

No. 12-0395

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

KATHRYN L. SCHLOTZHAUER,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Cook County.
)	
XL SPECIALTY INSURANCE COMPANY,)	No. 10 L 8255
Defendant-Appellant,)	
and)	
)	The Honorable
AIR CAPITAL INSURANCE, LLC,)	Drella C. Savage,
Defendant.)	Judge Presiding.

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justices Steele and Sterba concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in denying defendant XL Specialty Insurance Company's motion to dismiss pursuant to the doctrine of *forum non conveniens* where the defendant failed to show the private and public interest factors strongly favored Iowa, and Illinois is plaintiff's chosen forum.

¶ 1

BACKGROUND

¶ 2 This appeal arises from a bad faith insurance settlement claim, where the underlying lawsuit concerned an aviation wrongful death case. Following a \$7.2 million jury verdict, the insured, Richard Green, assigned any bad faith claim he may have had against defendant, XL Specialty Insurance Company, to plaintiff Kathryn Schlotzhauer. The sole issue before this court is whether the trial court abused its discretion in denying defendant XL Specialty Insurance Company's motion to dismiss pursuant to the doctrine of *forum non conveniens*.

¶ 3 On February 26, 2010, plaintiff Kathryn Schlotzhauer filed her original action solely against defendant XL Specialty in the Circuit Court of Cook County. On April 1, 2010, defendant XL Specialty removed the case to the United States District for the Northern District of Illinois. On April 8, 2010, plaintiff voluntarily dismissed her original action.

¶ 4 On July 16, 2010, plaintiff filed the present action in the Circuit Court of Cook County, Illinois, seeking damages of approximately \$5.2 million against defendant, Air Capital Insurance, LLC. On October 6, 2010, plaintiff filed her first amended complaint adding defendant XL Specialty as a defendant.

¶ 5 In her complaint, plaintiff alleges a cause of action against XL Specialty for bad faith refusal to settle within insurance policy limits and breach of duty of good faith and fair dealing. Plaintiff also brought suit against defendant Air Capital for negligence in procuring insufficient and inadequate insurance coverage.

¶ 6 The insurance coverage was triggered by a helicopter crash in June 2006 in Benton County, Iowa, that resulted in the death of plaintiff's husband, Roland Schlotzhauer. Richard

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Green, owner of Ritel Copter Service, was operating the helicopter at the time of the crash.

Insurance broker, Air Capital Insurance, LLC, sold the aviation insurance policy to Mr. Green.

The policy provided \$2 million in coverage. The application was taken by phone from Kansas.

Defendant XL Specialty issued the policy to Ritel Copter Service.

¶ 7 Plaintiff filed an action for wrongful death of her husband in Iowa. Defendant XL Specialty defended the underlying action, with David Luginbill representing Mr. Green. Mr. Green was also personally represented by Douglas Coonrad. Both Mr. Luginbill and Mr. Coonrad are named witnesses in the present action.

¶ 8 On May 9, 2009, Mr. Green demanded defendant XL Specialty offer to settle with plaintiff for \$1.3 million. David Luginbill made a \$2 million joint offer to plaintiff and Tony Wilson, a passenger injured in the crash, who filed a separate suit, which was later consolidated with plaintiff's suit for trial. The joint offer was rejected. Tony Wilson and his attorney are residents of Iowa.

¶ 9 On July 11, 2009, plaintiff offered to settle the claim against Mr. Green for \$1.5 million. The offer was not accepted and the case went to trial. The jury returned a verdict in favor of plaintiff for \$7.2 million.

¶ 10 Mr. Green assigned his rights under defendant XL Specialty's insurance policy to plaintiff. As part of his assignment, he agreed to travel to wherever the trial was held in the case. The District Court of Polk County, Iowa, judicially approved the assignment.

¶ 11 On January 19, 2011, defendant XL Specialty moved to dismiss plaintiff's amended complaint pursuant to the doctrine of *forum non conveniens* and have the case refiled in Iowa.

