AFFIRM; and Opinion Filed November 18, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01244-CV

TIN STAR DEVELOPMENT, LLC AND TIN STAR-IRVINE MEMBER, LLC, Appellants
V.
360-IRVINE, LLC, 360-IRVINE MEMBER, LLC, 360 RESIDENTIAL, LLC, Appellees

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-14255

MEMORANDUM OPINION

Before Justices Fillmore, Brown, and O'Neill[1]
Opinion by Justice O'Neill

Appellants Tin Star Development, LLC (Tin Star Development) and Tin Star-Irvine Member, LLC (Tin Star Member) (together, Tin Star) challenge the trial court's order dismissing a number of Tin Star's claims against appellees 360-Irvine, LLC (360 Irvine), 360-Irvine Member, LLC (360 Member), and 360 Residential, LLC (360 Residential) (together, the 360 Entities) pursuant to the doctrine of forum non conveniens. In a single issue, Tin Star argues this doctrine may only be invoked when the entire case may be tried in the alternative forum. Accordingly, Tin Star contends the court erred by making a partial dismissal of its claims against the 360 Entities. For the reasons discussed below, we affirm the trial court's order.

[1] The Hon. Michael J. O'Neill, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

Background

This dispute arose between entities jointly developing commercial property in California. Tin Star Development (a Texas limited liability company) identified the California site and contracted to buy the property. Tin Star Development then sought financing for the project and located a possible partner in 360 Residential (a Georgia limited liability company). Prior to disclosure of information about the project, those two entities signed a Confidentiality, Nonintervention and Non-Circumvention Agreement (the Non-Circumvention Agreement). The Non-Circumvention Agreement protected Tin Star Development's confidential information and provided for a three-year period during which 360 Residential would not pursue any interest in the project except through Tin Star Development. This agreement called for any action arising out of its terms to be brought in the courts of Dallas, Texas.

Eventually, these entities agreed to work together on the California project. They created an entity for that purpose, 360 Irvine (a Delaware limited liability company). Each also created an entity to hold its interest in 360 Irvine, i.e., Tin Star Member (a Nevada limited liability company) and 360 Member (a Delaware limited liability company). The Tin Star companies were managed by Larry White and Charles Barnett, Texas residents; 360 Residential and 360 Member were managed by Jeff Warshaw and Clark Butler, Georgia residents.

The member entities entered into an agreement (the Company Agreement) that would govern their shared business enterprise. The Company Agreement appointed Tin Star Member as administrator of 360 Irvine and provided a plan for initial funding and profit division. The agreement is governed by Delaware law.

Relatively quickly, disagreements arose concerning performance of the members' business obligations. Tin Star sued the 360 Entities, Warshaw, and Butler in Dallas County. The lawsuit ultimately included claims against the defendants, in various combinations, for breach of

the Company Agreement, breach of the duty of good faith and fair dealing, breach of the Non-Circumvention Agreement, fraud and fraudulent inducement, tortious interference with contract, breach of fiduciary duty, and an accounting. All five defendants—who were residents of, or headquartered in, Georgia—filed special appearances. The trial court granted the special appearances of Warshaw and Butler, but it denied the special appearances of the 360 Entities. This Court affirmed the denial of 360 Irvine's special appearances. *See 360-Irvine, LLC v. Tin Star Dev., LLC*, No. 05-14-00412-CV, 2015 WL 3958509 (Tex. App.—Dallas June 30, 2015, no pet.) (mem. op.).

During the personal-jurisdiction litigation, Tin Star filed a second lawsuit in Georgia against the 360 Entities, Warshaw, and Clark.[2] Tin Star pleaded claims against the five defendants, in various combinations, for breach of the Company Agreement, breach of the duty of good faith and fair dealing (and aiding and abetting that breach), fraud and fraudulent inducement, tortious interference with contract, breach of fiduciary duty, tortious interference with a fiduciary relationship, and an accounting. Tin Star's claims were based upon the same facts as those urged in the Texas suit.

The 360 Entities filed their Motion for Dismissal Based on the Doctrine of *Forum Non Conveniens* (the Motion), seeking dismissal of the entirety of Tin Star's action filed in the Texas court. The trial court granted the Motion in part, dismissing all claims against the 360 Entities except those growing out of the Non-Circumvention Agreement, because that agreement contained the Texas forum selection provision. The trial court then severed the dismissed claims and signed a judgment making the severed case final.

Tin Star appeals that severed case.[3]

[2] Tin Star's Georgia suit also named another individual and two entities that had been involved in financing for the project.

[3] The claims related to the Non-Circumvention Agreement are not before us.

Forum Non Conveniens

In its single appellate issue, Tin Star argues the trial court erred by granting the Motion. Specifically, Tin Star contends that—given the mandatory forum selection clause attached to its non-circumvention claims—the trial court was unable to apply the doctrine as the law requires, i.e., by dismissing only when the movant establishes inconvenience for the entire case. Tin Star argues further that the trial court failed to give appropriate deference to its choice of Texas as the forum for its suit.

