Krehl v Siberio
2020 NY Slip Op 34865(U)
June 2, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 622514/17
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

ORIGINAL

ELISA KREHL, as Administratrix of the ESTATE OF DANIEL KREHL,

Plaintiff,

-against-

WILLIAM SIBERIO, COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, and ANTHONY W. MILLS,

Defendants.

Index No.
622514/17

Motion Seq:
005 MG
006 MG

Decision/Order

The following electronically-filed papers were read upon this motion:

Notice of Motion 89-104; 105-18
Answering Papers.....123-31
Reply.....132; 133
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

The defendants each move this Court for summary judgment dismissal of the complaint and all cross-claims as asserted against them in this negligence/wrongful death action arising from a motor vehicle accident in which plaintiff's decedent, Daniel Krehl, drove into the rear of a tractor trailer parked on the shoulder of Montauk Highway, Suffolk County, New York.

Defendant Siberio, the owner and operator of the tractor trailer, asserts that he is free from any liability for the happening of the accident and that the sole proximate cause of the accident was due to Daniel Krehl's speeding and driving while intoxicated on February 23, 2017, at approximately 2:35 a.m., under foggy weather conditions (Motion Sequence 005).

The Suffolk County defendants similarly maintain that the sole proximate cause of the fatal accident was due to Daniel Krehl's own conduct, that the County defendants were not involved in the

accident, that they had no duty to Daniel Krehl, nor did they owe him any special duty (Motion Sequence 006).

It is undisputed that there are no eyewitnesses to the accident. Siberio, who was in the sleeper portion of the tractor, became aware of the accident when he heard a noise and felt an impact to his tractor trailer. Officer Mills saw Daniel Krehl speed past him proceeding eastbound on Montauk Highway (Route 80). The officer was proceeding in a westbound direction when he saw Krehl's car speed past him in the opposite direction. By the time the officer was safely able to turn his car around and proceed in an eastbound direction to stop Krehl, Krehl's vehicle's taillights were no longer visible. Officer Mills nevertheless proceeded eastbound on Montauk Highway and shortly came upon the accident scene. The front of Krehl's vehicle was wedged underneath the rear of Siberio's trailer. Daniel Krehl was pronounced dead at the scene of the accident.

Summary Judgment Standard

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

Proximate Cause and Death Case Considerations

"Though negligence and proximate cause frequently overlap in the proof and theory which support each of them, they are not the same conceptually. Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint" (***Sheehan v. City of New York***, 40 NY2d 496, 501 [1976]). Although the issue of proximate cause is generally one for a jury to decide, where the party merely furnishes the condition or occasion for the occurrence of the event, rather than its cause, there is no liability (***Kante v. Tong Fei Chen***, 176 AD3d 928, 929-930 [2d Dept 2019]; ***Margolin v. Friedman***, 43 NY2d 982 [1978], *citing* ***Sheehan***, ***supra*** at 503; ***Schmidt v. Policella***, 43 AD3d 1141 [2d Dept 2007]; ***Wechter v. Kelner***, 40 AD3d 747 [2d Dept 2007]; ***Ely v. Pierce***, 302 AD2d 489 [2d Dept 2003]). When only one conclusion may be drawn from the established fact, proximate cause may be determined as a matter of law (***Canals v. Tilcon New York, Inc.***, 135 AD3d 683 [2d Dept 2016]).

Although it is the defendants that seek summary judgment dismissal at this juncture, and it is the defendants who bear the initial burden of establishing their entitlement to summary judgment, it bears noting that, "in a death case plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence (citations omitted). Plaintiff'[s] evidence is deemed sufficient to make out a prima facie case if it shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (citations omitted) ***Wragge v. Lizza Asphalt Constr. Co.***, 17 NY2d 313, 320 [1966]; ***Noseworthy v. New York***, 298 NY 76, 80 [1948]). Where negligence cannot "legitimately [be] inferred," however, even in a death case, a defendant should not be held liable (*see* ***White v. Lehigh V.R. Co.***, 220 NY 131, 136 [1917]).

