IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID WILLIAMS,

Plaintiff,

v.

MICHAEL WILSON, M.D.,

Defendant.

MEMORANDUM AND ORDER

05-C-227-S

Plaintiff David Williams commenced this action for monetary relief alleging that Defendant Michael Wilson, M.D. received and held money belonging to plaintiff and accordingly has been unjustly enriched. Alternatively, plaintiff alleges defendant breached a "de facto" contract for the sale of property by failing to deliver title to plaintiff. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332(a)(1). The matter is presently before the court on defendant's motion to dismiss based on the doctrine of forum non conveniens. The following relevant facts are undisputed.

BACKGROUND

Plaintiff is a resident of the State of Texas. Defendant is a resident of Wisconsin and holds dual citizenship in the United States and New Zealand. On October 4, 2004 plaintiff sent defendant a letter alleging that he had transferred $368,880.00 to defendant's bank account for the purchase of Lot 2, Scenic Drive, Bilambil Heights, which is located in Australia. The letter also alleges that

when plaintiff tried to sell the land, he learned that title to the property had been transferred to defendant's sister in New Zealand. Accordingly, plaintiff demanded that defendant return the $368,880.00 to him within 10 days.

Defendant admits that he did in fact have $368,880.00 wired to his bank account on or about May 9, 2003. However, he alleges that he does not know if the funds he received were from plaintiff and alleges that he never entered into a contract with plaintiff for the sale of his land. Accordingly, defendant did not return any money to plaintiff.

Plaintiff commenced this action on April 14, 2005 and defendant filed his answer on May 3, 2005. His motion to dismiss based on the doctrine of forum non conveniens is presently before the court.

MEMORANDUM

Defendant argues that the courts of Australia are the proper forum for the present action because most of the witnesses reside in Australia , all of the documents relevant to the controversy are located in Australia and because the property itself is located in Australia. Plaintiff argues the Western District of Wisconsin is the proper forum because the action involves a dispute between two United States Citizens, there are no factors that indicate Australia is the most convenient forum and because the time and expense to litigate the action in Australia would be overwhelming.

The first step in any forum non conveniens inquiry is to decide whether there is an adequate alternative forum available to hear the case. Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 802 (7th Cir. 1997) *citing* (Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 102 S.Ct. 252, 265 (1981)). An alternative forum is available if all the parties are "amenable to process and are within the forum's jurisdiction." Id. at 803 *citing* (In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165

(5th Cir. 1987) (en banc), *partially vacated on other grounds*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989)). An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly. Id. *citing* (Piper, 454 U.S. at 255, 102 S.Ct. at 265-66).

Provided an adequate alternative forum exists the court must then balance the private and public interests that emerge in the case. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). The factors pertaining to the private interests of the parties include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling (witnesses), 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 factors pertaining to the public interest include:

> administrative difficulties stemming from court congestion; the local interest in having localized disputes decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Kamel, 108 F.3d at 803 *citing* (Piper, 454 U.S. at 241 n.6, 102 S.Ct. at 258 n. 6.).

Additionally, there is ordinarily a strong presumption in favor of plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point toward a trial in the alternative forum. Piper, 454 U.S. at 255, 102 S.Ct. at 265-266. Further, defendant bears the burden of persuading the court that it should dismiss an action on forum non conveniens grounds. In re Ford Motor Co., 344 F.3d 648, 652 (7th Cir. 2002). The defendant is unable to meet this burden.

As a threshold matter defendant does not meet his burden because he cannot demonstrate that

an adequate alternative forum exists. To satisfy the first prong of the inquiry defendant must show that he is amenable to service in Australia or that he consents to jurisdiction in Australia. *See* Kamel, at 803. This he has not done. Defendant states that his amenability to service in Australia is not an issue. However, that is precisely the issue defendant needs to address in order to establish the existence of an alternative forum. Defendant asserts that he is not a necessary party to the case and alternatively argues that plaintiff can pursue a claim against his brother for breach of contract. Whether or not plaintiff can pursue a claim against someone else is not the issue the court must determine when it decides forum non conveniens. In this context the court must determine whether or not an alternative forum exists that can address plaintiff's claim against defendant. Id. Since defendant did not address this issue he has not persuaded the court that an alternative forum exists. Defendant has not met his burden concerning an alternative forum and the court need not address the adequacy prong of the test. Connecticut Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 619 (1st Cir. 1988).

Had Australia been an alternate and adequate forum the court determines nonetheless that the action should remain in this district after balancing the private and public factors involved.

It is important to note that in forum non conveniens cases involving a potential reference to a foreign court, the relative distinction for the court is whether or not "the plaintiff who has selected the federal forum is an American citizen, not whether the plaintiff resides in the particular district where the case was brought." Interpane Coatings, Inc. v. Australia and New Zealand Banking Group Ltd., 732 F.Supp. 909, 915 (N.D. Ill. 1990). Accordingly, in these cases the home forum for the plaintiff is any federal district in the United States. Reid-Walen v. Hansen, 933 F.2d 1390, 1394 (8th Cir. 1991). For purposes of this motion the court considers the Western District of Wisconsin the

home district of plaintiff and since the Western District of Wisconsin is the home district of defendant as well, the court weighs this fact strongly against dismissal. Id. at 1395. Some courts discount a plaintiff's United States citizenship when the plaintiff is an American corporation with extensive foreign business. Kamel, 108 F.3d. at 804. However, there is not enough proof in the record to determine that plaintiff functioned as an American corporation with extensive foreign business. Accordingly, plaintiff's American citizenship is not discounted.

The next issue is the private issue of relative ease of access to sources of proof. Gilbert, 330 U.S. at 508, 67 S.Ct. at 843. Defendant has provided the court with numerous documents from Australia including court documents from the Supreme Court of Queensland, from the New South Wales Supreme Court and Caveats from New South Wales. Accordingly, defendant has not convinced the Court that obtaining documents from Australia would be a hardship.

In terms of compulsory process for unwilling witnesses the Court acknowledges that it does not have compulsory process over witnesses who reside in Australia, a fact that leans toward dismissal. However, defendant does not provide any affidavits or other evidence indicating there are any witnesses who are unwilling to travel to the United States to testify in this case. Defendant mentions his brother as a potential witness. However, should defendant wish to call his brother as a witness, the Court has no reason to believe that he would be an unwilling witness. Compulsory process would not be an issue.

The Court further acknowledges if other willing witnesses are required from Australia traveling to Wisconsin would be expensive. Again, this is a factor that suggests dismissal. However, the expense of bringing witnesses to this jurisdiction needs to be balanced with the expense of litigating the entire case in a foreign forum. *See* Wilson v. Humphreys (Cayman) Ltd.,

916 F.2d 1239, 1246-1247 (7th Cir. 1990). Additionally, if other witnesses are needed from Australia, the time and expense of obtaining the presence or testimony of foreign witnesses are significantly lessened by the numerous avenues of communication and travel that are available in today's society. Lehman v. Humphrey Cayman Ltd., 713 F.2d 339, 343 (8th Cir. 1983). Further, defendant has not persuaded the Court that other methods such as depositions could not be used to obtain the testimony of any potential Australian witnesses. Finally, the Court cannot discount the importance of defendant himself as a key witness in this case. Accordingly, when the Court balances all the issues involved in this factor, the cost of obtaining the testimony of willing witnesses does not strongly weigh in favor of dismissal.

Finally, even though the land at issue is in Australia, defendant has not persuaded the Court that it is necessary to view the premises in order to decide the action. This private factor is not weighed in favor of dismissal.

The public factors do not weigh in favor of dismissal. Court congestion is not an issue. Jury selection in this case is scheduled for October 17, 2005 with a trial date scheduled for October 20, 2005. There is a local interest involved in this case because it involves a dispute between two United States citizens and involves transactions that allegedly took place between a Texas and Wisconsin bank. The United States and Wisconsin have an interest in having this case decided. Finally, in terms of the substantive law, should Australian law govern, that fact might weigh in favor of a trial in Australia. However, the fact that a federal court may be required to apply foreign law is not dispositive. Id. at 345. This court is certainly qualified to apply Australian law and finds that this factor alone does not weigh in favor of dismissal.

ORDER

IT IS ORDERED that defendant's motion to dismiss is DENIED.

Entered this 30th day of August, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge