| **Do He Kim v Cho** |
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| 2015 NY Slip Op 32487(U) |
| December 16, 2015 |
| Supreme Court, Queens County |
| Docket Number: 702206/2015 |
| Judge: Robert L. Nahman |
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. ROBERT L. NAHMAN** IAS PART 19
Justice

DO HE KIM,

Plaintiff,

- against -

HEATHER HYUN-AH CHO and KOREAN AIR LINES CO., LTD,

Defendant.

Index No.: 702206-2015

Motion Date: November 23, 2015

Motion Seq. Number: 1

Motion Cal. Number: 7



Upon the following papers e-file numbered 10 through 39 read on this motion by defendants to dismiss the plaintiff's complaint with prejudice pursuant to the forum selection clause in the employment agreement and pursuant to the doctrine of forum non conveniens:

| | Papers E-File Numbered: |
|---|---|
| Notice of Motion/Affirm-Exhibits/Memorandum..... | 10 - 22 |
| Affirmation in Opposition/Exhibits/Memorandum..... | 25 - 38 |
| Reply Memorandum..... | 39 |

**IT IS ORDERED** that the branch of defendants motion to dismiss the plaintiff's complaint with prejudice pursuant to the forum selection clause in the employment agreement is denied; and it is further

**ORDERED** that the branch of defendants motion to dismiss the plaintiff's complaint with prejudice pursuant to the doctrine of forum non conveniens is granted.

This is an action brought to recover for assault, battery, intentional and negligent infliction of emotional distress resulting from an incident on defendant Korean Air Line's Flight KE086, while the plane was on the tarmac at JFK International Airport in Queens, New York. Plaintiff, a flight attendant for defendant Korean Air Line claims that defendant Heather Hyun-Cho, the vice president of cabin services for defendant Korean Air Lines physically assaulted her by, *inter alia*, hitting her with a ten page galley

information sheet and shoving her, as well as verbally assaulting her.

Plaintiff contends that the alleged assault and battery began when the plaintiff served the defendant Heather Hyun-Cho macadamia nuts and the defendant Heather Hyun-Cho did not like the manner in which the plaintiff had offered the nuts. Plaintiff alleges that defendant Heather Hyun-Cho believed that the service of the nuts did not comply with the defendant Korean Air Lines' first class service manual's instructions.

Plaintiff alleges in her complaint that at all times during the acts described in the complaint, defendant Heather Hyun-Cho was a senior executive of defendant Korean Air Lines, acting within the scope of her employment and that the plaintiff was specifically assigned to serve the first class cabin and, in particular, to serve the defendant Heather Hyun-Cho. Plaintiff further alleges in the complaint that she was required to attend two special training sessions which focused largely on the defendant Heather Hyun-Cho's personal preferences.

Plaintiff is claiming that as a result of the physical and verbal attack, and the fallout that ensued, that she suffered severe psychological harm, emotional distress, deep humiliation and that her professional reputation and career have been irreparably damaged. Indeed plaintiff in her affidavit states that due to the media attention "I became widely known as a 'national traitor', and was falsely accused of cooperation with Korean Airlines in order to cover up the incident."

As a result of this incident, a criminal proceeding was brought against defendant Heather Hyun-Cho in Seoul Korea, in which she was found guilty of, *inter alia*, assaulting a crew member and sentenced to a year in prison. The defendant Heather Hyun-Cho appealed and as a result her sentence was reduced to 10 months and suspended for two years. The Korean prosecutors have appealed that decision and are awaiting a result.

Plaintiff's employment contract with defendant Korean Air Lines, Ltd., provides that "all disputes arising between the parties in connection with the agreement" shall be subject to the exclusive jurisdiction of the Seoul Southern District Court of Korea.

Plaintiff contends that the forum selection clause in the employment contract is inapplicable because her tort claims are not premised upon, or in connection with, the employment agreement and that the forum selection clause does not apply to the claims asserted against defendant Heather Hyun-Cho, individually.

While New York courts have sometimes held that forum selection clauses encompass tort claims, the facts of this case can be distinguished from those cases.

