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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ANTONIO ABREGO ABREGO et al.,

Plaintiffs and Appellants,

v.

THE DOW CHEMICAL COMPANY
et al.,

Defendants and Respondents.

B222612

(Los Angeles County Super. Ct. Nos.
BC331844, BC331846, BC403362,
BC403367, BC403375, BC403376,
BC403377, BC403430, BC403431,
BC403432, BC403434, BC403452,
BC403506, BC403512, BC403513,
BC403514, BC403515, BC403516)

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COURT OF APPEAL - SECOND DIST.

FILED

DEC 29 2010

JOSEPH A. LANE Clerk

Deputy Clerk

APPEAL from orders of the Superior Court of Los Angeles County.

Ann I. Jones, Judge. Affirmed.

Provost Umphrey Law Firm, Joe J. Fisher II, Mark Sparks; Engstrom, Lipscomb & Lack, Elizabeth Crooke for Plaintiffs and Appellants.

Filice Brown Eassa & McLeod, Gennaro A. Filice III, Paul R. Johnson, Richard H. Poulson; Schirmeister Diaz-Arrastia Brem, Michael L. Brem for Defendant and Respondent The Dow Chemical Company.

Hinshaw & Culbertson, Frederick J. Ufkes; Cleary Gottlieb Steen & Hamilton, Boraz S. Morag for Defendant and Respondent Del Monte Fresh Produce N.A., Inc.

Pillsbury Winthrop Shaw Pittman, J. Richard Morrissey, Nathan M. Spatz for Defendants and Respondents Chiquita Brands International, Inc., Chiquita Brands, Inc., and Chiquita Brands Company, North America.

This is a consolidated appeal from two orders granting motions to dismiss on the grounds of forum non conveniens and finding that Michigan is a suitable alternative forum. Plaintiffs are several thousand banana workers in Guatemala and Panama, and defendants are companies associated with a toxic chemical pesticide alleged to have caused the plaintiffs various injuries, such as sterility, miscarriages, liver damage, and cancer. The pesticide was designed, researched, developed, and manufactured by one of the defendants, The Dow Chemical Company (Dow), which is headquartered in Michigan. The other two defendants, Chiquita,¹ which is headquartered in Ohio, and Del Monte Fresh Produce N.A. (Del Monte), which is headquartered in Florida, used the pesticide that allegedly caused plaintiffs' injuries.

In dismissing on grounds of forum non conveniens, the trial court found that Michigan was a suitable alternative forum and noted that defendants had stipulated to the following: to submit to jurisdiction in Michigan; to appoint an agent for service in Michigan; to allow discovery from the California litigation to be used in Michigan proceedings to the same extent as if in California; to waive the assertion of any statute of limitations defenses in Michigan arising after the filing of the present action; and to agree to apply the discovery rule in determining the accrual of a cause of action, as that rule is understood and applied in California.

The trial court also found that the public and private interest factors warranted litigating the claims in Michigan, which has a substantial interest in the litigation. The court determined that none of the private interest factors weighed in favor of a California forum, noting the lack of a local interest in the cases because none of the litigants was a California resident and no injuries or tortious conduct occurred in California.² Also,

¹ Specifically, plaintiffs sued Chiquita Brands Company, North America, Chiquita Brands, Inc., and Chiquita Brands International, Inc., which we collectively refer to herein as Chiquita.

² Former defendant Dole Food Company, Inc., whose principal place of business is California, was originally involved in this litigation, but it was nonsuited and is not a party to this appeal.

public interest factors supported a forum non conveniens dismissal, because otherwise a substantial and undeserved burden would be placed on California courts and taxpayers.

We agree and affirm the orders of dismissal.

DISCUSSION

Appeal

An order granting a motion to dismiss the action on the grounds of forum non conveniens is appealable. (Code Civ. Proc. § 904.1, subd. (a)(3).)

Forum non conveniens principles

“Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere.” (*Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*)). Code of Civil Procedure section 410.30, subdivision (a) provides: “When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.”

In determining whether to grant a forum non conveniens motion, the court first considers whether “the alternate forum is a ‘suitable’ place for trial.” (*Stangvik, supra*, 54 Cal.3d at p. 751.) If so, the court next considers “the private interests of the litigants and the interests of the public in retaining the action for trial in California.” (*Ibid.*) “The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation.” (*Ibid.*) Thus, the “jurisdiction with the greater interest should bear the burden of entertaining the litigation.” (*Id.* at p. 757.)

