

STATE OF MICHIGAN
COURT OF APPEALS

BRP ACQUISITION GROUP, INC., d/b/a
BLACK RIVER PLASTICS, BLACK RIVER
COMPANIES RO, S.R.L., BLACK RIVER
CHIMPLAST, S.R.L., PETER H. MYTNYK and
MARIA FAYE CABALLERO,

UNPUBLISHED
March 27, 2012

Plaintiffs-Appellants,

v

DAN LEUCIUC, VOICHITA I. LEUCIUC,
SERGIU NICOARA and ALSECA, L.L.C.,

No. 301734
Macomb Circuit Court
LC No. 2010-002004-CK

Defendants-Appellees.

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

The individual parties in this business tort case are Michigan residents. For several years, they worked together as professional colleagues at Black River Plastics, a Michigan enterprise. Black River Plastics unsuccessfully attempted to establish a business presence in Romania. Plaintiffs claim that defendants deliberately thwarted that effort and, in so doing, tortiously interfered with plaintiffs' European business relationships and breached duties of loyalty. Defendants sought dismissal of the case on the ground of forum non conveniens.

The circuit court determined that this case should be adjudicated in Romania rather than in Michigan. In reaching this result, the circuit court fundamentally misconstrued the nature of plaintiffs' claims, neglected to accord any deference to plaintiffs' forum choice, and failed to hold defendants to their burden of proof. Due to these errors, the circuit court improperly balanced the public and private interest factors central to a forum non conveniens analysis, and thereby abused its discretion. We reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiff BRP Acquisition Group, Inc. (BRP), d/b/a Black River Plastics, is a Michigan corporation that manufactures plastic parts and sells them to the automotive industry. Plaintiffs Peter H. Mytnyk and Maria Faye Caballero own BRP. Both are United States citizens and Michigan residents. Between 2001 and 2003, BRP hired defendants Dan Leuciuc, Voichita Leuciuc, and Sergiu Nicoara. Nicoara and the Leuciucs are natives of Romania, but now possess

United States citizenship and reside in Michigan. Defendant Alseca, L.L.C., is a Michigan limited liability corporation owned by Dan Leuciuc.

Mytnyk and Caballero desired to expand the market for BRP's plastic products. In 2005, they formed plaintiff Black River Companies RO, S.R.L. (Black River). Although Black River is a Romanian corporation, it is wholly-owned by Michigan residents. Mytnyk and Caballero hold the majority (60%) of its stock; the individual defendants own the balance. After forming Black River, Mytnyk and Caballero learned that General Motors, one of BRP's primary Michigan customers, intended to establish a "supply base" in Romania. BRP hoped to sell plastic parts to General Motors' Romanian facility. To further this plan, Black River entered into a joint venture with S.C. Chimica S.A. (Chimica), a publicly traded Romanian company, by forming plaintiff Chimplast S.R.L., a Romanian corporation. Chimplast, like BRP and Black River, manufactures plastic parts and sells them to the automotive industry.

Initially, Black River owned 65% of Chimplast, Chimica owned 25%, and four Romanian citizens owned the remaining shares. A written agreement, "Statutes of Black River Chimplast S.R.L." (the equivalent of the company's articles of incorporation), provides in relevant part: "This agreement and the relationship between the parties shall be governed, construed and enforced in accordance with, the laws of the State of Michigan, despite the references made herein to Romanian law." The "Statutes" designated Mytnyk and Dan Leuciuc as two of Chimplast's three directors. The third director was Iancu Filisan, a Romanian citizen.

In December 2008, General Motors removed its parts from BRP's Michigan facilities, hurling BRP into an economic crisis. BRP urgently sought revenue from its Romanian counterparts. Plaintiffs claim that instead of enthusiastically cultivating new business opportunities for BRP and Black River, defendants and several Romanian confederates conspired to steal BRP's business. According to the first amended complaint, Dan Leuciuc refused to search for "quoting opportunities" available to BRP, and instead spent "an inordinate amount of time on a company owned cell phone almost daily speaking to colleagues in Romania." Plaintiffs further allege that Dan Leuciuc created Alseca to directly compete with BRP in Michigan.

Dan Leuciuc resigned from BRP in April 2009, and Nicoara was fired a few months later.¹ Plaintiffs contend that defendants set their sights on acquiring control of Chimplast. The first amended complaint describes that in August and September 2009, Dan Leuciuc and Alexandru Oltean, Black River's on-site general manager in Romania, arranged a shareholders' meeting at which Oltean contributed cash to the enterprise and thereby became a majority shareholder. Oltean immediately sold half his interest to Dan Leuciuc. The two new Chimplast owners promptly relieved Mytnyk of his position as a Chimplast director.

Five Romanian lawsuits followed this corporate coup. Defendants claim that Mytnyk, Caballero and Chimica brought two of the legal actions; plaintiffs assert that Chimica filed two of the suits without plaintiffs' consent. The first action was dismissed for failure to pay the

¹ Voichita Leuciuc had resigned from BRP in 2008.

equivalent of a filing fee. The second, in the nature of a preliminary injunction, failed for want of proof. We have been provided little information concerning the three remaining cases. According to defendants, Chimplast's reorganization survived all legal challenges, and plaintiffs have not contested this assertion.

In May 2010, plaintiffs commenced this action in the Macomb Circuit Court. Plaintiffs' first amended complaint spans 22 pages and sets forth four counts. The first, entitled "Conspiracy," describes in detail the acts allegedly taken by Leuciuc and Oltean to wrest control of the Romanian plastics business from Mytnyk, Caballero and BRP. Plaintiffs aver that "Renegade Management" made false entries in the books and records of Black River and Chimplast, fraudulently engineered the change in Chimplast's capital structure, formed a separate Romanian company called "Black River Technologies" to siphon money and business from Black River and Chimplast, excluded "US Management" from bank accounts and corporate information, publicly disparaged "US Management," and misappropriated engineering software belonging to BRP or Black River.²

The first amended complaint's second count avers that Dan Leuciuc and Nicoara breached their employment contracts with BRP by working against the Michigan company's best interests, and by "scheming and plotting to defraud the company and its shareholders of the Romanian business[.]" The third count seeks the imposition of a constructive trust on Michigan real property owned by Dan and Voichita Leuciuc, and the fourth count describes that Dan Leuciuc breached his duties of loyalty to BRP, Black River and Chimplast by forming Alseca.

Defendants filed a motion to dismiss plaintiffs' claims based on the doctrine of forum non conveniens. After a hearing, the circuit court issued a written opinion granting defendants' motion, finding Romania a more convenient forum. The circuit court opined, "This action primarily involves the propriety of actions taken by defendants with respect to plaintiffs [Black River] and Chimplast (both Romanian companies) in Romania." Based on that finding, the circuit court dismissed the action in favor of a Romanian forum.

II. ANALYSIS

"This Court reviews a trial court's decision to grant or deny a motion to dismiss a case on the basis of the doctrine of forum non conveniens for an abuse of discretion. An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). In exercising this discretion, the circuit court should consider the public and private interest factors adopted by our Supreme Court in *Cray v Gen Motors Corp*, 389 Mich 382, 396; 207 NW2d 393 (1973). A court abuses its discretion if it bases its ruling on a clearly erroneous assessment of the evidence. *Cooter & Gell v Hartmarx Corp*, 496 US 384, 405; 110 S Ct 2447; 110 L Ed 2d 359 (1990).

² According to the first amended complaint, Voichita Leuciuc and Nicoara were "part and parcel" of the conspiracy.

Although the circuit court's opinion reflects that it considered and applied the *Cray* factors, we conclude for three reasons that the circuit court nevertheless abused its discretion. First, the circuit court fundamentally misapprehended the nature of this lawsuit. Contrary to the circuit court's characterization, this case does not center on the propriety of Chimplast's reorganization. Rather, plaintiffs' first amended complaint avers that the individual defendants, three Michigan residents, breached fiduciary duties owed to BRP and Black River, companies owned and operated by Michigan residents. The circuit court's erroneous conclusion that this case primarily concerns "Romanian companies, residents and citizens" tainted the court's analysis of the *Cray* factors.

Second, in weighing and balancing *Cray*'s private interest factors, the circuit court failed to afford any deference to the forum choice made by the Michigan-based plaintiffs. Third, in analyzing the *Cray* factors, the circuit court failed to place on defendants the burden of persuasion.