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¶ 12 Discovery was conducted. Defendant XL Specialty issued *forum non conveniens* interrogatories to plaintiff, specifically asking her to identify all persons having knowledge relevant to her claims and living in Illinois, as well as those living in Iowa. Defendant XL Specialty maintains plaintiff failed to identify any Illinois resident by name and failed to describe any knowledge she believed any Illinois resident possessed relevant to her claims, nor did she ever amend her discovery responses to include such information.

¶ 13 In her response to the *forum non conveniens* interrogatories, plaintiff identified witnesses Richard Green, Rick Allen Green, David Luginbill, *Esq.*, and Douglas Coonrad, *Esq.*, as persons in Iowa with knowledge relevant to her claims. Plaintiff further identified herself, defendant Air Capital and her attorneys in both the underlying action and the present one, as individuals with relevant knowledge.

¶ 14 Plaintiff deposed defendant XL Specialty's corporate representative on *forum non conveniens* topics on November 8, 2011. During the deposition, the corporate representative testified that defendant XL Specialty had not been domiciled in Illinois over the last ten years. However, after being shown an exhibit, he admitted that it was domiciled in Chicago in December 2000, but claimed it moved many years ago, a date of which he did not know.

¶ 15 In her response to defendant XL Specialty's motion to dismiss, plaintiff asserted that "key witnesses are located in Cook County" and identified employees¹ of defendant XL Specialty who work in Chicago.

¹ Defendant claims plaintiff identified employees of XL Insurance Companies, not XL Specialty.

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¶ 16 The parties are geographically dispersed. Plaintiff is a resident of Kansas. Defendant Air Capital was incorporated and has its principal place of business in Kansas. Defendant XL Specialty is a Delaware corporation with its principal place of business in Stamford, Connecticut.

¶ 17 Two of defendant XL Specialty's regional offices for the central United States are located in Cook County, Illinois; none are located in Iowa. Defendant XL Specialty is licensed to conduct insurance business in Illinois and has been authorized to transact insurance business in Illinois since 2002. An unspecified number of employees work out of defendant XL Specialty's Chicago office, including the contacts for aviation insurance in the central region. Plaintiff identified one of those contacts as Uwe Schoberth, "the senior vice president and regional executive for the central region of XL insurance companies, which includes Defendant XL Specialty Insurance Company." The Chicago office also includes an aviation underwriting team for the "U.S. Midwest."

¶ 18 The trial court denied defendant XL Specialty's motion to dismiss based on *forum non conveniens*. In doing so, the trial court analyzed the underlying facts, including the location of the potential witnesses and documentary evidence, and applied the requisite private and public interest factors as required by Illinois law. The court identified only one witness in Iowa, Richard Green, who agreed to travel wherever the trial was held in this case as part of his assignment of his right under the insurance policy to plaintiff. Concerning the other potential witnesses, the court found the following defendant XL Specialty employees were located in Illinois: Uwe Schoberth, Senior Vice President and Regional Executive for the Central Region of XL Insurance Companies, including defendant XL Specialty; Mike LaRocca, the Aviation

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Insurance contact for the North Central Region of XL Insurance Companies, including defendant XL Specialty; Brian Ackland, Aviation Class Underwriter for defendant XL Specialty; and two aviation insurance underwriters. The court found Randy Hobbs, Head of Specialty Claims for defendant XL Specialty was located in Pennsylvania. The court found the following defendant XL Specialty employees were located in Connecticut: Jim Divirgilio, Head of North America Property & Casualty claims; Andrew Will, CFO; Rich McCarty, General Counsel for XL America, Inc.; Michael S. McGavick, Officer of XL Group; Gregory Hendrick, Head of Strategy for XL Group in Connecticut or Bermuda; Myron Hendry, Head of IT for XL Group; and James Veghte, Chief Executive for Reinsurance for XL Group. Lastly, the trial court identified New York as the location of the following witnesses, also employees of defendant XL Specialty: Paul Tuhy, Head of Claims for XL Group; Russ Mirabile, Head of all Aviation Claims, who monitored the subject litigation for defendant XL Specialty; Dave Kraus, Aviation Claims employee, who handled the subject litigation for defendant XL Specialty; Lisa Fleisig, Aviation Claims employee; Natasha Fekula, Claims employee; Sarah Street, Head of Investments for XL Group; and aviation claims personnel. The trial court found relevant documents to be located in New York.

