2017 IL App (1st) 171195-U

THIRD DIVISION
December 27, 2017

No. 1-17-1195

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE TRAVELERS INDEMNITY COMPANY; TRAVELERS PROPERTY CASUALTY COMPANY OFAMERICAN, f/k/a The Travelers Indemnity Company of Illinois; and TRAVELERS CASUALTY AND SURETY COMPANY, f/k/a THE AETNA CASUALTY AND SURETY COMPANY,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 16 CH 14807
TATE & LYLE INGREDIENTS AMERICAS LLC, f/k/a A.E. STALEY MANUFACTURING COMPANY,	)	
Defendant-Appellee,	)	
(ARROWOOD INDEMNITY COMPANY; CALIFORNIA UNION INSURANCE COMPANY, n/k/a CIGNA SPECIALTY INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; CHUBB CORPORATION; FEDERAL INSURANCE COMPANY; UNITED NATIONAL INSURANCE COMPANY; ROYAL INDEMNITY	)	

COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; TWIN CITY FIRE INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; GIBRALTAR CASUALTY COMPANY, n/k/a MT. MCKINLEY INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; COLUMBIA CASUALTY COMPANY; CONTINENTAL CASUALTY COMPANY; HARBOR INSURANCE COMPANY, n/k/a GREENWICH INSURANCE COMPANY; THE CONTINENTAL INSURNACE COMPANY; THE NORTH RIVER INSURANCE COMPNAY; SAFETY MUTUAL CASULTY CORPORATION, n/k/a SAFETY NATIONAL CASUALTY CORPORATION; CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES AND DOE COMPANIES 1 through 5,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendants).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the trial court considered the factors for dismissal under section 2-619(a)(3) and *forum non conveniens* and was not arbitrary, fanciful, or unreasonable in its balancing of those factors favoring litigation in New Jersey.

¶ 2 Plaintiffs, Travelers Indemnity Company, Travelers Property Casualty Company of America, and Travelers Casualty and Surety Company (collectively "Travelers"), appeal the trial court's dismissal order granted under section 2-619(a)(3) and *forum non conveniens*. Plaintiffs filed a complaint in Illinois against the named defendants seeking declaratory judgment on its denial of an insurance claim made by Tate & Lyle Ingredients Americas LLC (Tate & Lyle) for costs incurred in the cleanup of the Lower Passaic River in New Jersey. Tate & Lyle

subsequently filed a complaint in New Jersey seeking declaratory judgment that Travelers are obligated to indemnify Tate & Lyle. Tate & Lyle then filed a motion in this Illinois case seeking dismissal under section 2-619(a)(3) and *forum non conveniens* because the New Jersey suit concerns the same parties over the same cause of action and is the location of the pollution site. The trial court found dismissal under section 2-619(a)(3) was warranted based on comity concerns favoring New Jersey, and dismissal under *forum non conveniens* warranted based on its finding that New Jersey is the more convenient forum. For the reasons that follow we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant-appellee, Tate & Lyle, formerly operated as A.E. Staley Manufacturing Company (Staley). Staley's principal place of business was in Decatur, IL. While Tate & Lyle is incorporated in Delaware, its principal place of business is in Decatur, IL. From 1968–78, Staley operated a manufacturing plant in Kearny, New Jersey, which produced organic polymers, rubber-based adhesives, and leather finishes. Staley also owned an office in Kearney, New Jersey at that time. The facility allegedly discharged manufacturing waste into a local sewer system which in turn discharged into the Passaic River in New Jersey.

¶ 5 Tate & Lyle was notified by the United States Environmental Protection Agency (EPA) on December 27, 2006 that it is was a potentially responsible party (PRP) for contamination of the Lower Passaic River in New Jersey on account of the activities of its predecessor, Staley. The EPA designated the lower 17 miles of the Passaic River as the "Lower Passaic River Study Area" in order to investigate and eventually remediate pollution there. The study indicated the river was contaminated with a variety of hazardous substances, such as DDT and mercury. In its letter, the EPA requested Tate & Lyle become a "cooperating party" expected to fund the river

restoration project. The EPA also indicated noncompliance could lead to EPA enforcement actions against Tate & Lyle. In May 2007, Tate & Lyle, along with 72 other companies, agreed to fund the EPA study of the Lower Passaic River. In June 2012, Tate & Lyle was one of 70 companies that reached an agreement with the EPA to fund cleanup and monitoring of the river.

