

**Kamerer v Turcios**

2016 NY Slip Op 32835(U)

August 1, 2016

Supreme Court, Orange County

Docket Number: 677/15

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

LAUREN R. KAMERER and ROBIN R.  
KAMERER,  
  
Plaintiffs,

-- against --

ANGEL O. TURCIOS and ALLSTATE  
INSURANCE COMPANY,  
  
Defendants.

To commence the statutory time period  
for appeals as of right (CPLR 5513[a]),  
you are advised to serve a copy of this  
order, with notice of entry, upon all  
parties.

Index No. 677/15

**DECISION AND ORDER**

Motion Dates: June 15, 2016, and July  
13, 2016

The following papers numbered 1 to 6 were read and considered on: (1) a motion by the Defendant Allstate Insurance Company, pursuant to CPLR §3211(a)(1) & (7), to dismiss the complaint based on documentary evidence and for failure to state a cause of action, and pursuant to CPLR §327 on the ground of forum non conveniens; and (2) a cross motion by the Plaintiff, pursuant to CPLR §3025(b), to amend the complaint to add a party.

Notice of Motion- Victor Affirmation- Exhibits A-D .....	1-3
Notice of Cross Motion- Cambareri Affirmation- Exhibits 1-6 .....	4-6

Upon the foregoing papers, it is hereby,

ORDERED, that Defendant's motion is denied; and it is further,

ORDERED, that Plaintiff's cross motion is granted.

**Factual/Procedural Background**

The Plaintiffs Lauren R. Kamerer and Robin R. Kamerer were allegedly injured in a motor vehicle accident involving the Defendant Angel O.Turcios. According to the police report, Turcios

admitted that he fell asleep at the wheel of his vehicle before hitting a guard rail and swerving into the Plaintiff's lane of travel.

Originally, the Plaintiffs commenced this action against Turcios alone to recover damages for personal injuries.

However, the Plaintiffs then served a supplemental summons and amended verified complaint adding Allstate Insurance Company (hereinafter "Allstate") as a defendant.

The Plaintiffs allege that Allstate issued an automobile insurance policy (# 9-39-050490 03/04) to Robin Kamerer and Edward Kamerer, that the policy was in effect at the time of the subject accident, and that the policy provided coverage for both Plaintiffs for the accident. Further, they alleged, they were entitled to underinsured motorist benefits thereunder because Turcios was underinsured. The Plaintiffs allege that Allstate breached the policy, and the covenant of good faith and fair dealing implicit therein, by failing to pay such benefits, despite due demand.

Rather than answering, Allstate makes the motion at bar to dismiss the amended complaint as against it.

In so moving, Allstate argues that the policy identified by the Plaintiffs was not issued by Allstate, but was issued by Allstate New Jersey Insurance Company (hereinafter ANJIC"). Further, it asserts, ANJIC is not an alter ego of Allstate.

In any event, Allstate argues, the policy at issue has a forum selection clause that places venue in New Jersey. Thus, Allstate asserts, the clause should be enforced and the action removed to New Jersey.

Moreover, Allstate argues, venue should be removed to New Jersey because New York is not a convenient forum, to wit: The policy at issue is a New Jersey policy, was issued in New Jersey, and

the parties are all New Jersey residents.

Appended as exhibits to Allstate's motion papers are, *inter alia*:

(1) The police report of the accident.

(2) A certified copy of the ANJIC policy. Pursuant to Policy Endorsement ANJ42-8, section I, subsection J: venue is to be in the courts of New Jersey. However, if the occurrence giving rise to a claim "happens outside of New Jersey," the lawsuit may be brought in the judicial district where the occurrence happened.

The Plaintiffs cross move to amend their complaint to add ANJIC as a defendant.

The Plaintiffs note that they settled the action as against Turcios for the full amount of his policy (\$25,000.00). Here, they note, their policy provides supplementary underinsured motorist ("SUM") benefits in the amount of \$250,000.00 per person, and \$500,000.00 per accident.

Concerning Allstate's motion, the Plaintiffs note that Allstate did not submit competent evidence in admissible form in support of its contention that Allstate and ANJIC are two separate and distinct entities. Rather, it submitted only the conclusory and hearsay contentions of its attorney.

Further, they note, the forum selection clause of the policy expressly allows a lawsuit, as here, in the jurisdiction in which the accident occurred. Thus, the clause does not support removal of the case to New Jersey.

Finally, they argue, New York is not an inconvenient forum, as the accident occurred here.

#### **Discussion/Legal Analysis**

CPLR §3211(a)(1) provides, in relevant part, that a party may move for dismissal of any one or more causes of action based upon the existence of documentary evidence. Dismissal upon such grounds, however, is only warranted where the documentary evidence conclusively establishes a

defense to the asserted claims, as a matter of law. *Arnav Industries, Inc. Retirement Trust v. Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 751 N.E.2d 936, 727 N.Y.S.2d 688 (2001). Such documentary evidence must flatly contradict the factual allegations contained in the complaint and resolve all factual issues as a matter of law, thereby conclusively disposing of the plaintiff's claim in its entirety. *Well v. Rambam*, 300 A.D.2d 580, 753 N.Y.S.2d 512 [2<sup>nd</sup> Dept. 2002]; *Harris v. Barbera*, 96 A.D.3d 904, 947 N.Y.S.2d 548 [2<sup>nd</sup> Dept. 2012].

