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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN W. JACKSON et al., Plaintiffs and Appellants, v. NORCO INDUSTRIES, Defendant and Respondent.	B237293 (Los Angeles County Super. Ct. No. TC025258)

APPEAL from an order of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Sico, White Hoelscher & Braugh, Jane M. Braugh; Esner, Chang & Boyer, Stuart B. Esner and Holly N. Boyer for Plaintiffs and Appellants.

Taylor Anderson, John M. Roche, Jorge A. Martinez and Davina A. Bloom for Defendant and Respondent.

INTRODUCTION

Plaintiffs and appellants are the husband, mother and children of decedent Willie Mae Jackson.[1] Willie died as a result of injuries she sustained in a motor vehicle accident in Texas. In this wrongful death action, plaintiffs assert strict product liability, breach of warranty and negligence causes of action against defendant and respondent Norco Industries, doing business as Adnik (Adnik), and other defendants. Adnik filed a motion to dismiss the complaint on the ground of forum non conveniens. The trial court granted the motion, finding that the action could more appropriately and justly be tried in Texas, where plaintiffs were pursuing another lawsuit arising from the same accident which caused Willie's death. The essential issue on appeal is whether the trial court abused its discretion in granting Adnik's motion to dismiss. We shall conclude that the trial court did not abuse its discretion and thus affirm the order granting the motion.

FACTUTAL AND PROCEDURAL BACKGROUND

1. *The Accident*

The accident which gives rise to this lawsuit occurred on August 3, 2010, in Houston, Texas. There were two vehicles involved: a bus owned by the Metropolitan Transit Authority of Harris County, Texas (MTA) and a 1996 Chevrolet pickup truck. The record does not indicate who owned or drove the Chevrolet. The bus was driven by a MTA employee, Gregory L. Clark. Willie was a passenger in the pickup truck. As a result of the accident, Willie sustained serious injuries, which led to her death.

2. *The Texas Petition*

On January 31, 2011, the same plaintiffs pursuing the present action filed an amended petition in the state district court in Texas (Texas action) against Clark and MTA, as well as General Motors, LLC (GM), Travel Quest, Inc., Travel Quest, "Norco

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[1] We shall refer to the decedent as "Willie" instead of her last name for the sake of clarity. Plaintiffs are Willie's husband John W. Jackson, mother Ida Mae Harris, and children Sofia Yates Davis, Robert Yates, Darrence Kyle Yates, and Kristena Louise Yates, each of whom claims to have standing pursuant to Code of Civil Procedure section 377.60.

Industries" and Adnik, each of whom allegedly designed, manufactured and marketed the pickup truck involved in the accident. The petition alleged that plaintiffs were residents of Harris County, Texas. It also alleged that Norco Industries and Adnik were California corporations.

The petition set forth a negligence cause of action against Clark and MTA, and strict product liability and negligence causes of action against the remaining defendants. The petition alleged that each of the defendants' tortious conduct was a proximate cause of Willie's injuries and death, and the damages suffered by the plaintiffs.

3. *The California Complaint*

On April 1, 2011, plaintiffs commenced the present action by filing a complaint in the superior court. The complaint set forth strict product liability, breach of warranty and negligence causes of action against "Norco Industries, Inc.," a California corporation, Adnik, "a California business entity, form unknown," and Does 1 through 100, unknown defendants sued by fictitious names. The complaint alleged that defendants designed, manufactured and sold the pickup truck involved in the August 3, 2010, accident, or its component parts.[2] It also alleged that defendants' tortious conduct was the proximate cause of the accident, Willie's injuries, and plaintiffs' damages.

4. *Adnik's Demurrer and Motion to Dismiss*

On August 19, 2011, Adnik filed a demurrer to the complaint and a motion to dismiss the complaint. Adnik based its demurrer on the grounds that there was a defect or misjoinder of parties (Code Civ. Proc., § 430.10, subd. (d)) and there was another action pending between the same parties on the same causes of action (Code Civ. Proc., § 430.10, subd. (c)). Adnik made its motion on the ground that the complaint should be dismissed under the doctrine of forum non conveniens pursuant to Code of Civil Procedure sections 410.30, subdivision (a) and 418.10, subdivision (a).

