

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

OGDEN N. LEWIS, as Personal)
Administrator of the Estate of)
Ogden N. Lewis, Jr.,)
)
Plaintiff,)
)
v.)
)
ROBERT A. D. PIKE,)
)
Defendant)

Civil No. 03-159-B-S

**RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS
ON THE GROUNDS OF FORUM NON CONVENIENS**

The personal administrator of the New York Estate of Ogden N. Lewis, Jr., brings this wrongful death action against Robert A. D. Pike, a childhood resident of Maine who now lives in Thailand, on account of fatal injuries Lewis received in connection with an automobile rollover incident in Argentina, where Lewis, Pike and Owen I. Breck, a common friend, were traveling together. Pike’s negligent operation of the automobile is alleged to be the cause of Lewis’s death. Now pending is Pike’s motion to dismiss the case on the ground that the circumstances strongly favor Argentina as the appropriate forum for this litigation. I recommend that the Court **DENY** the motion.

“Forum non conveniens determinations are committed to the district court’s sound discretion.” Mercier v. Sheraton Int’l, Inc., 935 F.2d 419, 423 (1st Cir. 1991) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981)). The Court will not abuse its discretion so long as it considers and appropriately weighs all of the material factors and does not base its

determination on any immaterial factors. Id. The applicable standard requires that the Court maintain jurisdiction over the case unless Pike can establish (1) that the alternative forum would afford an adequate remedy and (2) that the balance among various private and public interests “strongly favor” a trial in the alternative forum. Id. at 423-24. Pike has appropriately submitted his evidence by way of affidavits, which Lewis’s Estate (“the plaintiff”¹) has challenged in like manner.

Proposed Findings

Lewis, Pike and Breck were friends from high school and college who were traveling together in Argentina. On November 14, 2001, the three were traveling in a rental car along Provincial Route Number 2 near the town of Puerto Piramides on the Valdéz peninsula of Argentina. Pike was driving, Lewis was a front seat passenger and Breck was a back seat passenger. (Complaint, Docket No. 1, ¶¶ 9-11; Aff. of Robert A. D. Pike, Docket No. 13, ¶ 3.) The car left the roadway, rolled and crashed. Lewis and Breck were ejected from the car. (Complaint, ¶¶ 15-16.) Lewis died within hours of the accident as a consequence of injuries he received in the crash. Roughly 19 months later, on June 30, 2003, the Trial Court of the City of Puerto Madryn in the Province of Chubut, Republic of Argentina, issued a summons for Pike to appear before the court on December 12, 2003, to present evidence with respect to the provisional charge of Manslaughter with Bodily Injuries. (Complaint, ¶ 23.) In the instant civil suit, the plaintiff asserts three counts on behalf of his son’s estate, all of which are premised on Maine’s wrongful death statute, 18-A M.R.S.A. § 2-804. The plaintiff alleges that the cause of Lewis’s death was negligent operation. (Id., ¶ 14.)

¹ The personal administrator of Lewis’s estate is his father, Ogden Lewis, Sr. To avoid any confusion over which Lewis I am referring to, I refer to the decedent as Lewis and his father as the plaintiff.

Service of the complaint was accomplished by hand delivery to Pike in Bangkok, Thailand, where he currently, albeit temporarily, resides. (Docket No. 6; Docket No. 13, ¶ 2.) In his affidavit, Pike represents that he has “no substantial assets to satisfy any judgment that could be entered in this case,” but that he believes insurance was automatically purchased with the rental of the car that would extend coverage so long as a claim is made or a judgment is obtained in Argentina. (Id., ¶ 5.) In addition to his own affidavit, Pike has submitted an affidavit from German Pollitzer, an Argentine attorney who is familiar with Argentine law respecting civil liability arising out of motor vehicle operation.² (Aff. of German Pollitzer, Docket No. 14, ¶¶ 1, 4.) According to Pollitzer:

The courts of the Republic of Argentina provide a process for a claim of compensation for injuries and death arising from negligence in the operation of a motor vehicle. That process is briefly described as follows: a) a case should be presented at the Civil Court of the place where the accident occur[r]ed. b) If there is a previous resolution of a Penal Court, that found the person driving guilty, then there is no need to prove again the responsibility for the damages. c) If instead there is no such previous resolution or there is a not guilty result at the criminal court, then the plaintiff must prove the liability of the driver to respond for the damages. d) [T]he plaintiff requests a certain amount of damages but after the evidence is produced, it is the Judge who establishes the amount of compensation that should be paid. e) If the car that caused the accident was insured, the insurance company is called to be a part of the case.

