

By Elaine Colavito

Suffolk County Supreme Court

Honorable Joseph Farneti

Punitive damages awarded after inquest; where a defendant is charged with criminally negligent homicide and pleads guilty, courts found it appropriate to award punitive damages in the civil wrongful death lawsuit.

In *Debra Albrecht, individually and as the administratrix of the estate of Scott Albrecht v. Steven Tolar, Casandra Tolar, Lily Flanagans Pub, Niall, Inc., and Lily Flanagans II, Inc.*, Index No.: 4290/2011, decided on Oct. 3, 2016, plaintiff, individually and as the administratrix of the estate of Scott Albrecht, commenced this action to recover damages for the alleged wrongful death of plaintiff's decedent.

Upon review of the record, plaintiff alleged that on Dec. 17, 2010, the defendant Steven Tolar, while operating a motor vehicle after patronizing co-defendant's premises — Lily Flanagan's Pub — crossed over a marked divider and collided head-on with a vehicle driven by the decedent. As a result, the decedent sustained personal injuries and ultimately died on Dec. 18, 2010. On April 23, 2012, in his criminal matter, Mr. Tolar pleaded guilty

to second-degree manslaughter, second degree vehicular manslaughter, driving while intoxicated, and reckless driving. Based on same, summary judgment was granted as to liability in the instant civil matter, and an inquest hearing as to damages was held.

In addition to loss of income and the value of household services over the course of the decedent's potential lifetime, plaintiff also sought punitive damages. Punitive damages were awarded in the amount of \$750,000.00 with statutory interest at a rate of 9 percent commencing Dec. 20, 2012. In rendering its decision, the court noted that punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him as well as others who might otherwise be so prompted from indulging in similar conduct in the future. The court also stated that where a defendant is charged with criminally negligent homicide and pleads guilty, courts have found it appropriate to award punitive damages in the civil wrongful death lawsuit.



Elaine Colavito

Motion for protective order as to non-party deposition of defendant's wife denied; defendant during his deposition admitted to discussing the subject of the plaintiff's allegations with his wife.

In *Lorraine Fazio v. County of Suffolk, Suffolk County Police Department, and P.O. Shawn McHugh*, Index No.: 14531/2006, decided on Sept. 26, 2016, the court denied the defendant's motion for a protective order to depose the defendant's wife. In denying the application, the court noted that the Court of Appeals has held that the material and necessary standard is the appropriate one for determining what circumstances or reasons are required before disclosure from a non-party may be obtained pursuant to CPLR 3101(a)(4) and is in keeping with New York State's policy of liberal discovery. The court continued and said, despite the broad and expansive view adopted by the Court of Appeals, reasonable limits may be placed upon the extent and nature of the discovery tailored to individual cases.

Here, plaintiff offered two reasons for her request to depose the defendant's wife. The first was that defendant, during his deposition, admitted to dis-

cussing the subject of the plaintiff's allegations with his wife and, second, proffered testimony that the reason for defendant's phone call the day after the alleged incident was to inquire about the plaintiff speaking with a dog breeder concerning defendant's interest in purchasing a golden retriever dog for himself and his family. Consequently, the court concluded that plaintiff was permitted to depose the defendant's wife on questions limited to conversations concerning the incident and a limited inquiry concerning any intention on the part of the family or any discussion concerning the acquisition of a golden retriever.

Motion for summary judgment for return of rent paid denied; generally illegal contracts are unenforceable; right to recover under such a contract will not be denied if the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract and its denial is wholly out of proportion to the requirements of public policy.

In *Anthony Goodling and Jacqueline Fulop-Goodling v. Frank Penna and Maureen Penna*, Index No.: 20625/2015, decided on Jan. 9, 2017, the court denied

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plaintiffs' motion summary judgment and for a money judgment to the extent that plaintiffs sought to recover rent paid.

The court noted the facts as follows: Defendants were the owners of a single-family residence in Hampton Bays in Southampton. On or about May 27, 2015, defendants, as landlords, entered into a written agreement wherein plaintiffs, as tenants, agreed to lease the premises for the period from July 1, 2015 through Sept. 15, 2015 for the sum of \$82,500.00, which plaintiffs paid prior to taking possession of the premises.

