

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID A. STEWART et al.,

Plaintiffs and Appellants,

v.

SUSANA LOPEZ-GAMEZ et al.,

Defendants and Respondents.

D058724

(Super. Ct. No. 37-2009-00103134-  
CU-FR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed in part, reversed in part and remanded with directions.

Appellants David A. Stewart, Ivonne E. Stewart and John M. Coleman (collectively Appellants) appeal after the trial court dismissed their lawsuit against Respondents Susana Lopez-Gamez and Susana Lopez-Gamez, Inc. (together Lopez-Gamez) and Sixto Lopez-Serrano (collectively with Lopez-Gamez, Respondents) based on the forum non conveniens doctrine. They contend the court abused its discretion by granting the motion for forum non conveniens and by dismissing, rather than staying, the action. We affirm the court's finding of forum non conveniens, but reverse the order to dismiss and remand with directions to vacate the dismissal and enter an order staying the matter.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellants executed real property purchase agreements with Lopez-Gamez, who was acting through a power of attorney on behalf of Lopez-Serrano, for the purchase of lots in Baja California, Mexico. They made installment payments on the property, but eventually stopped the payments because the promised development of the project had not occurred. Appellants filed suit against Respondents alleging that they had been victims of a fraudulent scheme perpetrated under the guise of a real property transaction.

Lopez-Gamez moved to quash service of summons alleging improper service. They also claimed that Appellants "waived" their right to personal jurisdiction in California when they agreed in the contracts to litigate any dispute in Mexico and argued that California was an inconvenient forum to hear the dispute. In turn, Lopez-Serrano moved to strike the complaint. After the trial court denied the motion to strike, Lopez-Serrano orally moved to join Lopez-Gamez's motion to quash. Lopez-Serrano also demurred to the complaint and moved to dismiss it on grounds of inconvenient forum.

The trial court denied Lopez-Gamez's motion to quash service of summons, but granted the motion to change the forum to Mexico. It noted that Lopez-Serrano had improperly labeled his motion as a demurrer, but nonetheless found that the proper forum for the action was Mexico and granted his request to dismiss the action based on an inconvenient forum. It concluded that individual and public interests favored a trial in Mexico because, among other things, the case involved adjudicating the right to real property located in Mexico. Appellants timely appealed.

## DISCUSSION

### A. General Legal Principles

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*)). An action will be dismissed or stayed if a suitable alternative forum exists and the balance of private and public interests weigh in favor of allowing the litigation to proceed in the alternative forum. (*Ibid.*) An alternative forum is suitable where all defendants are subject to personal jurisdiction and the statute of limitations on plaintiff's claim has not expired. (*Id.* at p. 752.) Any concerns regarding the "[suitability]" of the alternative forum may be avoided by defendant's agreement to comply with certain conditions, such as submission to jurisdiction or waiver of the statute of limitations defense. (*Ibid.*) The trial court's decision that another forum is suitable is subject to de novo review. (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 436.)

If the trial court determines an alternative forum is a suitable place for trial, "the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Stangvik, supra*, 54 Cal.3d at p. 751.) Private interest factors to consider include "the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." (*Ibid.*) Public interest factors "include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called

upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Ibid.*) The moving party bears the burden of proof, and the trial court's decision balancing the private and public interests is reviewed for abuse of discretion. (*Id.* at pp. 751-752.) "A court has exercised discretion appropriately when it acts within the range of options available under governing legal criteria in light of the evidence before it." (*Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 758.)

#### B. Private and Public Interests

Appellants do not challenge the trial court's finding that Mexico provided a suitable alternative forum for trial. Rather, they dissect the trial court's written minute order and conclude that in balancing the private and public factors, the trial court misinterpreted evidence or failed to consider other evidence that weighed in favor of retaining jurisdiction in California. However, in determining whether the trial court abused its discretion "we review judicial action and not judicial reasoning." (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1676.) Here the trial court cited the seminal *Stangvik* case and concluded that "[o]n balance" Mexico was the proper forum to decide the dispute. Accordingly, we review the evidence presented, not the trial court's reasoning, to determine whether the trial court "exceed[ed] the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "As long as there is a reasonable or even fairly debatable justification for the ruling, we will not set it aside." (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1195.)

Considering the private interest factors in this case, Appellants' claims include breach of contract and fraud. Appellants' declarations assert that they stopped making installment

payments on the property because Respondents failed to develop it as promised. In turn, Lopez-Gamez claims in her declaration that Appellants have unclean hands and have not complied with the required payments and other conditions for purchasing the property. Accordingly, the nature of the claims will presumably require the testimonies of both percipient and expert Mexican witnesses and other Mexican evidence regarding real property development in Mexico.

Respondents also presented evidence that the contracts were negotiated and signed in Mexico, that numerous witnesses are Mexican citizens and it would be difficult for them to appear in a California court because many Mexican citizens do not have visas to legally enter the United States. Significantly, a California court has no jurisdiction to compel the attendance of these out-of-state witnesses. (*Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London* (1995) 34 Cal.App.4th 554, 559.) Thus, the trial court could infer that the private interest factors regarding access to proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses weighed in favor of litigating this matter in Mexico.

Turning to the public interest factors, Respondents presented uncontroverted evidence that all negotiations and discussions before and after signing the contracts were conducted and completed in Mexico, that Appellants entered into the contracts in Mexico, and that the land at issue is located in Mexico. Respondents also presented the declaration of a Mexican attorney stating that the contracts Appellants executed contained a provision whereby Appellants agreed to be subject to the courts and laws of Mexico and waived any other jurisdiction. Based on this evidence, the trial court could reasonably conclude the lawsuit would add to the burden of local courts and require potential jurors to decide a case in which the local community had little

concern. Additionally, Mexico has a strong interest in adjudicating a dispute involving real property located in Mexico. In contrast, California has little interest in a dispute that arose almost entirely beyond its borders.

Based on our review of the record, we conclude the trial court did not abuse its discretion in weighing the private and public interest factors and concluding a Mexican court would be a more convenient and appropriate forum for trial of Appellants' claims.

### C. Continued Jurisdiction

Appellants claim the trial court abused its discretion when it granted a dismissal as to all Respondents without considering a stay as to two of the respondents and retaining jurisdiction as to the one remaining respondent. We agree that the trial court erred in dismissing, rather than staying this action.

"In California, the action of a non-California resident may be dismissed on forum non conveniens grounds, but, barring extraordinary circumstances, the action of a California resident may only be stayed. [Citation.] This is necessary so that the California court can 'protect . . . the interests of the California resident pending the final decision of the foreign court.'" ( *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 126.) Here, it is undisputed that all Appellants are residents of California. Additionally, it appears that Respondents are California residents.

Nonetheless, extraordinary circumstances might justify the dismissal of an action brought by a California resident, such as cases "in which California cannot provide an adequate forum or has no interest in doing so" as well as cases "in which [a] nominal California resident sues on behalf of foreign beneficiaries or creditors." ( *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 859, fns. omitted, superseded by statute as stated in *Stangvik, supra*, 54 Cal.3d at

p. 755.) None of those circumstances exist in the present case. California has an interest in providing a forum to California residents who allege that another California resident breached a contract to sell property even if that property is located outside the state. Thus, we conclude that the trial court erred in dismissing the action on the basis of forum non conveniens.

Finally, Appellants claim the trial court abused its discretion when it granted Lopez-Serrano's dismissal because he failed to properly raise the issue in his initial moving papers and improperly raised it by way of demurrer. However, our conclusion that the trial court erred in dismissing rather than staying this action moots this procedural issue.

#### DISPOSITION

The part of the order granting the motion for forum non conveniens is affirmed and the part of the order dismissing the action is reversed. The matter is remanded with directions to vacate the part of the order dismissing this action and issue a new order granting a stay of this action. The parties are to bear their own costs on appeal.

McINTYRE, J.

WE CONCUR:

MCDONALD, Acting P. J.

O'ROURKE, J.