

**Tooth v Georgiou**

2009 NY Slip Op 30830(U)

April 13, 2009

Supreme Court, New York County

Docket Number: 116019/07

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan  
*Justice*

PART 36

Index Number : 116019/2007

SEARS TOOTH

INDEX NO. 116019/07

vs

GEORGIU, ANTONY

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS

MOTION CAL. NO. \_\_\_\_\_

Motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached memorandum decision, granting the motion.*

**FILED**

APR 15 2009

COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 4/13/09

*[Signature]*  
\_\_\_\_\_  
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
SEARS TOOTH,

Plaintiff,

Index No. 116019/07

-against-

Motion Seq. No. 001

ANTONY GEORGIU,

**FILED**  
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COUNTY CLERK'S OFFICE  
NEW YORK

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Defendant.

DORIS LING-COHAN, J.:

Plaintiff Sears Tooth moves, pursuant to CPLR 327, for an order dismissing without prejudice defendant's counterclaims based on *forum non conveniens* or, in the alternative, for an order dismissing without prejudice both the complaint and the counterclaims, based on *forum non conveniens* and in the interests of justice, pursuant to CPLR 327 and 3217.

Sears Tooth is a London firm of solicitors. Defendant Antony Georgiou (Georgiou) is a former client of Sears Tooth. This is an action to recover a legal fee earned by plaintiff for its representation of defendant in a divorce action in London, England. Georgiou, a British citizen, has counterclaimed for legal malpractice.

In support of its motion, Sears Tooth argues that the counterclaims would be better adjudicated in London since there is no real connection to New York. Plaintiff contends that it only commenced this action in New York as an account stated since defendant maintains a residence here. However, since the events giving rise to this action occurred in the U.K., almost all of the witnesses reside there, many of the documents are in the U.K., English law is applicable and an alternative forum exists, this matter is better suited to be adjudicated in England.

In opposition, defendant argues that a plaintiff choosing to initiate a lawsuit in New York

cannot use the doctrine of *forum non conveniens* as a sword, seeking dismissal of counterclaims that are inextricably intertwined with plaintiff's original claim.

In further support, plaintiff argues that because there were two divorce actions commenced against Georgiou by his spouse (a second divorce action commenced after a brief reconciliation), its claim for a fee earned in the second of the divorce actions is not intertwined with defendant's counterclaim for malpractice allegedly committed in the first divorce action.

CPLR 327 (a) provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

The factors to be considered on a *forum non conveniens* motion are: the burden on the New York courts, the potential hardship to the movant, and the unavailability of an alternative forum in which the other party may bring suit (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). The court may also consider the residency of the parties and whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*id.*). No one factor has been held controlling. Rather, the determination is in the sound discretion of the court, based upon all the facts and circumstances of the case at hand (*id.*).

Plaintiff's motion is granted and the complaint and counterclaims are dismissed without prejudice. Here, plaintiff has sufficiently shown that, although New York may be a proper forum, England is the more convenient and appropriate one given the facts and circumstances of this case. Here, the facts lean in favor of New York being an inconvenient forum. Defendant, a

British citizen, retained plaintiff in London to represent him in a divorce action occurring in London. All the dealings between the parties occurred in London and, thus, all of the witnesses, except for defendant, reside in the U.K. Moreover, since this case concerns legal malpractice and the underlying divorce actions, determinations will be based on English law and a U.K. court is better suited to deal with such issues and applicable laws.

The only factor in defendant's favor to allowing this case to continue in New York is that defendant has a residence in New York. However, as stated above, CPLR 327(a) states that the residence of a party in the state does not preclude the court from dismissing the action. Additionally, defendant admitted that his "official" residence is in Monaco and that he resides in New York only half of the year, spending the remainder at various residences all over the world. While defendant argues that the motion should not be granted because he no longer resides in the U.K. and all his files are currently in New York, such contentions do not amount to real prejudice that would be suffered by defendant should the motion be granted.

In a similar case, the court dismissed a client's legal malpractice and recoupment claims against lawyers that arose out of probate actions undertaken in Montreal, Canada, by Canadian attorneys, to which Canadian law would have been applicable (*Rosenberg v Stikeman Elliott, LLP*, 44 AD3d 840, 841 [2d Dept 2007]). The court found that, even if the client possessed residences or domiciles both in New York and Canada, she already had availed herself of Canadian courts in the past, not only in the related probate action, but also in an almost identical matter involving the payment of legal fees for the probate matter.

In addition, since the issues between plaintiff's representation of defendant in the divorce actions are intertwined with its entitlement to collect its fee for such representation, the

complaint and counterclaims are both dismissed so that they may be adjudicated together; the legal fee and malpractice lawsuits should clearly be heard in the same forum.

Further, CPLR 3217 (b) provides for voluntary discontinuance by a party "upon terms and conditions, as the court deems proper" where, as here, the answer has been served. A party should be permitted to discontinue the action at any time unless the adversary's rights would be prejudiced thereby (*Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 94-95 [1st Dept 2007] affd 10 NY3d 852 [2008]; *Louis R. Shapiro, Inc. v Milspemes Corp.*, 20 AD2d 857, 857 [1st Dept 1964]). Whether to grant or deny an application to voluntarily discontinue is within the sound discretion of the court, but "[p]articular prejudice to the defendant or other improper consequences flowing from the discontinuance may however make denial of discontinuance permissible" (*Tucker v Tucker*, 55 NY2d 378, 383 [1982] [emphasis added]). As stated above, defendant has failed to show any particular prejudice. Thus, the action is dismissed without prejudice, in order for the parties to litigate in a more appropriate forum.

Accordingly, it is

ORDERED that the motion is granted and the complaint and counterclaims are dismissed without prejudice; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve upon defendant a copy of this order and notice of entry.

Dated: \_\_\_\_\_

4/13/09

HON. DORIS LING-COHAN



Hon. Doris Ling-Cohan, J.S.C.

**FILED**  
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