Fordham Law Review

Volume 26 | Issue 3 Article 8

1957

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Moreover, an opportunity which would otherwise be a corporate opportunity, ceases to be such if the corporation is definitely unable to take advantage of it.[47] Thus, the financial inability of a corporation to avail itself of the particular opportunity is a valid defense in an action against the director.[48] Legal barriers, refusal of a third party to deal with the corporation,[49] or any other circumstances which prevent the corporation from acting upon the opportunity, may also be invoked as defenses.

CONCLUSION

Today, with modern corporate organization involving vast sums of capital, property, and various other assets, a director may well be tempted to act for himself and to the detriment of his corporation. The corporate opportunity doctrine has as its purpose the discouragement, as well as the proper resolution, of such business conflicts between a director and his corporation. To achieve this end, the courts in applying the doctrine must demand the highest degree of fidelity of corporate fiduciaries. In *Meinhard v. Salmon,* Justice Cardozo stated, "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."[50] This strict standard can best be imposed upon directors by a broad construction of the "right, interest or expectancy" requirement, as has already been suggested. The area in which a director can act for himself should be clearly defined by resolving any doubts in favor of the corporation. Thus the courts can avoid the creation of a large shady area of law within which the wayward often seek refuge.

THE EFFECT OF THE COMMON-LAW DOCTRINE OF FORUM NON-CONVENIENS ON THE NEW YORK STATUTE GRANTING JURISDICTION OVER SUITS AGAINST FOREIGN CORPORATIONS

Section 225, subdivision 4, of the New York General Corporation Law provides that a nonresident may bring an action against a foreign corporation "where [the] foreign corporation is doing business within this state." This is so even where the cause of action has arisen outside of the state. Despite this, New York courts can, and do under certain circumstances, decline jurisdiction

47. 3 Fletcher, op. cit. supra note 2, § 862.1, at 231-33.

48. Kelly v. 74 & 76 W. Tremont Ave. Corp., 4 Misc. 2d 533, 151 N.Y.S.2d 900 (Sup. Ct. 1956); Murray v. Vanderbilt, 39 Barb. 140 (N.Y. Sup. Ct. 1863). In the federal courts financial inability short of complete insolvency is no defense. Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934).

49. Crittenden & Cowles Co. v. Cowles, 66 App. Div. 95, 72 N.Y. Supp. 701 (3d Dep't 1901).

50. 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

over suits between a nonresident and a foreign corporation. Through the years the attitude of the New York courts toward the exercise or refusal of this jurisdiction has undergone a change. This article will trace the influences which have brought about the change.

History of the Statute

It was the common-law rule in New York that courts of general jurisdiction could exercise that jurisdiction over all suits, including those between two nonresidents, even where the cause of action arose outside of the state.[1] Though the early statutory enactments concerning suits against foreign corporations provided that a nonresident might bring such a suit where the cause of action arose within the state and were silent with respect to causes of action arising outside the state,[2] they were construed to be nonexclusive and thus not to abrogate the common-law rule.[3] However, in 1880, the legislature enacted section 1780 of the Code of Civil Procedure, which expressly provided that a nonresident could bring an action against a foreign corporation only in a case where the cause of action arose within the state. The addition of the word "only" to the text of that statute led to its being construed as denying jurisdiction over nonresidents on an out-of-state cause of action.[4] In 1913 the statute was changed to its present form.[5] In addition to providing for suits between a nonresident and a foreign corporation on causes of action arising within the state, the section now provides for such suits wherever the foreign corporation is doing business here.

When Jurisdiction Is Discretionary

Where either of the parties to an action is a resident of the state, the courts may not decline jurisdiction, no matter where the cause of action arose.[6] But where both parties are nonresidents the rule has always been that courts are

1. Robinson v. Oceanic Steam Nav. Co., 112 N.Y. 315, 19 N.E. 625 (1889); McCormick v. Pennsylvania R.R., 49 N.Y. 303 (1872).

2. See N.Y. Sess. Laws 1849, c. 107.

3. Robinson v. Oceanic Steam Nav. Co., 112 N.Y. 315, 19 N.E. 625 (1889).

4. Ibid.

5. N.Y. Sess. Laws 1913, c. 60. In 1920 this became N.Y. Gen. Corp. Law § 47, and in 1929 it became N.Y. Gen. Corp. Law § 225.

6. Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923). This is true even where a nonresident plaintiff assigns his cause of action, whether with or without consideration, to a resident solely for the purpose of having the resident assignee bring suit. McCauley v. Georgia R.R. Bank, 239 N.Y. 514, 147 N.E. 175 (1924); Segal Lock and Hardware Co. v. Market, 124 N.Y.S.2d 181 (Sup. Ct. 1953). See Miele v. Chicago, M., St. P. & P.R.R., 151 Misc. 137, 270 N.Y. Supp. 788 (N.Y. City Ct. 1934). A misconstruction of the Miele case led to the dicta contra the general rule in Cinces v. Seaboard Air Line Ry., 201 Misc. 887, 113 N.Y.S.2d 29 (Sup. Ct., App. T. 1952) and Jacobson v. Baltimore & O.R.R., 161 Misc. 268, 291 N.Y. Supp. 628 (N.Y. City Ct. 1936). Where a resident and nonresident defendant are in the same action the courts will retain jurisdiction over both. White v. Boston & Me. R.R., 283 App. Div. 482, 129 N.Y.S.2d 15 (3d Dep't 1954); Castanos v. Public Service Coordinated Trans., 140 N.Y.S.2d 609 (Sup. Ct. 1954), appeal dismissed, 285 App. Div. 854, 138 N.Y.S.2d 351 (4th Dep't 1955).

free to decline jurisdiction.[7] This discretion is given whether the cause of action arose within or without the state, but jurisdiction has rarely been declined over a suit on a cause of action arising within the state.[8]

Two separate rules developed, one for tort and one for contract actions. Where the action sounded in tort, it was early held that it is the public policy of this state that its taxpayers should not bear the burden of maintaining a forum where two nonresidents may litigate disputes arising outside the state.[9] There were several reasons for this rule. New York, as the most populous state in the nation, was heavily burdened with litigation involving its own residents. Dockets were crowded and calendars were congested.[10] In addition to this, many out-of-state plaintiffs sought the metropolitan courts where they felt that juries would be more willing to award large verdicts.[11] Others sought a forum which would be most inconvenient for the defendant, thereby hoping to coerce a settlement. Usually the most convenient forum in which to litigate a tort action is the one nearest to the place where the tort occurred. The rule developed, therefore, that a tort action between two nonresidents would be dismissed in the absence of special circumstances.[12] Such special circumstances might be that the place where the cause of action arose is far from the residences of both the plaintiff and the defendant,[13] or that the action is barred by the statute of limitations in the state where the action arose or in defendant's home forum if he has no place of business in the state where the action arose.[14]

Where the suit is on a contract or other commercial matter, the law developed in just the opposite direction. Courts were influenced by the fact that such actions are not usually local in nature and that commerce should be encouraged. Thus the rule came to be that jurisdiction over contract and other commercial transactions would be retained in the absence of special cir-

7. Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923); Ferguson v. Neilson, 58 Hun 604, 11 N.Y. Supp. 524 (Sup. Ct. 1890). The question is normally raised on a motion by defendant though there is some dicta to the effect that the court may raise it on its own motion. Burdick v. Freeman, 120 N.Y. 420, 24 N.E. 949 (1890); Winchester v. Browne, 59 Hun 626, 13 N.Y. Supp. 655 (N.Y. Sup. Ct. 1891).

8. Ivy v. Stoddard, 147 N.Y.S.2d 469 (Sup. Ct. 1955).

9. Pietrarois v. New Jersey & H.R.R. & F., 197 N.Y. 434, 91 N.E. 120; Hatfield v. Sisson, 28 Misc. 255, 59 N.Y. Supp. 73 (Sup. Ct. 1899); Ferguson v. Neilson, 58 Hun 604, 11 N.Y. Supp. 524 (Sup. Ct. 1891).

10. But see Note, Does Forum Non Conveniens Still Exist in the Federal System?, 24 Geo. Wash. L. Rev. 208, 211 (1955).

11. Yesuvida v. Pennsylvania R.R., 201 Misc. 815, 111 N.Y.S.2d 417 (Sup. Ct. 1951).

12. Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923); Yesuvida v. Pennsylvania R.R., supra note 11.

13. Murnan v. Wabash R.R., 222 App. Div. 833, 226 N.Y. Supp. 393 (2d Dep't 1928); Richter v. Chicago, R.I. & P.R.R., 123 Misc. 234, 205 N.Y. Supp. 128 (Sup. Ct. 1924); Salomon v. Union Pac. R.R., 197 Misc. 272, 94 N.Y.S.2d 429 (N.Y. City Ct. 1949).

