STATE OF MICHIGAN

COURT OF APPEALS

THOMAS E. JONES and JUDITHANN JONES,

Plaintiffs-Appellants,

v

W + M AUTOMATION, INC., FRANKFORT, INC., I.S.I. MANUFACTURING, INC., IBIS MANUFACTURING COMPANY, I.S.I. ROBOTICS, INC., I.S.I. AUTOMATION PRODUCTS GROUP, INC., IBIS INVESTMENT COMPANY, W + M ENGINEERING & AUTOMATION GmbH & COMPANY, TRI-TEC CONTROLS, DETROIT PRECISION TOOL COMPANY, TELEMACANIQUE GmbH, TELEMACANIQUE, SIEMENS ENERGY AND AUTOMATION, SIEMENS AUTOMOTIVE CORPORATION, SIEMENS INDUSTRIAL AUTOMATION, SIEMENS AG, SIEMENS AUTOMOTIVE, GOULD, INC., and GENERAL ELECTRIC COMPANY,

Defendants-Appellees,

and

TRI-TEC CONTROLS, INC, HEGENSCHEIDT-MFD CORPORATION, HELLER MACHINE TOOLS, L.P., INDUSTRIAL METAL PRODUCTS CORPORATION,

Defendants.

UNPUBLISHED
March 8, 2002

No. 219813
Wayne Circuit Court
LC No. 98-824489-NO

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting the motion of certain defendants for summary disposition under MCR 2.116(C)(6), granting the motion of certain defendants for dismissal under the doctrine of forum non conveniens, and dismissing on the ground of forum non conveniens those defendants who had not yet appeared. We reverse the grant of summary disposition, and we reverse dismissal on the basis of forum non conveniens and remand for further proceedings.

I. Facts and Procedure

This products liability action arose on August 8, 1995 when plaintiff Thomas Jones' head was struck by a portion of a "gantry system," a large automated conveyance system for automotive assemblies, at the General Motors plant in Tonawanda, New York. Jones suffered catastrophic brain injuries.

Plaintiffs filed suit in New York state court in November 1996 against W+M Automation, Inc. (W+M), a Michigan corporation, and another defendant not a party to this action, alleging they had been involved in the design, manufacture, and installation of the gantry system. That suit was removed to the United States District Court for the Western District of New York on diversity grounds, and W+M filed an answer raising, among other affirmative defenses, lack of personal jurisdiction.

When discovery in the federal case revealed that additional entities were involved with the gantry system, plaintiffs filed a second suit in New York state court, on July 22, 1998, against twenty-four defendants (the same defendants later named in this action).[1] The second suit was not subject to removal and remained in New York state court because one of the new defendants, General Electric Company, was a resident of New York. However, because several defendants in the second suit were Michigan corporations, and there could be a question of personal jurisdiction,[2] plaintiffs filed the instant action in Michigan on July 31, 1998, shortly before the Michigan statute of limitations would have run on plaintiffs' claim.

In response to the Michigan filing, Defendant Heller Machine Tools, L.P. (Heller) moved for dismissal on the basis of forum non conveniens. Seven other defendants (all Michigan corporations), W+M, Frankfort, Inc., I.S.I. Manufacturing, Inc., IBIS Manufacturing Company, I.S.I. Robotics, Inc., I.S.I. Automation Products Group, Inc., and IBIS Investment Company, joined in a motion for summary disposition under MCR 2.116(C)(6),[3] contending that the pending New York action involving the same parties and claim warranted dismissal of the Michigan action.

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[1] Telemacanique and Telemacanique, Inc. were not separately identified parties on the lower court docket; consequently, the instant action names only twenty-three defendants.

[2] Several defendants in the second suit raised the affirmative defense of lack of personal jurisdiction; however, some have since withdrawn that defense. Plaintiffs apparently have stipulated to the dismissal of three defendants in this action upon agreement to jurisdiction in New York.

[3] MCR 2.116(C) provides, "The motion [for summary disposition] may be based on one or more of these grounds … (6) Another action has been initiated between the same parties involving the same claim." Defendants W+M, et al. filed two motions for summary disposition, the first coupled with a motion for a more definite statement. Some non-movant defendants concurred in the first summary disposition motion, but not in the second motion. It is unclear from the record whether the trial court dismissed those that concurred in the first motion, the second motion or either motion; however, because we reverse the order of dismissal, the distinction is moot.

