SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17
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LOUISE CANTRELL, Administrator of the Estates of Edward D. Cantrell, Isabella Cantrell and Natalia Cantrell (Decedents), individually, and as a Personal Representative of the Estates and Beneficiaries of Decedents,

Plaintiffs,

Index No. 159840/11

-against-

GENERAL SECURITY, INC., TIME WARNER CABLE, INC., TIME WARNER CABLE ENTERPRISES, LLC, and TIME WARNER CABLE SOUTHEAST, LLC,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of a tragedy wherein plaintiff Louise A. Cantrell ("plaintiff" or "Cantrell") lost her husband and two daughters in a fire which destroyed their home at 4151 Pecan Drive, Hope Mills, North Carolina ("premises" or "home"). Plaintiff appears here both individually, and as Administrator of the estates of her husband Edward D. Cantrell, and daughters Isabella and Natalia. Plaintiff now resides in New York.

I. Background

This motion is brought by defendants Time Warner Cable, Inc., Time Warner Cable Enterprises, LLC and Time Warner Cable

Southeast, LLC (together, "TWC") to dismiss the action on the ground of forum non conveniens. Alternatively, TWC moves to dismiss plaintiff's seventh cause of action for punitive damages, and to stay the action and compel plaintiff to arbitrate the matter.

The events leading up to the fire are as follows. Plaintiff and her family contracted in October 2009 with defendant General Security, Inc. ("General Security") to install a security/fire detection alarm system in their home, which included monitoring of the premises. This system provided that, in the event of a fire, the home's smoke detectors would warn the family that a fire had been detected, and ensure that emergency services would be sent to the home.

In November 2011, the Cantrells decided to switch their telephone service to TWC. TWC contracted with nonparty Southeastern Cable Contractors, Inc. ("SEC") to actually install the new telephone system. Plaintiff claims that TWC breached a duty of care owed to the Cantrells by negligently disconnecting the security/fire alarm system while installing the telephone system, which allegedly disabled the smoke detectors and fire alarm.

On the morning of March 6, 2013, a fire broke out in the Cantrell's home. The Cantrells awoke to the smell of smoke.

Plaintiff's husband managed to call 911, but perished in the fire along with plaintiff's two young daughters. Plaintiff escaped.

Plaintiff commenced this action against General Security and TWC for the alleged negligent placement of the elements of the security/fire alarm system by General Security, and the negligent disconnection of the security/fire alarm system by TWC. Plaintiff has not sued SEC, and it is undisputed that there is no jurisdiction over SEC in New York.

Plaintiff, however, has obtained jurisdiction over TWC due to its corporate presence in New York. Regardless, TWC moves, pursuant to CPLR 327, to dismiss the complaint on the ground of forum non conveniens, claiming that North Carolina is the proper forum for this action. If the action is not dismissed, TWC asks that plaintiff be compelled to arbitrate her dispute with TWC, based on an alleged contract between plaintiff and TWC. TWC also asks that the cause of action for punitive damages be dismissed.

II. Discussion

A. Forum Non Conveniens

Pursuant to the doctrine of forum non conveniens, as set forth in CPLR 327(a):

> "[w]hen a court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

The doctrine of forum non conveniens was developed to provide for the dismissal of an action "in situations in which it was found that, on balancing the interests and conveniences of the parties and the court, the action could better be adjudicated in another forum [internal quotation marks and citations omitted]." *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 360 (1972). The doctrine is meant to be "applied flexibly by the court, in its sound discretion, based upon the facts and circumstances of each particular case." *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294 (1st Dept 2005).

In determining a motion under CPLR 327(a), the following factors are considered: "'the residency of the parties, the potential hardship to proposed witnesses including, especially, nonparty witnesses, the availability of an alternative forum, the situs of the underlying actionable events, the location of evidence, and the burden that retention of the case will impose upon the New York courts.'" *Jackam v Nature's Bounty, Inc.*, 70 AD3d 1000, 1001 (2d Dept 2010), quoting *Turay v Beam Bros. Trucking, Inc.*, 61 AD3d 964, 966 (2d Dept 2009). "No one factor is controlling [internal quotation marks and citation omitted]." *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d at 294; *see also Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), *cert denied* 469 US 1108 (1985). However, a New York plaintiff is "presumptively entitled" to his or her choice to sue in New York.

Barocas v Gorenstein, 189 AD2d 847, 848 (2d Dept 1993), quoting *Broida v Bancroft*, 103 AD2d 88, 92 (2d Dept 1984). In the First Department, it has been held that the residence of the plaintiff in New York "is generally the most significant factor in the equation (internal quotation marks and citation omitted]." *Sweeney v Hertz Corp.*, 250 AD2d 385, 386 (1st Dept 1998).