A. The Nature of This Case

Plaintiffs' first amended complaint is not artfully drafted. Indeed, it can be fairly characterized as rambling and disorganized. But despite that the complaint references many events that occurred in Romania, plaintiffs grounded their causes of action on defendants' alleged breaches of fiduciary duties owed to BRP and Black River.³

The first substantive paragraph of Count I avers that Dan Leuciuc "as an employee of BRP and Oltean as an employee of BLACK RIVER RO owed a general duty of loyalty to their employers during the employment relationships and not to take actions which would be contrary to the interests of their employers." Throughout the balance of Count I, the first amended complaint recites the manners in which Dan Leuciuc allegedly breached his duty of loyalty to BRP and Black River. Count II, entitled "Breach of Employment Contract By BRP Against [Dan Leuciuc] and Nicoara," avers:

[D]uring those times that [Dan Leuciuc] and NICOARA were employees of BRP and supposedly working on behalf of the best interest of the company soliciting and quoting new business as well as overseeing the Romanian operations or interacting legitimately with their Romanian colleagues and getting paid for such work, they were in fact scheming and plotting to defraud the company and its shareholders of the Romanian business and enriched themselves during that period as a result of the compensation and other benefits paid to them which they did not earn or are entitled to retain.

Count IV, brought against Alseca, asserts that Dan Leuciuc breached his "duty of loyalty and fidelity to BRP" by forming a company that would directly compete for the same business.

³ We acknowledge that Black River is a Romanian corporation. However, all of its shareholders reside in the State of Michigan.

In applying the *Cray* factors, the circuit court made no mention of plaintiffs' breach of fiduciary duty allegations, and instead cast the case as a legal battle over Chimplast's ownership and control. Fairly interpreted, plaintiffs' first amended complaint asserts that defendants improperly divested plaintiffs of their interest in Chimplast, but none of the allegations suggest a need to relitigate Chimplast's ownership, an issue apparently now resolved by the Romanian courts. Rather, plaintiffs contend that defendants' successful reorganization of Chimplast breached their duties of loyalty to plaintiffs. Although defendants' alleged conspiratorial acts impacted Romanian businesses, the central issues in the case revolve around whether defendants violated Michigan law by conspiring against and competing with the interests of their Michigan employer and their Michigan employer's wholly-owned Romanian satellite. By misinterpreting the legal issues presented in the complaint, the circuit court focused solely on Romanian events and failed to consider Michigan's interest in this litigation.⁴

B. Plaintiffs' Forum Choice and Defendants' Burden

A central tenet of the forum non conveniens doctrine holds that a plaintiff's forum is ordinarily accorded deference. *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 628-629; 309 NW2d 539 (1981). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp v Gilbert*, 330 US 501, 508; 67 S Ct 839; 91 L Ed 1055 (1947). However, a foreign plaintiff's forum choice is entitled to less deference than would apply to a domestic plaintiff's selected forum. *Radeljak*, 475 Mich 612-614.

This case presents a hybrid situation. Plaintiffs BRP, Mytnyk and Caballero are Michigan residents. Plaintiffs Black River and Chimplast are Romanian corporations, although Black River is owned by Michigan residents. Thus, for all intents and purposes, plaintiffs other than Chimplast are firmly rooted in Michigan. Our analysis of Chimplast's importance to this case is complicated by defendants' argument that Chimplast is not a proper party because it never authorized a Michigan lawsuit on its behalf. Plaintiffs have not responded to this contention. While we acknowledge the presence of one foreign plaintiff, Michigan is home to the rest. Regardless whether Chimplast remains a party, the remaining plaintiffs have strong ties to Michigan, and have elected to file suit in their home forum.

In ascertaining the degree of deference due to plaintiffs' forum choice, we look to federal precedent. Michigan's forum non conveniens jurisprudence closely tracks the United States Supreme Court's decisions on the subject. In *Cray*, the Supreme Court adopted the forum non conveniens doctrine as described in *Gulf Oil*, 330 US at 508-509. In *Radeljak*, 475 Mich at 613, our Supreme Court followed the Supreme Court's holding in *Piper Aircraft Co v Reyno*, 454 US

⁴ We take this opportunity to remind the parties that plaintiffs' "conspiracy" claim, standing alone, cannot support a damage claim. "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable, tort." *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 631; 403 NW2d 830 (1986). The torts susceptible of identification in plaintiffs' first amended complaint include breach of fiduciary duty and tortious interference with a business relationship or expectancy.

235, 259; 102 S Ct 252; 70 L Ed 2d 419 (1981), that a foreign plaintiff's forum choice merits less deference. In *Piper*, the Supreme Court reaffirmed *Koster v Lumbermens Mut Cas Co*, 330 US 518, 524; 67 S Ct 828; 91 L Ed 1067 (1947), stating that where there are only two parties to a dispute, a plaintiff should not be deprived of the advantages of his "home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." And in *Radeljak*, 475 Mich at 613, our Supreme Court specifically recognized "the presumption in favor of a domestic plaintiff's forum choice." Thus, when reviewing a motion to dismiss on the ground of forum non conveniens, a court should begin its analysis by assuming that a Michigan plaintiff's selection of a Michigan forum likely will stand unless evaluation of the *Cray* factors demonstrates that trial in this state would unnecessarily burden the defense or the court.

In this case, the circuit court's 10-page opinion makes no mention of the deference due the forum choice made by the Michigan plaintiffs, nor does it incorporate this presumption in weighing and balancing the *Cray* factors. The circuit court erroneously assigned no weight to plaintiffs' forum choice, and concomitantly omitted consideration of the relative advantages of a Michigan forum.

Furthermore, the circuit court failed to recognize that defendants bore the burden of demonstrating that the *Cray* factors favor litigating this claim in Romania. "Federal courts are unanimous in concluding that the defendant bears the burden of persuasion on all elements of the forum non conveniens analysis." 14D Wright, Miller & Cooper, Federal Practice & Procedure, § 3828.2, p 646. In reviewing the *Cray* factors, it was incumbent on the circuit court to look to defendants for evidence of inconvenience. Where gaps in the record created uncertainty, the circuit court presumed Michigan to be inconvenient rather than holding defendants to their burden. By failing to acknowledge either the deference owed to plaintiffs' forum choice or defendants' heavy burden of persuasion, the circuit court abused its discretion.

C. Application of the *Cray* Factors

The circuit court determined that plaintiffs could have filed this action in Romania, noting that "Chimica previously filed at least two lawsuits in Romania that also named plaintiffs Mytnyk and Caballero – apparently without informing them – as parties." We observe that if accurate, this statement does not reassure us that the courts of Romania offer an adequate alternate forum. But because the parties did not submit evidence concerning this issue in the circuit court, we assume without deciding that plaintiffs could obtain a fair trial in Romania.

After identifying Romania as an adequate alternate forum, the circuit court proceeded to analyze the case under each of the *Cray* factors. In *Cray*, 389 Mich at 395-396, the Supreme Court enumerated the following factors that a trial court should "balance[e] out and weigh[]" in deciding a forum non conveniens motion:

1. The private interest of the litigant.
 - a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
 - b. Ease of access to sources of proof;
 - c. Distance from the situs of the accident or incident which gave rise to the litigation;
 - d. Enforcibility [sic] of any judgment obtained;
 - e. Possible harassment of either party;
 - f. Other practical problems which contribute to the ease, expense and expedition of the trial;
 - g. Possibility of viewing the premises.
2. Matters of public interest.
 - a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
 - b. Consideration of the state law which must govern the case;
 - c. People who are concerned by the proceeding.
3. Reasonable promptness in raising the plea of forum non conveniens.

The circuit court determined that subfactors 1(a), 1(b), 1(e), 1(f), 2(a) and 2(b) favored a Romanian forum. It characterized the remaining subfactors as neutral, finding none that favored trial in Michigan. We confine our analysis to the subfactors judged by the circuit court to support a Romanian forum.

Subfactor 1(a) addresses the “[a]vailability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses.” The circuit court commenced its analysis of this subfactor by observing that defendants “have identified various *other* citizens of Romania as alleged participants” (emphasis added) in Chimplast’s restructuring and the alleged changing of plaintiffs’ access to Romanian bank accounts.⁵ The circuit court noted that defendants stipulated to the jurisdiction of Romanian courts and that “the record is

⁵ The circuit court’s use of the word “other” in this sentence suggests that the circuit court may have lacked awareness that defendants are all United States citizens and Michigan residents. We note that in its opinion, the circuit court failed to acknowledge this critical fact, and instead referred to defendants as “Romanian nationals.”

devoid of any suggestion that these other participants/witnesses have or will stipulate to the jurisdiction of the Court.” While plaintiffs’ complaint indisputably identifies persons in Romania who may supply relevant evidence, the circuit court clearly disregarded that the witnesses possessing the most pertinent information to plaintiffs’ business tort claims are plaintiffs and defendants, Michigan residents. Obviously, if this case were to be tried in Romania, all of the parties would have to travel there to testify. The circuit court entirely ignored that dismissal in favor of Romania would significantly inconvenience plaintiffs.