At a March 24, 1999 hearing on the motions, the trial court inquired whether there was any connection with Michigan other than the fact that one or more of the corporations does business in or has its principal place of business in Michigan. Counsel for plaintiffs indicated a preliminary belief that the gantry system was designed and manufactured in Michigan and installed by some of the Michigan defendants.

Citing *Cray v General Motors Corp*, 389 Mich 382, 395; 207 NW2d 393 (1973), and the factors for deciding whether to dismiss on the basis of forum non conveniens, including "where witnesses reside, where there would be access to proof, access to witnesses, where the accident occurred, even where the defendants do business," the Court concluded that dismissal was proper. The court noted that the accident occurred in the state of New York, most, if not all the witnesses reside in New York, plaintiffs reside in New York, and most, if not all, the defendant companies conduct business in New York or provide goods and services to entities that conduct business in New York. Consequently, unlike Michigan, New York posed little problem with regard to subpoenaing necessary witnesses.

The court also concluded that dismissal was proper under MCR 2.116(C)(6), stating: "Motions of Defendant Heller Machine and I.S.I. [W+M], concurred in by the other defendants present and represented in court today are granted." Our review of the record indicates the following status of each defendant with respect to the motions granted:

Defendants before this Court	Concurred in I.S.I. 2.116(C)(6) motion	Concurred in Heller forum non conveniens motion
W+M Automation, Inc.	(Co-movant)	Yes
Frankfort, Inc.	(Co-movant)	Yes
I.S.I. Manufacturing, Inc.	(Co-movant)	Yes
IBIS Manufacturing Co.	(Co-movant)	Yes
I.S.I. Robotics, Inc.	(Co-movant)	Yes
I.S.I. Automation Products	(Co-movant)	Yes
IBIS Investment Co.	(Co-movant)	Yes
W+M Engineering & Automation GmbH & Co.	12/30/98 motion	Yes
Tri-Tec Controls [Canada]	Nonappearing defendant	
Detroit Precision Tool Co.	Nonappearing defendant	
Telemacanique GmbH	Nonappearing defendant	
Telemacanique	Nonappearing defendant	
Siemens Energy and Automation	10/20/98 motion	Yes
Siemens Automotive Corp.	10/20/98 motion	Yes
Siemens Industrial Automation	10/20/98 motion	Yes
Siemens AG [Germany]	10/20/98 motion	Yes
Siemens Automotive	10/20/98 motion	Yes
Gould, Inc., a/k/a Gould Electronics	no	Yes
General Electric Co.	no	Yes

The trial court's ruling from the bench dismissed the co-movants and the concurring defendants listed above under the MCR 2.116(C)(6) motion, and dismissed all defendants that appeared under the forum non conveniens motion. However, in a subsequent ruling following plaintiffs' objection to a proposed order, the trial court dismissed the action with regard to all defendants, including those that had not appeared:

> The motion for entry for the order of dismissal with prejudice is granted as to all of the defendants, including the ones who were not here present, who were not here on the date of the motion and at time [sic] I originally ruled because the same result would occur regardless of what happened, or regardless of who the other defendants might be who have not yet answered. The case shouldn't be here regardless of who the named individual defendants might be. Motion granted.
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> I should have said for reasons of forum non conveniens.

II. Analysis

A. MCR 2.116(C)(6) Summary Disposition Dismissal

We review de novo the trial court's grant of summary disposition. *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999). The interpretation of court rules is a question of law that is reviewed de novo. *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000).

MCR 2.116(C)(6) provides for summary disposition if "[a]nother action has been initiated between the same parties involving the same claim." Plaintiffs argue the words "another action" apply only to other actions pending in state or federal courts in Michigan. Defendants argue, and the trial court agreed, that the plain meaning of the words "another action" includes plaintiffs' pending New York lawsuits. Plaintiffs are correct.

MCR 2.116(C)(6) does not bar the filing of a second lawsuit in this state when the first action is pending in the court of another state or foreign jurisdiction. *Sovran Bank, NA v Parsons*, 159 Mich App 408, 412-413; 407 NW2d 13 (1987); *Hoover Realty v American Institute of Marketing Systems, Inc*, 24 Mich App 12, 16-17; 179 NW2d 683 (1970). The actions filed in New York do not bar the Michigan suit. We reverse the trial court's grant of summary disposition based on MCR 2.116(C)(6).

