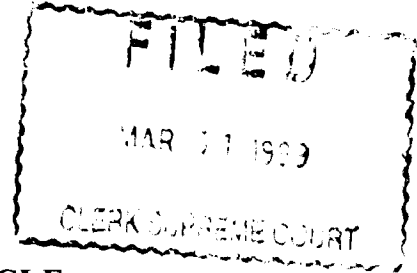


IN THE COURT OF APPEALS OF IOWA

No. 9-061 / 97-0727
Filed March 31, 1999



BELL SECURITY INC.,
Plaintiff-Appellant,

vs.

**JOHN BARONE, LEE ENTERPRISES, INC., CHRONICLE
PUBLISHING COMPANY, OMAHA WORLD HERALD
COMPANY, DEBORAH WARD, MIKE McKNIGHT, PAT
PERSAUD, CHRIS BURBACH, PULITZER BROADCASTING
COMPANY, PAPPAS TELECASTING CORPORATION OF
THE MIDLANDS, JOHN F. BARONE COMPANY, THE
ASSOCIATED PRESS, TAMARA BOWEN, and JOHN MASON;**
Defendants-Appellees.

Appeal from the Iowa District Court for Pottawattamie County, Timothy
O'Grady, Judge.

Plaintiff appeals from the district court's ruling Iowa was an inconvenient
forum to litigate defamation claims against certain defendants. **AFFIRMED.**

Bruce B. Green of Willson & Pechacek, P.L.C., Council Bluffs, for appellant.

Cynthia A. Rismiller until withdrawal and then Jill Ackerman of Baird, Holm,
McEachen, Pedersen, Hamann & Strasheim, Omaha, Nebraska, for appellee
Chronicle Publishing Company.

Michael C. Cox of Koley, Jessen, Daubman & Rupiper, P.C., Omaha, Nebraska, and John Heisterkamp of the Peters Law Firm, Council Bluffs, for appellees Omaha World-Herald Company, Pulitzer Broadcasting Company, Pappas Telecasting Corporation of the Midlands, and the Associated Press.

Shawn D. Renner of Cline, Williams, Wright, Johnson & Oldfather, Lincoln, Nebraska, and W. Curtis Hewett of Smith, Peterson Law Firm, Council Bluffs, for appellee Lee Enterprises, Inc.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Plaintiff-appellant Bell Security, Inc. appeals contending the district court erred in dismissing its claims against certain defendants-appellees on the basis of a finding Iowa was a *forum non conveniens*. We affirm.

Plaintiff, a corporation licensed and doing business in Nebraska, brought this action contending defendants defamed it through news reports and broadcasts in April of 1995. Defendants-appellees Omaha World Herald Company, a Nebraska corporation which publishes a newspaper, the *Omaha World Herald*; Pulitzer Broadcasting Company, incorporated in Delaware and owning and operating Omaha television station KETV; Pappas Telecasting Corporation of The Midlands, owning and operating KPTM/Fox42, an Omaha television station; The Associated Press, a New York corporation which gathers and disseminates news throughout the United States, which news is published by the *Lincoln Journal-Star*; Chronicle Publishing Company, owning and operating WOWT-TV, an Omaha-based television station; and Lee Enterprises, Inc., a Delaware-based corporation owning KMTV, an Omaha-based and licensed television station, filed motions to dismiss contending Iowa was not a convenient forum, which the district court sustained.¹

Plaintiff was in the business of telemarketing, selling, installing, and contracting monitoring services for AT&T home alarm systems in Nebraska and

¹ Defendants Deborah Ward, Mike McKnight, Pat Persaud, Chris Burbach, Tamara Bowen, and John Mason moved to dismiss claiming absence of personal jurisdiction. Their motions were sustained and are not a subject of this appeal. Defendants John Barone and John F. Barone Company filed motions and are not a part of this appeal.

western Iowa. On November 10, 1994, Omaha police officers arrested Karl Erickson, a former employee of plaintiff, in connection with an incident where an older woman was allegedly defrauded out of \$12,000. The officer also had information another of plaintiff's former employees, Scott Ziegler, allegedly borrowed money from an older customer of plaintiff to start a competing home alarm business.

