[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10
Justice

Index Number : 117151/2009
GOODWIN, JOHN
VS.
CIRQUE DU SOLIEL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Could a compliance conference is set for Thursday, July 12, 2012 @ 9:30 am, in Room 232, located at 60 Centre St.

FILED

MAY 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: MAY 14 2012

HON. JUDITH J. GISCHE J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

---x

John Goodwin,

Plaintiff,

-against-

Cirque du Soliel, Inc., and Cirque du Soliel America Inc.,

Defendants.

---x

Decision/Order
Index No.: 117151/09
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's n/m [3212] w/ BVK affirm, MR affid, exhs.	1, 2
Pltf's opp. w/ KFM affirm, JG affid, exhs [sep back].	3, 4
Def's reply w/ BVK affirm, GL affid, MR affid, exhs.	5
Pltf's x-mo and further opp [strike] w/ KFM affirm.	6
Def's opp. w/ BVK affirm.	7
Pltf's reply w/ KFM affirm.	8
Transcript	9

Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from a negligence claim brought by John Goodwin ("plaintiff" or "Goodwin") against Cirque du Soliel, Inc. ("Cirque") and Cirque du Soliel America Inc. ("Cirque America") (collectively "defendants"). Defendants bring this motion to dismiss the complaint pursuant to CPLR §3212 (summary judgment) and §327 (inconvenient forum). Plaintiff opposes the defendants' motion and cross-moves to strike the answer. Issue has been joined. Summary judgment relief is, therefore, available. CPLR § 3212; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001].

Summary of the Facts

Plaintiff is a citizen of the United Kingdom who lives in New York. Beginning in 1995, plaintiff was employed by Cirque, a Canadian company headquartered in Montreal and registered to do business in New York State. Cirque America was organized under the laws of the State of Delaware and is registered to do business in New York as well.

Plaintiff worked at Cirque until such time as he began to work for Cirque America as a Director of Production for a show known as "Quidam." As a Director of Production for Quidam, plaintiff would travel with the show while it was on tour, including when it was touring in Asia. While Quidam was on tour in Shanghai, China, plaintiff claims he received an electrical shock while working in a production support office for Quidam.

On a rainy June 28, 2007, plaintiff claims that he was working in Shanghai, when his office began to flood. According to plaintiff, he began to remove items from the floor to avoid their getting wet, and, as a result, he received an electrical shock when he tried to move an electrical distribution box. Plaintiff was driven to the Shanghai East International Medical Center where he received medical treatment. From August 2007 on, plaintiff has treated at facilities in Ireland, at the Johns Hopkins Medical Center, in Maryland, its sister hospital, Clinica Las Condes, in Santiago, Chile, Mt. Sinai and SUNY hospitals in New York.

Plaintiff does not presently work and is out on sick leave from employment with defendants. He commenced this action in New York County in December of 2009. Defendants have interposed an answer, denying all claims.

In their moving papers, defendants claim that this action must be dismissed as a matter of law: (1) if New York law applies, because the instant action is precluded under

New York's Workers' Compensation Law, and (2) if New York law does not apply, because of *forum non conveniens*.[1]

Plaintiff opposes the motion. He also cross-moves to either strike the reply, because plaintiff claims that the defendants raised a new issue regarding whether plaintiff has a New York residence or to threat the cross-motion as a sur-reply. Defendants opposed.

Discussion

In deciding whether the defendants are entitled to the grant of summary judgment in their favor, the court considers whether they have tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Zuckerman v. City of New York , 49 N.Y. 2d 557, 562 [1980]. If met, the burden then shifts to plaintiff who must then demonstrate the existence of a triable issue of fact in order to defeat these motions. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 [2d Dept. 2003].

Forum Non Conveniens

The plaintiff's choice of forum is entitled to great deference. However, a court may stay or dismiss an action, in whole or in part, when, "In the interest of substantial justice the

---

[1] While the issue of whether the laws of New York apply to this case is premature, New York courts would be perfectly capable of and would not be unduly burdened by applying the law of a foreign jurisdiction, should the need arise. See Yoshida Print. Co. v Alba, 213 A.D.2d 275 [1995].

action should be heard in another forum." CPLR §327, Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 (1984) *cert. den.* 469 US 1108 [1985]. The doctrine is based upon "justice, fairness and convenience" (Grizzle v Hertz Corp., 305 A.D.2d 311, 312 [1st Dept 2003] citing Corines v. Dobson, 135 A.D.2d 390, 391 [1st Dept. 1987]), and the burden is on the party challenging the forum to demonstrate that the action would be best adjudicated elsewhere (Grizzle v Hertz Corp., *supra*, citing Islamic Republic of Iran v. Pahlavi, *supra*. See also Intertec Contracting A/S v. Turner Steiner Intl. S.A., 6 A.D.3d 1 [1st Dept. 2004]). Unless the balance is "strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Waterways Ltd. v. Barclays Bank, 174 A.D.2d 324, 327 [1st Dept. 2006].

Among the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum. Grizzle v Hertz Corp., *supra*; see Islamic Republic of Iran v. Pahlavi, *supra*. See also Intertec Contracting A/S v. Turner Steiner Intl. S.A., 6 A.D.3d 1 [1st Dept. 2004]; Ghose v. CNA Reinsurance Co. Ltd., 43 A.D.3d 656 [1st Dept 2007]; Continental Ins. Co. v. Garlock Sealing Tech., LLC, 23 A.D.3d 287 [1st Dept. 2005]. No one of these factors is controlling or decisive. Islamic Republic of Iran v. Pahlavi, *supra*.

Defendants claim that plaintiff brought the instant suit against Cirque and Cirque America in New York, despite plaintiff's alleged accident and injuries occurring in Shanghai, China. Defendants point out that Cirque, a Canadian corporation, Cirque America, a Delaware corporation, and plaintiff, a citizen of the United Kingdom are all

foreign to New York. Defendants further claim that almost all of the witnesses are located outside of the State of New York, with the possible exception of plaintiff and some doctors. Defendants claim that the accident and the subcontractors that built the structure are located in Shanghai.

The residency of the parties, although a consideration, is one, but only one, factor that may show inconvenience. Am. BankNote Corp. v Daniele, 45 A.D.3d 338, 340 [1st Dept. 2007]; Bank Hapoalim [Switzerland] Ltd. v. Banca Intesa S.p.A., 26 A.D.3d 286, 287 [1st Dept. 2006]. Plaintiff maintained a presence in New York from 2007 through, at least, 2011.[2] He evidenced his connection to New York and his intent to return to "NYC for good sometime early 2009" when discussing scheduling anointments with a doctor at SUNY. See, Pltf's x-mo and further opp, Exh. 13.

Although plaintiff is a citizen of the United Kingdom, defendants are authorized to do business here, accepted service in New York, and are, therefore, capable of being sued in New York. Furthermore, defendants are corporations operating not only in New York, but globally, and may be called upon to litigate claims wherever they engage in their business. Plaintiff on the other hand, has been on medical leave from work with the defendants and will bear a greater burden if this case is transferred elsewhere. Other arguments that this case will burden the New York courts or be a burden to the defendant

---

[2] As a preliminary matter, the court rejects defendants challenge of plaintiff's designation of venue in New York. Where the complaint was served with a summons, and the complaint made clear the basis of the designated venue, plaintiff's failure to have the summons specify a basis for the designated venue is not a jurisdictional defect. CPLR § 305; Archer v. Astra Pharmaceutical Products, Inc., 133 Misc.2d 804 (Sup.Ct.N.Y.Co. 1986); Forte v. Long Island R.R., 143 Misc.2d 663, (Sup.Ct.N.Y.Co. 1989).

to defend are unpersuasive. The defendants have their employees scattered in almost every continent, no other jurisdiction would be more convenient for the witnesses, and with the advent of technology may not be overly burdened in producing their employees as witnesses. Despite the fact that plaintiff has treated in jurisdictions other than New York, the presence of plaintiff's physicians and medical records (Mt. Sinai and SUNY) in New York further support that New York is an appropriate forum for the litigation of plaintiff's claims.

After weighing the arguments in favor of and against dismissing this action, the courts' decision is that based on the evidence submitted, New York is not an inconvenient forum for this dispute and there is no reason to dismiss this case simply because the tort occurred in Shanghai, China. It is not clear that another venue exists that would significantly make the litigation of this claim any easier, nor would keeping this case in New York make it any more complicated or be unduly burdensome to the New York courts, or the parties. See Islamic Republic v Pahlavi, supra.