Obtaining the attendance of necessary Romanian witnesses may be difficult and costly. But based on the record before us, we are unable to conclude that the number of important and unwilling Romanian witnesses tilts the balance in favor of a Romanian forum. In focusing its concern on “other participants/witnesses” who may be unwilling to testify in Michigan, the circuit court lost sight of the burden allocated to defendants to demonstrate that “other witnesses” possess relevant information and would be unwilling to travel to Michigan for trial. No record evidence substantiates that the foreign witnesses named by defendants qualify as “unwilling” to testify, or possess information relevant to plaintiffs’ business tort claims. Simply put, the circuit court failed to hold defendants to their burden of demonstrating that the inconvenience to these witnesses qualifies as disproportionately oppressive or vexatious. Rather than favoring a Romanian forum, as the circuit court decided, subfactor 1(a) favors trial in Michigan.

Similarly, in evaluating subfactor 1(b), the “ease of access to sources of proof,” the circuit court again employed a flawed analysis of the *Cray* factors by misconstruing plaintiffs’ claims. The circuit court stated, “The limited record suggests defendants, alleged exploits have had their principal impacts in Romania. Thus, the greater number of documents and proofs regarding this action are likely located in Romania.” To the contrary, this case concerns torts allegedly committed by Michigan residents, largely in Michigan, that purportedly harmed other Michigan residents or their corporate interests. Moreover, defendants have not identified any documents placed out of reach by a Michigan forum. “Certainly, when the plaintiff has a significant interest in the chosen forum, the defendant should outline the intended course of litigation in order for the balance to be struck in favor of another forum.” *Anderson*, 411 Mich at 630. The documents thus far produced by the parties are in English. Michigan law governs Chimplast’s management. It appears that the parties have ready access to an extensive bank of documentary evidence in Romania. Because defendants failed to demonstrate the manner in which a Michigan forum would impair their ability acquire proof necessary to defend against plaintiffs’ allegations, the circuit court clearly abused its discretion by finding that this factor favors trial in Romania.

Nor is there any reason to conclude, as did the circuit court, that plaintiffs’ forum choice “manifests harassment” under subfactor 1(e). Defendants are Michigan residents. They are being sued in their home state. We have located no authority for the rather shocking proposition that suing a defendant in his home forum concerning events that occurred in that forum constitutes “harassment.” The circuit court clearly abused its discretion in weighing this factor in defendants’ favor.

Under subfactor 1(f), the circuit court found that defendants’ inability to implead “other Romanian members of the renegade management conspiracy” supported a Romanian forum. While Romanian citizens may have participated in the “renegade management conspiracy,”

defendants maintain the ability to name these other potential tortfeasors as nonparties at fault. MCL 600.2957. Moreover, defendants have failed to propose any theory logically supporting the need to implead the Romanian members of the alleged conspiracy. Given the absence of any meaningful explanation for impleader, this factor should have been weighed either in favor of a Michigan forum, or as neutral.

The circuit court determined that public interest factors subfactors 2(a) and (b) favored a Romanian forum, based on its erroneous conclusions that this case has only “tenuous ties to Michigan” and would likely be governed by Romanian law. Michigan has an identifiable interest in protecting its citizens and businesses from unlawful conduct. Michigan also possesses a strong interest in providing a forum for its citizens and corporations. Accordingly, the circuit court abused its discretion by weighing the public interest factors in Romania’s favor.

In summary, we conclude that plaintiffs have stated a claim that bears a direct and meaningful connection to Michigan. Because plaintiffs are primarily Michigan residents and Michigan-owned corporations, their forum choice mandated deference. To prevail, defendants were required to make a clear showing that the *Cray* factors weighed heavily in their favor. This they failed to do.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher