

THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

NATHAN CLEMMER

vs.

LINDA GACY, ET AL

: TRIAL DIVISION- CIVIL

:

: OCTOBER TERM, 2007

: No. 4647

:

: Superior Court#911 EDA2008

OPINION

Tereshko, J.

PROCEDURAL HISTORY

Plaintiff Appeals from this Court's Order of February 19, 2008, granting Defendant Transportation Services, Inc.'s Preliminary Objections based on improper venue and transferring the case to Montgomery County Court of Common Pleas with Plaintiff to pay the cost of transfer.

FACTUAL BACKGROUND

This case arises out of a motor vehicle accident which occurred on July 13, 2004 in Upper Salford, Montgomery County, Pennsylvania. (Complaint ¶6). Plaintiff Nathan Clemmer (Clemmer) alleges that he sustained injuries to his head, back, knees and shoulder as a result of an automobile accident caused by the negligence of co-Defendant

Linda Gacy (Gacy) while operating Defendant Transportation Services, Inc.'s (TS) bus. (Complaint ¶¶6, 10).

Clemmer brought suit in the Philadelphia Court of Common Pleas on November 1, 2008, seeking damages for injuries, pain and suffering, and loss of earnings stemming from the accident with Gacy, while she was operating TS's bus. (See Docket, Complaint ¶¶6, 10, 12, 15). Clemmer alleges specific injuries including head injury, lacerations to forehead causing permanent scarring and discoloration, cervical and lumbar paraspinal musculature and soft tissue injuries, and injuries to left knee and right shoulder. (Complaint ¶10). Besides physical pain and suffering, Clemmer also alleges suffering mental anguish and humiliation. (Complaint ¶15).

Clemmer is a resident of Perkasio, Montgomery County, Pennsylvania. (Complaint ¶ 1). Gacy is also a resident of Montgomery County. (Complaint ¶ 2). TS has its headquarters in Franconia, Montgomery County. (Godshell Deposition, pg. 21). TS conducts its business out of Montgomery County. *Id.* It keeps no offices, employees, buses or property in Philadelphia. *Id.* The main function of TS is to bus students in the Souderton Area School District to school during the 180 day school year. *Id.* at 8-9. The school district is mostly in Montgomery County with a small piece of the district in Bucks County. *Id.* at 19. On rare occasions, TS's buses could go into Philadelphia, mostly for field trips for the students of the Souderton Area School District. *Id.* at 10. This might consist of about ten percent of TS's bus trips. *Id.* at 12.

Defendant TS filed Preliminary Objections to venue on November 29, 2007. (See Docket). The Motion to Determine Preliminary Objections was filed on November 30, 2007. *Id.* The Preliminary Objections argued that venue was not proper in Philadelphia

because all parties to the lawsuit are residents of Montgomery County. (Defendant's Preliminary Objections pgs. 2-3). The Court issued an Order taking the Preliminary Objections under advisement on January 2, 2008, pending a deposition on the venue issue that was scheduled by agreement of counsel. (See Docket). Supplemental Briefs were due within 30 days, with a deadline of February 4, 2008. *Id.* The Supplemental Brief for Clemmer was not filed until February 14, 2008, 10 days after the Court Ordered deadline. *Id.* The Supplemental Brief reached the Court by February 19, 2008. *Id.* The Preliminary Objection to venue had already been granted by this Court on the same date, precluding the Court from considering Clemmer's Supplemental Brief in opposition to the Preliminary Objections. *Id.* TS did not submit a Supplemental Brief.

Clemmer Appealed the Court's Order of February 19, 2008, granting TS's Preliminary Objection on the basis of venue to the Superior Court on March 4, 2008. (See Docket). On April 11, 2008, this Court issued its Notice for Plaintiff to file his Statement of Errors pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). *Id.* Plaintiff filed his 1925(b) Statement of Errors on April 16, 2008. *Id.*

The sole issue to be addressed on Appeal is whether the Trial Court abused its discretion when it sustained Defendant TS's Preliminary Objections to Venue and transferred this case to Montgomery County. (Statement of Errors pg. 2).

