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Commercial division update – The role of New York residency in *forum non conveniens* dismissals

Thomas J. Hall, *New York Law Journal*

New York courts may stay or dismiss an action that has little connection with the state. Under CPLR § 327(a), the doctrine of *forum non conveniens* permits a court to dismiss or stay an action "[w]hen the court finds that in the interest of substantial justice, the action should be heard in another forum." Defendants bear a heavy burden of establishing that New York is not a convenient forum, and courts have discretion in considering a number of factors in determining the issue. While no one factor is controlling, the residency of the parties has emerged in recent Commercial Division decisions as an important factor.

Court of Appeals Precedent

The leading New York case on *forum non conveniens* is *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597,(1984), *cert denied*, 469 U.S. 1108 (1985). In that case, the Islamic Republic of Iran brought an action against its former ruler, Shah Mohammed Reza Pahlavi. The complaint alleged that Pahlavi accepted bribes and misappropriated $35 billion in Iranian funds. Plaintiffs claimed that New York was the proper forum for the litigation because funds were deposited into New York banks and there was no alternate forum available. The Court of Appeals affirmed the *forum non conveniens* dismissal, agreeing that there was "not a substantial nexus between this State and plaintiff's cause of action." In its discussion, the Court set forth several factors for courts to weigh in determining whether a substantial nexus exists between a cause of action and New York, specifically: (1) the burden on New York courts, (2) the potential hardship to the defendant, and (3) the unavailability of an alternative forum in which plaintiff may bring suit. The Court added that other appropriate considerations would be the residences of the parties and that the transaction from which the cause of action arose occurred primarily in a foreign jurisdiction. The Court noted that no one factor is controlling, and that the great advantage of the *forum non conveniens* rule is flexibility based upon the facts and circumstances of each case.

Appellate Division Precedent

After *Pahlavi*, the Appellate Division's application of the balancing test has often placed an emphasis on the residency of the parties, and in particular that of the plaintiff. For example, in *Wyser-Pratte v. Babcock*, the First Department emphasized that where the plaintiff is a New York resident, its choice of forum is "presumptively favored," though "not dispositive." 23 A.D.3d 269, 270, 808 N.Y.S.2d 3, 5 (1st Dep't 2005). Notwithstanding that pronouncement, the Court affirmed the lower court's dismissal on *forum non conveniens* grounds where five of the nine defendants were German

residents and because the "New York connection to the litigation is minimal."

In another case, the First Department in *Thor Gallery v. Reliance Mediaworks* noted that the plaintiff's New York residency "has been held to generally be the most significant factor" in the analysis, weighing against a *forum non conveniens* dismissal. 131 A.D.3d 431, 432, 15 N.Y.S.3d 766, 768 (1st Dep't 2015). While the plaintiff's New York residence is acknowledged to be significant, CPLR § 327(a) provides that it is not dispositive: "The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." In that case, in addition to the plaintiff being a New York resident, the defendant was authorized to do business in New York. As such, the court reversed the dismissal based on *forum non conveniens* holding that the suit had a substantial nexus to New York, even though the real property that was the subject of the dispute was located in Georgia.

Commercial Division Treatment

The Commercial Division has taken a similar approach in recent years, placing considerable weight on the residence of the parties measured against the other relevant factors.

In *Gusinsky v. Genger,* Justice Jane S. Solomon of the New York County Commercial Division noted that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gusinsky v. Genger,* 2008 WL 4819598 (N.Y. Co. Oct. 28, 2008) (citing *Anagnostou v. Stifel,* 204 A.D.2d 61, 62, 611 N.Y.S.2d 525 (1st Dep't 1994)). In denying the defendants' motion to dismiss based on *forum non conveniens* grounds, Justice Solomon noted that both parties maintained offices in New York, and that the defendant resided in New York. The court also emphasized that checks involved in the transaction at issue were tendered in New York, and the likely key witness was a New York resident. The court did consider another factor that the transaction at issue was governed by Nova Scotia law, but found that did not render New York inconvenient as "New York courts are well equipped to enforce a choice of law provision and doing so is not unduly burdensome."