¶ 6 On March 3, 2016, Tate & Lyle notified Travelers of its liability as a PRP for the pollution of the Passaic River, and sought indemnification based on Travelers' insurance policy schedule. Staley had purchased indemnity policies from Travelers, and its claim was based on policies purchased from October 1970 through April 1990. Staley purchased the policies in Illinois, though the policies covered property in numerous States.

¶ 7 On March 4, 2016, the EPA issued its Record of Decision explaining it selected a remediation plan that was estimated to cost $1.4 billion. On March 31, 2016, the EPA sent a letter to Tate & Lyle indicating its claim against Tate & Lyle and its expectation that Tate & Lyle would comply with obligations to contribute to the remediation or else be subject to treble damages.

¶ 8 On March 9, 2016, Travelers sent a letter to Tate & Lyle acknowledging receipt of its March 3 notice letter. Travelers requested copies of documents relating to Tate & Lyle's claim, and also informed Tate & Lyle that it reserved the right to decline coverage if it found Tate & Lyle violated the notice of occurrence provision in the applicable policies based on Tate & Lyle receiving notification from the EPA in 2007. When Tate & Lyle failed to reply to this request, Travelers followed up by sending another letter on June 6, 2016 requesting relevant documents. Tate & Lyle again failed to reply. On November 11, 2016, Travelers sent a letter to Tate & Lyle denying its request for coverage. On November 14, 2016 (the next business day), Travelers filed a complaint in the Circuit Court of Cook County, Illinois, seeking declaratory judgment of its

obligations under a number of insurance contracts. Travelers filed the complaint against Tate & Lyle as well as over 20 other insurers. While some of those insurers are incorporated and principally conduct business in Illinois, many are not. They are incorporated and conduct business in California, Connecticut, Delaware, Indiana, Missouri, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Texas, and the United Kingdom. Travelers are Connecticut corporations that have their principal places of business in Hartford, CT.

¶ 9 On December 27, 2016 Tate & Lyle filed a suit in New Jersey seeking a declaration that Travelers and its other insurers are obligated to defend and indemnify Tate & Lyle. Tate & Lyle named Travelers as well as the other insurers in this action as the defendants in the New Jersey action.

¶ 10 In the Illinois action Travelers has argued Tate & Lyle provided notification of its obligations as a PRP past the contractually permitted time to file a claim and receive indemnification. On February 3, 2017, Travelers filed a motion in its Illinois action for judgment on the pleadings due to Tate & Lyle's late notice. On February 6, 2017, Tate & Lyle filed a motion to dismiss Travelers' Illinois action under section 2-619(a)(3) of the Code of Civil Procedure (Code) and *forum non conveniens*. See 735 ILCS 5/2-619(a)(3) (West 2016). The Code establishes a procedure for a defendant to file a motion to dismiss a case when there is a case pending in another forum with the same parties for the same cause:

> "Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * *

> (3) That there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a) (West 2016).

The doctrine of *forum non conveniens* also provides a party a means to move for dismissal where another forum is more convenient.

> "According to this equitable doctrine, a court which has jurisdiction over the parties and the subject matter involved may nevertheless decline jurisdiction of a case when it is apparent that trial in another forum with jurisdiction over the parties would be more convenient and would better serve the ends of justice." *Vinson v. Allstate*, 144 Ill. 2d 306, 310 (1991).

Plaintiffs have not filed a motion to dismiss the New Jersey action. Tate & Lyle have already been served with discovery requests and have produced numerous documents in New Jersey. Discovery is presently under way in New Jersey.

