

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANDRES ARTEAGA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. N12C-05-008 JRJ
)	
BELL HELICOPTER TEXTRON, INC.,)	
and BRISTOW HELICOPTERS, INC.,)	
)	
Defendants.)	

Date Submitted: October 9, 2012
Date Decided: November 30, 2012

OPINION

*Upon Consideration of Defendants' Joint Motion to Dismiss
on the Grounds of Forum Non Conveniens: **DENIED***

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JURDEN, J.

I. INTRODUCTION

In order to dismiss a complaint on the ground of *forum non conveniens*, the Court must first find that an available alternative forum exists. Here, the potential alternative forum is Mexico.¹ Based on the record before it, the Court does not find that Mexico is an available alternative forum. Consequently, the motion to dismiss is **DENIED**.

II. FACTS AND PROCEDURAL HISTORY

In October, 2010, a helicopter crashed in Las Choapas, in the State of Veracruz, Mexico, killing everyone on board: seven passengers and both pilots.² Representatives of the pilots and five of the seven passengers (together, the “Plaintiffs”) have filed wrongful death actions against Bell Helicopter Textron, Inc., and Bristow Helicopters, Inc., (together, the “Defendants”).³ Plaintiffs allege that defects in the manufacturing process of components vital to keeping the helicopter in flight caused the crash.⁴ After briefing, oral argument,⁵ and an amended complaint,⁶ Defendants filed a motion to dismiss on the grounds of *forum non conveniens*.⁷

III. DISCUSSION

Application of the doctrine of *forum non conveniens* “presupposes at least two forums in which [Defendants are] amenable to process; the doctrine furnishes criteria for choice between

¹ Officially, the United Mexican States. See <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last visited 30 Nov. 2012); <http://en.wikipedia.org/wiki/Mexico> (last visited 30 Nov. 2012).

² Opening Brief in Support of Defendant Bell Helicopter Textron, Inc.’s Motion to Dismiss the Complaint for *Forum Non Conveniens* at 3, *Arteaga v. Bell Helicopter Textron, Inc.*, N12C-05-008 JRJ (Del. Super. June 22, 2012) [hereinafter Brief].

³ *Id.* at 1-3.

⁴ Plaintiffs’ Consolidated Response and Brief in Opposition to Defendants’ Joint Motions to Dismiss on the Grounds of *Forum Non Conveniens* at 3-4, *Arteaga v. Bell Helicopter Textron, Inc.*, N12C-05-008 JRJ (Del. Super. July 23, 2012) [hereinafter Response] (internal citations omitted) (Three of the seven actions were filed on May 1, 2012. Brief at 1. The remaining four were filed on May 7, 2012. *Id.* A stipulated motion consolidated the seven actions on June 1, 2012, mostly for purposes of discovery and this motion to dismiss on the grounds of *forum non conveniens*. *Id.*).

⁵ Heard on September 10, 2012.

⁶ Filed on September 25, 2012.

⁷ Motion of Defendant Bell Helicopter Textron, Inc. to Dismiss Plaintiffs’ First Amended Complaints for *Forum Non Conveniens*, *Arteaga v. Bell Helicopter Textron, Inc.*, N12C-05-008 JRJ (Del. Super. Oct. 9, 2012).

them.”⁸ The fact that Defendants are willing to stipulate to Mexican jurisdiction because it is (supposedly) more convenient is not sufficient, nor does it change the situation.⁹ This is so because “the determination of *forum non conveniens* must be made as of the time” Plaintiffs bring their suit.¹⁰ Not only must there be “a choice of jurisdictions in which to sue,” but that choice must have been present when Plaintiffs initially filed their complaint.¹¹ The Court balances a “clear preference in favor of a plaintiffs’ choice of forum” with a defendant’s potential “overwhelming hardship and inconvenience” only in the presence of two or more forums amenable to process when a plaintiff files.¹²