Based upon the foregoing, in pertinent part, plaintiffs commenced this action for fraud in the inducement and violation of Southampton Town Code section 270-3. Plaintiffs now filed for summary judgment. In support of the application, plaintiffs contended and defendants did not dispute that the defendants did not have a valid rental permit for the premises from the town as required in Town Code. Plaintiffs argued that having a rental permit was a condition precedent to receiving rent. Defendants argued that it would be inequitable at this juncture to excuse plaintiffs from their obligation to pay rent after they enjoyed the benefits of the premises for the full term.

In denying this branch of this summary judgment motion, the court reasoned that generally, illegal contracts are unenforceable. However, where a contract violates a statutory provision in merely malum prohibitum, the right to recover under such contract will not be denied if the statute did not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy. In denying the application, the court concluded that here, the defendants raised questions of fact as to whether forfeiture was warranted under the circumstances.

Cross-motion for an order extending the time to serve and file an answer denied; defendant's contention that he did not know that he was supposed to file an answer to a complaint did not constitute a reasonable excuse for a default.

In *Lieb at Law, P.C. v. Terry Gjezo and Eli Gjezo*, Index No.: 20564/2015, decided on Oct. 12, 2016, the court denied the defendants' cross-motion for an order extending the time to serve and file an answer.

The court noted that the action was commenced on or about Nov. 30, 2015 to recover damages for a breach of contract relative to legal services provided by plaintiff to defendants. Plaintiff now filed a motion for a default judgment against defendants, alleging that defendants failed to appear or respond to the summons and verified complaint, and the

time to do so expired. Defendants alleged that they failed to answer the complaint herein as they are involved in multiple, ongoing lawsuits, and failed to recognize that the instant summons and complaint were for a new, separate suit. Therefore, defendants contended that they were unaware that they needed to answer the complaint.

In denying the cross-motion, the court found that the defendants failed to proffer a reasonable excuse for failing to respond to the summons and complaint in this action. The court reasoned that the Second Department has held that a defendant's contention that he did not know that he was supposed to file an answer to a complaint did not constitute a reasonable excuse for a default.

Honorable Arthur G. Pitts

Motion for summary judgment denied; issues of fact may exist as to whether any control was retained by the moving defendants as to the situs of the subject incident.

In *Dolores Cassel v. Dunkin' Brands Inc., Multibrands East/Dunkin Donuts, Dunkin Donuts, Martin J. Winter, and An-nemarie Winter*, Index No.: 5304/2016, decided on Jan. 17, 2017, the court denied defendants' motion for summary judgment.

The case was one sounding in negligence, which arose from an accident that occurred at a Dunkin Donuts store. Plaintiff claimed that while exiting the store, she tripped and fell over a rolled-up mat by the door and sustained a serious injury. Defendants moved for summary judgment averring that pursuant to a franchise agreement entered into between themselves as franchisor and co-defendant, Mr. Bruno, Inc., as franchisee, they did not operate, manage, supervise or control the subject restaurant and that it is in no way responsible for any acts of the co-defendants. In support of their motion, the moving defendants cited numerous cases that provided that there was no basis to impose liability on a franchisor unless it had retained the right to direct and control the premises of the franchisee.

In denying the motion, the court noted that no discovery had been exchanged by the parties and a preliminary conference had not yet been held. CPLR 3212 allows courts to deny a motion for summary judgment where it appears that the facts essential to oppose the motion exist but cannot then be stated. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. The court concluded that notwithstanding, the franchise agreement issues of fact may exist as to whether any control was retained by the moving defendants as to the situs of the subject incident. Accordingly, the motion was denied.

Honorable William B. Rebolini

Motion to compel; demands were overly broad, and should be limited to photographs taken of the scene of the accident, the defendant's vehicle, and the plaintiff's injuries.

In *Peter J. Denigris and Christopher Denigris v. Vicklyn C. Williams and EAN Holdings, LLC*, Index No.: 17953/2015, decided on June 5, 2017, the court granted the discovery motion to the extent provided therein. In deciding the motion, the court noted that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of burden of proof. The words "material" and "necessary," as used in section 3101, must be interpreted liberally to required disclosure upon request, of any facts bearing on the controversy, which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The court found that to the extent that the defendant sought production of

cell phone photographs taken on the date of the accident as well as plaintiffs' cell phones, such demands were overly broad, and should be limited to photographs taken of the scene of the accident, the defendant's vehicle, and the plaintiff's injuries.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.