¶ 11 The trial court held a hearing on the motion on May 2, 2017, and at its conclusion the court issued a ruling from the bench granting Tate & Lyle's motion to dismiss both under section 2-619(a)(3) and *forum non conveniens*. The court granted dismissal under section 2-619(a)(3) after considering the four *Kellerman* factors: comity; prevention of multiplicity of litigation, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and, the *res judicata* effect of a foreign judgment in the local forum. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447-48 (1986).

¶ 12 The trial court found the comity factor strongly favored New Jersey because the site of the pollution and cleanup is in New Jersey. The court looked to a New Jersey supreme court case, *Sensient Colors, Inc. v. Allstate Insurance Co.*, 193 N.J. 373 (2008), and found New Jersey has an interest when the location of the subject of the underlying claim regarding environmental

contamination is in New Jersey. In *Sensient Colors*, the New Jersey supreme court held New Jersey has a public policy interest in resolving insurance coverage disputes where the polluted site is located in New Jersey. The trial court therefore concluded the comity factor favored New Jersey. The court also noted "while it appears Travelers has filed its answer and counterclaim to the New Jersey action, no similar motion to dismiss is currently pending in New Jersey. And although counsel in court today has identified the reasons why, it is still highly unlikely that the New Jersey court would dismiss its action in favor of a case pending in Illinois." The court then found "a judgment entered by the New Jersey court would have a *res judicata* effect on this action," and that "complete relief can be obtained in either forum." As to the vexation and harassment factor, the court indicated it weighed neutrally because "each party has filed in the forum that they perceive that they are most likely to have an advantage, all within a reasonably short period of time following the denial of the coverage by Travelers."

¶ 13 The trial court also granted Tate & Lyle's motion to dismiss on *forum non conveniens* grounds. The court weighed the public and private interest factors of maintaining the suit in Illinois. The court heard arguments from both sides concerning the convenience and interest in each forum – namely how the environmental catastrophe is in New Jersey and the contracts were negotiated in Illinois. Eight potential witnesses who worked at Staley's Kearny, New Jersey plant are still alive and live in New Jersey (with the exception of one who lives in New York). They are no longer employed by Tate & Lyle. Two of Tate & Lyle's employees who have knowledge of the late notice provided to Travelers live in Illinois. The court found "it would not be inconvenient for those two witnesses to travel. Therefore, the private interests favor New Jersey." The court then found the public interest factors weigh in favor of New Jersey because the environmental and public health concern exists there.

¶ 14 Travelers argued that the trial court improperly relied on an unpublished decision when ruling on this case. However, the court in reaching its holding stated: "Although this Court has read and considered the unpublished opinion, I do not think that it is binding upon this Court and only have used it as the parties have referred to it in the briefs."

¶ 15 ANALYSIS

¶ 16 Plaintiffs claim the trial court abused its discretion by granting Tate & Lyle's motion to dismiss under section 2-619(a)(3) and *forum non conveniens*. Although plaintiffs agree the New Jersey action concerns the same parties over the same cause, they contend the court did not correctly apply the law when the court granted dismissal under section 2-619(a)(3). They argue that the court did not factor the connections to Illinois or the prejudice plaintiffs face under New Jersey law. Plaintiffs also maintain the court unreasonably granted dismissal under *forum non conveniens* because a balancing of the public and private interest factors did not strongly favor New Jersey, and because the court's dismissal was not supported by the facts.

¶ 17 The trial court has considerable discretion when ruling on a motion to dismiss under section 2-619(a)(3). *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st) 110137, ¶ 27 ("A section 2–619(a)(3) motion to dismiss is inherently procedural and urges the trial court to weigh several factors when deciding whether it is appropriate for the action to proceed."). Accordingly, we will not overturn the trial court's dismissal under section 2-619(a)(3) "absent an abuse of that discretion." *Id.* "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008).

¶ 18 The trial court here granted Tate & Lyle's motion to dismiss also on *forum non conveniens* grounds. "The trial court is vested with considerable discretion in its determination

of whether transfer is warranted on the basis of *forum non conveniens* principles. The court's decision is subject to reversal only if the court abused its discretion." *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 336 (1994). "We will reverse the circuit court's decision only if [plaintiffs show] that the circuit court abused its discretion in balancing the relevant factors. [Citation.] A circuit court abuses its discretion in balancing the relevant factors only where no reasonable person would take the view adopted by the circuit court." *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 442 (2006).