William Siberio's Motion (Sequence 005)

In support of his motion, he submits, *inter alia*, the pleadings, the deposition transcripts of the parties, the non-party deposition transcript of Daniel Krehl's fiancée, police accident reports, police reports, the autopsy report and the crash data retrieval report generated by the "black box" recovered from Krehl's vehicle.

The pleadings essentially allege that Siberio illegally parked his tractor trailer on the shoulder of Montauk Highway, violated the vehicle and traffic laws of the State of New York, as well as regulations and safety provisions concerning vehicles involved in interstate commerce, failed to display any type of warning, lights or other devices to alert other motorists of his position, failed to equip his tractor trailer with safety devices preventing vehicles from going under the rear portion of the trailer, failed to comprehend an imminently dangerous situation, and failed to take the necessary steps to remedy the situation.

The submitted evidence, however, is devoid of any indication that Siberio was illegally parked on the shoulder of the roadway, nor is there any evidence that his trailer was not equipped with the device/bar that is designed to prevent vehicles from going under the rear portion of a trailer (underride guard). In fact, the evidence establishes that his trailer was properly equipped with the aforementioned safety device and lights, flashers and reflectors, that the lights were illuminated at the time of the crash, and that Siberio's tractor trailer was parked on the shoulder, next to the curb and approximately three to four feet from the solid white line separating the shoulder from the roadway. Moreover, Siberio never received any tickets/summonses from the police who responded to the accident scene.

Siberio's trailer was loaded with mulch that he was slated to deliver to a nursery located on Montauk Highway on February 23, 2017. Siberio was unfamiliar with the area, and there was a substantial amount of fog when he arrived in the vicinity of the nursery at approximately 11:00 p.m. on February 22, 2017. When Siberio realized that he had passed the nursery where he was to deliver the mulch early in the morning, he determined that he would simply park his tractor trailer on the shoulder of the roadway rather than risking making a U-turn on Montauk Highway in the fog. Siberio parked on the eastbound shoulder of the roadway. He testified that he kept his lights and flashers on the entire time he was on the shoulder. He was watching television inside the sleeper compartment of the tractor. At

approximately 2:30 a.m. on February 23, 2017, he became aware of the accident when he heard a "bang." As William Siberio alit from the tractor, the police were already present.

Mr. Siberio also testified that he had extra red and white reflectors on the rear door of the trailer, in addition to the reflectors required by the Department of Transportation. Furthermore, approximately one to two years before the subject accident, he had the metal device installed on the rear of his trailer to prevent a vehicle from going under the trailer in case someone were to strike the trailer in the rear (an underride guard).

Prior to the subject accident's occurrence, Officer Mills of the Suffolk County Police Department was on routine patrol. He observed Mr. Siberio's tractor trailer parked on the shoulder of Montauk Highway/County Route 80. Officer Mills noticed the tractor trailer approximately twenty (20) minutes or more prior to the accident, and he may have observed it twice during that time span. He testified that he remembered saying to himself when he first saw it "Oh, look at the truck. He wants to be seen. It's parked under a streetlight. It has its parking lights on. That's awesome." When Officer Mills made that observation, he traveled past it going westbound on Montauk Highway, and he had no problem seeing the tractor trailer despite the foggy conditions.