In contrast, CPLR §3211 (a)(7) motions are addressed to the facial sufficiency of the pleading itself. In addressing a CPLR §3211(a)(7) motion, the court must give the pleading a liberal construction, take the facts as alleged as true, and afford the plaintiff the benefit of every reasonable inference in determining whether the allegations fit within any cognizable legal theory. *Leone v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Uzzle v. Nunzie Court Homeowners Association, Inc.*, 70 A.D.3d 928, 895 N.Y.S.2d 203 [2<sup>nd</sup> Dept. 2010]; *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171, 863 N.Y.S.2d 737 [2<sup>nd</sup> Dept. 2008].

Initially, it is noted, the Plaintiffs are correct that Allstate failed to proffer competent evidence in admissible form sufficient to demonstrate, *prima facie*, that ANJIC, not Allstate, is the Plaintiff's insurance carrier, and that ANJIC and Allstate are two separate and distinct entities with no relevant relationship to one another. Thus, the branch of Allstate's motion which seeks to dismiss the complaint for failure to state a cause of action is denied. This is without prejudice to Allstate renewing that argument upon proper proof.

Further, the Plaintiffs are correct that the forum selection clause relied upon by Allstate does not support removal of the case to the courts of New Jersey. Rather, the clause expressly permits a lawsuit, as here, to be commenced in the state in which the underlying accident occurred. Thus,

the branch of Allstate's motion which is to dismiss the complaint based on documentary evidence is denied. *Adler v 20/20 Companies*, 82 A.D.3d 918 [2<sup>nd</sup> Dept. 2011].

Finally, Allstate failed to meet its burden of demonstrating that New York is an inconvenient forum.

The doctrine of forum non conveniens permits a court to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum." *CPLR 327[a]*; see also, *Koop v. Guskind*, 116 A.D.3d 672 [2<sup>nd</sup> Dept. 2014]; *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 110 A.D.3d 938 [2<sup>nd</sup> Dept 2013]. On such a motion, the defendant bears the burden of demonstrating relevant private and/or public interest factors which militate against accepting the litigation. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 cert. denied 469 U.S. 1108; *Koop v. Guskind*, 116 A.D.3d 672 [2<sup>nd</sup> Dept. 2014]; *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 110 A.D.3d 938 [2<sup>nd</sup> Dept 2013]. The court is required to weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system. *Koop v. Guskind*, 116 A.D.3d 672 [2<sup>nd</sup> Dept. 2014]; *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 110 A.D.3d 938 [2<sup>nd</sup> Dept 2013]. No one factor is dispositive. The court's determination of the motion will not be disturbed unless the court improvidently exercises its discretion or fails to consider the relevant factors. *Koop v. Guskind*, 116 A.D.3d 672 [2<sup>nd</sup> Dept. 2014]; *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 110 A.D.3d 938 [2<sup>nd</sup> Dept 2013].

Here, according to the police report, both the Plaintiffs and Turcio are residents of New Jersey; albeit that the Plaintiffs are residents of Ringwood, New Jersey, which is in close proximity

to Orange County. However, the situs of the accident, and the law enforcement officials, and emergency and medical personnel who responded to the same, are in New York. Further, Allstate did not identify any witnesses it intends to call that might be inconvenienced by venue in New York, or any hardship that will be caused by the choice of forum. Further, given that it appears that liability has been settled, the burden on the New York court system would be minimal.

Thus, that branch of Allstate's motion which seeks to dismiss the complaint based on the doctrine of forum non conveniens is denied.

Finally, the Plaintiffs' cross motion for leave to serve and file amended pleadings to add ANJIC as a defendant is not opposed and is granted. Indeed, leave to amend a pleading, including to add a party, is to be freely given provided that the proposed amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit. *Bloom v. Lugli*, 102 A.D.3d 715, 958 N.Y.S.2d 184 [2<sup>nd</sup> Dept. 2013]; *Ruddock v. Boland Rentals, Inc.*, 5 A.D.3d 368 [2<sup>nd</sup> Dept 2004]; *CPLR 3025*. Here, this standard is satisfied. Accordingly, and for the reasons stated herein, it is,

ORDERED, that Defendant's dismissal motion is denied; and it is further,

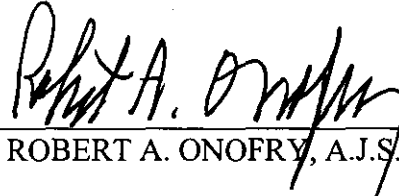
ORDERED, that Plaintiffs' cross motion, which seeks leave to amend their complaint to add an additional party, is granted; and it is further,

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear at a Preliminary/Scheduling Conference, such Conference to be held on Tuesday, October 4, 2016 at 1:30 P.M., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

This constitutes the Decision and Order of the Court.

Dated: August 1, 2016  
Goshen, New York

ENTER



Handwritten signature of Robert A. Onofry in black ink, written over a horizontal line.

HON. ROBERT A. ONOFRY, A.J.S.C.

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