SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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YVONNE JOHNSON,

Plaintiff(s),

-against-

ALLEN L. VERNON, FRANMAR LEASING INC. and ACADEMY LINES LLC d/b/a ACADEMY EXPRESS also d/b/a ACADEMY BUS,

Defendant(s).

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Index #: 151412/14
Mot. Seq: 01

DECISION/ORDER
HON. LETICIA M. RAMIREZ

Defendants' motion for an Order (1) dismissing the Complaint, pursuant to CPLR §327(a), based upon *forum non conveniens*; (2) dismissing the Complaint, pursuant to CPLR §3211(a)(5) on the grounds that the relevant New Jersey State statute of limitations has expired; (3) dismissing the Complaint, pursuant to CPLR §306(b) and CPLR §3211(a)(8), against defendant Allen L. Vernon based upon lack of personal jurisdiction; (4) and for an award of attorneys' fees and expenses, pursuant to 22 NYCRR §130-1.1(a); and plaintiff's cross-motion, pursuant to CPLR §3212, for summary judgment on the issue of liability are decided as follows:

This action arises from a motor vehicle accident, involving a five-car chain collision, which took place on August 19, 2012 on the Garden State Parkway in New Jersey. Plaintiff was a passenger on a bus owned by defendant Franmar Leasing Inc. ("Franmar"), leased by defendant Academy Lines LLC d/b/a Academy Express also d/b/a Academy Bus ("Academy") and operated by defendant Allen L. Vernon ("Vernon").

According to the police accident report, defendant Vernon stated that he was slowing the bus, which was the rear most vehicle, due to traffic when the vehicle in front of him stopped short, causing him to strike that vehicle in the rear. Thereupon, the vehicle in front of the bus struck the vehicle in front of it in the rear, resulting in a chain collision with the two vehicles in front of that vehicle. According to the police accident report, all the vehicle operators, except for the bus operator, claim that they were stopped at the time of the accident. A review of the police accident report also reveals that of the 34 passengers on defendants' bus, the names and addresses of 31 bus passengers were obtained by the responding police officer. Of which, 7 bus

passengers were New Jersey residents, 21 bus passengers were New York residents and 3 were Pennsylvania residents.

In support of their motion, defendants argue, *inter alia*, that this action should be dismissed on the grounds of *forum non conveniens* because (1) defendants resided in New Jersey at the time of the commencement of this action and continue to reside therein; (2) the operators of the four other vehicles involved in the accident, but who were not named in this action, are all New Jersey residents; (3) the subject accident occurred in New Jersey; (4) plaintiff had the opportunity to commence action in New Jersey; and (5) the only connection to New York is the plaintiff's residency. Defendants further argue that plaintiff's claims against defendant Vernon should be dismissed based upon lack of personal jurisdiction, since plaintiff failed to timely effectuate service of the Summons and Complaint upon defendant Vernon, who is no longer an employee of defendant Academy.

In opposition, plaintiff argues that New York is the proper forum, since plaintiff resides in New York, the majority of the plaintiff's medical treatment stemming from the subject accident was in New York and defendants regularly solicited business from New York residents, including during the time period of the subject accident. Plaintiff claims that she came to New Jersey on the day of the subject accident for a bus trip to Atlantic City as part of a casino tour operated by defendants. Plaintiff alleges that she was picked up by defendants' bus in New York City as part of the tour organized by the defendants and was being transported as part of the tour by defendants' bus back to New York City when the accident occurred.

In support of her cross-motion, plaintiff argues that as she was an innocent passenger on the subject bus at the time of the accident and as the bus rear-ended the vehicle in front of it, thereby causing the five-car chain collision, she is entitled to summary judgment. In opposition, defendants argue that there remain triable issues of fact that preclude summary judgment in favor of plaintiff on the issue of liability.

Although the court has jurisdiction over an action, it may dismiss or stay the action under the doctrine of *forum non conveniens*, when "the court finds that in the interest of substantial justice the action should be heard in another forum." *CPLR §327.* "The doctrine is flexible, requiring the balancing of many factors in light of the facts and circumstances of the particular case."*National Bank & Trust Co. of N. Am. v Banco De Vizcaya, 72 N.Y.2d 1005 (1988).* Some

of the factors that the court considers are the residency of the parties, the location of potential witnesses and evidence, the availability of an alternative forum, the location of the accident, the hardship upon defendants in defending this action in the chosen forum, whether the laws of the other state apply and the burden upon the court if the action is retained in the court where the action was commenced. *Shipyard Quarters Marina LLC v New Hampshire Insurance Co., 2016 NY Slip Op 30903U (NY Sup Ct. 2016).*

The burden of proving *forum non conveniens* is upon the defendant challenging the forum to establish that the action would be better adjudicated in another forum. *Islamic Republic of Iran v Pahlavi, 62 N.Y.2d 474 (1984); Anagnostou v Stifel, 204 A.D.2d 61 (1st Dept. 1994); Diallo v Mill Pen Corp., 2009 NY Slip Op 32308U (Sup Ct NY 2009).* "This burden becomes even more onerous where the plaintiff is a New York resident." *Highgate Pictures, Inc. v. De Paul, 153 A.D.2d 126 (1st Dept. 1990).* As the court held in *Cadet v Short-Line Terminal Agency, Inc*, "[a] plaintiff's choice of forum should not be disturbed absent a balancing of factors which strongly favors the defendant. Although residence of a plaintiff is not the sole determining factor on a motion for dismissal on grounds of *forum non conveniens*, it has been held to generally be "the most significant factor in the equation. *Cadet v Short-Line Terminal Agency, Inc., 173 A.D.2d 270 (1st Dept. 1991).* A defendant can meet his burden by demonstrating that he will suffer disproportionate hardship if venue is maintained in the chosen forum. *Highgate Pictures, Inc. v. De Paul, supra.*

In this action, defendants did not meet their burden of demonstrating that the balance of factors favors disturbing plaintiff's choice of forum. This Court finds that the balance of factors support maintaining this action in New York. First, the plaintiff resides in New York. Second, defendants solicited New York residents for a trip to a casino in New Jersey and picked up plaintiff and other New York residents in New York and was to return said New York residents to New York. Third, the majority of the passengers on the bus, who are potential witnesses, are New York residents. Fourth, the majority of plaintiff's medical treatment stemming from the subject accident was done in New York. Fifth, New Jersey is no longer an available forum, since the relevant statute of limitations has expired. Sixth, New Jersey law, which would govern the resolution of this action [*Cooney v Osgood Machinery, Inc., 81 N.Y.2d 66 (1993)*], is applicable. Seventh, retention of this case will not pose an unacceptable burden on the New York court.

Furthermore, plaintiff commenced this action while the relevant New Jersey statute of limitations had not yet expired, but defendants did not move for dismissal based upon *forum non conveniens* until after said statute had expired. Plaintiff filed the Summons and Complaint in this action on December 26, 2013. Defendants filed their Answer, which included an appearance for defendant Vernon, on March 20, 2014. (Defendants do not state in their motion, when defendant Vernon's employment with defendant Academy ended). Yet, defendants waited until March 22, 2016, two years after filing their answer, to move for dismissal based upon *forum non conveniens*. Defendants did not set forth a reasonable excuse of their delay in making this application.

Finally, the Court finds that defendants will not suffer disproportionate hardship if this action is maintained in New York, since they can seek the deposition and trial testimonies of any potential witness that resides in New Jersey pursuant to the Uniform Interstate Deposition and Discovery Act, which is codified in New Jersey under NJ Court Rule 4:11-4 and in New York under CPLR§ 3119.

Accordingly, that portion of defendants' motion seeking dismissal of plaintiff's Complaint based upon *forum non conveniens* is denied and plaintiff's chosen forum stands.

Next, that portion of defendants' motion seeking sanctions is denied, in light of the foregoing.

That portion of defendants' motion seeking dismissal of plaintiff's claims against defendant Vernon based upon lack of personal jurisdiction is granted, as plaintiff failed to demonstrate that service of the Summons and Complaint was properly effectuated upon defendant Vernon.

That portion of plaintiff's cross-motion seeking summary judgment on the issue of liability based upon the allegation that defendants caused the subject rear-end chain collision is denied without prejudice, with leave to renew upon completion of discovery to enable defendants to secure the deposition testimonies of any New Jersey witnesses.

That portion of plaintiff's cross-motion seeking summary judgment on the issue of liability based upon the allegation that plaintiff was an innocent passenger at the time of the accident, is denied, as this Court, in applying New Jersey law, finds that there remains an issue of fact as to whether plaintiff "exercised such reasonable care and caution as an ordinarily prudent person would exercise under like circumstances," particularly in light of her claim that defendant

Vernon was driving "erratically prior to the accident and at a very high speed." *Lombardo v Hoag, 269 N.J. Super. 36, 634 A.2d 550 (App. Div. 1993).*

The Court has considered the parties' remaining arguments and finds them unavailing.

The remaining parties in this action are to appear for a DCM Status Conference on December 2, 2016.

Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon all parties within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: October 21, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.