St. John's Law Review

Volume 52
Number 4 *Volume 52, Summer 1978, Number 4*

Article 7

CPLR 327: Forum Non Conveniens Invoked Sua Sponte by a Court of Limited Jurisdiction

Joseph G. Braunreuther

ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 327: Forum non conveniens invoked sua sponte by a court of limited jurisdiction

The equitable doctrine of forum non conveniens, embodied in CPLR 327,[65] enables a court to stay or dismiss an action "in the interest of substantial justice" when it determines that the action would be more appropriately heard in another forum.[66] Use of this doctrine is discretionary as it presupposes that the court has personal and subject mattter jurisdiction.[67] It is typically invoked at the supreme court level in New York to dismiss causes of action which have minimal contacts with the state.[68] Courts of limited jurisdiction, on the other hand, have made little use of the doctrine due to

---

[65] CPLR 327 provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Enacted in 1972 as a "sorely needed balance to jurisdictional reform," NINTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1971), *in* SEVENTEENTH ANN. REP. N.Y. JUD. CONFERENCE A-35 (1972), CPLR 327 represented the codification of the forum non conveniens doctrine in New York.

In response to expanded bases of jurisdiction, the Judicial Conference had unsuccessfully tried three times to liberalize the use of forum non conveniens through the elimination of the case law requirement that both plaintiff and defendant be non-residents. *Id.* In 1972, however, the Court of Appeals upheld the use of forum non conveniens although one of the parties was a New York resident. *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). Subsequently, in 1973, the Judicial Conference enacted CPLR 327, thereby incorporating the *Silver* holding into the forum non conveniens doctrine in New York. *See* 1 WK&M ¶ 327.01; *The Survey*, 46 ST. JOHN'S L. REV. 561, 609-12 (1971) [hereinafter cited as *The Survey*]. *See generally* CPLR 327, commentary at 103 (McKinney Supp. 1977-1978).

[66] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-09 (1947). Cullinan v. New York Cent. R.R., 83 F. Supp. 870, 871 (S.D.N.Y. 1948); Varkonyi v. Varig, 22 N.Y.2d 333, 337, 239 N.E.2d 542, 544, 292 N.Y.S.2d 670, 673 (1968).

[67] CPLR 301, commentary at 13 (McKinney 1972). For a general discussion of the doctrine of forum non conveniens, see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947) [hereinafter cited as Barrett]; Blair, *The Doctrine of Forum Non Conveniens In Anglo-American Law*, 29 COLUM. L. REV. 1 (1929) [hereinafter cited as Blair]; 58 CORNELL L. REV. 782 (1973); *The Survey, supra* note 65, at 588.

[68] *See, e.g.*, De La Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949); Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (1st Dep't 1966) (per curiam), *aff'd mem.*, 23 N.Y.2d 717, 244 N.E.2d 56, 296 N.Y.S.2d 363 (1969); Winters v. General Tire & Rubber Co., 13 App. Div. 2d 470, 212 N.Y.S.2d 285 (1st Dep't 1961); *cf.* Suriano v. Hosie, 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969) (action between Queens County residents arising out of Queens County auto accident, dismissed in Nassau County Court on forum non conveniens grounds).

their restrictive jurisdictional requirements.[69] Nevertheless, in the recently decided case of *Roseman v. McAvoy*,[70] an inferior state court dismissed a cause of action on the ground that it could be heard more conveniently in another New York court.[71]

Roseman involved a suit brought in the New York City Civil Court for property damages arising out of a Nassau County automobile accident.[72] All parties to the action were residents of Nassau County. The defendants' motions to dismiss for lack of jurisdiction or, in the alternative, for a change of venue to Nassau County were rejected by the court.[73] Judge Sherman noted that the New York City Civil Court had subject matter jurisdiction since the claim was for less than $10,000.[74] In addition, the defendants' voluntary appearance, coupled with their failure to raise the issue of in personam jurisdiction in their answer, effected a waiver of any objection on jurisdictional grounds.[75] The venue transfer motion could not be granted since the New York City Civil Court is a court of limited jurisdiction and is not empowered to make venue changes to courts outside New York City.[76] Finding no alternative way of removing the

[69] The strict jurisdictional requirements of the lower New York state courts incidentally assure that the forum of litigation will be conveniently located. For example, § 213 of both the Uniform Justice Court Act and the Uniform City Court Act require that the plaintiff or the defendant either be a resident of the municipality, have regular employment within the municipality or transact business on a regular basis in the municipality. Such requirements preempt the need for forum non conveniens, to some degree, as contacts with the forum are a prerequisite to the court's exercise of jurisdiction.

