

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LINDA GRAHAM

Plaintiff,

v.

STATE FARM MUTUAL
INSURANCE COMPANY,
TROY O. BOLGEN and
DELAWARE EXPRESS SHUTTLE
INC., a/k/a DELAWARE EXPRESS
TOURS, INC.

Defendants.

C.A. No. 05C-11-014 SCD

Submitted: May 26, 2006

Decided: June 12, 2006

ORDER

Upon consideration of the motion to dismiss filed by Troy O. Bolgen and Delaware Express Shuttle Inc., a/k/a Delaware Express Tours, Inc. and joined by State Farm, the response of plaintiff Linda Graham, and portions of the record in this case, it appears that:

(1) On November 27, 2003, an auto accident occurred near the intersection of 10th Avenue and West 41st Street in New York City, New York. Plaintiff was a passenger in a Delaware Express Shuttle operated by Troy O. Bolgen an agent and employee of Delaware Express Shuttle Inc. (collectively “Delaware Express”). While traveling near 10th Avenue and West 41st Street, Delaware Express struck a motor vehicle driven by Jorge L. Galarza (“Galarza”) in the rear. The police report advises there were two accounts of the incident. Galarza claimed he was heading straight on West 41st Street when Delaware Express hit him from behind. Delaware

Express stated that Galarza was improperly turning left, thus causing the collision. The police officer's assessment of the property damage was consistent with the story of Delaware Express.

(2) Plaintiff specifically asserts the negligence of both Galarza and Delaware Express.

Galarza is a resident of New York and is not a party to this proceeding. Delaware Express and its agent, Bolgen, are Delaware residents. Delaware Express Shuttle is a Delaware corporation. Plaintiff has also alleged a claim against State Farm Mutual Insurance Company ("State Farm") for uninsured motorist benefits. Defendant State Farm is a corporation doing business in the State of Delaware.

(3) Defendants have filed a motion to dismiss based on failure to join an indispensable party¹ or alternatively, improper venue² and *forum non conveniens*³.

(4) In a motion to dismiss the record must be viewed in a light most favorable to the non-moving party and all reasonable inferences are considered most strongly in favor of plaintiff.⁴ All well-pled allegations are taken as true.⁵

(5) Under Superior Court Civil Rule Rule 12 (b)(7), the Court may dismiss a plaintiff's claim for failure to join an indispensable party pursuant to guidelines set forth in Superior Court Civil Rule 19. The factors for the Court to consider in making this determination, include:

First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.⁶

¹ Super. Ct. Civ. R. 12 (b)(7)

² Super. Ct. Civ. R. 12 (b)(3)

³ 10 Del. C. § 3104.

⁴ *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984).

⁵ *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

⁶ Super. Ct. Civ. R. 19(b)

If a party is indispensable to the case and cannot be joined in the proceedings, Rule 19 permits the Court to dismiss the claim.

(6) Rule 19 provides that a person is necessary to a claim if complete relief cannot be accorded in his or her absence. Plaintiff specifically charges Galarza with negligence in her complaint, but has not included him in the action, presumably because he is not subject to the jurisdiction of a Delaware Court. Plaintiff makes complete relief in Delaware unattainable from the outset as Defendant Delaware Express has no opportunity to secure contribution. Likewise, State Farm's uninsured obligations are dependent upon a resolution of the liability case, and determination of damages.

(7) Based on plaintiff's allegations, and statements on file, the cause of the accident is disputed. Any judgment rendered in Galarza's absence would be prejudicial to the remaining parties. Galarza is a New York resident involved in a New York accident. Galarza is not within this Court's jurisdiction and may not be joined as a party to this Delaware action.

(8) This action should be filed in New York where full adjudication of the issues, and participation by all parties involved in the November 27, 2003, incident may occur.

(9) Viewed in the light most favorable to the non-moving party, the Court dismisses plaintiff's claims against **all** defendants for failure to join an indispensable party.⁷

(10) Because I find Rule 12(b)(7) controlling, I do not reach the other arguments in support of the motion to dismiss.

⁷ State Farm joined in Delaware Express's motion to dismiss by letter to the Court of April 7, 2006. Therefore, the entire action is dismissed, without prejudice as to State Farm, should circumstances arise which makes Delaware the appropriate forum after the liability case is resolved. The Court has reviewed the cases cited at oral argument, *Saienni v. Anderson*, 669 A.2d 23 (Del. 1995) and *DeMedio v. Nationwide Ins. Co.*, 1987 WL 6452 (Del. Super. Ct.), and finds neither on point.

WHEREFORE, defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED.

Judge Susan C. Del Pesco

Original to Prothonotary

xc: L. Vincent Ramunno, Esquire
Delia A. Clark, Esquire
Thomas P. Leff, Esquire