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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DIRTT ENVIRONMENTAL SOLUTIONS, INC.; DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,

Plaintiffs - Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Defendants - Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON; FALK MOUNTAIN STATES, LLC,

Defendants.

Nos. 21-4078, 21-4153

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 19-CV-00144-DBB-DBP)

Catherine A. Miller, Akerman LLP (Jeffrey J. Mayer, Akerman LLP, Chicago, Illinois, and Chad E. Nydegger, Workman Nydegger, Salt Lake City, Utah, with her on the briefs), Chicago, Illinois, for Plaintiffs – Appellants.

Artemis D. Vamianakis (Tanner J. Bean with her on the brief), Fabian VanCott, Salt Lake City, Utah, for Defendants – Appellees.

Before **CARSON**, **BALDOCK**, and **EBEL**, Circuit Judges.

BALDOCK, Circuit Judge.

In today's appeal we address a question of first impression in this Circuit: Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it? Reasoning that the *forum non conveniens* doctrine is fundamentally concerned with the convenience of the venue—and relatedly the efficient administration of justice—we conclude the answer to that question is "no." Accordingly, we hold a district court clearly abuses its discretion when, as here, it elects to dismiss an action as to several defendants under a theory of *forum non conveniens* while simultaneously allowing the same action to proceed against other defendants. Exercising jurisdiction pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291,[1] we **REVERSE** the district court's judgment.[2]

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[1] We consider two consolidated appeals in this case. The first, no. 21-4078, addresses the district court's decision to dismiss part of the underlying action under a *forum non conveniens* theory. The district court certified this appeal under Fed. R. Civ. P. 54(b). The second, no. 21-4153, addresses the district court's decision to deny Appellants' motion filed under Fed. R. Civ. P. 60(b). Because we resolve this case by reversing the district court's underlying decision in appeal no. 21-4078, we **DISMISS** appeal no. 21-4153 as **MOOT**.

[2] Appellants also filed a motion asking us to take judicial notice of filings from their Rule 60(b) motion and a related proceeding before another district court outside our Circuit. Because we do not need to consider these materials to grant Appellants the relief they seek by reversing the district court's decision, we **DENY** Appellants' motion as **MOOT**.

I.

The Parties to this appeal are no strangers to the facts of the underlying dispute since they have litigated it in one form or another since May 2019. As a result, we limit our discussion of the facts and procedural history of this case solely to those necessary to resolve the issue before us.

The facts of this case—as alleged in Appellants' first amended complaint—concern the litigious aftermath of an acrimonious corporate divorce. Appellants are DIRTT Environmental Solutions, Inc., a Colorado corporation,[3] and DIRTT Environmental Solutions Ltd., its Canadian parent (collectively "DIRTT"). DIRTT operates a business specializing in the design and construction of prefabricated interior spaces and utilizes proprietary software in its design process. DIRTT was founded in 2003 by Mogens Smed and two other individuals. For years, DIRTT enjoyed a fruitful relationship with Smed, who served as DIRTT's CEO. That changed in 2018 when, for reasons that remain unclear based on this record, DIRTT decided to part ways with Smed. Following his termination, Smed established his own company, Falkbuilt Ltd. (and Falkbuilt, Inc., its U.S. based subsidiary). Like DIRTT, Falkbuilt's business also focuses on producing prefabricated

[3] DIRTT, Inc.'s principal place of business was the subject of some debate in the proceedings below. DIRTT originally stated in its complaint that DIRTT, Inc.'s principal place of business was in Canada. DIRTT later stated in its first amended complaint that DIRTT, Inc.'s principal place of business was in the United States. The district court noted that DIRTT's "filings and representations regarding DIRTT, Inc. have been many and varied." We offer no opinion on DIRTT, Inc.'s principal place of business. We note, however, that both parties appear to have taken contradictory positions on various matters at different stages of this litigation, depending on whether they were seeking or opposing dismissal for *forum non conveniens*. *See* Appellants' Br. at 5, Appellee's Br. at 10–11.

interior spaces. Falkbuilt relies on a network of affiliates that are invested in Falkbuilt itself to facilitate the conduct of its business. DIRTT alleges that Smed remained heavily influenced by his time at DIRTT and that he continued "to identify himself as a 'DIRTTbag,' a phrase used by DIRTT employees to describe themselves and express pride in adhering to DIRTT's philosophy," even after his departure from the firm.