LEGAL ANALYSIS

Pennsylvania law vests the Trial Court with considerable discretion in making determinations whether or not to grant a petition to transfer venue. *Purcell v. Bryn Mawr Hospital*, 525 Pa. 237, 242, 579 A.2d 1282, 1284 (1990). The standard of review in such

cases is abuse of discretion. *Id.* A lower court's determination that a corporation was not regularly conducting business in a county will not be overturned when such a conclusion is reasonable in light of all the facts. *Monaco v. Montgomery Cab Co.*, 417 Pa. 135, 143, 208 A.2d 252, 256 (1965). It is not enough for an appellant to persuade an appellate court that it might have come to a different result. *McCrorry v. Abraham* 441 Pa. Super. 258, 261, 657 A.2d 499, 501 (1995). The burden rests on the appellant to show that the trial court misapplied or overrode the law or the decision was manifestly unreasonable, or resulted from partiality, prejudice, bias or ill will. *Id.*

Preliminarily, the Court would first like to address the tardiness of Plaintiff's Brief. The Court asked for Briefs on the issue of venue to be submitted within 30 days of the Court Order, which came out to be February 4, 2008. Plaintiff's Brief was not received by the Prothonotary's Office until February 14, which was 10 days late. This violated the Court Order setting out the deadline for Briefs to be submitted. The Brief eventually was received in chambers on February 19, 2008. The Order granting the Preliminary Objection had already been signed on this day (docketed February 20, 2008) precluding the Court from considering Plaintiff's Brief in making its decision to grant the Preliminary Objection to Venue. Without the benefit of a timely Supplemental Brief, Plaintiff has failed to meet its burden of proving that Defendant TS regularly conducts business in Philadelphia County.

The Superior Court has held that a "waiver frequently occurs when a litigant fails to follow established and approved methods of raising allegations of error in the lower court or in appellate courts." *Strickler v. United Elevator Co.*, 257 Pa. Super. 542, 548 (1978). The trial court has discretion to allow the non-moving party to respond to a

motion after the required response date has elapsed. *Commonwealth v. Jash Int'l, Inc.*, 847 A.2d 125, 130 (Pa. Commw. Ct. 2004) (citing *Thomas v. Elash*, 2001 PA Super 214, 781 A.2d 170, 177 (2001)). Upon allowing a non-moving party to file an untimely response, our Superior Court has consistently held that a counsel's mistake or inadvertence will often justify the consideration of an untimely response, however, a reasonable excuse for its lateness must be offered. *Vorhauer v. Miller*, 311 Pa. Super. 395, 404 (1983). Here, no reason was given by counsel for Plaintiff to explain the late filing of his responsive brief. As such, it is within this Court's discretion to not allow consideration of the late brief.

Clemmer does not contest that venue is not proper in Philadelphia for Gacy. (Memorandum of Law in Opposition to Preliminary Objections ¶¶8-9). No evidence has been produced to show any other county would be proper to serve Gacy besides Montgomery County, where she lives.

Pennsylvania Rule of Civil Procedure 1006 governs where venue may be laid against an individual. Pa. R.C.P. 1006(c)(1) states where a claim for joint and several liability is pled as in this case, venue is proper in any county where venue may be laid against any of the defendants. In cases such as this one, where one defendant is a corporation, Pa. R.C.P. 1006(c) dictates that Pa. R.C.P. 2179 is applicable. Rule 2179 states in relevant part:

- [A] personal action against a corporation or similar entity may be brought in and only in:
- (1) the county where its registered office or principal place of business is located;
 - (2) a county where it *regularly conducts business*;
 - (3) the county where the cause of action arose;
 - (4) a county where a transaction or occurrence took place out of which the cause of action arose, or

(5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property
Pa. R.C.P. 2179(a) (2008)(emphasis added).

The registered office of TS is in Montgomery County. (Godshell Deposition, pg. 21). The accident took place in Montgomery County. (Complaint ¶6). No property of TS is in Philadelphia, nor is any property in dispute in this matter in Philadelphia. Therefore subsection (a)(2) is the only applicable part of Pa. R.C.P. 2179. Thus the question is whether TS regularly conducts business in Philadelphia County. Plaintiff contends that TS does regularly conduct business in Philadelphia County.

In order to prove that an entity regularly conducts business, Plaintiff must prove that the business engaged in must be of a sufficient quantity and quality to provide venue in the specific forum. *Shambe v. Delaware & Hudson R.R. Co.*, 288 Pa. 240, 246, 135 A. 755, 757 (1927). “The term ‘quality of acts’ means those directly, furthering or essential to, corporate objects; they do not include incidental acts. By ‘quantity of acts’, is meant those which are so continuous and sufficient to be termed general or habitual. A single act is not enough.” *Id.* The Court must distinguish between acts which merely aid a main purpose, and those necessary to its existence. *Id.* at 758. The former are collateral or incidental, while the latter are direct. *Id.* Each case must depend on its particular facts. *Id.*

Here the only issue is whether the Trial Court properly found TS does not regularly conduct business in Philadelphia to warrant proper venue in Philadelphia County.

One of the leading Pennsylvania cases on improper venue is *Purcell v. Bryn Mawr Hospital*, 525 Pa. 237, 579 A.2d 1282 (1990). This was a wrongful death suit against a hospital and its medical staff. *Id.* at 1283. The hospital’s contacts with

Philadelphia included contractual agreements with several Philadelphia teaching hospitals for residency programs, recruiting and employing medical personnel from Philadelphia, advertising in Philadelphia phone books and the Philadelphia Inquirer, purchasing goods and services for the hospital from suppliers in Philadelphia, and accepting payment from Philadelphia residents who went to Bryn Mawr Hospital for their medical care. *Id.* at 1284.

The Supreme Court of Pennsylvania found that these contacts did not satisfy the quality-quantity test to make venue proper in Philadelphia County. *Id.* at 1287. It also upheld the Trial Court's findings that these acts were separate from the hospital's purpose of treating patients at the hospital. *Id.* Educational agreements with teaching hospitals in Philadelphia were not part of the hospital's main focus of providing care within the hospital in Montgomery County. *Id.* Neither making purchases from suppliers in Philadelphia or advertising in Philadelphia be considered enough to rest venue in Philadelphia County. *Id.* The hospital could carry out its goal of treating patients at the hospital without the rotating medical school students, advertising, or supplies being bought in Philadelphia. *Id.*

The case of *Battuello v. Camelback Ski Corp.*, also dealt with insufficient quality and quantity for venue to be brought in Philadelphia County. 409 Pa. Super. 642, 598 A.2d 1027. In that case Camelback, a ski mountain in Monroe County, advertised in Philadelphia, sent promotional brochures and pricing information to a travel company located in Philadelphia, which directed customers to Camelback, and engaged in other promotional activities in Philadelphia. *Id.* at 1028. These activities were viewed as being in aid of a main purpose and were thus incidental contacts. *Id.* at 1029. The quality-

quantity test was not met and venue accordingly was not proper in Philadelphia and the case was moved to Monroe County where Camelback is located.

Plaintiff cites cases where venue was proper in Philadelphia. *Monaco v. Montgomery Cab Co.* is one such case where venue was proper because of sufficient business being conducted within Philadelphia County. 417 Pa. 135, 208 A.2d 252 (1965). In that case, a taxi company transported customers from Montgomery County to Philadelphia County because of customer requests. *Id.* at 256. While the cab company was not allowed to pick up passengers in Philadelphia because of its certification, it was permitted to pick up customers in Montgomery County and drop them off in Philadelphia County. *Id.* This type of activity made up five to ten percent of its overall business and revenue. *Id.* The Supreme Court of Pennsylvania opined venue was proper because driving into Philadelphia County on request by its customers *and* collecting fares in Philadelphia was an act directly essential to its corporate objective, which satisfied the quantity and quality analysis. *Id.* (emphasis added).

A similar case to *Monaco* is that of *Canter v. American Honda Motor Corp.*, 426 Pa. 38, 231 A.2d 140. In that case, a Honda car dealership located in Montgomery County would demonstrate its cars in Philadelphia County to prospective customers. *Id.* at 141. One to two percent of its sales came from this type of activity where demonstration *and* consummation of the sale both took place in Philadelphia County. *Id.* (emphasis added). These contacts were of sufficient quality and quantity to confer venue in Philadelphia. *Id.* at 143.