14. Williamson v. Palmer, 181 Misc. 610, 43 N.Y.S.2d 532 (Sup. Ct. 1943). In such a case the court may condition a dismissal on defendant's agreement to waive the statute of limitations in the more convenient forum. Ivy v. Stoddard, 147 N.Y.S.2d 469 (Sup. Ct. 1955). See Foster, Place of Trial, 44 Harv. L. Rev. 41, 50 (1930).

cumstances of hardship or oppression to the defendant requiring dismissal.[15] Such special circumstances were so rarely found that there was often confusion concerning whether or not the court had the power to dismiss at all.[16]

Forum Non Conveniens

Though the early cases do not employ the term, New York's rule concerning discretionary jurisdiction began to be referred to as an application of the doctrine of forum non conveniens.[17] The doctrine of forum non conveniens was first developed by the English and Scotch courts as a means of dismissing an action where jurisdiction was proper, but where the ends of justice would be best served if it were litigated in a more convenient forum.[18] The convenience here referred to was generally not the court's convenience, but that of the parties. Difficulty and expense in getting witnesses to trial, in gathering proof, and any other factors which might cause inconvenience and hardship to the defendant were weighed in arriving at a decision. These had to be sufficient to overcome the plaintiff's right to bring his action in the forum of his choice. It was up to the trial court to exercise a sound discretion in weighing all of these factors.[19] The guiding principle was that the court should seek the forum in which justice would best be served.

Forum non conveniens was thus a flexible rule, one involving the consideration of many factors. The New York rule, on the other hand, was much more rigid; the area of discretion for the trial judge was much narrower. To be sure, the interests of justice were to be considered, but they would override the "rule" only in the rare, "special circumstance."

Through the years, however, the New York rule has assumed, not only the name, but also much of the approach of forum non conveniens. This metamorphosis was spurred in 1947 by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*.[20] There the Court, in discussing forum non conveniens, laid down a rule very close to the classic doctrine. The court's convenience was mentioned, but as only one among many considerations. Some of the other considerations which the Court mentioned were: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; cost of obtaining attendance of willing witnesses; possibility of view of the premises if that be appropriate; and all other practical problems that make trial of a case easy, expeditious and inexpensive. The Supreme Court then declared that this rule which it laid down was the same as that in New York. Although the statement was not true when made, it was soon to become so.

15. Wertheim v. Clergue, 53 App. Div. 122, 65 N.Y. Supp. 750 (1st Dep't 1900); Belden v. Wilkerison, 44 App. Div. 420, 60 N.Y. Supp. 1033 (1st Dep't 1899); Rederiet Ocean Aktieselskab v. W. A. Kirk & Co., 51 N.Y.S.2d 565 (Sup. Ct. 1944).

16. See Crane, Hayes & Co. v. New York, N.H., & H.R.R., 131 Misc. 71, 225 N.Y. Supp. 775 (N.Y. City Ct. 1927).

17. See Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1 (1929).

18. Ibid.; see note 10 supra.

19. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

20. Ibid.

Following the lead of *Gulf Oil Corp. v. Gilbert,* a series of New York cases announced a more liberal rule of forum non conveniens.[21] In truth, the terminology often remained the same as that employed by the older cases, but the result was much nearer the true standards of forum non conveniens. In both tort and contract actions special circumstances for avoiding the old rule were more freely found. Indeed, the old rule is not entirely dead,[22] but the trend today is definitely toward a full airing and weighing of all of the relevant factors.

Two other doctrines often come into play at the same time that forum non conveniens is invoked. One is that the courts will not entertain a suit which involves the internal affairs of a foreign corporation.[23] This may not be a separate doctrine, but where applied may merely constitute a special circumstance in which a court would choose to dismiss a commercial action under forum non conveniens.[24] The second doctrine is actually separate and distinct from forum non conveniens. It is that a court may not entertain jurisdiction over an action which will burden interstate commerce. Here there is no question of discretion; the court simply has no jurisdiction over such a suit.[25]

Appellate Review

The attitude of appellate courts toward reviewing a trial court's ruling on forum non conveniens has also undergone a change during the years. The classic forum non conveniens viewpoint is that, while appellate courts may review both a dismissal and a refusal to dismiss under forum non conveniens, the lower court's ruling should not be disturbed unless there has been an abuse of discretion.[26] The early New York decisions, on the other hand, though often employing "abuse of discretion" terminology, were in reality applying a rather rigid rule of law. A leading case of this type is *Ferguson v. Neilson,*[27] where the court declared that it would reverse where the lower court's exercise of discretion was against the settled policy of the state. The court then held that

21. Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952); Central Publishing Co. v. Wittman, 283 App. Div. 492, 128 N.Y.S.2d 769 (1st Dep't 1954); White v. Boston & Me. R.R., 283 App. Div. 482, 129 N.Y.S.2d 15 (3d Dep't 1954); Hoolihan v. United States Lines Co., 189 Misc. 168, 70 N.Y.S.2d 356 (Sup. Ct. 1947).

