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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JANUS FRIIS, Plaintiff and Appellant, v. MARIA LOUISE JOENSEN, Defendant and Respondent.	B276896 c/w B278919 & B279828 (Los Angeles County Super. Ct. No. BC592828)

APPEALS from orders and judgment of the Superior Court of Los Angeles County. Deirdre Hill, Judge. Affirmed as modified.

Horvitz & Levy LLP, Jeremy B. Rosen, Mark A. Kressel; Baker Marquart LLP, Jaime W. Marquart, and Blake McCay for Plaintiff and Appellant.

The Law Office of Gregory L. Smith, Gregory L. Smith for Defendant and Respondent.

Plaintiff and appellant Janus Friis filed an action against defendant and respondent Maria Louise Joensen seeking the return of an engagement ring and other gifts given in contemplation of marriage. The trial court granted Joensen's motion to dismiss based on forum non conveniens, finding the matter to be more appropriately heard in Denmark. Subsequently, the trial court denied Friis's motion to vacate the dismissal order on the basis that it was procured through extrinsic fraud. Friis challenges both rulings.

We find Denmark is a suitable alternative forum and the trial court properly weighed the relevant interests. However, the trial court abused its discretion in dismissing, rather than staying, the action. Accordingly, we modify the forum non conveniens order and judgment so that they stay the action. We affirm the order and judgment as modified. We also affirm the trial court's order denying Friis's motion to vacate.

FACTUAL AND PROCEDURAL BACKGROUND

Friis is a successful Danish entrepreneur, known for co-founding Skype and Kazaa, who is a resident of the United Kingdom. Joensen is a Danish recording artist who is a resident of Denmark. Friis and Joensen met and began dating in 2011. At the time, Joensen resided in Denmark and Friis resided in London. By February 2013, Friis and Joensen agreed to be married.

In June 2013, Joensen relocated to Los Angeles to record an album. Two months later, while on a flight from London to Denmark, Friis gave Joensen an engagement ring valued at approximately $500,000. Over the next year and a half, Friis allegedly made additional gifts to Joensen worth more than $1 million.

According to Friis, after the engagement and while Joensen was living in California, Joensen engaged in multiple affairs. Friis and Joensen mutually ended their engagement in December 2014. Joensen refused to return the gifts, including the engagement ring.

In August 2015, Friis filed an action against Joensen in Los Angeles Superior Court for return of personal property and cash, pursuant to Civil Code section 1590.[1] In relief, Friis sought return of the engagement ring and all other property given by him to Joensen in contemplation of their marriage.[2]

Forum Non Conveniens Motion

On January 19, 2016, Joensen filed a motion to dismiss or stay based on forum non conveniens, asserting the action should be tried in Denmark rather than California. In support of her motion, Joensen submitted evidence that she resided in California only temporarily from June 2013 through December 2014, during which time Friis visited her twice. In August 2015, she relocated permanently to Denmark, where she has resided since. According to Joensen, the engagement ring is currently in Denmark, and she could not recall ever having taken it to

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[1] Civil Code section 1590 provides, "Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just."

[2] Friis originally asserted a second claim for declaratory relief related to an apartment in Denmark. He subsequently dismissed that claim.

California. Joensen further asserted that, in addition to herself and Friis, the people with the most information regarding their relationship and breakup—her parents, her closest friends, and her personal assistant—reside in Denmark.

Joensen argued that, if the action is tried in Denmark, the parties could obtain discovery from California-based witnesses pursuant to title 28 United States Code section 1782 (28 U.S.C. § 1782).[3] In contrast, to obtain discovery from Danish witnesses for use in a California action would necessitate the involvement of the U.S. Department of State and Danish Ministry of Justice, or the issuance of letters rogatory.[4] In addition, Joensen submitted evidence that Danish courts will not assist a foreign party obtain pre-trial discovery, including the taking of depositions, although they may provide assistance obtaining

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[3] 28 U.S.C. § 1782 provides, "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court." (28 U.S.C. § 1782(a).)

[4] "A letter rogatory is a judicial request addressed to a foreign court that a witness be examined within the latter's territorial jurisdiction by written interrogatories or, if the foreign court permits, by oral interrogatories." (*Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 Cal.App.3d 503, 506–507.) Friis described the letters rogatory process as "so cumbersome as to make it no remedy at all."

documentary evidence and witness statements for use at trial if requested by the foreign court.

