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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL PART: 50**

LINDA SAEGERT, as Executrix of the Estate of VICTORIA SARAFINO,

INDEX NO.: 12419/04

Plaintiff,

MOTION DATE:5-15-06
SUBMIT DATE: 7-17-06
SEQ. NUMBER - 001

-against-

GERARD SIMONELLI and KAREN SIMONELLI,

Defendant

----------x

The following papers have been read on this motion:

Notice of Motion, dated 4-3-06.....1
Affirmation in Opposition, dated 6-15-06.....2
Reply Affirmation, dated 7-10-06.....3

Upon the foregoing papers it is ordered that this motion by the defendants for summary judgment pursuant to CPLR 3212 is granted to the limited extent that the cause of action sounding in wrongful death is dismissed insofar as asserted by the plaintiff Linda Saegert on her own behalf, and is otherwise denied.

This is a personal injury and wrongful death action that is based upon the death of plaintiff's decedent, Victoria Sarafino, which resulted from her being struck by an

automobile being driven by defendant Gerard Simonelli. The essential facts of how the accident occurred are not disputed. At approximately 10:00 p.m. on March 25, 2003 Simonelli and coworkers, including one Craig Bergen, left their place of business to go home, and turned north on to Franklin Avenue in Franklin Square, New York. They were driving north at about 25 to 30 miles per hour, roughly side-by-side, in the two northbound lanes. Bergen was in the left northbound lane, Simonelli in the right. North of Franklin Avenue's intersection with Linden Street, Sarafino, a pedestrian, attempted to cross from the other side of this four-lane road. She was not in a crosswalk. Bergen apparently saw her and managed to slam on his brakes in time to avoid hitting her. However, Simonelli testified that he did not see her until she appeared in front of him because Bergen's vehicle obstructed his view, and she was struck by his car. She was alive when she was taken to a nearby hospital, but unfortunately expired approximately three hours later, in the early morning of March 26, 2003.

Initially, the Court finds that the plaintiff as executrix has the standing to bring this action, except insofar as she asserts a claim for wrongful death on her own behalf. There is no dispute that the plaintiff and Sarafino were same-sex domestic partners who had lived together for some 17 years prior to the latter's death. The Appellate Division, Second Department, has ruled that a same-sex partner, as executor, has no standing to sue in wrongful death on the partner's own behalf because such a person is not a "distributee" under the relevant sections of the Estates, Powers and Trusts Law (*Langan v St. Vincent's Hosp.*, 25 AD3d 90 [2005]). This Court is, of course, bound by that determination in the instant

case, especially in view of the more recent decision of the Court of Appeals upholding the current New York State ban on same-sex marriage (*Hernandez v Robles,* _NY3d_, Slip Op. 05239, 2006 WL 1835429 [2006]). *Langan*'s holding is based on making a legal distinction between same-sex partners and heterosexual spouses, and *Hernandez* makes it clear that until the Legislature changes matters such a distinction may be made. Accordingly, the plaintiff, whose status as a distributee is based on her same-sex relationship with the decedent, cannot assert such a claim. The fact that the plaintiff was sole beneficiary under the will – except for a series of one dollar bequests to members of the decedent's family – is irrelevant, as wrongful death damages, a creature of statute, pass outside the estate to statutory distributees (EPTL 5-4.4(a); *Rakta v St. Francis Hosp.,* 44 NY2d 604, 609; *Matter of Rodriquez,* 3 Misc 3d 1049 [2004]).

However, the *Langan* court did not discuss (and apparently had no reason to discuss) the plaintiff's standing as executor to bring a wrongful death action on behalf of statutory distributees, even if the executor himself would be disqualified (*see* EPTL 5-4.1; EPTL 4-1.1). In this case, the amended complaint alleges that such distributees exist. The defendants' moving papers have failed to address, much less disprove, that such distributees exist, or that they have suffered no pecuniary loss (EPTL 5-4.3(a)). Accordingly, under well-established rules applicable to summary judgment motions they have failed to make out a *prima facie* case that they are entitled to judgment as a matter of law dismissing the wrongful death claim to the extent it is alleged to exist in favor of named statutory distributees, requiring denial of the motion without regard to the strength of the opposing papers (*see, e.g.,*

Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985]). The arguments and references to the will of plaintiff's decedent made in the movants' reply papers cannot serve to correct this fatal defect in the moving papers (*Agwin v SRF Partnership, LP*, 28 AD3d 593 [2006]; *Adler v Suffolk County Water Auth.*, 306 AD2d 229 [2003]).

The plaintiff as executrix also has standing to bring the related, but distinct, action for personal injuries. If an occurrence causes the death of the injured party before an action is commenced, a personal representative of the estate may bring suit for such personal injuries, which may include damages for pain and suffering; any recovery would belong to the estate (*Rakta v St. Francis Hosp.*, 44 NY2d 604, 609, *supra*). As sole estate beneficiary under the will, the plaintiff herself may recover under this theory.

The Court now addresses the second basis advanced by the defendants, that the action must still be dismissed because Gerard Simonelli, whose automobile struck the plaintiff's decedent, was not negligent as a matter of law.