[70] 92 Misc. 2d 1063, 401 N.Y.S.2d 988 (N.Y.C. Civ. Ct. N.Y. County 1978).

[71] *Id.* at 1064, 401 N.Y.S.2d at 990.

[72] *Id.*, 401 N.Y.S.2d at 989.

[73] *Id.*, 401 N.Y.S.2d at 990.

[74] *Id.*, 401 N.Y.S.2d at 989. Section 202 of New York City Civil Court Act provides in pertinent part that "[t]he court shall have jurisdiction of actions and proceedings for the recovery of money . . . where the amount sought . . . does not exceed $10,000." CCA § 202.

[75] 92 Misc. 2d at 1064, 401 N.Y.S.2d at 989. The defendants were served with process in Nassau County. Section 403 of the New York City Civil Court Act provides that "[s]ervice of summons shall be made only within the city of New York except as this act otherwise provides." Since the exceptions to the requirement that service be made within New York City were inapplicable to the situation in *Roseman*, service alone was insufficient to center personal jurisdiction upon the court. Under the provisions of CPLR 3211(e), expressly adopted in part by § 1002 of the Civil Court Act, an objection to personal jurisdiction is waived if not asserted in the defendant's answer. Thus, the defendant's voluntary appearance and subsequent failure to object to personal jurisdiction in his answer constituted a waiver of his right to object. *See* Casden v. Broadlake Corp., 47 Misc. 2d 847, 263 N.Y.S.2d 345 (New Rochelle City Ct. 1965); Suriano v. Hosie, 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969). *See generally* CPLR 1002, commentary at 160 (McKinney 1963).

[76] 92 Misc. 2d at 1065, 401 N.Y.S.2d at 990. A change of venue can only be effected within a single court. Thus, the court within which a venue change is sought must necessarily have a number of geographical divisions. The New York City Civil Court is divided into five New York City counties within which venue changes may be made. CCA art. 3. Consequently, a venue change to Nassau County was unavailable to the *Roseman* defendants. *See* Fountain-

case to Nassau County, where the out-of-county tort action should properly be heard, Judge Sherman conditionally dismissed the suit on the grounds of forum non conveniens.[77] The court was of the opinion that the rationale utilized by the supreme court when faced with a cause of action arising out of extraterritorial conduct between non-residents must be applied at the county level with respect to out-of-county torts.[78] Thus, citing the already overburdened court calendars, the court dismissed the suit.[79]

The *Roseman* decision is suggestive of the growing importance of the conveniens doctrine in New York.[80] Intended to codify prior

---

head Caterers, Inc. v. Peck, 42 Misc. 2d 330, 248 N.Y.S.2d 258 (Westchester County Ct. 1964). In contrast, the supreme court may make a venue change from New York County to Nassau County because it possesses statewide jurisdiction and it is part of the statewide court system. The supreme court also has authority to consolidate or remove cases, *see* CPLR 325 & 602, but this authority is separate and distinct from that conferred by the venue provisions of article 3 of the CPLR. *See* CPLR 306, commentary at 48 (McKinney Supp. 1977-1978).

