

New York Commercial Division Round-Up

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[Motion to Dismiss Based Upon Forum Non Conveniens Denied, Despite Presence Of Foreign Defendants And Application Of Foreign Laws](#)

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On June 25, 2010, Justice Shirley Werner Kornreich of the Commercial Division issued a Decision and Order, *inter alia*, denying several foreign defendants' motion to dismiss based upon forum non conveniens. See *Coventry Real Estate Advisors, LLC, et al., v. Developers Diversified Realty Corp., et al.*, Index No. 115559/09 (Sup. Ct. NY Co., June 25, 2010) ("Coventry").

The Plaintiff was an investment manager and brought the action derivatively on behalf of twelve Property Owner REITs (all Delaware LLCs) acquired pursuant to an investment agreement. The underlying action involved claims that defendants (investment advisors, developers and managers) mismanaged the leasing and development of the real properties.

The Doctrine of Forum Non Conveniens.

"The doctrine of forum non conveniens, codified in CPLR 327(a), 'permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere.'" *Coventry*, at 7-8, quoting *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-79 (1984), *cert den.*, 469 U.S. 1108 (1985). Although no factor is controlling and it is always subject to the discretion of the trial court, courts consider and balance the following factors in determining whether a defendant has carried its burden for dismissal based on forum non conveniens: (i) the existence of an adequate alternative forum; (ii) situs of the underlying transaction; (iii) residency of the parties; (iv) potential hardship to the defendant; (v) location of documents; (vi) location of a majority of the witnesses; and (vii) the burden on New York courts.

As explained below, the Court analyzed these factors and held that they all favored a New York forum.

Prior Pending Litigation, Alternative Available Forum, and Application of Foreign Law.

First, the Court noted that New York was an available forum because the parties contracted in

New York and, thus, were subject to personal jurisdiction.

Second, Defendants argued that there were two related litigations in Ohio, which were filed within weeks of the New York action. However, the Court noted that while “CPLR 3211(a)(4) provides that a party may move to dismiss an action when ‘there is another action pending between the parties for the same cause of action in a court of any state or the United States’”, New York courts often analyze this issue by the “first to file” rule. In addition, the Court noted that this is not a mechanical rule and when, like here, “the actions are filed close in time”, “the timing of filing is irrelevant.” The Court also determined that there “is no danger of inconsistent verdicts” because one of the related litigations only had two overlapping causes of action (which the New York Court would stay pending the Ohio trial) and the second Ohio action has been stayed in favor of this New York action.

Finally, the Court held that application of foreign law is “not determinative.” Among other things, the main agreement at issue was governed by New York law, Delaware law governed relevant LLC agreements, and various other state laws governed related agreements. Because “New York courts are capable of applying the law of another state”, New York was not an inconvenient forum.

Residency of the Parties and Burden on Defendants.

The Court quickly disposed of this factor, since “the plaintiffs all maintain a principal place of business in New York, while the defendants are incorporated and maintain their principal places of business in Ohio.” Thus, because the parties would be “equally inconvenienced by trial in the other party’s home state,” the defendants could not meet their burden to disturb “plaintiff’s choice of forum.”

Situs of the Underlying Transaction and Location of Documents and Witnesses

Because the main agreement was “entered into in New York” and the documents and witnesses “are all over the United States”, defendants again could not meet their burden to disturb plaintiff’s choice of forum.

Conclusion

Based on the foregoing, the Court held that, on balance, “[t]he factors either militate in favor of New York as a convenient forum or demonstrate Ohio to be inconvenient for plaintiffs.” Thus, there was a “nexus with New York sufficient to deny the forum non conveniens motion.”

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