

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

PRESENT: KAPNICK
Justice

PART 12

TWITTY, ELIZABETH ANN,
ET AL

INDEX NO. 102254/06

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
JORAN VAN DER SLOOT,
ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

AUG 04 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/3/06

[Signature]
ESTHER R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
ELIZABETH ANN TWITTY and DAVE EDWARD
HOLLOWAY,

Plaintiffs,

- against -

JORAN VAN DER SLOOT and PAULUS VAN DER
SLOOT,

Defendants.
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 102254/06
Motion Seq. No. 001

Plaintiffs Elizabeth Ann Twitty, a resident of Alabama, and Dave Edward Holloway, a resident of Mississippi, commenced this action against defendant Joran van der Sloot, a resident of the Netherlands, and his father, Paulus van der Sloot, a resident of Aruba.

Plaintiffs allege that defendant Joran van der Sloot sexually assaulted and falsely imprisoned their daughter, Natalee Holloway, during her high school graduation trip to Aruba in May 2005. The Complaint asserts claims against Joran van der Sloot for injuries suffered by their minor child arising out of her false imprisonment and for intentional and malicious interference with custodial relations. The Complaint also asserts a claim against defendant Paulus van der Sloot for failing to take reasonable steps to prevent his son from sexually assaulting Natalee Holloway.

Defendants now move by Order to Show Cause for an Order (i) pursuant to CPLR § 2004 extending the time within which the defendants have to appear, answer or otherwise move with respect to

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the summons and complaint herein, including, but not limited to, challenging the jurisdiction of this Court, and/or moving to dismiss the Complaint under CPLR § 3211 pending the determination of the instant motion; and (ii) pursuant to CPLR § 327(a) dismissing this action in its entirety, in the interests of substantial justice, as this Court is an inconvenient forum.

That portion of the motion in which defendants seek an extension of time within which they have to appear, answer or otherwise move with respect to the summons and complaint was resolved pursuant to Stipulation dated March 8, 2006, which extended defendants' time to ten days following entry of this Court's Decision/Order on that portion of the instant motion seeking to dismiss on forum non conveniens grounds.

Discussion - Forum Non Conveniens

The common-law doctrine of *forum non conveniens*, also articulated in CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere (see, generally, Siegel, NY Prac, § 28; 1 Weinstein-Korn-Miller, NY Civ Prac, par 327.01, pp 3-469 -- 3-470).

Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 478-479 (1984),
cert. den. 469 U.S. 1108 (1985).

The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (citations omitted) and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered

are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (citations omitted). The court may also consider that both parties to the action are nonresidents (citation omitted) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (citation omitted). No one factor is controlling (citations omitted). The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case (citations omitted). The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court (citations omitted).

Islamic Republic of Iran v. Pahlavi, *supra* at 479.

Burden on the New York Courts

Certainly, great deference must be afforded to plaintiffs' choice of forum in the first instance. "It 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 ...' (*Gulf Oil Corp. v Gilbert*, 330 U.S. 501, 508 [1947]; *Bata v Bata*, 304 N.Y. 51, 56 [1952]; *Hacohen v Bolliger Ltd.*, 108 A.D.2d 357, 360 [1985]." *Waterways Ltd. v. Barclays Bank*, 174 A.D.2d 324, 327 (1st Dep't 1991).

However, the Court of Appeals has held that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." (*Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356,

361 (1972). See also, Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Limited, 9 A.D.3d 171, 176 (1st Dep't 2004).