Standard of Review

We will reverse a trial court's forum non conveniens determination only if the record shows a clear abuse of discretion. *See Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 31 (Tex. 2010) (per curiam). We give the trial court's decision substantial deference: we determine whether there is sufficient evidence to uphold the dismissal, but we do not mechanically re-weigh the factors considered by the trial court. *See id.* at 35. Those factors include both private interests of the litigants and public interests of the two forums. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Unless the balance of those factors "is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*; *see also Sarieddine v. Moussa*, 820 S.W.2d 837, 840 (Tex. App.—Dallas 1991, writ denied).

We address Tin Star's two arguments in turn.

Dismissal of the Entire Case

Tin Star argues the trial court's dismissal was erroneous because it did not, and could not, provide for dismissal and transfer of the entire case to Georgia. Tin Star's "entire case" argument grows out of the threshold legal requirement that there exist an adequate and available forum in which dismissed claims could be brought. *See, e.g., RSR Corp. v. Siegmund*, 309 S.W.3d 686, 710 (Tex. App.—Dallas 2010, no pet.) ("Because the doctrine of forum non

conveniens presumes that at least two forums are available to a plaintiff, our first step is to determine whether an alternative forum exists, inquiring whether another forum is 'available' and 'adequate.'"). Tin Star relies on *RSR Corporation*'s statement that "[a] forum is 'available' if *the entire case* and all parties can come within the jurisdiction of that forum." *Id.* (emphasis added). The 360 Entities dismiss the emphasized portion of the quote as dicta. We understand the quoted sentence to stand for the unremarkable proposition that an alternate forum is not available for purposes of a forum non conveniens analysis unless that forum is able to exercise jurisdiction over the parties and subject matter transferred to it. Tin Star has not challenged the Georgia court's personal or subject matter jurisdiction over the parties and claims dismissed by the trial court. Indeed, in its Georgia complaint, Tin Star asserts that the Georgia court has both personal and subject matter jurisdictions over its claims against these parties. Thus, the Motion does not fail based on a reading of the *RSR Corporation* definition of an available forum.

However, even if Tin Star's premise were correct that the "entire case" must be transferred in a forum non conveniens process, we could not say the trial court erred in this case. Our rules state generally that "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. Severance is appropriate if: (1) the controversy involves more than one cause of action, (2) the severed claim is one that could be asserted independently in a separate lawsuit, and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). In this case, the trial court severed the dismissed claims from the claims subject to the mandatory venue provision of the Non-Circumvention Agreement. The record does not indicate either party objected to the severance in the trial court. Nor has either party challenged the severance in this Court. We presume, therefore, that the severance was performed in compliance with proper Texas procedure. A proper severance creates two

independent cases. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 383 (Tex. 1985). Here, one of those independent cases includes—and only includes—the dismissed claims. That independent case constitutes the "entire case" for purposes of dismissal and our review.

Viewing both the jurisdictional availability of Georgia over the dismissed claims and the fact that those claims make up the entirety of the severed case before us, we conclude the 360 Entities established that Georgia is an available forum for those claims. The burden then shifted to Tin Star to establish that Georgia was not an adequate forum for those claims. *Sarieddine*, 820 S.W.2d at 841. An alternative forum is adequate for these purposes if the parties "will not be deprived of all remedies or treated unfairly." *Id.* Tin Star's brief fails to identify any reason why Georgia is an inadequate forum for the dismissed claims. Tin Star does not argue it will be deprived of any remedy (let alone all remedies) and does not contend it will be treated unfairly in Georgia.[4] Accordingly, we must presume Georgia is "adequate and qualif[ies] as [an] alternative forum." *Id.* at 842 (presuming three forums were adequate and qualified as alternative forums in the absence of showing of inadequacy).

We conclude Georgia is an available and adequate forum for Tin Star's dismissed claims. Our conclusion is reinforced by the fact that Tin Star has filed and pursued claims in Georgia that are identical to the dismissed claims before us. In effect, Georgia has already proven itself an available and adequate forum for Tin Star's claims.

[4] At oral argument, counsel for Tin Star represented that the Non-Circumvention Agreement contains an injunctive remedy that would be lost in Georgia. But Tin Star will have access to that remedy in Texas to the extent it is entitled. The remedy is not lost; it remains with the Texas case below.

Proper Deference to the Plaintiffs' Choice of Forum

Tin Star's second argument is that the trial court failed to give appropriate deference to its choice of Texas as the forum for its claims. We address this argument by considering the trial court's review of the public and private interest considerations set forth in the United States Supreme Court's opinion in *Gulf Oil*. *See* 330 U.S. at 508. Again, we are cautioned not to conduct a de novo review by re-weighing each of those factors. Instead, we must ask whether the trial court's balancing of the factors was supported by evidence. *See Quixtar Inc.*, 315 S.W.3d at 35. The evidence in our record includes Tin Star's original and First Amended Verified Complaints that were filed in Georgia; the Declaration of Larry White; the Non-Circumvention Agreement; and Tin Star's Fourth Verified Amended Petition (which attaches the Company Agreement), filed in the Texas trial court.[5]

The Supreme Court's "public factors" include the burden imposed upon the citizens of the alternative forum, the burden on the trial court, and the general interest in having localized controversies decided in the jurisdiction in which they arose. *Gulf Oil*, 330 U.S. at 507–08. The record indicates that defendants have already answered in the Georgia lawsuit and that litigation is proceeding in that forum. The pleadings before us indicate that no additional action need be filed in Georgia: all of the claims dismissed below can be resolved in the single case that is already pending there. Accordingly, Georgia's citizens and trial court will not be burdened any further than Tin Star has already burdened them by filing suit there. These public factors weigh

[5] The 360 Entities also offered two demonstrative exhibits: a redlined document comparing the pleadings filed by Tin Star in the two forums and a document purporting to list Tin Star's causes of action in Georgia that cannot be brought in Texas.