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[2] In their opening brief, appellants claim that the "seatback and restraint system" of the 1996 Chevrolet pickup truck Willie was riding in "failed," and that Norco Industries, Inc. and Adnik "designed, manufactured, sold and distributed the defective seat and restraint system" of the truck.

In support of its motion to dismiss, Adnik filed a notice of lodgment, which attached two documents. The first was a printout from Adnik's website. This document indicated Adnik's address is in Elkhart, Indiana. The second document was a printout from the website of "Norco Industries." This document indicated that the manufacturing facility of Norco Industries is in Elkhart, Indiana. In an accompanying declaration, Adnik's counsel stated that the exhibits attached to the notice of lodgment were "true and accurate" copies of printouts from the Adnik and Norco Industries websites. The record on appeal does not include any objection by plaintiffs to these documents.

In opposition of Adnik's motion to dismiss, plaintiffs' attorney Jane M. Braugh filed a declaration. Braugh attached to her declaration a copy of Norco Industries, Inc.'s statement of information filed with the California Secretary of State, which indicates that the company is a California corporation operating in Compton, California. She also acknowledged that the Texas action was "pending" and that it "arises out of the same incident or accident." Braugh further stated that it was her "understanding," based on her experience litigating similar cases, that there will be 15 witnesses or more who reside in California. These witnesses allegedly include designers, engineers and others who can testify about various aspects of the manufacture, design, marketing and selling of the allegedly defective seatback and restraint system manufactured and distributed by Norco Industries, Inc. and Adnik. Braugh did not identify any potential witnesses by name.

5. *Entry of Default Against Norco Industries, Inc.*

On August 25, 2011, plaintiffs filed a request for entry of default against Norco Industries, Inc. The request was granted.

6. *September 27, 2011, Hearing*

On September 27, 2011, the trial court held a hearing on Adnik's demurrer and motion to dismiss. The court overruled the demurrer at that time. It also indicated that it was inclined to grant the motion to dismiss, but it was concerned that the Texas district court would not assert personal jurisdiction over Norco Industries, Inc. and Adnik. The court thus granted Adnik's counsel until October 11, 2011, to file a declaration indicating

whether Adnik and Norco Industries, Inc. were waiving any and all rights to assert a personal jurisdiction defense in the Texas action.

7. *Andrew Tallman's Declaration*

On or about October 6, 2011, Adnik filed a declaration by Andrew Tallman in support of its motion to dismiss. Tallman was the president of Norco Industries, Inc. Tallman stated that Adnik was an unincorporated division of Norco Industries, Inc. and that Adnik was not a distinct corporate entity. He further stated that at his direction, both "Norco Industries" and "Norco Industries d/b/a Adnik" filed an answer in the Texas action, and that both parties submitted to personal jurisdiction in Texas.

8. *October 11, 2011, Order*

On October 11, 2011, the trial court entered an order granting Adnik's motion to dismiss the entire complaint without prejudice. Plaintiffs filed a timely notice of appeal of the order.

CONTENTIONS

Plaintiffs argue that the trial court lacked jurisdiction to dismiss their action because Norco Industries, Inc. was in default. Alternatively, plaintiffs contend that the trial court abused its discretion in granting Adnik's motion to dismiss.

DISCUSSION

"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."[3] (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).) In determining whether to grant a motion to dismiss based on forum non conveniens, the trial court must engage in a two-step process. The first step is to determine whether the proposed alternative forum is a suitable place for trial. (*Ibid.*) "If it is, the next step is to consider the private interests

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[3] "A 'transitory action' is an 'action that can be brought in any venue where the defendant can be personally served with process.' " (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1186, fn. 4 (*Hahn*).)

of the litigants and the interests of the public in retaining the action for trial in California." (*Ibid.*)

1. *The Trial Court Had Jurisdiction to Adjudicate Adnik's Motion to Dismiss*

A motion to dismiss based on forum non conveniens may be brought by a defendant (Code Civ. Proc., § 418.10, subd. (a)(2)) or a plaintiff (*In re Marriage of Taschen* (2005) 134 Cal.App.4th 681, 686-687 (*Taschen*)). There is no requirement that *all* defendants or *all* plaintiffs be parties to the motion, so long as the proposed alternative forum has jurisdiction over all of the defendants. (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 435, 438 (*American*).) In *American*, for example, the trial court had jurisdiction to adjudicate a motion to dismiss based on forum non conveniens brought by two of the five named defendants. (See *id.* at p. 435.)