Defendants argue that the resolution of this case will undoubtedly involve the application of foreign law and the need for expert testimony to explain that law, as well as the necessity to translate thousands of documents from Dutch into English. While New York Courts are frequently called upon to apply the law of foreign jurisdictions (see, Anagnostou v. Stifel, 204 A.D.2d 61, 62 [1st Dep't 1994]), the applicability of foreign law has been held to be an appropriate concern on a forum non conveniens motion. See, Nguyen v. Banque Indosuez, 19 A.D.3d 292 (1st Dep't 2005) lv. den. 6 N.Y.3d 703 (2006); Shin-Etsu Chem. Co., Ltd. v. ICICI Bank, Ltd., supra at 178; Bewers v. American Home Prods. Corp., 99 A.D.2d 949, 950 (1st Dep't 1984) aff'd 64 N.Y.2d 630 (1984).

Plaintiffs contend that this Court has an interest in insuring that Aruba is made a little bit safer for the many thousands of New York residents who travel there each year. However, defendants dispute that Aruba is a dangerous venue and point out that tourism, which may have declined slightly after May of 2005 for a combination of reasons, is still a major source of income for Aruba.

In any event,

the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its

subject matter to the State of New York is so ephemeral (citations omitted).

Islamic Republic v. Pahlavi, supra at 483.

Potential Hardship to the Defendants

Plaintiffs argue that defendants cannot claim undue hardship or inconvenience if they are compelled to litigate this action in New York since defendant Joran van der Sloot voluntarily traveled to New York in February 2006 for an interview which appeared on the ABC News Programs *Primetime* and *Good Morning America*.

However, it appears that defendant's flight to New York and hotel arrangements for these interviews was paid for by ABC, and that defendants would, very likely, be subject to economic hardship if required to travel to New York, at their own expense, to participate in the various stages of this litigation.

Plaintiffs argue that jurisdiction should nonetheless be retained in New York because potential witnesses in this case, including many of Natalee Holloway's friends who were with her in Aruba, as well as certain agents of the F.B.I., reside in the United States. However, it is not clear that these witnesses would, in fact, be unable to travel to Aruba to testify or to what extent their testimony would be relevant and not cumulative.

In addition, plaintiffs contend that a 17-year old woman, who is initially unidentified, but subsequently named in the papers as

Karen Martina, alleges that she is a prior victim of a sexual assault purportedly committed by defendant Joran van der Sloot. Plaintiffs claim that her lawyer, Helen Lejuez, who at one time represented Elizabeth Twitty, has represented that she is not willing to testify in Aruba, but that she will probably testify in New York if her safety is assured.

Defendants' counsel, however, also claims to have spoken to Ms. Martina and has submitted an affidavit in which she indicates that Joran never did anything improper to her, that she is willing to testify in Aruba and that she "would not be able to afford to go to New York to testify on behalf of Joran Van der Sloot."¹

Moreover, it appears that were the case to be retained in New York, the defendants would be prejudiced by their inability to subpoena other key witnesses, including law enforcement personnel, who are located in Aruba. See, e.g., Nicholson v. Pfizer, Inc., 278 A.D.2d 143 (1st Dep't 2000), in which the Appellate Division, First Department, held that dismissal on the ground of forum non conveniens was warranted where certain key witnesses were located

¹ Plaintiffs' counsel made reference during the oral argument to a supplemental affidavit from Ms. Lejuez in which she firmly stands by her story that Karen Martina went to an Aruban government lawyer who brought her to Ms. Lejuez to make a complaint about the defendant. However, this affidavit was not submitted due to its production for the first time in Court during the oral argument.

in New Jersey, and thus beyond the reach of New York's subpoena power.²

Defendants also contend that they would be unable to implead third parties into this case such as the beach patrol, who were charged with the responsibility of guarding people who were on the beach that night, as well as the casinos, bars and hotels in Aruba, if the action remains in New York, as they would have no jurisdiction over them.

Alternative Forum

Although plaintiffs argue that pre-trial discovery in Aruba would be much more limited than the broad discovery afforded in this jurisdiction, the courts of the Kingdom of the Netherlands, of which Aruba is a constituent part, have been found to present an appropriate alternative forum in which to bring suit (see, Stoomhamer Amsterdam N.V. v. CLAL (Israel) Ltd., 204 A.D.2d 186 [1st Dep't 1994]; Obex Trading Corp. v. Maraven, S. A., 68 A.D.2d 841 [1st Dep't 1979]).