For instance, in *Courvertier v Concourse Rehab*, 117 AD3d 772 (2nd Dept., 2014),

in an action to recover for wrongful death the court upheld the order of the court which changed the venue from the Bronx County to Westchester County based upon the forum selection clause in the admission agreement. The forum selection clause stated that "any and all actions arising out of or related to this Agreement...shall be brought in... Westchester County...." *Id.* The court rejected the plaintiff's contention that the forum selection didn't apply because it was a tort action and not a breach of contract action, *Id.*, at 73. The court found that the applicability of a forum selection clause does not depend on the nature of the underlying action, but upon the language of the forum selection clause itself, *Id.* The court held that the language "any and all actions arising out of or related to the agreement" included tort claims that were predicated on the care rendered by the defendants, and transferred the action to Westchester.

In *Forbes v AG Edwards*, 2009 US Dist. LEXIS 12894 (SDNY 2009),plaintiff sued her employer, alleging that a member of upper management assaulted and battered her during a work conference. The mandatory arbitration clauses, which were a type of forum selection clauses in her employment agreement were broad and did not limit disputes to those arising solely from the employment contract. Rather they encompassed "all matters related to or arising from the plaintiff's employment," including specifically sexual harassment claims, *Id.,* at 24. The court found that because the claims of assault and battery related to or arose from her employment, the arbitration clause applied.

In the case at bar, the undisputed translated language of the employment agreement provides "[a]ll disputes arising between the parties in connection to this agreement...." This language is not as broad as the language in the cases that have included tort claims. Accordingly, the court finds that the forum selection clause in the employment contract is inapplicable.

When the court finds that in the interest of substantial justice an action should be heard in another forum, the court may dismiss it, CPLR §327. Among the factors to be considered in determining *forum non conveniens* are the burden on the New York courts, the potential hardship to the defendant, the unavailability of an alternative forum, the residents of the parties and where the cause of action arose, *Islamic Republic v Pahlavi,* 62 NY32d 474, 479 (1984).

In *Islamic Republic v Pahlavi*, the plaintiff alleged that the Shah of Iran and his wife accepted bribes and embezzled money, breaching their fiduciary duty to the Iranian people, *Id.* The Court of Appeals upheld the dismissal of the action based upon *forum non conveniens* grounds, since the only connection New York had to the action was the depositing of the monies in New York banks, *Id.* The Court of Appeals found that even though there was no alternative forum available to obtain relief, the record did not demonstrate a substantial nexus between New York and the plaintiff's cause of action, *Id.*, at 484.

Similarly, in *Mashreqbank v Ahmed*, 23 NY3d 120 (2014) the Court of Appeals dismissed the plaintiff's action based upon *forum non conveniens*. In an action arising from a fraudulent exchange transaction involving a foreign national and several foreign entities, the parties used New York banks to facilitate money transfers, *Id.* The Court used an "interest analysis" approach and sought to effect the law of the jurisdiction having the greatest interest in resolving the particular issue, *Id.*, at 138. In considering that neither party to the lawsuit was a New York resident and that no relevant conduct apart from the execution of money transfers occurred in New York, the case was dismissed, *Id.*

Furthermore, in *Nicholson v Pfizer*, 278 AD2d 143 (1st Dept., 2000) and *Avery v Pfizer*, 68 AD3d 633 (1st Dept., 2000), the courts dismissed both plaintiff's actions upon forum non conveniens grounds where plaintiff's physicians were all located out of New York State and beyond the reach of New York's subpoena power.

In the case at bar both the plaintiff and the defendants reside in Korea, the other first class passenger who witnessed the incident is located in Korea, the other employees of Korean Air Lines reside in Korea, all of plaintiff's medical treatment occurred in Korea, the physicians who treated plaintiff reside in Korea, virtually all of the evidence is in located in Korea, the Korean authorities already acted to assert their interest in this matter by investigating the incident, criminally charging and convicting defendant Heather Hyun-Cho and Korea is an available alternative forum. Although plaintiff's counsel has stated that plaintiff's physicians would consent to the jurisdiction of New York, the fact remains that all of the Korean witnesses are all beyond New York's subpoena power. It appears that the only cause of action not available to plaintiff in Korea is plaintiff's claims for punitive damages.

Additionally, although plaintiff contends that Korea is not a viable forum since she would not receive a fair trial, based upon the criminal conviction of defendant Heather Hyun-Cho and the negative media attention that the defendants received, plaintiff's contention is conclusory and without merit.

The action is dismissed pursuant to the doctrine of *forum non conveniens*.

Dated: December 16, 2015

**Robert L. Nahman, J.S.C.**