The Republic of Argentina has an effective process for awarding compensation to parties injured by the fault of others in automobile accidents.

I have spoken to the insurance company whose policy was issued with the rental car. There should be coverage but the Lewises must present their claim to the insurance company.

In addition to the civil process for recovering damages, according to the laws of the Province of Chubut, where the accident in this case occurred, a private party may also participate in the criminal investigation process as an “adhesive plaintiff.” This status enables the private party to propose witnesses and evidence to be investigated. In this case, Mr. and Mrs. Lewis have been accepted by the

² There is no indication in the record that Attorney Pollitzer has been retained by Pike in connection with the criminal proceedings in Argentina. The only indication is that he was retained to review the pleadings in this case and provide expert testimony concerning the availability of an adequate remedy for Lewis’s Estate in Argentina.

judge in this capacity and have participated. I attach to this affidavit a rough translation of the petition filed on behalf of Mr. and Mrs. Lewis to be accepted as plaintiffs and to reopen the criminal investigation.

(Id., ¶¶ 6-9.) Attached to Pollitzer's affidavit is a translation of a petition that was submitted to the Argentine court by the plaintiff and his wife. The petition reflects the fact that the plaintiff retained Argentine counsel in order to intervene in the criminal proceeding. As Pollitzer describes it, criminal proceedings that had been dropped against Pike were reopened as a consequence of this petition.

The plaintiff has submitted a competing sworn statement from Juan Manuel Aleman, another Argentine attorney, who describes the plaintiff's participation in the criminal proceeding somewhat differently. According to Attorney Aleman, the Argentine court had "reserved proceedings in April of 2002," possibly because of the absence of any eye-witness testimony in the file. (Docket No. 16, ¶ 9.) As a consequence:

Mr. and Mrs. Lewis were required under Argentinean law to petition the court in Puerto Madryn before November 14, 2006 (within five years of the accident) to have the investigation continue or else suffer its dismissal by operation of law for failure of the victim's family to evidence their interest. This was done by the filing of a formal "Presentacion" with the court on March 7, 2003. The court accepted the Presentacion, prepared by our firm, which allowed it to receive additional evidence of the criminally negligent conduct of the Defendant and, of similar importance, of the fact that no intervening cause (weather, other traffic, etc.), apart from the Defendant's excessive speed, was the cause. That evidence would not otherwise have been received.

(Id., ¶ 8.) In effect, the petition, or "Presentacion," filed by the plaintiff in the Argentine court satisfied a procedural impediment to that court's receipt of evidence. Despite the filing of a petition in Argentina, neither the plaintiff nor his wife has ever traveled to Argentina in connection with the criminal proceeding. (Aff. of Ogden N. Lewis, Docket No. 17, ¶¶ 31-32.) Aleman's affidavit also reveals that the filing of the petition served to prevent any civil action under Argentine law from being lost as a consequence of a two-year statute of limitation on such

an action. (Docket No. 16, ¶ 13.) Aleman’s explanation of Argentine procedure also suggests that, unless Pike appears in Argentina to offer a defense, he will likely be found guilty. (Id., ¶¶ 11-12.) This criminal finding, in turn, would be “conclusive proof of civil liability.” (Id., ¶ 13.)

On the issue of insurance, the plaintiff testified as follows by way of affidavit:

I undertook a search for possible insurance coverage . . . and spoke with representatives of USAA (United Services Automobile Association), which provides me and my family with casualty, property, umbrella, and other insurance. I was informed that under the policies I have purchased (and which I have read), no coverage extends to an accident such as this one occurring in a foreign country.

I also spoke with representatives of American Express, since the car was rented on our son’s American Express card. I was again informed that no coverage extended overseas under American Express card usage in a situation like this.

. . . . I asked our Argentinean counsel to ascertain whether the rental agreement for the car entailed possible access to insurance coverage. In that connection, I communicated with our counsel specifically about the Bristol Group policy referred to in the rental agreement with Locasur, SA, the rental car company I was informed that the “B1 Coverage” referred to there did not apply to the accident.

In connection with that inquiry, I also asked Argentinean counsel to contact the Hertz company in Argentina, as I was informed that Locasur, SA, was an affiliate of Hertz. I was informed that any insurance inquiries would have to be pursued through Locasur, SA, as Hertz was a separate entity.

To my knowledge, therefore, no liability coverage has been located or identified that would respond to a claim for damages in Argentina.

(Aff. of Ogden N. Lewis, Docket No. 17, ¶¶ 24-28.) Attorney Aleman’s affidavit also addresses the issue of insurance. According to Aleman, his firm investigated whether insurance was available and was “unable to confirm that any such insurance is available.” (Docket No. 16, ¶ 15.)

A. Adequacy of Alternative Forum

“[T]he doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process.” Tramp Oil and Marine, Ltd. v. M/V Mermaid I, 743 F.2d 48, 50 (1st Cir. 1984) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947)). In this case, the plaintiff offers some argument in an effort to refute this presupposition, but the testimony of both his Argentine attorney and Pike’s supports a finding that the defendant is amenable to process in Argentina. From the attorneys’ testimony, it is apparent that the Argentine forum would assert jurisdiction over the plaintiff’s claim and afford him a meaningful remedy. (Docket No. 14, ¶¶ 6-9; Docket No. 16, ¶¶ 13-14.) Based on this evidence, Pike has successfully established that Argentina offers a suitable alternative forum for this litigation.

B. Private and Public Interests.

The second part of the inquiry requires the Court “to balance an array of factors relevant to both private and public interests, and to ascertain whether that balance justifies dismissal.” Iragorri v. Int’l Elevator, Inc., 203 F.3d 8, 15 (1st Cir. 2000). Dismissal is justified only if the defendant’s showing supports a finding that “considerations of convenience and judicial efficiency strongly favor the proposed alternative forum.” Id. The interests that must be balanced on the private scale include the following:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; . . . all other practical problems that make trial of a case easy, expeditious and inexpensive [and] questions as to the enforceability of a judgment if one is obtained.

Those that must be balanced on the public scale include:

the administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the

action; the avoidance of unnecessary problems in conflict of laws, or in application of foreign laws; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Mercier, 935 F.2d at 424 (citing Gulf Oil, 330 U.S. at 508, and Piper Aircraft, 454 U.S. at 241 n.6).

1. Private interests favor litigation in an American forum.

Pike argues that the private interest scale tips strongly in favor of litigation in Argentina because (1) all of the witnesses to the accident are in Argentina (other than Breck)³; (2) a Maine jury would not have access to the accident scene; (3) the Argentine witnesses cannot be compelled to appear and testify in this forum; (4) the costs of travel to Argentina for depositions and the cost of translations would be “enormous”; (5) Lewis “has already invoked the alternative forum and is benefiting from its processes” in connection with the ongoing criminal matter; and (6) the only available insurance requires that the claim be pursued in Argentina. (Docket No. 12 at 6.) In opposition, Lewis argues that the scale tips in favor of litigation in this forum because (1) Pike has longstanding connections with this forum and is only temporarily in Thailand; (2) Lewis and Pike are both American citizens and Breck, the primary witness, is also American; (3) Breck is not reasonably subject to compulsory process to ensure his attendance in Argentina; (4) the plaintiff’s efforts to identify insurance in Argentina have been unsuccessful; and (5) “[t]rial in Argentina is demonstrably inconvenient from the point of view of cost, time, language, travel and fair and familiar procedures for a dispute between American citizens compared to trial in the United States.” (Docket No. 15 at 2-3.)

In my assessment, the private interest scale tips in favor of keeping the litigation here.

The only witnesses in Argentina who appear to have testimony addressing the cause of the

³ Pike evidently suffered a brain injury in the accident and has no recollection of the circumstances of the accident.

accident are one individual who, it appears, may have witnessed the vehicle traveling at a high rate of speed sometime before the accident, which he did not observe, and an engineer who performed an accident reconstruction on behalf of the local authorities. In other words, Breck really is the most significant witness on the material aspects of the negligence question because he is the only witness with any recollection of what transpired inside the automobile at the time of the accident. Considering that Breck and the parties are all United States citizens, none of whom appear to have any desire to actually travel to Argentina for purposes of litigation, the balance of the private interests indicates that litigation should take place in the United States. The accident scene can adequately be presented to a jury by photographs, just as accident scenes are routinely presented in litigation arising from local accidents. Additionally, Pike offers no real evidence that the cost of preserving and presenting the testimony of the Argentine witnesses through letters rogatory, depositions and translated documentary evidence, if any, would be significantly greater than the cost of traveling to Argentina for purposes of civil proceedings there. In fact, Pike offers nothing by way of argument to explain exactly why it would be more convenient for him to travel to Argentina for trial as opposed to Maine, assuming he actually intends to appear and offer a defense in Argentina. Given the criminal proceedings under way there, one would expect that Pike would actually prefer to submit to this forum's jurisdiction, rather than Argentina's. Finally, although the presence of insurance in Argentina might balance the scale or even tip it in favor of litigation in Argentina, the evidence presented concerning the existence of insurance is inconclusive.

2. *Public interests favor litigation in an Argentine forum.*

According to Pike, public interests "obviously" favor the Argentine forum because Argentine law will apply in this case, Maine has no interest in the dispute, the plaintiff is already

engaged in the criminal proceedings in Argentina, and Maine jurors should not be bothered with a foreign accident governed by foreign law with foreign witnesses who will appear only by deposition and whose testimony will have to be translated. (Docket No. 12 at 7.) In response, the plaintiff argues, essentially, that any United States forum has a greater interest in this case than Argentina because all of the parties are United States citizens and that Maine, in particular, has a significant interest because the defendant is a long time resident of the State. (Docket No. 15 at 6, 13.) In my view, public interests favor an Argentine forum because Argentina was the place where the accident occurred and Argentine law would seem to define the legal relationship between Pike and his fellow travelers in Argentina, regardless of their nationality.⁴ On the other hand, Pike’s childhood and familial connection to Maine (and the parties’ U.S. citizenship) certainly provide a localized flavor to this controversy, and there is nothing to indicate that Argentine law, assuming it applies, is significantly different from Maine law except, perhaps, on the issue of damages.⁵ In any event, there is no explanation in Pike’s memorandum why the

⁴ Additionally, it may well be that the Argentine court would be in a position to resolve both the criminal and civil matters through default, in light of Pike’s failure to make any suggestion in his filings that he would prefer the litigation to be in Argentina because of the reduced burdens associated with his participation there, something that the typical forum non conveniens movant would be expected to emphasize.

⁵ The Presentacion filed on behalf of the plaintiff in the Argentine criminal proceeding discusses, among other things, the duty of care owed by operators of motor vehicles to other travelers on the road. Although the translation is not perfect, there can be no mistaking the similarity the language has with the American tort concept of due care under the circumstances.

“Both decisions – to travel on a not safe surface and double the peril with a high speed- add to form the negligent conduct, on which the voluntary manslaughter is partially constructed”. (24-12-1998; High Court of Justice, Rawson; “M.,C. s/ voluntary manslaughter”; at eIDial – AS1433)

....

“The unlawful nexus requires that the injuries derive directly from the lack of care; in other words, that the result could have been avoided had the accused observed a conduct according to his duty.” (CNCRIM, Sala I; c.36.640, CORDOVANA, C.A.; Rta: 16/3/90; at eIDial AI195)

“On the misdemeanors the result is objectively imputable when the action produced an increase of the risk that such act occurred, hence there was an action that contributed to the preexisting danger and it materialized on the result.” (CNCRIM, Sala III; c.29.042, SAVEIRO, Enrique; Rta:

application of Argentine law would be especially onerous for this Court. Still, on balance, the public interest factors favor litigation in Argentina.⁶

Conclusion

Although Pike succeeds in establishing that Argentina affords a suitable forum for this litigation, when it comes to the relevant private and public interests, the scales tip in favor of an American forum. Private interests favor this forum; public interests may slightly favor the Argentine forum. Because I cannot conclude that the interests at stake in this litigation “strongly favor” litigation in an Argentine forum, I recommend that the Court **DENY** the motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

26/6/91; at eDial–AI4b8)

“1. The unlawful on the Penal blame consist of the negligent use of the means at his disposition in order to obtain a lawful objective, violating the care duty, measurable considering the conduct that in similar circumstance would have observed a reasonable and diligent person.

2. It results in an unlawful act, making a vehicle circulate at a speed, not only above the maximum allowed, but also above the expected according to the transit conditions- as they are the fact that it was during the night and the rain that made the paved road slippery- would have made any person careful to avoid socially undesirable results.” (CNCRIM, Sala I; c.39.038, BLAS, Alejandro; Rta: 5/7/91; at eDial AI526)

(Docket No. 14 at 6-7.)

⁶ The recommendation concerning public interests may be gratuitous. Some courts refrain from considering the public interests unless the private interests are “in equipoise or near equipoise.” *Pain v. United Tech. Corp.*, 637 F.2d 775, 784-85 (D.C. Cir. 1980).

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: March 23, 2004

LEWIS v. PIKE

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to:

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1332 Diversity-Tort/Motor Vehicle (P.I.)

Date Filed: 09/11/03

Jury Demand: Both

Nature of Suit: 350 Motor Vehicle

Jurisdiction: Diversity

Plaintiff

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V.

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