In the present case, plaintiff is a New York resident, and TWC maintains a corporate presence here in New York. The presence of the parties in New York is an important factor weighing in favor of jurisdiction here. Yet, TWC maintains that SEC is a "necessary party" and the "primary tortfeasor," who is missing from this jurisdiction (CPLR 1001). As such, TWC claims it would be impossible to litigate the present action fully in New York, and to bring in SEC as a third-party defendant in a potential action for contribution and indemnification. TWC considers this to be, at the least, unfair.

TWC relies on the case *Horwitz v Sax* (16 AD3d 161 [1st Dept 2005]) for the unremarkable premise that, where the court lacks subject matter jurisdiction over a necessary party, and there is an alternative forum elsewhere, an action should be dismissed. However, it is well settled that a joint tortfeasor is not a necessary party in a tort action. *See Ferriola v DiMarzio*, 83 AD3d 657, 658 (2d Dept 2011)("joint tortfeasors are not necessary parties"); *Amsellem v Host Marriott Corp.*, 280 AD2d 357, 360 (1st

Dept 2001)(same); *Tudor v Riposanu*, 93 AD2d 718, 718 (1st Dept 1983)(same). A plaintiff may sue whichever tortfeasor he or she chooses, and need not bring in all the tortfeasors. *Smith v Pasqua*, 110 AD3d 710 (2d Dept 2013)("[c]omplete relief may be accorded . . . without the presence of the [joint tortfeasor], as a plaintiff may proceed against any or all joint tortfeasors."). Therefore, the action should not be dismissed merely because SEC cannot be sued here by either plaintiff or TWC.

Further, TWC's argument that it will be prejudiced by not being able to bring a third-party suit against SEC in New York is irrelevant for purposes of forum non conveniens. Dismissal is not warranted "because of the alleged difficulty in obtaining jurisdiction over possible joint tort-feasors." *Boracas v Gorenstein*, 189 AD2d at 848. TWC has a presence in North Carolina, and may sue SEC there.[1]

Plaintiff further argues that she will be prejudiced if she is required to bring suit in North Carolina because North Carolina applies the rule of contributory negligence. Plaintiff is concerned that applying North Carolina law would constitute a "hardship," and "deprive her of her day in court." (Plaintiff's supplemental memorandum, at 12). Under North Carolina law,

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[1] As a result, it is unnecessary to address plaintiff's argument concerning SEC's alleged obligation to make itself available for suit in any jurisdiction TWC chooses, which plaintiff claims is mandated by the contract between TWC and SEC.

"[c]ontributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which plaintiff complains [internal quotation marks and citation omitted]." *Fisk v Murphy*, 212 NC App 667, 670, 713 SE2d 100, 102 (NC App, 2011). Under this law, "a plaintiff is completely barred from recovering for any injury proximately caused by plaintiff's contributory negligence." *Thorpe v TJM Ocean Isle Partners LLC*, 733 SE2d 185, 188 (NC App, 2012). Consequently, under North Carolina law, plaintiff may have no recovery at all if, under some unlikely scenario, she were to be found to have contributed to the events which took her family from her.

The need to apply the law of other jurisdictions is "an appropriate concern in a forum non conveniens motion." *Fox v Fusco*, 4 AD3d 313, 313 (1st Dept 2004). In the present matter, plaintiff is assuming that the North Carolina law of contributory negligence would only be applied if the action were to be litigated in North Carolina. That is not necessarily true. This Court may apply North Carolina law, if necessary. Under a choice of law analysis, which need not be exhaustively addressed here, it is possible that the law of the situs of the accident might be applicable even were the case to be tried in New York. It can be argued that North Carolina has a very strong interest in

adjudicating the alleged negligence of its corporate residents in North Carolina courts, and under its own law. In any event, in the choice of law context, a court "may only refuse to apply [foreign] law if its application would violate public policy . . . ." *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 205 (1st Dept 2013). North Carolina's law does not violate public policy. Plaintiff's fear that the application of North Carolina law would cause her harm is not a determining factor in keeping this action in New York.

As previously stated, the situs of the incident is an important factor in determining a forum non conveniens motion. *Turay v Beam Bros. Trucking, Inc.*, 61 AD3d at 966. In the present case, the site of the house fire has been thoroughly investigated by both TWC and plaintiff's experts, and the house has been razed. There is, in effect, no more physical evidence left at the site of the fire. There is, however, other evidence obtainable only in North Carolina, affecting North Carolina's strong interest in the outcome of this litigation.