¶ 19 Dismissal Under Section 2-619(a)(3)

¶ 20 Tate & Lyle sought dismissal of plaintiffs' Illinois complaint due to the existence of a New Jersey suit over the same cause of action with the same parties. The Code "permits a defendant to seek a dismissal or a stay when there is another action pending between the same parties for the same cause." *Continental Casualty Co. v. Radio Materials Corp.*, 366 Ill. App. 3d 345, 347 (2006); 735 ILCS 5/2-619(a)(3) (West 2016) ("Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit: *** (3) That there is another action pending between the same parties for the same cause.").

¶ 21 Plaintiffs maintain the trial court abused its discretion because the court ignored Tate & Lyle's connection to Illinois and the connection of the insurance contracts to Illinois. However, at the May 2, 2017 hearing, the court heard arguments concerning New Jersey and Illinois' connection to the litigation. The court ultimately concluded comity favored New Jersey because the waste site is there. The court exercised its discretion to dismiss the Illinois action. Plaintiffs argue that our supreme court's decision in *A.E. Staley Manufacturing Co. v. Swift & Co.*, 84 Ill.

2d 245 (1980) compels the opposite outcome. We disagree. The *Staley* court noted that

> "the circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed (Restatement (Second) of Conflict of Laws sec. 86 (1971)). The circuit court here felt that it had no discretion in this matter and therefore failed to conduct an appropriate analysis of the situation." *Staley*, 84 Ill. 2d at 253.

The trial court in *Staley* failed to exercise its discretion at all. Therefore, it failed to correctly apply the law.

> "The *Staley* court examined a situation in which the trial court determined it had no discretion and therefore failed to conduct the proper analysis. Thus, when analyzing the propriety of granting the section 2-619(a)(3) motion, the *Staley* court had no need to defer to the conclusions of the trial court, and was able to review the situation de novo." *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 47–48 (1990).

That is not the case here. The record indicates the trial court here weighed the four *Kellerman* factors and concluded in favor of dismissal. As noted above, "[t]he factors that a court should consider in deciding whether a stay under section 2-619(a)(3) is warranted include: [1] comity; [2] the prevention of multiplicity, vexation, and harassment; [3] the likelihood of obtaining complete relief in the foreign jurisdiction; and [4] the *res judicata* effect of a foreign judgment in the local forum." *Kellerman*, 112 Ill. 2d at 447-48. The court found comity strongly favored litigation in New Jersey because the pollution site is there. The court examined the other factors

and determined that none of them weighed in favor of Illinois litigation. Plaintiffs contend the trial court abused its discretion in finding the four *Kellerman* factors weighed in favor of dismissal, claiming Illinois has the greater connection to the dispute. However, plaintiffs simply argue for why there exists a connection to Illinois, not why the trial court conducted an unreasonable weighing when it determined New Jersey has an interest given the pollution site is there, discovery is underway, and plaintiffs have not moved for dismissal in New Jersey. We cannot say the trial court's balancing was unreasonable or arbitrary or that no reasonable court would also dismiss under section 2-619(a)(3). Nor can we say that the trial court's judgment was arbitrary or fanciful, or that the trial court failed to apply the correct rule of law.

¶ 22 Plaintiffs argue the *Kellerman* factor of preventing vexation or harassment strongly favors litigation in Illinois because Tate & Lyle engaged in forum shopping by filing the New Jersey action. However, the trial court considered the location of each suit and concluded that *Kellerman* factor did not favor either side because both parties filed in the State with laws they perceive as most favorable to their respective claims. Although plaintiffs claim Tate & Lyle filed the New Jersey complaint in order to forum shop, plaintiffs have not moved to dismiss the New Jersey action. Given the pollution site and cleanup will occur in New Jersey, plaintiffs have failed to support their argument the trial court abused its discretion by not considering Tate & Lyle's alleged forum shopping. See *Performance Network Solutions, Inc.*, 2012 IL App (1st) 110137, ¶ 39 ("However, there is no indication in the record, nor do the Illinois plaintiffs claim, that they have attempted to seek a dismissal of the Canadian lawsuit based on lack of subject matter jurisdiction and the court refused or improperly denied their request *** thus, we cannot say that Cyberklix intended to vex or harass the Illinois plaintiffs by filing its claim in Canada.").