Contrary to the 360 Entities' argument, the trial court is not limited to evidence formally admitted at the hearing; we consider evidence attached to the Motion and response to that Motion. *See, e.g., Crum & Forster Specialty Ins. Co. v. Creekstone Builders, Inc.*, 489 S.W.3d 473, 481 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("[T]he trial court may consider any evidence properly before it, including evidence attached to the defendant's forum non conveniens motion. ").

in favor of dismissal in Texas. As to the community's interest in having a local controversy resolved "where it arose," it is true that the parties' development project was located in California. However the actions that Tin Star complains of involve individual and corporate decision making, which would have occurred where the defendant businesses were headquartered. The Company Agreement identifies the address of the 360 Entities in Atlanta, Georgia. Accordingly, this factor also weighs in favor of dismissal.

Factors to be considered in terms of the private interests of the litigants include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance from willing witnesses, the possibility of viewing the premises, "and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil*, 330 U.S. at 508. As to access to documentary proof, the Company Agreement required 360 Irvine to maintain its books and records at its offices, which are located in Atlanta, Georgia. And as to access to witnesses, although both plaintiffs are located in Texas, all eight defendants are located in Georgia.[6] Certainly obtaining evidence from those defendants would be easier and less expensive in Georgia. While Tin Star avers it does not foresee the need for additional witnesses beyond the parties, the 360 Entities do identify additional potential witnesses in Georgia. These issues of proof and witnesses weigh in favor of dismissal. To the extent California is the location of the "premises" in this case, any need for inspection of the premises would not weigh in favor of dismissal because travel to the premises would be required regardless of the forum. Additionally, we note that neither party has evidenced a need for such an inspection.

[6] Location, in this respect, is where individuals reside and companies are headquartered. Although the companies are organized under the law of several different states, that fact does not impact the issue of convenience in this case.

Finally, *Gulf Oil* instructs the trial court to consider any other matters that "make trial of a case easy, expeditious and inexpensive." *See Gulf Oil*, 330 U.S. at 508. Certainly dismissal in this case would promote judicial economy "by reducing the multiplicity of suits related to the same controversy." *Crum & Forster Specialty Ins. Co.*, 489 S.W.3d at 484. Indeed, it cannot be convenient to continue litigation of the same claims in two forums: such a duplication of resources cannot possibly help "make trial of a case easy, expeditious and inexpensive." *See Gulf Oil*, 330 U.S. at 508.

It is this duplication of resources that ultimately tips the balance of *Gulf Oil* factors to be strongly in favor of dismissal and the Georgia forum. When the balance is strongly in favor of dismissal, the trial court need not defer to the plaintiff's choice of forum. *See Sarieddine*, 820 S.W.2d at 84. And to that point, we cannot ignore the fact that Tin Star chose Georgia as a forum as well. We conclude evidence supports the trial court's conclusion that the balance of the *Gulf Oil* factors strongly supports dismissal of these claims in Texas. *See id.*

We decide Tin Star's single issue against it.

Conclusion

Tin Star's case, as pleaded, was doomed to be litigated in two forums: its claims under the Non-Circumvention Agreement must be tried in Texas; its claims over certain defendants not amenable to personal jurisdiction in Texas must be tried in Georgia. We conclude the balance of factors before us weighs strongly in favor of the Georgia forum for all of Tin Star's claims that are not related to the Non-Circumvention Agreement. We discern no abuse of discretion in the trial court's ruling that those claims—the claims severed and appealed in this case—find a more convenient forum in Georgia. We affirm the trial court's order dismissing Tin Star's claims

pursuant to the doctrine of forum non conveniens.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE, ASSIGNED

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TIN STAR DEVELOPMENT, LLC AND TIN STAR- IRVINE MEMBER, LLC, Appellants

No. 05-15-01244-CV V.

360-IRVINE, LLC, 360-IRVINE MEMBER, LLC, 360 RESIDENTIAL, LLC, Appellees

On Appeal from the 101st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-14255.
Opinion delivered by Justice O'Neill.
Justices Fillmore and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees 360-IRVINE, LLC, 360-IRVINE MEMBER, and LLC, 360 RESIDENTIAL, LLC recover their costs of this appeal from appellants TIN STAR DEVELOPMENT, LLC and TIN STAR- IRVINE MEMBER, LLC.

Judgment entered this 18th day of November, 2016.