TWC expresses concern for the convenience of several nonparty, North Carolina based, witnesses, offering five affidavits of potential witnesses, from: (1) an ex-employee of SEC who actually commenced the installation of the telephone service to plaintiff's home, but who handed the job off to another SEC employee to complete (this second person is also no

longer a SEC employee) (Notice of Motion, Exhibit C); (2) the owner and president of SEC (*id.*, Exhibit D); and (3), (4) and (5) the affidavits of three first responders (*id.*, Exhibits F, G and H). TWC also provides the affidavit of a "Technical Facilitator" of TWC, who lives and works in North Carolina, who "is familiar with records given by [TWC] when installing digital phone service at residences equipped with an alarm/security system, and who can testify as to the alleged Subscriber Agreement between SEC and plaintiff(*id.*, Exhibit E). The TWC Facilitator would be a nonresident party witness. All of these witnesses profess that they would be seriously discomfitted by having to appear in New York, as they have jobs and families in North Carolina which need their attention.

As previously stated, *Turay v Beam Bros. Trucking, Inc.*, (61 AD3d 964) rules that the potential hardship to proposed witnesses is "especially" considered as to nonparty witnesses. *Id.* at 966; *see also Wild v University of Pa.*, 115 AD3d 944 (2d Dept 2014). In the present case, TWC has pointed to several nonparty witnesses who will likely be needed for the full adjudication of this action. Notwithstanding plaintiff's position to the contrary, it is self-evident that the testimony of the nonparty North Carolina witnesses who actually had a direct and significant causal connection with the installation of the telephone lines, especially the nonparty telephone installer and

SEC's president, is crucial in this action. Although plaintiff states that TWC installed the lines so that a TWC witness will suffice, plaintiff has clearly alleged that "TWC employed Southeastern Cable Contractors, Inc. [SEC]... to perform telephone service installation on its behalf, including the installation at the Cantrell home." (Complaint, ¶62). Thus, it is clear that TWC did not physically install the lines in the Cantrell home, but actually contracted out the installation to SEC, which is a crucial issue in this matter. Further, the testimony of the first responders may well be a route of discovery necessary to this action. *See Turay v Beam Bros. Trucking, Inc.*, 61 AD3d at 966 (in which the Court found that the testimony of first responders, there, police and medical personnel, "will likely be necessary and important witnesses").

Plaintiff argues that depositions of these parties can be obtained in North Carolina. It is true that a deposition on written questions is obtainable out of state pursuant to CPLR 3108.[2] However, TWC cannot serve a subpoena on the out-of-state nonparty witnesses to appear at trial, which presumably may yet occur, because "such service is without effect." *Coombs v*

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[2]Plaintiff errs in referring the court to CPLR 3119, the "Uniform Interstate Depositions and Discovery" statute. Under CPLR 3119 (a) (1), an "out-of state subpoena" is a "subpoena issued under authority of a court of record of a state *other than this state* [emphasis supplied]." That is, CPLR 3119 is to be used by states other than New York to obtain depositions here, not the other way around.

Rowand, 39 AD2d 532, 532 (1st Dept 1972); *see also Matter of OxyContin II*, 76 AD3d 1019, 1021 (2d Dept 2010)("New York courts lack the authority to subpoena out-of-state nonparty witnesses"). Therefore, lack of jurisdiction over the nonparty witnesses is a serious factor in determining the present motion.

As set forth above, under the totality of the circumstances and in the exercise of discretion, the convenience of essential out-of-state nonparty witnesses who physically installed the actual lines in the Cantrell home, the situs of the accident in North Carolina, and that North Carolina has a stronger interest in the outcome of this litigation than this State, so strongly militates in favor of dismissal on the ground of forum non conveniens, that TWC's motion must be granted, and the action dismissed without prejudice.

As a result, it is not necessary to address TWC's other arguments, concerning the viability of the cause of action for punitive damages, or whether or not the matter should be arbitrated. These are issues for the proper forum.

III. Conclusion

Accordingly, it is

ORDERED that the motion brought by defendants Time Warner Cable, Inc., Time Warner Cable Enterprises, LLC and Time Warner Cable Southeast, LLC to dismiss the complaint is granted without prejudice and on condition that defendants stipulate to waive

jurisdictional and statute of limitations defenses, if applicable; and it is further

ORDERED that the complaint is dismissed without prejudice; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: December 24, 2014

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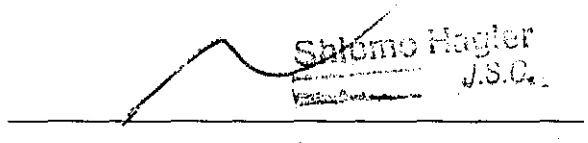

J.S.C.