

Lai Fong Chan v Lee Chan

2019 NY Slip Op 31319(U)

March 11, 2019

Supreme Court, Queens County

Docket Number: 704557/2018

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

LAI FONG CHAN,

Index No.704557/2018

Motion
Date: January 16, 2019

Plaintiff,

Motion Cal. No. 9

Motion Sequence No. 1

-against-

LEE CHAN, DANDAN LIN AND CHOI ANG
CHENG A/K/A SAI YING ZHENG

Defendants.

The following efile papers numbered 12-16 and 20 submitted and considered on this motion by defendants LEE CHAN, DANDAN LIN and CHOI ANG CHEN (collectively referred to as "Defendants") for an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 327 to dismiss the Complaint with prejudice pursuant to forum non conveniens.

	<u>Papers Numbered</u>
Notice of Motion- Aff. In Support-Exhibits.....	EF 12-16
Aff. In Opposition.....	EF 20

This is a breach of contract case arising out of an oral agreement between the plaintiff LAI FONG CHAN (hereinafter referred to as "Plaintiff") and the Defendants involving real property located at Xian Ta Street Xiao Wang Fu No. 11 Gu Lou District, Fuzhou City, Fujian Province, China (hereinafter referred to as "Premises"). According to the Verified Complaint filed March 26, 2018, the parties were owners of two units within the Premises. The Premises were made up of three

units. The Defendant owned the floor 2 unit and the Plaintiff owned the floor 1 unit. According to the Plaintiff, in anticipation of condemnation of the Premises by the People's Republic of China (hereinafter referred to as "China") the Plaintiff spent a substantial amount of money, time and energy to partition the floor 2 unit of the Premises into three separate legal units which would result in individual deeds for each unit (hereinafter referred to as "Work").

The Plaintiff alleges that it incurred \$100,000 in Deed Partition Fees. The oral agreement was allegedly between Defendant Choi Ang Chen, her husband and the Plaintiff. The agreement was allegedly made in New York in 1999. According to the Plaintiff, the agreement stated that the Defendants would receive a loan (the \$100,000) from the Plaintiff to complete the Work. The agreement allegedly stated that upon condemnation by China, Defendants shall reimburse the Plaintiff for the Deed Partition Fees (referred to as a loan in the Opposition papers) with interest at the compound rate of 6% per annum. Furthermore, the Plaintiff alleges the agreement also guaranteed Plaintiff the Condemnation Fees. The defendant Choi and her husband allegedly pledged the original deed to their second floor unit to Plaintiff as a security for the loan. The condemnation occurred in late 2017, eighteen years after the alleged agreement. According to the Plaintiff, In December 2017, the parties engaged in several conversations and texts in New York concerning the manner in which payments would be made to Plaintiff. However, according to Plaintiff in January of 2018, the Defendants changed their minds and refused to make payment, effectively breaching the alleged agreement between the parties.

According to the Defendants, "The property condemnation process of the Municipal Government is ongoing and has yet to totally resolve the status of The Property, the compensation to be awarded, or the parties to whom the compensation is due" which disputes Plaintiff's entitlement to the Condemnation Proceeds.

The Defendants, now move pursuant to CPLR 327 to dismiss the action on the ground of forum non conveniens.

Defendants argue this case should be dismissed. According to the Defendants, the property is located in China, the alleged agreement was oral with no documentary evidence to support its existence. Furthermore, the privacy law recently enacted in China could result in difficulty obtaining records related to chain of title. Finally, the Defendants argue the total cost of obtaining witnesses in China with knowledge of the alleged Work, the lack of access to any physical evidence at the location where the Premises was once located, and finally the potential need for the application of Chinese law makes this case inappropriate for a Queens Court.

