

2012 IL App (2d) 120058-U
No. 2-12-0058
Order filed October 23, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TITAN RAIL, INC.,)	Appeal from the Circuit Court
)	of Kendall County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-L-0019
)	
SABIC INNOVATIVE PLASTICS US, LLC,)	Honorable
)	Timothy J. McCann,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in granting defendant's motion to dismiss pursuant to the doctrine of *forum non conveniens*.

¶ 2 In March 2011, plaintiff, Titan Rail, Inc., filed a single-count complaint against defendant, Sabic Innovative Plastics US, LLC, alleging breach of a lease agreement. Defendant moved to dismiss the complaint under the doctrine of *forum non conveniens*, pursuant to Illinois Supreme Court Rule 187 (eff. Aug. 1, 1986) and section 2-104 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-104 (West 2010)). The trial court granted defendant's motion and plaintiff filed a petition for leave to file an interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(2) (eff. Feb.

16, 2011). In an order dated March 9, 2012, we granted plaintiff's petition and ordered the parties to submit a complete record and briefs. For the reasons set forth below, we affirm.

¶ 3 I. Background

¶ 4 The pleadings reflect that plaintiff is a Delaware corporation with its office located in Oswego, Illinois. Plaintiff is engaged in the business of selling, leasing, and providing maintenance for locomotives. Defendant is a Delaware corporation with its corporate headquarters in Pittsfield, Massachusetts. Defendant maintains a facility in Selkirk, New York.

¶ 5 On July 31, 2008, the parties entered into an agreement for plaintiff to lease to defendant a locomotive labeled TANX911. Defendant leased TANX911 from another company before plaintiff purchased it. The parties adopted a lease schedule, which incorporated a master lease agreement dated July 29, 2008, and a lease maintenance agreement. Defendant would pay \$131 per day to lease the locomotive, plus \$2,400 per month for the locomotive's maintenance. Paragraph 14.9 of the master lease agreement provided:

“Governing Law: This [master lease agreement] and each [l]ease [s]chedule are entered into under, and shall be construed in accordance with, and governed by, the laws of the state where the equipment is located.”

The locomotive was located at defendant's Selkirk, New York facility. The lease maintenance agreement provided:

“CONSENT TO JURISDICTION/WAIVER OF JURY TRIAL: The parties hereby submit to the jurisdiction of the courts of the state of Illinois, or federal courts located in the state of Illinois, as to all disputes arising hereunder.”

¶ 6 On March 12, 2011, plaintiff filed a single-count complaint in the circuit court of Kendall County alleging that defendant breached the lease agreements by failing to make lease and maintenance payments. Plaintiff alleged that, after adjusting for credits, defendant owed \$262,748.12 in delinquent lease and maintenance payments.

¶ 7 On July 7, 2011, defendant filed a motion to dismiss plaintiff's complaint pursuant to the doctrine of *forum non conveniens*. Defendant argued that, because plaintiff failed to properly repair the locomotive, defendant was unable to use it. Defendant maintained that the "evidence related to the operability and physical condition of [the locomotive] at various times is critical to this case." Defendant further argued that public and private factors favored dismissal, including the convenience of the parties and that, pursuant to the master lease agreement, New York law governed this dispute. Defendant attached an affidavit from William Watters. Watters averred that he worked for defendant as its "material services operation lead" at defendant's Selkirk facility. Watters averred that, prior to plaintiff purchasing TANX911, defendant leased the locomotive from another company. Watters averred that plaintiff purchased the locomotive to repair and rebuild it to defendant's specifications and hired contractors in Rochester, New York, to rebuild the locomotive. Watters averred that defendant refused to accept delivery of TANX911 from plaintiff because the locomotive was inoperable. Watters's affidavit specified members of his team who were familiar with TANX911 and that those persons were located New York, and that the mechanic who serviced TANX911 before plaintiff purchased was also in New York.

¶ 8 In response, plaintiff argued that its right to select the forum was "substantial"; defendant submitted to the jurisdiction of Illinois courts; the trial court's docket was not congested; the trial

court would be able to apply New York law if necessary; and defendant failed to specify how New York would be the more convenient jurisdiction for both parties.

