, 176 AD2d 119, 123; *Stein v Lebowitz-Pine View Hotel*, 111 AD2d 572, 573; *Sanchez v Morgan El. Co., Ltd.*, 24 Misc 3d 1247A.

Defendants' motion to dismiss plaintiff's claims for conscious pain and suffering is granted concerning post-impact pain and suffering and denied as to pre-impact terror.

This shall constitute the Decision and Order of the Court.

Dated: June 30, 2015

ENTER :



Hon. Debra Silber, A.J.S.C.
 Hon. Debra Silber
 Justice Supreme Court

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