

Gurl v Titan Racing, Inc.
2007 NY Slip Op 31719(U)
June 12, 2007
Supreme Court, New York County
Docket Number: 0105394/2006
Judge: Shirley W. Kornreich
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~HON. SHIRLEY WERNER KORNREICH~~

PART 54

Index Number : 105394/2006

GURL, MATTHEW

INDEX NO. _____

TITAN RACING INC.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

CHANGE VENUE

MOTION CAL. NO. _____

The following papers, numbered _____ is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED	
1-A, 2-A, 3-A	_____
4-A, 5-A	_____
6-A	_____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

JUN 20 2007

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 6/20/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
MATTHEW GURL,

Plaintiff,

Index No.: 105394/06

-against-

**DECISION,
ORDER and
JUDGMENT**

TITAN RACING, INC., HILL CONSTRUCTION CORP.,
THOMAS HILL, CARROLL MARINE, LTD.,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action seeks recovery for personal injury allegedly caused by the negligence of defendant Carroll Marine, Ltd., (“Carroll”) and the unseaworthiness of the Titan XII, a racing yacht built by defendant. Defendant Carroll has made a motion for a change of venue to Suffolk County or dismissal on forum non conveniens grounds and moves for summary judgment. Plaintiff has opposed and made a cross motion to retain venue in New York County and to strike Carroll’s fourth affirmative defense that all claims against it are time-barred by Rhode Island law for dissolved corporations.

I. *Background*

Plaintiff avers the following. On July 31, 2003, plaintiff was employed as a seaman on the vessel Titan XII (“Vessel”) by co-defendants Titan Racing, Inc., Hill Construction Corp., and Thomas Hill. Aff. of Matthew Gurl, para. 1. The vessel was participating in a race around Long Island called the “Around Long Island Regatta.” *Id.*, para. 3.

The night before the race, plaintiff and other crewmembers from the vessel were quartered at the New York Yacht Club headquarters in New York County. Gurl Aff., para. 4. The vessel was moored at the southern tip of Manhattan in New York County and set sail from

there on the morning of the race. *Id.*, para. 5. The vessel docked in the Bronx at the conclusion of the race. *Id.*

In the amended complaint, plaintiff alleges that during the race, it was discovered that the vessel was taking on water through a defective deck fitting. Water was accumulating in the hull of the vessel. Plaintiff was sent below deck to try to remove the water collected in the hull and to staunch the flow of water. The hull lacked sufficient hand-holds, anti-skid coating, and lighting. Plaintiff alleges that these and other faults made the vessel unseaworthy and defendants negligent. In attempting to perform his duties, plaintiff fell numerous times and suffered serious personal injury. As a result, plaintiff has past and future medical expenses for physical and mental pain and will be disabled from performing his usual duties, occupations, and avocations.

At the time of plaintiff's accident, the vessel was operating in international waters off the southern coast of Fire Island in Suffolk County. *Gurl Aff.*, para. 3. However, the vessel did not put into any Suffolk County port, and no one from the vessel set foot in Suffolk County. *Id.*, para. 8.

The amended complaint states that the Titan XII was a racing yacht owned and operated by co-defendants Titan Racing, Inc., Hill Construction Corp., and Thomas Hill. The vessel's home port was Newport, Rhode Island, but it has participated in races at various ports along the eastern seaboard of the United States, including several races in and through New York state waters. None of the parties is a resident of New York.

Plaintiff avers that Titan Racing, Inc. is incorporated in Delaware; Hill Construction Corp. is incorporated in Puerto Rico, and Thomas Hill is a resident of Puerto Rico. *Gurl Aff.*, para. 6. Plaintiff is a resident of Rhode Island. *Id.* Carroll is incorporated in Rhode Island. *Id.*, para. 7. Plaintiff presents an online article from *Sailing World* stating that Carroll was a \$10

million business with a worldwide market. Affirmation of Joseph E. Donat, Ex. A. Carroll manufactured the vessel for the co-defendants. Gurl Aff., para. 1.