Likewise, in this case, the trial court had jurisdiction to adjudicate Adnik's motion to dismiss even though Norco Industries, Inc. did not join the motion. The court did not lose jurisdiction merely because Norco Industries, Inc. was in default. Plaintiffs cite no authority to the contrary. All of the cases plaintiffs rely on simply indicate that Norco Industries, Inc. was precluded from filing a motion to dismiss. These cases are inapposite because the motion was brought by Adnik, not Norco Industries, Inc.

2. *Texas is a Suitable Forum*

Whether there is a suitable alternative forum is a question of law that we review independently. (*Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 472 (*Animal Film*).) "It is well settled under California law that the moving parties satisfy their burden on the threshold suitability issue by stipulating to submit to the jurisdiction of the alternative forum and to waive any applicable statute of limitations." (*Hahn*, *supra*, 194 Cal.App.4th at p. 1190.)

Here, at the time plaintiffs filed their motion to dismiss,[4] they were pursuing the Texas action against Adnik and Norco Industries, Inc.,[5] both of which have submitted to the court's personal jurisdiction in that case. Further, nothing in the record indicates plaintiffs' claims in the Texas action against Norco Industries, Inc. and Adnik are barred by the statute of limitations. We therefore hold that Texas is a suitable forum.

Plaintiffs argue in a supplemental brief that Texas is not a suitable forum because claims against fictitiously named "Doe" defendants may be barred by the Texas statute of limitations. This argument, however, is based on pure speculation. Although plaintiffs contend that "it is possible" some unknown third parties are responsible for "the manufacturing and distributing of the [allegedly defective] seat cushion and seat back," they produced no admissible evidence supporting this contention. We must decide whether an alternative forum is suitable based on evidence—not bald assertions. (*Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, 610.)

3. *The Trial Court Did Not Abuse Its Discretion in Balancing Private and Public Interests*

a. *Standard of Review*

We review the trial court's balancing of private and public interests for abuse of discretion. (*Animal Film, supra,* 193 Cal.App.4th at p. 473.) The trial court has not abused its discretion unless it " ' " 'exceeds the bounds of reason' " ' " (*Hahn*, *supra*, 194 Cal.App.4th at p. 1195) and fails to act " 'within the range of options available under

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[4] In a sworn declaration filed shortly before oral argument in this case, plaintiffs' counsel in the Texas action stated that the Texas action is still "pending" and that further proceedings were scheduled in January 2013.

[5] Norco Industries, Inc. was apparently sued as "Norco Industries" in the Texas action. In his declaration in support of Adnik's motion to dismiss, the president of Norco Industries, Inc. stated that his company submitted to personal jurisdiction in the Texas action. The Texas district court has the authority to enter judgment against "Norco Industries, Inc." because that is the true corporate name of Norco Industries. (See *Carlyle Real Estate Limited Partnership-X v. Leibman* (Tex.App. 1989) 782 S.W.2d 230, 233; *Kendall v. Johnson* (Tex.App. 1948) 212 S.W.2d 232, 236-237.)

governing legal criteria in light of the evidence before the tribunal.' " (*Taschen*, *supra*, 134 Cal.App.4th at p. 691.) When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*Ibid*.) "As long as there is a reasonable or even fairly debatable justification for the ruling, we will not set it aside." (*Hahn*, at p. 1195.)

b. *Private and Public Interests*

"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 and 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 alternative jurisdiction in the litigation." (*Stangvik*, *supra*, 54 Cal.3d at p. 751.) These factors must be applied flexibly, without giving undue emphasis to any one element. (*Id.* at p. 753.)

Turning to this case, plaintiffs alleged in their pleadings in the Texas action that the tortious conduct of other defendants—GM, Travel Quest, Clark, and MTA—proximately caused the very same damages they seek to recover against Adnik in this suit. Hence, a key issue in this case is whether these third-party non-litigants proximately caused plaintiffs' damages. (See *Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1716, fn. 3 [causation is an element of both negligence and strict liability causes of action].) Adnik therefore will be compelled to undertake the expensive and burdensome tasks of compelling out-of-state non-litigants to provide discovery and attend trial in Los Angeles. Additionally, plaintiffs, who undoubtedly will be called as witnesses, are Texas residents. It would be far more expeditious and cost-effective for all of the parties in this action and the Texas action if all of plaintiffs' claims arising from the August 3, 2010, accident were litigated in one case in Texas.

