

Rice v Graswald

2018 NY Slip Op 34161(U)

April 3, 2018

Supreme Court, Dutchess County

Docket Number: Index No. 52754/2017

Judge: James D. Pagonis

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
LAURA A. RICE, as Administrator of
the ESTATE OF VINCENT A. VIAFORE,
Deceased,

Plaintiff,

DECISION AND ORDER

-against-

Index No: 52754/2017

ANGELIKA GRASWALD a/k/a ANGELIKA
LIPSKA,

Defendant.

-----X

PAGONES, J D., A.J.S.C.

Plaintiff moves for an order, pursuant to CPLR 3212,
granting partial summary judgment on the issue of liability.

The following papers were read:

Notice of Motion-Affirmation-Exhibits 1-3-	1-7
Affidavits of Service (2)	
Affirmation in Opposition-Memorandum of Law-	8-14
Exhibits A-D-Affidavit of Service	
Reply Affirmation-Affidavit-Exhibit 4-	15-18
Affidavit of Service	
Memorandum of Law	19
Certificate of Conformity-Affidavit of Service	20-21
Affidavit-Affidavit of Service	22-23

By way of background, on or about April 19, 2015, the decedent and Graswald were kayaking in separate kayaks in the Hudson River in Orange County, New York. The weather that day was cold and windy, with water temperature in the 40's. The decedent was not wearing a life vest or a wet suit. The decedent and Graswald entered the Hudson River from Plum Point Park in



Orange County and went to what is commonly known as "Bannermans Island", an island in the Hudson River slightly southeast of the Plum Point. The couple spent about two hours hiking the island before disembarking back to Plum Point. The decedent and Graswald left the island at about 7:00 p.m., the waters were rough, it was windy and it was getting dark. The decedent's kayak's paddle was missing a locking clip and had no drain plug, as it was removed by Graswald. While crossing the Hudson, the decedent's kayak began to take on water and it began to sink. The decedent exited his kayak and entered the river. Ultimately, the decedent drowned in the river.

Graswald was arrested and charged with Second Degree Murder and Second Degree Manslaughter. On June 24, 2017, the case against Graswald was resolved by her plea to Criminally Negligent Homicide, a class E felony under Penal Law §125.10.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (see *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see

Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of her motion, the plaintiff alleges that partial summary judgment is warranted as defendant, by her own admission, acknowledged and admitted under oath to causing the wrongful death and conscious pain and suffering of the decedent. Moreover, defendant was made aware that her plea of guilty had the same legal significance as a verdict of guilty after.

Where a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from relitigating the issue of her liability (see *McDonald v. McDonald*, 193 AD2d 590 [2nd Dept 1993]). All that is required to give rise to the bar of collateral estoppel in the civil action is that the plaintiff demonstrate that there is identity of the issues and that the defendant had a full and fair opportunity to litigate the issues in the criminal action (*id.*).

Defendant's guilty plea to Criminally Negligent Homicide is sufficient to collaterally estop her from re-litigating the issue of whether her negligence was a proximate cause of the incident on April 19, 2015 (see *Strychalski v. Dailey*, 65 AD3d 546 [2nd Dept 2009]). However, the plaintiff's submissions fail to establish as a matter of law that the decedent was free from culpable conduct with regard to the causation of his injuries and ultimate death (see *Pink v. Ricci*, 100 AD3d 1446 [4th Dept 2012];

Saldana v. Guzman, 34 Misc3d 1233[A] [Sup Ct, Nassau County 2012]). The submissions of the plaintiff, including the affirmation of counsel, plea transcript and the pleadings fail to establish as a matter of law that the decedent was free from culpable conduct with regard to the causation (see *Rodgers v. Duffy*, 87 AD3d 1126 [2nd Dept 2011]). The defendant's plea allocution includes her acknowledgment of blameworthy conduct so serious that it contributed to a substantial and unjustifiable risk that Mr. Viafore's death would occur (see Plea Allocution pp 13-14 lines 23-35, 1-3). Moreover, the defendant admitted that she failed to perceive the substantial and unjustifiable risk of death that her conduct contributed to it (see Plea Allocation p 14 lines 8-11). Additionally, throughout the transcript, the dangers of both the river and the unpreparedness of the parties are emphasized. Particularly, the defendant indicates that she knew, as the decedent presumably did, that it was cold and windy with water temperatures in the 40's (see Plea Allocution at p 15 lines 11-16). The decedent was neither wearing a life jacket nor wet suit (see Plea Allocution at p 15 lines 19-25). Upon attempting to return to Plum Point, the river was rougher, windier and it was getting darker (see Plea Allocution at p 15 lines 18-24). By highlighting these portions of the defendant's plea allocution, the Court is not making a finding that the decedent bore responsibility for his injuries/death; rather, the Court intends to merely highlight conduct, submitted by plaintiff

in support of her motion, which the jury could find contributed to the decedent's injuries/death (see generally *Jordan v. Britton*, 128 AD2d 315 [4th Dept 1987]).

Lastly, the Court notes that the defendant's answer raised the affirmative defense of comparative negligence, thereby putting into issue the relative degrees of culpability between the decedent and the defendant (see CPLR §1411).

Based upon the foregoing, plaintiff's motion for summary judgment is denied in its entirety. A preliminary conference is scheduled for April 30, 2018 at 9:30 a.m. Adjournments are only granted with leave of the Court.

This constitutes the decision and order of this Court. This decision and order has been electronically filed.

Dated: April 3, 2018
Poughkeepsie, New York

ENTER


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