Also shortly prior to the accident, as Officer Mills was traveling westbound on the highway, he testified that he was keeping his eye on a gas station where there had been a number of "break-ins, disturbances." As he looked toward the gas station, he saw the headlights of an oncoming vehicle headed eastbound that ultimately turned out to be Mr. Krehl's vehicle. According to the officer, he did not think anything of the oncoming vehicle until he "felt the vehicle zoom fast past" him; the vehicle was "going fast." At that point, Officer Mills turned and saw the vehicle's taillights and Officer Mills decided that he was going to stop that vehicle. In order to stop the vehicle, Officer Mills had to execute a U-turn. Knowing that the convenience store/gas station was open twenty-four (24) hours and that there could be traffic as a result, Officer Mills made sure that traffic was clear before he made the U-turn. When he completed the U-turn, Officer Mills could no longer see the taillights of the vehicle that he intended to stop; "It was gone." Officer Mills nevertheless proceeded eastbound on Montauk Highway, intending to intercept the vehicle at a traffic light; however, he shortly came upon the tractor trailer that he had observed earlier. The tractor trailer still had its parking lights on, but "there was something in the back that . . . shouldn't have been there." That "something" was Mr. Krehl's vehicle in/under the rear of the trailer.

Officer Mills further testified that he did not observe any skid marks on the roadway at the accident scene, and that the speed limit on that roadway changes from thirty (30) miles per hour (mph) to perhaps thirty-five (35) mph. Officer Mills testified that he did not issue any traffic citation to Mr. Siberio and the police accident report also reflects that no tickets were issued. Moreover, the annexed certified police reports prepared by the investigating detective indicate that the tractor trailer was inspected, and no deficiencies related to this incident were noted.

The submitted autopsy report containing the toxicology results reveals that Mr. Krehl's femoral blood alcohol content was .29% and his brain tissue revealed a blood alcohol content of .27%. Elisa Krehl, decedent's mother, testified that she learned from the autopsy report that his blood alcohol level was ".28 or something." Vehicle and Traffic Law § 1192.2 provides that an individual is driving while

intoxicated, per se, when he or she operates a motor vehicle while having .08 of one percentum or more by weight of alcohol in their blood; therefore, Mr. Krehl was operating his vehicle at the time of the accident with more than three times the legal limit of alcohol in his blood.

The certified crash data retrieval report revealed that one second before the airbag control module recorded a deployment decision event, the speed of Mr. Krehl's vehicle was seventy-two (72) mph and the brake was recorded as being "OFF." The module also revealed that the brake was "OFF" from eight seconds before the deployment decision to one second before the deployment decision.

Based upon the evidence presented by defendant William Siberio, he has established that he merely furnished the condition or occasion for the accident but was not a proximate cause thereof. Mr. Krehl was apparently speeding eastbound on Montauk Highway at more than twice the legal speed limit, and while his blood alcohol level was more than three times the legal limit for driving while intoxicated. Moreover, he never even applied his brakes when he left the roadway. Whether he was conscious or unconscious during the moments before the crash cannot be known, nor will it ever be known what he may or may not have observed prior to the crash; yet, even viewing the evidence in the light most favorable to the plaintiff, that evidence establishes, *prima facie*, that the sole proximate cause of the accident was the plaintiff's loss of control of his own vehicle resulting from his intoxication and excessive speed (*see* ***Kante***, 176 AD3d at 929-930; ***Wechter***, 40 AD3d at 748; ***Arumugam v. Smith***, 277 AD2d 979 [4th Dept 2000]; Nieves v. City of New York, 63 AD2d 1000 [2d Dept 1978]).

In opposition to William Siberio's motion, plaintiff submits, *inter alia*, counsel's affirmation, photographs of the trailer, various sections of the Code of Federal Regulations (CFR), and the affidavits of two individuals not previously disclosed to the defendants during the course of discovery.

The affidavits of Damian Digiacomo and Kara Pedrone are each sworn to on February 21, 2020 and February 19, 2020, respectively. The Note of Issue and Certificate of Readiness in this matter was filed on May 22, 2019. Since these witnesses are disclosed for the first time in opposition to the instant summary judgment motion, after discovery was certified by plaintiff as completed, in its discretion, this Court refuses to consider the affidavits of these individuals absent any excuse for the failure to previously disclose them, let alone a valid excuse (***Awai v. Benchmark Construction Service, Inc.***, 172 AD3d 978 [2d Dept 2019]; ***Gallway v. Muintir, LLC***, 142 AD3d 948 [2d Dept 2016]; ***Henry v. Higgins***, 117 AD3d 796 [2d Dept 2014]).

