

Scott v Pleasure Leasing, Ltd.
2016 NY Slip Op 31970(U)
October 17, 2016
Supreme Court, New York County
Docket Number: 151828/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. CAROL R. EDMEAD

PRESENT: J.S.C. Justice

PART 35

Index Number : 151828/2016
SCOTT, CHRISTOPHER
vs
PLEASURE LEASING, LTD.
Sequence Number : 001
CHANGE VENUE

INDEX NO.
MOTION DATE 10/17/16
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Defendant Pleasure Leasing, Ltd. ("Pleasure Leasing") and Skydive Realty LLC ("Skydive Realty") (collectively, "defendants") move pursuant to CPLR §§ 501, 510 and 511 to change venue of this action to Suffolk County.

Factual Background

Plaintiff, a skydiving instructor, sues for personal injuries he sustained in a skydiving/parachuting accident which occurred on July 30, 2014, in Suffolk County, New York.

Prior to the accident, on March 22, 2014, plaintiff and "Altitude Express Inc., D.B.A. Skydive Long Island (and its associated entities)" signed an agreement entitled, "Agreement, Release of Liability & Assumption of the Risk" (the "Agreement"). The Agreement contains a forum selection clause indicating that any action be filed in Suffolk County.

Defendants now move to transfer venue of this action based on the forum selection clause. Plaintiff opposes the motion on various grounds.

Discussion

For the Supreme Court of the State of New York, the prescribed venue of an action is codified at and statutorily authorized by Article 5 of the CPLR. The statutory scheme provides that "notwithstanding the provisions of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order of the court upon motion or by consent...." CPLR Article 5 permits the plaintiff the right to make the initial selection of an appropriate venue (See, CPLR 501, 503, 509; Medicorp v. Avis Corp., 122 Misc.2d 813 [1984]). CPLR 501, entitled, "Contractual provisions fixing venue" provides that subject to 510(2), a "written agreement fixing place of trial, made before an action is

Dated: , J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

commenced, shall be enforced upon a motion for change of place of trial.” Thus, unless the parties have by prior written agreement fixed the venue of an action, CPLR Article 5 permits the plaintiff the right to make the initial selection of an appropriate venue (*See*, CPLR 501, 503, 509; *Medicorp v. Avis Corp.*, 122 Misc.2d 813 [1984] (emphasis added)).

Upon a motion by defendant to change venue, the defendant bears the burden to establish that the plaintiff’s choice of forum is not appropriate, or that other factors and circumstances require that venue be changed (*Islamic Republic v. Pahlavi*, 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597, 467 N.E.2d 245, cert. denied 469 U.S. 1108, 105 S.Ct. 783 [1984]; *Clark v. Michael Ahem Production Service, Inc.* 181 A.D.2d 514, 580 N.Y.S.2d 360 [1st Dept.1993]; *Bradley v. Plaisted*, 277 A.D. 620, 102 N.Y.S.2d 295 [3rd Dept.1951], leave denied, 278 A.D. 127, 103 N.Y.S.2d 661). It is well-accepted policy that forum-selection clauses are prima facie valid (*British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg*, 172 A.D.2d 234, 567 N.Y.S.2d 731 [1st Dept 1991]). “In order to set aside such a clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.” (*Id.*).

It is uncontested that the Agreement provides that "any lawsuit" *between the parties* should be filed in the "State Court of County of Suffolk, New York." (Emphasis added).

Paragraph 3 of the Agreement provides:

PARTIES INCLUDED: I understand that this Agreement, Release of Liability and Assumption of Risk includes but is not limited to . . . SKYDIVE LONG ISLAND . . .and . . .its or their . . . customers, associated entities, *employees*, volunteers, pilots, *instructors*, jumpmasters, *aircraft* (which shall also include but not be limited to airfoils and balloons), SKYDIVE LONG ISLAND, CALVERTON ENTERPRISE PARK, the former GRUMMAN FACILITY, The Town of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY, and M-GBC, LLC, the owners of any land utilized for “skydiving/parachuting activities”, . . . any manufacturer of any piece of equipment or gear which I may use or am using at the time of my INJURY or DEATH and anyone involved in any way, shape, form, or manner in my "skydiving/parachuting activities ", and specifically including but not limited to tandem or experimental test parachute jumping to include tandem parachute jumping”

Paragraph 4 of the Agreement provides:

4. This entire Contract, Release of Liability and Assumption of Risk is expanded to include *all parties mentioned anywhere in the body of the document by name* or by category, all vendors or suppliers of materials or equipment for "skydiving /parachuting a activities", . . . its employees . . and *all other persons in any way associated with any entity mentioned, either specifically or by implication, in the body of this document.* (Emphasis added).

