

Piwowski v Piwowski

2010 NY Slip Op 31222(U)

May 18, 2010

Supreme Court, Suffolk County

Docket Number: 09366/2008

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 09366/2008

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:**Hon. Paul J. Baisley, Jr.** __________
LECH PIWOWARSKI,

Plaintiff(s),

-against-

ANDRZEJ PIWOWARSKI AND TRI-EXPRESS,
INC.,Defendant(s).
_____**ORIG. RETURN DATE:** September 16, 2008**FINAL RETURN DATE:** October 28, 2008**MTN. SEQ. #:** 001-MD

002-MD

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Upon the following papers numbered 1 to 51 read on this motion and cross motion: Notice of Motion and supporting papers 1 - 6; Affirmation in Opposition and supporting papers 7 - 11; Reply Affirmation 12 - 16; Notice of Cross Motion and supporting papers 17 - 23; First Affirmation in Opposition and supporting papers 24 - 33; Second Affirmation in Opposition and supporting papers 34 - 43; First Reply Affirmation and supporting papers 44 - 48; Second Reply Affirmation 49 - 51; it is

ORDERED that the motion (001) by the defendant Tri-Express, Inc. for dismissal of the complaint as to it on the basis of inconvenient forum pursuant to CPLR 327 is denied; and it is further

ORDERED that the cross motion (002) by the plaintiff for summary judgment in his favor as to liability and against the defendant Tri-Express, Inc. pursuant to CPLR 3212 is denied without prejudice; and it is further

ORDERED that pursuant to 22NYCRR 202.8(f) the parties are directed to appear for a preliminary conference on May 28, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

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This is a personal injury action arising out of motor vehicle accident in the state of Ohio on December 9, 2007. Venue was properly place in Suffolk County based upon the residence of the plaintiff Lech Piwowarski (hereinafter the plaintiff) (*see* CPLR 503[a]). The parties include the plaintiff who was a passenger in a the sleeping compartment of a tractor-trailer; the plaintiff's son, the defendant Andrzej Piwowarski (hereinafter Andrzej), who was the driver of the tractor-trailer; and the defendant Tri-Express, Inc. (hereinafter Tri-Express), the company for whom the plaintiff and Andrzej were providing driving services as well as the tractor.

The defendant Tri-Express brings this motion (001) to dismiss on the basis of inconvenient forum. The plaintiff cross-moves (002) for summary judgment on the issue of liability as to the defendant Tri-Express (the defendant Andrzej had not yet appeared when the cross motion was brought).

The following facts are not in dispute: While driving westbound on the Ohio Turnpike (delivering a trailer and its contents from New York to Chicago), the tractor-trailer being driven by Andrzej came up behind a salt spreader (hereinafter the truck) actively salting the roadway. The tractor-trailer, according to Andrzej, was going 69 miles per hour; the truck, according to its driver, was going 40 miles per hour.

The defendant Andrzej had to take evasive actions to avoid hitting the truck and tried to move around it by going into the lane to the left. In doing so, the tractor-trailer clipped the rear of the truck, flipped over onto its side and slid into a ditch to the right of the roadway.

The plaintiff suffered injuries for which he was transported to a local Ohio hospital where he was operated on the next day.

The responding police officer to the accident took statements from three witnesses which were reduced to writing and, although witnessed by the police officer, were neither sworn to nor did the witnesses acknowledge they were advised that a false statement made by them could result in criminal charges (as the New York accident witness statements do).

The statements to the police officer were made by the driver of the truck, Steve Urbanski; a driver of a vehicle behind the tractor-trailer, William Schnack; and the defendant Andrzej.

Mr. Urbanski stated that he was spreading salt that day in the right lane of the Ohio Turnpike and traveling at 40 miles per hour. He saw the tractor-trailer rapidly approaching him from the rear and was struck by the tractor-trailer. After striking Mr. Urbanski's vehicle, the tractor-trailer "passed me then overturned . . . and slid off the right side and come to rest."