Both parties point to *Islamic Republic of Iran v. Pahlavi*. In *Islamic Republic of Iran v. Pahlavi*, the plaintiff brought the action against the defendant, the former ruler of Iran, and his wife. (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 477 [1984]). The plaintiff alleged that the defendant and his wife accepted bribes and misappropriated, embezzled or converted thirty-five billion dollars in Iranian funds breaching their fiduciary duty to the Iranian people. (*Id* at 477). The Appellate Division affirmed the Special Terms decision to grant the defendant's motion for dismissal based on forum non conveniens. (*Id*). On appeal the plaintiff argued that forum non conveniens should not have been granted because no alternative forum existed. (*Id* at 478). The Court of Appeals set forth a non-exhaustive list of factors that a court may consider when confronted with the common law doctrine of forum non conveniens the factors include: a. burden on New York courts, b. the potential hardship to the defendant, c. unavailability of an alternative forum where plaintiff could bring suit, d. both parties are non-residents and e. that the transaction upon which the cause of action is based primarily occurred in a foreign jurisdiction. (*Id* at 479). According to the court, no one factor is controlling, the doctrine is flexible based upon the facts of each case. The ruling must rest upon justice, fairness and convenience. (*Id*). The court affirmed the decision that a New York forum was improper because the genesis of the claims is Iran, Iranian law would likely need to be applied, both parties are non-residents and plaintiff's cause of action requires the court to make "a sweeping review of the conduct of the Shah's government during the 38 year reign" which would necessitate foreign witnesses. (*Id* at 480).

Addressing the plaintiff's argument that the non-existence of an alternative forum requires a different holding, the court stated it has never held that a prerequisite for applying the forum non conveniens doctrine is the availability of an alternative forum. (*Id* at 481). According to the court, the availability of an alternative forum is a pertinent factor but not a precondition to dismissal. (*Id*).

This Court will consider the factors set forth in *Pahlavi* in its analysis. The factors are as follows: a. burden on New York courts, b. the potential hardship to the defendant, c. unavailability of an alternative forum where plaintiff could bring suit, d. both parties are non-residents and e. that the transaction upon which the cause of action is based primarily occurred in a foreign jurisdiction. (*Id* at 479).

Burden on New York Courts

The Defendants' argue this Court is being called upon to resolve a real property dispute involving property located in China. The Defendants point out that New York State "is home to immigrants from more than 150 countries and immigrants from almost all those nations reside in Queens County". In consideration of the crowded civil dockets with complicated issues, the Defendants contend that this case should be resolved in China. Furthermore, Defendants point out that this Court will be burdened because it will have to apply Chinese law, interpret documents and hear testimony or receive other forms of evidence that will not be in English.

This Court notes, that notwithstanding the Defendants contention that immigrants from "150 countries" reside in New York State, this Court will not hesitate to hear those cases which, upon considerations of justice, fairness and convenience, are deemed appropriately before this Court.

The Plaintiff argues, the case involves New York residents, who made an oral agreement in New York. Furthermore, Plaintiff contends that while Chinese law is potentially applicable Defendants' fail to point out any conflict between Chinese and New York law.

The Defendants' point to *Phat Tan Nguyen v. Banque Indosuez*, in support of their contention that the potential applicability of Chinese law warrants granting dismissal on forum non conveniens grounds. In *Phat Tan Nguyen v. Banque Indosuez*, the plaintiffs were a part of an uncertified class of about 600 former employees of the defendants alter ego. (*Phat Tan Nguyen v. Banque Indosuez*, 19 A.D.3d 292 [1st Dept 2005]). The defendants were a French banking corporation, whose New York branch was being sued as an alter ego of its subsidiaries that were once located in Vietnam. The plaintiffs sought to recover benefits that were allegedly owed to them by the non-party French banking corporation whose then entities were forced to close its operations in Saigon, Vietnam. (*Id*). The court granted dismissal on the basis of forum non conveniens. (*Id at* 295). The court considered the applicability of foreign law which according to the court is "one factor which weighs in favor of dismissal on forum non conveniens grounds" (*Id at* 294). However, the court weighed several other factors before making its ultimate decision including: the non-residence of a majority of the parties, that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction, the relevant documents would be in French or Vietnamese, a majority of witnesses will be in France or Vietnam, and that France has more of an interest in regulating its own banking institutions. (*Id at* 295). According to the court, "no one factor is controlling" (*Id at* 294).

