

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Francis Schertenleib v. Jerome S. Traum

589 F.2d 1156 (2d Cir. 1978) · No. No. 7, Docket 78-7049 · Decided December 15, 1978

SUMMARY

The Second Circuit reviewed a Southern District of New York dismissal of claims arising from allegedly false testimony and related events in Geneva, Switzerland. The court held that a federal court may conditionally dismiss on forum non conveniens grounds even when the alternative foreign forum was not initially available without the defendant's consent, provided the defendant consents to jurisdiction there. The court affirmed the dismissal with modifications, including a requirement that the defendant waive any statute of limitations defense arising since the action was commenced.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Irving R. Kaufman? No; opinion by Chief Judge Feinberg; Jon O. Newman? No; FEINBERG; MULLIGAN; PRATT, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	December 15, 1978
DOCKET	No. 7, Docket 78-7049
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order of the United States District Court for the Southern District of New York dismissing one count of his diversity action for failure to state a claim and three counts on forum non conveniens grounds.
STANDARD OF REVIEW	Abuse of discretion for the district court's forum non conveniens determination; de novo review of dismissal for failure to state a claim.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Francis Schertenleib v. Jerome S. Traum

TOPICS

- civil procedure
- motions to dismiss
- statutory interpretation
- torts

PRACTICE AREAS

civil procedure

conflicts of law

torts

statutory interpretation

QUESTIONS PRESENTED

1. Whether a federal district court may dismiss an action on forum non conveniens grounds when the alternative foreign forum was not available to the plaintiff as of right when the action commenced but becomes available through the defendant's consent.
2. Whether the district court abused its discretion in determining that Geneva was a substantially more convenient forum and conditionally dismissing the tort claims.
3. Whether New York Judiciary Law § 487 applies to alleged deceit by an attorney occurring outside New York and involving proceedings before foreign courts and authorities.
4. What conditions were necessary to ensure that the conditional dismissal did not leave the plaintiff without a remedy.

HOLDINGS

1. A district court may dismiss an action under the common-law doctrine of forum non conveniens when an alternative foreign forum is currently available through the defendant's consent, even if the plaintiff could not have commenced the action there as of right when suit was filed.
2. The district court did not abuse its discretion in conditionally dismissing the abuse-of-process, prima facie-tort, and defamation claims because the balance of private and public conveniences overwhelmingly favored Geneva.
3. New York Judiciary Law § 487 does not apply extraterritorially to alleged deceit occurring outside New York in proceedings before foreign courts or authorities.
4. A conditional forum non conveniens dismissal should require the defendant to submit to jurisdiction in the alternative forum and waive any statute-of-limitations defense that arose after commencement of the dismissed action.

KEY QUOTATIONS

“We conclude, therefore, that the district court had the power to exercise its discretion to apply the doctrine of forum non conveniens even if there was no alternative forum in which plaintiff could have originally commenced his action without the consent of defendant.”

“We also hold that plaintiff's cause of action based on section 487 of New York's Judiciary Law, quoted in footnote 4, was correctly dismissed for failure to state a claim.”

FACTUAL BACKGROUND

The litigation arose from a dispute involving foreign mutual funds, their management company, and events occurring primarily in Geneva, Switzerland. Schertenleib alleged that Traum participated in misconduct involving the funds and later gave false testimony in Geneva that led to Schertenleib's arrest and imprisonment. Schertenleib asserted claims for violation of New York Judiciary Law § 487, abuse of process, prima facie tort,

and defamation. The witnesses, documents, related proceedings, and governing legal issues were predominantly located in Switzerland.

PROCEDURAL HISTORY

Schertenleib sued Traum in the Southern District of New York based on alleged conduct and testimony in Geneva, Switzerland. The district court dismissed the claims for abuse of process, prima facie tort, and defamation on forum non conveniens grounds, conditioned on Traum's submission to jurisdiction in Geneva, and dismissed the New York Judiciary Law § 487 claim for failure to state a claim. The Second Circuit affirmed, adding a condition that Traum waive any statute-of-limitations defense arising after commencement of the New York action.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The dismissal remains conditional on Traum's prompt submission to jurisdiction in Geneva and on restoration of the action if the Swiss court refuses jurisdiction or Traum refuses to submit. Traum must also waive any statute-of-limitations defense arising after commencement of the New York action.

CASES CITED

- Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-09 (1947)
- Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir. 1950), cert. denied, 340 U.S. 851 (1950)
- Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960)
- Sullivan v. Behimer, 363 U.S. 335, 364-65 (1960)
- Fitzgerald v. Westland Marine Corp., 369 F.2d 499, 501 n.3 (2d Cir. 1966)
- Grammenos v. Lemos, 457 F.2d 1067, 1074 n.5 (2d Cir. 1972)
- Frangiskatos v. Liberian M/V Konkar Pioneer, 471 F.2d 714, 715 (2d Cir. 1972)
- Telephonics Corp. v. Lindly & Co., 291 F.2d 445, 447 (2d Cir. 1961)
- Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976)
- Silver v. Great American Insurance Co., 29 N.Y.2d 356, 359-60, 328 N.Y.S.2d 398, 278 N.E.2d 619 (1972)
- Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972)
- Conte v. Flota Mercante Del Estado, 277 F.2d 664, 667 (2d Cir. 1960)
- Nones v. Security Title & Guaranty Co., 4 Misc. 2d 1057, 162 N.Y.S.2d 761 (Sup. Ct. Nassau County 1956)
- In re Richard M. Nixon, An Attorney, 53 A.D.2d 178, 385 N.Y.S.2d 305 (1st Dep't 1976)
- Tivoli Realty v. Interstate Circuit, 167 F.2d 155, 156-57 (5th Cir. 1948), cert. denied, 334 U.S. 837 (1948)
- Menendez Rodriguez v. Pan American Life Insurance Co., 311 F.2d 429, 432-33 (5th Cir. 1962), vacated on other grounds, 376 U.S. 779 (1964)
- Hellenic Lines v. Rhoditis, 412 F.2d 919, 922 n.6 (5th Cir. 1969)

- Paramount Pictures, Inc. v. Rodney, 186 F.2d 111, 119 (3d Cir. 1950), cert. denied, 340 U.S. 953 (1951)
- A. J. Industries, Inc. v. United States District Court, 503 F.2d 384, 387 (9th Cir. 1974)
- Ferri v. United Aircraft Corp., 357 F. Supp. 814, 818 (D. Conn. 1973)
- Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 921-22 (S.D.N.Y. 1977)

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