Joensen also submitted an expert declaration from her Danish attorney, Bjarke Vejby, in which he stated, "To the extent that Joensen would be able to assert statute of limitations defenses to Friis's counterclaims, Joensen has directed me to waive such defenses for a reasonable time as may be established by this Court if this Court requires such waiver as a condition of dismissing or staying the present action."

In opposition, Friis submitted evidence that Joensen's connections to California were more significant than she represented, including that Joensen kept the engagement ring in California while she lived there, Joensen did not relocate to Denmark until September 2015, and Joensen was a party in another pending action filed in California. Friis also submitted evidence that he spent 53 days in California in 2013 and 2014, some of the gifts in question may be held in a storage locker in California, and at least 10 potential witnesses reside in California.

Like Joensen, Friis submitted an expert declaration from his Danish attorney, Peter Lambert. According to Lambert, Friis might be able to assert a contract claim under Danish law for return of the engagement gifts pursuant to the Danish doctrine of failure of basic assumptions, but it was uncertain whether a court would actually apply the doctrine to this dispute. Lambert further asserted that, although Danish courts will not enforce a California judgment, they regularly afford American court decisions "significant evidentiary weight."

On July 12, 2016, the court granted Joensen's motion and ordered the action dismissed. The court determined Denmark is

a suitable forum because, according to Friis's own expert, Danish courts recognize a cause of action for the return of gifts promised on condition of marriage. The court further noted there were no jurisdiction concerns, and Joensen "waived any right to claim statute of limitations defense in a potential action in Denmark."

The court next determined the private interest factors weigh in favor of Denmark. The court found that, although there are witnesses in California and Denmark, discovery could not be obtained from Denmark-based witnesses if the case proceeds in California. In contrast, if the case proceeds in Denmark, pre-trial discovery could be obtained from California-based witnesses pursuant to 28 U.S.C. § 1782.

With respect to the public interest factors, the court noted the infidelities allegedly occurred in California, and California generally has an interest in disputes of this kind, as evidenced by the existence of Civil Code section 1590. Nonetheless, the court found it was "difficult to see what concern" California courts and jurors would have with a relationship between two non-residents who have spent relatively little time in California. The court noted there was no reason to further burden the already over-burdened California courts with such a dispute.

The court entered judgment of dismissal on September 19, 2016. Friis filed notices of appeal on August 16 and November 9, 2016, challenging the order and judgment, respectively.[5]

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[5] An order granting a motion to dismiss based on forum non conveniens is not appealable, but an "order of dismissal . . . following an order granting a motion to dismiss the action" on forum non conveniens grounds is appealable. (Code Civ. Proc., § 904.1, subd. (a)(3).)

Motion to Vacate

On September 22, 2016, Friis filed a motion to vacate the trial court's dismissal order on the basis that it was procured through extrinsic fraud. In support, Friis submitted a series of emails exchanged in September 2016 between the parties' respective Danish counsel, in which Joensen's counsel expressed a belief that the Danish statute of limitations had expired on Friis's claims.[6] Friis maintained these emails showed Joensen never intended to waive a statute of limitations defense and her representations before the trial court to the contrary were fraudulent.[7] He further asserted that, in reliance on Joensen's

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[6] Among other things, Vejby wrote, "I ask you nevertheless to take note of the expiry of the limitation period as at [sic] March 2016," "[i]n Demark, in relation to Friis my client's ring is an exhausted subject," and, "all claims are time-barred according to Danish law."

[7] Friis identified four allegedly fraudulent statements: (1) Vejby's declaration, made in support of the motion to dismiss, that, "[t]o the extent that Joensen would be able to assert statute of limitations defenses to Friis's counterclaims, Joensen has directed me to waive such defen[s]es for a reasonable time as may be established by this Court if this Court requires such waiver as a condition of dismissing or staying the present action"; (2) a statement in Joensen's motion to dismiss that "[t]o the extent Friis's claims under Danish law are vulnerable to a statute of limitation[s] defense, Joensen is willing to waive such defenses as the Court may find just"; (3) a statement in Joensen's reply brief that she "agreed to waive any argument as to the statue of limitations for a reasonable period"; and (4) Joensen's counsel's statement at oral argument that, if there is a statute of limitations issue, "we have offered to waive it."

representations, he declined to file a timely action in Denmark and declined to argue before the trial court that Denmark is not a suitable forum.

In opposition, Joensen submitted evidence that her Danish counsel did not understand that the trial court's order had addressed the statute of limitations waiver issue. When informed that the court had addressed the issue, Vejby wrote to Lambert on September 23, 2016, stating, "[My] views concerning statutes of limitation concerning the ring if a case is filed in Denmark are not valid, per the litigation agreement in the US."