According to DIRTT, Smed set up Falkbuilt to directly compete with it. To this effect, DIRTT claims Smed recruited its employees and affiliates not only to join his new business, but to bring DIRTT's proprietary information with them. In this regard, DIRTT's allegations as they pertain to Lance Henderson ("Lance"), a former DIRTT employee, and his wife Kristy Henderson ("Kristy"), a former employee of a DIRTT affiliate, are particularly relevant. Lance worked as a Utah sales representative for DIRTT from 2009 until 2019. As part of his employment with DIRTT, Lance acknowledged receipt of DIRTT's confidentiality policy, which prohibited him from, amongst other things, retaining DIRTT's sensitive data.

Unbeknownst to DIRTT, Lance had a felony conviction for defrauding investors of between $6 and $8 million. Smed apparently knew about Lance's conviction but did not bring it to DIRTT's attention because DIRTT alleges it only first learned about Lance's past after Smed's departure when the State of Utah sent it an administrative garnishment order. Sometime thereafter, Lance decided to leave DIRTT and "either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah." Lance then uploaded 35 gigabytes of DIRTT's data on to his personal drives at Smed's behest or direction. DIRTT learned of this upload one week after it took place,

and Lance admitted to uploading the information but denied any wrongdoing or nefarious intent. Less than one month before Lance's departure, Kristy incorporated Falk Mountain States, LLC ("FMS") to serve as Falkbuilt's Utah affiliate. When Lance ultimately parted ways with DIRTT in August 2019, he informed them he would be starting a construction business even though he intended to work for Falkbuilt. Smed allegedly recruited numerous other DIRTT employees to participate in similar schemes, although those former employees are not subject to this suit.

DIRTT began its legal campaign against Falkbuilt and Smed in May 2019—before Lance's departure—by filing suit against them for breach of contract in Canadian court. DIRTT expanded its legal campaign after it learned about Lance's apparent misappropriation of its data by filing the instant lawsuit against Falkbuilt Ltd., the Hendersons, and FMS. DIRTT's original complaint alleged various theft of trade secret claims under both federal and state law as well as a breach of contract claim against Lance. DIRTT also sought a preliminary injunction. Falkbuilt responded by filing a counterclaim, which DIRTT moved to dismiss on *forum non conveniens* grounds. The parties then engaged in a series of protracted discovery disputes. DIRTT subsequently amended its complaint in October 2020. The first amended complaint (amongst other things) added new parties—DIRTT Ltd. as a plaintiff as well as Falkbuilt, Inc. and Smed as defendants—changed DIRTT, Inc.'s principal place of business from Canada to the United States and refined its allegations to be more focused on harm suffered in the United States. Falkbuilt and Smed moved to dismiss DIRTT's first amended complaint, based on *forum non*

conveniens. The Hendersons and FMS refused to join this motion or consent to Canadian jurisdiction—the alternative forum proposed in Falkbuilt's motion to dismiss.

In March 2021, the district court held a hearing on DIRTT's motion to dismiss Falkbuilt's counterclaim for *forum non conveniens*. The district court granted that motion. Thereafter, in May 2021, the district court held a hearing on Falkbuilt and Smed's motion to dismiss DIRTT's first amended complaint. After hearing argument from the parties, the district court issued a preliminary ruling from the bench.[4] In doing so, the district court went through each factor of the *forum non conveniens* analysis and ultimately granted Falkbuilt and Smed's motion. DIRTT appealed that ruling and it is the subject of appeal no. 21-4078. DIRTT also filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) based on a series of emails disclosed by Falkbuilt during discovery. The district court denied that motion in a written order. DIRTT appealed that ruling as well, and it is the subject of appeal no. 21-4153. We consolidated these appeals for briefing and oral argument. But because our resolution of the *forum non conveniens* issue disposes of both appeals, we focus our analysis on DIRTT's first appeal. *See supra* n.1.

II.

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

[4] Although the district court described this ruling as a preliminary one, it provided no meaningful explanation of its *forum non conveniens* analysis in the written order it issued thereafter. As a practical matter, a district court generally should issue rulings on complex matters such as *forum non conveniens* in written form. This makes it easier for both parties and appellate courts to understand the district court's reasoning, thereby enhancing judicial economy and facilitating the efficient administration of justice.

of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994). Those "conditions" are "central[ly] focus[ed]" on the convenience of the forum as compared to foreign alternatives. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248–249 (1981). Accordingly, dismissal under a *forum non conveniens* theory "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.* at 249. The doctrine therefore requires courts to ask whether a suit could be more conveniently resolved in a foreign jurisdiction rather than the forum chosen by the plaintiff. To answer that question, our precedents follow a familiar framework. That framework gives effect to the principle that:

> [W]hen an alternative forum has jurisdiction to hear a case, and when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established.

Am. Dredging Co., 510 U.S. at 447–48 (internal quotations and punctation omitted).

Accordingly, our inquiry begins with two threshold questions. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009). First, we ask whether the Canadian forum is "an adequate alternative forum" in which Defendants are amenable to process." *Gschwind*

v. Cessna Aircraft Co., 161 F.3d 602, 605 (10th Cir. 1998) (citing *Piper Aircraft*, 454 U.S. at 254 n.22). Second, we consider whether Canadian, *i.e.*, foreign, law applies. *Id.* (citing *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993)). We may only proceed with the analysis if the answer to both questions is yes. *Id.* at 605–06. In the event we can continue the analysis, we then examine and balance various private and public interest factors, none of which come into play here. *Id.* at 606. We will only reverse a district court's *forum non conveniens* determination "when there has been a clear abuse of discretion." *Piper Aircraft*, 454 U.S. at 257

III.

Appellants challenge virtually every aspect of the district court's decision to dismiss the Falkbuilt Entities and Smed from their suit. Because we conclude the district court abused its discretion by finding that Canada was an adequate alternative forum—the first of the two threshold inquiries in the analysis—we need only address the parties' arguments relating to this specific issue. This, of course, does not constitute an implicit endorsement of the aspects of the court's decision we need not address.

The threshold inquiry of "whether there is an adequate alternative forum" for the suit is itself comprised of two components: The alternative forum must be both "available" and "adequate." *Gschwind*, 161 F.3d at 606; *Yavuz*, 576 F.3d at 1174. The district court found that Canada was both available and adequate as an alternative forum. The district court devoted most of its analysis to the question of whether Canada was an adequate forum and appeared to simply assume it was an available forum because "DIRTT, Limited, filed suit against Falkbuilt, Ltd, and Mr. Smed in Alberta, Canada, on May 9, 2019." But we

are concerned with the court's findings as to the first consideration—whether Canada was available as a forum.

Appellants argue this finding was erroneous and an abuse of discretion. Specifically, they contend the district court abused its discretion by concluding Canada was an available forum when three of the six defendants in the suit—Lance Henderson, Kristy Henderson, and Falk Mountain States—were not subject to Canadian jurisdiction and had not consented to proceeding with an action there. *See* Appellants' Br. at 42. For their part, Appellees argue the district court correctly concluded Canada was an available forum because "[t]he Falkbuilt Defendants explicitly agreed to be subject to the Canadian court's jurisdiction" and because DIRTT "'splintered' the litigation over this dispute when it filed one case in Canada and then filed a second, overlapping action seven months later in Utah." Appellees' Br. at 27–28.