¶ 23 Nonetheless, plaintiffs maintain the trial court abused its discretion because it was

arbitrary to conclude New Jersey would permit the litigation to move forward, and the first filed complaint should be given deference. Plaintiffs argue the court failed to sufficiently consider that they filed their complaint in Illinois before Tate & Lyle filed the New Jersey complaint. The trial court did not fail to consider the timing of the respective complaints, it simply gave more weight to the pollution location. Plaintiffs argue this constitutes an abuse of discretion because it is an incorrect application of the law. However, section 2-619(a)(3) makes no mention of favoring the forum where the first action was filed. Our supreme court noted as much when it indicated in *Staley* that the prior filing of one action is not determinative of dismissal: "no mention is made in section 48(1)(c) [the predecessor of section 2-619(a)(3)] of the respective filing times of the actions, and it is therefore apparent that the statute does not attribute any significance to that factor. That one action is filed prior to the other therefore would not be determinative." *Staley*, 84 Ill. 2d at 252; see also *Golden Rule Insurance Co. v. Robeza*, 151 Ill. App. 3d 801, 805 (1986) ("the fact that one suit was filed prior to the other is not determinative in considering a section 2–619(a)(3) motion."). Thus, it was not improper for the trial court to not give weight to which suit was filed first. Nevertheless, plaintiffs maintain New Jersey law looks to the first filed action and that the trial court erred by not considering that the New Jersey action will be dismissed as a result. However, the trial court considered this argument, found plaintiffs have not filed a motion to dismiss the New Jersey action, and that discovery is well under way in New Jersey. Plaintiffs have not shown this finding was arbitrary, fanciful, or that no reasonable court would make the same finding.

¶ 24 Plaintiffs claim the trial court also abused its discretion failing to recognize the *Kellerman* factor of being able to obtain complete relief weighed against New Jersey because plaintiffs are not able to obtain complete relief in New Jersey. Plaintiffs rely on *Zurich*

Insurance Co. v. Baxter International, 173 Ill. 2d 235, 251 (1996) for the proposition that a defendant is unable to obtain relief when it cannot avail itself of certain defenses. However, this citation was to a special concurrence, not the opinion of the *Zurich* court. Moreover, this misrepresents both the argument in the special concurrence and the decision of the court itself. The special concurrence noted complete relief was unavailable outside of the Illinois litigation because the California court was limited on which insurance policies it could declare the rights of the parties, necessitating Illinois action even with litigation in the other forum. *Id*. *Zurich* did not stand for the proposition that another forum fails to provide complete relief unless the same defenses with the same burdens of proof are available. The *Zurich* court concluded the *res judicata* factor weighed in favor of Illinois because action in the other forum would not have any *res judicata* effect on the remaining insurers, and that the Illinois litigation was more comprehensive. *Id*. at 246-47. Here Tate & Lyle's New Jersey action names all of the insurers as defendants, including Travelers. Resolution of the New Jersey litigation would have *res judicata* effect on this litigation because it concerns the same parties over the same cause of action (presuming the New Jersey court reaches a final judgment on the merits with respect to Travelers). See *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996) ("For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies."). However, resolution of Travelers' claim would not resolve Tate & Lyle's dispute with their other insurers who are aggregated in the New Jersey action. Thus, the New Jersey action here is more comprehensive than the Illinois action and we cannot say no reasonable court would conclude the completeness of relief factor and *res judicata* factor favored the New Jersey litigation.

¶ 25 Plaintiffs contend the trial court abused its discretion by applying New Jersey's choice of law in the Illinois suit because of Illinois' substantial interest in resolving this dispute. However, the record does not reveal the trial court making any ruling about which choice of law provisions apply. Rather, the court found comity favored New Jersey because the site of the environmental contamination and cleanup is in New Jersey. Plaintiffs argue that New Jersey has little interest in the suit because Illinois law does not give weight to the pollution site being located in New Jersey. Plaintiffs' position is that the site of the injury is in Illinois because that is where they received the late notice. However, simply because a contract was negotiated in Illinois does not mean Illinois has a greater interest than the forum where the harm occurred. "Even assuming that [defendant] issued defective warnings in this State, '[i]t is well established * * * that in law the place of a wrong is where the last event takes place which is necessary to render the actor liable.' [Citation.] In this case, there is no tort until there is an injury, and any alleged injuries occurred in the United Kingdom." *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 377 (1982). Plaintiffs argue they will be prejudiced by litigating in New Jersey because they would not be entitled to defenses available under Illinois law. However, the *Kellerman* factors do not consider choice of law rules. The issue of whether the laws of Illinois or New Jersey apply to this action (or even the New Jersey action) was not before the trial court. Thus, plaintiffs' argument the trial court abused its discretion applying choice of law provisions is without merit.

¶ 26 Plaintiffs claim the court abused its discretion by not allowing the Illinois action to proceed simultaneously with the New Jersey action because section 2-619(a)(3) does not require dismissal even if the same cause with the same parties is also before a different tribunal. Even if the New Jersey action does go forward, plaintiffs argue the trial court abused its discretion granting the motion to dismiss because it could have permitted simultaneous litigation in Illinois

and New Jersey: "Illinois courts frequently permitted overlapping actions in different jurisdictions arising out of the same operative facts to proceed." However, simply because the trial court has discretion to allow simultaneous litigation does not mean it was an abuse of that discretion to dismiss plaintiffs' case. Plaintiffs have not shown the court's decision to not permit simultaneous litigation was arbitrary or that no reasonable court would similarly exercise its discretion.

¶ 27 Plaintiffs note the *Staley* court allowed for simultaneous litigation. However, *Staley* does not stand for the principle that parties must litigate in Illinois when the contract was negotiated in Illinois even when an environmental spill occurred in a different jurisdiction. The *Staley* court permitted simultaneous litigation in Illinois because litigation in this State would not require Staley to seek indemnification in the same action as the breach of contract claim, as the Iowa court would. "Significantly, resolution of Staley's breach-of-contract action could moot or facilitate resolution of the questions of Swift's right to indemnity and its right to recovery of amounts retained by Staley." *Staley*, 84 Ill. 2d at 254. As noted above, the *Staley* court did not review a trial court's exercise of discretion to dismiss under section 2-619(a)(3). Because the trial court failed to exercise discretion, our supreme court did not have to defer to the trial court's judgment. On the other hand, here the court recognized it had discretion under the *Kellerman* factors to decide on whether New Jersey or Illinois has a greater interest in the dispute. Plaintiffs have not shown the court applied the incorrect law to reach its decision to dismiss under section 2-619(a)(3). Instead, plaintiffs argue that the factors could have been balanced differently such that they weighed in favor of Illinois' interest in the dispute. However, we use the abuse of discretion standard of review. Under that standard we review whether the trial court's exercise of discretion was arbitrary, fanciful, or whether any reasonable court could reach the same

judgment as the trial court. In this case the trial court balanced all the factors it was required to consider under section 2-619(a)(3) and concluded dismissal was appropriate. We cannot say that the trial court's judgment was arbitrary, fanciful, or that no reasonable court could reach the same conclusion. Therefore, we do not find an abuse of discretion.

¶ 28 *Forum Non Conveniens*

¶ 29 The trial court granted Tate & Lyle's motion to dismiss not only under section 2-619(a)(3), but also under the doctrine of *forum non conveniens*. "We note that section 2–619(a)(3) and the doctrine of *forum non conveniens* are interrelated procedural devices which should be invoked together when another action is pending and the defendant feels that one forum is inconvenient." *Golden Rule Insurance Co.*, 151 Ill. App. 3d at 806. Therefore, we address plaintiffs' arguments contesting dismissal under *forum non conveniens*.