Defendant, by its former President Barry C. Carroll, avers the following. Carroll was incorporated in Rhode Island in 1984. Aff. of Barry C. Carroll, para. 2. The vessel was assembled, purchased, and registered in Rhode Island. *Id.*, para. 12-13. Other firms were responsible for designing the vessel, providing assembly instructions for the vessel, and providing structural engineering. *Id.*, para. 8. The pin that allegedly failed in the vessel was supplied by a third party. *Id.*, para. 9. Carroll was formally dissolved in accordance with Rhode Island law on January 6, 2004, and a certificate of dissolution was issued by the Rhode Island Secretary of State. *Id.*, para. 3-4, Ex. 1. Carroll has not conducted any business since its dissolution, currently has no employees, agents or representatives authorized to act upon its behalf in New York or elsewhere, and distributed all assets at the time of dissolution. *Id.*, para. 5-7. Defendant avers that prior to its dissolution, Carroll had not conducted any business with or in the State of New York since at least the mid 1980s.

Plaintiff filed the instant action against co-defendants Titan Racing, Inc., Hill Construction Corp., and Thomas Hill on April 19, 2006. Aff. of Alfred J. Will, para. 7. The complaint was amended to name Carroll Marine, Ltd. as a defendant on July 27, 2006. *Id.*

II. *Conclusions of Law*

A tort claim falls within federal admiralty jurisdiction when two requirements are met: (1) the wrong must take place on navigable waters (location requirement); and (2) it must bear a significant relationship to traditional maritime activity (connection requirement). *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); *See also O'Hara v. Bayliner*, 89 N.Y.2d 636 (1997). Maritime law permits tort claims involving personal injury

from allegedly defective products based on negligence and strict liability. *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 865-866 (1986); *Smith v. Mitlof*, 198 F. Supp. 2d 492, 502 (2002).

While federal courts have primary jurisdiction over maritime torts, state courts have concurrent jurisdiction of tort actions in personam under the "saving to suitors" clause of the statute conferring admiralty jurisdiction. *Scholl v. Babylon*, 95 A.D.2d 475, 481 (2nd Dept. 1983); 28 U.S.C. § 1333. Plaintiffs have the option of seeking common-law remedies for maritime torts in state court, but federal maritime law governs with respect to the rights and liabilities of the parties regardless of whether the action is brought in a state or federal court. *See Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001); *Scholl*, 95 A.D.2d at 481. Substantive remedies afforded by the states must conform to governing federal maritime standards. *O'Hara*, 89 N.Y.2d at 646.

Plaintiff's accident occurred on board the vessel in international waters, meeting the location requirement. The actions leading to his accident were performed as part of plaintiff's duties as a seaman employed on the vessel and fall under traditional maritime activity. It is undisputed that the instant action is a maritime tort claim within federal admiralty jurisdiction. Since the action was filed in state court, plaintiff must meet the requirements for venue and personal jurisdiction in New York.

A. *Venue*

New York CPLR. 503(a), the general rule that governs venue in transitory actions, states that if none of the parties reside in the state, venue is proper in any county designated by the plaintiff. CPLR 510 states that the court, upon motion, may change the place of trial of an action where: (1) the county designated for that purpose is not a proper county; or (2) there is reason to

believe that an impartial trial cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change.

It is undisputed that none of the parties resides in New York. The action was filed in New York County. Plaintiff argues that venue is proper because the plaintiff and the vessel had contact with New York County prior to the accident, and the vessel's defective condition was present before it set sail on the day of the accident. While these contacts are not sizable, CPLR 503(a) has no minimum contacts requirements for actions with non-resident parties.

Defendant contends that plaintiff's selection of New York County is improper, and venue should be changed to Suffolk County as permitted by CPLR 510. Defendant argues that Suffolk County, not New York County, is the proper venue because the accident occurred near Fire Island, making Suffolk County the "place of incident." However, neither the plaintiff nor the vessel made contact with Fire Island or any other part of Suffolk County, and the accident occurred in international waters.

Consequently, New York County is proper under CPLR 503(a). Defendant presents no reason to believe an impartial trial cannot be had there, and there is no evidence that convenience or justice would be better served in Suffolk County. Thus, there are no grounds for granting defendant's change of venue motion.

B. *Forum Non Conveniens*

Defendant, alternatively, asks that the action against it be dismissed on grounds of forum non conveniens. CPLR 327(a), which codifies the common law doctrine of forum non conveniens, provides that a court may stay or dismiss an action if it finds that in the interest of substantial justice the action should be heard in another forum.

The New York Court of Appeals articulated the standard for forum non conveniens in

Islamic Republic of Iran v. Pahlavi:

The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation, and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction occurred primarily in a foreign jurisdiction. No one factor is controlling.

62 N.Y.2d 474, 479 (citations omitted). The *Pahlavi* court emphasizes that the standard is flexible based on the facts and circumstances of each case with a basis in justice, fairness and convenience. *Id.*

Defendant cites *Economos v. Zizikas*, 18 A.D. 392, 393 (1st Dept. 2005), as requiring a nonresident plaintiff in a tort case to demonstrate special circumstances which warrant the retention of the action in New York in order to defeat a dismissal on forum non conveniens grounds. However, *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 288 (1st Dept. 2006), states that any departure from the *Pahlavi* rule should be restricted to the transitory motor vehicle accident type of case involved in *Economos*. It is clear that the burden of proof rests with the defendant.

Defendant bases its argument for dismissal on forum non conveniens grounds solely on the fact that none of the parties are residents of New York and does not provide evidence towards any of the other factors outlined in *Pahlavi*. It is undisputed that New York is the situs of the underlying accident, and, unlike in *Economos*, the parties are not all residents of a forum other than New York. Although alternative forums exist, defendant fails to show that they would be more convenient for parties or potential witnesses. Defendant also does not present evidence that the case would be an undue burden upon New York courts. The facts of the case, therefore, do

not support a dismissal on forum non conveniens grounds.

C. *Summary Judgment*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citybank Corp.*, 100 N.Y.2d 72, 81 (2003). Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980). Carroll moves for summary judgment on two grounds: (1) this court lacks personal jurisdiction over defendant, and (2) as a matter of law, a dissolved corporation may not be sued.

1. *Personal jurisdiction*

CPLR 302(a)(3) governs personal jurisdiction by acts of nondomiciliaries in New York for tortious acts committed outside the state. The conferral of jurisdiction under CPLR 302(a)(3) rests on five elements: (1) defendant committed a tortious act outside the State; (2) the cause of action arises from that act; (3) the act caused injury to a person or property within the state; (4) defendant expected or should reasonably have expected the act to have consequences in the state; and (5) defendant derived substantial revenue from interstate or international commerce.

LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 214 (2000). The court in *LaMarca* held that, in order to satisfy the fourth element, the defendant was not required to foresee the specific event that produced the plaintiff's injury but only that any defect in its product would have direct consequences in New York. *Id.* at 214-215.

Plaintiff has alleged that defendant committed a tortious act outside the state resulting in the instant action for plaintiff's injury within the state. Defendant's affidavit establishes that

Carroll currently does not have contact with New York, and has not conducted business with or in New York since the mid 1980s. Defendant further establishes that Carroll has not conducted any business since its dissolution and currently has no employees, agents or representatives authorized to act upon its behalf in New York or elsewhere. Defendant does not address the question of whether Carroll expected or should have reasonably expected its products to have consequences in New York before or after its dissolution. Nor does defendant discuss whether it derived substantial revenue from interstate or international commerce. These facts are key to deciding the issue of the foreseeability of consequences in New York at the time of the accident.

Plaintiff contends that Carroll had a worldwide market and argues that discovery is needed to decide the issue of foreseeability. When facts essential to justify opposition to a motion for summary judgment may exist but cannot then be stated by the opposing party, CPLR 3212(f) provides that the court may deny the motion or order a continuance to permit discovery. Defendant has not made a prima facie showing as to all the elements of personal jurisdiction in the instant case; questions of fact remain with regard to foreseeability. Discovery should be permitted to determine foreseeability and the revenue derived by Carroll from interstate commerce. Thus, summary judgment is not appropriate on this ground.

2. *Dissolution*

Nonetheless, summary judgment is appropriate on the second ground argued. The Supreme Court has emphasized a need for a uniform system of federal maritime law; state remedies may supplement general maritime law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 211 (1996). Under maritime law, a civil action for damages for personal injury arising out of a maritime tort must be brought within three years after the cause of action arose. 46 USC § 30106 (former 46 USC Appx. § 763(a)).

When determining issues of corporate status and capacity to be sued under New York and federal law, the law of the state of incorporation governs. *In re National Surety Co.*, 283 N.Y. 68, 76-77 (1940); Fed Rules Civ Pro rule 17 (b). Under Rhode Island law, any claim against a dissolved corporation existing prior to the dissolution must be filed within two years after the date of the dissolution. R.I. Gen. Laws § 7-1.2-1324 (c). The Rhode Island statute serves to extend the legal capacity of a dissolved corporation to be sued where none existed at common law. *Theta Props. v. Ronci Realty Co.*, 814 A.2d 907, 913 (2003).

Plaintiff cites *Lambert v. Babcock & Wilcox, Co.*, 70 F. Supp. 2d 877, 887 (1999), where the court held that a state statute of repose for product liability claims was preempted by the federal statute of limitations for maritime torts. The court in *Lambert* stated that state laws are given no effect when inconsistent with the substance of federal maritime law. *Id.* Federal maritime law, however, has no comparable provision dealing with the capacity to sue a dissolved corporation. *Bisso Marine Co. v. Conmaco, Inc.*, 1999 U.S. Dist. LEXIS 15855, *5 (1999). Without a federal counterpart, state dissolution laws are not inconsistent with federal maritime law. For that reason, the court in *Bisso* applied Missouri dissolution law to an action arising under admiralty jurisdiction.

The Rhode Island statute of dissolution is comparable to the Missouri statute applied in *Bisso*. Since the three-year federal statute of limitations for maritime torts deals with the time limit for bringing an action, not a corporation's capacity to be sued, it does not preempt the Rhode Island statute of dissolution. The cases plaintiff cites concern state statute of limitations in direct conflict with the federal statute of limitations, which were therefore preempted under maritime law.

As a corporation incorporated and dissolved pursuant to Rhode Island law, Carroll falls

under Rhode Island General Laws § 7-1.2-1324 (a). It is undisputed that the instant action was filed against defendant within the three-year statute of limitations for maritime torts but outside the two-year time frame established by the Rhode Island statute of dissolution. Therefore, plaintiff's claims are time-barred by the Rhode Island statute of dissolution as a matter of law. Accordingly, it is

ORDERED that Carroll Marine Ltd.'s motion for change of venue or dismissal on forum non conveniens grounds is denied; and it is further

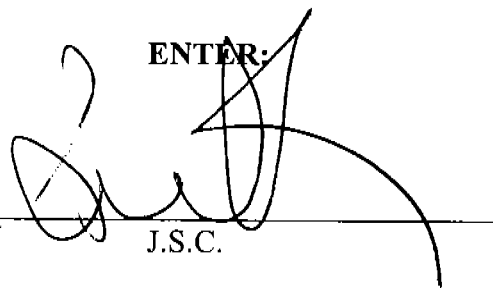
ORDERED that Carroll's motion for summary judgment is granted on the ground that the instant action is time-barred under Rhode Island law, and the action against it is dismissed; and it is further

ORDERED that the remainder action is severed and shall continue; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Date: June 12, 2007
New York, New York

ENTER:



J.S.C.

FILED
JUN 20 2007
COUNTY CLERK'S OFFICE
NEW YORK