B. Forum Non Conveniens Dismissal

This Court reviews the trial court's decision to grant a motion to dismiss on the basis of forum non conveniens for an abuse of discretion. *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999). "An abuse of discretion is found only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*.

A court is required to make two inquiries when deciding the issue of forum non conveniens: (1) whether the forum is inconvenient, and (2) whether there is a more appropriate forum available. *Id*. The doctrine of forum non conveniens "presupposes that there are at least two possible choices of forum." *Id*. If there is not a more appropriate forum, the court's inquiry ends, and the court may not decline jurisdiction. *Id*. If there is a more appropriate forum, the decision to decline jurisdiction is discretionary. *Id*.; see also *Cray, supra* at 396. The court must weigh the relative advantages and disadvantages of jurisdiction and the ease of and obstacles to a fair trial in this state, considering relevant factors, in deciding whether to dismiss the action. *Id*.

In this case, the trial court considered the *Cray* factors and determined that the entire action in Michigan should be dismissed under forum non conveniens. However, the court failed to make the necessary two-part inquiry before dismissing the action, i.e., whether there was a more appropriate forum available for the claims against the individual defendants. The trial court must determine that a second forum is available before declining jurisdiction in a claim. *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 527-528; 487 NW2d 475 (1992). That omission fatally undermines the court's decision. *Id*. at 526-528; *Robey v Ford Motor Co*, 155 Mich App 643, 645; 400 NW2d 610 (1986).

A forum may be unavailable because the applicable statute of limitations for a plaintiff's action has expired. *Miller, supra* at 713-715. A forum may also be unavailable because it lacks personal jurisdiction over the defendants. *Bellin v Johns-Manville Sales Corp*, 141 Mich App 128, 132, 134; 366 NW2d 20 (1984) (affirming forum non conveniens conditioned on an agreement by defendants to submit to foreign jurisdiction).

At issue is whether the lack of personal jurisdiction in New York rendered the alternative forum unavailable.[4] The trial court merely noted that another action was pending in New York involving the same parties, but failed to consider whether particular defendants had disputed personal jurisdiction in the New York courts. Instead, the court determined that the *Cray* factors favored defendants as a group and dismissed the case with respect to all defendants, including those that had not appeared. The mere fact that other actions had been filed in New York does not satisfy the two-part inquiry for forum non conveniens because several defendants that were subject to jurisdiction in Michigan, were contesting personal jurisdiction in New York.

The trial court abused its discretion in dismissing plaintiffs' action with respect to those defendants for whom the New York fora may be unavailable, e.g., defendants asserting a lack of personal jurisdiction. It appears from the record that at the time of the trial court's decision, several defendants[5] were contesting jurisdiction in New York. However, because the trial court failed to address the "more appropriate forum available" prong of the forum non conveniens analysis, we are unable to conclusively determine the status of each defendant in this regard. We

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[4] At the hearing on the motions for dismissal, plaintiffs' counsel informed the court that the issue was one of personal jurisdiction, and if defendants in the Michigan case would stipulate to jurisdiction in New York, plaintiffs would agree to dismissal of the Michigan action.

[5] W + M, Frankfort, Inc., I.S.I. Manufacturing, Inc., IBIS Manufacturing Company, I.S.I Robotics, Inc., I.S.I. Automation Products Group, IBIS Investment Co., W + M Engineering Automation GmbH & Company, and Gould, Inc.

therefore remand for a determination whether New York is an available alternative forum with respect to each defendant seeking dismissal on the basis of forum non conveniens. If it is not an available alternative forum, dismissal is improper.

It also appears from the record that several defendants[6] did not contest personal jurisdiction in New York and were willing to stipulate to New York as a forum, thus satisfying the requirement of an available alternative forum. As noted above, while we agree that the trial court must find that an alternative forum is available to the plaintiffs before a dismissal based on forum non conveniens would be appropriate, we disagree with plaintiffs' contention that dismissal is not favored under the *Cray* factors.

1. *Cray* factors analysis

The *Cray* factors are divided into three groups: (1) private interest of the litigant; (2) matters of public interest; and (3) reasonable promptness on the part of the defendants in raising the issue of forum non conveniens dismissal. *Cray, supra* at 395-396. Not all factors were addressed by the trial court; however, given the trial court's considerations, we find no abuse of discretion in the court's decision to decline jurisdiction.