¶ 30 "*Forum non conveniens* is a doctrine that is founded in considerations of fundamental fairness and sensible and effective judicial administration." *Adkins v. Chicago, Rock Island and Pacific R.R. Co.*, 54 Ill. 2d 511, 514 (1973). This is an equitable doctrine that allows "a court which has jurisdiction over the parties and the subject matter involved [to] nevertheless decline jurisdiction of a case when it is apparent that trial in another forum with jurisdiction over the parties would be more convenient and would better serve the ends of justice." *Vinson v. Allstate*, 144 Ill. 2d 306, 310 (1991). A court ruling on a motion to dismiss under *forum non conveniens* must balance "the private interests affecting the convenience of the litigants and the public interests affecting the administration of the courts." *Id*.

> "Private interest factors to be considered may include the relative ease of access to sources of proof, the accessibility of witnesses, the possibility of a jury view of premises, if appropriate, 'and all other practical problems that make trial of a case

> easy, expeditious and inexpensive.' [Citation.] Public interest considerations include having localized controversies being decided in the local forum, administrative concerns, including the congestion of court dockets, and the imposition of jury duty upon residents of a county with little connection to the litigation." *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 337 (1994)

This is not a balancing based on rigid factors. "The doctrine of *forum non conveniens* is a flexible one which requires evaluation of the total circumstances rather than concentration on any single factor." *Id*. at 336-37.

¶ 31 Plaintiffs argue the trial court abused its discretion because Tate & Lyle had the burden of proving the factors weighed strongly in favor of litigating in New Jersey and that Tate & Lyle failed to do so. However, simply because a party claims the balancing of factors does not strongly favor defendants does not mean the trial court abused its discretion granting Tate & Lyle's motion under *forum non conveniens*. See *Jones v. Searle Laboratories*, 93 Ill. 2d at 377-78

> ("the question is not whether a reviewing court would have weighed the factors differently or would have resolved the issue as did the trial court. As previously noted, the only concern on review is whether the trial court's decision constituted an abuse of discretion. Here, the record indicates that the trial court carefully balanced the relevant factors. Under these circumstances, we are not prepared to conclude that there was an abuse of discretion.").

The trial court here found the private interest factors strongly favored New Jersey. We cannot say the court's conclusion was arbitrary. The Illinois litigation will not resolve Tate & Lyle's dispute with their other insurers, meaning the New Jersey litigation is more practical and

convenient. See *Zurich Insurance Co.*, 173 Ill. 2d at 246-47. Moreover, the trial court considered that the two Illinois witnesses relevant to the late notice issue will not be burdened by traveling to New Jersey, and that they are employees of Tate & Lyle. However, the court indicated the same was not true of the eight witnesses in New Jersey and New York. Plaintiffs argue the trial court abused its discretion by not weighing the private interest factors such that they favored Illinois over New Jersey. As noted above, our review does not encompass reweighing the trial court's balancing of interests. Plaintiffs must show the court abused its discretion, not that they disagree with how the court balanced factors.

¶ 32 Here the trial court concluded the public interest factors strongly favored New Jersey because that is the site of the pollution and cleanup. Plaintiffs claim the record fails to support the trial court's conclusion, and that the record indicates Illinois has the greater public interest. As noted above, the injury here occurred in New Jersey because that was the site of the tort. *Searle Laboratories*, 93 Ill. 2d at 377. Moreover, "our supreme court has consistently favored rulings granting dismissals based upon *forum non conveniens* where the cause of action occurred outside the state and no individual plaintiff was an Illinois resident." *Kourdoglanian v. Yannoulis*, 227 Ill. App. 3d 898, 903 (1992). Plaintiffs claim Illinois has the greater interest and is the most convenient forum because they conduct business in Illinois. However, the trial court did not abuse its discretion by giving little weight to the fact that plaintiffs conduct business in Illinois:

> "[T]he fact that [defendant] conducts business within the county is not the only factor the court should consider in its analysis. 'A *forum non conveniens* motion *** causes a court to look beyond the criterion of venue when it considers the relative convenience of a forum.' [Citation.] '[M]erely conducting business in

> [the] County does not affect the *forum non conveniens* issue.' " *Vinson*, 144 Ill. 2d at 311.