According to Defendants, Mexico is not only an adequate and available alternative forum in which to litigate,¹³ it is also the most appropriate forum in which to do so.¹⁴ For this reason, Defendants offer (as a condition of dismissal) to “stipulate[e], if necessary, to a reasonable tolling of the applicable Mexican statute of limitations,” and to “execute a written agreement waiving the right to invoke any jurisdictional defenses on the basis of its domicile and

⁸ *Harry David Zutz Ins., Inc. v. H.M.S. Assocs. Ltd.*, 360 A.2d 160, 165-66 (Del. Super. 1976), citing *Life Assurance Co. of Pa v. Associated Investors Int’l Corp.*, 312 A.2d 337, 340 (Del. Ch. 1973), citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947), *partially superseded by statute* Pub. L. 87-845, § 9, 76A Stat. 699 (superseded only with respect to the change of venue of federal cases within the federal system; *Gilbert* remains good law with respect to federal claims in which the possible alternative forums are state or foreign courts. See, e.g., *Mace v. Mylan Pharm., Inc.*, 714 S.E.2d 223, 231 (W. Va. 2011) and *Cowen v. Ford Motor Co.*, 713 F.2d 100, 103 (5th Cir. 1983)); see also, *Cervantes v. Bridgestone/Firestone N., Tire Co., LLC*, 2009 WL 457918 at *1 (Del. Super. Jan. 29, 2009) and *Pena v. Cooper Tire & Rubber Co., Inc.*, 2009 WL 847414 at *1 (Del. Super. Mar. 31, 2009).

⁹ See *Pena*, 2009 WL 847414 at *3.

¹⁰ *Dietrich v. Texas Nat’l Petrol. Co.*, 193 A.2d 579, 589 (Del. Super. 1963).

¹¹ *Id.* at 588-89; see also *Hoffman v. Blaski*, 363 U.S. 335 (1960).

¹² *Smith v. Freescale Semiconductor, Inc.*, 2010 WL 5140751 at *1 (Del. Super. Dec. 13, 2010) (The continued analysis referred to requires the Court to weigh six factors: “(1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises; (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction; (5) the pendency or non-pendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.” Brief at 5, citing *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135-36 (Del. 2006) and *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964)).

¹³ Defendant Bell Helicopter Textron, Inc.’s Reply Brief in Support of Motion to Dismiss the Complaints for *Forum Non Conveniens*, *Arteaga v. Bell Helicopter Textron, Inc.*, N12C-05-008 JRJ at 1-10 (Del. Super. Aug. 3, 2012) [hereinafter Reply].

¹⁴ Brief at 1-2 and implied throughout Defendants’ briefing.

specifically agree[] to jurisdiction in a Mexican forum.”¹⁵ Whether Mexico can exercise jurisdiction over Defendants is the first (and ultimately, sole) issue before the Court.

Under Mexican law, “*competencia* refers to the power of the Court to assert jurisdiction over both the parties *and* the subject matter of the dispute before it.”¹⁶ In Mexico, “a judge is required to have jurisdiction over all parties, including the defendant, in order to hear or rule on a case. . . . Jurisdiction over a defendant is based on the defendant’s domicile. The domicile of a corporate defendant is the location where its business activities are managed.”¹⁷ Defendants assert they can waive their domicile and agree to be subject to Mexican jurisdiction when they answer the complaint or by appearing in court.¹⁸ Plaintiffs, on the other hand, argue that *competencia* is decided *before* defendants are even notified that a suit has been filed against them, making Defendants’ offer/claim procedurally impossible.¹⁹

The parties’ experts on Mexican law are diametrically opposed on this issue. Defendants’ expert, Alfonso J. Sepulveda Garcia (“Garcia”), argues that a defendant can “validly submit to the jurisdiction of the courts of Mexico” when he or she “answers the complaint and counterclaims against the plaintiff.”²⁰ Plaintiffs’ expert, Adalberto Chávez Bustos (“Bustos”) – whose expertise this Court relied upon in *Pena v. Cooper Tire & Rubber Co., Inc.*²¹ – counters,

¹⁵ *Id.* at 11.

¹⁶ *Pena v. Cooper Tire & Rubber Co., Inc.*, 2009 WL 847414 at *1 n.13 (Del. Super. Mar. 31, 2009) (internal citations omitted) (emphasis in original).

¹⁷ Response at 7, quoting Affidavit of Adalberto Chavez Bustos, at ¶8, attached as Exhibit 8.

¹⁸ Reply at 2.

¹⁹ Compendium of Exhibits cited in Plaintiffs’ Consolidated Response and Brief in Opposition to Defendants’ Joint Motions to Dismiss on the Grounds of *Forum Non Conveniens* at ¶15 of Exhibit 8, *Arteaga v. Bell Helicopter Textron, Inc.*, N12C-05-008 JRJ (Del. Super. July 23, 2012) [hereinafter Compendium for Response]; Plaintiffs’ Consolidated Sur-Reply and Brief in Opposition to Defendants’ Joint Motions to Dismiss on the Grounds of *Forum Non Conveniens* at page 2 of Exhibit 4, *Arteaga v. Bell Helicopter Textron, Inc.*, N12C-05-008 JRJ (Del. Super. Aug. 17, 2012) [hereinafter Sur-Reply].

²⁰ Brief at pages 9 and 4-5, respectively, of Declaration of Alfonso J. Sepulveda Garcia.

²¹ 2009 WL 847414.

arguing that “[t]he fact that the defendants submitted themselves to the jurisdiction of a Mexican court after the accident has no effect.”²² According to Bustos:

In Mexico, when a plaintiff submits a demand, the Court first determines if it has jurisdiction to hear the case. This decision is made without discussing the matter with the defendant. If the Court determines that it does have jurisdiction, the defendant is served with notice and the legal action initiates. If the Court does not have jurisdiction, it dismisses the case. The defendant is not allowed to submit arguments to the Court regarding whether or not the Court has jurisdiction.²³

Plaintiffs also offer the sworn affidavit of Jorge Luis Guevera Coubert (“Judge Coubert”), a Mexican judge.²⁴ Judge Coubert’s affidavit supports Bustos’ expert opinion.²⁵ Moreover, as discussed below, Judge Coubert has, essentially, already heard and dismissed this case for lack of *competencia*.²⁶

On November 15, 2011, Maria Alma Gutierrez Baeza, mother of decedent-plaintiff Jonathan Gutierrez Baeza, sued Bell Helicopter Textron, Inc., in the Fourth Civil Court of the Judicial District Sitting in Coatzacoalcas, State of Veracruz, for the wrongful death of her son arising from the same crash at issue in the present case before this Court.²⁷ There, Judge Coubert held that “this action is unquestionably of a personal nature, and thus should of necessity be heard by the judge of *defendant’s domicile*.”²⁸ And, “[i]t should not be overlooked that the domicile of Defendant . . . is in the United States of America.”²⁹ Thus, because, “the judge who should hear personal proceedings is the judge of the defendant’s domicile,” Judge Coubert held

²² Compendium for Response at ¶14 of Exhibit 8.

²³ *Id.* at ¶15.

²⁴ Sur-Reply at Exhibit 4.

²⁵ *Id.*

²⁶ *Id.* at page 1 of Exhibit 4.

²⁷ Compendium for Response at Exhibits 2 and 3.

²⁸ *Id.* at Exhibit 3 (italics added).

²⁹ *Id.*

that “it is evident that the lawsuit cannot be brought before this court, inasmuch as this is not the defendant’s domicile.”³⁰ Judge Coubert dismissed the claim for lack of *competencia*.³¹

Defendants argue that they were not given an opportunity to waive jurisdiction by answering the complaint in that case³²:

[T]he Mexican court dismissal does nothing to show that Mexico is not an available forum for Plaintiffs’ suit. This is particularly important because Bell was never (a) notified of Ms. Gutierrez’s intent to file suit in Mexico so as to allow Bell to express its consent to the satisfaction of Mexican legal standards; or (b) given the opportunity to appear in court to submit to or waive territorial jurisdiction.³³

But, according to both Bustos and Judge Coubert, Defendants *cannot* answer a complaint *until competencia* is decided.³⁴ This is so because the “court notifies the respondent” after a determination of *competencia*.³⁵ “The petitioner does not do it.”³⁶ Thus, “[o]nly after the determination that there is jurisdiction and the case is admitted can the respondent receive official notification of the complaint and obtain a copy of the complaint from court personnel.”³⁷

Defendants offer the expert opinion of Felipe Lopez-Contreras (“Justice Contreras”), a former Justice of the Mexican Supreme Court.³⁸ Justice Contreras asserts that Judge Coubert’s decision was unconstitutional.³⁹ According to Justice Contreras:

While it is true that, in practice, trial court judges in Mexico – especially in state courts – frequently dismiss complaints *sua sponte* when they see that the defendant is domiciled outside of the place of residence of the court, that practice has been subject to constitutional scrutiny and found to violate the parties’ due process rights.⁴⁰

³⁰ *Id.*

³¹ *Id.*

³² Reply at 6-7.

³³ *Id.* at 7.

³⁴ Compendium for Response at ¶15 and Sur-Reply at page 2 of Exhibit 4, respectively.

³⁵ Sur-Reply at page 2 of Exhibit 4.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Reply at Exhibit A.

³⁹ *Id.* at page 5 of Exhibit A.

⁴⁰ *Id.*

Defendants, however, argue that the cases cited in support of Justice Contreras' opinion are "non-binding decisions under Mexican law."⁴¹ They explain:

Because Mexico does not have the same common law history of *stare decisis* as the United States, in order to establish binding precedent ("*jurisprudencia obligatoria*") in Mexico, the federal Supreme Court or circuit courts must hand down five consecutive decisions upholding the same point of law. This is a basic tenet of Mexican law, and Contreras cites only two court of appeals cases.⁴²

This Court remains convinced that Mexico is not an available alternative forum. Mexican courts will almost certainly dismiss this suit because Defendants are domiciled in the United States of America. According to Delaware law, an available alternative forum must not only exist, it must exist at the time a plaintiff files a complaint.⁴³ Mexican courts decide *competencia* before defendants are even notified of the claim—before defendants have an opportunity to answer or counterclaim and before defendants have an opportunity to waive *competencia*. A defendant, then, cannot waive *competencia* by answering a complaint. Justice Contreras' opinion supports this, whether he agrees that it is proper or not. Defendants cannot argue that Mexico is an available alternative forum when they admit that, in practice, Mexican courts routinely dismiss exactly such cases as this one for lack of *competencia*. Moreover, Defendants fail to offer an example of a case in which a similarly-situated defendant successfully waived *competencia* by answering a complaint.⁴⁴ For these reasons, Defendants' Motion to Dismiss on the Grounds of *Forum Non Conveniens* is denied.

⁴¹ Sur-Reply at 5.

⁴² *Id.* at 5 (internal citations omitted).

⁴³ See *Dietrich v. Texas Nat'l Petrol. Co.*, 193 A.2d 579, 589 (Del. Super. 1963).

⁴⁴ As in *Pena*, Defendants fail to submit to the Court any comparable cases in which (1) an American court dismissed because they found that Mexico is an available alternative forum *and* (2) a Mexican court accepted. *Pena v. Cooper Tire & Rubber Co., Inc.*, 2009 WL 847414 at *2 (Del. Super. Mar. 31, 2009). The first criterion without the latter is insufficient.

CONCLUSION

Because Defendants failed to show that Mexico is an available alternative forum in which to litigate the consolidated wrongful death actions, the Motion to Dismiss on the Grounds of *Forum Non Conveniens* is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary