

<b>Ali v Norris</b>
2019 NY Slip Op 31422(U)
April 29, 2019
Supreme Court, Kings County
Docket Number: 511469/18
Judge: Carolyn E. Wade
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2019 MAY -7 AM 8:40

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29<sup>th</sup> day of April, 2019.

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X  
MOHAMED H. ALI, AS THE ADMINISTRATOR OF THE  
ESTATE OF SUMIAH M. ALI, DECEASED, AND  
MOHAMED H. ALI, INDIVIDUALLY,

Plaintiff,

- against -

HILTON O. NORRIS AND UNITED PARCEL SERVICE INC.

Defendants.  
-----X

The following papers numbered 1 to 3 read herein:

DECISION and ORDER

Index No. 511469/18

Motion Sequence No. 1

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and

Affidavits (Affirmations) Annexed \_\_\_\_\_

1-2

Opposing Affidavits (Affirmations) \_\_\_\_\_

3

Defendants Hilton O. Norris ("Norris") and United Parcel Service Inc. ("UPS") move, pursuant to CPLR 3211 (a) (3) and (7), for an order dismissing (1) the fourth, fifth and seventh causes of action of the August 6, 2018 amended complaint of plaintiff, Mohamed H. Ali, as the Administrator of the Estate of Sumiah M. Ali, deceased, and Mohamed H. Ali, individually ("plaintiff"), (2) the non-pecuniary losses as asserted in the sixth cause of action; and (3) the complaint in its entirety as asserted by Mohammed H. Ali individually.

### *Background*

This personal injury action arose from a motor vehicle accident on February 17, 2018 at the intersection of Dekalb Avenue and Ashland Place in Brooklyn when a UPS package car struck and killed the decedent, Sumiah M. Ali (“decedent”), while crossing the street. At the time, the UPS package car was driven by Norris, a UPS employee.

On April 3, 2018, the Kings County Surrogate’s Court issued Letters of Administration appointing Mohamed H. Ali, Administrator of the decedent’s estate. Thereafter, plaintiff commenced this action on June 4, 2018, on behalf of both the decedent’s estate and plaintiff, individually, by filing a verified complaint against UPS, the vehicle owner and Norris. The complaint alleged seven causes of action: negligence in Norris’ operation of the vehicle, vicarious liability against UPS, negligent hiring and retention, negligent supervision, wrongful death and punitive damages pursuant to EPTL 5-4.3 (c). Plaintiff filed an amended complaint on August 6, 2018, to add further factual allegations supporting the fourth and fifth causes of action for negligent hiring and retention as well as negligent supervision. Defendants separately answered the amended complaint on August 27, 2018.

Defendants now move, pursuant to CPLR 3211, for dismissal of the fourth and fifth causes of action against UPS, as its answer admits that Norris was an employee operating its vehicle. Specifically, Defendants contend that, under the doctrine of respondeat superior, a direct cause of action in negligent hiring, retention or supervision should be dismissed since

UPS has admitted vicarious liability. Defendants also seek dismissal, pursuant to EPTL 5-4.3, of the seventh cause of action for wrongful death, on the basis that plaintiff lacks standing to assert such claim individually. In addition, defendants seek dismissal of the sixth cause of action insofar as it seeks to recover non-pecuniary damages. Finally, defendants seek to dismiss the complaint as alleged by plaintiff, individually, because a wrongful death action can only be maintained on behalf on the decedent's distributees.

### *Discussion*

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), “the standard is whether the pleading states a cause of action,” and, “[i]n considering such a motion, ‘the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’” (*Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010], quoting *Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). “[T]he burden never shifts to the nonmoving party to rebut a defense asserted by the moving party” (*Sokol*, 74 AD3d at 1181). “Thus, a plaintiff ‘will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint’” (*id.* quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

“A necessary element of a cause of action alleging negligent retention or negligent supervision is that the employer knew or should have known of the employee's propensity

for the conduct which caused the injury” (*Bumpus v New York City Tr. Auth.*, 47 AD3d 653, 654 [2d Dept 2008] [internal quotation marks and citations omitted]). Generally, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior; and a plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training (*see Ambroise v United Parcel Serv. of Am., Inc.*, 143 AD3d 929, 931 [2d Dept 2016]; *Saretto v Panos*, 120 AD3d 786, 788 [2d Dept 2014]; *Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]; *Neiger v City of New York*, 72 AD3d 663, 664 [2d Dept 2010]). However, “such a claim is permitted when punitive damages are sought based upon facts evincing gross negligence in the hiring or retention of an employee” (*Gipe v DBT Xpress, LLC*, 150 AD3d 1208, 1209-1210 [2d Dept 2017], quoting *Quiroz*, 96 AD3d at 1037; *Talavera v. Arbit*, 18 AD3d 738, 739 [2d Dept 2005]. “Punitive damages are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton, or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives” (*Boykin v Mora*, 274 AD2d 441, 442 [2d Dept 2000]; *Felton v Tourtoulis*, 87 AD3d 983, 984 [2d Dept 2011]).

