STATE OF MICHIGAN

COURT OF APPEALS

VALASSIS COMMUNICATIONS, INC.,

Plaintiff-Appellant,

v

AMERICAN HOME ASSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 20, 1996

No. 185586
LC No. 94-421906-CK

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's dismissal of its suit on the ground of forum non conveniens. Plaintiff brought this and another action against its liability insurers, seeking indemnification for a settlement it had reached in a New York litigation. We affirm in part and remand.

Plaintiff was sued in a New York federal court by Sullivan Marketing, Inc. The federal court action arose from plaintiff's alleged conduct to prevent Sullivan's entry into the free-standing insert market.[1] Sullivan alleged various common law theories of recovery against plaintiff, as well as violations of federal and New York state laws. The parties to the *Sullivan* action negotiated a settlement, and plaintiff notified its commercial liability insurers, Royal Insurance Company of America and Royal Indemnity Company (collectively referred to as "Royal"), requesting approval of the settlement. Royal declined to approve the settlement and reserved the right to determine whether the settlement was reasonable. The *Sullivan* action was settled.

[1] Plaintiff is in the business of producing free-standing inserts (FSIs), which are promotional booklets inserted into newspapers for purposes of distributing coupons, advertising refunds, sweepstakes and promotions. Plaintiff and its codefendant in the New York action by Sullivan, News America FSI, Inc, controlled approximately fifty per cent of the $1.3 billion FSI market. Sullivan alleged that its parent company announced its intention to enter the FSI business in early 1992, and that in response to this announcement, plaintiff and News America combined and conspired to maintain their "duopoly."

* Circuit judge, sitting on the Court of Appeals by assignment.

Following plaintiff's request for approval of the settlement and its consummation, Royal filed a declaratory judgment action against plaintiff in New York state court seeking an adjudication that (1) Royal had no duty to defend or indemnify plaintiff or (2) Royal's potential liability was limited to a single occurrence and did not cover punitive damages. Defendant, plaintiff's excess insurer, did not participate in that action.

While Royal's New York action was pending, plaintiff brought separate declaratory judgment actions in Wayne Circuit Court against Royal and defendant. Plaintiff alleged that defendant and Royal wrongfully failed to provide coverage and to indemnify plaintiff for the settlement amount and requested that judgment be entered against them. These actions were consolidated below.

Royal moved to dismiss plaintiff's Michigan action for forum non conveniens. Defendant did not specifically join Royal's motion, but filed a brief in which it argued that the cases remain consolidated and that if the Royal action was dismissed, the action against defendant should also be dismissed. Defendant did not advance any arguments in favor of or in opposition to Royal's motion, other than requesting that the cases remain consolidated.

Meanwhile, plaintiff moved for dismissal of Royal's New York action for forum non conveniens. The New York court granted plaintiff's motion and dismissed that action. Approximately five weeks after the New York action was dismissed, the Wayne Circuit Court granted Royal's motion for dismissal, finding that the same reasons for dismissing the action against Royal applied to defendant. Plaintiff appealed the decisions against both Royal and defendant. Eventually, plaintiff and Royal stipulated a dismissal of that appeal, leaving only the appeal against defendant.

Plaintiff first claims that the trial court erred in granting the dismissal because no other forum was available. We disagree.

The principle of forum non conveniens provides courts with the right to resist imposition upon their jurisdiction although such jurisdiction is proper. *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 521; 487 NW2d 475 (1992). The principle "presupposes that there are at least two possible choices of forum." *Id.* at 521-522. Plaintiff argues that in the instant case, there is no forum other than Michigan because the New York court dismissed the previous action. Whether the doctrine of forum non conveniens is inapplicable when the other possible forum has already granted a forum non conveniens dismissal in the same action is a question of law. We review questions of law de novo. *Oakland Hills Development Corp v Lueders Drainage District*, 212 Mich App 284, 294; 537 NW2d 258 (1995).