Initially, the Court cannot agree with the plaintiff that the proof advanced by the defendants is deficient because they rely on Gerard Simonelli's deposition testimony and that of a non-party witness, Craig Bergan, who as noted above was driving his own car next to the defendant's when the accident occurred. In a footnote, the plaintiff cites to CPLR 3117(a) and asserts that neither transcript is acceptable as proof because defendants have not submitted affidavits and have not been able to meet the statutory requirements for their use contained in that statute. It is well-established that proof on a summary judgment motion may be advanced by way of deposition transcripts annexed to an attorney's affirmation (*see, e.g., Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Rivas v Metropolitan Sub. Bus. Auth.*, 203

AD2d 349 [1994]) – especially where, as here, the transcripts are signed by the deponents and notarized. This Court agrees with the analysis of the Appellate Division, First Department which held that CPLR 3212 trumps CPLR 3117 when summary judgment motions are made. It is only where a motion results in an actual hearing that the proscriptions against the use of a party's own EBT might apply (*State of New York v Metz,* 241 AD2d 192, 196-197 [1998]). In any event, as no authority emanating from the Appellate Division, Second Department expressing a contrary view has been presented by the defendants, and the Court's own research has found none, the Court is bound to follow the Appellate Division, First Department (*Mountain View Coach Lines v Storms,* 102 AD2d 663 [1984]).

Turning to the merits, the description of the accident found in the depositions of Simonelli and Bergen make out a *prima facie* showing that defendants are entitled to judgment as a matter of law. The testimony establishes that Gerard Simonelli was not operating his vehicle in a negligent manner, and that the accident was caused by the sudden and unanticipated appearance of plaintiff's decedent in front of him, giving him no time to react and avoid the accident. This shifts the burden to the plaintiff to come forward with proof in admissible form creating issues of fact that merit a trial (*see, e.g., Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]).

However, viewing plaintiff's submission, as it must, in a light most favorable to her as the motion opponent (*see, Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 [2003]), the Court finds that she has met her burden. Specifically, she has submitted the affidavit of Mark Marpet, Ph.D., a Professional Engineer who has experience in the reconstruction of vehicular

and pedestrian accidents. Based upon his analysis of photographs taken at the scene, deposition testimony and other information, he concludes that Simonelli's view of Sarafino as she attempted to cross was not blocked by the Bergen vehicle, which as noted above managed to stop in time. This puts in issue the defendant's assertion that, in effect, he could not be charged with negligence for not seeing Sarafino as she attempted to cross (*see Spicola v Piracci,* 2 AD3d 1368 [2003]; *Levy v Town Bus Corp.,* 293 AD2d 452 [2002]). The expert's statement, combined with the undisputed fact that Sarafino was crossing from the other side of a wide roadway and did not suddenly step out in front of Simonelli from behind or between vehicles on his right, distinguishes the case from those where the pedestrian's sudden appearance gave the defendant driver no opportunity to see the plaintiff or to avoid the accident (*cf., Sheppeard v Murci,* 306 AD2d 268 [2003]; *Sae Hyun Kim v Mirisis,* 286 AD2d 761 [2001]; *Miller v Sisters of the Order of St. Dominic,* 262 AD2d 373 [1999]).

Finally, the defendants are not entitled to summary judgment dismissing the claim for personal injuries on the ground that plaintiff's decedent did not experience any conscious pain and suffering. Even assuming that defendants met their initial burden by way of the accident witnesses' observation of Sarafino as being unconscious, the plaintiff has met her own burden (*Zuckerman v City of New York,* 49 NY2d 557, 562, *supra*).

She presents her own affidavit, in which she states that she saw Sarafino in the hospital after the accident and that Sarafino squeezed her hand when the plaintiff spoke to her, indicating that Sarafino was conscious. In addition, the plaintiff submits the affirmation of a forensic pathologist, Louis S. Roh, M.D. Upon review of medical records and other proof, he concluded that the decedent died from subarachnoid hemorrhages and subsequent

herniation of the brain, which took time to develop; she was pronounced dead some three hours after the accident, which took place, as noted above, at about 10 p.m. "The presence of normal vital signs until 12:01 a.m., 3/26/03 clearly indicates that she was alive and conscious... It is my opinion... that Ms. Victoria Sarafino was alive and feeling excruciating pain, fear of impending death, helplessness, anxiety and fainting sensation for approximately 2 hours before she lapsed into coma" (Roh Aff., at 2-3). Accordingly, issues of fact are presented with regard to this claim that precludes summary judgment (*see Geller v Aza Taxi, Ltd.*, 282 AD2d 287 [2001]).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 1, 2006

HON. DANIEL PALMIERI

Acting Supreme Court Justice

ENTERED

AUG 0 3 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Kurzman, Karelsen & Frank, LLP
Attorneys for Plaintiff
230 Park Avenue, 23rd Floor
New York, NY 10169

Martyn, Toher and Martyn, Esqs.
Attorneys for Defendant
By: David C. Smith, Esq.
1983 Marcus Avenue
New Hyde Park, NY 11042