Counsel's affirmation is not evidence and plaintiff offers no evidence at all contesting either the blood alcohol results contained in the autopsy/toxicology report, or the crash data retrieval report. In fact, counsel acknowledges that the "crash report from the black box of the vehicle indicate[s] a maximum speed of 72 mph in the eight seconds preceding the crash (Exhibit M to the moving papers)." Counsel also acknowledges that "travelling 72 mph on Montauk Highway would constitute a speeding ticket. . ."

Mr. Krehl's fiancée's testimony that she and Mr. Krehl bought a bottle of wine earlier in the evening, and that each of them had a glass from approximately 6:30 p.m. until 12:30 a.m. prior to her going to bed at 12:30 a.m. is unavailing and insufficient to raise a question of fact as to intoxication. Ms. Collins never saw Mr. Krehl after 12:30 a.m. and had no idea where he had gone or what he had done after she fell asleep.

Plaintiff also offers no evidence contradicting or raising an issue of fact as to whether Mr. Siberio had an underride guard installed on the rear of his trailer well prior to the accident. Emblematic of the impermissible speculation woven throughout the opposition, plaintiff's counsel poses the question, "if the guard was present, how did the deceased plaintiff's vehicle windup (sic) almost completely underneath the trailer?" Not only is this speculative, but plaintiff offers no evidence at all as to whether the underride guard would have stopped the plaintiff's vehicle that was travelling unimpeded at 72 mph. Also, the photographs of the plaintiff's car under the trailer submitted by plaintiff in opposition depict a portion of the underride guard that remained following the accident.

Plaintiff's claims concerning Mr. Siberio's trucker logbook is also unpersuasive, in addition to the fact that the logbook is utterly irrelevant to where Siberio was parked on the shoulder of the roadway. Plaintiff's reference to the Vehicle and Traffic Law as relates to parking is also inapposite as there is no evidence that Mr. Siberio was illegally or improperly parked, or jutting into the roadway, or that he was issued any summonses by the police. Moreover, as noted, the tractor trailer was inspected after the accident and no deficiencies were noted as related to the subject accident; accordingly, plaintiff's references to the CFR are unsupported and speculative. As to plaintiff's counsel's claim that the deceased plaintiff's representatives did not have an opportunity to inspect the trailer, Siberio replies that plaintiff's predecessor counsel was advised that the *decedent's* insurance carrier paid for the trailer and took possession of it; thus, it could have been inspected by plaintiff.

Mindful that this is a death case and that greater latitude can be given to plaintiff when inferring negligence, the circumstances of this case and plaintiff's opposition are still insufficient to raise a triable issue of fact and defeat William Siberio's summary judgment motion. There is no reasonable inference that can be drawn from the evidence that this accident was due to Siberio's conduct, either in whole or in part. Allegations of negligence do not raise issues of fact requiring a trial unless there is a demonstration that such negligence was a proximate or concurring cause of the accident (*see* ***Tomassi v Town of Union***, 46 NY2d 91 [1981]; *see also*, ***Lomnitz v Town of Woodbury***, 81 AD2d 828 [2d Dept 1981]). "[S]peculation is not a substitute for proof." (***1A Warren, NY Negligence, § 6.10, pp 242-243***).

Accordingly, William Siberio's summary judgment motion is granted in its entirety, and the complaint and all cross-claims are dismissed as against him.

The County Defendants' Motion (Sequence 006)

The County defendants submit essentially the same evidence as submitted by William Siberio, including the pleadings, party transcripts, police accident report and autopsy report, thereby establishing that Mr. Krehl was speeding and driving while intoxicated when the accident occurred.