22. See dissenting opinion in Central Publishing Co. v. Wittman, 283 App. Div. 492, 128 N.Y.S.2d 769 (1st Dep't 1954).

23. Langfelder v. Universal Laboratories Inc., 293 N.Y. 200, 56 N.E.2d 550 (1944).

24. See Koster v. Lumberman's Mut. Cas. Co., 330 U.S. 518, 532 (1947); Travis v. Knox Terpezone Co., 215 N.Y. 259, 109 N.E. 250 (1915).

25. N.V. Brood en Beschuitfabriek v. Aluminum Co. of America, 231 App. Div. 693, 248 N.Y. Supp. 460 (1st Dep't 1931); Panstwowe Zaklady Graviozne v. Hartford Automobile Ins. Co., 36 F.2d 504 (S.D.N.Y. 1928).

26. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). The question of forum non conveniens may never be raised for the first time on appeal. Sperling v. McGee, 268 App. Div. 925, 51 N.Y.S.2d 274 (2d Dep't 1944). Generally speaking such a motion is timely if raised at any time prior to trial. Jewett v. Gardner, 73 N.Y.S.2d 782 (Sup. Ct. 1947). See also Burdick v. Freeman, 120 N.Y. 420, 24 N.E. 949 (1890).

27. 58 Hun 604, 11 N.Y. Supp. 524 (Sup. Ct. 1891).

it was against the settled policy of the state to maintain tort actions between nonresidents in the absence of some special reason. This in reality leaves the trial court very little discretion. In the case of contract actions, the appellate courts were so strict that there is considerable dicta in the early cases to the effect that no discretion existed to dismiss a contract suit.[28] Though the same terminology is often found in both the old and modern cases, the latter, especially since *Gulf Oil Corp. v. Gilbert*, have tended to adopt true forum non conveniens standards.[29] This trend is to be commended since the "abuse of discretion" rule, where it is really applied, lends a note of finality to forum non conveniens rulings and prevents much delay and uncertainty in litigation.

In 1902 the First Department[30] held that once the discretion is exercised and the trial has been completed, the court's ruling should not be disturbed. It was reasoned that since the expense of trial had already been incurred, there was no possibility of saving the taxpayer's money by a dismissal. Though the reasoning is somewhat outmoded, the result still seems proper, since, where the defendant has failed to appeal the ruling directly, he should be found to have waived his rights. After a trial on the merits has resulted in a judgement against him it is somewhat late for the defendant to press his contention that justice will be better served by a trial elsewhere.[31]

Federal Courts

It was held in *Erie R.R. v. Tomkins*[32] that when an action is brought in the federal court under diversity of citizenship, the federal court must follow state substantive law. Does this mean that the federal court must dismiss under forum non conveniens, where the state court would have done so? It would seem not since forum non conveniens appears not to be part of the substantive law of the state but, rather, a procedural matter which the rule of *Erie R.R. v. Tomkins* would not require the federal courts to follow. Furthermore, Congress has legislated in the field. In addition to retaining forum non conveniens for situations in which the suit could not be brought within another federal district, Congress has passed section 1404(a) of the new Judicial Code[33] to provide for a transfer of venue to a more convenient federal district. This section has generally been held to entail a more liberal standard than dismissals under forum non conveniens. But if federal courts were required to follow the New

28. See note 16 supra.

29. See Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952).

30. Hoes v. New York, N.H. & H.R.R., 73 App. Div. 363, 77 N.Y. Supp. 117 (1st Dep't 1902), rev'd on other grounds, 173 N.Y. 435, 66 N.E. 119 (1903).

31. While a general appearance by defendant waives lack of jurisdiction, Simons v. Inecto Inc., 242 App. Div. 275, 275 N.Y. Supp. 501 (3d Dep't 1934), he may still move under forum non conveniens even after he has appeared generally. Jewett v. Gardner, 73 N.Y.S.2d 782 (Sup. Ct. 1947).

32. Erie R.R. v. Tomkins, 304 U.S. 64 (1938).

33. 28 U.S.C.A. § 1404(a)(1952). For a good analysis of this statute see Kaufman, Observations on Transfer Under Section 1404(a) of the New Judicial Code, 10 F.R.D. 595 (1951); Kaufman, Further Observations on Transfers Under Section 1404(a), 56 Colum. L. Rev. 1 (1956).