The trial court could also reasonably conclude that Texas has a greater interest in this litigation than California. Texas is where the accident occurred, decedent sustained her injuries, and plaintiffs reside. According to plaintiffs, Texas is also where a resident bus driver employed by a local public entity negligently caused decedent's injuries. Clearly Texas has a strong public interest in this case. While it is true that California may have an interest in regulating California corporations that produce products that caused harm to a resident of another state (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1467 (*Morris*), there is no evidence that Adnik or Norco Industries, Inc. manufactured, designed, or marketed any products in California. Further, "[s]uccessful litigation in Texas would have the same deterrent effect that a California court might afford." (*Ibid.*; accord *Stangvik*, *supra*, 54 Cal.3d at p. 759 ["We are persuaded that under the facts in the present case, the additional deterrence that would result if defendants were called to account for their allegedly wrongful conduct in a California court rather than in the courts of Scandinavia would be negligible"].)

Plaintiffs argue that Adnik did not present any evidence to support its motion to dismiss. This is simply not true. Adnik relied on, inter alia, the allegations in plaintiffs' pleadings in this action and the Texas action. Since the pleadings frame the issues in the case (*Heritage Marketing & Ins. Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 764; *Vanguard Ins. Co. v. Schabatka* (1975) 46 Cal.App.3d 887, 890), the courts may review them in determining whether private and public interests weigh in favor of granting a motion to dismiss based on forum non conveniens. (See *Hahn*, *supra*, 194 Cal.App.4th at p. 1195 [citing complaint].)

Plaintiffs argue that their choice of forum should be given great deference. Ordinarily we presume a plaintiff's choice of forum is convenient. (*Stangvik*, *supra*, 54 Cal.3d at p. 753.) We do not, however, give substantial weight to a plaintiff's choice of forum when, as in this case, the plaintiffs are not residents of California. (*Id.* at pp. 753, 755; *Hahn*, *supra*, 194 Cal.App.4th at p. 1195.) Plaintiffs' request for deference is further undermined by their decision to first file suit against Adnik and other parties in their home state of Texas.

Plaintiffs argue that we should presume California is a convenient forum for Adnik because it (or more accurately Norco Industries, Inc.) is incorporated in this state. "If a corporation is the defendant, the state of its incorporation and the place where its principal place of business is located is presumptively a convenient forum." (*Stangvik, supra*, 54 Cal.3d at p. 755.) But this presumption is not conclusive, and maybe be overcome by evidence that the alternative jurisdiction is a more convenient place for trial of the action. (*Id.* at p. 756.)

Here, the record does not clearly indicate where any witnesses associated with Adnik reside. Although plaintiffs presented evidence that Norco Industries, Inc.'s officers and directors reside in California, they presented no evidence that these individuals will be witnesses in this case. While plaintiffs' counsel speculated that unnamed Adnik designers, engineers, and other employees live in California, plaintiffs did not present any evidence to support this assertion. Similarly, Adnik presented evidence that it and Norco Industries, Inc. had facilities located in Indiana, but did not present any evidence that individuals who work at these facilities will be witnesses in this case.

On this record, a reasonable judge could have concluded that all of the private and public interests, on balance, indicate that plaintiffs' claims against Adnik and Norco Industries, Inc. may be "more appropriately and justly tried" in Texas. (*Stangvik*, *supra*, 54 Cal.3d at p. 751.) Although there is countervailing evidence and argument, we cannot say that the trial court's decision exceeded the bounds of reason or failed to respect governing legal criteria. (*Taschen*, *supra*, 134 Cal.App.4th at p. 691; accord *Hahn*, *supra*, 194 Cal.App.4th at p. 1198 ["On this record, we cannot say no reasonable judge would make the same ruling"].)

DISPOSITION

The trial court's order entered October 11, 2011, granting respondent Adnik's motion to dismiss is affirmed. Respondent is awarded costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.