

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS PART 2
Justice

JONATHAN ROHOMAN, Infant, KAREN X Index Number 2952/2006
ROHOMAN, Infant, by mother and
natural guardian, BIBI NAIZIMA Motion
ROHOMAN, and BIBI NAIZIMA Date November 8, 2006
ROHOMAN, Individually,
Plaintiffs, Motion
Cal. Number 22 and 23

- against -

BIBI CATTIJA KHAN and
NAZMUIL A. ROHOMAN,
Defendants.

X

The following papers numbered 1 to 20 read on this motion by defendant Bibi Cattija Khan for an order granting summary judgment dismissing the complaint on the ground of inconvenient forum, pursuant to CPLR 327(a), and in the alternative declaring that the laws of the Province of Ontario Canada are applicable to this action, pursuant to CPLR 3016. Defendant Nazmuil A. Rohoman separately moves for the identical relief.

| | <u>Papers Numbered</u> |
|---|----------------------------|
| Notice of Motion-Affirmation-Exhibits(A-D)..... | 1-4 |
| Notice of Motion-Affirmation-Memorandum of Law -Exhibits(A-D)..... | 5-11 |
| Opposing Affirmation-Exhibits(A-E)..... | 15-16 |
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| Reply Affirmation..... | 19-20 |

Upon the foregoing papers it is ordered that these motions are consolidated for the purposes of a single decision and order, and are decided as follows:

This action to recover damages for personal injuries arises out of a four vehicle chain collision accident that occurred on August 20, 2004 in Niagara Falls, in the Province of Ontario, Canada. The the first two vehicles involved in the accident were owned and operated by drivers who reside in Niagara Falls, Canada. The third vehicle in the chain was owned and operated by Nazmuil Rohoman, was registered in Pennsylvania, and bore a Pennsylvania license plate. The fourth vehicle was owned and operated by Bibi Cattija Khan, was registered in New York, and bore a New York license plate. Plaintiffs were all passengers in the Rohoman vehicle. Plaintiff Bibi Naizima Rohoman is the wife of defendant Nazmuil A. Rohoman, and the sister of defendant Bibi Cattija Khan. The infant plaintiffs Jonathan and Karen Rohoman are the children of Bibi Naizima Rohoman and Nazmuil A. Rohoman.

Mr. Rohoman states in an affidavit that the accident occurred when the two Canadian vehicles in front of him stopped short for unknown reasons, that the vehicle in front of him struck the lead vehicle, that he was unable to stop in time and that he struck the vehicle in front of him, and that he was then struck in the rear by the Khan vehicle. Plaintiffs, however, do not allege that the accident was caused by the actions of the Canadian drivers.

Inconvenient Forum:

The common-law doctrine of forum non conveniens, now codified in CPLR 327, permits a court to dismiss an action when, "in the interest of substantial justice the action should be heard in another forum" (CPLR 327 [a]). The doctrine is based upon "justice, fairness and convenience" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479, [1984], cert denied 469 US 1108 [1985]; see Martin v Mieth, 35 NY2d 414, 417 [1974]; Price v Brown Group, 206 AD2d 195, 200-201[1994]; Corines v Dobson, 135 AD2d 390, 391, [1987]), and the burden is on the party challenging the forum to demonstrate that the action would be best adjudicated elsewhere. It is a flexible doctrine to be applied by the court in its sound discretion based upon the facts and circumstances of each case (see National Bank & Trust Co. v Banco De Vizcaya, 72 NY2d 1005, 1007[1988], cert denied 489 US 1067 [1989]; Islamic Republic of Iran v Pahlavi, supra at 479; Silver v Great Am. Ins. Co., 29 NY2d 356, 361 [1972]). The doctrine should be applied "when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties" (Silver v Great Am. Ins. Co., supra at

361; see National Bank & Trust Co. v Banco De Vizcaya, supra at 1007). A court should not retain jurisdiction where the action lacks a substantial nexus to New York (see Martin v Mieth, supra at 418). 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 (see e.g., id. at 479).

Here, the accident occurred in Niagara Falls, Ontario Province, Canada, and two of the four drivers are Canadian residents. However, the Canadian driver are not parties to this action, and there are no witnesses to the accident other than the four drivers and the plaintiffs. Plaintiffs assert in their complaint that they are residents of New York, although their verified bill of particulars states that they presently reside in Florida. It is undisputed that defendant Khan has resided in Queens County at all times, and although the complaint recites that defendant Rohomon is a resident of Pennsylvania, Mr. Rohomon states in an affidavit that he is now a resident of Queens County. The court finds that the defendants have not presented any evidence which establishes that the plaintiffs are not also residents of Queens, or that they will not be available to attend a trial here. Since both of the defendants reside in Queens they cannot be inconvenienced by the trial of the action in this court. Thus, the residence and convenience of the parties argues against a change of forum. The presence of plaintiffs' post accident treating physicians and medical records in New York further suggests that New York is an appropriate forum for the litigation of plaintiffs' claims (see Grizzle v Hertz Corp., 305 AD2d 311, 312-313 [2003]; Corines v Dobson, 135 AD2d 390, 392 [1987]). In addition, the fact that the police officer who responded to the accident scene is a resident of Canada does not provide a basis for a change of forum, since the officer was not a witness to the accident and there is no suggestion that the officer would be able to offer any material evidence other than the written report, which the parties already have (see Grizzle v Hertz Corp., supra; Corines v Dobson, 135 AD2d 390, 392 [1987]). Finally, defendants have made no showing that retention of the action would unduly burden New York courts (see Islamic Republic of Iran v Pahlavi, supra at 479). Therefore, as defendants have not demonstrated that the interests of substantial justice would be served by moving the action to the proposed alternative forum of Pennsylvania or Canada (see CPLR 327; Grizzle v Hertz Corp., 305 AD2d 311, 312 [2003]), those branches of the defendants' motions which seek to dismiss the complaint on the grounds of inconvenient forum are denied.

Choice of Law

When there is a conflict as to the law to be applied, New York uses an "interest analysis" to determine the applicable law in tort cases (Schultz v Boy Scouts of Am., 65 NY2d 189, 196-197 [1985]). In applying the interest analysis test, a court must first identify the significant contacts and the jurisdiction in which they are located (see Padula v Lilarn Proprs. Corp., 84 NY2d 519, 521 [1994]; Bodea v TransNat Express, 286 AD2d 5, 9 [2001]). "The court must next determine whether the purpose of the laws is to regulate conduct or allocate loss" (Bodea v TransNat Express, supra at 9). Conduct-regulating rules govern primary conduct (see Schultz v Boy Scouts of Am., supra at 198). When the conflicting rules involve the appropriate standards of conduct, the law of the place of the tort will generally apply (see Padula v Lilarn Proprs. Corp., supra at 522; Cooney v Osgood Mach., 81 NY2d 66, 72 [1993]; Schultz v Boy Scouts of Am., supra at 198). "Loss allocating rules," by contrast, are laws that "prohibit, assign, or limit liability after the tort occurs" (Padula v Lilarn Proprs. Corp., supra at 522; see King v Car Rentals, 29 AD3d 205, 209 [2006]). "Where the conflicting rules at issue are loss allocating and the parties to the lawsuit share a common domicile, the loss allocation rule of the common domicile will apply" (Padula v Lilarn Proprs. Corp., supra at 522; DeMasi v Rogers, ___ AD3d ___, 2006 NY Slip Op 8912, 2006 NY App Div; LEXIS 14375 [November 28, 2006]).

Here, the significant contacts in this case are the domiciles of the parties and the place of the tort. The place of the tort is Ontario, Canada, and it is undisputed that none of the parties are domiciled in Ontario, Canada. Defendants, in support of their motions, assert that the plaintiffs are residents of Florida, and that Mr. Rohomon was a resident of Pennsylvania and Florida, and may have been domiciled in Pennsylvania at the time of the accident. It is undisputed that Ms. Khan, is a resident of Queens County, and does not claim to be domiciled in any place other than New York. Defendants, however, have not presented any evidence pertaining to the domicile of either the plaintiffs or defendant Rohoman. It is axiomatic that a person may have many residences, but only one domicile.

In this case, the laws of New York, and the Province of Ontario, are conflicting with respect to the recovery of damages for injuries sustained in an automobile accident, thus the conflicting laws relate to the allocation of losses among the parties rather than the regulation of conduct. In New York, the no-fault legislation provides that an injured party may recover for his or her basic economic loss without regard to fault (Insurance Law § 5102 [a],[b]; § 5103 [a]). A person who has sustained a serious

injury may commence an action to recover damages for non-economic loss, and there is no limitation on the amount of that recovery (see Insurance Law § 5104 [a]). The Province of Ontario also has no-fault legislation, and an injured party may bring an action to recover damages for non-economic loss under certain circumstances. However, the amount of damages that the party may recover is limited (RSO 1990 ch I.8, § 267.5 [Insurance Act]; see Mensah v Moxley, 235 AD2d 910, 911 [1997]).

New York's legislative no-fault scheme was enacted to ensure prompt and full compensation for an injured party's basic economic loss, without regard to fault (see Thomas v Hanmer, 109 AD2d 80,84 [1985]). In addition, the legislation was intended to reduce litigation in automobile accident cases, thereby lowering no-fault insurance premiums, while still allowing recovery for non-economic loss resulting from serious injuries (see Licari v Elliott, 57 NY2d 230, 236-237 [1982]; Thomas v Hanmer, supra at 84; see also Dufel v Green, 84 NY2d 795, 798 [1995]). The purpose of Ontario's no-fault legislation is similar: "The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault" (Meyer v Bright, 15 OR3d 129, 134 [1993]).

In the absence of any evidence that the plaintiffs and defendant Rohoman are domiciled in any place other than New York, the court will presume that for the purposes of this motion that all of the parties are domiciled in New York. The court therefore finds that as the laws of New York and Ontario, Canada are conflicting, and as there is no evidence that the plaintiffs and the defendants are domiciled in different states or countries, the law of New York law controls (see Neumeier v Kuehner, 31 NY2d 121 [1972]). Accordingly, those branches of defendants' motions which seek to apply the laws of the Province of Ontario, Canada to this action, are denied.

In view of the foregoing, defendants' motions to dismiss the complaint pursuant to CPLR 317, or to apply the laws of Ontario, Canada to this action, pursuant to CPLR 3016, are denied in their entirety.

Dated: 12/22/06

J.S.C.