Based on a plain reading of the contract provisions above, plaintiff is bound by the

Agreement's forum selection clause. Additionally, contrary to plaintiff's contention, the forum selection clause is not permissive, but mandatory. The forum selection clause provides: "[i]t is further agreed between the parties that no matter wherever venue lies, any lawsuits shall be filed in State Court of Suffolk County, New York." Here, there is no evidence of overreaching, and as signatory to the Agreement who initialed each paragraph therein, plaintiff is presumed to know the contents of the instrument she signed and to have assented to such terms (*British West Indies Guar. Trust Co., Ltd. , supra*).

Further, there is no distinction made in the Agreement between a "patron" and "employee," such that the document can be said to apply solely to patrons. It is uncontested that at the time of the incident, plaintiff was serving as an instructor in the performance of a tandem parachute dive. Indeed, the paragraph 3 and 4 noted above broadly includes the activities of "employees" and "instructors" such as plaintiff. Although several paragraphs and phrases appear to apply to patrons who might be "making a student jump," "wearing a harness that will need to be adjusted by the jumpmaster," and refers to the first party signatory as having paid money to Skydive for "parachute/skydiving activities," subject to a refund under certain conditions, such language does not overshadow the large, remaining portions of the Agreement indicating the broad applicability of the document to all who skydive at the premises.

Further, both defendants fall within the scope of the "Parties Included" as "the owner of the aircraft" and "the owner [] of any land utilized for skydiving /parachuting activities." As pointed out by defendants, plaintiff's complaint alleges, and Pleasure Leasing admits, that Pleasure Leasing owned a certain aircraft that was involved in plaintiff's accident. And, Skydive Realty, is the alleged owner of the land on which plaintiff made contact after his skydive was over. Thus, Pleasure Leasing and Skydive Realty have standing to enforce the forum selection clause.

Nor is the Agreement procedurally or substantively unconscionable. Plaintiff's reliance on *Weidman v Tomaselli* (81 Misc 2d 328, 365 N.Y.S.2d 681 [Rockland County, County Court 1975]), for the proposition that Agreement involved plaintiff's employment and thus is a necessity of life, is misplaced. The case involved a lease for the provision of shelter, and took judicial notice that "food, clothing, shelter, and employment are necessities of life." Plaintiff cites no caselaw in the context of employment as a parachute instructor as a necessity of life. And, to the extent there is a waiver of defendants' negligence and gross negligence, such exculpatory clauses are severable. The Agreement expressly provides: "if any portions of this Agreement, Release of Liability & Assumption of Risk are found to be unenforceable against public policy, ... only that portion shall fall." And, the Agreement does not supplant the New York Workers' Compensation laws. Notably, and according to defendants, plaintiff is entitled to and is receiving workers compensation benefits.¹

¹ To obtain a discretionary change of venue under CPLR 510(3), "the moving party must provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue" (*Rodriguez v. Port Auth.*, 293 A.D.2d 325, 326, 740 N.Y.S.2d 323, citing *Cardona v. Aggressive Heating*, 180 A.D.2d 572, 580 N.Y.S.2d 285). While it is uncontested that the incident occurred in Suffolk County, and that potential nonparty witnesses are from, in or near Suffolk County, and, the estate of the person who died as a result of the accident at issue commenced an action in the Suffolk County where joint discovery may be supervised in one

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion pursuant to CPLR §§ 501, 510 and 511 to change venue of this action to Suffolk County is granted pursuant to 501 and 511; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, Suffolk County, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Suffolk upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that the proceedings in this matter is stayed until the Clerk of the Supreme Court, County of Suffolk receives the papers on file in this action.

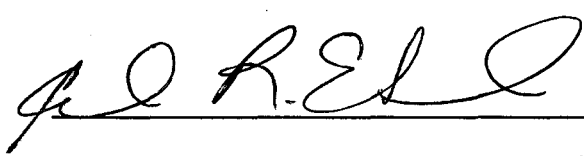
This constitutes the decision and order of the Court.

J

footnote 1, cont'd.

the accident at issue commenced an action in the Suffolk County where joint discovery may be supervised in one court, there is no explanation of the manner in which witnesses would be inconvenienced by the initial venue.

DATED: 10/17/16



J.S.C.

HON. CAROL R. EDMOND
J.S.C.

1. CHECK ONE :	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE :	MOTION (S): <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
3. CHECK IF APPROPRIATE :	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
<input type="checkbox"/> DO NOT POST	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE