IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TRINITY INVESTMENT TRUST, L.L.C. and SMR HOLDINGS, L.L.C.	)	
Plaintiffs,	)	
v.	)	C.A. No. 01C-03-005 HLA
MORGAN GUARANTY TRUST COMPANY OF NEW YORK and J.P. MORGAN & COMPANY, INC.,	)	
Defendants.	)	

Date Submitted: July 24, 2001
Date Decided: September 28, 2001

MEMORANDUM OPINION

UPON DEFENDANTS' MOTION TO DISMISS

GRANTED

Brian A. Sullivan, Esq. and Duane D. Werb, Esq. of Werb & Sullivan, P.O. Box 25046, Wilmington, DE 19899. Attorneys for Plaintiffs.

Richard H. Morse, Esq. of Young, Conaway, Stargatt & Taylor, LLP, P.O. Box 391, Wilmington, DE 19899-0391. Attorney for Defendants.

On this 27th day of September 2001, upon consideration of the Motion to Dismiss on the ground of *res judicata*, *forum non conveniens*, or failure to state a claim upon which relief can be granted filed by Morgan Guaranty Trust Company of New York and J.P. Morgan & Company, Inc. ("Defendants"), the Response filed by Trinity Investment Trust, L.L.C. and SMR Holdings, L.L.C., and the oral argument heard on July 24, 2001, it appears to the Court that:

FACTS AND PROCEDURAL HISTORY

This case was first filed in the Supreme Court of New York on or about October 7, 1999, with an admittedly similar complaint to that filed here. On February 22, 2000, the New York Court before the Honorable Barry Cozier heard Defendants motion to dismiss the complaint based on *forum non conveniens* or failure to state a cause of action. In dismissing the case based on the doctrine of *forum non conveniens*, the New York Court stated that "Japan is clearly the more appropriate forum to litigate this action in which plaintiff alleges that defendants breached a commitment to provide mortgage financing that would have enabled plaintiffs to purchase an office building in Tokyo, Japan."[1]

[1] *See Trinity Investment Trust, L.L.C. v. Morgan Guaranty Trust Co. of New York,*

et al., 713 N.Y.S.2d 313 (2000).

On March 1, 2001, Plaintiffs filed this suit in the Superior Court of Delaware alleging breach of contract, fraud in the inducement, negligent misrepresentation, and tortious interference of prospective business advantage and expectancy against Defendants. This action concerns an August 20, 1998 signed agreement between Morgan Guaranty Trust and SMR Kudan Y.K. The agreement, negotiated and executed in Tokyo, Japan, was for Defendants to provide financing for Plaintiffs to purchase a building, the Hiei Kidan Kita Office Building, in Tokyo, Japan. The Commitment Letter signed on August 20, 1998, purported to commit Defendants to provide financing in the amount of $33 million to Plaintiffs for the purchase of the aforementioned property. During the next few months, a variety of events occurred in which some investors "bailed out" and others entered this venture. Allegedly on October 12, 1998, Defendants informed Plaintiffs it would not finance the transaction. This action stems from an alleged breach of the Commitment Letter by Defendants.

In lieu of an answer, Defendants filed a Motion to Dismiss, in the alternative, on the grounds of *res judicata*, *forum non conveniens*, or failure to state a claim upon which relief can be granted. On July 24, 2001, oral argument was heard by this Court on the various issues raised in the Motion to Dismiss.

DISCUSSION

Res Judicata

The doctrine of res judicata is judicially created to foresee an end to litigation and to set forth the finality of judicial decrees.[2] This doctrine binds litigants to their forum of choice, so they "may have one day in court but not two."[3] To prove *res judicata* on a motion to dismiss, the movant must establish the following elements: (1) the court making the prior adjudication of the case had proper subject matter jurisdiction over the cause of action and the parties therewith; (2) the parties to the second action must be the same parties or in privity with the parties of the first action; (3) both actions maintain the same causes of action; (4) the issues in the first action were decided adversely to the plaintiffs in the second action; and (5) the first action has reached a final judgment in favor of the defendant.[4] "Essentially, *res judicata* bars a court . . . from reconsidering conclusions of law previously adjudicated."[5] The Court will examine each of these factors in turn.

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[2] *See Maldonado v. Flynn*, Del. Ch., 417 A.2d 378, 381 (1980).

[3] *See Malone Freight Lines, Inc. v. Johnson Motor Lines, Inc.*, Del. Supr., 148 a.2d 770, 775 (1959).

[4] *See Bailey v. City of Wilmington*, Del. Supr., 766 A.2d 477 (2001); *Elder v. El Di, Inc.*, Del. Super., C.A. No. 96C-09-007, Graves, J., (April 24, 1997).

[5] *Betts v. Townsends, Inc.*, Del. Supr., 765 A.2d 531, 534 (2000) (citing *M.G.*

As to the first factor, there seems to be no dispute that the Supreme Court of New York had jurisdiction over the first action. Plaintiffs filed the action in such court alleging jurisdiction under the New York Constitution, Article 6, section 7 and under C.P.L.R. § § 301 and 302.

Secondly, the Court finds that the parties are the same parties or are in privity with the parties of the first action. "The concept of privity pertains to the relationship between a party to a suit and a person who was not a party but whose interest in the action was such that he or she will be bound by the final judgment as if he or she were a party."[6] The Court agrees with Defendants that SMR Holdings, L.L.C. is a subsidiary of Trinity Investment Trust, L.L.C. and thus bound by any decision against it.

In analyzing the third factor, the Court also agrees that the claims asserted in the first action parallel the claims asserted in this second action. Both actions arise from the same transaction, which is a contract for the sale of land in Tokyo, Japan. Indeed, in oral

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Bancorporation, Inc. v. Le Beau, Del. Supr., 737 A.2d 513, 520 (1999)).

[6] *Fox v. Christina Square Assoc., L.P.*, Del. Super., 1994 WL 146023, Alford, J. (April 5, 1994).

argument counsel for Plaintiffs agreed that this second action was similar to the first action.

As to the fourth factor, the Court is in agreement that the issue in the first action was decided adversely against the Plaintiffs or those in privity with the Plaintiffs in the second action. The Supreme Court of New York held that "Japan is clearly the more appropriate forum to litigate this action."[7] Thus, the New York Court adversely decided the *forum non conveniens* issue against the Plaintiffs.

Finally, the Court determines that a final determination on the merits was not reached in the first action in favor of the Defendants. The New York Court's decision to dismiss the first action based on *forum non conveniens* was a jurisdictional decision. The New York Court believed that New York was not a convenient forum and suggested that Japan is the more appropriate forum. However, this is not a decision on the merits of the case and thus should not be given *res judicata* effect. Thus, this Court will not dismiss this action based on *res judicata*.

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[7] *Trinity Investment Trust, L.L.C. v. Morgan Guaranty Trust Co. of New York, et al.*, 713 N.Y.S.2d 313 (2000).

Forum Non Conveniens

A motion to dismiss a complaint based on forum non conveniens is committed to the sound discretion of the trial court.[8] In applying the doctrine of *forum non conveniens*, it is well settled in Delaware that the Court should apply six (6) 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 nonpendency 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.[9] In applying these factors, the court cannot reach a conclusion solely based on the finding that "there is a better forum."[10] The trial court must find a particularized showing of overwhelming hardship on the defendant

[8] *See Williams Gas Supply Co. v. Apache Corp.*, Del. Supr., 594 A.2d 34,37 (1991).

[9] *See Ison v. E.I. DuPont de Nemours and Co., Inc.*, Del. Supr., 729 A.2d 832, 837 (1999); *General Foods Corp. v. Cryo-Maid, Inc.*, Del. Supr., 198 A.2d 681, 683 (1964), *overruled on other grounds Pepsico, Inc. v. Pepsi Cola Bottling Co.*, Del. Supr., 261 A.2d 520 (1969).

[10] *See Ison*, 729 A.2d at 835.

for the case to be dismissed.[11] "It is not enough that all of the *Cryo-Maid* factors may favor a defendant. The trial court must consider the weight of those factors in the particular case and determine whether any or all of them truly cause both inconvenience and hardship."[12] Absent a showing of inconvenience and hardship, the court should not override plaintiffs choice of forum.[13] It is said to be a rare occurrence when a case is dismissed based on forum non conveniens in Delaware.[14] For the below reasons, I

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[11] *See Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, Del. Supr., No. 526,2000, Walsh, J., (July 25, 2001); *Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196, 1199 (1997).

[12] *Ison*, 729 A.2d at 837.

[13] *See Taylor*, 689 A.2d at 1200.

[14] *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, Del. Supr., No. 526,2000, Walsh, J., (July 25, 2001).

believe that Defendants have particularized the overwhelming hardship needed to grant this motion.

The first factor tends to favor the Defendants. From the record of this case it shows that numerous witnesses are located in Japan. The transaction upon which this suit is brought was negotiated in Japan, as such many, if not all, of the relevant documents will be located there. The lawyers who negotiated the transaction are Japanese lawyers who reside there. Further, even those witnesses who do not live in Japan, do not appear to reside in Delaware, but rather in New York. In addition, as the contract was negotiated in Japan by Japanese lawyers, many documents pertaining to the drafting and the pre- and post-negotiating sessions of the contract still exist in Japan. In fact, much of the documentation was drafted in Japanese; i.e., engineering reports, appraisals of the building, and the location and conditions of the market. Thus, access to proof may present a problem if this action is maintained in Delaware.

The second factor also seems to cause a problem with being able to compel witnesses to testify in Delaware. As stated above, many of the witnesses reside in Japan or outside of Delaware. It would present a hardship to the Defendants not to be able to call relevant witnesses due to the inability to compel them to testify in Delaware. Further as Plaintiffs contend such witnesses may be deposed; however, the expense of out of state

depositions may pose as a hardship and inconvenience on the Defendants. Problems may arise with witnesses needed as rebuttal witnesses. There may be individuals who live in Japan and whom Defendants cannot compel to come to Delaware or secure their agreement to take voluntary depositions.

In an ongoing lawsuit Plaintiffs have with the owner of the Hiei Kita Kudan building, they have listed residents of Japan as witnesses: Shigeki Ikeda Ken Shibuya of Trinity Japan and Hisashi Hara, Esq. of the law firm of Nagashima & Ohno.[15] Further, potential defense witnesses include Leonard Van Drunen, Naoto Ichiki, Susumu Hiruma and Yasushi Ito, all of whom are residents of Japan.[16]

There is not a need to inspect the premises as the property was never purchased, therefore the third factor does not come into play here. As to the fourth factor, Delaware law does not apply to this dispute. Per the terms of the underlying transaction, the law of Japan governs the breach of contract issue. The parties dispute which law governs the tort issues; however, Delaware law is not among the dispute, but rather it is between whether Japan or New York law govern the tort issues. The necessity for this court to

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[15] *See* Hiroyuki Tezuka Affidavit, ¶ 12 (1999).

[16] *See* Aisaku Suzuki Affidavit, ¶ 8 (1999); Leonard Van Drunen Affidavit, ¶ 18 (1999).

apply foreign law to a cause of action is in itself not a sufficient reason to warrant dismissal of the action, but is a factor to be considered.[17] Thus, this factor weighs in favor of the Defendants as the controversy is not dependent upon the application of Delaware law.

The fifth factor does not influence this case to a great extent. There is one case pending in the Tokyo District Court between plaintiffs and the owner of the Hiei Kita Kudan building. This lawsuit allegedly concerns the same transaction as plaintiffs are being sued for certain payments as a result of their failure to purchase the building.

[17] *See Taylor*, 689 A.2d at 1200.

The sixth factor tends to favor the Defendants argument that a trial in Japan would be easier, more expeditious and less expensive. The differences in the discovery rules, which Plaintiffs contend favor a trial in Delaware, may properly be taken into account in considering this motion and favor Plaintiff.[18] The transaction was negotiated in another country, witnesses are located in either another country or another state, and documents are located in another country or another state. Further, this Court does not place much weight on Plaintiffs assertions that many documents will need to be translated into Japanese for an efficient trial there. Most of the negotiations and drafting of the documents occurred in Japanese, clearly many, if not all, of the documents have already been translated or could easily be translated.

Therefore, the totality of all the factors weighs in favor of Defendants. In addition, there would be inconvenience and hardship to the Defendants to have this matter tried in Delaware. As previously stated, the evidence as well as many witnesses are located elsewhere. Litigation in Delaware would be both costly and cumbersome to the defense; and would impose an extreme hardship on the defense by not ensuring them access to

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[18] *See Id.* at 1201.

evidence and witnesses as Delaware's compulsory process would not reach Japan. This is one of those rare cases in which the Complaint should be dismissed on grounds of forum non conveniens. The Defendants have particularized witnesses not subject to our process and evidence located in Japan that is needed. The Defendants have thus particularized overwhelming hardship. Therefore, this Court grants Defendant's motion to dismiss based on *forum non conveniens*.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED** on the grounds of *forum non conveniens*.

IT IS SO ORDERED.

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ALFORD, J.

Original: Prothonotary's Office - Civil Div.