

**Cadigan v Liberty Helicopters, Inc.**

2023 NY Slip Op 30619(U)

March 2, 2023

Supreme Court, New York County

Docket Number: Index No. 152286/2018

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: Hon. James d'Auguste**

**PART 55**

*Justice*

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**INDEX NO. 152286/2018**

JERRY CADIGAN, NANCY CATON CADIGAN,

**MOTION DATE \_\_\_\_\_**

Plaintiffs,

**MOTION SEQ. NO. 018**

- v -

LIBERTY HELICOPTERS, INC., A NEW YORK CORPORATION, NY ON AIR LIMITED LIABILITY COMPANY, A NEW JERSEY LIMITED LIABILITY COMPANY, FLYNYON LLC, A DELAWARE LIMITED LIABILITY COMPANY, MERIDIAN CONSULTING CORPORATION, INC., A DELAWARE CORPORATION, RICHARD ZEMKE VANCE, A CONNECTICUT RESIDENT, AIRBUS HELICOPTERS, S.A.S., A FRENCH CORPORATION, AIRBUS HELICOPTERS, INC., A DELAWARE CORPORATION, APICAL INDUSTRIES, INC. D/B/A DART AEROSPACE

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 018) 387, 388, 389, 390, 391, 392, 393, 402, 403, 404, 405, 407, 408

were read on this motion to/for MISCELLANEOUS

In this wrongful death action arising from a helicopter crash, defendants NYONair LLC and FLYNYON LLC (“NYON defendants” or “NYON”) move for an order holding that New Jersey law applies to plaintiffs’ tort claims against the NYON defendants, based on a contractual pre-flight liability waiver signed by plaintiff/decedent Trevor Cadigan (“decedent”) prior to the fatal flight. Plaintiffs Jerry Cadigan and Nancy Caton Cadigan, as the Proposed Administrators of the Estate of Trevor Cadigan, Deceased; defendants Airbus Helicopters SAS and Airbus Helicopters, Inc. (“Airbus defendants”); and defendant Apical Industries d/b/a Dart Aerospace

(“Dart Aerospace”) oppose the motion. The motion is denied, as New York law applies to plaintiff’s tort claims.

On March 11, 2018, decedent was a passenger on an “doors off” aerial photography helicopter tour operated by Liberty Helicopters Inc. on behalf of NYON. Liberty Helicopters is a New York corporation and was the operator of the subject helicopter – a Eurocopter AS350 B2 with the registration number N350LH (“subject helicopter”). Meridian Consulting 1 Corp. is a Delaware corporation and the registered owner of the subject helicopter. Richard Zemke Vance (“Vance”) was piloting the subject helicopter at the time of the fatal crash.<sup>1</sup> The NYON defendants are New Jersey corporations that are in the business of operating sightseeing helicopter tours in the New York City area. The Airbus defendants (Airbus Helicopters SAS, a French corporation, and Airbus Helicopters, Inc., a United States subsidiary and Delaware corporation) are the successors to the subject helicopter’s original manufacturer, Eurocopter. During the flight on March 11, 2018, the subject helicopter suffered a mid-air malfunction that caused it to descend rapidly. Vance was able to perform an emergency landing on the East River, and unsuccessfully attempted to inflate the floatation devices attached to the subject helicopter’s skids. The emergency floatation system was manufactured by Dart Aerospace and installed by Eurotec Canada.<sup>2</sup> When the floatation devices failed to inflate properly, the subject helicopter tipped over, filled with water, and sank into the East River north of Roosevelt Island. Vance was able to escape the sinking aircraft, but the five passengers, including decedent, drowned.

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<sup>1</sup> The parties stipulated to discontinue the action without prejudice as to Richard Zemke Vance (NYSCEF Doc. No. 479).

<sup>2</sup> Eurotec Canada is a non-party to this action, and the parties have stipulated that Eurotec Canada’s installation did not cause or contribute to the wrongful deaths in this action (NYSCEF Doc. No. 478).

Prior to the fatal flight, decedent signed NYON's "Release of Liability and Photo Consent" ("pre-flight liability waiver"). Paragraph 5 of the pre-flight liability waiver states: "[t]his Release shall be governed by and interpreted in accordance with the laws of the State of New Jersey" (NYSCEF Doc. No. 389). In Motion Sequence 012, the NYON defendants moved to dismiss this action as to the NYON defendants based on the forum selection clause in the pre-flight liability waiver, located in paragraph 6: "[a]ny litigation brought by or on behalf of Participant that involves parties contemplated by this Document shall be exclusively brought in the Courts of the State of New Jersey." The Court denied the motion, holding that the NYON defendants did not raise the forum selection clause in any of its answers or a pre-answer motion to dismiss, and the NYON defendants waived the forum-selection clause based on their substantial participation in this action for three years prior to filing the motion to dismiss. (NYSCEF Doc. No. 355).

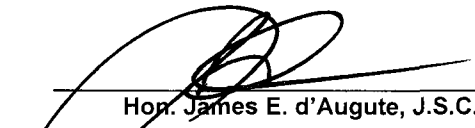
Under New York law, the "choice of law" provision in the "pre-flight liability waiver" would not apply to tort claims. As the parties brought this action in New York, New York's choice-of-law rules apply when analyzing the choice-of-law provision in the "pre-flight liability waiver." See Hughes v LaSalle Bank, N.A., 419 F Supp 2d 605, 616 [S.D.N.Y. 2006] [*vacated on other grounds by 2007 WL 4103680, (2d Cir. Nov. 19, 2007)*] ["[t]he relevant forum is the forum where the action is brought, here New York, and under New York law the scope of the contractual choice-of-law provision is determined under New York law as opposed to the law selected by the provision"]; see Capital Z Fin. Services Fund II, L.P. v Health Net, Inc., 43 AD3d 100, 109 [1st Dept 2007] [showing that New York courts apply New York law to interpret choice-of-law clauses when the action is brought in New York]. New York courts are reluctant to extend contractual choice-of-law clauses to extra-contractual tort claims. Knieriemmen v Bache

Halsey Stuart Shields Inc., 74 AD2d 290 [1st Dept 1980]; *see also* Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp., 72 Misc3d 1218(A) [Sup Ct 2021]. In the rare instances when New York courts have extended a choice-of-law provision to include extra-contractual claims, the choice-of-law provision had affirmative language stating that the provision intended to affect the entire legal relationship between the parties. *See* Capital Z Fin. Services Fund II, L.P. v Health Net, Inc., 43 AD3d 100, 109 [1st Dept 2007] [upholding contractual choice-of-law for extra-contractual causes of action based on a provision stating “Delaware law governs ‘all issues’ concerning ‘enforcement of the rights and duties of the parties’”]; *see also* Avnet, Inc. v Deloitte Consulting LLP, 187 AD3d 430, 433 [1st Dept 2020] [upholding contractual choice-of-law for extra-contractual causes of action based on a provision stating “(t)his Agreement and each Work Order, *and all matters relating to this Agreement and each Work Order*, shall be governed by . . . the laws of the State of New York”]. NYON highlights that a “Release of Liability” is a contract that governs the relationship of the parties if a tort occurs; in essence, a tort that occurs during the scope of the “Release of Liability” is integral to the contract itself. Therefore, NYON argues that adding additional language to the “choice of law” section of the “Release of Liability” to specify that the contract applies to the tort claims contemplated under the contract is unnecessary to determine the intent of the parties. New York law has not established a “release of liability” exception to the requirement that the choice-of-law provision itself must contain affirmative language that the provision is intended to cover the entire relationship of the contracting parties.

As the Court has determined that the “choice-of-law” provision in the “pre-flight liability” waiver does not apply to tort claims per New York law, the Court does not need to proceed with the remaining arguments presented.

Accordingly, the Court finds that the "choice-of-law" provision in the "pre-flight liability waiver does not extend to the tort claims in this action, and the motion for an order holding that New Jersey law applies to plaintiffs' claims against the NYON defendants is denied.

This constitutes the decision and order of the Court.

<u>3/2/2023</u>						
DATE			Hon. James E. d'Augute, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE