

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VALERIE HOLFORD, individually)
and as Administratrix)
of the Estate of ERMA HOLFORD,)
deceased, and)
VERONICA LANDER,)
)
)
Plaintiffs,)
)
v.) Civ. No. 03-608-SLR
)
AVIS RENT A CAR SYSTEM, INC. and)
GREGORY B. MILLER,)
)
)
Defendants.)

MEMORANDUM ORDER

At Wilmington, this 28th day of June, 2004, having reviewed defendant Avis Rent A Car System, Inc.'s ("Avis") motion to dismiss (D.I. 7);

IT IS ORDERED that Avis' motion to dismiss (D.I. 7) is **granted** for the reasons that follow:

1. Plaintiffs first filed the present action on June 6, 2002 in the Supreme Court of the State of New York for the County of Kings, alleging negligence on the part of Avis and of defendant Miller. That action was dismissed by the New York court with the understanding that the present action would be refiled in Delaware. The complaint was filed in this court on

June 27, 2003. (D.I. 1)

2. Avis filed a motion to dismiss on September 15, 2003 (D.I. 3), to which plaintiffs failed to answer. In its February 27, 2004 memorandum order, the court denied Avis' motion without prejudice to renew if Avis could show that it was in compliance with Delaware's statutory requirements for public liability insurance for car rental companies, 21 Del. C. § 6102(a) (2004).

(D.I. 6) The court also ordered plaintiffs to show cause on or before March 28, 2004 as why the case should not be dismissed with respect to defendant Gregory B. Miller for lack of service.

3. The present action arises from an automobile collision occurring in Ogletown, Delaware on August 1, 2000. Miller had rented the automobile from Avis, apparently at a location in New York City. Miller was operating the vehicle at the time of the collision, and plaintiffs were passengers in that vehicle. Plaintiff Erma Holford was fatally injured in the collision, and plaintiffs Valerie Holford and Veronic Lander sustained bodily injuries.

4. Count one of the complaint, and counts two through four by reference, asserts that the collision "was caused wholly and solely by the recklessness, carelessness and negligence of the defendants in the ownership [and] operation of the aforesaid motor vehicle." (D.I. 1, ¶ 15)

5. In analyzing a motion to dismiss pursuant to Rule

12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

6. Delaware law provides for joint and several liability for a car rental company which fails to satisfy the statutory requirements with respect to public liability insurance. 21 Del. C. § 6102(a) (2004). The statute further provides that an automobile owner is entitled to dismissal once it has furnished proof that it has complied with the insurance requirements. Id. § 6102(d).

7. Consistent with the court's February 27, 2004 memorandum order, Avis has demonstrated that at the relevant time period it held a certificate of insurance from the State of

Delaware in compliance with 21 Del. C. § 6102(a). Consequently, pursuant to § 6102(d), the Avis' motion to dismiss shall be granted.

8. The court also notes that, as of this date, plaintiffs have failed to file proof of service upon the remaining defendant Miller. Rule 4(m) requires that service of the complaint upon a defendant must be effected within 120 days of filing of suit. Fed. R. Civ. P. 4(m). Upon showing of good cause, the court may extend the time of service. Id. Although plaintiffs assert that they personally served defendant Miller, after more than one year and three summonses issued by the Clerk of the Court, they have still failed to demonstrate proof of service. Further, plaintiffs have failed to respond to motions and briefs filed by Avis throughout the case. Consequently, on its own motion the court will dismiss the action without prejudice as to defendant Miller.

9. IT IS FURTHERED ORDERED that, pursuant to Fed. R. Civ. P. 4(m) and D. Del. L.R. 41.1, the action is dismissed without prejudice as to defendant Miller.

Sue L. Robinson
United States District Judge