Mr. Schnack stated that the tractor-trailer was just ahead of him when he saw it lose control, clip the "ODOT salt truck," veer left and then roll over on the right side of the road.

The defendant Andrzej stated that he was traveling in the right lane on the Ohio Turnpike, doing 69 miles per hour, when he saw the "maintenance truck" in front of him. "I went to pass the truck and hit the rear of the truck."

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It is noteworthy that the statements of Urbanski and Schnack, without ruling on their admissibility, are both adverse to the defendants. Indeed, the statement by Andrzej, which may qualify as an admission against interest, is also consistent with liability on the part of the defendant Andrzej.

After the plaintiff was released from the Ohio hospital, he returned to his home in Suffolk County where the defendant Andrzej also lives.

The defendant Tri-Express, based in Illinois, brings this motion (001) to dismiss on the ground that New York is an inconvenient forum to litigate this matter since the accident took place in Ohio, the non-party witnesses are from Ohio, the responding police officer is based in Ohio, Ohio law would arguably be applied to the facts and the initial treating hospital which performed the surgery is in Ohio.

Tri-Express also contends that there are additional factors supporting the inconvenient forum argument, namely; the burdensome caseload of the courts in Suffolk County, the availability of the alternative forum in Ohio and the potential hardship on Tri-Express to produce the Ohio witnesses in New York.

In opposition, the plaintiff argues that the non-party witnesses made statements adverse to the defendants and, thus, the defendant Tri-Express's contention that there would be a hardship to bring such witnesses to New York is disingenuous. The plaintiff also points out that two of the parties, himself and his son, the defendant Andrzej, reside in Suffolk County and the "only truly relevant witness" for the defendants would be the defendant Andrzej who not only resides in Suffolk County but who, in any event, has "already admitted liability."

The plaintiff also states that the post hospital medical treatment all took place in New York and included, among others, treating physicians, a plastic surgeon, radiologists and physical therapy. Accordingly, the plaintiff argues, it would be more of an overall inconvenience for these potential witnesses on the issue of damages to have to go to Ohio than for the potential witnesses on the liability issue to come to New York. In any event, the plaintiff suggests, the liability is an easier issue to determine and, indeed, that is the subject of his cross motion (002).

As to the inconvenience of New York as the forum for this action, the defendant Tri-Express must show certain factors, including, for example, that the residency of the parties favors a different jurisdiction; there is a potential of hardship for the proposed witnesses; there is an alternative forum available; the situs of the underlying action is in a different jurisdiction; and, the New York courts are already overburdened with cases (*see Prestige Brands, Inc. v Hogan & Hartson, LLP*, 65 AD3d 1028, 885 NYS2d 501 [2d Dept 2009]).

Any one of these factors is usually not dispositive in itself and the court must undertake a balancing of the factors presented (*see Banko Ambrosiano, S.P.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65, 476 NYS2d 64 [1984]).

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In this case, the factors in the defendant Tri-Express's favor are that the accident took place in Ohio and that the plaintiff was treated and operated on in an Ohio hospital. The fact that two of the non-party eye witnesses are residents of Ohio does not weigh in the defendant's favor because these witnesses are adverse witnesses to the defendant Tri-Express. Indeed, the main witness who may have anything favorable to the defendants to testify to is the defendant Andrzej who is a resident of Suffolk County, New York.

Regarding medical testimony, there are doctors and medical professional who treated the plaintiff in New York as well as Ohio. Indeed, as to the degree of the long term effects of the injuries, the New York doctors would be more likely to provide material and relevant evidence as well as evidence of the initial injuries.

As to whether the laws of Ohio, Illinois (as to certain agreements) or New York apply, whatever is ultimately determined, the courts of New York are fully capable of applying whatever is the appropriate law or laws.

Lastly, without deciding the issue of liability, it does seem that the liability issue may not be complicated and may even ultimately be resolved on a future motion for summary judgment (the instant cross motion for that relief being denied at this time). Therefore, as a practical matter, it appears that the convenience issue as to liability may be slightly balanced in the plaintiff's favor but the convenience issue as to damages is heavily weighted in the plaintiff's favor as to Suffolk County being a convenient forum.

Accordingly, the motion (001) by the defendant Tri-Express to dismiss based upon the ground of inconvenient forum pursuant to CPLR 327 is denied.

Turning now to the cross motion (002) by the plaintiff for summary judgment, this cross motion was brought before issue was joined as to the defendant Andrzej and thus may not be considered by the court as to said defendant. The court notes that subsequent to this cross motion being brought, issue was joined as to the defendant Andrzej but there was no attempt to amend said cross motion or to bring a separate motion for summary judgment as to Andrzej. This cross motion for summary judgment, therefore, is not applicable to the defendant Andrzej (*see* CPLR 3212[a]).

Insofar as the cross motion seeks summary judgment against the defendant Tri-Express, the cross motion is denied.

It is well settled that on a motion or cross motion for summary judgment the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

Moreover, under New York law, a driver is under an obligation not to follow the vehicle in front of him “more closely than is reasonably prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway” (VTL §1129[a]; see *Mandel v Benn*, 67 AD3d 746, 748, 889 NYS2d 81 [2d Dept 2009]). In this case, while not dispositive of the issue, the court notes, nevertheless, that the defendant Andrzej was cited under the Ohio equivalent for “following too closely” pursuant to VTL §1129(a), too wit; Ohio Revised Code §4511.21(A) (“assured clear distance ahead”).

In support of this cross motion, the plaintiff submits unsworn statements by the driver of the truck and the driver of the vehicle behind the tractor-trailer. While these statements were reduced to writing, witnessed by a police officer on the scene and signed by the witnesses, they were not sworn to and contain no notice of the consequences of making a false statement. As such, these statements are not in admissible form and will not be considered by the court in support of this cross motion. The statement by the defendant Andrzej, while in the same format, does qualify as an admission against interest and, as such, is an exception to the hearsay rule and may be considered by the court..

Andrzej’s statement simply indicates that Andrzej was doing 69 miles per hour in the same lane as the slower moving truck and as Andrzej went to pass the slower moving vehicle, he hit the rear of said vehicle. On its face, such a statement is consistent with Andrzej being at fault for the accident and provides no non-negligent explanation for the accident. If the court is satisfied as to Andrzej’s negligence and if the relationship between Tri-Express and Andrzej can provide a legal basis for Tri-Express being vicariously liable for Andrzej’s negligence, the negligence may be attributed to Tri-Express as well.

The court is satisfied that the plaintiff has made a prima facie showing of entitlement to summary judgment on the issue of liability as to the defendant Andrzej. Andrzej’s own statement admits of hitting the truck in the rear and supplies no non-negligent explanation for the accident. But insofar as making a showing of Tri-Express being vicariously liable or even a showing that Andrzej was employed by or was an agent acting for Tri-Express, as opposed to, for example, being an independent contractor, the plaintiff has failed to make such a prima facie showing.

Accordingly, with regard to the defendant Tri-Express, there is no prima facie showing of entitlement to summary judgment and the cross motion, thus, is denied. This denial is without prejudice to being renewed upon further discovery.

In any event, even if there was a prima showing in this regard, the defendant Tri-Express has come forward with evidence sufficient to raise issues of fact. These issues include factual questions as to the ownership of the tractor, ownership of the trailer, the applicability of certain agreements between Andrzej and Tri-Express and Tri-Express’s liability for the acts of Andrzej.

Accordingly, the court concludes that the plaintiff failed to make a prima facie showing of entitlement to summary judgment as to the defendant Tri-Express and, in any event, Tri-Express raised questions of fact in opposition which would require a trial.

This constitutes the decision and order of the court.

Dated: May 18, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.