² Although plaintiffs argue that defendants could compel witnesses located in Aruba, under the provisions of the Hague Convention, to offer testimony at a deposition, there is no dispute that there is no mechanism for this Court to compel these foreign witnesses to offer live testimony at a trial in New York. See, Strategic Value Master Fund, Ltd. v. Cargill Financial Services Corp., 421 F. Supp.2d 741, 768 (S.D.N.Y. 2006) which held that "[t]he fact that defendant's nonparty witnesses are not subject to the Court's compulsory process weighs heavily in favor of dismissal."

Plaintiffs further argue that Aruba does not present a viable alternative forum in this case because the prosecutor in charge of the criminal investigation, Karin P.J. Janssen, the Chief Prosecutor of the Public Prosecution Service of Aruba, has submitted a letter addressed to Mr. John Kelly, Esq., one of plaintiffs' attorneys, stating that she personally believes that the presence in Aruba of the civil case would result in renewed media attention and media representatives traveling to Aruba which would have a negative effect on the ongoing investigation. However, her statement that it would be better to settle the civil proceedings in the New York courts is her personal opinion, and she writes in a subsequent letter to Mr. Tacopina that she does not have the authority to speak on behalf of the Aruban Government, but was rather writing "on behalf of the Public Prosecution Service of Aruba."

It appears to this Court that wherever this civil case proceeds there will be an enormous amount of media attention and press coverage, both in Aruba, in New York and elsewhere.

In addition, plaintiff Elizabeth Twitty indicates that she fears returning to Aruba because of an alleged incident and threat she received in September 2005 during a prior visit to the island. However, she has since returned, albeit briefly, to Aruba in November 2005 to give a statement to the Aruban police department, and it is not clear that adequate security arrangements could not be made to alleviate Ms. Twitty's concerns.

Moreover, "although federal courts require an alternative forum for a forum non conveniens dismissal, New York courts do not where the New York connection to the litigation is minimal (see *Shin-Etsu Chem. Co. Ltd. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 179 [2004])." *Wyser-Pratte Management Co., Inc. v. Babcock Borsig AG*, 23 A.D.3d 269, 270 (1st Dep't 2005).

Residency and Situs of The Occurrence

Plaintiffs submit that the fact that none of the parties to the action are New York residents is not dispositive. See, *National Car Rental Systems, Inc. v. La Concorde Compagnie D'Assurance*, 283 A.D.2d 249 (1st Dep't 2001).

While plaintiffs are correct that the residency of the parties is not always determinative, "[i]t is also well settled that acceptance of a suit between nonresident parties, based upon an out-of-State tort, is appropriate only upon a showing of special and unusual circumstances, none of which are evident here". *Healy v. Renaissance Hotel Operating Co.*, 282 A.D.2d 363, 364 (1st Dep't 2001). See also, *Economos v. Zizikas*, 18 A.D.3d 392, 393 (1st Dep't 2005).

Conclusion


Accordingly, based on the papers submitted and the oral argument held on the record on May 17, 2006, and after weighing all the factors set forth in *Islamic Republic of Iran v. Pahlavi*,

supra, this Court finds that New York is not a convenient forum for litigating the instant dispute which "has no discernible connection to New York but a very substantial nexus to" Aruba. Hbouss v. Bank of Montreal, 23 A.D.3d 152 (1st Dep't 2005). See also, Finance and Trading Ltd. v. Rhodia S.A., 28 A.D.3d 346 (1st Dep't 2006); Economos v. Zizikas, supra; Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Limited, supra.

This Court, therefore, grants defendants' motion to dismiss this action on the ground of *forum non conveniens*. The Clerk may enter judgment dismissing plaintiffs' Complaint without prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: August 3, 2006



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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