Moreover, it is clear that the defendants are guilty of laches. Having participated in the action for quite an extended period of time, over three (3) years, before moving to dismiss, the court will not allow defendants to claim that New York is an inconvenient forum. Bock v Rockwell Mfg. Co., Inc., 151 A.D.2d 629, 631 [2d Dept. 1989]; Corines v. Dobson, *supra*.

Having failed to prove that this case must be dismissed because this is an inconvenient forum, this portion of the defendants' motion is denied.

Workers' Compensation Law

Under New York's Workers' Compensation Law ("WCL") the liability of an employer

shall be exclusive and in place of any other liability whatsoever whenever an employee sustains injury arising out of and in the course of the employment without regard to fault as a cause of the injury. In this case the defendants claim that WCL §11 is a bar to the plaintiff's action.

Although generally the case, an exception has been carved out where:

> "an employer fails to obtain Workers' Compensation coverage, [the legislature] obviously reasoning that notwithstanding the strong policy toward the exclusivity of the remedy [section 11], an employer which does not fulfill its obligations under the statute should not enjoy its benefits. Thus, section 11 also provides, if an employer fails to secure the payment of compensation for his injured employees an injured employee may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury. The effect of the statute is, to an extent, deliberately punitive, since the derelict employer subjects itself to personal and unlimited liability for its failure to obtain coverage." Burke v Torres, 120 A.D.2d 283, 284-85 [1st Dept. 1986] [internal citations and quotation omitted]; see also O'Rourke v. Long, 41 N.Y.2d 219, 222 [1976]; Terry v Maurice Pastries, Inc., 34 A.D.3d 328 [1st Dept 2006].

Defendants have failed to establish a *prima facie* case that they are entitled to summary judgment dismissing this case based upon New York's WCL. They have not provided sufficient evidence to establish, *inter alia*, that defendants had a workers' compensation policy, that the plaintiff and his injuries were covered by such policy, and that plaintiff's job category was covered by workers' compensation law.

Furthermore, plaintiff has raised sufficient issues of fact regarding whether such a policy existed. Plaintiff has provided correspondence between himself and other Cirque employees. Of particular note, is the correspondence between plaintiff and Richard Imbeau (Plt's opp, Exh. 12, 13). The correspondence explained that:

> "At the time of your injury in Shanghai, your coverage was provided by CIGNA International for your personal and occupational matters. Not all territories mandate or require workers comp type coverage. When offered, such coverage limits itself within the country, if ever he could be covered under workers compensation, he would need to remain in the country to remain covered. However the duration of his visa or work permit does not allow him/her to stay therefore he cannot remain covered." (Plt's opp, Exh. 13, pg. 2)

Mr. Imbeau's email went on to explain that

> "all non resident workers working for a Quebec company out of Quebec cannot be covered under the Quebec's workers compensation. That is why it has been [Cirque's] choice to provide non occupational and occupational coverage across all territories in order to ensure consistent protection to touring employees notwithstanding the territory or local requirements. In this particular case, this provider allowed receiving treatment in various international treatment centers and then to the US to seek medical attention & treatment. *Such occupational coverage is not the same thing as workers compensation.* ...to recap, ... you should not expect workers' comp[ensation] to take over." Id. (Plt's opp, Exh. 13, pg. 2) [emphasis added.]

Based on the foregoing, the court finds that defendants have failed to establish a *prima facie* case that they are entitled to summary judgment dismissing this case based on New York's Workers' Compensation Law. In any event, plaintiff has raised a material issue of fact whether worker's compensation coverage was applicable to plaintiff or whether it was available. A failure to maintain coverage, being one of the exceptions to the exclusive remedy of workers' compensation, permits the employee the option to sue for the damages sustained as a result of the injury. Therefore, this portion of the defendants motion is denied.

This decision is made without reaching, and without prejudice to the parties raising at an appropriate time, whether New York State law even applies in this situation.

Conclusion

In accordance with the foregoing, it is hereby,

ORDERED that defendants motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties are to appear for a **Compliance Conference on Thursday, July 12, 2012 at 9:30 a.m., in room 232 located at 60 Centre Street**; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 14, 2012

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.