Burden of proof and standard of review on appeal

“On a motion for forum non conveniens, the defendant, as the moving party, bears the burden of proof. The granting or denial of such a motion is within the trial court’s discretion, and substantial deference is accorded its determination in this regard.” (*Stangvik, supra*, 54 Cal.3d at p. 751.) The trial court’s threshold inquiry as to whether there is a suitable alternative forum is a nondiscretionary question of law, and is subject to de novo appellate review. (*Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, 1186 (*Roulier*)).) However, the trial court’s weighing of public and private interests, the second and third issues to be resolved, is reviewed for abuse of discretion. (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 436.)

The test for abuse of discretion is whether the trial court has “exceeded the bounds of reason.” (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) “When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) Thus, the trial court’s conclusion regarding the proper balance of public and private interests will be reversed only if the reviewing court concludes that “under all of the evidence, viewed most favorably in support of the trial court’s action, no judge could have reasonably reached the challenged result.” (*Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340.)

To the extent a party contends the trial court abused its discretion by reaching a conclusion not supported by the evidence, that party bears the burden of showing that substantial evidence does not support the conclusion. (*Forman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Merely reciting isolated pieces of favorable evidence is insufficient to meet that burden. (*Ibid.*)

Analysis of forum non conveniens factors

1. Michigan is a suitable alternative forum.

The threshold inquiry is satisfied, since it is apparent that the alternative forum of Michigan is available as “a ‘suitable’ place for trial.” (*Stangvik, supra*, 54 Cal.3d at p. 751.) “‘Suitability’ and ‘availability’ in this context mean that a valid judgment can be

obtained in the selected forum. [Citation.] Normally, this is limited to a determination that there is jurisdiction over the dispute and the statute of limitations has not expired as of the time the motion is considered. [Citation.] Also, the forum must have a reasonable connection to the parties or the dispute.” (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12, fn. 5.) Significantly, the ““forum is suitable where an action “can be brought,” although not necessarily won”” (*Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1037), and whether the law of the alternative forum is less favorable than the law of California is of no consequence to the analysis. (*Roulier, supra*, 101 Cal.App.4th at p. 1187.)

In the present case, Michigan is a suitable forum. It is well established that the test of forum suitability is satisfied where the defendants stipulate (1) to submitting to jurisdiction in the alternative forum, and (2) “to the tolling of the statute of limitations during the pendency of the actions in California.” (*Stangvik, supra*, 54 Cal.3d at p. 752; see also *Shiley, Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 132-133.)

Here, mirroring the situation in *Stangvik*, the defendants stipulated to submit to the jurisdiction of the court in the alternative forum and stipulated to the tolling of the statute of limitations during the pendency of the California action. As a condition to the dismissal on grounds of forum non conveniens, the defendants specifically (1) stipulated to “waive assertion of any statute of limitations defenses in Michigan arising after the filing of this action on April 14, 2005,” and (2) agreed to “stipulate that they will not assert any limitations defense that would put plaintiffs in a position different than that [which] they would face under California’s discovery rule for a case filed on April 14, 2005.”

Plaintiffs argue that Michigan is not a suitable available alternative forum because defendants’ stipulations do not adequately deal with the limitations issues. Plaintiffs theorize that their litigation might be barred in Michigan. They point out that in Michigan for personal injury or products liability claims there is a three-year statute of limitations (Mich. Comp. Laws, § 600.5805, subs. (10), (13)) and that, in contrast to the discovery rule in California, an action “accrues at the time the wrong upon which the

claim is based was done regardless of the time when damage results.” (Mich. Comp. Laws, § 600.5827.) “Under a discovery-based analysis [which is not the rule in Michigan], a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint.” (*Trentadue v. Gorton* (2007) 479 Mich. 378, 389.) Plaintiffs urge that because defendants assert Dow stopped manufacturing the pesticide in question in 1977 and Chiquita and Del Monte stopped using it in 1977, even with a stipulation to toll the statute of limitations, it is unlikely that plaintiffs could show their claims were timely filed, unless they could apply California law on the statute of limitations and the discovery rule. Plaintiffs thus contend that only a complete waiver of the statute of limitations defense could satisfy defendants’ burden of establishing that Michigan is a suitable forum.

However, as the trial court observed, defendants acknowledged in their trial brief that as a result of their stipulation, they will “not assert any limitations defense that would put Plaintiffs in a position worse than they face under California’s discovery rule for a case filed on April 14, 2005, which is the date Plaintiffs filed the instant case.” Thus, the effect of defendants’ stipulation, for the purpose of evaluating the accrual of the plaintiffs’ claims in any re-filed action in Michigan, is that they have stipulated to the full and complete operation of the discovery rule, as that rule is understood and applied in California.

