

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Kwipu v. Sontag

2022 NY Slip Op 02067 (App. Div. 2022) · No. Appeal No. 15596; Case No. 2021-03595; Index No. 30261/18E · Decided March 24, 2022

SUMMARY

The Appellate Division, First Department affirmed an order granting the plaintiff summary judgment on liability and dismissing the defendants' affirmative defenses. The court held that the decedent was negligent for leaving an unattended vehicle in neutral without engaging the parking brake, and that the defendants failed to raise a triable issue regarding plaintiff's culpable conduct, assumption of risk, or the emergency doctrine.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Kern, J.P.; Moulton, J.; Rodriguez, J.; Pitt, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	March 24, 2022
DOCKET	Appeal No. 15596; Case No. 2021-03595; Index No. 30261/18E
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order of Supreme Court, Bronx County, granting her motion for summary judgment on liability and dismissing the affirmative defenses of assumption of the risk, contributory negligence, culpable conduct, and unanticipated emergency.
STANDARD OF REVIEW	Summary judgment is proper where the movant establishes entitlement to judgment as a matter of law and the opposing party fails to raise a genuine issue of fact; the appellate court reviewed whether defendants raised an issue of fact in opposition.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Neomy-Miny Kwipu v. Howard Sontag and Gary Topche as Executors of the Estate of Leonard Weisman

TOPICS

negligence

standard of care

summary judgment

affirmative defenses

appellate procedure

PRACTICE AREAS

negligence

personal injury

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether plaintiff established prima facie entitlement to summary judgment on liability based on the decedent's failure to secure the unattended vehicle.
2. Whether defendants raised an issue of fact regarding negligence or proximate causation.
3. Whether defendants raised issues of fact supporting the affirmative defenses of assumption of the risk, contributory negligence, culpable conduct, or the emergency doctrine.

HOLDINGS

1. Plaintiff established prima facie that the decedent was negligent because he left the vehicle unattended, in neutral, and without engaging the parking brake, thereby failing to secure it against movement. Defendants failed to raise an issue of fact.
2. Defendants failed to raise an issue of fact supporting assumption of the risk, contributory negligence, or culpable conduct because they submitted no evidence that plaintiff engaged in conduct contributing to the accident or assumed the risk of being struck by a vehicle while walking on the sidewalk.
3. Defendants failed to raise an issue of fact under the emergency doctrine because they submitted no evidence that the events giving rise to the accident were not of the decedent's own making.

FACTUAL BACKGROUND

A vehicle owned or operated by defendants' decedent was left unattended in a gas station parking lot, in neutral and without the parking brake engaged. The vehicle rolled from the gas station onto the sidewalk and struck plaintiff, a pedestrian, from behind, causing her injuries. Although the decedent testified that the vehicle was parked on a flat surface, plaintiff's experts opined that the lot had a five-percent grade incline.

PROCEDURAL HISTORY

Supreme Court, Bronx County, entered an order on May 7, 2021 granting plaintiff summary judgment as to liability and dismissing the specified affirmative defenses. The Appellate Division, First Department, unanimously affirmed the order to the extent appealed from.

DISPOSITION

affirmed

CASES CITED

- Franco v. City of New York, 168 A.D.3d 543 (1st Dep't 2019)

- Stewart v. Ellison, 28 A.D.3d 252, 254 (1st Dep't 2006)

OPINION

PER CURIAM.

Kwipu v Sontag (2022 NY Slip Op 02067) Kwipu v Sontag 2022 NY Slip Op 02067 Decided on March 24, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: March 24, 2022 Before: Kern, J.P., Moulton, Rodriguez, Pitt, Higgitt, JJ. Index No. 30261/18E Appeal No. 15596 Case No. 2021-03595 [*1]Neomy-Miny Kwipu, Plaintiff, vHoward Sontag and Gary Topche as Executors of the Estate of Leonard Weisman, Defendants.

Camacho Mauro Mulholland, LLP, New York (Kathleen M. Mulholland of counsel), for appellant. Anthony V. Gentile, Brooklyn, for respondent. Order, Supreme Court, Bronx County (Veronica Hummel, J.), entered May 7, 2021, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability and dismissing the affirmative defenses of assumption of the risk, contributory negligence, culpable conduct, and unanticipated emergency, unanimously affirmed, without costs.

Plaintiff established prima facie that her injuries were proximately caused when defendant decedents' car, which was left unattended, rolled out of a gas station and onto the sidewalk, where it struck plaintiff, a pedestrian, from behind.

Although defendant decedent testified that he was parked on a flat surface, plaintiff's experts opined that the gas station parking lot was on a 5% grade incline. This discrepancy is of no moment, as defendant decedent testified that he left his car unattended, in neutral, without engaging the parking brake. This testimony clearly established that defendant decedent was negligent in failing to secure the unattended vehicle to prevent it from moving (see *Franco v City of New York*, 168 AD3d 543 [1st Dept 2019]; Vehicle & Traffic Law § 1210[a]).

In opposition, defendants failed to raise an issue of fact. Defendants also failed to raise an issue of fact as to any of the affirmative defenses. They submitted no evidence that plaintiff engaged in any culpable conduct or that any such conduct played a part in the accident or that by walking on the sidewalk plaintiff assumed the risk of being struck from behind by a car.

As to the emergency doctrine, defendants submitted no evidence that the events that gave rise to the accident were not of the decedent's own making (see *Stewart v Ellison*, 28 AD3d 252, 254 [1st Dept 2006]). THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: March 24, 2022

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