Plaintiff claims, based on this information and without any evidence suggesting plaintiff corporation had any responsibility for the criminal actions of either men, the Omaha police department obtained a search warrant to search plaintiff's premises. The warrant issued but was never filed with the Clerk of Court for Douglas County, Nebraska, or any other court.

Before the warrant was executed, the Omaha Police Department faxed a press release to news media, including appellees here, serving Nebraska and western Iowa. The press release said the police department's fraud units, United States secret service agents, and detectives of the Lincoln police department were in the process of serving search warrants at plaintiff's Omaha and Lincoln business locations. The release also alleged a suspect in what was referred to as a "911 scam" was a former employee of plaintiff, and the department believed plaintiff was targeting older citizens as potential clients and, while not a violation of any statute, plaintiff was selling alarm systems at two to three times the cost of comparable systems sold by its competitors, and the department believed plaintiff was in violation of the Nebraska Adult Protection

Services Act. On the same day, the statements were broadcast by certain defendants, including appellees, and reached people in Nebraska and western Iowa.

Plaintiff contends the statements in the release it targeted older citizens as clients and sold alarms at two to three times the cost of comparable systems and engaged in practices in violation of the Nebraska Adult Protection Services Act and the inferences it was engaged in a "911 scam" are false. Plaintiff claims it was damaged as the result of actions of the broadcast of the information.

On April 17, 1996, plaintiff filed suit in the United States District Court for the District of Nebraska against the City of Omaha and certain police officers, certain of plaintiff's competitors, and the named appellees for violating 42 U.S.C. § 1983, Nebraska defamation law, and the Nebraska Unfair Competition Act. Appellees moved to dismiss the claim for failure to state a cause of action. The motion was sustained with respect to plaintiff's 42 U.S.C. § 1983 claim. The federal court did not rule on the claims which are the basis of this case. Rather, the federal court declined to exercise jurisdiction over them. Plaintiff, on January 17, 1997, then filed this suit in the Iowa District Court for Pottawattamie County. The district court dismissed the claims on defendants' motion the forum was not convenient. This appeal followed. The Supreme Court found the appeal interlocutory but granted permission to take it.

Plaintiff contends the district court erred in dismissing the claims on the ground of forum non conveniens.

We review for an abuse of discretion. Application of the forum non conveniens doctrine lies in the sound discretion of the trial court. *Silversmith v. Kenosha Auto Transp.*, 301 N.W.2d 725, 728 (Iowa 1981). We will accord considerable deference to a trial court's ruling in such cases. *Id.* However, if the decision is based on an improper legal standard, we review for correction of errors at law.

Forum non conveniens is a facet of venue under which a court can decline to proceed with an action, although venue and jurisdiction are proper. *See Douglas Machine & Engraving Co. v. Hyflow Blanking Press Corp.*, 229 N.W.2d 784, 791 (Iowa 1975). The doctrine was developed as a means of protecting a defendant from having to defend in an unreasonably inconvenient forum. *Hoth v. Sexton*, 539 N.W.2d 137, 139 (Iowa 1995). It is a self-imposed limit used to avoid unfair, vexatious, and oppressive actions in a forum away from the defendant's domicile. *Silversmith*, 301 N.W.2d at 726-27. It came in response to the expansion of personal jurisdiction derived from long-arm statutes. *See id.* at 726.

The Iowa Supreme Court first considered the doctrine of forum non conveniens in *Rath Packing Co. v. Intercontinental Meat Traders, Inc.*, 181 N.W.2d 184 (Iowa 1970). There, the supreme court said the doctrine may only be invoked "when the facts of the particular case show it would be inequitable to take jurisdiction of a cause of action even though the court might have the power to do so, it is rarely applied." *Id.* at 190-91. It was considered again in *Silversmith*. There, the supreme

court related that neither the desire of a party for another forum or a showing the claim arose elsewhere is sufficient reason to sustain a dismissal on the grounds of forum non conveniens. *See Silversmith*, 301 N.W.2d at 727. The supreme court went on to say, rather, the party making the motion must show the inconveniences are so unbalanced that jurisdiction should be declined on an equitable basis. *See id.*; *see also In re Marriage of Kimura*, 471 N.W.2d 869, 878 (Iowa 1991).