According to plaintiff, this Court is bound by the New York court's determination that New York is an inconvenient forum through the full faith and credit clause of the federal constitution, US Const, art IV, § 1. The full faith and credit clause mandates that judicial proceedings be given the same faith and credit in every court within the United States as they have by law or usage in the court of the state from which they are taken. *McMath v McMath*, 174 Mich App 576, 583; 436 NW2d 425 (1989). Thus, this Court must give effect to the New York court's dismissal of the action by Royal

against plaintiff to the same extent that the New York courts would. We note that defendant was not a party to the New York action. However, under the doctrine of collateral estoppel, if the New York courts would extend the result of the dismissal to defendant, our courts must do the same.

Collateral estoppel bars relitigation of issues that were actually decided. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 92; 535 NW2d 529 (1995). For collateral estoppel to apply, however, the parties must either be the same as or in privity with those in the prior action. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995). A party is in privity with another if, after the judgment, the party "has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase." *Id.* Defendant was not a party to the action between Royal and plaintiff, and we find no evidence that defendant was in privity with the primary insurer. Therefore, collateral estoppel would not apply to defendant and we are not required to give the New York decision full faith and credit as applied to defendant.

We note that if plaintiff refiles this action in New York, defendant will be precluded from filing its own motion for forum non conveniens in that state. Michigan and New York recognize the doctrine of judicial estoppel, which holds that a party who successfully and unequivocally asserts a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994); *Moore v Co of Clinton*, 219 AD2d 131; 640 NYS2d 927, 929 (1996). Because defendant has unequivocally conceded that New York is a more convenient forum, defendant will not be permitted to argue otherwise in a New York court, if, as directed below, the trial court determines that this matter should not be litigated in Michigan. Plaintiff next claims that the trial court abused its discretion in granting defendant's motion for dismissal on the ground of forum non conveniens. A trial court's decision whether to decline jurisdiction is a discretionary matter which will not be reversed on appeal absent an abuse of discretion. *Hacienda Mexican Restaurants of Kalamazoo v Hacienda Franchise Group, Inc*, 195 Mich App 35, 38; 489 NW2d 108 (1992).

The principle of forum non conveniens establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked. *Id*., quoting *Cray v General Motors Corp*, 389 Mich 382, 395; 207 NW2d 393 (1973). Courts ordinarily give deference to a plaintiff's forum choice. *Manfredi*, *supra* at 523. Our Supreme Court has enumerated the factors which a trial court should consider in deciding a forum non conveniens motion:

1. The private interest of the litigant.

a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;

b. Ease of access to sources of proof;

c. Distance from the situs of the accident or incident which gave rise to the litigation;

d. Enforcibility of any judgment obtained;

e. Possible harassment of either party;

f. Other practical problems which contribute to the ease, expense and expedition of the trial;

g. Possibility of viewing the premises.

2. Matters of public interest.

a. Administrative difficulties which may arise in an area which may not be present in the area of origin;

b. Consideration of the law of the state which must govern the case;

c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. [*Cray*, *supra* at 395-396.]

The trial court in the instant case carefully reviewed the applicable factors as they related to plaintiff and Royal. Absent from the court's consideration, however, is reference to application of the factors as to defendant. While we appreciate that the analysis to a large extent involves common issues regarding the *Sullivan* action, there must be consideration of matters relating to plaintiff's policies with defendant in order to properly determine whether the matter should be dismissed for forum non conveniens. Moreover, there were conclusions made by the trial court on matters applicable only to Royal and not to defendant. These matters should not be considered in determining whether the action against defendant should be litigated in another forum. We simply can not review the trial court's decision when it merely concluded that "[t]he same consideration also dictates granting the same relief to American." We therefore find it necessary for the trial court to revisit defendant's motion and consider each of the relevant *Cray* factors as they relate to defendant. The trial court should then make a determination as to whether forum non conveniens applies as to this defendant.

We affirm the trial court's determination that another possible forum exists and remand for proceedings consistent with this opinion. We retain jurisdiction.

/s/ Harold Hood
/s/ H. David Soet