[77] 92 Misc. 2d at 1065, 401 N.Y.S.2d at 990. CPLR 327 provides that the court "may stay or dismiss the action in whole or in part on any conditions that may be just." *See, e.g.*, Martin v. Mieth, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853 (1974) (dismissal conditioned on defendant's stipulation to submit to service in an alternate forum); Irrigation & Indus. Dev. Corp. v. Indag S.A., 44 App. Div. 2d 543, 353 N.Y.S.2d 471 (1st Dep't 1974) (per curiam), *aff'd*, 37 N.Y.2d 522, 337 N.E.2d 749, 375 N.Y.S.2d 296 (1975) (dismissal conditioned upon waiver of statute of limitations defense); Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (1st Dep't 1966), *aff'd mem.*, 23 N.Y.2d 717, 244 N.E.2d 56 (1969) (dismissal conditioned on defendant's agreement not to challenge plaintiff's capacity to sue). In *Roseman*, Judge Sherman conditioned the dismissal on the defendant's consenting to the jurisdiction of a Nassau County court of appropriate jurisdiction. 92 Misc. 2d at 1065, 401 N.Y.S.2d at 990.

[78] 92 Misc. 2d at 1065, 401 N.Y.S. 2d at 990. Use of forum non conveniens has often occurred where an out of state cause of action has been brought by a nonresident. *See, e.g.*, Bata v. Bata, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952); Robinson v. Oceanic Steam Navigation Co., 112 N.Y. 315, 323-24, 19 N.E. 625, 627 (1889); Vath v. Israel, 80 Misc. 2d 759, 364 N.Y.S.2d 97 (Sup. Ct. Queens County 1975). Since *Roseman* involved a cause of action which arose outside the jurisdiction of the Civil Court of New York between nonresidents of New York City, Judge Sherman found that the same policy considerations justified use of the doctrine. 92 Misc. 2d at 1064, 401 N.Y.S.2d at 989. Such an application of the doctrine of forum non conveniens has been endorsed by Professor Siegel who has commented that "[t]he rules of forum non conveniens might be invoked to prompt the court to refuse the case, if in a like case a forum non conveniens dismissal would result in the supreme court . . . ." CCA 202, commentary at 19 (McKinney 1963).

[79] 92 Misc. 2d at 1063, 401 N.Y.S.2d at 989.

[80] In recognition of the growing importance of forum non conveniens, several limitations on its use have been abandoned. It had long been held that the doctrine was not available where either party was a resident of New York. *See* De La Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949). In *De La Bouillerie*, although the circumstances indicated that another forum would be more appropriate, the court held that jurisdiction must be accepted because the defendant was a resident of New York. This restriction was eliminated in Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). The *Silver* court held that while the residency of the litigants is an important consideration, it should not be the dispositive factor. 29 N.Y.2d at 363, 278 N.E.2d at 622, 328 N.Y.S.2d at 404. For a discussion of the difficulties inherent in the *De La Bouillerie* decision and the changes

decisional law, CPLR 327 provides courts with the discretionary power to dismiss a suit in situations where adjudication would be more appropriate in another forum.[81] In recent years, increased use of forum non conveniens has been necessitated by the expansion of New York jurisdictional authority and a resultant increase in cases the courts have had to entertain.[82] Flexibility in the doctrine's use is viewed to be necessary to ensure proper consideration of the inter-

effected by *Silver*, see 58 CORNELL L. REV. 782, 787-91.

In addition, at one time New York trial courts could not refuse to adjudicate suits on a contract or other actions of a commercial nature. *See* Wedemann v. United States Trust Co., 258 N.Y. 315, 317-18, 179 N.E. 712, 713 (1932); N.V. Brood en Beschuitfabriek V/H John Simons v. Aluminum Co. of America, 231 App. Div. 693, 696, 248 N.Y.S. 460, 462-63 (1st Dep't 1931); Strickler v. Palmer, 190 Misc. 688, 689, 73 N.Y.S.2d 389, 391 (Sup. Ct. N.Y. County 1947). This prohibition was intended to encourage business in New York. *See* Wertheim v. Clergue, 53 App. Div. 122, 125, 65 N.Y.S. 750, 753 (1st Dep't 1900), *quoted in* Barrett, *supra* note 3, at 405 n.124, wherein the court declined to invoke forum non conveniens in a contract action, refusing "to establish a precedent which would shut [the] courts to great numbers of foreign merchants, nonresidents of the state, who may find their non resident debtors, fraudulent or honest, temporarily within our jurisdiction." *See generally The Survey, supra* note 65, at 595-96. Today the doctrine of forum non conveniens is available in contract actions as well as tort actions. *See* Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952); Sutton v. Garcia, 80 Misc. 2d 690, 363 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1974); *The Survey, supra* note 65, at 595-611.

