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Tenth Circuit Rules Courts Cannot Dismiss Only Part of an Action Based on Forum Non Conveniens

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The circuit court held that a district court abused its discretion in dismissing an action as to several defendants based on forum non conveniens while allowing the same action to proceed against other defendants.

Answering a question of first impression, in *DIRTT Environment Solutions, Inc. v. Falkbuilt*, – F.4th –, 2023 U.S. App. LEXIS 8535 (10th Cir. April 11, 2023), the U.S. Court of Appeals for the Tenth Circuit foreclosed district courts in the circuit from dismissing only part of an action under the forum non conveniens doctrine. The circuit court held that a district court abused its discretion in dismissing an action as to several defendants based on forum non conveniens while allowing the same action to proceed against other defendants.

Factual Background

Appellants, a Colorado corporation and its Canadian parent (collectively, DIRTT), specialize in the design and construction of prefabricated interior spaces and use proprietary software in its design process. Id. at *2. DIRTT was founded in 2003 by three individuals, including Mogens Smed, who served as DIRTT's CEO. Id. In 2018, DIRTT parted ways with Smed, and Smed established his own company, Falkbuilt, Ltd. Id. at *2-3. Falkbuilt's business also focuses on producing prefabricated interior spaces. Id. at *3. DIRTT alleged that after his departure, Smed continued identifying himself “as a 'DIRTTbag,' a phrase used by DIRTT employees to describe themselves and express pride in adhering to DIRTT's philosophy.” Id.

DIRTT also claimed that Smed recruited its employees to join Falkbuilt and bring DIRTT's proprietary information with them. Id. This included Lance Henderson, who had worked as a Utah sales representative for DIRTT, and his wife, Kristy Henderson (collectively, Hendersons). Id. Unbeknownst to DIRTT, Lance had a prior felony conviction for defrauding investors of $6 to $8 million. Id. at *4. Though he had signed a confidentiality agreement, as Smed's behest, he uploaded 35 gigabytes of DIRTT's data to his personal drives. Id. at *3-4. Shortly before his departure, Kristy incorporated Falk Mountain States, LLC (FMS) to serve

as Falkbuilt's Utah affiliate. Id. at *4.

District Court Proceedings

In May 2019, before Lance's departure, DIRTT sued Smed and Falkbuilt for breach of contract in a Canadian court. Id. at *5. After it learned of Lance's apparent misappropriation of its data, it sued Falkbuilt, the Hendersons, and FMS in the federal court in Utah. Id. DIRTT alleged various theft of trade secret claims under federal and state law, alleged breach of contract against Lance, and sought a preliminary injunction. Id. Falkbuilt filed a counterclaim, which DIRTT moved to dismiss for forum non conveniens. Id.

DIRTT later filed a first amended complaint which, among other things, added the Canadian parent as a plaintiff, added Smed and Falkbuilt as defendants, and refined its claims to focus on harm suffered in the United States. Id. at *5-6. Smed and Falkbuilt moved to dismiss the amended complaint based on forum non conveniens. Id. at *6. The Hendersons and FMS declined to join the motion or consent to Canadian jurisdiction—the alternative forum proposed by Falkbuilt. Id. After holding hearings on (i) DIRTT's motion to dismiss Falkbuilt's counterclaim for forum non conveniens and (ii) Smed's and Falkbuilt's motion to dismiss DIRTT's first amended complaint for forum non conveniens, the district court granted both motions. Id. DIRTT appealed the ruling dismissing its complaint and a related ruling denying its Rule 60(b) motion. Id. at *7.

The Doctrine of Forum Non Conveniens

As the circuit court explained, forum non conveniens “is a discretionary common law doctrine under which a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.” Id. (citation and quotations omitted). Dismissal based on forum non conveniens “will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.” Id. (citation and quotations omitted).

The court's inquiry began with two threshold questions: (i) whether the Canadian forum was an “adequate alternative forum”; and (ii) whether Canadian law applied. Id. at *8. If the answer to both questions were yes, the court would then examine various “private and public interest factors,” and reverse only if the district court's forum non conveniens determination involved “a clear abuse of discretion.” Id. at *8-9 (citation and quotation marks omitted).

The Tenth Circuit Reverses

Because it concluded that the district court abused its discretion when it found Canada to be an adequate alternative forum—the first of the two threshold inquiries—the circuit court addressed only that issue. Id. at *9. This first threshold inquiry comprises two components: the alternative forum must be “available” and “adequate.” Id.

The appellate court noted that an alternative forum is “available” when a defendant is amenable to process there and also when the defendant consents to the forum's jurisdiction. Id. at *10-11. Appellants contended the district court abused its discretion because three of six defendants—Lance, Kristy, and FMS—were not subject to Canadian jurisdiction and had not consented to proceeding with an action there. Id. at *10. Appellees, by contrast, insisted that a foreign forum is available for forum non conveniens purposes when “the particular defendants moving for dismissal are amenable to process in, and subject to the jurisdiction of, that foreign forum,” even if other defendants in the action are not. Id. at *11 (emphasis in original).

The Tenth Circuit reasoned that appellants had “the better of this argument.” Id. at *12. Citing cases from the Fifth, Sixth, and Seventh Circuits, the circuit court agreed that “[a]n alternative forum is available if all parties are amenable to process and are within the forum's jurisdiction.” Id. at *12 (quoting Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 803 (7th Cir. 1997)) (emphasis and alternation in original). The court added, “[l]ogically, this makes good sense. Forum non conveniens is a doctrine that is fundamentally concerned with convenience.” Id. at *13. Courts should thus “consider convenience as it applies to the entire case.” Id. (emphasis in original).

Here, though all defendants were subject to the district court's jurisdiction, the Utah-based defendants weren't subject to, and had not consented to, Canadian jurisdiction. Id. at *14. Nor had they joined the Canadian defendants' motion to dismiss for forum non conveniens. Id. Canada thus was not an available alternative forum. Id. Finally, noting that the district court's ruling contradicted the central purpose of forum non conveniens, the Tenth Circuit concluded, “We therefore foreclose this possibility by expressly holding that forum non conveniens is not available as a tool to split or bifurcate cases.” Id. at *15.

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Masciocchi leads the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Van Bockern helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.