The key question here is what does it mean for a foreign forum to be available under *forum non conveniens*? We have previously explained that an alternative forum is generally considered available "when the defendant is amenable to process in the other jurisdiction." *Fireman's Fund Ins. Co. v. Thyssen Mining Const. of Can., Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012) (quoting *Piper Aircraft*, 454 U.S. at 254 n.22). As such, we have stated that a forum can be considered available when the defendant consents to the jurisdiction of the alternative forum. *See Archangel Diamond Corp. Liquidating Tr. v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016); *Yavuz*, 576 F.3d at 1174–75; *Gschwind*, 161 F.3d at 606. Appellees hang their hats on these statements and would have us hold a foreign forum is available for the purposes of *forum non conveniens* whenever *the particular*

defendants moving for dismissal are amenable to process in, and subject to the jurisdiction of, that foreign forum, even if that does not include other defendants in the action.

Adopting Appellees' position, however, would require us to accept the premise that *forum non conveniens* can be used to split cases. Appellees—who carry the burden of establishing that Canada is available as a forum, *see Rivendell*, 2 F.3d at 993—cite no authority on the question of whether a district court can split cases using *forum non conveniens*. *See* Appellees' Br. at 27–29. In contrast, Appellants point to authority from the Fifth Circuit stating "[a] foreign forum is available when *the entire case and all parties* can come within the jurisdiction of that forum." *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993) (emphasis added) (quoting *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 (1989)). Appellants have the better of this argument. Although our own precedents appear not to have expressly addressed this question, we have at least implicitly endorsed the Fifth Circuit's understanding of forum availability. As we stated in *Yavuz*: "The availability requirement is usually satisfied, however, where the *defendants* concede to be amenable to process in the alternative forum." 576 F.3d at 1174 (emphasis added). *Yavuz* addressed a multi-defendant situation, and this statement recognizes the basic logic of requiring all defendants in such suits be amenable to the jurisdiction of another forum before considering it available for the purposes of *forum non conveniens*.

Furthermore, we can find support for this understanding of availability from our sister circuits. The Seventh Circuit, for example, has expressly adopted the Fifth Circuit's

understanding of forum availability, stating "[a]n alternative forum is available if *all parties* are amenable to process and are within the forum's jurisdiction." *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997) (emphasis added) (citing *In re Air Crash Disaster*, 821 F.2d at 1165); *see also Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (same). The Sixth Circuit has also followed suit, noting that "a foreign forum is not truly 'available'—and a defendant is not meaningfully 'amenable to process' there—if the foreign court cannot exercise jurisdiction over both parties." *Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 620 (6th Cir. 2018) (citing *Watson v. Merrell Dow Pharm., Inc.*, 769 F.2d 354, 357 (6th Cir. 1985)).[5] In other words, there is support among the various circuits for the idea that *all parties* (and by extension the entire case) must be subject to the jurisdiction of an alternative forum in order for it to be considered available under *forum non conveniens*.

Logically, this makes good sense. *Forum non conveniens* is a doctrine that is fundamentally concerned with convenience. *See, e.g.*, *Piper Aircraft*, 454 U.S. at 256;

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[5] *But see Watson v. Merrell Dow Pharms., Inc.*, 769 F.2d 354 (6th Cir. 1985). In *Watson*, the Sixth Circuit addressed a case where a series of plaintiffs sued a pharmaceutical company and several individuals for alleged birth defects. 769 F.2d at 355–56. The pharmaceutical company moved to dismiss the case under *forum non conveniens* and agreed to consent to the United Kingdom's jurisdiction. *Id.* at 356–57. The individual defendants did not consent to that jurisdiction. *Id.* at 357. The district court granted the motion, reasoning that the pharmaceutical company was the "primary" defendant. *Id.* at 357–58. The Sixth Circuit disagreed with that assessment and highlighted the principle that "dismissal predicated on *forum non conveniens* requires [the] availability of [an] alternative forum possessing jurisdiction as to *all* parties." *Id.* (citation omitted). Nevertheless, the *Watson* court inexplicably decided to affirm the district court's decision as it applied to the pharmaceutical company but reversed it as it applied to the individual defendants—effectively splitting the case. *Id.* While we agree with *Watson*'s description of the law, we disagree with its ultimate resolution.

Gschwind, 161 F.3d at 605; *Yavuz*, 576 F.3d at 1172. And convenience is a multi-dimensional concept that is not primarily focused on any one party's interests. Instead, courts should consider convenience as it applies to the *entire case* when it analyzes the appropriateness of dismissal for *forum non conveniens*. That means considering the convenience as it relates to *all* parties as well as the court's inherent interest in the efficient administration of justice. *See Piper*, 454 U.S. at 257–61. As such, the Supreme Court has explained that dismissal for *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.* at 249. The latter consideration is particularly relevant to this case. This is clearly not a case "where the plaintiff is unable to offer *any* specific reasons of convenience supporting his choice [of forum]." *Id.* (emphasis added). When a plaintiff brings suit against multiple defendants in a forum where they are all subject to jurisdiction and the proposed alternative forum could only exercise jurisdiction over some of those defendants, the plaintiff has satisfied the requirements of *Piper Aircraft*.[6]

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[6] In general, the plaintiff's choice of forum is entitled to deference. *See, e.g.*, *Gschwind*, 161 F.3d at 606; *Yavuz*, 576 F.3d at 1172; *Sinochem Int'l Co. v. Malaysia Shipping Corp.*, 549 U.S. 422, 430 (2007). Foreign plaintiffs' choices are entitled to less deference, however. *Id.* The district court found DIRTT was a "foreign" plaintiff because it is incorporated in Colorado rather than Utah. While we offer no opinion on DIRTT, Inc.'s principal place of business or citizenship, we believe it is important to highlight that the district court misunderstood the meaning of "foreign" in this context. For the purposes of *forum non conveniens*, plaintiffs are not "foreign" if they are based in the United States. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015) ("A plaintiff's choice of forum is generally entitled to deference, *especially where the plaintiff is a United States citizen or resident*, because it is presumed a plaintiff will choose her 'home forum.'" (emphasis

Here, all the defendants are subject to the district court's jurisdiction. The Utah based defendants, however, are not subject to Canadian jurisdiction and neither consented to that jurisdiction nor joined the Canadian defendants' motion to dismiss for *forum non conveniens*. As a result, Canada is not an available alternative forum. Appellees failed to establish the first threshold requirement for dismissing a case under *forum non conveniens* and the district court abused its discretion by finding they had. Splitting cases in the manner employed by the district court fundamentally contradicts the "central purpose" of *forum non conveniens* because it only increases the possibility of overlapping, piecemeal litigation that is inherently inconvenient for both the parties and the courts. *See Gschwind*, 161 F.3d at 605. We therefore foreclose this possibility by expressly holding that *forum non conveniens* is not available as a tool to split or bifurcate cases. Because we conclude Appellees failed to pass the first threshold requirement in the *forum non conveniens* analysis, we need not inquire any further to reverse the district court's judgment and dispose of this appeal.

IV.

We hold the district court abused its discretion by granting Appellees' motion to dismiss. We therefore **REVERSE** the district court's judgment in appeal no. 21-4078 and **REMAND** with instructions for the district court to exercise jurisdiction over the entirety

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added) (citing *Piper Aircraft*, 454 U.S. at 255)); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) ("[T]he 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." (footnote omitted)).

of Appellants' action. We also **DISMISS** appeal no. 21-4153 as **MOOT** and **DENY** Appellants' motion to take judicial notice filed in appeal no. 21-4078 as **MOOT**.