

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEANETTE SALESMAN : CIVIL ACTION  
 :  
v. :  
 :  
ROBERT S. PHILLIPS, III, and :  
SONIA B. FISHER : NO. 97-4742

MEMORANDUM AND ORDER

Fullam, Sr. J. February , 1998

Plaintiff, a citizen and resident of the State of New York, was injured in a Pennsylvania motor vehicle accident on December 24, 1992. She filed this action in the Eastern District of New York on December 12, 1995, shortly before the expiration of the three-year limitations period under New York law. The defendants are both citizens and residents of Pennsylvania.

On July 10, 1997, the action was transferred to this court pursuant to 28 U.S.C. §1406, the New York court having determined that it lacked personal jurisdiction over the defendants, but that the interests of justice might better be served by the transfer, than by dismissing the action.

On January 29, 1998, the defendant Robert S. Phillips, III filed a motion for summary judgment, to which plaintiff responded on February 17, 1998. The motion must be granted.

In a diversity case such as this, choice-of-law issues are governed by the law of the forum. It is clear that Pennsylvania courts would apply the Pennsylvania two-year

limitations provision to this case, which arose in Pennsylvania, and which involves Pennsylvania defendants. Indeed, even if the claim had accrued in New York, the same two-year Pennsylvania limitations period would apply, under Pennsylvania's "borrowing statute."

It may well be that, if this action were being pursued in a New York court, the New York limitations statute might be deemed applicable. But New York courts lacked jurisdiction over this litigation, as the transferor court has already decided. Indeed, plaintiff conceded that in personam jurisdiction was lacking, and that venue in the Eastern District of New York was improper.

As to the moving defendant, Robert S. Phillips, III, this action will be dismissed with prejudice. The other named defendant, Sonia B. Fisher, has not appeared in the action. The file received from the Eastern District of New York does not reveal whether she has been served with process. So far as the record discloses, no summons was served upon her after the case was transferred to this court. And plaintiff has not sought judgment by default against her. It therefore appears that the action should be dismissed as to both defendants, but plaintiff's counsel will be granted an opportunity to clarify the status of the defendant Fisher.

An Order follows.

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ORDER

AND NOW, this day of February, 1998, IT IS  
ORDERED:

1. The motion of the defendant Robert S. Phillips, III, for summary judgment is GRANTED. As to the defendant Robert S. Phillips, III, this action is DISMISSED WITH PREJUDICE.

2. As to the defendant Sonia B. Fisher, this action is DISMISSED FOR LACK OF PROSECUTION, but plaintiff's counsel is granted a period of 30 days in which to demonstrate that timely service of process upon the defendant Fisher has been achieved and, if so, to seek a default judgment. Unless otherwise ordered by this Court upon such a showing within 30 days, the judgment in favor of both defendants shall be deemed final.

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John P. Fullam, Sr. J.