

Petition for Writ of Mandamus Denied and Memorandum Opinion filed February 1, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-01219-CV

IN RE OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
61st District Court
Harris County, Texas
Trial Court No. 2009-05106**

MEMORANDUM OPINION

On December 13, 2010, relator Old Republic National Title Insurance Company filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. §22.221; *see also* Tex. R. App. P. 52. In the petition, Old Republic asks this court to compel the Honorable Alfred H. Bennett, presiding judge of the 61st District Court of Harris County, to vacate his order of October 28, 2010, denying Old Republic's motion to dismiss for forum non conveniens.

Background

Real-party-in-interest AmericaHomeKey, Inc. filed suit in Harris County on January 28, 2009, alleging Old Republic breached its fiduciary duty owed to AmericaHomeKey as the insurance underwriter on ten mortgage loans issued in Florida. AmericaHomeKey is a mortgage lender attempting to collect on ten defaulted mortgage loans. The dispute centers around closing protection letters issued by Old Republic. AmericaHomeKey alleges Old Republic is liable as the title company underwriter pursuant to the closing protection letters.

Old Republic is a Florida company; the collateral for each of the loans is Florida property, and the original mortgage broker was in Florida. AmericaHomeKey is a Texas company based in Dallas, with offices in 27 states. According to the petition, AmericaHomeKey filed suit but did not actively pursue discovery until the spring of 2010. At that time AmericaHomeKey issued a notice of intention to take depositions of Old Republic's representatives for which Old Republic sought a protective order. After receiving Old Republic's notice, the parties engaged in mediation. Mediation was unsuccessful, and on October 19, 2010, shortly before trial was set to commence, Old Republic filed a motion to dismiss for forum non conveniens to facilitate re-filing in Florida. On October 22, 2010, the trial court held a hearing at which it denied Old Republic's motion to dismiss.

At the hearing, Old Republic argued that dismissal was appropriate and the case should be filed in Florida because the property and its purchasers are in Florida, the mortgages were entered into in Florida, and all of the witnesses reside in Florida. Old Republic's attorney stated she anticipated calling the borrowers, who lived in Florida and who would not voluntarily travel to Texas to testify. AmericaHomeKey's attorney responded, stating that this dispute is one between two companies and AmericaHomeKey needs to call only four witnesses, one from California, one from Missouri, and two from

Florida. All of AmericaHomeKey's representatives are in Texas. AmericaHomeKey's attorney expressed his willingness to travel to California, Missouri, and Florida to take depositions of the witnesses.

The parties' attorneys engaged in a debate as to the importance of the borrowers from Florida as witnesses. Old Republic's attorney represented that the borrowers were important to its case, and because the witnesses live in Florida, they are beyond subpoena range. It is AmericaHomeKey's position that the borrowers committed fraud, never intended to pay their mortgages, and are unavailable to testify regardless of whether they are subject to subpoena. AmericaHomeKey further asserted that the borrowers' testimony is irrelevant to this dispute involving liability for coverage on the foreclosed loans. AmericaHomeKey represented that if it were determined that any of the borrowers' testimony is necessary, AmericaHomeKey would be willing to travel to Florida to take the depositions of the borrowers. AmericaHomeKey further represented that it would be ready for trial in Harris County within three to four months. Moving the case to Florida would mean that the trial process would begin again and most likely trial would be delayed.

The trial court denied Old Republic's motion to dismiss. Old Republic seeks mandamus relief to direct the trial court to vacate its order and to order the trial court to dismiss the underlying suit for re-filing in Florida.

Mandamus Standard

Under the doctrine of forum non conveniens, a trial court may exercise its discretion to resist imposition of an inconvenient jurisdiction upon a litigant who is otherwise subject to its jurisdiction. *Boots v. Lopez*, 6 S.W.3d 292, 294 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). A trial court abuses its discretion if its forum-non-conveniens ruling is arbitrary, unreasonable, and without reference to guiding

principles. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 673 (Tex. 2008). There is no adequate remedy at law if a trial court erroneously denies a motion to dismiss based on forum non conveniens. *Id.* at 679.