¶ 19 The trial court concluded defendant XL Specialty "failed to meet its burden that the private interest factors *strongly favor* an Iowa court over the Plaintiff's chosen forum, Cook County." (Emphasis in original.) The trial court found it significant that defendant failed to provide any affidavits from the potential witnesses stating that Cook County would be inconvenient.

¶ 20

ANALYSIS

¶ 21 This is an interlocutory appeal, taken pursuant to Illinois Supreme Court Rule 306 (eff. Feb. 16, 2011). The rule provides, in relevant part:

"(a) A party may petition for leave to appeal to the Appellate Court from the following orders of the trial court:

(2) from an order of the circuit court allowing or denying a motion to dismiss on the grounds of *forum non conveniens* ***." Ill. S.Ct. R. 306 (eff. Feb. 16, 2011).

On March 14, 2012, this court granted defendant XL Specialty's petition for leave to appeal the trial court's denial of its motion to dismiss the First Amended Complaint pursuant to the doctrine of *forum non conveniens*.

¶ 22 *Forum non conveniens* is an equitable doctrine "founded in considerations of fundamental fairness and sensible and effective judicial administration," which allows a trial court to transfer a case when a "trial in another forum 'would better serve the ends of justice.'" *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 441 (2006) (quoting *Vinson v. Allstate*, 144 Ill. 2d 306, 310 (1991)). The party seeking dismissal bears the burden of showing that the relevant factors "strongly favor" transfer. (Emphasis in original.) *Langenhorst*, 219 Ill. 2d at 443 (quoting *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill. 2d 101, 108 (1990)).

¶ 23 "A trial court is afforded considerable discretion in ruling on a *forum non conveniens* motion." *Langenhorst*, 219 Ill. 2d at 441. As a reviewing court, we will only reverse a trial

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court's decision on a *forum non conveniens* motion where the defendants show the court abused its discretion in balancing the relevant factors. *Langenhorst*, 219 Ill. 2d at 442. "A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court." *Langenhorst*, 219 Ill. 2d at 442. Our supreme court has "repeatedly noted that the *forum non conveniens* doctrine gives courts discretionary power that should be exercised *only in exceptional circumstances* when the interests of justice require a trial in a more convenient forum." (Emphasis in original.) *Langenhorst*, 219 Ill.2d at 442 (citing *First American Bank v. Guerine*, 198 Ill.2d 511, 520 (2002)). As such, the issue before us is not what decision we, as the reviewing court, would have reached based on our review of the record, but whether no reasonable person would have acted as the trial court did. See *Koss Corp. v. Sachdeva*, 2012 IL App (1st) 120379 (July 6, 2012).

¶ 24 In deciding a *forum non conveniens* motion, the trial court must consider both private and public factors as outlined by our supreme court and balance them "without emphasizing any one factor." *Langenhorst*, 219 Ill. 2d at 443. The private interest factors include: "(1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make trial of a case easy, expeditious, and inexpensive ***." *Langenhorst*, 219 Ill. 2d at 443 (quoting *Guerine*, 198 Ill. 2d at 517).

These public factors include: "(1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and (3) the administrative difficulties presented by adding litigation to already congested court dockets." *Langenhorst*, 219 Ill.2d at 443–44 (citing *Guerine*, 198 Ill.

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2d at 516–17).

¶ 25 Deference is given to the plaintiff's choice in forum, with our supreme court stating,

"the battle over forum begins with the plaintiff's choice already in the lead. Though the plaintiff's choice is not absolute, intrastate transfer is appropriate only when the litigation has 'no practical connection' (*Peile v. Skelgas, Inc.*, 163 Ill. 2d 323,336 (1994)), no nexus, with the plaintiff's chosen forum." *Guerine*, 198 Ill. 2d at 521.