New York has specific Choice of Law rules in the event that a conflict of laws arises. This Court will not predetermine whether there will be a conflict of law scenario, nonetheless New York courts have been called upon in the past to interpret foreign law as noted in *Intertec Contr. A/S v. Turner Steiner Intl.* (*Intertec Contr. A/S v. Turner Steiner Intl., S.A.*, 6 a.d.3D 1,6 [1st Dept 2004]). With regard to the translation of documents the Court is well equipped with interpreters who can interpret Cantonese, Mandarin and a plethora of other languages. However, this Court will look to the remaining factors in making its final determination.

Potential Hardship to Defendant

Defendants' allege that it will experience hardship in attempting to subpoena key non-party

witnesses who currently reside in China. According to the Defendants the Plaintiff's allegations that it incurred \$100,000 in Deed Partition Fees completing the Work would require testimony from non-party witnesses who allegedly reside in China. These witnesses would testify to the costs that were incurred, the fees that were paid, contracts that were completed. Furthermore, there may be a need for documents located within the Chinese government.

In Plaintiff's Affidavit the \$100,000 amount is referred to as a loan. However, in the Verified Complaint this \$100,000 amount is referred to as Deed Partition Fees which is defined as "The costs for the partitioning, issuance of an individual deed for the Floor 2 unit and all application and processing fees incurred by Plaintiff for the Floor 2 Unit...". The Court notes that this is a huge discrepancy.

Nonetheless, in a dispute involving whether or not an oral agreement was made and if so, what the terms of such an agreement was, the key witnesses are the parties to that alleged oral agreement. Here, the alleged oral agreement was made in New York, all parties currently reside in New York, in fact, the witnesses who allegedly made the agreement both reside in New York. While China may be an appropriate forum, this Court declines to dismiss this case simply because there may be a need for non-party witnesses who may be Chinese nationals. Therefore, based on the facts in this case, this factor weighs in favor of keeping the case at bar, before this Court. However, this Court will continue to look at the remaining factors in making its final determination.

Unavailability of Alternative Forum

Defendants' contend that China is an appropriate alternative forum because the Premises was located there, Chinese law may be applicable and there may be a need for non-party witnesses who are Chinese Nationals. The Defendant also refers to *Sinochem Intern. Ltd. Co. v. Malaysia Intern. Shipping Corp.*, at issue was whether a Federal Court needs to establish its own jurisdiction before deciding whether dismissal is warranted pursuant to the doctrine of forum non conveniens. The action arose out of an agreement between the petitioner (Chinese company) and a non-party

corporation domiciled in the United States. (*Sinochem Intern. Co. Ltd. v. Malaysia Inten. Shipping Corp.*, 549 U.S. 422 [2007]). The agreement provided that the petitioner would purchase steel coils from the non-party and payment would be made under a letter of credit once the non-party produced a valid bill of lading certifying that the coils had been loaded for shipment to China on or before April 30, 2003. (*Id.*) The non-party sub-chartered a vessel owned by the respondent a Malaysian company, to transport the coils and hired a stevedoring company to load the coils in Philadelphia. A bill of lading, dated April 30, 2003, triggered the payment under the letter of credit. (*Id.*) However, the petitioner alleged the respondent falsely backdated the bill of lading and petitioned a Chinese admiralty court for preservation of a maritime claim against the respondent and arrest of the vessel. (*Id.*) The Chinese admiralty court, despite respondents objections to jurisdiction, ordered the vessels arrest. (*Id.*) Thereafter, the respondent filed this action in a US District Court. The District Court despite questions of its own jurisdiction, dismissed on forum non conveniens grounds finding that the case would be adjudicated more adequately in a Chinese court. (*Id.*) The Supreme Court held, a District Court has discretion to respond at once to a defendant's forum non conveniens plea, and need not address any other threshold objection. (*Id.* at 432). Specifically, the Supreme Court held there is no need to resolve issues of subject matter jurisdiction or personal jurisdiction when in any event, a foreign tribunal is the more suitable arbiter. (*Id.* at 425).

The Defendant asserts that this is evidence that the United States views China as an appropriate forum to settle disputes. This Court does not agree that the holding in *Sinochem* intended such a broad holding. However, this Court will not make a determination on the appropriateness of a Chinese forum because the remaining factors before this Court support denial of Defendants' request.

Non-Residency of Parties

Within *Sinochem* the Supreme Court notes "[A] defendant invoking forum non conveniens ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." (*Id.* at 430). Plaintiff points to a First Department case *Waterways Ltd. v. Barclays Bank PLC*, which similarly states "[I]t is well

established law that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” (*Waterways Ltd. v. Barclays Bank PLC*, 174 A.D.2d 324, 327 [1st Dept 1991]).

Plaintiff asserts that the Defendants have not fulfilled their burden of proving inconvenience because Defendants live in New York and have lived here “for decades” similar to the holding in *Intertec Contr. A/S v. Turner Steiner Intl., S.A.*

In *Intertec Contr. A/S v. Turner Steiner Intl., S.A.*, plaintiff entered into a subcontract with defendant to perform construction work on a high rise located in Sri Lanka. (*Intertec* at 1). The project was plagued by many delays and the plaintiff commenced the lawsuit seeking damages for the delays. (*Id* at 3). Defendants among other things moved for dismissal on grounds of forum non conveniens, contending that most of the parties are foreign, international witnesses would be necessary, and the work was performed in Sri Lanka. (*Id*). The plaintiff contended the defendant had a New York office and is incorporated in Delaware, its parent corporation’s board meetings have almost exclusively been held in New York, most of the defendants’ witnesses are Americans or American residents, and most of its non-party witnesses did not reside in Sri Lanka. (*Id* at 4). The court held, despite the fact that the cause of action had its genesis in Sri Lanka the defendants failed to demonstrate that they would suffer great hardship by remaining in New York. (*Id*). The court considered that the defendants’ corporations have offices in New York, have routine board meetings in New York and extensive pretrial discovery had taken place in New York. (*Id* at 5). Conversely the court found that the plaintiff would suffer severe hardship if compelled to initiate a new action in Sri Lanka since the current action had been pending so long in New York courts and that there was a civil war in Sri Lanka with multiple terrorist incidents. (*Id*). Furthermore, the court noted the potential application of the laws of Sri Lanka would not be an unnecessary burden “since our courts are frequently called upon to apply the laws of foreign jurisdictions” (*Id* at 6).

Transaction That Gives Rise To Cause of Action Primarily Occurred In A Foreign Jurisdiction

As was the case in *Intertec Contr. A/S v. Turner Steiner Intl*, the transaction that gives rise to this action has a connection to China in that the Premises was located in China. However, upon consideration of the other factors set forth in *Islamic Republic of Iran v. Pahlavi*, the court in *Intertec*, ultimately decided to keep the case in New York. Here, while the basis of the oral agreement was a property in China the oral agreement occurred right here in New York. Therefore, based on the facts in this case, this factor weighs in favor of keeping the case at bar, before this Court.

This Court recognizes a decision regarding forum non conveniens has far reaching effects including potentially requiring the parties (all of which are New York residents) to travel to the other side of the world to litigate this case. This Court has taken the factors set forth in *Pahlavi*, in consideration in making its determination. While the potential application of foreign law and the need for an interpreter of both documents and testimony weigh in favor of dismissal pursuant to CPLR 327, consideration of all the *Pahlavi* factors leads this Court to a different conclusion. Both parties reside in New York. The agreement was made in New York. New York Choice of Law rules and availability of interpreters that speak a plethora of languages ease any potential burden on this Court. Therefore it is,

ORDERED, that Defendants' motion pursuant to CPLR 327 to dismiss this case on grounds of forum non conveniens is denied.

This constitutes the decision and Order of the Court.

Dated: March 11, 2019



Hon. Chereé A. Buggs, JSC