¶ 9 On December 9, 2011, following a hearing, the trial court granted defendant's motion. In rendering its determination, the trial court opined:

“[T]he evidence such as it exists at this stage of the proceeding entitles the defendant to have this motion granted. The evidence which at this point consists of the attachments to the various pleadings indicate that these matters were properly subject to be heard in the State of New York. That's where virtually all of the actions took place.

If it wasn't for the forum selection clause, we wouldn't be having this discussion at all. And that does not overcome the burden in this case.

The question is not whether it could be brought in Illinois but whether it should be brought in Illinois. And I believe it should not be. It belongs in the State of New York.”

Thereafter, we granted plaintiff's petition to file a permissive interlocutory appeal pursuant to Supreme Court Rule 306(a)(2).

¶ 10

II. Discussion

¶ 11 At the outset, we address various outstanding motions in this case. Defendant has an outstanding motion to strike a portion of plaintiff's statement of facts in plaintiff's initial brief. After having reviewing the parties' briefs and defendant's motion, we deny the motion to strike. Further, we allow plaintiff's motion to file its reply brief *instanter* and deny defendant's motion to strike plaintiff's reply brief. We will, however, disregard any unsupported factual statements in either of plaintiff's briefs.

¶ 12 The only issue in this appeal is whether the trial court abused its discretion in granting defendant's motion to dismiss plaintiff's complaint pursuant to the doctrine of *forum non conveniens*. Plaintiff contends that defendant failed to satisfy its burden in establishing that the various factors with respect to *forum non conveniens* favored dismissal.

¶ 13 The doctrine of *forum non conveniens* is an equitable doctrine rooted in considerations of fundamental fairness and the sensible and effective administration of justice. *First National Bank v. Guerine*, 198 Ill. 2d 511, 515 (2002). As a result, the doctrine enables a court to decline jurisdiction in the exceptional case where trial in another forum with proper jurisdiction and venue would better serve the ends of justice. *Id.* In determining whether to decline jurisdiction, the trial court must balance private interest factors affecting the convenience of the parties and public interest factors affecting the administration of the court. *Wagner v. Eagle Food Centers, Inc.*, 398 Ill. App. 3d 354, 359 (2010). "In Illinois, the private interest factors include (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make trial of a case easy, expeditious, and inexpensive—for example, the availability of compulsory process to secure attendance of unwilling witnesses, the cost to obtain attendance of willing witnesses, and the ability to view the premises (if appropriate)." *First National Bank*, 198 Ill. 2d at 516. Conversely, the public interest factors include (1) the interest in deciding localized controversies locally; (2) the unfairness of imposing the expense of a trial and the burden of jury duty on residents of a forum with little connection to the litigation; and (3) the administrative difficulties presented by adding further litigation to court dockets in already congested forums. *Hacki v. Advocate Health & Hospitals Corp.*, 382 Ill. App. 3d 442, 448 (2008). In addition, although substantial deference must be given to a plaintiff's choice of its home forum, such a choice

is not dispositive. *Continental Casualty Co. v. Michigan Mutual Insurance Co.*, 183 Ill. App. 3d 778, 782 (1989). Rather, the ultimate determination rests with the balance of conveniences, and dismissal of a cause of action pursuant to the doctrine of *forum non conveniens* is proper if the chosen forum is unnecessarily burdensome for the defendant or court. *Id.*

¶ 14 In making a determination, the trial court must evaluate the totality of the circumstances as to whether defendant has proven that the balance of factors strongly favors a transfer, and the defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient for all parties. *Wagner*, 398 Ill. App. 3d at 359. A trial court's determination of a *forum non conveniens* motion will not be disturbed absent an abuse of discretion, which occurs when "no reasonable person would take the view adopted by the trial court." *Dawdy*, 207 Ill. 2d at 176-77; see also *Haight v. Aldridge*, 215 Ill. App. 3d 353, 358-59 (1991) (noting that it is not the function of a reviewing court to substitute its judgment for that of the trial court or weigh the factors of *forum non conveniens* different from the trial court).

¶ 15 In this case, the trial court did not abuse its discretion in granting defendant's motion to dismiss pursuant to the doctrine of *forum non conveniens*. First, the balance of the private factors strongly favor transferring the case to New York. Regarding the convenience of the parties, we recognize that both corporations are incorporated in Delaware and that plaintiff has its principle place of business in Oswego. However, this dispute involves a locomotive located at defendant's New York facility, and whether that locomotive was defective and inoperable when plaintiff delivered it. Thus, the parties and their attorneys may need to travel to New York to inspect the locomotive, which remained at defendant's New York facility. Consequently, "[s]uch travel would not be convenient for the parties." See *Medical Alliances LLC v. Allstate Insurance Co.*, 352 Ill.

App. 3d 239, 244 (2004) (holding that, even though both parties conducted business in Illinois, the accidents involved in the case occurred outside of Illinois, and the possibility that the parties would have to travel out of state rendered Illinois not convenient). In addition, based on our review of plaintiff's complaint and the record before us, the primary witnesses will be people with knowledge of the locomotive's physical condition, and most of those witnesses are located near defendant's New York facility. Pursuant to Watters's affidavit, these witnesses include people who worked for defendant at or near its New York facility, as well as a mechanic that serviced the locomotive before plaintiff purchased it. Watters averred that these witnesses live in or near New York. See *Gridley v. State Farm Mutual Insurance Co.*, 217 Ill. 2d 158, 174 (2005) (noting that the private factors in a *forum non conveniens* analysis favored Louisiana over Illinois because most of the witnesses were located in Louisiana).

¶ 16 Second, the public factors similarly favor transferring the case to New York. As plaintiff concedes, New York law governs this case, and “ ‘[t]he need to apply the law of a foreign jurisdiction has been considered a significant factor favoring dismissal of a suit on grounds of *forum non conveniens*.’ ” *Id.* at 175 (quoting *Moore v. Chicago & North Western Transportation Co.*, 99 Ill. 2d 73, 80 (1983)). Moreover, the locomotive was located in New York at all times, including before plaintiff purchased it to lease to defendant, and the only connection to Illinois is that plaintiff, despite being a Delaware corporation, keeps its principle place of business in Oswego. We believe that the people of Illinois should not be burdened with the expense of a trial when no part of this transaction occurred in Illinois; and at the same time, given New York's connection to this case, it would not be unfair to burden its citizens with the expense of a trial to resolve this dispute. See *Gridley*, 217 Ill. 2d at 175 (noting that it would be unfair to burden Illinois's citizens with jury duty

when the action did not arise in, and has no connection to, Illinois). Finally, we note that, although defendant submitted information regarding court congestion in both Kendall County and Albany County, New York, defendant concedes that a “direct statistical comparison between the court dockets *** is limited by the available data.” Thus, we do not take that factor into consideration in our analysis. See *id.*

¶ 17 Finally, we reject plaintiff’s argument that defendant waived an objection to the forum due to the forum selection clause contained in the lease maintenance agreement. Although that clause provided that the parties would consent to the jurisdiction of Illinois courts for all disputes arising under the agreement, it did not contain mandatory language providing that such disputes *must* be exclusively litigated in Illinois courts. As a result, the clause constituted a permissive forum selection clause, as opposed to a mandatory clause, and did not preclude defendant from arguing that Illinois was an inconvenient forum. See *Whirlpool Corp. v. Certain Underwriters at London*, 278 Ill. App. 3d 175, 178-80 (1996) (distinguishing a mandatory forum selection clause from a permissive forum selection clause); see also *Continental Casualty Co. v. LaSalle RE, Ltd.*, 500 F. Supp. 2d 991, 994 (N.D. Ill. 2007) (concluding that a clause providing that the parties consent to the jurisdiction of Illinois courts, but not further providing that all disputes “shall be resolved” by Illinois courts, or providing that “venue is *only* proper in Illinois courts,” was permissive).

¶ 18 In sum, based on the foregoing, including that the transaction giving rise to this dispute involved a locomotive that remained entirely in New York and that most of the witnesses were located in New York, we conclude that the trial court did not abuse its discretion in granting defendant’s motion to dismiss pursuant to the doctrine of *forum non conveniens*.

¶ 19

III. Conclusion

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County.

¶ 21 Affirmed.