Italiano v Nevada Resort Props. Polo Towers, Ltd.
2003 NY Slip Op 30225(U)
June 24, 2003
Supreme Court, Suffolk County
Docket Number: 02-14938
Judge: Patrick Henry
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SHORT FORM ORDER

COPY

INDEX No. 02-14938

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 15 - SUFFOLK COUNTY

PRESENT:

Hon. PATRICK HENRY
Justice of the Supreme Court

MOTION DATE 10/23/02
ADJ. DATE 11/29/02
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD

-- X

ANTHONY ITALIANO and MICHELINA ITALIANO,

Plaintiffs,

- against -

NEVADA RESORT PROPERTIES POLO TOWERS, LTD. PARTNERSHIP, POLO TOWERS MASTER ASSOCIATION, INC., POLO TOWERS VACATION OWNERSHIP OWNERS ASSOCIATION, INC., DIAMOND RESORTS INTERNATIONAL, INC. and DIAMOND RESORTS, LLC,

Defendants.

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Upon the following papers numbered 1 to 37 read on this motion ~~to dismiss and cross motion for discovery~~; Notice of Motion/ Order to Show Cause and supporting papers 1-7; 8-21 ; Notice of Cross Motion and supporting papers __________ ; Answering Affidavits and supporting papers 22 - 29 ; Replying Affidavits and supporting papers 30 - *36* ; Other 37 (memorandum of law); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants to dismiss the complaint because of a lack of personal jurisdiction is considered, together with a cross motion by the plaintiff for discovery under CPLR 3211(d). They are decided as follows:

The failure to serve a notice of cross motion has been corrected and excused, and the motion to dismiss has been withdrawn with respect to defendant Nevada Resort Properties Polo Towers Limited Partnership. The remaining defendants are: Polo Towers Master Owners Association, Inc. s/h/a Polo Towers Master Association, Inc. (hereafter Master Association), Polo Towers Vacation Ownership Owners Association, Inc. (hereafter Owners Association) and Diamond Resorts, LLC (hereafter Diamond Resorts).

Plaintiff was exposed to bacteria while staying at the Polo Towers on the strip in Las Vegas, Nevada. Upon returning to his home in New York, he became sick with pneumonia and was diagnosed with legionnaires disease. Defendants seek to dismiss the complaint because there is no jurisdictional basis under CPLR 302(a)(3). The statute permits the court to exercise jurisdiction over a non-domiciliary who commits a tortious act without the state which causes injury within the state. Defendant argues that the insult or injury to plaintiffs body occurred in Las Vegas, not New York. Plaintiff counters that while he was exposed to the bacteria in Las Vegas, the injury only manifested itself in New York.

The controversy revolves around the meaning of the words "injury within the state." The 1966 amendment to CPLR 302 adding subsection (a)(3) was intended to fill a gap in the law as revealed by the holding of the Court of Appeals in ***Feathers v McLucas,*** 15 NY2d 443, 261 NYS2d 8, 209 NE2d 68. ***Feathers*** involved a product manufactured outside the state which caused an injury in New York. The amendment was intended to make the non-domiciliary manufacturer subject to New York jurisdiction when their defective product used in New York caused an injury in New York. Immediately following the enactment of the amendment, the Nassau County Supreme Court held that a New York resident who was injured in a fall at a Florida hotel could not acquire long-arm jurisdiction over the Florida corporation because the tortious act did not cause injury in New York ***(Rose v Sans Souci Hotel, Inc.,*** 51 Misc2d 1099, 274 NYS2d 1000). Then in 1977 the First Department Appellate Division held that a New York resident who was bitten by a dog in a hotel in Spain, even though the most severe medical result, septicemia, did not manifest itself until the he had returned to New York, could not acquire jurisdiction over the foreign corporation because the situs of the original injury, not the resultant damage, controls ***(Kramer v Hotel Los Monteros S. A.,*** 57 AD2d 756, 394 NYS2d 415). The Court reasoned, "To hold otherwise would open a veritable Pandora's box of litigation subjecting every conceivable prospective defendant involved in an accident with a New York domiciliary to defend actions brought against them in the State of New York" ***(Kramer v Hotel Los Monteros S.A., supra*** 757). Consistent with the above, the Second Department Appellate Division in cases involving medical malpractice where the plaintiff was treated outside New York held that the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff ***(Herman v Sharon Hosp., Inc.,*** 135 AD2d 682 522 NYS2d 581; ***Carte v Parkoff,*** 152 AD2d 615, 543 NYS2d 718).

This reasoning blurs somewhat when the New York resident traveling outside the state receives an insult to his or her body which does not manifest itself at all until he or she returns to New York. In 1997 the Court of Appeals was presented with this issue in ***Ingraham v Carroll,*** 90 NY2d 592, 665 NYS2d 10, 687 NE2d 1293, where the plaintiff was improperly diagnosed by a Vermont physician and went untreated for cancer in New York. However, the Court skirted the issue stating, "Assuming, without deciding, that the alleged tortious conduct in Vermont caused injury within New York, the issue before us is whether appellant has successfully demonstrated that either the first or second jurisdictional subset of CPLR 302(a)(3) has been met. Because we conclude that appellant has failed to satisfy the requirements of either clause (i) or (ii) of CPLR 302(a)(3), we hold that the complaint against respondent was properly dismissed" ***(Ingraham v Carroll, supra*** 12). In April of 2002 the Bronx County Supreme Court, citing this non-holding by the Court of Appeals, broke with the strict interpretation of

the First and Second Departments and reasoned that the alleged medical malpractice of a New Jersey physician on a New York resident who was transported there for treatment subjected the physician to jurisdiction in New York under CPLR 302(a)(3). However, the holding of the Court was dicta in that it also found that the New Jersey physician was transacting business in New York under CPLR 302(a)(1) (***Reyes v Sanchez-Pena,*** 191 Misc2d 600, 742 NYS2d 513).

Plaintiff relies on the 1995 Federal District Court case of ***Penny v United Fruit Co.,*** 869 F.Supp 122. In ***Penny*** a naval seaman who had been exposed during his time of service to asbestos at an unknown place and time developed a rare form of cancer years later. Relying on a case concerning damages to members of a class who had been exposed to a toxic substance but had no symptoms and one concerning rules applicable to the statute of limitations in toxic tort cases, the Court held that the injury occurred when the disease manifested itself in New York, not at the unknown time of exposure. While there may be reason to treat cases involving exposure to a toxic substance differently than other tort cases for jurisdictional purposes, this Court finds the federal court's reasoning unconvincing, as it fails to consider the legislative history and relevant New York case law.

Frequently in negligence actions which involve personal injury, the plaintiff may suffer continuing damages which manifest themselves months after the initial insult. Except in products liability cases and certain commercial torts, such as fraud, the situs of the act of negligence and the injury are the same, as they occur simultaneously. Clearly CPLR 302(a)(3) was drafted with actions sounding in products liability in mind. While there may be sufficient due process protections built into the statute to broadly interpret it to permit a New York resident who is injured while temporarily out of the state to sue a non-domiciliary in New York without opening the floodgates ***(Reyes v Sanchez-Pena, supra),*** neither the Second Department Appellate Division nor the Court of Appeals has so held. Furthermore, such a holding is not supported by the plain wording of the statute, which does not make reference to either the initial or continuing manifestation of the injury.

Accordingly, this Court is constrained to follow the holding of the Second Department that the situs of an injury is where the plaintiff encountered the insult to his person, not the place where the symptoms first manifest themselves. The motion is granted and the cross motion is denied. The complaint is dismissed as against Master Association, Owners Association and Diamond Resorts.

Dated: 24 JUNE 2003

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**