

<b>Stoutenburgh v Mugnos</b>
2018 NY Slip Op 34225(U)
April 17, 2018
Supreme Court, Dutchess County
Docket Number: Index No. 52413/2016
Judge: James D. Pagonis
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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  
ROBERT A. STOUTENBURGH as Executor of  
the Estate of MURIEL A. STOUTENBURGH  
and ROBERT A. STOUTENBURGH, Individually,  
  
Plaintiff,

Index No. 52413/2016  
(Action #1)

-against-

CONCETTA M. MUGNOS, JULIA M. MARCUS  
and JOHN J. MARCUS,

DECISION AND ORDER

Defendants.

-----X  
JULIA M. MARCUS and JOHN MARCUS,  
  
Plaintiffs,

Index No. 51245/2017  
(Action #2)

-against-

CONCETTA M. MUGNOS,

Defendant.

-----X  
CONCETTA M. MUGNOS,  
  
Plaintiff,

Index No. 51497/2017  
(Action #3)

-against-

JULIA M. MARCUS,

Defendant.

-----X

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

Plaintiff in Action #1, Robert A. Stoutenburgh as Executor  
of the Estate of Muriel A. Stoutenburgh and Robert A.

Stoutenburgh, Individually, moves for an order, pursuant to CPLR 3212, granting him summary judgment on the issue of liability against defendant Concetta M. Mugnos (hereinafter "Mugnos").

Defendants Julia M. Marcus and John J. Marcus move for an order, pursuant to CPLR 3212, dismissing plaintiff's complaints in Actions #1 & #3 and all cross-claims.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-L-Affidavit of Service	1-15
Cross-Motion-Affirmation-Exhibit A	16-18
Affirmation in Opposition-Exhibits A-D-Affidavits of Service	19-24
Affirmation in Opposition-Affidavit-Exhibits A-D-Affidavit of Service	25-31
Reply Affirmation-Affidavit of Service	32-33

Upon the foregoing papers, the motion and cross-motion are decided as follows:

Plaintiff in Action #1 commenced this action seeking to recover damages for injuries and the wrongful death of Muriel A. Stoutenburgh allegedly sustained as a result of a motor vehicle accident on August 8, 2016. Plaintiff in Action #1, Robert A. Stoutenburgh also maintains a derivative cause of action for the loss of his mother, Muriel A. Stoutenburgh. The decedent was a passenger in the front seat of the Marcus vehicle. The accident occurred at the intersection of Mill Road and State Route 9 in the Town of Red Hook, New York. Plaintiff in Action #1 maintains the Mugnos vehicle made a left hand turn from Mill Road onto State Route 9, directly in front of the Marcus vehicle which was

proceeding with the right-of-way.

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 the interest of judicial economy, the motion and cross-motion will be considered concurrently.

In support of his motion, plaintiff in Action #1 submits the relevant deposition transcripts of defendant Mugnos and that of Julia Marcus. The Marcus cross-movants agree with and adopt "the recital of the facts, legal issues, case law and each and every argument laid out in Plaintiffs' Affirmation in Support of Motion for Summary Judgment on Liability, dated February 14, 2018 in that liability rests with defendant, CONCETTA M. MUGNOS".

The deposition of Ms. Mugnos begins with a brief description of the day of the accident. Specifically, Ms. Mugnos indicated

that there was nothing on the surface of the road that created problems with her vehicle, the lighting or sunlight had nothing to do with the accident and it was generally a nice sunny day (see Deposition of Mugnos at p 15 lines 6-15). Ms. Mugnos stated that she stopped at the stop sign on Mill Road at the intersection of Route 9 (see Deposition of Mugnos at p 15 lines 16-21). Ms. Mugnos testified that there were no vehicles in front of her as she approached the intersection and she did not notice any other vehicles approaching the intersection from any direction (see Deposition of Mugnos at p 21 lines 11-24). Upon coming to a stop, Ms. Mugnos acknowledged that she saw vehicles traveling on Route 9 (see Deposition of Mugnos at p 22 lines 22-25). There was one vehicle heading southbound on Route 9, while two other were heading northbound (see Deposition of Mugnos at p 23 lines 2-7). After the vehicles passed, Ms. Mugnos looked left, i.e. north, and did not see any vehicles proceeding in the southbound direction (see Deposition of Mugnos at p 23 lines 17-20). Ms. Mugnos indicated that she could see approximately one football field north, as there was a bend in the road beyond that distance (see Deposition of Mugnos at p 24 lines 6-12). Ms. Mugnos accelerated into the intersection and the accident occurred (see Deposition of Mugnos at pp 25-26 lines 16-25, lines 2-14). She further testified that she never saw, what was later identified as the Marcus vehicle prior to impact (see Deposition

of Mugnos at p 26 lines 12-14).

