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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GARY S. GILL, II)
Plaintiff-Appellant,)
vs)
CATERPILLAR TRACTOR CO.)
Defendant-Appellee.)

Filed August 29, 1985

5-228
84-1285

Appeal from the Iowa District Court for Scott County, C. H. Pelton, Judge.

The plaintiff has appealed from the conditional dismissal of his Iowa suit. He challenges the conclusion that the doctrine of forum non conveniens requires the suit to be brought in Illinois rather than Iowa. REVERSED AND REMANDED.

Gary S. Gill, Sr., Des Moines, for the plaintiff-appellant.

Richard M. Bather of Bozeman, Neighbour, Patton & Noe, Moline, Illinois, for the defendant-appellee.

Considered by Oxberger, C.J., Schlegel, and Sackett, JJ.

The plaintiff has appealed from the trial court's dismissal of his action against Caterpillar Tractor Company on the ground of forum non conveniens. We reverse and remand.

The dismissal occurred after the plaintiff, Gary Gill II, brought his petition against Caterpillar, alleging wrongful discharge. The facts of the case are taken from the petition. Since the dismissal followed a motion to dismiss by defendant, the court accepts the facts pleaded as true, and resolves all doubts in the plaintiff's favor. Stafford v. Valley Community School District, 298 N.W.2d 307, 308 (Iowa 1980).

Gary Gill was a student at the University of Iowa when Caterpillar came to the university to recruit students. Gill interviewed with the company, but took a job elsewhere. He was later interviewed by a Caterpillar employee at the Scott County plant in Iowa. Gill visited Peoria, Illinois, on two occasions to discuss employment with the company and visit the community. Final negotiations were initiated by a phone call from Gill with a Caterpillar employee. Gill worked for Caterpillar as an accountant and was absent from work on March 26, 1982. He was discharged on March 29, 1982. Gill claims this is contrary to the company's employment policies indicating an employee will be discharged only if absent from work for three days. Caterpillar is a corporation incorporated in the state of California and authorized to do business in Iowa. It employs 1800 persons at its Scott County plant.

The Supreme Court case discussing forum non conveniens at length is Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). There, the court recognized the doctrine, but emphasized it applied only in exceptional circumstances where consideration of the interests of the litigants shows the balance is "strongly" in favor of the defendant. Id. at 508, 67 S. Ct.

at 843, 91 L. Ed. at 1062. The plaintiff's choice of forum should be rarely disturbed. Id. The doctrine arose because of the possibility a plaintiff would choose an inconvenient place for the defendant with the purpose of harassing the opponent. Id. at 507, 67 S. Ct. at 842, 91 L. Ed. at 1062. While cautioning against a laundry list of factors to be used in such decision, the court outlined the important considerations. Factors involving the private interest of the litigants included the ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining willing witnesses; the possibility of viewing the premises if that would be appropriate to the action; and other practical problems making trial of the case easy, expeditious, and inexpensive. Id. at 508, 67 S. Ct. at 843, 91 L. Ed. at 1062. Public interest factors include whether the trial is brought in a judicially congested center; whether jury duty will burden a community with no interest in the litigation; and whether the forum is at home with the state law that must govern the case. Id. at 508, 67 S. Ct. at 843, 91 L. Ed. at 1062-63. The court has discretion in its decision regarding grant or denial of dismissal on the basis of the doctrine, since "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." Id. at 508, 67 S. Ct. at 843, 91 L. Ed. 2d at 1062. (footnote omitted).

Iowa dealt with the question of forum non conveniens in Silversmith v. Kenosha Auto Transport, 301 N.W.2d 725, 727 (Iowa 1981) and stated the defendant has the burden of proving the inconvenience of the forum. The ability of the respective parties to bear the expenses of travel is a factor the courts will consider. Id. at 728.

In a memorandum addressed to the trial court judge below, and included in our record on review, these two cases and the factors set out in them were

reviewed, with the conclusion Illinois was the better forum. In the memo, it was noted that the usual deference accorded a plaintiff in the choice of forum has been reduced to a factor in the balancing process citing Silversmith, at 727.

We do not agree that the residence of the plaintiff is only one of many factors to consider. The supreme court on page 728 of Silversmith, concluded: "Thus, residence of the plaintiff is not a controlling factor when other considerations point strongly in another direction." (emphasis added). The court merely indicated the plaintiff's residence does not create an irrebuttable presumption in favor of that forum. The Eighth Circuit recently applied Iowa law in a case of forum non conveniens and emphasized the importance of the factor. Noting that the trial court is given discretion in such matters, the court quoted from a case which stated, "Emphasis on the district court's discretion, however, must not overshadow the central principle of the Gilbert doctrine that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' " Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 342 (8th Cir. 1983)(quoting from Manu International, S.A. v. Avon Products, 641 F.2d 62, 65 (2d Cir. 1981)). The court further clarified, "Thus, the plaintiff's choice of forum is more than just one factor that the trial judge must consider when balancing equities between two alternative forums." Id. (quoting from Pain v. United Technologies Corp., 637 F.2d 775, 783 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981)). The court in Lehman found significant that the plaintiff was in Iowa, witnesses were employees of Holiday Inn, who could be brought to Iowa by the company, and the defendant was in a better financial condition to weather the expenses. Id. at 343-45. The court also found important Iowa's interest in providing a forum for its injured residents, a factor "neither insignificant or absent." Id.

at 344. The fact that the defendant actively solicited business in Iowa and the United States also weighed in favor of denying dismissal. Id. at 347.

In a case with a similar fact situation, the court noted in dicta that forum non conveniens would not apply. The plaintiff was an Iowa resident who negotiated an employment contract with a Saudi Arabian corporation through its Iowa intermediary. Powell v. Khodari-Intergreen Co., 303 N.W.2d 171, 172-73 (Iowa 1981). The contract was to be wholly performed outside the United States. Id. at 73. The breach of contract occurred in Saudi Arabia. Id. The court noted the defendants had conceded, "the inapplicability of forum non conveniens" and added "were we to apply the Silversmith principles to the facts of this case, we would conclude that the most appropriate forum for the litigation of (plaintiff's) claims is in Iowa." Id. at 174.

Another Iowa case reviewed the factors providing in personum jurisdiction over a defendant, and reviewed those factors regarding forum non conveniens as well. Douglas Machine & Engineer Co., Inc. v. Hyflow Blanking Press Corporation, 229 N.W.2d 784, 791 (Iowa 1975). Among significant factors was defendant's acts in soliciting business in Iowa. Id. Plaintiff was an Iowa corporation, defendant a New York Corporation, the acceptance of the contract was mailed from Iowa, the press which plaintiff purchased was sent from New York, and service and repair was to occur in Iowa. Id. at 787-88. Noting that forum non conveniens is rarely used, the court denied dismissal on that basis. Id. at 792. Along the same line is Rath Packing Co. v. Intercontinental Meat Traders, Inc., 181 N.W.2d 184, 190 (Iowa 1970) where, although there were considerable factors weighing in favor of Illinois as a more convenient forum, dismissal was denied.

In this case plaintiff is an Iowa resident, and the defendant does business in the county where the action was brought. Gill says those 1800 employees there will be affected by his case since it deals with the company's employment practices. The initial interview occurred in Iowa City, and another interview occurred at the Scott County plant. Final negotiations and acceptance by Gill were initiated by his phone call from Iowa. Gill notes that the travel distance to the trial site in Scott County is only thirty miles more for defendant than it is for him. Further, defendant is in a better position to handle the expenses, since it lists $5.4 billion in sales for 1983. 515 Standard NYSE Stock Report, No. 48 § 7. Gill has provided statistics on the case load in Scott county which shows that the Seventh District is ranked fourth out of eight Iowa districts in civil cases docketed in 1983 and sixth in the number of civil cases pending as of December 31, 1983. Gill also claims Iowa law will apply to the case since the factors set out Wilmotte & Co. v. Rosenman Bros., 258 N.W.2d 317, 326 (Iowa 1977) show that under conflict of law rules Iowa has the most significant relationship to the case.

Caterpillar points out that Gill went to Peoria two times for interviews and was working there when he was terminated. They say the offer of employment was extended there and the persons who decided to terminate Gill are also in Illinois. In regard to its financial condition, Caterpillar notes a $345 million loss in 1983. Caterpillar also claims Illinois law would apply to the facts of the case.

In applying the considerations set out at the cases cited, we find numerous contacts with both states. Of considerable importance is plaintiff's choice of forum. Partial performance of the contract occurred in Illinois, although Gill's work there was temporary and he did not know where he was to be perma-

nently located. Despite Caterpillar's losses, it is in a significantly better condition to handle the expenses than is a graduate student at an Iowa university. It should have no trouble in obtaining its own employees as witnesses. As the cases we have reviewed indicate, the fact Caterpillar came to Iowa to recruit workers is important, along with the fact the interviews and part of the negotiations occurred in Iowa. Without deciding the issue, we are not convinced Illinois law would apply to the case since it is not entirely clear where the contract was concluded, although many of the negotiations occurred here, and the place where most of the performance was to occur was Illinois. It is, at best, a close question. The courts have indicated that where the question is close, dismissal under forum non conveniens is not proper. See Lehman, at 342.

We find dismissal under forum non conveniens is not proper and reverse the trial court. We remand to reinstate the action.

REVERSED AND REMANDED.