The pleadings relative to the County defendants essentially allege that they did not properly patrol the area, that they failed to be apprised of the illegally parked tractor trailer presenting a hazard, that they failed to issue a citation to Siberio and have him move his tractor trailer, and that they failed to take necessary steps to intercept or stop the plaintiff's decedent, and/or to protect plaintiff's decedent.

The provision of police protection is a governmental function, and "although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care

running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created" (***Valdez v. City of New York***, 18 NY3d 69, 75 [2011]). "The elements of this 'special relationship' are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (***Cuffy v. City of New York***, 69 NY2d 255, 260 [1987]).

Furthermore, "the common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions" (***Valdez***, ***supra*** at 75-76). "In other words, even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority. It is also clear from our precedent that the governmental function immunity defense cannot attach unless the municipal defendant establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated (***Id***. at 76).

As established by the testimony of Officer Mills set forth above, it is established that the County had no vehicle involved in the accident, that Officer Mills determined to stop Mr. Krehl as soon as he observed Mr. Krehl "zoom" past him in the opposite direction, but that due to Krehl's excessive rate of speed, Officer Mills was not able to stop him before the accident occurred. It is also established that Officer Mills did not issue any traffic summonses to William Siberio. In fact, Officer Mills noticed that Mr. Siberio's tractor trailer was parked fully on the shoulder of the roadway, that its parking lights were on, and that it was parked under a streetlight. Officer Mills also testified that he is empowered to issue a citation at his sole discretion.

There is absolutely no evidence that there existed a special duty or special relationship between plaintiff's decedent and the County defendants. There was no promise or action indicating a duty to act on Krehl's behalf; there was no form of direct contact between Officer Mills and Krehl prior to the accident; accordingly, Krehl could not have place any justifiable reliance on alleged affirmative undertaking by the County defendants. In any event, there is no evidence that Officer Mills on behalf of the County defendants committed any negligence. Furthermore, as it was in Officer Mills' discretion whether to issue a citation to anyone and he was performing a purely governmental function, the County defendants have established their *prima facie* entitlement to summary judgment on the basis of governmental immunity as well.

Further as established by the submitted evidence, and as discussed in connection with William Siberio's motion, the sole proximate cause of the accident was the plaintiff's loss of control of his own vehicle resulting from his intoxication and excessive speed.

Plaintiff submits the same exhibits as those submitted in opposition to William Siberio's summary judgment motion. For the same reasons as those discussed in connection with Siberio's motion, the Court will not consider the affidavits of the two previously undisclosed witnesses.

Plaintiff argues with respect to the County defendants that "Officer Mills had a duty to enforce the law and protect motorists from violations of the Vehicle and Traffic Laws of the State of New York," and claims that the officer "was clearly unaware of the relevant law and admittedly failed to enforce it." Plaintiff refers to an alleged failure of Officer Mills to ticket Mr. Siberio for illegally parking his tractor trailer. Plaintiff's position is unsupported by any legal authority.

Officer Mills testified that he was familiar with Section 1200 of the Vehicle and Traffic Law, prohibited parking, which is the gravamen of plaintiff's argument. Although he testified that he was not familiar with the other specific sections related to parking, his deposition testimony clearly establishes that it was his determination that Siberio's tractor trailer was parked on the shoulder, properly lit with its parking lights on and parked under a street light, such that the officer was pleased, remarking to himself that, "[h]e wants to be seen. . .That's awesome."

There is nothing else in plaintiff's opposition that raises a triable issue of fact, either as to negligence or governmental function/immunity. As with Mr. Siberio's motion, the Court affords the plaintiff greater latitude when inferring negligence due to plaintiff's death; however, the circumstances of this case and plaintiff's opposition are still insufficient to raise a triable issue of fact and defeat the County defendants' summary judgment motion. There is no reasonable inference that can be drawn from the evidence that this accident was due to the County defendants' conduct, either in whole or in part.

Accordingly, the County defendants' summary judgment motion is granted in its entirety, and the compliant and all cross-claims are dismissed as alleged against those defendants.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 2, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE CS

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]