Conversely, in *Estate of Karner v. UBS AG,* 2017 N.Y. Slip Op 32316(U) at 17-18 (N.Y. Co. Oct. 30, 2017), Justice Marcy Friedman of the New York County Commercial Division granted a *forum non conveniens* motion where none of the plaintiffs were New York residents, observing that if they were, this would be a "significant factor" militating against dismissal. Another significant factor considered by the court was the pendency of a foreign proceeding involving similar issues. And although the Court of Appeals in *Pahlavi* provided that the unavailability of another forum was a factor to be considered, the court was dismissive of the argument, holding that while the existence of such a forum "is a most important factor," "its alleged absence does not require the court to retain jurisdiction."

In *Financial Guarantee Insurance Company v. IKB Deutsche Insustriebank AG*, 2008 WL 5478808 (N.Y. Co. Dec. 29, 2008), a New York-based plaintiff, Financial Guaranty Insurance Company (FGIC-NY), and its United Kingdom affiliate (FGIC-UK), sought to invalidate a Commitment Agreement issued by FGIC-UK to the New Jersey-based defendant Havenrock. Other defendants were German and Swiss-based corporations. Although FGIC-NY was not a signatory to the Commitment Agreement at issue, both FGIC-NY and FGIC-UK argued that their joint choice of a New York forum should be accorded deference. In granting the defendants' *forum non conveniens* motion, the Court focused on the foreign residence of plaintiff FGIC-UK, relying in part on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981), where the Court stated that "when the plaintiff is a foreign entity, such as FGIC-UK, its choice of forum is entitled to less deference." The court placed little weight on the argument that the other plaintiff, FGIC-NY, a New York resident but a non-party to the agreement at issue, should be afforded deference. Instead, Justice Herman Cahn of the New York County Commercial Division reasoned that because only one of the two plaintiffs, and none of the defendants were New York residents, the residency of the parties factor weighed in favor of granting the motion to dismiss.

The court primarily focused on the situs of the transaction. While acknowledging that while certain important meetings and negotiations took place in New York, the court noted that material events also took place elsewhere, including Las Vegas and Germany. Thus, the court explained that "a mirror image argument can be made that a significant portion of the transactions took place outside of New York." The court also found it important that the fraud claim was based on

conversations between the parties that occurred outside of New York, as well as based on financial statements produced outside of New York.

In *Ace Decade v. UBS*, Justice Eileen Bransten of the New York County Commercial Division found *forum non conveniens* dismissal appropriate notwithstanding plaintiff's residency in New York. *Ace Decade Holdings Ltd. v. UBS AG,* 2016 WL 7158077 (N.Y. Co. Dec. 07, 2016). Significantly, however, the court noted that the plaintiff established New York residency in 2015, after the transaction at issue which occurred outside of New York. As such, the court concluded: "[D]ismissal based upon *forum non conveniens* is warranted where there is 'no substantial connection to this state.'" Id. (quoting *Blueye Nav., Inc. v. Den Norske Bank*, 239 A.D.2d 192, 192, 658 N.Y.S.2d 9 (1st Dep't 1997)). In that case, the relationship between plaintiff Ace Decade, incorporated in the British Virgin Islands, and defendant UBS was entered into in Hong Kong.

Conclusion

While the above decisions highlight the discretion afforded to courts in determining whether to dismiss or stay a litigation based on the doctrine of *forum non conveniens*, they reflect the importance of residency to the analysis. A plaintiff's New York residency is a substantial factor weighing against dismissal, but it alone may not be sufficient to avoid a *forum non conveniens* dismissal. Nor is New York residency of a defendant alone sufficient to show that a substantial nexus to New York exists. The Commercial Division appears more inclined to dismiss cases, despite a plaintiff's New York residency, where the defendant is a nonresident *and* a substantial portion of the transaction occurred outside of New York.

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