

Ren Zheng Zheng v Bermeo

2011 NY Slip Op 31171(U)

May 2, 2011

Supreme Court, Suffolk County

Docket Number: 17108/2010

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 17108/2010

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

PRESENT:**Hon. Paul J. Baisley, Jr.**

REN ZHENG ZHENG,

Plaintiff,

-against-

LUIS G. BERMEO, ELSA HURTADO A/K/A
 ELSA HERTADO, ZHENQIN LI, YULING LI,
 TOWN OF SOUTHAMPTON, THE VILLAGE
 OF SOUTHAMPTON AND THE COUNTY OF
 SUFFOLK,

Defendants.
_____**DEFT'S ATTORNEY FOR COUNTY OF SUFFOLK:**

CHRISTINE MALAFI, ESQ.
 100 VETERANS MEM HWY, POB 6100
 HAUPPAUGE, NY 11788

ORIG. RETURN DATE: October 20, 2010
FINAL RETURN DATE: November 30, 2010
MTN. SEQ. #: 001-MotD
 002-MotD

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Upon the following papers numbered 1 to 19 read on this motion to remove an action and join Actions 1, 2, and 3 for trial, and motion to remove and for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4, 5 - 8 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 9 - 11, 12 - 13, 14, 15 ; Replying Affidavits and supporting papers 16 - 17, 18 - 19, _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motions (001, 002) are consolidated for the purpose of this determination; and it is further

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ORDERED that the unopposed motion (001) by defendants Luis G. Bermeo and Elsa Hurtado, also known as Elsa Hertado, pursuant to CPLR 602 (b) for an order removing the action entitled Xing-Bin Dong v Elsa Hurtado, Luis Bermeo, Yu Ling Li, and Zhen Qin Li, Index No. 105091/10, pending in the Supreme Court, New York County, to the Supreme Court, Suffolk County, and joining for trial said action with the instant action and a second action, entitled Zhenqin Li v Luis G. Bermeo, Elsa Hurtado, a/k/a Elsa Hertado, Town of Southampton, The Village of Southampton, and The County of Suffolk, Index No. 20730/10, is granted to the extent that the instant action and the action entitled Zhenqin Li v Bermeo, Index No. 20730/10 are joined for trial and is otherwise denied; and it is further

ORDERED that the motion (002) by defendants Zhen Qin Li and Yu Ling Li for an order removing the action entitled Xing-Bin Dong v Elsa Hurtado, Luis Bermeo, Yu Ling Li, and Zhen Qin Li, Index No. 105091/10, pending in the Supreme Court, New York County, to the Supreme Court, Suffolk County, and joining for trial said action with the instant action, and a second action, entitled Zhenqin Li v Luis G. Bermeo, Elsa Hurtado, a/k/a Elsa Hertado, Town of Southampton, The Village of Southampton, and The County of Suffolk, Index No. 20730/10, and for summary judgment is granted to the extent that summary judgment dismissing the complaint and all cross claims as asserted against them is granted and is otherwise denied; and it is further

ORDERED that counsel for the moving defendants is directed to serve a copy of this order upon the Calendar Clerk; and it is further

ORDERED that the actions shall keep their separate identities and index numbers; and it is further

ORDERED that pursuant to 22NYCRR §202.8 (f) the parties in the instant action and the action entitled Li v Bermeo are directed to appear for separate preliminary conferences on May 11, 2011 at the Supreme Court, DCM Part, One Court Street, Riverhead, New York at 10:00 a.m.; and it is further

ORDERED that counsel for the moving defendants shall serve a copy of this Order with Notice of Entry upon all parties pursuant to CPLR 2103(b) (2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

These three actions arise out of a multi-vehicle accident which occurred on March 28, 2009, on County Road 39 in the Town of Southampton, New York. The record reveals that plaintiff Ren Zheng Zheng commenced this action (Action #1) on June 8, 2010 to recover damages for personal injuries allegedly sustained in the accident. Plaintiff alleges that a vehicle owned by defendant Elsa Hurtado and operated by defendant Luis Bermeo was proceeding westbound on County Road 39 and allegedly crossed the double yellow line. The police accident report reveals that the Hurtado vehicle struck a vehicle owned by defendant Yu Ling Li and operated by defendant Zhenqin Li, which struck a third vehicle which was owned and operated by non-party Kenneth B. Whitman. Ren Zheng Zheng and Xing-Bin Dong were passengers in the Li vehicle at the time of the collision. Non-party Delfina Orrego was a passenger in the Hurtado vehicle and died from her injuries.

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A related action, entitled Xing-Bin Dong v Elsa Hurtado, Luis Bermeo, Yu Ling Li, and Zhen Qin Li, Index No. 105091/10, was commenced in New York County on April 19, 2010. A third related action, entitled Zhenqin Li v Luis G. Bermeo, Elsa Hurtado, a/k/a Elsa Hertado, Town of Southampton, The Village of Southampton, and The County of Suffolk, Index No. 20730/10 (Action #2), was commenced in Suffolk County on June 9, 2010.

Defendants Hurtado and Bermeo seek an order, pursuant to CPLR 602, removing the action entitled Xing-Bin Dong v Elsa Hurtado, Luis Bermeo, Yu Ling Li, and Zhen Qin Li, Index No. 105091/10, now pending in the Supreme Court, New York County, to the Supreme Court, Suffolk County, and joining such action for trial with this action and Action #2. Defendants Zheng Qin Li and Yu Ling Li (hereinafter referred to as “the Li defendants”) move for the same relief. Defendants assert that the actions share common questions of fact and law, and that a joint trial will serve the interests of the court, the parties and the witnesses.