Here, the amended complaint sufficiently alleges (at ¶ 26) that “UPS improperly trained or did not train at all its truck drivers in how to safely drive and maintain UPS trucks . . .” Plaintiffs amended the complaint to specifically allege (at ¶ 30) that “UPS knew or should have known that Norris had a demonstrated history of operating motor vehicles in a

negligent, reckless, and dangerous manner.” The amended complaint thus makes factual allegations that UPS engaged in conduct which rise to the high level of moral culpability to support a claim for punitive damages (*cf. Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744, 745 [3d Dept 2006]). At this juncture, before discovery, and accepting the facts as alleged in the complaint as true, it is premature to dismiss the complaint under CPLR 3211 (a) (7).

With respect to plaintiffs’ seventh cause of action for punitive damages under ETPL 5-4.3, New York State does not recognize an independent cause of action to recover punitive damages (*see Dixon v William Floyd Union Free Sch. Dist.*, 136 AD3d 972, 973 [2d Dept 2016]; *Stein v Doukas*, 98 AD3d 1024, 1026 [2d Dept 2012]). Here, plaintiff erroneously pleads the request for punitive damages as a separate cause of action, which should therefore be dismissed.

Defendants also seek to dismiss the sixth cause of action insofar as it seeks damages for non-pecuniary losses. Specifically, defendants argue that the allegation (in ¶73) that plaintiffs “sustained great pecuniary loss . . . including . . . loss of guidance [and] counsel . . .” are not pecuniary damages that may be claimed by plaintiffs. Defendants also seek to dismiss the complaint as asserted by plaintiff individually.

A personal representative who has obtained letters of administration to administer a decedent’s estate is the only party who is authorized to commence an action to recover damages for conscious pain and suffering sustained by the decedent, or a wrongful death action to recover the pecuniary loss sustained by the decedent’s distributees on account of his

or her death (*Jordan v Metropolitan Jewish Hospice*, 122 AD3d 682, 683 [2d Dept 2014]; see also *Ambroise v Uniteod Parcel Serv. of Am., Inc.*, 143 AD3d 929, 932 [2d Dept 2016]; *DeLuca v Gallo*, 287 AD2d 222, 225 [2d Dept 2001]; EPTL 5-4.1 [1]). “While other States now permit recovery for loss of society, New York since its first wrongful death statute, has steadfastly restricted recovery to ‘pecuniary injuries,’ or injuries measurable by money, and denied recovery for grief, loss of society, affection, conjugal fellowship and consortium” (*Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 667-668 [1991]). “[T]he essence of the cause of action for wrongful death in this State is that the plaintiff’s reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent’s death (*id.* at 668). EPTL § 5-4.4 provides that when the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents are deemed to be distributees for purposes of distribution under this section. Where the beneficiaries of the action are a decedent’s parents, the pecuniary injuries include loss of their child’s support and services (*Parilis v Feinstein*, 49 NY2d 984, 985 [1980]; *Johnson v Richmond Univ. Med. Ctr.*, 101 AD3d 1087, 1088 [2d Dept 2012]; *DeLuca v Gallo*, 287 AD2d at 228).

Plaintiff does not seek non-pecuniary losses such as grief or loss of society.<sup>1</sup> Insofar as plaintiff seeks damages for loss of guidance or counsel, this type of pecuniary loss is only allowed for decedent’s children (*see* PJI 2:320). Therefore the sixth cause of action shall be limited to pecuniary damages to the extent that plaintiff is making any claim for loss of

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<sup>1</sup> See plaintiff’s affirmation in opposition, ¶ 44.

guidance or counsel. Finally, as noted above, a cause of action to recover damages for wrongful death should be brought on behalf of the decedent's distributees, not a distributee individually. Here, the complaint does not appear to assert any cause of action by plaintiff individually other than to assert that plaintiff and the decedent's estate suffered damages in the sixth cause of action. The complaint is therefore dismissed as asserted by plaintiff, Mohammed H. Ali, individually.

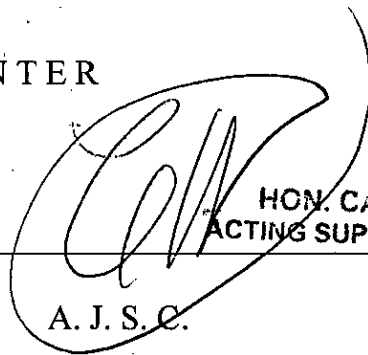
**ORDERED** that the branch of defendants' motion to dismiss plaintiff's fourth, fifth and seventh causes of action is **denied**; and it is

**ORDERED** that the branch of defendants' motion to dismiss the non-pecuniary losses claimed in plaintiffs' sixth cause of action is **granted**; and it is

**ORDERED** that the complaint as asserted by plaintiff Mohamed H. Ali, individually, is hereby dismissed, and the action severed accordingly.

This constitutes the decision and order of the court.

ENTER



HON. CAROLYN E. WADE  
ACTING SUPREME COURT JUSTICE

A. J. S. C.

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