We look to reasons advanced by defendants in support of their motion to see if the district court was correct in finding they met this burden.

Defendant Lee Enterprises, Inc. advances this is a Nebraska-based dispute based on Nebraska law that has little relationship to Iowa, and all evidence and proof is in Nebraska. Lee contends plaintiff is a Nebraska corporation and its sole places of business are in Omaha and Lincoln, Nebraska. It argues defendants-appellees are Omaha-based broadcasters and publishers, and plaintiff's claims against its station, KMTV, are based on statements made by Omaha police officers and a search warrant issued by a Nebraska judge. It further advances while plaintiff claims to have sold products in western Iowa, if it did so, it was done illegally. Lee alleges all evidence concerning the suit occurred in Nebraska.

Defendants Omaha World-Herald Company, Pulitzer Broadcasting Company, Pappas Telecasting Corporation of The Midlands, and The Associated Press advance additionally with most witnesses in Nebraska, a district court in Iowa is without subpoena power. They further point out plaintiff had few customers in Iowa.

Defendant Chronicle Publishing Company says its inability to compel attendance of witnesses may hinder its defenses. It contends the court records concerning the search warrant are in Nebraska.

Plaintiff contends (1) defendants routinely do business in Iowa; (2) defending in Council Bluffs in Pottawattamie County, Iowa, provides little inconvenience for defendants from Omaha in Douglas County, Nebraska; (3) part of plaintiff's injuries occurred in Iowa; and (4) necessary witnesses can be deposed in Nebraska.

Plaintiff further contends the statute of limitations has now run under Nebraska law and because of that there was no other forum to prosecute its claim. Plaintiff contends the court may apply the doctrine only if there is another available forum where the trial will better serve the convenience of the parties and justice. *See Douglas Machine*, 229 N.W.2d at 791.

The district court found at the time it ruled on the motion plaintiff, a foreign corporation, did not have a certificate of authority issued by the Iowa Secretary of State and, consequently, under Iowa Code section 490.1502(1) (1995) could not maintain a proceeding in an Iowa court. The court denied defendants' dismissal on that basis finding plaintiff stated it had applied for the certificate. Plaintiff represented to this court the certificate has been received. We decline to affirm the dismissal on this basis.

While recognizing factors to consider in deciding whether a forum is not convenient may be difficult to articulate, the Iowa Supreme Court in *Silversmith* set

forth certain factors that may be considered. *Silversmith*, 301 N.W.2d at 727. The court pointed out important considerations are the relative ease of access to sources of proof; availability of the compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Id.*

The district court, in granting the motion, found it was not prepared to say the litigation had no relation to Iowa and said, in part:

Virtually all sources of proof in this case will be found in Nebraska. . . . The actions of the Omaha police officers were the genesis of this suit. . . . [T]hey are beyond the subpoena power of the Iowa courts. While [plaintiff] is correct that their depositions could be used in court in their stead, the Court believes their absence could leave the Defendants unable to properly defend against [plaintiff's] claims. The same subpoena problems are true of the customers who were allegedly targeted by [plaintiff].

. . . .
It appears that, under the "most significant relationship test" employed in Iowa, Nebraska substantive law will apply in this case. . . .

. . . .
. . . [Plaintiff] has its principal place of business in Douglas County, Nebraska and is incorporated in Nebraska. . . . [I]t is unclear just how much business [plaintiff] did in Iowa.

We generally agree with these findings. The record before us does not support a finding there is not a convenient forum to litigate the issues.

We affirm.

AFFIRMED.