[81] CPLR 327, commentary at 103 (McKinney Supp. 1977-1978); D. SIEGEL, NEW YORK PRACTICE 29 (1978); 1 WK&M ¶ 327.01.

[82] Several commentators have noted the growing importance of the doctrine of forum non conveniens. Increased case loads resulting from liberalized jurisdictional requirements point to the need for greater discretion in the use of forum non conveniens. *E.g.*, 1 WK&M ¶ 327.01, at 3-470; *Recent Developments*, 39 BROOKLYN L. REV. 218, 226 (1972); *accord*, Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398 (1972); NINTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1971), *in* SEVENTEENTH ANN. REP. N.Y. JUD. CONFERENCE A-35 (1972). One of the most significant developments was the decision by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), where it was held that a defendant need only have minimum contacts with the forum to be subject to the personal jurisdiction of that court. Following the mandate of *International Shoe*, New York enacted its "longarm" statute, CPLR 302, which enables New York courts to obtain jurisdiction over nonresidents in a number of situations. Liberal interpretations of that statute have resulted in a further expansion of New York's jurisdictional authority. *See* Sybron Corp. v. Wetzel, No. 438 (N.Y. Ct. App. Dec. 7, 1978); *cf.* Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 212, 269 N.Y.S.2d 99 (1966) (allowing quasi-in-rem jurisdiction over one insured by a corporation subject to personal jurisdiction in New York). In addition, changing choice of law rules have generated additional concerns as to what is the proper forum. For example, in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), it was held that New York courts were not required to apply the guest statute of the jurisdiction where the injury had occurred. In Kilbert v. Northeast Airlines Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), it was held that New York courts were not required to apply the statute of limitations of the jurisdiction where the injury occurred. In situations where the plaintiff has several available forums, each applying different laws, forum non conveniens may be used to discourage forum shopping. *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398 (1972); CCA 202, commentary at 16 (McKinney Supp. 1977-1978).

ests of both the court and the litigants.

The sua sponte invocation of forum non conveniens in *Roseman* is indicative of the broad use contemplated by CPLR 327.[83] In conditionally dismissing the suit, Judge Sherman stated that such action was necessary "to bring some semblance of unity to the fragmented state court system."[84] This emphasis on administrative considerations is consistent with the use of the doctrine in prior New York decisions.[85] Furthermore, utilization of the doctrine by a court of limited jurisdiction is a noteworthy addition to the trend indicating its increased implementation.[86] The conditional dismissal in

[83] The statutory language of CPLR 327 provides that a stay or dismissal on forum non conveniens grounds may be made "on motion of any party." *See* note 65 *supra*. There is authority to the effect that under this provision the court may invoke the doctrine on its own initiative. *But see* Christovao v. Unisul-Uniao, 55 App. Div. 2d 561, 562, 390 N.Y.S.2d 71, 73 (1st Dep't 1976) (dissenting opinion), *appeal dismissed per curiam*, 41 N.Y.2d 338, 360 N.E.2d 1309, 392 N.Y.S.2d 609 (1977). Wachsman v. Craftool Co., 77 Misc. 2d 360, 353 N.Y.S.2d 78, 81 (Sup. Ct. N.Y. County 1973).

[84] 92 Misc. 2d at 1065, 401 N.Y.S.2d at 990.

[85] *Id.* Traditionally, the doctrine of forum non conveniens has involved weighing by the court of the interests of the litigants and those of the court itself. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). In *Gulf Oil*, the Supreme Court stated that the factors involved in this weighing process include evidentiary considerations and the administrative inconveniences the litigation would cause. *Id. See also* Barrett, *supra* note 65, at 408-16. In New York, however, the doctrine has primarily been used to lessen the burden on local courts. Thus, the Court of Appeals has stated that it is "the 'convenience' of the court, and not that of the parties, which is the primary consideration." Bata v. Bata, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952). An earlier court asserted that "[a]s a question of policy, it is intolerable that our courts should be impeded in their administration of justice, and that the people of the state should be burdened with the expense, in redressing wrongs permitted in another state for the benefit solely of its citizens and where the remedy is in the enforcement of its statutes." Pietraroia v. New Jersey & H.R. Ry. & Ferry Co., 197 N.Y. 434, 439, 91 N.E. 120, 122 (1910); *see* Barrett, *supra* note 67, at 404-06; Blair, *supra* note 67, at 25-27; *The Survey*, *supra* note 65, at 604-606. Although, absent countervailing considerations, the interests of the court may be sufficient to invoke forum non conveniens, use of the doctrine might not be permitted where the result would be hardship to one of the parties. *See* Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig), 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968).