Julia Marcus next testified concerning the accident. Ms. Marcus was driving her vehicle at the time of the accident (see Deposition of Marcus at p 13 lines 18-20). The decedent was seated in the front passenger's seat wearing a seat belt (see Deposition of Marcus at p 14 lines 6-21). The friends were headed back to Poughkeepsie, from the decedent's son and daughter in-law's home in Red Hook, with a planned stop at Holy Cow Ice Cream (see Deposition of Marcus at p 15 lines 7-17). Ms. Marcus testified that she did not see the other car at any time before the accident (see Deposition of Marcus at p 20 lines 9-11). She did not know what speed she was traveling prior to the accident (see Deposition of Marcus at p 25 lines 3-5). She first became aware of the accident when her passenger stated either "look out" or "watch out" (see Deposition of Marcus at p 23 lines 2-3). Ms. Marcus could not recall how far her car was from Mill Road when Ms. Stoutenburgh signaled her to "watch out" (see Deposition of Marcus at p 23 lines 10-14). She recalled that everything happened instantaneously (see Deposition of Marcus at p 25 lines 15-17).

The movant and cross-movants establish their *prima facie* entitlement to judgment as a matter of law, by demonstrating that the defendant Mugnos violated VTL §1141 when she made a left hand turn directly into the path of the Marcus vehicle and that this

violation was the sole proximate cause of the accident (*see Choi v. Schwabenbauer*, 124 AD3d 574 [2<sup>nd</sup> Dept 2015]). Moreover, the moving plaintiff also demonstrated that the decedent was an innocent passenger who did not contribute to the happening of the accident (*see Mata v. Road Masters Leasing Corp.*, 128 AD3d 780 [2<sup>nd</sup> Dept 2015]).

Ms. Mugnos and the plaintiff in Action #1 submit opposition papers. These submissions must be individually addressed.

The opposition papers of Ms. Mugnos first allege that Julia M. Marcus was comparatively negligent and that her negligence was the proximate cause of the accident. Next, Ms. Mugnos alleges that the plaintiff in Action #1's motion must be denied as material issues of fact exist as to whether the decedent was contributory negligent and/or assumed the risk by failing to inform Julia M. Marcus to slow down and stop traveling at excessive speed.

In support of her first allegation, Mugnos offers a Notice to Admit, annexed as Exhibit "A", together with a copy of the Bosch CDR data retrieval record that came from the Marcus vehicle. The contents of the Bosch CDR data retrieval record were deemed admitted. At or near the time of the accident, the data show that Julia M. Marcus was traveling at 52-53 mph. The posted speed limit at or near the accident site is 40 mph. This fact, coupled with the fact that Julia M. Marcus testified that

she did not see the Mugnos vehicle any time before the accident raises a triable issue of fact as to whether, in the exercise of reasonable care, Julia M. Marcus could have avoided the accident (see *Choi v. Schwabenbauer*, 124 AD3d 574 [2<sup>nd</sup> Dept 2015]).

Accordingly, the Marcus cross-motion must be denied as potential issues of comparative negligence exist.

The second branch of the Mugnos opposition alleges that the decedent contributed to the happening of the accident by not telling her friend to slow down and/or assumed the risk of the accident's happening by riding in the speeding vehicle. Mugnos submits absolutely no proof that the decedent was aware of the speed of the vehicle or that she was under a duty to ascertain the precise speed of the Marcus vehicle and regulate the same. Therefore, the Court finds no merit in law or fact to this branch of the Mugnos opposition papers. Accordingly, since the defendant did not raise a triable issue of fact as to any comparative fault on the part of the plaintiff in Action #1, the plaintiff's motion for summary judgment on the issue of liability must be granted.

The Court need not address the opposition papers as submitted by the plaintiff in Action #1, as they are rendered academic by the determination above.

Accordingly, the plaintiff's motion is granted. The cross-motion of Julia M. Marcus and John J. Marcus is denied as triable

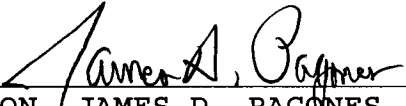
issues of fact exist concerning potential issues of comparative negligence.

Counsel are directed to appear for a pretrial conference on June 1, 2018 at 11:00 a.m. Adjournments are only granted with leave of the Court.

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

Dated: April 17, 2018  
Poughkeepsie, New York

ENTER

  
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