St. John's Law Review

Volume 45, December 1970, Number 2 Article 29

Forum Non Conveniens: Action Dismissed Despite New York Residence of Corporate Codefendant

St. John's Law Review

FORUM NON CONVENIENS

Forum non conveniens: Action dismissed despite New York residence of corporate codefendant.

When an action is brought by one nonresident against another on a cause of action arising outside the state, New York courts may refuse under the doctrine of *forum non conveniens* to take cognizance of the controversy.[182] Nevertheless, in this situation the court does have jurisdiction over the parties and any decision to dismiss the action must be reached by balancing the interests of the court and the defendant with the possibility that another forum would be either unavailable or undesirable.[183] Traditionally, however, the exercise of discretion as to whether to retain jurisdiction is foreclosed if one of the parties is a New York resident or the cause of action arose here. In either instance, New York courts must hear the case.[184] In view of the ironclad approach to *forum non conveniens* in the latter circumstances, how can *Pharo v. Piedmont Aviation, Inc.*[185] be reconciled with precedent?

In *Pharo*, the plaintiff, an Ohio resident commenced a wrongful death action in New York to recover damages sustained by reason of an airline crash in West Virginia. Jurisdiction over three corporate codefendants was grounded in the contention that two of the defendants were doing business in New York while the third was a New York corporation. The First Department "in the exercise of discretion" dismissed the complaint for the following reasons: (1) actions were pending in other forums where witnesses and documents were more readily available; (2) the United States was a necessary party and could not be brought into the New York action;[186] and (3) all of the defendants agreed to submit to jurisdiction in West Virginia. The dissent did not argue that the presence of a New York resident as defendant was a priori reason to affirm the lower court's denial of the motion to dismiss. Rather, it also cited "special circumstances," those militating against the majority's conclusion.[187]

182 *See, e.g.*, Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (1st Dep't 1966).

183 Varkonyi v. S.A. Empresa De Viacao Airea Rio Grande (Varig), 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968).

184 De La Bouillerie v. de Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949). *See also* Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952).

185 34 App. Div. 2d 752, 310 N.Y.S.2d 120 (1st Dep't 1970) (mem.).

186 *See* U.S.C. § 1402(b) (1964).

187 In his dissent, Justice Capozzi was of the opinion that unless the balance of countervailing considerations was strongly in favor of the defendants, the decision of

As noted above, it has not generally been the rule that courts will dismiss an action in the exercise of discretion if one of the parties is a New York resident or the cause of action arose here. One exception has been posited in situations where the parties have contractually designated another forum in which to settle their grievances.[188] *Pharo* has added a second exception, which, dogmatically speaking, is not tenable. Yet, it is apparent that *forum non conveniens* questions cannot be considered in the abstract. Inroads in the areas of jurisdiction[189] and conflict of laws[190] have affected persons and effected results in a manner heretofore impossible. Thus, the *forum non conveniens* doctrine should be flexible enough to insure fairness to all of the litigants, and the residence of the parties should not be the sole factor in determining convenience.[191]

Forum non conveniens: Court recognizes that sister state is in more advantageous position to determine best interests of child in custody proceeding.

Unlike some jurisdictions,[192] the New York version of *forum non conveniens* is completely nonstatutory.[193] It is nonetheless well founded, and the recent matrimonial proceeding in *Anonymous v. Anonymous*[194] provides an excellent illustration of its practicality. In *Anonymous* the parties had previously had their marriage declared a nullity and custody of their child awarded to the wife by a New York court. Subsequently, both parties became domiciliaries of New Jersey, where they currently reside. The husband sought to modify the award of custody, recent libertine-like behavior being alleged on the part of the wife. Jurisdiction was contested on the ground that mere personal service of notice of the instant application upon the wife in New Jersey was insufficient to secure in personam jurisdiction in New York. The court,

---

the lower court to retain jurisdiction should not be overturned. 34 App. Div. 2d at 753, 310 N.Y.S.2d at 123, *citing* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946). It should be noted that *Gulf Oil* involved a commercial transaction. Assuming, *arguendo*, that a consideration of special circumstances was permitted in *Pharo*, the criterion for tort cases is opposite that of *Gulf Oil, i.e.*, the burden rests on the plaintiff to prove special circumstances warranting the retention of jurisdiction. *See* 7B MCKINNEY'S CPLR 301, supp. commentary at 104 (1967).

188 *See* Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 301 N.Y.S.2d 397 (1st Dep't 1969); Export Ins. Co. v. Mitsui S.S. Co., 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966).

189 *See, e.g.*, Parke-Bernet v. Franklyn, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

190 *See, e.g.*, Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

191 *See* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 54 (2d ed. 1968).

192 *See, e.g.*, WIS. STAT. ANN. § 262.19 (1957).

193 *See generally* 1 WK&M ¶ 301.07.

194 62 Misc. 2d 758, 309 N.Y.S.2d 966 (Sup. Ct. Queens County 1970).