

**Bagg v Doring**

2019 NY Slip Op 35142(U)

September 25, 2019

Supreme Court, Bronx County

Docket Number: Index No. 20142/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: **PART 14**

-----X  
**BAGG, DIANE**

Index No. **20142/2018E**

- against -

Hon. **JOHN R. HIGGITT,**

**DORING, MICHAEL, et ano.**  
-----X

A.J.S.C.

The following papers numbered 13 to 21, 23 to 24 and 35 to 40 in the NYSCEF System were read on this motion for **DISMISSAL**, noticed on May 31, 2019 and duly submitted as No. 19 on the Motion Calendar of June 18, 2019.

|  | NYSCEF Doc. Nos. |
|--|------------------|
| Notice of Motion – Exhibits and Affidavits Annexed       | 13-21            |
| Notice of Cross-Motion – Exhibits and Affidavits Annexed | 23-24            |
| Answering Affidavit and Exhibits                         | 35-37            |
| Replying Affidavit and Exhibits                          | 38-39, 40        |
| Filed Papers   |                  |
| Memoranda of Law   |                  |
| Stipulations   |                  |

Upon the foregoing papers, the motion of defendant Ethan Bagg and cross motion of defendant Doring for an order dismissing the action without prejudice under CPLR 327 or in the alternative to transfer venue to Montgomery County are granted to the extent indicated, in accordance with the annexed decision and order.

Dated: 09/25/2019

Hon.   
**JOHN R. HIGGITT, A.J.S.C.**

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
DIANE M. BAGG,

Index No. 20142/2018E

Plaintiff,

- against -

MICHAEL H. DORING and ETHAN L. BAGG,

Defendants.  
-----X

TIFFANY MONCALIERI,

Plaintiff,

Index No. 303712/2016

- against -

ETHAN L. BAGG, DIANE M. BAGG  
and MICHAEL H. DORING

Defendants.  
-----X

John R. Higgitt, J.

Upon defendant Ethan Bagg’s April 29, 2019 notice of motion and the affirmation, affidavit and exhibits submitted therewith; defendant Doring’s June 7, 2019 notice of cross motion and the affirmation, affidavit and exhibits submitted therewith; plaintiff’s June 14 affirmation in opposition and the exhibits submitted therewith; and due deliberation, the motion and cross motion for an order dismissing the action without prejudice under CPLR 327 or in the alternative to transfer venue to Montgomery County under CPLR 510(3) are granted to the extend indicated below.

The parties were involved in a two-car accident in Montgomery County, New York on July 31, 2015. On November 16, 2016, Tiffany Moncalieri commenced an action against Ethan and Dane Bagg and Doring in Supreme Court, Bronx County (index no. 303712/2016). On

January 2, 2018, plaintiff Diane Bagg commenced an action against defendant Doring and defendant Ethan Bagg in Supreme Court, Bronx County (index no. 20142/2018E). None of the parties resided in New York State at the times the actions were commenced, so plaintiffs laid venue in Bronx County under CPLR 503(a). The actions were joined for discovery and trial in July 2018. Party depositions were taken in March and April 2019. The parties in the *Moncalieri* action settled that matter, leaving the *Bagg* action.

Defendant Ethan Bagg moved for dismissal of the *Bagg* action under CPLR 327 or, alternatively, for a discretionary change of venue under CPLR 510(3). Defendant Doring cross-moved for the same relief. The moving parties submitted the transcripts of the deposition testimony of the parties. The parties testified that the subject motor vehicle accident happened in Montgomery County. They also testified they are residents of the State of Massachusetts. At no point did any of the parties live or work in Bronx County. Also, defendants submitted the relevant police accident report, which confirms that the accident took place in Montgomery County, New York.

Plaintiff Diane Bagg opposes the motion and cross motion.

CPLR 327(a) provides, in relevant part, that “[w]hen the 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.”

In *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), the Court of Appeals directed that a trial court confronted with a motion to dismiss under CPLR 327(a) must, “after considering and balancing the various competing factors, ... determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of

an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresident[s]... No one factor is controlling” (internal citations omitted). “The burden rests on the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation” (*id*). However, “[a] nonresident plaintiff in a tort case must demonstrate special circumstances which warrant the retention of the action in New York or risk dismissal of the action pursuant to the doctrine of forum non conveniens” (*Economos v Zizikas*, 18 AD3d 392, 393 [1st Dept 2005]).

Here, no party to the *Bagg* action is a resident of New York State; rather, all parties reside in Massachusetts. The parties’ deposition testimony suggests that travelling to the Bronx to further litigate the action would create hardships for them. The courts of Massachusetts are available to the parties to resolve their claims and defenses stemming from the subject motor vehicle accident, which occurred in Montgomery County.<sup>1</sup> The only connection between the *Bagg* action and New York State is that the subject accident occurred here; “that happenstance alone does not constitute a substantial nexus so as to mandate retention of jurisdiction” (*id* at 394).

Considering the factors articulated in *Islamic Republic of Iran* and the various circumstances surrounding the *Bagg* action, defendants have met their burden of demonstrating relevant factors militating against having the action adjudicated in New York State, and plaintiff failed to demonstrate any special circumstance warranting the retention of the action in this court. The action would be better adjudicated in Massachusetts (*see Fajardo v Alejandro*, 126 AD3d 644 [1st Dept 2015]; *Economos v Zizikas*, *supra*; *cf. Swaney v Academy Bus Tours of New York, Inc.*, 158 AD3d 437, 439 [1st Dept 2018]). To protect plaintiff from any procedural

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<sup>1</sup> Approximately, 200 miles separate the Montgomery County Courthouse and the Bronx County Courthouse.

hurdles in a Massachusetts action, the court will condition the CPLR 327(a) dismissal of the *Bagg* action on defendants' consent to the personal jurisdiction of the Massachusetts' courts and waiver of any statute of limitations defense (*see Foley v Roche*, 68 AD3d 558 [1st Dept 1979]; *see also Economos v Zizikas, supra*).

The court rejects plaintiff's argument that defendants' motion and cross motion are untimely because of laches. The motion and cross motion were made on the heels of the completion of the parties' depositions, discovery is not complete and no note of issue has been filed in the action (*cf. Kefalas v Kontogiannis*, 44 AD3d 624 [2d Dept 2007]; *Corines v Dobson*, 135 AD2d 390 [1st Dept 1987]).

The aspects of the motion and cross motion seeking to transfer venue of the action to Montgomery County are denied as moot.

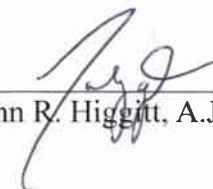
Accordingly, it is

ORDERED that the aspects of the motion and cross motion to dismiss the complaint under CPLR 327(a) are granted, and the complaint is hereby dismissed without prejudice on the condition that defendants consent to the personal jurisdiction of the Massachusetts' courts and waive any statute of limitations defenses; and it is further

ORDERED, that the motion and cross motion are otherwise denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: September 25, 2019

  
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John R. Higgin, A.J.S.C.