

Bekas v Tjornhom

2016 NY Slip Op 30407(U)

March 3, 2016

Supreme Court, Suffolk County

Docket Number: 27641/2010

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Spiro Bekas and Carol Bekas, his wife,

Action No. 1

Plaintiffs,

Index No.: 27641/2010

-against-

Laurie Tjornhom and Wayne Tjornhom,

Defendants.

Attorneys [See Rider Annexed]

Laurie Tjornhom and Wayne Tjornhom,

Third-Party Plaintiffs,

-against-

Third-Party Action

The Town of Huntington,

Third-Party Defendant.

Elaine Robinson, as Administratrix of the
Estate of Ulysses Taylor, deceased,

Action No. 2

Plaintiff,

Index No.: 26218/2010

-against-

Motion Sequence No.: 005; MG

Motion Date: 1/22/15

Submitted: 4/22/15

Laurie Tjornhom, Wayne Tjornhom,
Spiro Bekas, Care & Comfort Associates, Inc.,
Town of Huntington, Brendan Higgins,
Tracy Higgins and County of Suffolk,

Motion Sequence No.: 006; XMD

Motion Date: 4/22/15

Submitted: 5/27/15

Defendants.

Robinson v. Tjornhom, et al.

Index No.: 26218/2010

Page 2

Timothy Shanahan, as Executor of the
Estate of Lorraine Shanahan, deceased,
and Lorraine Shanahan individually,

Plaintiff,

-against-

Lauren Tjornhom, Wayne Tjornhom,
Care & Comfort Associates, Inc., Spiro N. Bekas,
Town of Huntington, County of Suffolk,
Brendan Higgins and Tracy Higgins,

Defendants.

Action No. 3

Index No.: 40811/2010

Spiro Bekas and Carol Bekas,

Plaintiff,

-against-

Town of Huntington, Brendan Higgins
and Tracy Higgins,

Defendants.

Action No. 4

Index No.: 36462/2011

Upon the following papers numbered 1 to 23 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 4; 9 - 10; Answering Affidavits and supporting papers, 11 - 19; Replying Affidavits and supporting papers, 20 - 23; it is

ORDERED that the motion by defendants in Action 2 and Action 3, Spiro Bekas and Care & Comfort Associates, Inc., for an order awarding summary judgment dismissing the complaints is determined as set forth herein; and it is further

ORDERED that the cross-motion by plaintiff in Action 2 to amend the bill of particulars is denied.

Four actions involving fatalities as a result of a motor vehicle accident between an ambulette operated by plaintiff/defendant Spiro Bekas ("Bekas") and owned by defendant Care & Comfort Associates, Inc. (hereinafter "Bekas/Care" when referred to collectively), and an SUV operated by defendant/third-party plaintiff Laurie Tjornhom and owned by defendant Wayne Tjornhom ("Tjornhom") were joined for trial by order of this Court dated February 8, 2011. It is well-settled

Robinson v. Tjornhom, et al.

Index No.: 26218/2010

Page 3

that where a joint trial has been ordered, each action maintains its separate identity, requiring separate motions with separate orders and judgments rendered in each (*see Brian Wallach Agency, Inc. v Bank of New York*, 75 AD2d 878 [2d Dept 1980]; *Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 497 [1st Dept 1968]). Moreover, in the actions at bar a stipulation executed by counsel for each of the parties, so ordered by this court in December 2013, explicitly sets forth that “all motions interposed in any of the four actions joined for trial bear but a single caption reflecting the action in which said motion is made...”

Here, the Bekas/Care defendants improperly make one motion seeking summary judgment in Action 2 and Action 3. To preserve the resources of the Court, a decision will be rendered in the procedurally improper motion and a copy of the order placed in the file of each action. However, failure to comply with the statute and the so ordered stipulation will result in the denial of any improperly filed future motion without regard to the substantive sufficiency of the moving papers.

The motor vehicle accident occurred on April 28, 2010 at the intersection of Third Avenue and Third Street in Huntington, New York. At the subject intersection, Third Street, which runs north and south, is controlled by a stop sign, whereas Third Avenue, which runs east and west, is a through street not controlled by any traffic device. The accident occurred when Tjornhom, traveling southbound on Third Street, collided in the intersection with the ambulette, traveling westbound on Third Avenue. As a result of the impact, a parked vehicle was hit and the ambulette flipped over onto its roof. At the time of the accident, Ulysses Taylor and Lorraine Shanahan were passengers in the ambulette and suffered injuries which resulted in their deaths.

Bekas commenced Action 1 to recover damages for personal injuries, alleging that Tjornhom was negligent in the operation of the SUV for failing to obey the stop sign controlling her lane of travel on Third Street, and for failing to yield to the ambulette which was already in the intersection. Tjornhom admits that she did not stop as she did not see the stop sign but alleges that it was obscured by foliage from a tree, and that the failure to properly maintain the tree was the proximate cause of the accident. The Tjornhom defendants commenced a third-party action against the Town of Huntington (the “Town”) for negligence and indemnification.

Elaine Robinson, as administratrix of the estate of Ulysses Taylor, deceased, commenced Action 2, and Timothy Shanahan, as executor of the estate of Lorraine Shanahan, deceased, and Lorraine Shanahan, individually (collectively hereinafter referred to as the “Shanahans”), commenced Action 3 against the Tjornhom defendants and Bekas/Care, alleging negligence in the ownership and operation of their respective vehicles, and against Brendan and Tracy Higgins (collectively the “Higgins defendants”), the owners of the property upon which the tree is located, the Town of Huntington (the “Town”) and the County of Suffolk (the “County”) for negligence with regard to the stop sign and maintenance of the tree. By order of this Court dated September 25, 2013, Action 2 and Action 3 were dismissed as against the County of Suffolk only. Robinson alleges that the Higgins defendants were negligent in failing to properly maintain the tree and allowing foliage to obscure the stop sign. Thereafter, Bekas commenced Action 4, making essentially the same allegations against the Town and the Higgins defendants.

Robinson v. Tjornhom, et al.

Index No.: 26218/2010

Page 4

Robinson also alleges that the Town was negligent as it has the non-delegable duty to maintain the tree in the event the property owners fail to do so, and that it was further negligent in the design, construction and maintenance of the sidewalk, including the failure to properly position the stop sign to prevent obstruction, and/or in improperly planting the tree and not maintaining it.

The Shanahans allege that Tjornhom failed to yield the right-of-way to the ambulette; that Bekas failed to use reasonable care and observe the Tjornhom vehicle and to take reasonable actions to avoid the collision; that Mr. Higgins failed to use reasonable care when some time prior to the accident he trimmed the tree obscuring the stop sign; and that the Town of Huntington failed to use reasonable care to maintain its traffic signs.

Discovery has been completed and the note of issue filed. The Bekas/Care defendants now move for summary judgment dismissing the complaint in Action 2 and Action 3 as asserted against them on the grounds that Bekas was neither negligent in the operation of the ambulette nor negligent with respect to the manner in which Taylor and Shanahan were secured inside the ambulette.

Bekas established his freedom from comparative fault for the collision through his deposition testimony that he was traveling 18-20 miles per hour when he entered the subject intersection. There was no traffic device controlling his direction and travel. Bekas testified that he had almost cleared the subject intersection when the back side panel of the ambulette was hit. Tjornhom admitted that she did not see the ambulette before the collision.

Vehicles traveling on a thru-street have a preferential right of way (*see* Vehicle and Traffic Law § 149). A driver with the right of way has no duty to watch for and avoid a driver who might fail to yield or otherwise obey the traffic laws (*see Barbato v Maloney*, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]; *Jenkins v Alexander*, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]). Indeed, Bekas was entitled to anticipate that Tjornhom would obey the traffic laws which required her to yield to the ambulette which was already in the intersection (*see Martin v Ali*, 78 AD3d 1135, 912 NYS2d 610 [2d Dept 2010]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; *D'Onofrio-Ruden v Town of Hempstead*, 29 AD3d 512, 815 NYS2d 141 [2d Dept 2006] [even fully crediting testimony that the stop sign was obscured by foliage, the driver was negligent in her failure to see that which should be seen through a proper use of her senses]). Thus, there is no evidence to support a finding of negligence attributable to Bekas in the operation of the ambulette.

The Shanahans assert in the supplemental bill of particulars that Bekas was negligent in failing to properly affix decedent's wheelchair to the ambulette. Such assertion is without merit and not supported by the evidence. The deposition testimony before the Court establishes that Shanahan was on a seat in the ambulance with a seat belt; she was not in a wheelchair. In their papers in opposition, the Shanahans do not address this issue, and thus, they have failed to raise an issue of fact. Therefore, the Bekas/Care defendants are entitled to summary judgment dismissing the complaint as asserted against them in Action 3.

The Bekas/Care defendants also maintain that without merit is any attempt by Robinson to argue that Taylor, who was in a wheelchair, was not properly secured to the ambulette. The

Robinson v. Tjornhom, et al.

Index No.: 26218/2010

Page 5

Bekas/Care defendants point out that no such allegation has been pled by Robinson. In response, Robinson cross-moves to amend the pleadings to allege that the Bekas/Care defendants were negligent in failing to properly secure Taylor's wheelchair to the ambulette "and in using restraints and belts that malfunctioned and/or which were not used for their intended purpose or as directed by their manufacturers."

Leave to amend a pleading, including the bill of particulars, should be freely granted absent prejudice or surprise resulting directly from the delay in seeking the amendment (*see* CPLR 3025[b]; *Kruger v EMFT, LLC*, 87 AD3d 717, 930 NYS2d 11 [2d Dept 2011]; *Vista Properties, LLC v Rockland Ear, Nose & Throat Assocs., P.C.*, 60 AD3d 846, 875 NYS2d 248 [2d Dept 2009]; *Mackenzie v Croce*, 54 AD3d 825, 864 NYS2d 474 [2d Dept 2008]). Although mere delay is insufficient to defeat a motion to amend, where an action has been certified as ready for trial, judicial discretion in allowing such amendments should be "discrete, circumspect, prudent and cautious" (*Evans v Kringstein*, 193 AD2d 714, 598 NYS2d 64 [2d Dept 1993], quoting *Perricone v City of New York*, 96 AD2d 531, 533, 464 NYS2d 839 [2d Dept 1983] *affd* 62 NY2d 661, 476 NYS2d 282 [1984]; *see* *Yong Soon Oh v Hua Jin*, 124 AD3d 639, 1 NYS2d 307 [2d Dept 2015]). Where a party is guilty of extended delay in moving to amend, the court should insure that the amendment procedure is not abused by requiring a reasonable excuse for the delay and an affidavit of merit with respect to the merits of the claim (*Evans v Kringstein*, *supra* at 715; *Gallo v Aiello*, 139 AD2d 490, 490-491, 526 NYS2d 593 [2d Dept 1988]).

Based on the aforementioned principles, plaintiff's cross-motion is denied. Where, as here, the proposed amendment inserts a new theory of liability into the case, it is clear that at this late stage in the action, undue prejudice will result to the defendants (*see* *Evans v Kringstein*, *supra*). Moreover, no reasonable excuse has been offered for the delay. The excuse of law office failure proffered by Robinson's counsel does not rise to the level of a reasonable excuse (*see* *Canals v Lai*, 132 AD3d 626, 17 NYS3d 311 [2d Dept 2015]). Thus, the Court will not exercise its discretion and grant Robinson leave to amend the bill of particulars.

Having denied the cross-motion, the Bekas/Care defendants are also entitled to summary judgment dismissing the complaint as asserted against them in Action 2. Accordingly, the motion is granted, the complaints in Action 2 and Action 3 are dismissed as to defendants Spiro Bekas and Care & Comfort Associates, Inc., the actions are severed as to the remaining defendants, and the cross-motion is denied.

Dated: March 3, 2016


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

RIDER
(Page 1)

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Clerk of the Court

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(Page 2)

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