It was not unreasonable for the trial court to find that New Jersey is the more convenient forum when Tate & Lyle's action there consolidates all of its insurers as defendants, rather than having Travelers act as a plaintiff here and simultaneously be one of many defendants in the New Jersey action. See *Zurich Insurance Co.*, 173 Ill. 2d at 246-47.

¶ 33 Plaintiffs claim the trial court abused its discretion because it failed to grant sufficient deference to plaintiffs' choice of forum. However, plaintiffs are Connecticut corporations with their principle places of business in Hartford, CT. They fail to recognize that their choice of forum is afforded less deference because they are foreign plaintiffs and the site of the injury is not in Illinois.

> "This court has emphasized that '[a] further consideration under the *forum non conveniens* doctrine is deference to the plaintiff's choice of forum. A plaintiff's right to select the forum is a substantial one, and unless the factors weigh strongly in favor of transfer, 'the plaintiff's choice of forum should rarely be disturbed.' [Citation.] If a plaintiff files suit in the county of his or her residence, such forum is assumed to be convenient. [Citation.] Under similar reasoning, plaintiff's choice of the county that is the situs of the accident or injury should be accorded deference, because in such an instance the litigation has the 'aspect * * * of a localized controversy,' *i.e.*, being 'decided at home.' [Citation.] This court has also held that plaintiff's choice of forum is entitled to less deference where the situs of the injury is not located in the chosen forum [citation,] and the plaintiff is not a resident of the chosen forum." *Peile*, 163 Ill. 2d at 337-38.

See also *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill. 2d 101, 106 (1990) ("The plaintiff's choice deserves less deference, however, where the plaintiff is not a resident of the chosen forum. *** When the plaintiff is foreign, however, this assumption is much less reasonable."); *Cook v. General Electric Co.*, 146 Ill. 2d 548, 557–58 (1992) ("It should be noted, however, that while St. Clair County is plaintiff's county of residence, he was employed in Montgomery County where the accident took place. Therefore, plaintiff's choice of forum is entitled to less deference than it normally is accorded when a plaintiff chooses his home forum."); *Brummett v. Wepfer Marine, Inc.*, 111 Ill. 2d 495, 500 (1986) ("in those cases where the court has concluded that Illinois did not provide the most convenient forum, the court also pointed out that the cause of action did not arise, and injury was not suffered, in Illinois."). Simply because plaintiffs filed first in Illinois does not mean the public and private interest factors weighed in favor of Illinois. In short, plaintiffs failed to show the trial court abused its discretion by finding New Jersey is a more convenient forum than Illinois.

¶ 34 Finally, we note that plaintiffs also argued the trial court abused its discretion by relying on an unpublished decision in its ruling. While the trial court acknowledged the parties referenced an unpublished case in their briefs, the court noted it did not rely on the unpublished decision in reaching its ruling: "Although this Court has read and considered the unpublished opinion, I do not think that it is binding upon this Court and only have used it as the parties have referred to it in the briefs." Therefore, we find plaintiffs' argument that the trial court abused its discretion by relying on an unpublished opinion is without merit because the trial court indicated the unpublished decision was not binding and the court did not rely on the unpublished decision to reach its holding.

¶ 35 Plaintiffs have not shown the trial court made a mistake of law in granting Tate & Lyle's

motion to dismiss under section 2-619(a)(3) and *forum non conveniens*. Nor have plaintiffs shown the trial court's dismissal was arbitrary, fanciful, or that no reasonable court would reach the same decision as the trial court. Here the trial court weighed the *Kellerman* factors to determine comity favored the action proceeding in New Jersey and that no similar motion to dismiss has been filed by Travelers in New Jersey. The court also weighed the public and private interest factors for litigation in New Jersey and Illinois. The trial court had discretion to determine the balancing of those factors and the court exercised that discretion to dismiss the action. We cannot say no reasonable court would dismiss this action in favor of ongoing litigation in New Jersey.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 38 Affirmed.