The doctrine rests on a strong presumption in favor of the plaintiff's choice of forum, a presumption a defendant may overcome only when the private and public interest factors clearly point toward trial in the alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). In *Gulf Oil Corp. v. Gilbert*, 380 U.S. 501, 507 (1947), the United States Supreme Court set forth factors federal trial courts should consider in applying the doctrine of forum non conveniens, and Texas courts have adopted these factors. *See Pirelli*, 247 S.W.3d at 676–77. The private factors a trial court should consider are the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses, the ability to view the premises (if appropriate), and other practical matters to make trying the case easy, expeditious, and inexpensive. *Gulf Oil*, 380 U.S. at 508. The trial court should also consider other public factors including the burden imposed upon the citizens of the state and on the trial court, and the general interest in having localized controversies decided in the jurisdiction in which they arise. *Id.* at 508–09.¹

A court should give greater deference to a plaintiff's choice of forum when the plaintiff has chosen its home forum. *Piper Aircraft Co.*, 454 U.S. at 255. Unless the balance weighs heavily in favor of the defendant, a court should rarely disturb the plaintiff's choice of forum. *In re ENSCO Offshore Intern. Co.*, 311 S.W.3d 921, 928–29 (Tex. 2010). The defendant bears the burden of proving the factors are in its favor. *Id.*

¹ As applied to tort matters, these factors have been codified in section 71.051 of the Texas Civil Practice and Remedies Code. Because this suit involves a contract dispute, we apply the common-law forum non conveniens factors.

Analysis

Adequate Alternate Forum

Old Republic contends that Florida is an adequate alternate forum because all of the witnesses who will testify at trial are Florida residents. AmericaHomeKey disputes this contention by pointing out that this is a contract dispute between two corporations. The individuals who allegedly signed the loans are immaterial to the dispute between the parties. AmericaHomeKey argues that the location of the mortgaged property is also irrelevant because all of the loans have been foreclosed by the investors. AmericaHomeKey has offices in 27 states including Texas, and alleges the closing coordinator on all ten loans was its employee in the Kingwood Branch in Texas.

Private Interests

The private factors are relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining willing witnesses; the possibility of viewing the premises; enforceability of any judgment obtained; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Gulf Oil*, 330 U.S. at 508.

Old Republic argues that the private-interest factors favor a Florida forum because the property and individual witnesses are in Florida and outside the subpoena power of a Harris County court. AmericaHomeKey responds by stating it intends to call only four witnesses. One witness would be from California because damages need to be proved through Bank of America, which is based in California. Another witness is in Missouri and AmericaHomeKey's representatives are in Texas. AmericaHomeKey also plans to call two witnesses who reside in Florida. AmericaHomeKey plans to call a handwriting expert who will testify that several of the loans were forgeries; the handwriting expert resides in Harris County. AmericaHomeKey's attorney represented that the "borrowers"

either were individuals whose names were forged or are from Haiti and have since fled the country. Old Republic's attorney did not dispute this representation.

With regard to other practical problems that make trial of a case easy, expeditious and inexpensive, it is important to recognize that this case has been on file in Texas for approximately three years. Within a week of trial Old Republic filed its motion to dismiss for forum non conveniens. If the court had granted Old Republic's motion to dismiss, the case would have to be re-filed in Florida, resulting in unnecessary delay.

Public Interests

Generally, the public-interest factors to be considered are the administrative difficulties related to court congestion, burdening the people of a community with jury duty when they have no relation to the litigation, local interest in having localized controversies decided at home, and trying a case in the forum that is at home with the law that governs the case. *In re Gen. Elec. Co.*, 271 S.W.3d 681, 691 (Tex. 2008).

Old Republic contends that Florida law will apply to this case and that the citizens of Texas should not be burdened with resolving a Florida business dispute. AmericaHomeKey disputes Old Republic's contention that Florida law will apply. AmericaHomeKey asserts that the contract in dispute was to be performed in Texas by delivery of the loan files. AmericaHomeKey argues that moving the case to Florida will unduly delay resolution by requiring the case to be re-filed in Florida. With the exception of the delay factor, the public interest factors do not weigh in favor of either forum.

Conclusion

Having reviewed the record of the hearing in the trial court and the appropriate factors, we cannot conclude the trial court's ruling was arbitrary, unreasonable or without reference to guiding principles. The balance of factors is not weighed so heavily in favor of the defendant that the court should disturb the plaintiff's choice of forum. Old

Republic has not established entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny the petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Anderson, Frost, and Brown.