Motions to consolidate pending actions pursuant to CPLR 602 (a) are addressed to the sound discretion of the court (*Leung v Sell*, 115 AD2d 929, 496 NYS2d 589 [3d Dept 1985]), subject to the general rule that, in the absence of special circumstances, where the actions have been commenced in different counties venue should be placed in the county having jurisdiction over the action first commenced (*see, Leung v Sell, supra; Maldonado v Whiting*, 109 AD2d 871, 486 N.Y.S.2d 783 [2d Dept 1985]; *Maciejko v Jarvis*, 99 AD2d 799, 472 NYS2d 133 [2d Dept 1984]). Under the general rule, therefore, venue of this action would properly be placed in New York County, where the first action was commenced. However, such relief was not requested by notice of motion and no special circumstances have been articulated.

Accordingly, the motions are granted solely to the extent that Action #1 and Action #2, the actions which were commenced in Suffolk County, are joined for trial. The parties shall exchange any matter previously received through pretrial discovery with any party so demanding. The parties are reminded that each action has retained a separate identity and index number. Thus, the parties in each action shall file a separate conference order, a separate note of issue and certificate of readiness, and pay separate fees (including the fee for an RJI). In addition, any request for relief must be made in the appropriate action under the appropriate index number.

Turning to the remaining branch of the motion by the Li defendants for summary judgment, the Court notes that inasmuch as Action #1 and Action #2 have been joined for trial, they retain their separate identities and index numbers. Since the instant motion was submitted under Index Number 17108/10, Action #1, the court shall consider the relief requested only as to Action #1 and denies all relief requested as to the action which was commenced in New York County. The Li defendants contend in their motion for summary judgment that Zheng Qin Li, the operator of the vehicle, should not be held liable for the accident inasmuch as he was confronted with an emergency situation not of his own making.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d

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557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Stewart Title Ins. Co. v Equitable Land Servs*, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]). However, once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

In support of the motion, defendants submit, *inter alia*, the pleadings, an uncertified copy of the police accident report, the 50-h testimony of defendant Zhenqin Li, and the sworn statement of defendant Bermeo. Initially, the Court notes that the copies of the uncertified MV 104 Police Report with annexed statements constitute hearsay and are inadmissible (*see, Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2nd Dept 2003]; *Hegy v Collier*, 262 AD2d 606, 692 NYS2d 463 [2nd Dept 1999]).

Zhenqin Li testified at his 50-h hearing that he was driving eastbound in the left lane on County Road 39 on the date of the accident with Ren Zheng Zheng and Xing-Bin Dong as passengers. He stated he first observed a dark-colored van traveling very fast in the westbound outer lane approximately 80 to 100 meters away, and then observed the van move to the inside eastbound lane to pass a gray sedan. According to Li, the van crossed the double yellow line in the center of the road and, in less than five seconds, struck his vehicle. Li testified he did not see the van use its directional signal or hear a horn before the collision. Li also stated that he stepped on the brake to slow his vehicle, but could not move to the right because there were vehicles in the right lane. He described the impact as heavy.

Bermeo averred in his sworn statement that he was driving a vehicle owned by defendant Hurtado and was accompanied by non-party Delfina Orrego. He stated that as he was proceeding westbound on County Road 39, he was very tired and began to fall asleep at the wheel. The vehicle drifted to the left and crossed the double yellow line, striking a vehicle going in the eastbound direction. After the vehicle came to rest, Bermeo, who admitted he did not apply the brake before the collision, climbed out through the broken windshield and wandered away from the accident site. Hours later, he appeared at the police station and gave his sworn statement through an interpreter.

The Li defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence showing that Bermeo violated Vehicle and Traffic Law § 1126 (a) by crossing over the double yellow line into an opposing lane of traffic, thereby causing the collision (*see, Marsicano v Dealer Stor. Corp.*, 8 AD3d 451, 452, 779 NYS2d 102 [2d Dept 2004]; *Browne v Castillo*, 288 AD2d 415, 733 NYS2d 494 [2001]). Under the circumstances, Li was faced with an emergency situation not of his own making (*Gadon v Oliva*, 294 AD2d 397, 742 NYS2d 122 [2d Dept 2002]). Li was “not required to anticipate that a vehicle traveling in the opposite direction [would] cross over into oncoming traffic” (*Eichenwald v Chaudhry*, 17 AD3d 403, 404, 794 NYS2d 391 [2d Dept 2005]; *see, Velez v Diaz*, 227 AD2d 615, 615-616, 643 NYS2d 614 [2d Dept 1996]).

In opposition, plaintiff contests the use of Li’s testimony which was certified but unsigned. However, inasmuch as the transcript was submitted by the party deponent himself and therefore was adopted as accurate by Li, as the deponent, it is admissible (*Ashif v Won Ok Lee*, 57 AD3d 700, 868

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NYS2d 906 [2d Dept 2008]; *cf. McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 773, 808 NYS2d 752 [2d Dept 2006]). Thus, plaintiff failed to raise an issue of fact. Accordingly, the branch of the Li defendants' motion which seeks summary judgment to dismiss the complaint and all cross claims against them is granted.

In sum, the motion by the Hurtado defendants and that branch of the motion by the Li defendants for an order removing the action entitled Xing-Bin Dong v Hurtado, New York County Index Number 105091/10 and joining said action with the instant action and a second action entitled Li v Bermeo, Index Number 20730/10 is granted solely to the extent that the instant action and the action entitled Li v Bermeo are joined for trial and is otherwise denied. The branch of the motion by the Li defendants seeking summary judgment in their favor is granted to the extent that the complaint as asserted against them and all cross claims against them are dismissed. Plaintiff Ren Zheng Zheng's claims against the Li defendants are severed and his remaining claims shall continue.

HON. PAUL J. BAISLEY, JR.

Dated: May 2, 2011

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