"Our supreme court has acknowledged "that, though the *forum non conveniens* standard remains difficult for defendants to meet, it does not foreclose legitimate transfers when the balance of factors strongly favors litigation in another forum." *Guerine*, 198 Ill. 2d at 521. The trial court's decision will only be reversed if the court abused its discretion in balancing the relevant factors. *Dawdy v. Union Pacific R.R.*, 207 Ill. 2d 167,172 (2003). "A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court." *Langenhorst*, 219 Ill. 2d at 442.

¶ 26 On appeal, defendant XL Specialty contends plaintiff engaged in improper forum shopping by filing her complaint in the Circuit Court of Cook County where it claims Illinois has no connection to plaintiff's claims. Defendant argues that because there is no connection to Illinois, the trial court abused its discretion in balancing the private and public factors to find Illinois to be the proper forum over Iowa.

¶ 27 Defendant XL Specialty argues the public and private interest factors weigh heavily in

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favor of a transfer to Iowa. Defendant XL Specialty argues plaintiff filed this lawsuit in Chicago five months prior to defendant opening an Aviation Underwriting satellite office in Chicago and five months prior to Mr. Ackland or any aviation underwriter being employed by XL Specialty in any capacity. Defendant XL Specialty contends plaintiff "clearly strained to find any connection her claims have to Cook County, Illinois, which strongly implies she is engaging in impermissible forum shopping."

¶ 28 Defendant XL Specialty argues that in denying its motion to dismiss, the trial court failed to consider that "key witnesses," Rick Allen Green (not to be confused with Richard Green), David Luginbill, and Douglas Coonrad reside in Iowa and cannot be compelled to appear in Cook County for trial. Plaintiff contends of those witnesses, two are "minor and may be unnecessary" and the third "may have little substantive testimony to offer." Plaintiff argues there is no evidence that David Luginbill, who represented Ritel Copter Service under the XL Specialty insurance policy, made decisions about settlement for defendant XL Specialty. Plaintiff contends the testimony of Richard Green's personal attorney, Douglas Coonrad is minor where he would only testify about the letter he sent Mr. Luginbill, demanding that defendant XL Specialty settle with plaintiff. Defendant XL Specialty argues it is "disingenuous" for plaintiff to contend that these individuals are not witnesses where plaintiff identified them as such in her First Supplemental Responses to defendant's *forum non conveniens* interrogatories.

¶ 29 Defendant XL Specialty contends it does not lease office space in Cook County. XL Global Services, Inc., and XL American, Inc. do, but defendant claims they are entities related to it, but not the same. Defendant XL Specialty contends it does not direct, control or coordinate

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any activities to advance its corporate objective in Illinois. Defendant XL Specialty argues that because plaintiff's bad faith claim arose out of an accident and trial that occurred in Iowa, it would be unfair to impose the trial expense and burden of jury duty on Cook County residents in the present matter.

¶ 30 The trial court found defendant XL Specialty failed to show the plaintiff's chosen forum of Cook County, Illinois was inconvenient and that any specific Iowa court, of which defendant never specified, would be more convenient to all parties.

¶ 31 Concerning the private interest factor of relative ease of access to evidence, the trial court was unpersuaded by defendant's argument that none of the potential witnesses were located in Cook County. The court accepted plaintiff's assertion that five potential witnesses resided in Cook County and further observed that witnesses were scattered throughout Kansas, Pennsylvania, Iowa, Connecticut and New York. Accordingly, the trial court found this factor did not favor transfer where multiple states could claim a connection to the litigation and defendant failed to provide the court with a single affidavit from any potential witness indicating that litigation in Cook County would be inconvenient. The trial court found the private factors did not strongly favor transfer to an Iowa court.