Joensen further argued the trial court's dismissal order was flawed in that it did not set a timeframe within which Friis would be required to file an action in Denmark. Joensen offered to enter into a judicially enforceable agreement that would allow Friis a "reasonable time" to file an action in Denmark, during which time Joensen would not assert a statute of limitations defense. Friis rejected the proposal.

On December 12, 2016, the trial court denied Friis's motion.[8] The court noted Joensen's representations regarding waiver of a statute of limitations defense were important to its decision dismissing the action, and the court "did not place any conditional language upon this waiver and did not find that Defendant only waived the statute of limitations defense 'for a

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[8] Around October 21, 2016, the court issued a tentative ruling denying the motion as moot because Vejby corrected his earlier statement to Lambert and Joensen agreed she had waived a statute of limitations defense. Following oral argument, the court requested additional briefing. Thereafter, it issued a second tentative ruling granting the motion on the basis that Vejby's repudiations were not credible. Following oral argument, the court took the matter under submission.

reasonable time' . . . ." Nonetheless, the court determined the issue was not ripe because Friis had yet to file an action in Denmark. The court stated, "As the facts currently stand, Defendant is not in violation of this court's order because Defendant has not actually asserted the statute of limitations defense in an action filed in Denmark."

Friis filed a notice of appeal challenging the denial of his motion to vacate. We consolidated Friis's appeals and consider them jointly.

DISCUSSION

I. Forum Non Conveniens

A. Applicable Law

The doctrine of forum non conveniens allows courts to "exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere." (*Price v. Atchison, T. & S.F. Ry. Co.* (1954) 42 Cal.2d 577, 584.) The doctrine of forum non conveniens is codified in Code of Civil Procedure section 410.30, which provides: "(a) 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." "The burden of proof is on the defendant, as the party asserting forum non conveniens." (*Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 204.)

"In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).) If the alternative

forum is suitable, the court then considers the private and public interests in retaining the action for trial in California. (*Ibid*.) If the private and public interests weigh in favor of a suitable alternative forum—and so long as the action was brought by a non-resident plaintiff—the trial court has discretion to either dismiss or stay the action on any conditions that may be just. (Code Civ. Proc., § 410.30, subd. (a); see *Laboratory Specialists Internat., Inc. v. Shimadzu Scientific Instruments, Inc.* (2017) 17 Cal.App.5th 755, 764; *c.f. Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 857 [generally, court may stay, but not dismiss, action brought by California resident].)

B. Denmark is a Suitable Alternative Forum

Friis asserts the trial court erred in finding Denmark is a suitable alternative forum. This contention lacks merit.

An alternative forum is suitable if the defendant is subject to its jurisdiction and the cause of action is not barred by the statute of limitations. (*Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 696 (*Guimei*).) To find an alternative forum suitable, courts generally may rely on a defendant's stipulation to submit to the alternative forum's jurisdiction and waive any statute of limitations defenses. (*Stangvik, supra*, 54 Cal.3d at p. 752; see *Roman v. Liberty University, Inc.* (2008) 162 Cal.App.4th 670, 683.) The availability of a suitable alternative forum is a nondiscretionary legal question that we review de novo. (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.)

Here, it was undisputed that Joensen is subject to jurisdiction in Denmark. Moreover, although the trial court did not consider whether Friis's claims might be barred by a Danish statute of limitations, it properly relied on Joensen's offer to waive such a defense. Accordingly, we find the trial court

correctly determined Denmark is a suitable alternative forum.

Friis acknowledges that courts generally may rely on a defendant's offer to waive a statute of limitations defense in finding an alternative forum is suitable. Nonetheless, he asserts Joensen's offer was insufficient because she never intended to actually waive such a defense. Friis, however, did not make this argument in opposition to Joensen's motion, and " '[a]s a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal . . . .' " (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997 (*Nellie Gail Ranch*.) Moreover, whether Joensen actually intended to waive a defense is a factual question, and we generally do not make factual determinations on appeal.[9] (See *Packer v. Sillas* (1976) 57 Cal.App.3d 206, 221 ["Where the trial court has made no [factual] findings, the reviewing court will not on such a record make independent findings of its own."].)