Although plaintiffs seek to have defendants agree to a broader and complete waiver of any statute of limitations defense, including any defenses that could have been raised in California litigation, such a stipulation is not necessary. The only statute of limitations problem identified by plaintiffs is Michigan’s lack of a discovery rule—a rule which would beneficially delay the accrual of plaintiffs’ claims. Because the parties have, in effect, agreed to allow the discovery rule to apply as if the matter had remained in California, defendants’ stipulation was sufficient to establish the suitability of Michigan as an alternative forum.

Plaintiffs complain that even though the stipulation would have the effect of eliminating the statute of limitations as a bar in Michigan, a Michigan court might

nonetheless simply decline to apply the California law agreed to by the parties and might on its own initiative deem plaintiffs' claims barred by the statute of limitations.

However, plaintiffs cite no support for that notion. Also, plaintiffs would have the same potential issue with even a more broadly worded agreement, which they suggest would be satisfactory; i.e. a broad and complete waiver of any statute of limitations defense. We decline to indulge in the rash assumption that a Michigan court might decline to honor the parties' stipulation.

Finally, contrary to plaintiffs' remaining assertion about the purported unsuitability of Michigan as an alternative forum, plaintiffs' litigation will not be subject to a forum non conveniens dismissal if they re-file their claims in Michigan. Defendants have agreed to submit to jurisdiction in Michigan, expressly represented to the trial court that they will not request a dismissal on the grounds of forum non conveniens in Michigan, and would be judicially estopped from doing so in a Michigan court. (See *Paschke v. Retool Industries* (1994) 445 Mich. 502, 509-510.)

Accordingly, analyzing the matter de novo, it is thus apparent that Michigan is a suitable alternative forum.

2. *The trial court did not abuse its broad discretion in ruling that plaintiffs' claims (bearing no relationship to California) may be more appropriately tried in Michigan.*

“[T]he next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California.” (*Stangvik, supra*, 54 Cal.3d at p. 751.) “The trial court’s balancing of these factors is entitled to substantial deference.” (*Roulier, supra*, 101 Cal.App.4th at p. 1188.)

Although the jurisdiction of a defendant’s residency is presumptively a convenient forum, that rebuttable presumption is inapplicable here because none of the defendants have their principal place of business in California. (See *Stangvik, supra*, 54 Cal.3d at p. 756, fn. 9.) Also, a foreign plaintiff’s choice of forum is “not a substantial factor in favor of retaining jurisdiction” in California. (*Id.* at p. 755 & fn. 7; see *Campbell v. Parker-Hannifin Corp.* (1999) 69 Cal.App.4th 1534, 1543.) Thus, the choice by the Guatemalan

and Panamanian plaintiffs herein of California as the forum is not a substantial factor in evaluating California as a convenient forum.

In the present case, the trial court did not abuse its broad discretion in finding that plaintiffs' claims bear no connection to California and would be more appropriately tried in Michigan. The undisputed facts establish the following: plaintiffs are not citizens or residents of California; plaintiffs were not injured in California; defendants did not manufacture the pesticide at issue in California; defendants did not sell or ship the pesticide at issue in California; and defendants do not reside in California. As the trial court aptly observed, "[j]ust as plaintiffs are strangers to this state, so too are the only defendants remaining in this action."

Thus, neither plaintiffs nor defendants have any connection to California. In contrast to California, Michigan has an interest in claims against a Michigan company (Dow) for allegedly tortious conduct in Michigan. (See *Radeljak v. DaimlerChrysler Corp.* (2006) 475 Mich. 598, 611 ["Michigan citizens have an interest in product liability lawsuits filed against Michigan manufacturers"]; *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, 712 [dismissing claims of non-California residents for wrongful acts in New York].) Only if plaintiffs were California residents or if claims were based on activities in California, could Michigan even be considered a "seriously inconvenient forum." (*Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, 611 [insurance dispute involving three contaminated sites in California and a plaintiff who was a California taxpayer, employer and property owner].) Such is not the case here where there is no California litigant or California activity.

Moreover, unrelated pesticide activity by Dow in California does not create a California interest in the present litigation. Plaintiffs allege that prior to 1977—i.e., prior to the date of injuries alleged in the present case—Dow engaged in pesticide-related business in California. Prior to 1977, Dow formulated the pesticide by mixing and finalizing the product in California, had two sales offices in California, and sold the pesticide in California. Significantly, however, the pesticide product formulated in California was sold only in California. As properly noted by the trial court, such

unrelated activities by Dow in California do not create a California interest in plaintiffs' subsequent and geographically unrelated claims.

Contrary to plaintiffs' suggestion, proceeding in Michigan on this matter will not create a multiplicity of litigation. Plaintiffs urge that proceeding in Michigan will create an unnecessary multiplicity of actions because Dow is a party in other pesticide litigation in California. However, the "question is not whether there may be a multiplicity of actions and inconsistent adjudications concerning *other* claims, but whether these factors may come into play with respect to the claims asserted in this action." (*Ford Motor Co. v. Insurance Co. of North America, supra*, 35 Cal.App.4th at p. 616.)

Nor is there any merit to plaintiffs' attempt to undermine the trial court's reliance on the factor of court congestion. The trial court found, in pertinent part, as follows: "Trying a thousand individual cases involving these parties could drag on for years and would place a wholly unfair and undeserved burden on California jurors and taxpayers. Congestion of the court system is a key factor in granting a motion such as this one. Where, as here, plaintiffs' choice of forum in California has imposed a heavy burden on this court and community, there should be a commensurate connection to the controversy in this forum." Our Supreme Court has expressly approved taking into consideration whether state interests are commensurate with the public burden of trying the case in California. (*Stangvik, supra*, 54 Cal.3d at p. 758.) For example, courts have observed that, "Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." (*Price v. Atchison, T. & S.F. Ry. Co.* (1954) 42 Cal.2d 577, 585.)

Equally unpersuasive is plaintiffs' assertion that the trial court purportedly erred to the extent it believed that Michigan was a more convenient forum because Michigan would apply its own law. Plaintiffs mistakenly assert that a Michigan court would apply the laws of Guatemala or Panama, the locations of the injuries. However, Michigan no longer adheres to such a location-based rule; Michigan courts now presume that Michigan law applies "unless a 'rational reason' to do otherwise exists." (*Sutherland v. Kennington Truck Serv.* (1997) 454 Mich. 274, 286.) Thus, absent a request to apply the

laws of Guatemala and Panama and a showing of some “rational reason” to apply those laws instead of the law of Michigan, the Michigan courts would apply Michigan law.

Finally, whereas it is undisputed that none of the parties or witnesses resides in California, Dow’s principal place of business is in Michigan. And, Michigan is where Dow tested, developed, and manufactured the pesticide and where it sold the pesticide to a Dow affiliate. Michigan is obviously a more convenient forum for Dow. Although we acknowledge that any documents located in Michigan could easily be transferred to California where some other relevant documents are already located, the ease of receiving documents is a factor that applies to any forum and thus does not weigh in favor of California.

Accordingly, the trial court did not abuse its discretion in finding plaintiffs’ claims bore no connection to California and in deeming them more appropriately tried in Michigan.

3. *The trial court did not abuse its discretion in dismissing, rather than staying, this litigation.*

When a trial court determines that a forum other than California is more convenient, it has the option either to dismiss or to stay the California action. (Code Civ. Proc., § 410.30, subd. (a).) Staying the action and retaining jurisdiction permits the court to make such further orders as might become appropriate. (See *Stangvik, supra*, 54 Cal.3d at p. 750.) Because dismissing an action, as distinguished from staying the action, “results in California’s loss of jurisdiction over the matter, it has long been the rule . . . that an action brought by a California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances.” (*Century Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408, 411.)

On the other hand, where the plaintiff is not a California resident, the trial court has discretion to dismiss the action outright. (See *Baltimore Football Club, Inc. v. Superior Court* (1985) 171 Cal.App.3d 352, 364-365; *Henderson v. Superior Court* (1978) 77 Cal.App.3d 583, 598.) Plaintiffs here are not California residents, and the trial court did not abuse its discretion in dismissing the action.

Plaintiffs' reliance on *Chong v. Superior Court, supra*, 58 Cal.App.4th 1032, is misplaced. In that case, the appellate court ordered the matter stayed, rather than dismissed, in recognition of the trial court's concern that due process of law may no longer exist in Hong Kong, at a time when sovereignty had just recently been transferred from Great Britain to China. Thus, the court held that "if [plaintiff] is not able to receive a fair trial in Hong Kong, it can apply to lift this stay." (*Id.* at p. 1040.) However, no such drastic concerns about a fair trial exist in the present case.

DISPOSITION

The orders granting the motions to dismiss on the grounds of inconvenient forum are affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.