¶ 32 Regarding the convenience to the parties, the defendant must show the plaintiff's chosen forum is "inconvenient" to him and in doing so, may not claim "the plaintiff's chosen forum is inconvenient to the plaintiff." *Langenhorst*, 219 Ill. 2d at 445, 450.

¶ 33 By filing this case in Cook County, Illinois, plaintiff made clear that it was her preferred forum. Defendant Air Capital endorsed Illinois as the forum, stating by affidavit that Chicago,

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Illinois would be the "least burdensome and inconvenient forum." Defendant Air Capital further stated that its personnel "would be willing to travel to Cook County for purposes of either giving deposition testimony or appearing live at trial."

¶ 34 Because this case involves allegations of bad faith refusal to settle within insurance policy limits and breach of duty of good faith and fair dealing, the insurer's actions concerning those claims are at issue. Accordingly, the trial court focused on the location of defendant XL Specialty's employees who may testify in this case about the actions, and reasons for them, taken by defendant XL Specialty. The trial court found at least five potential witnesses were located in Illinois. The trial court found only one potential witness in Iowa, with the remaining witnesses scattered throughout various states.

¶ 35 It is unclear whether the witnesses would be inconvenienced by coming to Cook County for a trial where defendant XL Specialty offered no affidavit from any witness expressing an unwillingness to travel to Illinois. The documentary evidence is located in New York and, therefore, not a factor that favors either Illinois or Iowa as the forum. The trial court determined that any other jurisdiction would suffer from the same inability to compel presence of witnesses as Illinois, where the witnesses are scattered across various states. Based on the evidence, we cannot conclude a reasonable person would not find as the trial court did, *i.e.* that the private factors do not favor either party.

¶ 36 Regarding the public interest factors, the trial court determined Cook County residents had an interest in the outcome of this case where defendant XL Specialty had two regional offices located here. We cannot say a reasonable person would not find the same based on the

evidence presented.

¶ 37 Defendant XL Specialty argues the trial court erroneously relied on *Brant v. Rosen*, 373 Ill. App. 3d 720 (2007), *appeal denied*, 225 Ill. 2d 628 (2007), to support its conclusion that defendant failed to meet its burden to show the factors strongly favored transferring the matter to Iowa. We disagree. Similar to the defendant in *Brant*, the defendant here failed to identify the county in the proposed state, failed to calculate the distances between the chosen and proposed forums and the locations of witnesses and other evidence, and failed to provide affidavits from any witness as to the inconvenience posed by plaintiff's chosen forum. *Brant*, 373 Ill. App. 3d at 723. Based on the absence of such evidence, the *Brant* court held the trial court did not abuse its discretion in denying the defendant's motion to dismiss. *Brant*, 373 Ill. App. 3d at 731.

¶ 38 The trial court's reliance on *Brant* was not improper, nor can its finding that the balance of public and private factors did not strongly favor transfer away from Illinois, or said to be an abuse of discretion. To clarify the doctrine of interstate *forum non conveniens*, our Supreme Court in *First American Bank* made clear, "a trial court abuses its discretion in granting an intrastate *forum non conveniens* motion to transfer venue where, [], the potential trial witnesses are scattered among several counties, including the plaintiff's chosen forum, and no single county enjoys a predominant connection to the litigation. The balance of factors must strongly favor transfer of the case before the plaintiff can be deprived of his chosen forum." *Guerine*, 198 Ill. 2d at 526. The case before us is exactly the type of case our Supreme Court cautioned would lend itself to an abuse of discretion by the trial court should the court grant the motion to transfer venue. Accordingly, the trial court properly exercised its discretion here by denying defendant's

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motion.

¶ 39

CONCLUSION

¶ 40 Defendant XL Specialty failed to meet its burden to show the trial court abused its discretion in concluding that the balancing of the relevant private and public interest factors did not strongly favor a transfer from plaintiff's chosen forum of Cook County, Illinois. Accordingly, we find the trial court did not abuse its discretion in denying defendant's motion to dismiss based on the doctrine of *forum non conveniens*.

¶ 41 Affirmed.