The trial court concluded that the private interest factors in this case strongly weighed in favor of dismissal. *Cray* sets forth seven factors that involve the private interests of the litigants: availability of compulsory process for witnesses, access to sources of proof, possible viewing of the place of the wrong, distance from the place of the wrong, enforceability of judgments, possible harassment of either party, and other practical problems, *Cray, supra* at 396. We agree with the trial court that the first factor greatly favors defendants where numerous witnesses from New York cannot be compelled to appear in a Michigan court, thus burdening defendants with deposing the witnesses as the basis of its defense. The second factor also more likely favors defendants because while proofs regarding the equipment's design and engineering may be in both Michigan and New York, proofs regarding the accident, the injury, and the equipment itself are more accessible in New York. The third, fourth, and sixth factors—viewing of the place of the wrong, distance from the place of the wrong, and possible harassment—clearly favor defendants. The fifth factor, enforceability of judgments, was not considered to weigh in favor of either party and is neutral. Finally, the seventh factor, "other practical problems," is also neutral; the trial court noted no factors that fit this catchall classification.

Plaintiffs argue that the private interest factors favor them primarily because at least nine defendants, including employer General Motors, have their principal place of business in Michigan, and one key witness now resides in Michigan. We are unconvinced that the weight of the factors raised by plaintiffs is sufficient to negate the trial court's analysis.

The *Cray* factors involving matters of public interest include: (1) administrative difficulties that would not arise in the foreign forum; (2) whether the court would have to apply

[6] Defendants Siemens Energy and Automation, Siemens Automotive Company, Siemens Industrial Automation, Siemens AG, Siemens Automotive, and General Electric Company may fall into this category, but as noted *supra*, n 5, we find no conclusive evidence in the record, and therefore must remand for a determination by the trial court.

foreign law; and (3) "[p]eople who are concerned by the proceeding," *Cray, supra* at 396. The trial court mentioned no public interest factors as noteworthy in this case and, on appeal, plaintiffs assert that the public interest factors are evenly balanced. Likewise, the trial court did not address the promptness factor as bearing on its decision, nor do plaintiffs.

Plaintiffs' choice of forum is also a consideration. *Cray, supra* at 396. Although plaintiffs are generally presumed to have a preference for the forum in which they file, in this case plaintiffs also expressed a preference to have all defendants before the New York courts. Plaintiffs admittedly filed in Michigan to protect against jurisdictional defenses raised in the New York action. The choice of forum consideration is therefore not significant.

Given the above considerations, the trial court could properly conclude that the forum non conveniens factors weigh in favor of defendants.

2. Dismissal of nonappearing defendants

The trial court included defendants that had not appeared in its order of dismissal on the ground of forum non conveniens. Because dismissal under forum non conveniens requires that a second forum be available, and because the availability of a second forum may require a defendant to waive otherwise applicable statutes of limitation, *Miller, supra* at 713-714, or personal jurisdiction defenses, we conclude that the trial court abused its discretion in dismissing the nonappearing defendants.

Even if the court could conclusively determine the availability of another forum with regard to these defendants, the *Cray* factors cannot properly be weighed in this instance. If neither the availability of the second forum nor the relative balance between plaintiff and defendant of the *Cray* factors can be determined, dismissal under forum non conveniens is improper. Therefore, the trial court abused its discretion in dismissing the case with respect to the nonappearing defendants, and we reverse.

C. Discovery on forum non conveniens issues

Plaintiffs' argument that the trial court should have permitted discovery on forum non conveniens issues, with respect to jurisdiction in New York, before it ruled on the motion is moot because we agree, as concluded above, that the court was required to determine that plaintiffs had an available alternative forum before dismissing on the basis of forum non conveniens. *Manfredi, supra* at 526-527.

III. Conclusion

We reverse the trial court's grant of summary disposition pursuant to MCR 2.116(C)(6).

We reverse the trial court's dismissal on the basis of forum non conveniens with respect to the nonappearing defendants. We also reverse dismissal under forum non conveniens with respect to the remaining defendants and remand for further proceedings consistent with this opinion. The trial court must conduct the required two-part inquiry set forth above to determine

whether dismissal on the basis of forum non conveniens is proper for each defendant seeking dismissal.[7]

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

[7] A "partial forum non conveniens" disposition is in accord with this Court's directive in *Miller*, *supra* at 714-15 n 1, that the trial court may consider a conditional grant of dismissal under forum non conveniens for individual defendants that waive defenses in a suit filed outside Michigan.