Another case which sheds much needed light on the present case is *Fritz v. Glen Mills Schools*, 2003 PA Super 516, 840 A.2d 1021 (Pa. Super. 2003). That case involved

a school located in Delaware County that helps rehabilitate juveniles. *Id.* at 1023. The school had 35% of its students coming from Philadelphia County and the school was in a contract to serve those Philadelphia students. *Id.* The school had to utilize the Philadelphia Court System occasionally to enforce those contracts if breached. *Id.* The Pennsylvania Superior Court ruled that such contacts were not enough to confer venue in Philadelphia County as the contacts were incidental and not essential to the existence of the school. *Id.* at 1024. The Court held that Glen Mills would go on without the Philadelphia students attending the school. *Id.*

The first thing to establish is TS's primary goals and objectives of the corporation. This allows the Court to know whether certain acts are a main purpose of the corporation or merely in aid of a main purpose. This in turn will dictate whether the acts satisfy the quality prong of the quantity-quality analysis.

The purported primary purpose of TS is busing students to and from school in the Souderton Area School District. (Godshell Deposition, pgs. 8-9). About 100 busses are used daily to carry out this objective. *Id.* at 9. This amounts to 85 percent of TS's total operation. *Id.* at 19. Therefore, this Court considered TS's purpose to bus students to and from Souderton Area School District schools. Busing students to their sporting events and field trips is therefore incidental or collateral to this objective. Sporting event transportation comprises the bulk of TS's total field trip requests and takes place almost exclusively in Montgomery and Bucks Counties. *Id.* at 14. TS also buses students on field trips to various sites, some of which include popular stops in Philadelphia like the Philadelphia Zoo, Franklin Institute, Academy of Natural Sciences, and historical sites. *Id.* at 11. TS provides sporadic trips for churches and other organization during the year.

Id. at 15. These trips are incidental to TS's corporate objective. Getting students to and from school is the primary objective of TS and busing for field trips, whether for sports or culture, is incidental to the overall goal.

This case is akin to *Purcell* and *Battuello*. TS's contacts with Philadelphia here are not part of its corporate objectives. They are merely incidental. The objective of busing students to and from school is the corporate objective. Occasionally going into Philadelphia for field trips is therefore incidental because a large majority of the field trips do not go into Philadelphia. Clearly the quality contacts with Philadelphia are not present in this case.

The present case is distinguishable from *Monaco* and *Cantor*. Those cases dealt with transactions taking place in Philadelphia itself. In *Monaco*, it was the one way taxi service to Philadelphia *and* the payment for such services in Philadelphia that warranted the finding of proper venue in Philadelphia. In *Cantor*, the demonstrations took place in Philadelphia and sales were consummated in Philadelphia, leading to proper venue in Philadelphia County.

In the present case, there is no transaction taking place in Philadelphia. When TS runs a field trip, 90 to 100 percent of the time, the starting point is in Montgomery or Bucks County. (Godshell Deposition, pg. 21). On field trips for students the busses leave from and return to Montgomery County at the end of the trip. Also, over three quarters of field trips are simply transporting students to sporting events, almost always in Bucks and Montgomery Counties. *Id.* at 14. TS admitted it may do some trips with origins and destinations in Philadelphia. *Id.* at 20-21. However, there is no information as to the quantity or frequency of such bus stops in Philadelphia.

The fact that 10 percent of the field trips make stops in Philadelphia, alone, is not enough to satisfy the quality-quantity test. The case law is clear that the plaintiff must prove that the contacts with Philadelphia continuously and directly further the purpose of the entity. Plaintiff has failed to meet this burden.

In fact, Glenn Godshell, a corporate designee for TS, testified that TS doesn't advertise besides a listing in the phone book because TS has all the business it needs. (Godshell Deposition, pg. 21). This further shows the conscious actions by TS to continue their main focus of busing students to school since that provides TS with sufficient business.

Based on the aforementioned analysis, this Court believes that Plaintiff had not met his burden of proving that TS regularly conducts business in Philadelphia.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that the February 19, 2008 Order granting Defendant's Preliminary Objections and transferring the case to Montgomery County Court of Common Pleas be affirmed.

BY THE COURT:

8-5-2008

Date

ALLAN L. TERESHKO, J.

cc:
Jeffrey Harlan Penneys, Esq., for Appellant
Jill R. Mezyk, Esq., for Appellee