In addition, Friis briefly contends in his reply brief that Denmark is not a suitable forum because it is uncertain whether a Danish court would entertain an action for return of an engagement ring. Generally, we do not consider arguments raised for the first time in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Nonetheless, the argument lacks merit. It is undisputed that Friis could assert a contract claim for return of the ring under the Danish doctrine of failure of basic assumptions. Although it is uncertain whether he would be successful in that claim, an alternative forum does not become unsuitable simply because the law is less favorable or recovery is

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[9] Although Friis raised the fraud issue in connection with his motion to vacate, the trial court did not make any factual findings in resolving that motion.

more difficult. (*Guimei, supra*, 172 Cal.App.4th at p. 696.) Nor is it necessary that the alternative forum provide equivalent relief. (*Shiley Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 132 (*Shiley*).) "[S]o long as there is jurisdiction and no statute of limitations bar, a forum is suitable where an action 'can be brought,' although not necessarily won." (*Ibid*.) Such is the case here.

C. The Court Properly Weighed the Private and Public Interests

Friis contends the trial court abused its discretion in finding the relevant private and public interests weigh in favor of a Danish forum. We disagree.

"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." (*Stangvik, supra*, 54 Cal.3d at p. 751.) We review a trial court's weighing of the private and public interests for abuse of discretion, and accord its determinations substantial deference. (*Ibid*.)

The court's determination that the private interests weigh in favor of Denmark was based primarily on the relative ease of pre-trial discovery if the action is tried there. As the trial court correctly observed, if the action is tried in Denmark, American

courts may assist the parties in obtaining pre-trial discovery from California residents, pursuant to 28 U.S.C. § 1782. In contrast, the evidence indicated Danish courts will not provide similar assistance if the action is tried in California. Although we acknowledge that, contrary to the trial court's suggestion, a Danish court's refusal to provide assistance does not foreclose one's ability to obtain discovery, it certainly could make it more challenging. Consequently, it was reasonable for the trial court to determine the ease of pre-trial discovery weighs in favor of Denmark.[10]

Friis suggests the trial court nonetheless abused its discretion because it incorrectly determined the location of the relevant witnesses is a neutral factor. He insists this factor weighs in favor of California because it is home to the "vast

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[10] On appeal, Friis details "several methods by which parties to a California action may obtain discovery, including depositions, from Danish witnesses." Friis, however, did not present these methods below. Moreover, his assertions are based in large part on evidence that is not part of the record, is hearsay, and is otherwise of questionable veracity. For example, in support of his assertions, he relies on hearsay found on a U.S. Department of State webpage containing the following statement: "DISCLAIMER: THE INFORMATION IS PROVIDED FOR GENERAL INFORMATION ONLY AND MAY NOT BE TOTALLY ACCURATE IN A SPECIFIC CASE." (U.S. Dept. of State, Judicial Assistance Country Information, Denmark <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Denmark.html> [as of April 24, 2018].) We decline to consider such argument and evidence. (See *Nellie Gail Ranch, supra,* 4 Cal.App.5th at p. 997; *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 450, fn. 5.)

majority" of witnesses.[11] Joensen, however, specifically identified at least three non-party witnesses who reside in Denmark and have knowledge of her relationship and breakup with Friis. Their testimony is likely to be relevant given the action is premised on the nature of that relationship and breakup. Based on this evidence, the trial court could reasonably determine there are relevant witnesses in California and Denmark, such that the location of the witnesses is a neutral factor.

Friis suggests that, even if there are witnesses in both locations, the court should have given more weight to the location of the California-based witnesses because they will not appear voluntarily at trial, whereas the Denmark-based witnesses likely will.[12] Friis, however, fails to point to any evidence in the record supporting this assertion. Rather, it appears to be based on the assumption that, because Joensen's witnesses are primarily friends and family, they will appear voluntarily in California upon her request. Even if that were true, Friis failed to provide evidence that the California witnesses would not do the same if

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[11] Friis asserts these witnesses have "personal knowledge about the ring and other gifts made in contemplation of marriage, Joensen's use and storage of those gifts in California, Joensen's affairs with other men, and Joensen's lavish parties thrown in the Hollywood Hills home Friis rented for them, at which she may have flaunted these affairs." Although we perceive potential relevance of testimony regarding the alleged affairs and the gifts made to Joensen, it is not immediately clear how testimony regarding the use and location of the gifts or parties in a Hollywood Hills home is relevant to Friis's claims.

[12] It is undisputed that, wherever the action is tried, the foreign non-party witnesses could not be compelled to appear at trial.

the action is tried in Denmark. Based on the record before us, we perceive no abuse of discretion.

Friis further asserts the trial court erred in overlooking the fact that the ease of access to proof supports a California forum. The record, however, suggests this factor is neutral, as there appears to be relevant physical evidence in both California and Denmark. Joensen, for example, presented evidence that the engagement ring—which is the most significant piece of property in dispute—is located in Denmark. Friis, in turn, presented evidence that other, unspecified gifts may be located in a storage facility in California. Friis gave no indication of what those gifts are, nor did he suggest he would have any particular difficulty in gaining access to them if needed for trial in Denmark. On this record, we perceive the ease of access to proof to be a neutral factor.

We also find the trial court reasonably determined the public interests weigh in favor of Denmark. This is essentially a domestic dispute between two non-residents who have spent relatively little time in California. Moreover, the dispute is primarily concerned with a ring located in Denmark and is based on alleged conduct that had little, if any, negative impact on California and its residents. Like the trial court, we perceive little interest from California and potential California jurors in such a dispute.

In addition, there is a very real possibility that any judicial resources expended on this case will be for naught. If Friis were to obtain a judgment in his favor, it is likely he would need to enforce it in Denmark given Joensen and the engagement ring reside there. It is undisputed, however, that Danish courts will not enforce a California judgment (although they may afford it

evidentiary weight). As a result, there is a significant risk that a California judgment would essentially amount to an advisory opinion, and, in order to obtain any effectual relief, Friis would need to file a new action in Denmark asserting the same claims. While Friis maintains he is willing to accept this risk, he ignores the waste of California's judicial resources that would be expended in the process.

On the record before us, we find the trial court did not abuse its discretion in determining the private and public interests weigh in favor of a Danish forum.

D. The Court Abused its Discretion in Dismissing the Action

Although we find Denmark is a suitable alternative forum and the trial court properly weighed the relevant interests, we nonetheless find the trial court abused its discretion in dismissing the action. When courts rely on a defendant's stipulation to find that an alternative forum is suitable, they typically proceed to stay the action. (See, e.g., *Stangvik, supra*, 54 Cal.3d at p. 750, fn. 2; *Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1040; *Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519; see also *Shiley, supra,* 4 Cal.App.4th at p. 134 [ordering trial court to consider whether to stay, but not dismiss, action].) This is because "by staying the action rather than dismissing it, the court retains the power to verify both that the [foreign] courts accept jurisdiction of the action and that defendants abide by their stipulations. If, for any reason plaintiffs cannot bring their action in [the other forum], they may return to California and request that the court lift the stay." (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1192; see *Archibald, supra*, 15 Cal.3d at p. 857.) This, in turn, affords

the trial court "more flexibility in assessing whether the proposed alternate forum is suitable—such as through reliance on the defendants' promises of future conduct in that other forum, or on its own expectations as to how the case is likely to proceed . . . ." (*Investors Equity Life Holding Co. v. Schmidt* (2015) 233 Cal.App.4th 1363, 1382 (*Investors Equity*); see *Century Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408, 411 [a trial court has "considerably wider discretion to grant stays" than it does to dismiss an action].)

Investors Equity, supra, 233 Cal.App.4th 1363, is instructive. There, the Court of Appeal reversed an order dismissing an action based on forum non conveniens despite having earlier affirmed an order staying the action on largely the same grounds. Both orders relied on the defendants' stipulations to submit to jurisdiction in the alternative forum. The court explained the stipulations were sufficient to warrant a stay because the trial court would retain indirect power to enforce the stipulations through the threat of resuming the proceedings in California. (*Id.* at pp. 1376–1377.) The stipulations were not sufficient for a dismissal, however, because the trial court would lose this power, and the significance of the stipulations "would be seriously diminished, if not scarified completely." (*Id.* at p. 1383.) As such, the court determined it was an abuse of discretion to dismiss the action.

Here, because the trial court dismissed the action outright, Joensen's offer to waive a statute of limitations defense was effectively unenforceable. Indeed, if Joensen were to assert a statute of limitations defense in Denmark, and if the Danish court were to accept it, it is not clear that Friis would have any recourse. While Friis might respond by filing a motion to vacate

the California order and judgment on the basis of extrinsic fraud (as he did here), or by bringing some other sort of equitable action seeking the same relief, it is far from guaranteed he would be successful in doing so. As a result, if this action is dismissed, there is a significant risk that Friis would be left without any suitable forum to hear his claims. Given this risk, it was an abuse of discretion for the trial court to dismiss the action outright.

Although we could remand the case for the trial court to determine the proper remedy, doing so would cause unnecessary expense and delay. Under the circumstances of this case, it is clear there is only one proper remedy, which is to stay the proceedings. Accordingly, we modify the order and judgment to stay, rather than dismiss, the action. (See Code Civ. Proc., § 43 [courts of appeal may "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered"].) On remand, the trial court may set additional terms on the stay in a manner consistent with this opinion. (See Code Civ. Proc., § 410.30, subd. (a) [trial court may stay or dismiss an action "on any conditions that may be just"].)

II. Motion to Vacate the Dismissal Order

Friis contends the trial court erred in denying his motion to vacate on the basis that the fraud issue was not ripe. According to Friis, the issue ripened, at the latest, when the trial court entered its judgment of dismissal. We find no prejudicial error.[13]

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[13] The parties dispute whether the trial court had jurisdiction to decide the motion to vacate. Generally, "the taking of an appeal by the filing of the notice of appeal deprives the trial court of jurisdiction of the cause and vests jurisdiction with the appellate court until issuance of a remittitur by the reviewing

The crux of Friis's motion to vacate was that the order of dismissal was void because it was procured through extrinsic fraud. " 'Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been "deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." ' [Citation.] It occurs when ' "the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff." ' [Citation.] In those situations, there has not been 'a real contest in the trial or hearing of the case,' and the judgment may be set aside to open the case for a fair hearing. [Citation.]" (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.) "To be entitled to relief from a judgment on the ground of extrinsic fraud, a party must show he or she had a

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court." (*Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523.) This general rule, however, does not prevent a trial court from setting aside a void order. (*Ibid.*) Friis asserts the order of dismissal was void by virtue of the fact that it was procured through fraud, and therefore the trial court had jurisdiction to set it aside, even while an appeal was pending. Joensen insists the court lacked jurisdiction because the order was merely voidable, rather than void. We think the jurisdiction issue is largely academic given the trial court did not consider the merits of the motion to vacate. Nonetheless, for purposes of our review, we will assume the trial court had jurisdiction to vacate the order. (See *Lovato v. Santa Fe Internat. Corp.* (1984) 151 Cal.App.3d 549, 556, fn. 1 [trial court had jurisdiction to set aside default judgment procured through extrinsic fraud despite pending appeal].)

meritorious defense, which would have been raised but for the other party's wrongful conduct." (*In re David H.* (1995) 33 Cal.App.4th 368, 381; see *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290–291.) To demonstrate a meritorious defense, the moving party must show "probable eventual success on the merits." (*New York Higher Education Assistance Corp. v. Siegel* (1979) 91 Cal.App.3d 684, 689.)

In his motion to vacate, Friis argued Joensen's fraud prevented him from asserting a meritorious defense to her motion to dismiss. Specifically, he asserted that, in reliance on Joensen's fraudulent representations that she would waive a statute of limitations defense, he declined to argue that his claims would be barred by the Danish statute of limitations. He maintained that, had he put forth such an argument, the trial court would have found Denmark is not a suitable alternative forum and, in turn, denied the motion to dismiss.

Although the trial court indicated it did not consider the merits of the motion to vacate, it nonetheless implicitly rejected Friis's assertion of a meritorious defense to the motion to dismiss. The court noted that, despite the statements by her Danish counsel, "[Joensen] is not in violation of this court's order because [she] has not actually asserted the statute of limitations defense in an action filed in Denmark." From this, it is clear the court was of the opinion that, until Joensen actually asserts a statute of limitations defense, her prior offer of a waiver remains valid and binding. This offer, in turn, provides a sufficient and continuing basis for finding Denmark to be a suitable alternative forum, even if Friis were to show his claims are barred by the Danish statute of limitations. (See *Stangvik, supra*, 54 Cal.3d at p. 752.) As a result, we are confident that had the trial court

considered the merits of the motion to vacate, it would have properly denied the motion on the basis that Friis failed to show a meritorious defense. Accordingly, to the extent the trial court erred in concluding the extrinsic fraud issue was not ripe, the error was not prejudicial and does not warrant reversal. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [error is prejudicial only if " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error' "]; Cal. Const., art. VI, § 13.)

DISPOSITION

The forum non conveniens order and judgment are modified to stay the action, rather than dismiss it. The order and judgment are affirmed as modified. On remand, the trial court may set additional terms on the stay in a manner consistent with this opinion. The order denying Friis's motion to vacate is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

ROGAN, J.*

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* Judge of Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.