[86] *See* Suriano v. Hosie, 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969). *Suriano* presented a similar situation to that in *Roseman*. The *Suriano* cause of action arose out of an automobile accident in Queens County between residents of that county. Although the Nassau County District Court found that jurisdiction had been perfected, it invoked forum non conveniens to dismiss the case. The court stated that

> [i]n the absence of a showing that the interests of justice will require the continuance of the action, the courts of this State as a matter of policy will refuse to entertain tort actions between non-residents where the cause of action arose outside of the State . . . . We know of no reason why this doctrine should not be invoked in this court as it pertains to non-residents of Nassau County since the same policy considerations prevail, and accordingly it is so invoked.

Id. at 974, 302 N.Y.S.2d at 217 (citations omitted). The position taken by the *Suriano* court has been approved by Professor Siegel in his commentary on the Civil Court Act. CCA 202, commentary at 16 (McKinney Supp. 1977-1978).

Roseman on the ground of forum non conveniens illustrates the way in which administrative benefits may be derived from use of the doctrine while preserving the "interests of justice."

Joseph G. Braunreuther

ARTICLE 14—CONTRIBUTION

Dole *claim held to accrue on date judgment is paid by party seeking contribution*

Article 14 of the CPLR, the codification of the seminal *Dole v. Dow Chemical Co.*[87] decision, authorizes a claim for contribution among joint tortfeasors in proportion to their relative culpability.[88] Although the legislation describes the procedure for claiming contribution,[89] it does not expressly define when the cause of action accrues.[90] One line of cases in New York has held that the *Dole* cause of action ripens on the date the claimant actually pays the judgment for which contribution is sought.[91] A second view has main-

---

[87] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 185 (1972).

[88] CPLR 1401-1402. The *Dole* Court stated:

> [W]here a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility between those parties.

30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

This reasoning has been codified in CPLR 1401, which states, in pertinent part, that "two or more persons who are subject to liability for damages for the same personal injury . . . or wrongful death, may claim contribution among them . . . ," and in CPLR 1402, which provides that a tortfeasor is entitled to contribution for the amount paid in excess of his "equitable share . . . determined in accordance with the relative culpability of each person liable for contribution."

[89] CPLR 1403 provides that "[a] cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

[90] The accrual issue has particular significance when the claimant is seeking contribution from the state. In such cases, the claimant cannot bring the state into the primary action, since the state can only be sued in the Court of Claims. Breen v. Mortgage Comm'n, 285 N.Y. 425, 429, 35 N.E.2d 25, 26 (1941); *see In re* Dormitory Auth., 18 N.Y.2d 114, 218 N.E.2d 693, 271 N.Y.S.2d 983 (1966). Instead, the claimant must bring a separate action for contribution in the Court of Claims after complying with the jurisdictional filing and notice requirements of the Court of Claims Act. N.Y. CT. CL. ACT § 8 (McKinney 1963); *see* McCorkle v. Degl, 74 Misc. 2d 611, 344 N.Y.S.2d 802 (Sup. Ct. Kings County 1973); 2A WK&M ¶ 1403.05. Since the limitations period for filing an action in the Court of Claims is unusually abbreviated, *see* note 101 *infra*, the question when the cause of action accrues becomes extremely important.

[91] *See, e.g.*, Blum v. Good Humor Corp., 57 App. Div. 2d 911, 394 N.Y.S.2d 894 (2d Dep't 1977); Bay Ridge Air Rights, Inc. v. State, 57 App. Div. 2d 237, 394 N.Y.S.2d 464 (3d Dep't